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Minn. L. Rev. Editorial Board

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The Minnesota Workmen’s Compensation Act: Recent Interpretations

INTRODUCTION

While the basic statute which established the Minnesota Workmen’s Compensation Act has been in operation for almost 50 years, the law continues to be “deceptively simple and litigiously prolific.” The purpose of this Note is to examine the workmen’s compensation cases decided by the Minnesota Supreme Court during the past year. The Note will first examine the court’s apparent acceptance of the work-relation test in determining who is an employee within the act’s coverage. Then it will analyze the court’s method of ascertaining whether the claimant’s injury arose out of and in the course of employment.

I. THE EMPLOYMENT RELATIONSHIP—THE RIGHT OF CONTROL TEST

A. INDEPENDENT CONTRACTORS

In Mount v. City of Redwood Falls the court had to determine whether the respondent was an employee or an independent contractor. The respondent was employed by the relator-city as manager of the latter’s municipal airport. At the time of the respondent’s original employment, he owned land adjacent to the airport. The respondent’s dwelling and a hangar were located on this adjacent land. As manager, the respondent’s duties consisted of general operation and maintenance of the airport; he was paid $50 per month for these services. Subsequently, the respondent sold his adjacent property to the city, and in lieu of his salary the respondent was permitted (1) to continue his use of the dwelling on

1. The first workmen’s compensation act in Minnesota was enacted by Minn. Laws 1913, ch. 467.
2. While this phrase was used by Mr. Justice Murphy in deciding a case under the District of Columbia Workmen’s Compensation Act, Cardillo v. Liberty Mutual Ins. Co., 330 U.S. 469, 479 (1947), it is equally applicable to the Minnesota act.
3. 108 N.W.2d 443 (Minn. 1961).
4. The Minnesota Supreme Court has often had to decide whether an injured workman was an employee within the Workmen’s Compensation Act or an independent contractor. See cases cited, 108 N.W.2d at 445 n.1.
the premises, and (2) to retain such income as he received from sales and services to airport users. While servicing an airplane, the respondent heated oil cans on an oil burner to make the oil more fluid; an explosion occurred, and the respondent was burned about the face and neck. The Minnesota Industrial Commission found that the injury was compensable under the Minnesota Workmen's Compensation Act. The Minnesota Supreme Court held that, although the question was a close one, there was sufficient evidence to support the Commission's findings that the respondent was "an employee of the city . . . at the time of the accident."

Traditionally, the primary test in determining whether the claimant is an employee or an independent contractor is the employer's right to control the details of the work. It is the ultimate right to control the work, not the actual exercise of that control, which determines whether this test has been met. On the other hand, if the work is performed according to the worker's own methods without being subject to the employer's control and if the employer's control over the work does not extend further than is necessary to insure a satisfactory result, the worker is considered to be an independent contractor not within the act's coverage. In applying this test the courts have generally looked to four factors: (1) what direct evidence is there of who has the right or exercise of control, (2) what method is used to pay the claimant, (3) who furnishes the equipment and has control of the premises where the work is performed, and (4) who has the right to discharge the claimant. However, as the court correctly noted in the instant case, these factors do not constitute a "rule of universal application"; they are only aids in determining the true relationship of the parties.

While the court continued to adhere to the right of control test, it also stated that the "degree of control exercised varies according


6. 108 N.W.2d at 446.

7. E.g., Geerdes v. J. R. Watkins Co., 258 Minn. 254, 103 N.W.2d 641 (1960); Koktavy v. City of New Prague, 246 Minn. 550, 75 N.W.2d 774 (1956); Hansen v. Adent, 238 Minn. 540, 57 N.W.2d 681 (1953); Aleckson v. Kennedy Motor Sales Co., 238 Minn. 110, 55 N.W.2d 696 (1952). See also 1 Larson, Workmen's Compensation § 44.00 (1952) [hereinafter cited as Larson]; 4 Schneider, Workmen's Compensation § 1065 (1945) [hereinafter cited as Schneider].

8. See 1 Larson §§ 44.00–35.

9. 108 N.W.2d at 446.
to the nature of the work." Hence, "the work in a particular case may be of a character which neither requires nor justifies its ex-
ercise."10 This would seem to indicate that the court will find 
that a worker is an employee rather than an independent con-
tractor if the work performed is an integral part of the employer's 
regular business and not part of the worker's own business.11 Thus, 
it may be that the court has substituted for the right of control 
test a relative nature-of-the-work (work-relation) test.

However, it is unclear from the court's opinion in the instant 
case whether such a substitution has occurred. The court supports 
its decision by reciting that at the time of the accident the respond-
ent had acted as the city's agent-employee in managing the air-
port, had performed services incidental to the usual operation and 
maintenance of the city-owned airport, could be discharged by the 
city, and was registered by the city with the Federal Aviation 
Agency as an employee. The court's reliance on these factors is 
consistent with its adherence to the right of control approach. 
While there was no direct evidence showing the city's control over 
the respondent, the fact that the city owned the premises and could 
enforce its directives by discharging the respondent illustrates that 
the city had the right to control the respondent's activities. The 
fact that the city provided the respondent with a hangar and a 
dwelling, and granted him the right to retain income received 
from sales and services, demonstrates that the respondent was be-
ing paid by the city. Furthermore, these facts show that the city 
furnished the equipment and controlled the premises where work 
was performed. On the other hand, the court also interpreted these 
facts to be analogous to Bieluczyk v. Crown Petroleum Corp.,12 
where the Connecticut Supreme Court held that the claimant's 
activities comprised only "part of a single enterprise." In other 
words, the court appears to have used these same facts to demon-
strate that the respondent was an employee under the work-rela-
tion test.13

10. Ibid., quoting from Aleckson v. Kennedy Motor Sales Co., 238 
Minn. 110, 114, 55 N.W.2d 696, 699 (1952).
11. 

The modern tendency is to find employment when the work being 
done is an integral part of the regular business of the employer, and 
when the worker, relative to the employer, does not furnish an inde-
pendent business or professional service.
LARSON § 45.00. The two parts of this test are interdependent and both 
must be satisfied if employment is to be shown. "Thus, the job or process 
contracted out may be an integral part of the employer's production se-
quency, but if he contracts it out to a separate and independent factory or 
shop, the result is of course not employment." Id. § 45.10, at 660.
13. See note 11 supra and accompanying text.
The decision in the instant case would have been stronger if the court had explicitly adopted the work-relation test. This test is specific; it can be used effectively to measure the significant features of the parties' relationships. In contrast, the right of control test is archaic, vague, and ill-suited to evaluate the parties' contacts.

When the work-relation test is applied to the instant problem, the respondent's activities at the time of the accident appear to have been an integral part of his management of the airport. Airplane servicing was, in this case, a normal function of airport operations. While the degree of city control over the manner in which the respondent performed his services is difficult to determine, the respondent's services do not appear to have been part of an independent business. A slight alteration of the facts illustrates the effectiveness of the work-relation test. Assume, for example, that instead of servicing the airplane, the respondent asked an outside business to provide a mechanic to perform the services. As a result of this change, the city's degree of control over the details of the service performed would remain the same, but its relationship to the nature of the work would be altered. If the mechanic were injured while performing this service, he probably would not be the city's employee under the work-relation test. That is, the mechanic's position is not determined by looking at his job and the work he performs; instead, it is determined by how "independent, separate and public" his service is in relation to the city. Thus, the question of liability would ultimately depend on whether the city or the outside business should bear the "enterprise risk."

While the work-relation test meets the needs of a compensation law, the right of control test was never relevant. For example, there is little logical relationship between the employer's right of control and the Minnesota act. The right of control test was developed as a limitation on the master's vicarious liability for his servant's torts. However, the act is not directly concerned with the injuries the employee inflicts on others; instead, it compensates for injuries to the employee which are caused by his own activities, by co-employees, by independent contractors, and by other third parties. Another objection is that the right of control test is vague and meaningless. The right of control is seldom capable of

14. Of course, if the business consisted of one mechanic whose only function was to service all airplanes that used the airport, he might be considered an employee of the city because the city would not be treating his services as those of an independent business but rather as a part of its regular airport operations. See 1 Larson § 45.31, at 668–69.
15. See id. at 669.
16. See id. § 43.42.
direct proof; it is usually an inference or conclusion. Moreover, the courts have been unwilling to assign any relative order to the weight given to the various factors which affect the employer's right of control. Furthermore, the right of control test is an inadequate device for evaluating the parties' relationships in complex business situations. The attempt to remedy this problem by the insertion of a statutory sub-contractor clause in the act has not been successful because the right of control test does not differentiate between those sub-contractors who are in fact employees and those sub-contractors who are in fact independent contractors. Because of these inadequacies in the right of control test, the court's failure to provide either a clear rule or reliable guidelines for determining whether an injured worker is an employee is unfortunate.

B. Loaned Servants

The right of control issue is raised when the worker performs services for two employers. In Petschow v. Schied the worker's original employer, X, contracted to do sheet metal work on a building project. Thereafter, this contract was sold by X to a third party, Y. As part of this sale, X agreed to assist Y in his performance of the sheet metal contract. As a result, one of X's employees was assigned to Y, and during the assignment to Y this worker was injured. While the worker had no knowledge of the arrangement between X and Y, he did consent to his assignment. However, he continued to be paid by X who probably retained the right to recall him and to provide a replacement. Therefore, if the court had passed the threshold question of whether there was a "contract of hire" between the worker and Y, the court would probably have found that X had retained the right of control; that is, the injured worker was not Y's loaned servant.

However, this question was not answered by the court because it determined that neither an express nor an implied contract existed between the worker and Y. As the court pointed out, a "primary essential of a master-servant relationship is a contract of

17. See id. § 44.00, at 638.
18. E.g., 108 N.W.2d at 446.
19. See 1 Larson § 45.10.
21. 108 N.W.2d 1 (Minn. 1961).
22. This agreement to assist Y is implied by the court's recitation of the facts. Id. at 2.
23. While the court does not specifically state whether X had the right of recall and substitution, this would seem to be implied by the fact that X made the assignment, paid the worker, and did the necessary bookkeeping. Ibid.
hire . . . .”

Instead of creating a new contract with Y, the worker was merely obeying his master's command. Hence, the Minnesota court affirmed the Industrial Commission's determination that the worker was not a loaned servant and that the original employer, X, was liable for workmen's compensation.

II. INJURIES ARISING “OUT OF AND IN THE COURSE OF EMPLOYMENT”

A. THE “INTENTIONALLY SELF-INFlicted” EXCEPTION—SUICIDES RESULTING FROM WORK-CONNECTED MENTAL ILLNESSES

An injury or death which arises “out of and in the course of employment” is compensable unless it was “intentionally self-inflicted.”

In two recent cases involving employee deaths by suicide—Anderson v. Armour & Co. and Olson v. F. I. Crane Lumber Co.—the Minnesota Supreme Court was faced, for the first time, with the question of whether death or injury resulting from a mental illness was intentionally self-inflicted. The court upheld the Industrial Commission's award of compensation in both cases on the theory that the employment had caused the mental illness which, in turn, caused the suicide; hence, the death was not intentionally self-inflicted.

While driving a truck in the course of his employment, the employee in Anderson struck down a pedestrian. This accident precipitated a psychotic depression in the employee; as a result, he committed suicide one week after the accident. Olson, on the other hand, involved an employee who had suffered a heart attack in the course of his employment.

24. Id. at 3. In support of this requirement, the court cited Pocrnich v. Snyder Mining Co., 233 Minn. 81, 45 N.W.2d 794 (1951) and Larson § 48. However, since this is a statutory requirement, a more appropriate citation would have been the Minnesota Workmen's Compensation Act. See note 5 supra.

25. Every . . . employer is liable for compensation according to the provisions of this chapter and is liable to pay compensation in every case of personal injury or death of his employee arising out of and in the course of employment without regard to the question of negligence, unless the injury or death was intentionally self-inflicted . . . . The burden of proof of that fact is upon the employer.

MINN. STAT. § 176.021(1) (1957).


28. The court noted that the heart attack was caused by the performance of labor under conditions of "excessive heat and humidity." 107 N.W.
mental illness ensued, and the employee entered a state mental hospital. *Two years* after the heart attack, the former employee committed suicide.

In allowing compensation for deaths caused by suicides or injuries caused by suicide attempts, a majority of courts award compensation only if the suicide attempt occurred (1) as a result of work-connected insanity and (2) through an "uncontrollable impulse or in a delirium of frenzy." Courts which advance the un-

2d at 224. But the court probably did not consider the "excessiveness" to be a prerequisite to a finding that the heart attack was a work-connected injury. See Note, 70 YALE L.J. 1129, 1139 (1961). The court has probably abandoned the Hiber v. City of St. Paul, 219 Minn. 87, 91, 16 N.W.2d 878, 880 (1944) rule that limited "accidental" injuries in heart attack cases to the following: an "injury to an employee's heart muscles caused by exertion and excitement greater than usual and customary in the performance of his duties is an *accidental injury* within the meaning of the compensation act." For example, in Golob v. Buckingham Hotel, 244 Minn. 301, 69 N.W.2d 636 (1955), the court noted that the unusual exertion rule has often led to peculiar results, and therefore "the modern trend has been away from a strict interpretation of the rule." *Id.* at 304, 69 N.W.2d at 638–39. In addition, the court pointed out that the Minnesota Workmen's Compensation Act had been amended to exclude the "accident" requirement, and if "the statute does not require proof of accident it probably is unnecessary to prove unusual exertion." *Id.* at 304 n.4, 69 N.W.2d at 638 n.4. Again, in Root v. City of Duluth, 247 Minn. 243, 248, 76 N.W.2d 698, 701 (1956), the court called attention to the modern trend and the amendment of the Minnesota statute. See also Balow v. Kellogg Cooperative Creamery Ass'n, 248 Minn. 20, 25, 78 N.W.2d 430, 433 (1956) (compensation awarded for hernia injury suffered "because of his exertions on that date in connection with his regular work").

Although the employee in Olson suffered from a pre-existing heart condition, it has long been settled in Minnesota that this does not prevent a finding that a heart attack arose "out of and in the course of" employment. *E.g.*, Walker v. Minnesota Steel Co., 167 Minn. 475, 209 N.W. 635 (1926).

29. Although it is sometimes said that the suicide must stem from a "compensable physical injury", this statement is unduly restrictive. The correct statement is that the suicide must be the result of some injury arising out of and in the course of employment. . . . [T]he rapid development and expansion of the field of compensation for nervous and mental disorders suggests that as cases arise of suicide following upon mental or nervous injury, awards will not be refused merely for lack of evidence of a compensable physical injury at some point.

1 LARSON, § 36.40. The Anderson case obviously follows and bears out Professor Larson's prediction.

Prior to Anderson, only one court had awarded compensation for a suicide caused by a mental disorder provoked by a mental injury. Wilder v. Russell Library Co., 107 Conn. 57, 139 Atl. 644 (1927). However, many courts have awarded compensation when the mental injury provoked a mental disorder short of suicide. *Page, Workmen's Compensation Law, 25 NACCA L.J. 201, 208 (1960).*

30. 1 LARSON § 36.00; *e.g.*, *In re Sponatski*, 220 Mass. 526, 108 N.E. 466 (1915). See also Annot. 143 A.L.R. 1227 (1943).
controllable impulse or delirium theory maintain that in the absence of such impulse or delirium there is an intervening cause; that is, the suicide is not the result of a work-connected injury but of the employee's "voluntary willful choice"—even though the "choice" may have been "dominated and ruled by a disordered mind." However, a minority of courts award compensation if there is a causal-relation between the employment and the insanity and between the insanity and the suicide.

The Minnesota court appears to have considered both tests in the Anderson case. On the one hand, the evidence was apparently sufficient to meet the uncontrollable impulse test. Thus, the court supported its decision by quoting Schneider's description of this test. However, the court's subsequent language seems to have impliedly rejected any use of the uncontrollable impulse test. As the court noted, an earlier Minnesota case had recognized that one may commit an act "with full realization of its consequences, yet the act may be the result of insanity rather than the individual's own conscious act." This statement supports the view that an act of suicide by one who is insane is not an intervening cause but rather in the direct line of causation. Moreover, the Anderson

32. 1 Larson § 36.00. This is also the rule under the English decisions. See Withers v. London, B. & S.C.R. Co., [1916] 2 K.B. 772. It seems logical that when suicide is the result of an employment-caused insanity the suicide is an intervening act, but not an intervening cause. An intervening cause is one occurring entirely independent of a prior cause. When a first cause produces a second cause that produces a result, the first cause is a cause of that result. There is then a direct as distinguished from a broken sequence, and the first cause is a responsible and proximate cause of the result.

Barber v. Industrial Comm'n, 241 Wis. 462, 467–68, 6 N.W.2d 199, 202 (1942) (dissenting opinion). (Citations omitted.)

The leading case for the adoption of this minority rule is Pushkarowitz v. A. & M. Kramer, 275 App. Div. 875, 88 N.Y.S.2d 885, aff'd, 300 N.Y. 637, 90 N.E.2d 494 (1950); accord, Whitehead v. Keene Roofing Co., 43 So. 2d 272 (Fla. 1949); Prentiss Truck & Tractor Co. v. Spencer, 228 Miss. 66, 87 So. 2d 272 (1956).

33. 257 Minn. at 285, 101 N.W.2d at 438.
34. Id. at 289, 101 N.W.2d at 440.

The bearing of the statutory provision to the effect that no compensation shall be paid if the disability or death is due to intentional self-inflicted injury is under the decisions, not material if the proof shows the employee's insanity or mental derangement due to the accident was of a degree that he killed himself while possessed of an uncontrollable or irresistible impulse or while in a delirium of frenzy without rational knowledge of the physical consequences of his act.

5 Schneider § 1411(e), at 265.
35. 257 Minn. at 289, 101 N.W.2d at 440; see Anderson v. Grasberg, 247 Minn. 538, 78 N.W.2d 450 (1956). However, the Grasberg case did not involve workmen's compensation.
opinion concluded that "there is no question but what there was a causal connection between the accident and the suicide."^{36}

This development in the direction of the causal-relation test was continued in Olson. In Olson the court neither mentioned the uncontrollable impulse nor did it indicate that the employee's suicide was committed under such an impulse. Instead, the court noted that there was a causal relationship between the heart attack and the mental illness and between the mental illness and the suicide—despite the two-year time lag.^{37}

Unfortunately, the court did not, in either Anderson or Olson, declare in precise, unambiguous terms the test that it would apply. Nevertheless, a close reading of these opinions seems to indicate that the statutory "intentionally self-inflicted" restriction will not bar compensation if the injury or death was the result of an employment-occasioned mental illness.

B. THE PERSONAL COMFORT DOCTRINE—COFFEE BREAKS

The right of control test has, on one occasion, also been applied to determine whether an employee acted in the course of his employment at the time he was injured. In Salmon v. Bagley Laundry Co.,^{38} the Michigan Supreme Court rejected a worker's claim for compensation for an injury which occurred on the employer's premises during a coffee break.^{39} The Michigan court cited the fact that the employer did not have the right to control the worker during the coffee break because the latter was free to leave the employer's premises; hence, the court reasoned that the worker was not injured while performing an act within the course of his employment.^{40} However, this would seem to be an unwarranted

36. 257 Minn. at 289, 101 N.W.2d at 440. In its review of the Anderson case, the Minnesota court in Olson said that it had upheld the Industrial Commission's award of compensation because there was a "causal connection between the [work-connected] accident and the suicide . . . ." 107 N.W.2d at 225.

37. 107 N.W.2d at 225. As to the time span between the injury and the death see Jackson Hill Coal & Coke Co. v. Slover, 102 Ind. App. 145, 199 N.E. 417 (1936) (suicide occurring 37 months after employee suffered burns held compensable); Dietz v. William H. Bunstead, Inc., 5 App. Div. 2d 739, 168 N.Y.S.2d 669 (1957); but see Root v. City of Duluth, 247 Minn. 243, 76 N.W.2d 698 (1956) (death occurring 37 months after alleged heart injury not compensable).


39. While the worker had left the employer's premises during the coffee break, the injury occurred when the worker was ascending the step outside the front door of the employer's premises. Thus, the injury did occur on the employer's premises. Id. at 473, 74 N.W.2d at 2.

40. Id. at 474, 74 N.W.2d at 3.
extension of the right of control test, and it has not been adopted by any other court.\textsuperscript{41}

\textit{Sweet v. Kolosky}\textsuperscript{42} recently presented the Minnesota Supreme Court with a fact situation similar to \textit{Salmon}. Here the employee was injured \textit{off} the employer's premises while taking a coffee break which was permitted under the employment agreement.\textsuperscript{43} In contrast to the Michigan court, the Minnesota court upheld the employee's right to compensation. The Minnesota court's approach was based on the theory that the employee's activity was "incidental to the employment and that, while exercising . . . [his] rights [under the employment agreement], the employee remains within the scope of employment."\textsuperscript{44} While the court's use of the terminology "scope of employment" in lieu of the statutory language "out of and in the course of employment" is unfortunate,\textsuperscript{45} the adoption of the minority rule\textsuperscript{46}—and modern trend—is consonant with its often-expressed intention to liberally interpret the workmen's compensation act.

By this decision, the Minnesota court has adopted the personal comfort doctrine which provides that

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 . . . .\textsuperscript{47}

\textsuperscript{41} As Justice Smith commented in his strongly worded dissenting opinion, the effect of the court's decision was to cut the working day into "a checkerboard of legal relationships." \textit{Id.} at 482-86, 74 N.W.2d at 7-9. The court's decision was severely criticized for its misuse of the right of control test. Horovitz, \textit{Workmen's Compensation Law}, 17 NACCA L.J. 25, 28-29 (1956); 54 Mich. L. Rev. 1192, 1193-94 (1956). However, the Michigan Workmen's Compensation Act was amended to cover the going to and coming from work periods after the facts of the \textit{Salmon} case had occurred. Mich. Stat. Ann. § 17.151 (1960). As a result, the \textit{Salmon} decision has been overruled. Dyer v. Sears, Roebuck & Co., 350 Mich. 92, 85 N.W.2d 152 (1957); see also Freiberg v. Chrysler Corp., 350 Mich. 104, 85 N.W.2d 145 (1957).

\textsuperscript{42} 106 N.W.2d 908 (Minn. 1960).

\textsuperscript{43} Since there were no facilities for obtaining coffee on the employer's premises, the employees customarily traveled around 200 feet to a nearby drugstore. The claimant here was injured on the way to the drugstore after having taken four or five steps out on the public sidewalk. Thus, the injury occurred \textit{off} the premises. Otherwise, the \textit{Sweet} case is indistinguishable from the facts in \textit{Salmon}.

\textsuperscript{44} \textit{Id.} at 910.

\textsuperscript{45} This is the language of the law of torts which has no application to workmen's compensation laws. Salmon v. Bagley Laundry Co., 344 Mich. 471, 486, 74 N.W.2d 1, 8 (1955) (Smith, J., dissenting); accord, Cunning v. City of Hopkins, 258 Minn. 306, 318, 103 N.W.2d 876, 884 (1960). \textit{But see} Pound, \textit{The Spirit of the Common Law} 30 (1921).

\textsuperscript{46} \textit{See} 7 Schneider § 1634, at 132.

\textsuperscript{47} 1 Larson § 21.00. The Wisconsin Supreme Court was the first court to give judicial recognition to this doctrine in the United States. Milwaukee
Prior to the decision in the instant case, the Minnesota court had been almost alone in refusing to recognize the personal comfort doctrine if the employee was injured while purchasing food or other refreshments. For example, in Callaghan v. Brown it was the employee's habit, with the acquiescence of his employer, to leave the employer's premises for a coffee break. While crossing the street adjacent to his employer's premises, the worker was injured. The Minnesota Supreme Court denied compensation on the ground that the employee's injury and subsequent death.

cannot in any way be traced to the nature of his employment nor to a risk to which his employer's business exposed him. He was where he was solely in furtherance of his own personal desires and accommodation. There was no causal connection between his employment and the exposure to the risks which caused his death.

One writer attributed Minnesota's former position to its "particularly harsh statute." It provides that personal injury means an "injury arising out of and in the course of employment" if the employee was "engaged in, on, or about the premises where his services require his presence as a part of such service at the time of the injury and during the hours of such service." Despite the strictness of this provision, the instant court held that an injury arises out of employment if it arises "out of the employment looked at in any of its aspects."

The court's adoption of the personal comfort doctrine in this case was based on two theories. First, the employee was exercising a right granted by the employment agreement; hence, this activity was not only incidental to his employment but also within the "scope of his employment." Second, the instant situation cannot be rationally distinguished from the situation where an employee is injured while going to or coming from his employer's lunch counter—and the "on-premise lunch counter" injury is compensated.

The court referred to the employment agreement to determine

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Western Fuel Co. v. Industrial Comm'n, 159 Wis. 635, 150 N.W. 998 (1915). The Wisconsin court has continued to be the leader in the development of this area of workmen's compensation. See generally Comment, 1960 Wis. L. REV. 91, 92–98.


49. 218 Minn. 440, 16 N.W.2d 317 (1944).

50. Id. at 441, 16 N.W.2d at 319. (Emphasis added.)

51. Comment, supra note 47, at 93 n.19.

52. MINN. STAT. § 176.011(16) (1957).

53. 106 N.W.2d at 910, quoting with approval Caswell's Case, 305 Mass. 500, 502, 26 N.E.2d 328, 330 (1940).

54. See generally 1 LARSON § 22.11.
what the employment covered and what was incidental thereto.\textsuperscript{55} While this analysis was sufficient in the instant case for finding that the employee was acting within the course of employment, other factors are relevant. The statutory provisions do not require that the court look only to the written contract.\textsuperscript{56} Hence, custom and usage established by the parties' conduct should also be considered.\textsuperscript{57} In \textit{Callaghan} the employment agreement did not provide for coffee breaks, but for 30 years the employer had acquiesced in the employee's habit of taking a coffee break; otherwise, the facts are identical to the instant case.\textsuperscript{58} This practice would seem to indicate that the employee's coffee break was an integral part of his employment. Thus, the court's attempt to distinguish and failure to overrule the \textit{Callaghan} case is questionable, and little reliance should be placed on \textit{Callaghan} as precedent in view of the result in the instant case.

The court also pointed out that an employee is compensated for an injury which occurs while he is either going to or coming from a lunch counter maintained on the employer's premises.\textsuperscript{59} This, it reasoned, is not distinguishable from the situation where the employee is injured while exercising the same right off of the employer's premises—if lunch counter facilities were unavailable on the premises. While the majority of courts which accept the personal comfort doctrine limit its application to on-premise injuries,\textsuperscript{60} the Minnesota court's disregard of this distinction between on and off-premise injuries is supported by strong authority.\textsuperscript{61} Moreover, compensation in the "personal comfort" situation

\textsuperscript{55} 106 N.W.2d at 910. The Minnesota court took judicial notice of the fact that coffee breaks are commonly recognized by employment agreements and therefore are taken within the course of employment. Compare Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956).

\textsuperscript{56} See text accompanying note 52 \textit{supra}.


\textsuperscript{58} It is interesting to note that the employer's benefit—if one assumes that coffee breaks increase efficiency and therefore result in greater output—was identical in \textit{Callaghan} and \textit{Sweet}. However, the formalization of the employee's practice of taking a coffee break in \textit{Sweet} resulted in the injury being compensable.

\textsuperscript{59} 106 N.W.2d at 910. See 1 \textsc{Larson} § 21.21(a); \textsc{Note}, 15 \textsc{Minn. L. Rev.} 792 (1931); see also Horowitz, \textit{supra} note 41, at 31.

\textsuperscript{60} Comment, \textit{supra} note 47, at 98.

\textsuperscript{61} The Wisconsin Supreme Court recently extended the personal comfort doctrine to cover an injury occurring off of the employer's premises during a brief break from the employee's regular work—if the employer consents to the break. Van Roy v. Industrial Comm'n, 5 Wis. 2d 416,
is not based on whether the employer can control the risk; therefore, the distinction seems to be meaningless. Instead, compensation is awarded because the employee was injured while engaged in an activity incidental to his employment.

Thus, the Minnesota court's refusal to limit the personal comfort doctrine by an artificial off-premise rule is logically sound. However, a consistent interpretation of the workmen's compensation act would seem to require that the court look to custom and usage as well as the employment agreement when it determines what the conditions of employment are and what is incidental thereto.

C. AGGRAVATION OF PRE-EXISTING INJURIES

The Minnesota court has long adhered to the rule that a work-connected injury or death is compensable even if it merely aggravates a pre-existing infirmity.\(^62\) That is, "an employer takes an employee as he is."\(^63\) This rule is also applied if the injury or death resulted from medical treatment of a work-connected accident and this medical treatment aggravated a pre-existing disability.\(^64\)

However, as the recent case of Zappa v. Charles Mfg. Co.\(^65\) illustrates, the injury is not compensable unless the claimant can show that the aggravating "medical treatment necessitated thereby, was a contributing cause of the employee's death" or injury.\(^66\) For example, in Zappa the employee sustained a back injury in the course of his employment. Since his back failed to respond to treatment, a spinogram\(^67\) was performed to determine, if possible, the exact nature of the injury. Three days after the spinogram the

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\(^{63}\) E.g., Pittman v. Pillsbury Flour Mills, 234 Minn. 517, 48 N.W.2d 735 (1951); Swanson v. American Hoist & Derrick Co., 214 Minn. 323, 8 N.W.2d 24 (1943); Westereng v. City of Morris, 205 Minn. 219, 285 N.W. 717 (1939); Smith v. Mason Bros., 174 Minn. 94, 218 N.W. 243 (1928). See generally 1 LARSON § 12.20.

\(^{64}\) 62. E.g., Pearson v. Ford Motor Co., 186 Minn. 155, 158, 242 N.W. 721, 722 (1932). The workmen's compensation law does not prescribe a standard of health for the employee. But cf. 6 SCHNEIDER § 1543(i), at 76.


\(^{67}\) 65. 109 N.W.2d 420 (Minn. 1961).

\(^{66}\) 66. Id. at 424; accord, Tillman v. Stanley Iron Works, 222 Minn. 421, 424-27, 24 N.W.2d 903, 905-06 (1946). See generally 6 SCHNEIDER § 1543(i), at 77.

\(^{67}\) 67. "Radiograph of the spinal cord, made after the injection of a contrast medium into the subarachnoid space." BLAKISTON, NEW GOULD MEDICAL DICTIONARY 770 (2d ed. 1956) (as defined in myelogram).
employee became “somewhat dizzy,”\textsuperscript{68} but otherwise he “progressed normally,” and five days after the operation he was discharged from the hospital in an improved condition. Six days after his release he exhibited partial facial paralysis which became progressively worse. The employee died of cancer\textsuperscript{69} four months after the original work-connected injury. His dependents, claiming workmen’s compensation benefits, contended that the medical treatment (spinogram) aggravated a pre-existing brain tumor and, thus, contributed to the employee’s death. However, after an examination of the record,\textsuperscript{70} the Minnesota Supreme Court reversed the Industrial Commission’s findings and upheld the referee’s decision because “even in the absence of the spinogram, death would have occurred at least as early as it did and possibly earlier if there had been no operation.”\textsuperscript{71} Thus, the dependents were not entitled to workmen’s compensation benefits.

While this decision does not establish a new causal-relation test to be applied by the Industrial Commission, the court did announce that it will continue to closely examine the record to determine if in fact there was sufficient evidence to support a conclusion that the medical treatment contributed to or hastened the employee’s death. Therefore, despite the court’s tendency to interpret the workmen’s compensation law liberally, unless a strong causal connection is established the employee or his dependent will not be compensated for aggravating medical treatment.\textsuperscript{72}

\textsuperscript{68} 109 N.W.2d at 421. The employee’s wife, and claimant here, also testified that “following the spinogram [the] employee fell while attempting to remove his robe [and] that his speech was slurred . . . .” However, the court apparently did not regard this as a significant factor in the establishment of a causal connection because of other medical testimony.

\textsuperscript{69} For a similar case involving the question of aggravating a cancerous condition, see Erickson v. Knutson, 237 Minn. 187, 54 N.W.2d 118 (1952). In Erickson the court summarized its affirmation of the Industrial Commission’s award of compensation as follows:

Where opinions of medical experts are conflicting as to whether an injury has aggravated an existing infirmity, a question of fact arises, and the determination thereof by the industrial commission will not be disturbed unless consideration of evidence and inferences permissible therefrom clearly requires reasonable minds to adopt a conclusion contrary to one arrived at by commission.

\textsuperscript{(headnote.)}

\textsuperscript{70} Five doctors testified at the referee’s hearing. Of these, two had no opinion as to whether the spinogram had any causal relationship to the employee’s death; two doctors testified that in their opinion the spinogram had no causal relationship to the employee’s death; and one doctor who testified that the spinogram could have contributed to the employee’s death, concluded that it did not hasten the employee’s death in this case.

\textsuperscript{71} 109 N.W.2d at 425.

\textsuperscript{72} This is the only workmen’s compensation case in which, during the 1960–1961 term, the Minnesota Supreme Court overruled a finding of the Industrial Commission.
A corollary to the causal-relation test for aggravating medical treatment is the requirement that in order for the subsequent injury to be compensable it must be a "direct and natural result of a compensable primary injury." Thus, if the primary work-connected injury creates a permanently weakened physical condition which the employee's subsequent normal physical activity aggravates to the extent that medical attention is required, the cost of such treatment is reimbursable. However, if the subsequent injury is attributable to the employee's undue exertion, negligence, or fault, the chain of causation is broken and the injury is not compensable.

Because of its adherence to this requirement, the Minnesota Supreme Court, in *Eide v. Whirlpool Seeger Corp.*, had to decide whether the re-injury of the employee's back was the proximate result of the primary injury. In *Eide* the employee's primary injury was a work-connected back injury for which he had been treated and compensated. Subsequently, he engaged in a game of badminton and sustained a knee injury. As a result of this injury he was hospitalized and a rigid plaster cast was applied to his leg. After removal of the plaster cast and release from the hospital, the employee had to return to the hospital for "treatment of the knee injury as well as for treatment of his back." The undisputed medical testimony was that this latter hospitalization was "due to the old injury to the employee's back, stimulated by the new, minor injury to his knee . . . ." Thus, the court upheld the Industrial Commission's determination that the additional medical and hospital treatment was reimbursable.

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73. 1 Larson § 13.11, at 183.
74. Kelly v. Federal Shipbuilding & Dry Dock Co., 1 N.J. Super. 245, 64 A.2d 92 (1949). In *Kelly* the employee's knee was in a cast as a result of a compensable injury. Attending a wedding reception he attempted to save a child from falling. However, as a result of wearing the cast the employee fell and broke his wrist. The court awarded compensation because the second injury was directly connected in the chain of physical causation with the compensable injury.
76. 109 N.W.2d 47 (Minn. 1961).
77. . . . that because of the rigid cast on his left leg employee had been required to swing his left foot in a rotary movement while walking which caused his pelvis to tilt and swing outward; that had the employee not had the prior back injury this method of walking would not have incapacitated him or given him any additional trouble; and that except for this fact employee would not have had this serious exacerbation of pain to his back, which required further medical and hospital treatment.

*Id.* at 49.
pital treatment of the employee's back was a natural consequence of the primary injury and, hence, was compensable.

Whereas the primary injury is compensable only if it arises out of and in the course of employment, the compensability of a subsequent injury is measured by a different standard. The Minnesota Workmen's Compensation Act requires the employer to furnish medical treatment "as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." Thus, where the subsequent injury does not arise in an employment context, it is not compensable if the employee has fully recovered from the primary injury, and the primary injury did not create a permanently weakened physical condition. However, the statute does not lay down a unique test for determining when recovery occurred or when the subsequent injury was not related to the primary injury. Hence, the courts have used the common-law concepts of "direct and natural results" and of an intervening cause.

In addition to the court's determination that the subsequent injury "was a natural consequence flowing from the primary injury, . . ." the court held that the employee's participation in a game of badminton was not an intervening cause. First, the injury was to the employee's knee and the cast caused the recurrence of the back injury only because the back had been weakened by the primary injury. Second, badminton is a mild form of exercise which is within the limits of normal physical activity. Third, the employee had not been instructed to avoid activities of this nature.

In both Zappa and Eide the Minnesota court was faced with situations in which a careless reading of the workmen's compensation law could have resulted in irreconcilable results. However, because of a careful analysis of the legal issues involved, the decisions are consistent and add further substance to the well-established positions previously taken by the court.

78. MINN. STAT. § 176.135(1) (1957). (Emphasis added.) "There is no statute limiting the time in which the commission may grant a rehearing on the need for further medical and hospital care in the treatment of the original injury. Fehland v. City of St. Paul, 215 Minn. 94, 9 N.W.2d 349." Eide v. Whirlpool Seeger Corp., 109 N.W.2d at 49.
79. 109 N.W.2d at 49.
80. Compare note 25 supra and accompanying text.
81. See generally 1 LARSON § 13.11.
82. 109 N.W.2d at 50.
LEARNED HAND
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