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THE EFFECT OF EMPLOYER APPROVAL ON WORKMEN'S COMPENSATION DECISIONS
—LETTING AFFECTED PARTIES COMMUNICATE STANDARDS

Clifford Davis†

Workmen's compensation statutes generally provide that employee death or disability is compensable only if "arising out of and in the course of the employment."1 This seemingly straightforward statement of the required work connection lacks precision in its practical application.2 The imprecision has forced courts and agencies, both state and federal, to render an almost wasteful number of decisions to establish sufficiently definite standards.3 Different jurisdictions have concluded that the same statutory language supports widely different limits of coverage. Cases demanding a close connection between injury and employment4 can be found side by side with cases

† Professor of Law, University of Iowa. B.S. 1949, University of Chicago; LL.B. 1952, Harvard University.


2 The two theories most often put forward to support compensation statutes suggest that only those losses connected to employment should be covered. Under the occupational risk theory of compensation, the cost of work connected disability is imposed on employers so that the costs of human death and disability connected with the production of goods, and only those costs, may be passed on to the consumer. W. Prosser, Law of Torts § 82, at 554-55 (3d ed. 1964). The theory of "least social cost," which according to E. Downey, Workmen's Compensation 9 (1924), is "that distribution of unavoidable losses . . . which imposes the least hardship upon individuals and results in the smallest diminution of the community's economic assets," may be less restrictive, but under either theory the statute requires a connection between compensable disability and employment. See Larson, The Nature and Origins of Workmen's Compensation, 37 Cornell L.Q. 206 (1952). For the reasons why an employment connection is required, see E. Cheit, Injury and Recovery in the Course of Employment 145 (1961).

3 Professor Hart argues that the Supreme Court is wasting its time rendering Federal Employers' Liability Act decisions. Hart, Forward: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 96 (1959). Many of those decisions involve essentially the same problems as arise under the workmen's compensation statutes. On the other hand, Thurman Arnold argues that the Federal Employers' Liability Act decisions were necessary to establish standards. Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298, 1304 (1960).

4 One restrictive view of the work connection formula requires that the risk be
interpreting the work connection so liberally that injuries only remotely related to the employment are covered.\textsuperscript{5} The resulting body of law has been characterized as "unsatisfactory and often bizarre."\textsuperscript{6}

The wide variation in the scope of coverage stems in large part from a shift in attitude concerning the imposition of compensation liability on the employer. An initial hostility to non-fault liability resulted in rigid limits of coverage,\textsuperscript{7} but its gradual acceptance has been accompanied by the expansion of coverage through changes in the statutes and their interpretation.\textsuperscript{8} The use of the concept of employer approval, in both statutes and cases, to support the necessary work connection has contributed substantially to this liberalization.\textsuperscript{9} Yet, within the workmen's compensation literature, employer approval is peculiar to the employment and not common to the public. Thus, many courts denied coverage when the injury was the result of a risk such as a sun stroke or lightning. Even the risks of the street were excluded in many states on the theory that these were shared by the general public. See 1 A. Larson, supra note 1, §§ 8-9.

A more liberal and generally accepted view suggests that there should be coverage where the risks are connected to employment, even though they are otherwise common risks.\textsuperscript{9}

\textsuperscript{5} In Gondeck v. Pan American Airways, 382 U.S. 25 (1965), a workman was killed in a jeep accident on San Salvador Island while returning to a defense base after recreation at a nearby town. The accident occurred after completion of the day's work, but the victim was on call for emergencies. The court of appeals found no benefit to the employment in this recreation, and no evidence relating the recreation to his employment. 299 F.2d 74, 77 (5th Cir. 1962). The Supreme Court reversed, saying:

\textit{... we reaffirmed the \textit{Brown-Pacific-Maxon} holding that the Deputy Commissioner need not find a causal relation between the nature of the victim's employment and the accident, nor that the victim was engaged in activity of benefit to the employer at the time of his injury or death. No more is required than that the obligations or conditions of employment create the "zone of special danger" out of which the injury or death arose.}

382 U.S. at 27.

\textsuperscript{6} L. Fuller, \textit{The Morality of Law} 76 (1964).

\textsuperscript{7} For a fuller description see H. Somers & A. Somers, \textit{Workmen's Compensation}, ch. 2 (1954).

\textsuperscript{8} [A] gradual process of expansion and improvement in most workmen's compensation systems has occurred. New categories of employees and employers have been added, benefits have been increased, and new kinds of injuries have been covered, notably occupational diseases.

\textsuperscript{9} Massachusetts abandoned the doctrine that risks of the street were not employment risks by using a reference to employer approval of employee trips when it provided:

For the purposes of this section any person, while operating or using a motor or other vehicle, whether or not belonging to his employer, with his employer's
EMPLOYER APPROVAL

an almost unnoticed and completely unexplained aspect of work connection cases.

Employer approval is an act by the employer which indicates that he considers the activity or situation in which the injury occurred as being a part of employment. Accordingly, acts of employer approval are relevant most often in cases concerning the “course of employment” requirement, which emphasizes the time, place, and circumstances surrounding the injury, and are less likely to be relevant to the “arising from” requirement, which looks to the causal relationship between injury and employment. This article collects and analyzes “course of employment” cases where employer approval of employee activities appears to have had an effect on the decision, for example, cases up-

mass. gen. laws ann., ch. 152, § 26 (1965). See caron’s case, 351 mass. 406, 221 n.e.2d 871 (1966), where the decedent drove his car to attend a company dinner party, and where there was an active discussion of company business. His death while en route home after the party was covered under that statute cited above.

the case law includes: B.J. Gump Co. v. industrial comm’n, 411 Ill. 196, 108 n.e.2d 504 (1952); sica v. retail credit Co., 245 Md. 606, 227 A.2d 39 (1967); dyer v. Sears, Roebuck & Co., 350 Mich. 92, 85 N.W.2d 152 (1957); harrison v. Stanton, 26 N.J. Super. 194, 97 A.2d 637 (App. Div. 1953), aff’d per curiam, 14 N.J. 172, 101 A.2d 554 (1954); Caporale v. Department of Taxation, 2 App. Div. 2d 91, 153 N.Y.S.2d 738 (3d Dep’t 1956), aff’d mem., 2 N.Y.2d 946, 142 N.E.2d 213, 162 N.Y.S.2d 40 (1957); American Motors Corp. v. industrial comm’n, 1 Wis. 2d 261, 83 N.W.2d 714 (1957). But see Elliott v. Darby, 382 S.W.2d 70 (Mo. Ct. App. 1964), distinguishing employer toleration from approval and denying coverage when a welder was injured welding barrels for a local club on employer’s premises after hours and without pay.

10 Despite extensive workmen’s compensation literature, employer approval is given only passing mention. But see, e.g., W. Malone & M. Plant, Cases on Workmen’s Compensation 145-47 (1963), where the notes call attention again and again to the presence of employer approval.

11 The statutory formula of “arising from” or “in the course of” is often treated as having two requirements. For examples of “in the course of” cases, see generally Wilson & Co. v. Curry, 259 Ala. 685, 68 So. 2d 548 (1953); harrison v. Stanton, 26 N.J. Super. 194, 97 A.2d 637 (App. Div. 1953), aff’d per curiam, 14 N.J. 172, 101 A.2d 554 (1954); Miller v. F. A. Bartlett Tree Expert Co., 3 N.Y.2d 654, 148 N.E.2d 296, 171 N.Y.S.2d 77 (1958).

The “arising” cases are discussed in 1 A. Larson, supra note 1, §§ 6-8. United States Steel Corp. v. Mason, 227 N.E.2d 694 (Ind. App. Ct. 1967), is an example of an “arising from” case for which approval was relevant. There the claimant crane operator, intoxicated at the time of his injury, was awarded compensation because his employer knew of this violation and failed to take steps to eliminate any appearance of non-acquiescence.

The distinction between “arising” and “in the course” often helps in coming to grips with the problem, A. Malone & M. Plant, supra note 10, at 140-41, and the distinction is useful in making a functional classification of the cases. The necessary work connection, however, is probably equally well defined as a single concept. See 1 A. Larson, supra note 1, § 29.10; Malone, Some Recent Developments in the Substantive Law of Workmen’s Compensation, 16 Vand. L. Rev. 1039, 1050-51 (1963); Malone, The Compensable Risk, 31 Rocky Mt. L. Rev. 447 (1959).
holding awards for injuries suffered in recreational and social activities, or in lunchroom or other employment connected facilities. These employer approval cases are compared with otherwise factually similar cases where acts of approval are said to be irrelevant or are disregarded, for example, cases denying coverage to employees injured while eating lunch or smoking on the employer's premises, or while engaged in social and recreational activities structured around employment. This comparison both facilitates an understanding of the effect of employer approval on work connection decisions and suggests a method for using approval to establish consistent limits of coverage.

I

POSSIBLE USES OF EMPLOYER APPROVAL

A. Direct Use of Approval

Acts of approval can have contractual significance. An employer's acts are sufficiently explicit, for example, when he directs or orders

12 In Lybrand, Ross Bros. & Montgomery v. Industrial Comm'n, 36 Ill. 2d 410, 223 N.E.2d 150 (1967), decedent, a personnel manager for the employer, drove his car to an annual firm golf outing. The employer underwrote the costs. The decedent died as a result of injuries sustained in an accident on the home trip. Compensation was awarded, the court distinguishing Becker Asphaltum Roofing Co. v. Industrial Comm'n, 333 Ill. 340, 164 N.E. 668 (1929) (where compensation was denied employee injured on way to company picnic), principally on the theory that there was no compulsion in Becker even though employees attending were given pay for a half day's work. Also, the Becker employer merely furnished soft drinks and ice cream but in Lybrand he furnished all the food. Perhaps more important than the distinctions based on compulsion or employer control is the fact that several related cases, principally Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304, 128 N.E.2d 699 (1955), intervened between Becker and Lybrand. For comments on Jewel Tea see Note, Workmen's Compensation Awards for Recreational Injuries, 23 U. Chi. L. Rev. 328-35 (1956).

13 See Inland Mfg. Div., G.M.C. v. Lawson, 232 N.E.2d 657 (Ohio C.P. 1967), where employee, injured when she slipped on a peach pit returning to work after lunch in a cafeteria operated by a third party on the employer's premises, was held to be covered. The court relied on the limitation of the lunch period to 35 minutes and the unavailability of other suitable eating facilities for female employees, as well as the fact that the premises were employer owned and thus approved.

14 See McFarland v. St. Louis Car Co., 262 S.W.2d 344 (Mo. Ct. App. 1953), where the court said; "We do not consider it of important consequence that the employer acquiesced in, or contributed some financial assistance to, such [recreational] activities." 262 S.W.2d at 348.

15 In Clarke v. Coats & Clark, Inc., 97 R.I. 163, 196 A.2d 429 (1964), the claimant ate her lunch whenever she could find time in a room provided for that purpose. After lunch she injured her back while bending over to put out her cigarette in a special cigarette bucket provided by the employer. Compensation was denied.


17 What has contractual significance is a difficult question. G. GRISMORE, CONTRACTS
the activity, or the employment contract itself or ratified change in
that contract fixes the limits of the course of the employment.16 Never-
theless, acts of approval insufficient to support a contractual inter-
pretation are also readily admitted into evidence and used to enlarge
coverage. The direct use of such acts to decide a specific controversy
makes an adverse result more understandable to the employer since
his own actions indicated that result. Although this mediational use
of approval resembles estoppel in that the affected employer’s actions
are cited to convince him to accept an otherwise adverse result, it has
been considered an extension of the employer’s contractual power to
enlarge the area of coverage.17

If it is assumed that every activity approved by the employer
benefits the employment, then the use of evidence of employer ap-
proval to impose coverage has as a doctrinal basis the principle that the
burdens of an employment relationship should follow the benefits.20
The converse, however, may also be true: the use of benefits to sup-
port coverage may be appropriate only because benefits imply em-
ployer approval and require recognition of an employment connection.
Benefit and approval are interrelated considerations; indeed, they
represent different aspects of the same question—whether the em-

145 (Murray ed. 1967), distinguishes between rules which select the manifestations of
intent that comprise a contract (rules of evidence) and the process of interpretation:
“While the two steps are distinct in theory, in practice it is seldom possible to separate
them.” While declarations against interest are generally both relevant and reliable, see
Note, Declarations Against Interest: A Critical Review of the Unavailability Requirement,
52 CORNELL L.Q. 301 (1967), the reliability of employer’s declarations of approval when
they follow the injury has been questioned in such cases as Charles v. Industrial Comm’n,

Too often it occurs that when the employer is carrying insurance, and thus suffers
no pecuniary loss himself through an accident to his employee, that his natural
emotions of sympathy for an injured man, and interest in an old and trusted
employee; leads him to the limits of, or even beyond the bounds of strict veracity;
in his endeavor to assist the injured party to recover from the insurance carrier.

Id. at 204, 407 P.2d at 393, quoting United States v. Fidelity & Guar. Co., 43 Ariz. 305,
311, 30 P.2d 846, 849 (1934).


19 Larson points out the effect of employer approval by noting:
It is unquestionably within his power to enlarge the “course of employment” area
by affirmative action in recreation situations, just as he can bring the lunch
hour or the journey to and from work within the orbit of employment by agree-
ment with the employee and by payment for the time so spent.

W. MALONE & M. PLANT, supra note 10, at 165.
ployer recognized, or should recognize, a connection between the activity and the employment. But no matter what theory supports the use of acts of approval as the basis of coverage, that usage might not please the compensation carrier, or other similarly situated but uncompensated employees.

Although the use of employer approval, either alone or in concert with the "benefit" theory, may explain the result in specific cases, it is hard to justify the refusals to impose compensation in cases that differ from successful award cases only in the absence of approval. The result is a variation in the extent of coverage, causing affected parties, especially compensation insurance carriers, to find the balancing process unsatisfactory because it reduces predictability. This is both inefficient and inequitable since one workman will be denied coverage, while another, in substantially similar circumstances, will recover compensation because his employer, by some relevant act, approved his employee's activity. Furthermore, since the employer who displays acts of approval assumes greater liability, either directly or through an increase in compensation premiums based on a poor experience rating; the result penalizes him and rewards employers who deny approval to employee activities.

B. Indirect Use by Communicating Functional Standards

If the instances of approval of a given activity have been meaningful or frequent enough, decision-making bodies can achieve equality and predictability by using employer approval indirectly, inferring approval in factually similar cases where no actual act of approval appears. Thus, wider uniform limits of coverage could be established by confirming that such activity is now work connected in all cases.

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21 Efficiency as a goal of workmen's compensation seems singularly appropriate since wastefulness and the antagonism created between employer and employee by the wasteful common law system of settlements was urged upon business as a reason to accept workmen's compensation. Gellhorn & Lauer, The Administration of the New York Workmen's Compensation Law, 37 N.Y.U.L. Rev. 3, 9 (1962).

22 Gondeck v. Pan American Airways, 382 U.S. 25 (1965), discussed in note 5 supra, is an interesting example of an attempt to treat alike the survivors of employees killed in the same accident despite a desire to have finality in judgments. Subsequent to the denial of recovery (through denial of a motion for rehearing) in the Supreme Court, the Fourth Circuit upheld awards to the survivors of another employee killed in the same accident. Because of a desire for equal treatment, the Supreme Court vacated the earlier order denying certiorari and reversed the judgment for the defendant.

23 For a discussion which questions the effect of merit ratings on prevention of work injuries, see H. Somers & A. Somers, supra note 7, at 228-30.

24 Larson notes that it is sometimes assumed that compensation, unlike other areas of the law, is not reducible to principles and rules because of the "tendency of compen-
EMPLOYER APPROVAL

The new standard would bind not only the employers whose acts communicated the work connection, but all employers in similar circumstances despite their failure to communicate such approval. In any change in the outer limits, a guide for the administration of coverage is necessary. The absence or rejection of doctrinal guides opens the way to the use of acts of employer approval. The use of acts of approval, however, makes factual guides necessary to avoid inequality, even though such guides are open to criticism.

II

ESTABLISHING FACTUAL GUIDES

A. Coming and Going

Traveling to and from work is certainly connected to employment, but in this country an employee injured during this time is generally excluded from coverage on the ground that commuting is not in the course of employment. This broad exclusionary rule has been modified by numerous exceptions, often involving some reference to employer approval to support the necessary work connection.

The coming and going exclusion may be justified on the ground that the employee selects where he lives, and thus his travel between home and job site is for his own benefit or convenience. In other words, because every employee travels to work, coming and going is not attributable to a particular employment. Perhaps an equally

sation law to grow up around factual rather than legal classifications (producing, for example, a street-risk rule and an epileptic-fall rule rather than a general causation rule . . . .") 1 A. Larson, supra note 1, at iii. It might be suggested that the desire for equality and efficiency dictate these factual classifications because otherwise the results would vary too widely.


26 See 1 A. Larson, supra note 1, § 15.
27 Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947), classifies the exceptions to the exclusion of coming and going injuries into four main categories: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.

Id. at 480 (emphasis added).


29 In Quarant v. Industrial Comm'n, 38 Ill. 2d 490, 231 N.E.2d 397 (1967), a teacher
important reason for the general exclusionary rule is the administrative difficulty that would arise if the limits of coverage for coming and going were not drawn tightly around the employer’s premises.\textsuperscript{30} The wealth of exceptions to the rule, however, suggest that these reasons are not too convincing. In some instances the use of acts of employer approval may give relief from the rigors of the exclusion.

Although commuting is generally deemed personal and not covered, an employer has the power to bring such travel within the scope of coverage. By contracting for travel time in an employment contract, an employer brings coming and going injuries within the course of employment.\textsuperscript{31} The employment connection for the ordinary commuter must be the employer’s unambiguous recognition of an existing work connection.

But lesser acts can also bring this activity within coverage. An employer willing to furnish a vehicle or pay transportation costs shows a willingness to accept such costs as expenses of the employment. This involvement may supply the necessary work connection even if the employer did not consider the compensation liability implications of his act. Payment of wages for the time consumed would help support the employment connection, but it is not essential.\textsuperscript{32} Furthermore, the driving to school was injured when a student driver swerved and hit her. The court denied compensation, holding that she was not subject to greater hazard by reason of her employment than other people using the highway.

\textsuperscript{30} Coming and going is excluded because “it is a fair question whether the uncertainty and litigation thereby imported ... would ... offset the resultant advantages” if coming and going were included. E. Downey, supra note 2, at 27.

\textsuperscript{31} Although there was no express contract for compensation coverage, the memorandum decision of the Court of Appeals in Solomon v. Russo, 20 N.Y.2d 688, 229 N.E.2d 231, 282 N.Y.S.2d 554 (1967), relied upon the employer’s agreement “to compensate” employees who regularly worked at one plant for the use of their own automobiles when temporarily working at a second plant in concluding that the employees were within the course of their employment. Accordingly an employee’s suit against a fellow employee for injuries received on such a trip was dismissed.

A case involving something more like a contract for compensation coverage is Whaley v. Steuben Co. Rural Elec. Mem. Corp., — Ind. App. —, 221 N.E.2d 435 (1966), which reversed the Industrial Board’s denial of coverage of a utility company’s line foreman who slipped and fell on the sidewalk when leaving his house to answer an emergency call. The opinion emphasized a stipulation that “[t]he employer is aware and expects the employee to use his own car to reach the employer’s place of business where he will pick up a service truck.” Id. at —, 221 N.E.2d at 436 (emphasis in original). This, together with the evidence that the employee was paid an hourly rate from the time he received the call until he returned home, justified holding that the Board’s denial of coverage was in error. See Zenith Nat’l Ins. Co. v. Workmen’s Comp. App. Bd., 56 Cal. 2d 944, 428 P.2d 606, 59 Cal. Rptr. 622 (1967).

\textsuperscript{32} In Bryan v. Aetna Cas. and Sur. Co., 381 F.2d 872 (8th Cir. 1967), the defendant insurer’s policy excluded coverage of any injury received by an employee “in the course of such employment in an accident arising out of the maintenance or use” of the insured’s
necessary work connection can be found whether the agreement to pay transpor-ration costs was freely made or was required under a labor contract.\textsuperscript{33}

The approval stemming from furnishing transportation is meaningful because the economic self-interest of an employer dictates that he not assume added costs without an employment reason. Thus, when an employer has an unambiguous connection with furnishing a vehicle or transportation (as opposed to an isolated gesture of kindness)\textsuperscript{34} his decision involves a meaningful judgment about the relevant employment connection or benefit to employment. That his decision was made without an awareness of the possible compensation consequences buttresses the conclusion that he considered such activity work connected.

A conflict exists, however, between the desire to find an employment connection solely by reason of some relevant act of employer approval and the desire to accord equal treatment to all employees injured in similar circumstances. This conflict is exhibited in \textit{Rubendall v. Brogan Construction Co.}\textsuperscript{35} Two employees of a company that had two bridges under construction at the same time shared the driving. On the day of the accident, the decedent was riding in the co-employee's car. They were working together on one bridge and the employer directed the decedent's co-employee to take tools from that bridge to the other near which both employees lived. The decedent's trip was deemed not employment connected and compensation was denied, but the co-employee's injury was held employment connected because he was directed to take the tools to be used the next day. The case could be explained as one where the decedent enjoyed employment connected transportation home on an isolated occasion, and therefore the employment connection was insufficient to overcome the usual rule that coming and going is not in the course of employment.

automobile. The insured's employee and his wife won a judgment against the driver of the insured's bus and sought recovery against the insurer. The court affirmed summary judgment for the insurer because the employee being transported to work was in the course of his employment under both the workmen's compensation statute and the liability policy exclusion. The court stressed, among other aspects of the case, that the employee's time started when he left the warehouse on the bus.\textsuperscript{36}

\textsuperscript{33} The obligation to provide transportation in \textit{Bryan} was under the working rules of a union agreement. The relevance of such an agreement is not only that it connects the transportation to the employment, but also that it indicates more than a casual provision of transportation. \textit{Id.} at 877.

\textsuperscript{34} See Maxim's, Inc. v. Industrial Com'n, 35 Ill. 2d 601, 221 N.E.2d 281 (1966).

\textsuperscript{35} 253 Iowa 652, 113 N.W.2d 265 (1962).
The decedent's place of work on the following day was disputed; if it could have been shown that he was to work on the other bridge, the furnishing of transportation by the co-worker might have supplied the connection. Using the acts of the employer (the direction to the co-employee to take the tools to the other job) is the only technique that supports coverage for the driver and not the decedent. This solution, however, does not provide similar treatment for those in factually similar circumstances.

B. Coffee Breaks, Lunch and Other Incidental Activities

Approval may support coverage of many activities near the work premises, especially activities that neither interrupt the employee's principal activities for more than a brief period nor take him far from his work site. Thus, when activities incidental to employment, such as smoking, taking a coffee break, or eating are covered, that coverage may grow out of the relative unimportance of the work interruption, since incidental deviations, unlike coming and going, do not require exclusion for administrative convenience. Also, the doctrine that acts of personal comfort are covered justifies such coverage.

Some incidental activities cases, however, involve a judgment by the employer that the activity is employment connected. An employer who pays for entertainment or for a midnight snack makes a meaningful act of approval, and should not be surprised to find the activity covered. Such an act provides a rational basis for a decision.

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36 Id. at 655, 113 N.W.2d at 267. Compare, however, the results in Rubendall with those in Solomon v. Russo, 20 N.Y.2d 668, 229 N.E.2d 231, 282 N.Y.S.2d 554 (1967), discussed in note 31 supra.


38 Since the very early cases the employee on the premises has enjoyed compensation protection even though not engaged in work. See Norris v. New York Cent. R.R., 246 N.Y. 307, 158 N.E. 879 (1927), where it was assumed that an employee killed during a rest period was killed by an accident arising out of the course of employment.

39 See American Motors Corp. v. Industrial Comm'n, 1 Wis. 2d 261, 83 N.W.2d 714 (1957). The court, quoting 1 A. Larson, supra note 1, § 21.00, expressed the doctrine as follows:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily be inferred . . .

Id. at 265, 83 N.W.2d at 716.

that the activity was employment connected for compensation purposes. Although courts affirming awards in these cases talk about the benefit to the employment received from the satisfied employee and mention the slight effect that incidental and personal comfort activities have on the continuity of the course of employment, it is probable that acts of approval, perhaps evidenced by custom of employers who saw a relevant work connection, have played a significant role in extending coverage for coffee breaks and other previously excluded incidental activities.

C. Recreation and Social Activities

Coverage is generally allowed for injuries received in a social situation which, because of the presence of possible customers, is semi-workstructured and is recognized as such by the employer. For example, an employee is covered on a hunting trip sponsored or approved by the employer. Courts cite the business purpose of the social activity and sometimes cite either the employer's approval of his employee's presence as a guest or the approval by the host employer. Similarly, an employer's efforts to solicit customers through employee participation in a service organization and its related social activities result in coverage and have even been cited as support for

41 The departure of an employee for a matter of minutes from the premises where he works to satisfy a personal desire, such as to get a cup of coffee or a newspaper, especially when it becomes a custom within the knowledge of the employer should not be held . . . a separation from employment. Redfield v. Boulevard Gardens Housing Corp., 4 App. Div. 2d 906, 907, 167 N.Y.S.2d 59, 61 (3d Dept 1957) (emphasis added).

42 In Callaghan v. Brown, 218 Minn. 440, 16 N.W.2d 317 (1944), recovery was denied to an employee injured on a coffee break. Sixteen years later, when the Minnesota court in Sweet v. Kolosky, 259 Minn. 253, 106 N.W.2d 908 (1960), granted recovery for coffee break injuries, the only obvious distinction was that express permission to take a coffee break was given in Sweet while such express permission was lacking in Callaghan.


44 See Employers Mut. Liab. Ins. Co. v. Sanderfer, 382 S.W.2d 144 (Tex. Civ. App. 1964), where the employee of an oil drilling company was granted compensation for injuries incurred while deer hunting as a guest of company with which the employer dealt. The court noted that the employer had asked the claimant to go on the hunt to promote goodwill for the company.

45 See, e.g., County of Peoria v. Industrial Comm'n, 31 Ill. 2d 562, 202 N.E.2d 504 (1964). There, the county sheriff held a party for several deputies and others at his cottage. The court held that a deputy who was killed while assisting a motorist on the adjacent highway was within the course of his employment because the sheriff had asked the guests to help the motorist and because helping distressed motorists was a normal duty of deputy sheriffs.
coverage of an employee injured while taking his babysitter home after returning from a service club dance.46

Compensation for injuries suffered at social events without advertising value is less easily explained except by reference to employer approval through the acceptance of related costs. Such approval, as distinguished from mere toleration or permission, plays a larger role here than in semi-social events with customers.47 Examples of seemingly "pure" social events where the employment connection necessary for compensation coverage has been found include an all-expense fishing trip for employees who win sales contests,48 the company picnic,49 the company Christmas party,50 and the intra-company softball league.51 Courts have cited both direct employer benefits such as increased employee interest in the employer's work52 and indirect benefits such as employee identification with the business, relaxation, and camaraderie to uphold coverage in these cases.53 In addition to the benefit arguments, employer control or coercion is sometimes stressed,54 and

46 Harrison v. Stanton, 26 N.J. Super. 194, 97 A.2d 687 (App. Div. 1953), aff'd, 14 N.J. 172, 101 A.2d 554 (1954). The opinion summarized a few of the criteria to be used in such cases to determine whether there was sufficient relationship between the employment and the recreation to justify an award:

(a) the customary nature of the activity; (b) the employer's encouragement or subsidization of the activity; (c) the extent to which the employer managed or directed the recreational enterprise; (d) the presence of substantial influence or actual compulsion exerted upon the employee to attend and participate; and (e) the fact that the employer expects or receives a benefit from the employee's participation in the activity.

26 N.J. Super. at 199, 97 A.2d at 689.

47 The advertising value of employee recreational activities has been cited to bring those events within the course of employment. See, e.g., Rafti v. Merrill Lynch; Pierce, Fenner & Smith, Inc., 20 App. Div. 2d 592, 245 N.Y.S.2d 223 (3d Dep't 1963) (mem.), where the court noted that the employer provided softball uniforms containing employer's initials and affirmed the compensation award. See also Le Bar v. Ewald Bros. Dairy, 217 Minn. 16, 15 N.W.2d 729 (1944).

48 Linderman v. Cowboy Furs, 234 Iowa 708; 13 N.W.2d 677 (1944). For criticism of this case see Merrill, Fifteen Years More of Workmen's Compensation in Iowa; 32 Iowa L. Rev. 1, 30 (1946).


53 Jewel Tea Co. v. Industrial Comm'n, 6 Ill. 2d 304; 128 N.E.2d 699 (1955); Linderman v. Cowboy Furs, 234 Iowa 708, 13 N.W.2d 677 (1944).

54 See Shoemake Sta. v. Stephens, 277 P.2d 998 (Okla. 1954) (employer induced em-
whether the activity is customary is also said to be relevant.\(^{55}\) Since nothing in the statutory formula requires employer benefit as a condition of coverage, the key to recovery may be the employer's acceptance of related costs or other acknowledgement that the event is work connected.

When an employer compels attendance at a social or recreational event by excusing the employee from work at full pay on the condition that he attend,\(^{56}\) or when the employer approves such activities as intra-company softball games by furnishing uniforms or the place to play, he is not merely tolerating the event, but rather is recognizing that it is structured, at least in part, on the basis of employment.\(^{57}\) Therefore, it is reasonable to accept the employer's recognition of the relationship between the activity and the employment and to treat resulting injury as employment related for compensation purposes.

When the indicia of approval, such as the furnishing of premises\(^{58}\) or bearing of some costs,\(^{59}\) appear neutral, an employer's declaration that he is not recognizing a work relation has been deemed sufficient to

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\(^{55}\) See, e.g., American Steel Foundaries v. Capala, 112 Ind. App. 212, 44 N.E.2d 204 (1942), where a coffee bottle warmed in the furnace as usual, exploded. Warming coffee at lunch time was found to be a customary practice, and the award was affirmed. \(^{56}\) But see Williams v. Industrial Comm'n, 38 Ill. 2d 599, 222 N.E.2d 744 (1967), where a butcher, "as he customarily did," stood behind a meat counter drinking coffee and eating a doughnut, choked on the doughnut, blacked out as he walked toward a wastebasket and fell. The Industrial Commission's award was reversed.

In Le Bar v. Ewald Bros. Dairy, 217 Minn. 16, 13 N.W.2d 729 (1944), the fact that employer customarily sponsored several types of athletic teams was held to show that sponsorship of the softball team was deemed desirable for the business.

\(^{57}\) See Chorley v. Koerner Ford, Inc., 19 N.Y.2d 242, 225 N.E.2d 737, 279 N.Y.S.2d 4 (1967) (award granted where deceased died of heart failure after engaging in strenuous dancing at an employer sponsored party which was held to increase employee motivation); Hendren v. Industrial Comm'n, 19 Ill. 2d 44, 166 N.E.2d 76 (1960) (compensation awarded when employer granted claimant and other employees time off for participation in softball games).


\(^{58}\) See McFarland v. St. Louis Car Co., 262 S.W.2d 344 (Mo. Ct. App. 1953), where denial of recovery was affirmed, the court stating, "We do not consider it of important consequence that the employer acquiesced in, or contributed some financial assistance to, such activities." Id. at 348.
prevent the exercise of his power to enlarge coverage. Finally, the employment connection is generally denied when recreational activities are employee organized and no employer approval can be shown. This different treatment of substantially similar cases has been the subject of criticism. Although coverage may someday be extended to employee organized social activities that are work-structured unless the employer expressly disapproves, the present state of the law offers a further instance of the effectiveness of employer approval in bringing coverage to a previously excluded area.

D. Prohibited Conduct

Employer approval is relevant in cases upholding coverage of injuries received while engaged in otherwise prohibited conduct. Although statutes often make intoxication a bar to recovery, employer approval or acquiescence in an employee's intoxication has been mentioned in upholding an award despite such a statute. The rules governing the rights of an employee injured in horseplay are in a state of flux and involve factors other than approval. Nevertheless, cases upholding coverage for employees injured in horseplay on the ground that horseplay has long been an "incident of the employment," are merely making an indirect reference to the employer's custom of acquiescence as approval of the conduct. Similarly, charging an employer with knowledge that boys will shoot paper clips from rubber bands is merely a step in the direction of finding employer acquiescence in, or approval of, playful activities to award coverage.

62 See Bonin, Workmen's Compensation Law: Reviews of Leading Current Cases, 23 NACCA L.J. 147 (1959), which describes the "no-man's land" of employer sponsorship with no compensation for injuries." Id. at 156.
63 Discontinuance of employer sponsored recreation programs would be unlikely even if compensation liability were generally imposed on recreational programs. Id.
64 See, e.g., IND. ANN. STAT. § 40-1208 (1965).
EMPLOYER APPROVAL

III

EMPLOYEE'S ACTS AS DETERMINING COVERAGE

If employer approval of an activity can make it work connected for compensation purposes because it is implied, correctly or not, that the employer saw an employment connection in the activity, then the question arises whether an employee should have a similar power. The humanitarian purposes behind compensation legislation, however, should not allow minor acts or declarations of an injured employee to control whether he was "in the course" of his employment. Whereas the use of minor acts of the employer to find the necessary employment connection is appropriate because the effect of his acts will not bear too hard upon him, the consequences of a denial of coverage to the employee are so severe than any act on his part sufficient to deny coverage must be not only unambiguous but of sufficient importance to bring home to the employee that he has left the course of his employment.69 Thus, even though an employee's power to take himself out of the course of employment cannot be denied, to be sufficient, his act must be "unusual, rash and unjustifiable."70 For these reasons, acts of employer approval have played a meaningful role in determining the limits of coverage while employee acts have made no similar contribution.

CONCLUSION

Through their acts of approval, affected employers can and do communicate perceived work connections and standards of work connections to the administrators of workmen's compensation laws. This flow of information can be used for mediational settlement of particular disputes and is a consent to changes in standards resulting from the receipt of the information. The resulting body of law, although perhaps still unsatisfactory, will at least have been achieved through an understandable process. Advocates and administrators should be aware of the process and focus attention upon acts of employer approval to determine when they are meaningful and whether the effect of such acts should be limited to the resolution of specific disputes to extend the limits of coverage.
