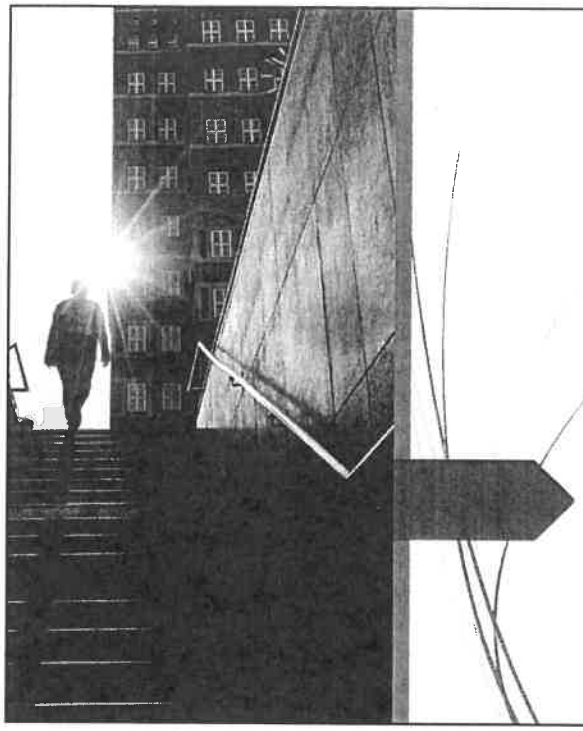
Accident Arising out of, and in the, Course of Employment with a focus on the Coming and Going Rule and Remote Work

Eric R. Chase, Esq.



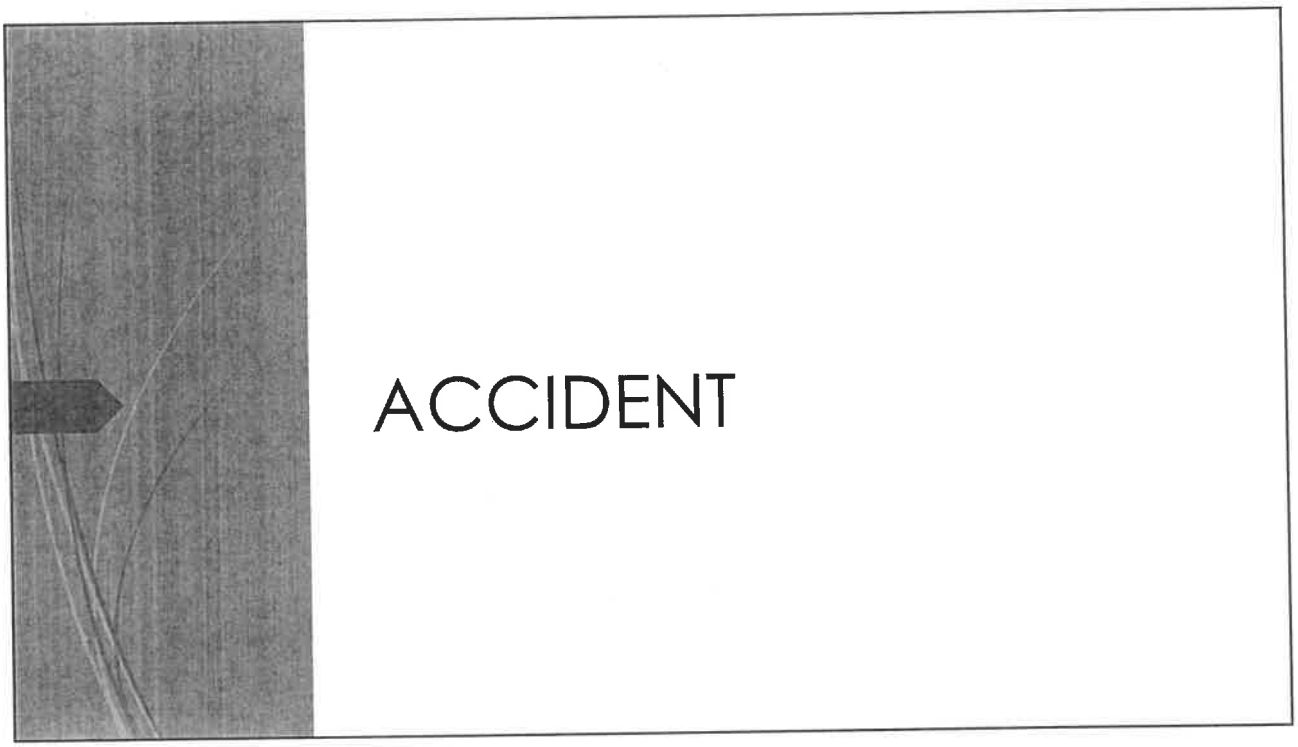
THE COMING AND GOING RULE

Prepared by:

Eric R. Chase, Esq.
Wolff, Goodrich & Goldman LLP
echase@wolffgoodrich.com
(315) 423-4400

NYS Workers' Compensation 101: Elements of a Claim

- Accident or Occupational Disease
- Notice
- Causal Relationship



INTRODUCTION TO COMPENSABLE ACCIDENT

- **Workers' Compensation Law §2(7):** An injury is compensable if it is an accidental injury **which arises out of and in the course of employment** and such disease or infection as may naturally and unavoidably result therefrom. The terms "injury" and "personal injury" shall not include an injury which is solely mental and is based on work-related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer.
- **Workers' Compensation Law §10(1)**: For an accident or occupational disease to be compensable **it must arise out of and in the course of employment**. In other words, to be compensable any injury must be a natural incident of the work (i.e. arise out of employment) and it must also occur during employment (i.e. be in the course of employment). See, Koerner v. Orangetown Police Dept., 68 N.Y.2d 974 (1986); Maltese v. N.Y.S. Criminal Court, 176 A.D.2d 397 (3d Dept. 1991).
- **Workers' Compensation Law §21**: Provides a number of presumptions favoring the compensability of a claim. These presumptions include Section 21(1) which presumes that a claim arises out of and in the course of employment. See Andrews v. Pinkerton Security, 306 A.D.2d 655 (3rd Dept. 2003).

PRACTICE POINT: In order to rebut the presumption provided by Section 21(1) of the Workers' Compensation Law, the burden is on the carrier to produce substantial evidence to the contrary. See Scalzo v. St. Joseph's Hospital, 297 A.D.2d 883 (3rd Dept. 2002).

CRITICAL ELEMENT OF A COMPENSABLE ACCIDENT –

SAME MUST ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT

- An injury arises out of employment when it is related to the employment and occurs while the employee is doing the duty they are employed to perform as part of the natural incident of work. Connelly v. Samaritan Hospital, 259 N.Y. 137 (1932) Two separate requirements that BOTH must be met

1. **ARISE OUT OF EMPLOYMENT:**

Examples of what generally does NOT arise out of employment despite being at work at the time of the incident:

- Aneurism
- Being struck by stray bullet fired from a gun off employer's property and intended for someone else not affiliated with work

2. **IN THE COURSE OF EMPLOYMENT:**

Examples of what generally does NOT occur in the course of employment:

- School teacher who falls in the driveway at their home before leaving for school.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT - TESTS

- Arise out of Work: Did the injury occur as " a natural incident of the work" and/or was one of the risks connected with the employment flowing therefrom as a natural consequence directly connected to work. Slater v. Pilch, 17 A.D.2d 340 (3rd Dept. 1962)
- Deviation (i.e. Personal v. Work Related): Are the activities leading to injury (1) reasonable and (2) sufficiently work related under the circumstances. Matter of Richardson v. Fiedler Roofing, 67 N.Y.2d 246 (1986)

Practice Point:
Course of employment is NOT limited to the actual production of goods or services NOR is it confined to the exact hours of work. See Sicktish v. Vulcan Industries of Buffalo, Inc., 33 A.D.2d 975 (4th Dept. 1970)

COMING & GOING - GENERAL RULE

General Rule: Employees are not deemed to be within the course of their employment until reaching the premises of their employer. Thus, injuries that occur during commuting activities are typically not compensable.

Judicial Explanation for General Rule: The Court of Appeals has provided a rationale for the coming and going rule In re Greene v. City of N.Y. Dep't of Soc. Servs., 44 N.Y.2d 322, 325 (1978), where the following was noted:

"[The coming and going rule] recognizes that the risks inherent in traveling to and from work relate to the employment only in the most marginal sense. Usually, injuries arising while traveling to and from the place of work are neither directly nor incidentally related to employment, and are, therefore, not compensable."

EXCEPTIONS

- Outside Worker
- Special Errand
- Dual Purpose
- Travel to/from Home Office
- On-Call Worker
- Special Employment Risks:
  - Public Roads
  - Parking Lot Injuries

OUTSIDE WORKER

- **Definition**: class of workers who have no fixed place in which work is done
- **Examples**: Traveling salesperson, collectors, solicitors, landscapers, In-home health aid, etc.
- **Exception to Coming and Going Rule**: Typically covered by compensation from the time they leave home until they return
- **Exclusions to Outside Worker Exception**:
  - Required to report to a fixed location before commencing work on the outside
  - Required to report to a fixed location for an extended period of time even if location is off employer's premises
  - Deviation from employment (i.e. purely personal act)
- **PRACTICE POINT**: Obtain information about the assignment of an employee for work off employer's premises that includes following:

1. Address(s) of locations assigned,
2. Duration of time assigned to each location and
3. Mode of transportation required to travel to/from each assigned work location off the employer's premises.
4. Determine if the employe was an outside worker on the date of injury.

DeVito v. Imbriano

33 N.Y.2d 757 (1973)

- **Facts**: Decedent worked as a laborer for a landscaping company. The decedent would be picked up at a specific location every morning by the employer and then transported to various work locations that changed day-to-day. On the day of the accident, the decedent had finished his work and had just finished stepping out of the employer's vehicle to leave the pick-up location when the decedent was struck and killed by an on-coming vehicle.
- **Holding**: In affirming the Board and Appellate Decision's establishment of the claim, the death *arose out of employment* because the accident happened from the dangers of the premises and the limits of the business there conducted as if it happened on the premises themselves and *in the course of employment* because employment is not limited to the exact moment when work ceases but extends to include a reasonable amount of time and space before and after ceasing actual employment.
- **Practical Application**: Outside employees are not only covered while doing work at outside locations, but during transportation to/from employment (aka portal to portal coverage)

Bennett v. Marine Works Inc.,

273 N.Y. 429 (1937)

- **Facts**: The decedent was employed as an outside salesman, estimator and supervisor of repairs. In his position, the decedent had no regular hours of employment, nor did he have to report to the office of his employer before commencing work. In addition, his employment paid him for his travel and entertainment expenses. On the morning of the accident, the decedent left his home to take a train to his first business call and while at the train station was struck by the train resulting in death.
- **Holding**: In affirming the Board's decision to establish the claim and reversing the Appellate Division's disallowance, the Court of Appeals held the death was compensable stating that it *arose out of employment* because the claimant was traveling for a work meeting and *in the course of employment* because the injury occurred at a time while the claimant was traveling with the intention of going directly to the place where he would engage in work.

Exclusions to Outside Worker Exception

Fixed Location: An employee who must first report to a fixed location before commencing work on the outside is not a "outside worker" for purposes of applying an exception to the coming and going rule. See Taber v. Abraham, 3 A.D.2d 776 (3rd Dept. 1957); Shafran v. Board of Education, 25 A.D.2d 336, 337-338 (3rd Dept. 1966)

Fixed Location for Extended Time: An outside employee becomes an inside employee for the period of time when the outside employee is assigned to a fixed location for an extended period of time and/or has a scheduled assignment at a fixed location. See Bobinis v. State Ins. Fund, 235 A.D.2d 955 (3rd Dept. 1997); Matter of Renner Brown Staffing Inc., WCB No. G202 7478 (July 23, 2018)

Deviation: If an outside worker engages in a purely personal act, like drinking at a hotel bar then getting injured while going swimming, on a work-related trip, the injuries are not compensable. See Grady v. Dun & Bradstreet, 265 A.D.2d 643 (3rd Dept. 1999)

SPECIAL ERRAND

- **Definition**: work or travel not associated with an employee's normal place and time of employment
- **Examples**: travel to an employer designated drycleaner for cleaning of uniform, travel to bank or post office for benefit of employer, travel to a college for courses, etc.
- **Exception to Coming and Going Rule**: Usually covered by compensation from the time they begin the special errand until any deviation from usual travel is complete
- **Exemption to the Special Errand Exception**:
  - Deviation from Special Errand (i.e. purely personal act)
- **PRACTICE POINT**: When assigning special errands, it is recommended that the employer be as specific as possible regarding the following to limit the extent of coverage:

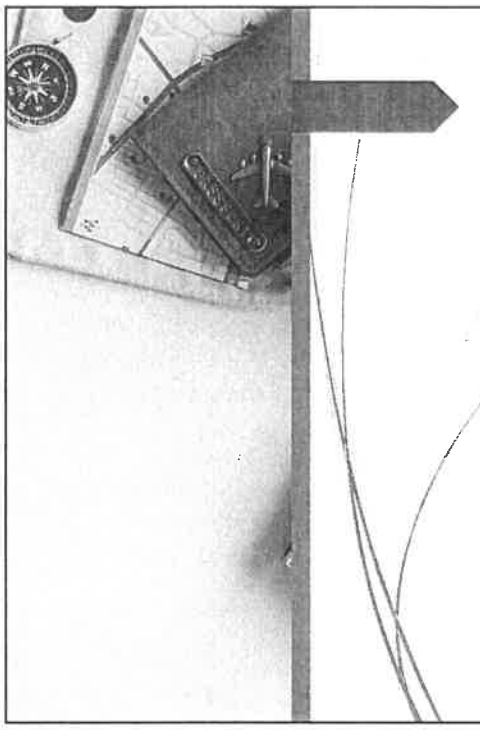
1. Date,
2. Time,
3. Activity(s) to be completed,
4. Vehicle to be used, if applicable, and
5. Route to be traveled.

Neacosia v. New York Power Auth.,
85 N.Y.2d 471 (1995)

- **Facts**: Claimant was a security officer assigned to work at a fixed location. On the date of accident, claimant completed his work shift, left the fixed location in his personal vehicle, stopped on his way home to deliver uniforms to an employer designated dry cleaner where the employer paid for the service of cleaning the uniform. After dropping off his uniform at the dry cleaners, the claimant drove directly home and while on his way home was injured in an MVA.
- **Holding**: In affirming the Board and reversing the Appellate Division by establishing this claim, the Court of Appeals relied upon the special errand exception to the coming and going rule by outlining satisfaction of a two-part test (1) Employer encouraged the errand and (2) Employer obtained a benefit from the errand that was still appliable because the claimant had deviated from his normal travel home due to the "special errand" even though he had completed the limited task of dropping off his uniform.
- **CAUTION – HOLDING EXPANDED:** Even if the employer did not ask or direct the "special errand," a deviation from the normal travel to and from work for the purpose of obtaining supplies not otherwise supplied by the employer for work related tasks is considered a "special errand" and injuries sustained during or after the completion of the "special errand" are compensable. See Dziedzic v. Orchard Park Cent. Sch. Dist., 283 A.D.2d 878 (3rd Dept. 2001)

Trent v. Collin S. Tuttle & Co.,
20 A.D.2d 948 (3rd Dept. 1964)

- **Facts**: Claimant, an executive secretary, who usually left work at 6:00 PM was told to produce a report by 9:15 AM the following day and she stayed in the office until 7:45 PM and then worked at home until 10:45 PM to complete the directed report. The following day, the claimant left her home 30-40 minutes early to give time to complete the directed report and while exiting the bus she took to work fell causing injury.
- **Holding**: In reversing the Board and disallowing the claim, the Court held that the coming and going rule precluded the claim because the accident occurred during claimant's travel to work. Despite the argument that a "special errand" occurred such an exception to the coming and going rule was rejected because if that position was accepted, then "any time an employee performed even an occasional piece of work at home at his employer's direction or even with his employer's permission or knowledge express or implied the risks of travel to and from employment on such an occasion would be incidents of employment," an untenable expansion of liability.



DUAL PURPOSE

- **Definition**: trip that serves both a business and personal purpose if the trip involves the performance of a service for the employer that would have caused the trip to be taken by another employee if it had not coincided with the personal journey.
- **Examples**: driving to a resort at the end of a business trip before going home, stopping to inquire about repairs to personal equipment after making a delivery for the employer, etc.
- **Exemption to Dual Purpose Exception**:
  - Deviation (i.e. purely personal act)

Mahoney v. Stern & Co., Inc.,
9 N.Y.2d 931 (1961)

- **Facts**: Clamant, a traveling salesman, from Rochester, NY went with his wife on a personal trip to New Hampshire to pick up a car. When in New Hampshire, the claimant's employer left a message for him to drive to Massachusetts to transact business for the employer. On his return trip to Rochester, NY, the claimant deviated from the trip and went to Old Forge, NY where he stayed overnight. On the day of the accident, the claimant had returned to the NYS Thruway and was on his way home when he was involved in an MVA causing injury.
- **Holding**: In establishing the claim by affirming the Board and reversing the Appellate Division, the Court of Appeals held there was substantial evidence to support an establishment of the claim presumptively under the doctrine of dual purpose.

Grimes v. Irish Echo Newspaper Corp.,

46 A.D.2d 711 (3rd Dept. 1974)

- **Facts**: Claimant, an inside worker who was provided a car by the employer for outside activities, left work on the date of accident and engaged in the purely personal act of driving to a restaurant and movie theater. After leaving the movie theater, the claimant was involved in an MVA at a location that was not on an expeditious route to his home and after the MVA, while heading home, the car caught fire and injured the claimant.
- **Holding**: In disallowing the claim and reversing the Board, the Court held that the factual elements to find the accident arose out of and in the course of employment were not present because there were questions about whether the claimant was on his way home when the injury occurred and he had engaged in a wholly personal act in going to dinner and a movie.

TRAVEL TO/FROM HOME OFFICE

- **Evidentiary Requirement**: Outgrowth from "mixed" or "dual purpose" trip doctrine and requires demonstration that the accident that occurred in the course of coming and/or going is employment connected either through evidence of a specific work assignment for the employer's benefit at the end of a particular homeward trip or so regular a pattern of work at the home that the home achieves the status of a place of employment.
- **Evidence that can be used to support exception to the coming and going rule when traveling to/from home**:

1. Quantity of work performed at home,
2. Regularity of work performed at home,
3. Continuous presence of work equipment at home, and
4. Special circumstances of the particular employment that make it necessary to work from home and not purely a convenience.

- **Exception to Coming and Going Rule**: If the evidentiary standard has been met, the travel between work and home may be compensable when travel between the two locations occurs and the intent is to work at the final location either as an isolated event or routine practice.
- **PRACTICE POINT**: Obtain information about the assignment of an employee for work off employer's premises that includes following:

1. Address(s) of locations assigned,
2. Duration of time assigned to each location and
3. Mode of transportation required to travel to/from each assigned work location off the employer's premises.
4. Must be an outside worker on date of injury.

Hille v. Gerald Records,

23 N.Y.2d 135 (1968)

- **Facts**: Decedent was president of Gerald Records, Inc., who as part of his job for the employer (that recorded and released phonograph records) would arrange and edit tapes of recordings made by various artists. Per inconclusive evidence, the decedent had an employer's tape recorder and studio in his home that was frequently used to listen to recording tapes for mistakes and at times corrections were made at the decedent's home studio. On the date of accident, the decedent had finished a recording session and was believed to have taken the tapes from the recording session home with him in his car, although same were not recovered at the scene of the accident. While traveling home from the recording studio, the decedent was involved in an accident that caused his death.
- **Holding**: In affirming the Board and reversing the Appellate Division, the Court of Appeals held that the decedent's home was a place of employment and therefore his travel from the recording studio to his home was covered employment activities because the travel met the test of the mixed or dual-purpose doctrine.

Broich v. New York State Union College of Optometry,

117 A.D.2d 868 (3rd Dept. 1986)

- **Facts**: Claimant, a senior chemist and occasional lecturer, worked at the college, a fixed location, that was a 2-hour train ride from his home. On the date of accident, the claimant had a briefcase with published material that he intended to use during the train ride home to prepare a lecture and was injured when an unidentified assailant shoved him onto the train tracks.
- **Holding**: In reversing the Board and disallowing the claim, the Court held that the facts did not support the application of any exception to the coming and going rule because there was no evidence that anyone at the college directed the claimant to take materials home and the decision to take materials in his briefcase was a personal convenience because there was no evidence that the claimant would work from home with any regularity.

ON-CALL WORKER

- **Definition**: regardless of work schedule, employee who can elect or must work when called
- **Examples**: police officers, EMTs, firefighters, truck drivers, etc.
- **Exception to Coming and Going Rule**: coverage extended to travel to and from work when called in during a non-scheduled assignment.
- **PRACTICE POINT**: When dealing with claims filed by on-call employees, information surrounding the direction and control by the employer over the claimant at the time of the call to work must be obtained and that information should include:

1. Time of regularly scheduled shift, if applicable;
2. Restrictions if any on claimant's actions and/or movements upon receipt of a call to return to work;
3. Time of call to claimant to return to work with name(s) of persons who made the call to the claimant, if applicable;
4. Whether the request for return to work was urgent or routine; and
5. Time and location of accident.

Gray v. Lyons Transp.,

179 A.D.2d 985 (3rd Dept. 1992)

- **Facts**: Claimant, a truck driver who was working on an as-needed basis and could refuse work unless he accepted assignment, was called into work on the day of accident by a supervisor who notified the claimant of an immediate need for his services and was injured in an MVA en route to work shortly after receiving the call.
- **Holding**: In affirming the Board's establishment of the claim, the Court held that the injury arose out of and in the course of employment because the claimant was providing a special service by rushing into work in response to the call from his supervisor.

Young v. New York State Police,
276 A.D.2d 984 (3rd Dept. 2000)

- **Facts**: Claimant, a State Trooper who was on-call 24 hrs. a day, was injured in an MVA at 6:45 AM driving her personal vehicle to work before her scheduled shift that started at 7:00 AM.
- **Holding**: In reversing the Board and disallowing the claim, the Court held since the claimant was not ordered into work and was not under any restrictions from work at the time of the accident, there was insufficient control over the claimant by the employer to establish a casual nexus between the claimant's commute and her employment.

SPECIAL EMPLOYMENT RISKS: PUBLIC ROADS

- **General Rule (aka Premises Rule)**: Accidents occurring on a public highway, away from the place of employment and outside regular working hours, are not considered to arise out of or in the course of employment.
- **Modification to General Rule**: The closer the employee gets to the place of employment, there develops a "gray area" where the risks of street travel merge with the risks of employment and can result in coverage.

Husted v. Seneca Steel Services, Inc.,
41 N.Y.2d 140 (1976)

- **Facts**: Claimant was an inside worker who was making a left-hand turn from a public highway to gain entrance to his employer's parking lot when his vehicle was struck by another vehicle ~ 1 foot from the apron of his employer's parking lot, which was the only way into the employer's premises.
- **Holding**: In establishing the claim, the Court of Appeals held that the necessity for the claimant to make a left turn into the parking lot was a special hazard of employment exposing the claimant to a risk not shared by the public (i.e. accident arose out of employment) and the proximity to the parking lot (i.e. feet or inches between vehicle and parking lot) support the conclusion that the accident was in the course of employment.

Matter of Johnson (New York City Tr. Auth.),
182 A.D.3d 970 (3rd Dept. 2020)

- **Facts**: Claimant, a telephone maintainer, was struck by a car and injured crossing the street in front of his place of work ~1 hour before the start of his shift.
- **Holding**: In affirming the Board's disallowance of the claim, the Court held that the risk of getting hit by a car while crossing a public road was unrelated to claimant's employment and merely constituted a danger that existed to any passerby traveling along the street in that location.

SPECIAL EMPLOYMENT RISKS: PARKING LOT INJURIES

- **General Rule**: Parking lot injuries will be compensable if the lot is owned, maintained or provided by the employer.
- **Expansion of General Rule**: Even where employer has no control over the parking lot or where claimant parks within the lot, there can be liability if the parking lot presents a risk associated with the particular employment and not to the general public.

Lawton v. Eastman Kodak Company,

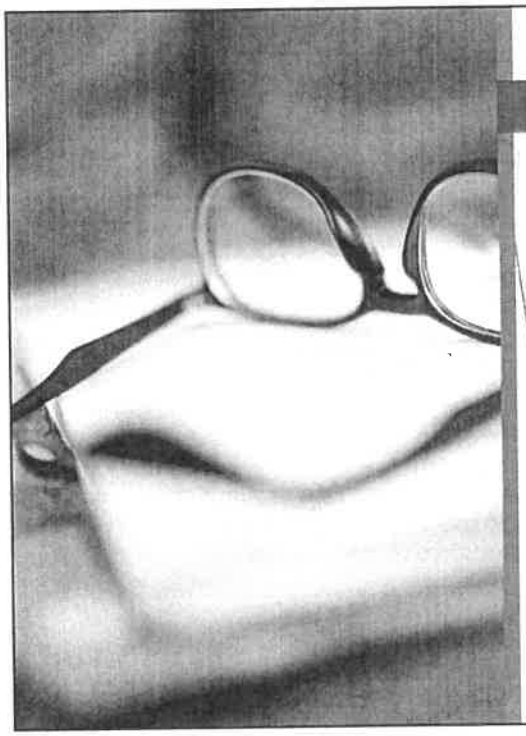
206 A.D.2d 813 (3rd Dept. 1994)

- **Facts**: Claimant, an inside employee, arrived at work ~1 hour before the start of work, parked in the employer's parking lot that they maintained and was walking toward the exit of the parking lot to have lunch when he was struck by a vehicle in the parking lot and injured.
- **Holding**: In affirming the Board's decision to establish the claim, the Court held that even though the claimant may have been on a purely personal errand at the exact time of the accident, the accident arose out of and in the course of employment because the parking lot maintained by the employer was a risk not shared by the public and there was sufficient nexus to work because the claimant's right to use the parking lot was exclusively as a result of his employment not because he would be a patron of the restaurant.

Matter of NYS Department of Health,

WCB No. G070 1237 (May 28, 2015)

- **Facts**: Claimant, an inside employee, paid for and parked in a specific spot in the parking garage near her place of employment, a building where her employer rents space. On the day of accident, the claimant was scheduled to start work at 8:15 AM and after leaving her assigned parking spot fell ~ 30 feet from her building's entrance near the edge of the parking garage at 8:10 AM causing injury.
- **Holding**: In affirming the majority Board Panel and disallowing the claim, the Full Board held that the accident did not arise out of or in the course of employment because there was no special hazard present at the site of the accident and the area where claimant fell was open to the public any of whom could have slipped and fallen.



DEVIATION FROM EMPLOYMENT

- **Definition**: A purely personal act without any relationship to work.
- **General Rule**: A deviation from employment is generally NOT compensable.
- **Exception to General Rule**: Momentary deviations from the work routine for a customary or accepted purpose(s) will not bar a claim for benefits.
- **Examples**:
  - Breaks from employment (i.e. coffee, smoking, bathroom, meal);
  - Attempts to assist others in non-occupational settings and/or activities;
  - Horseplay

FACT PATTERN #1 – "THE BREAK"

During a regular work shift, the claimant was on a paid 10-minute morning break, a break that did not require the claimant to be on-call (i.e. have the potential for the claimant to leave her break to return to work).

Like other employees, the claimant left her place of employment for a walk during the break. The claimant elected to walk to a nearby church and was injured during the walk back when the claimant slipped on a public sidewalk while greeting a passer-by and fell onto her left arm causing injury.

- **DID THIS INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?**

FACT PATTERN #2 – "THE THIEF"

The decedent was a water proofer and roofing mechanic who was assigned to work on the roof of a building. During working hours, but at a time when there was no work to be done because the decedent was waiting for materials, the decedent and a co-worker moved away from the work area onto another part of the structure where work was assigned to remove copper downspouts from the building to sell as salvage, a common practice for the employer's employees and a practice that at times forced the employer to replace the stolen downspouts. While removing the copper downspouts, the decedent fell to his death.

- **DID THE DECEDENT'S DEATH ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?**

FACT PATTERN #3 – "ICED IN"

Claimant is assigned to work 3.5 days at one site and 1.5 days at a second site but must use her own vehicle to travel between work sites. On a day where she was assigned to work at one site the entire day and before she attempted to travel to work, the claimant fell and was injured while attempting to free her vehicle from being stuck in ice in her own driveway.

- **DID THE INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?**

FACT PATTERN #4 – "THE PEN"

Claimant is a hearing rep whose primary role was as an outside worker attending hearings but would work one day per week in his office on the employer's premises. On the day of the accident, the claimant worked at his office on the employer's premises, finished his work and on his way home stopped in a shopping center to purchase a pen. While in the shopping center's parking lot, claimant was struck by an automobile causing injuries.

- **DID THE INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?**

FACT PATTERN #5 – "THE AUCTION"

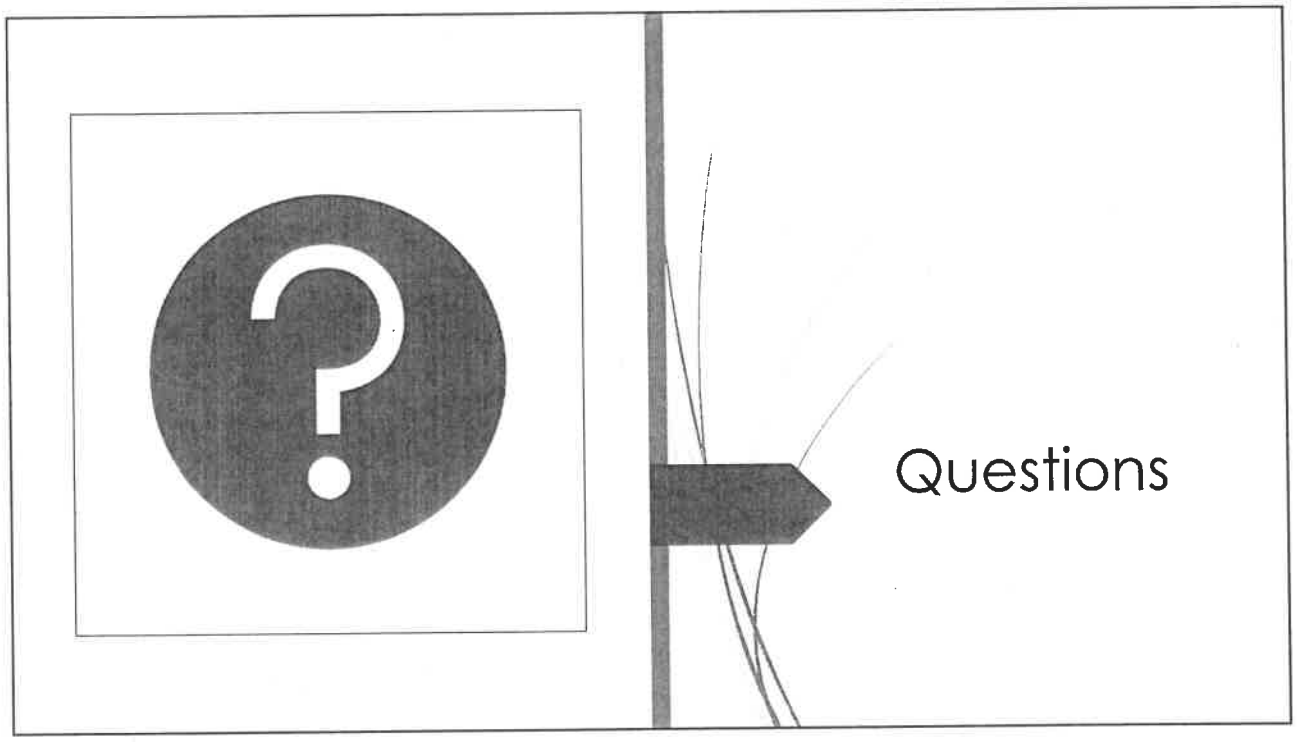
Decedent attended a fund-raising auction at a golf club at the direction of his employer, a location that was ~1 mile from decedent's home. The decedent left the auction at about 11:30 P.M. and was not seen again until his body was discovered five (5) days later several miles away. The only witness to the decedent's death (hereinafter "CE") was eventually convicted of murder.

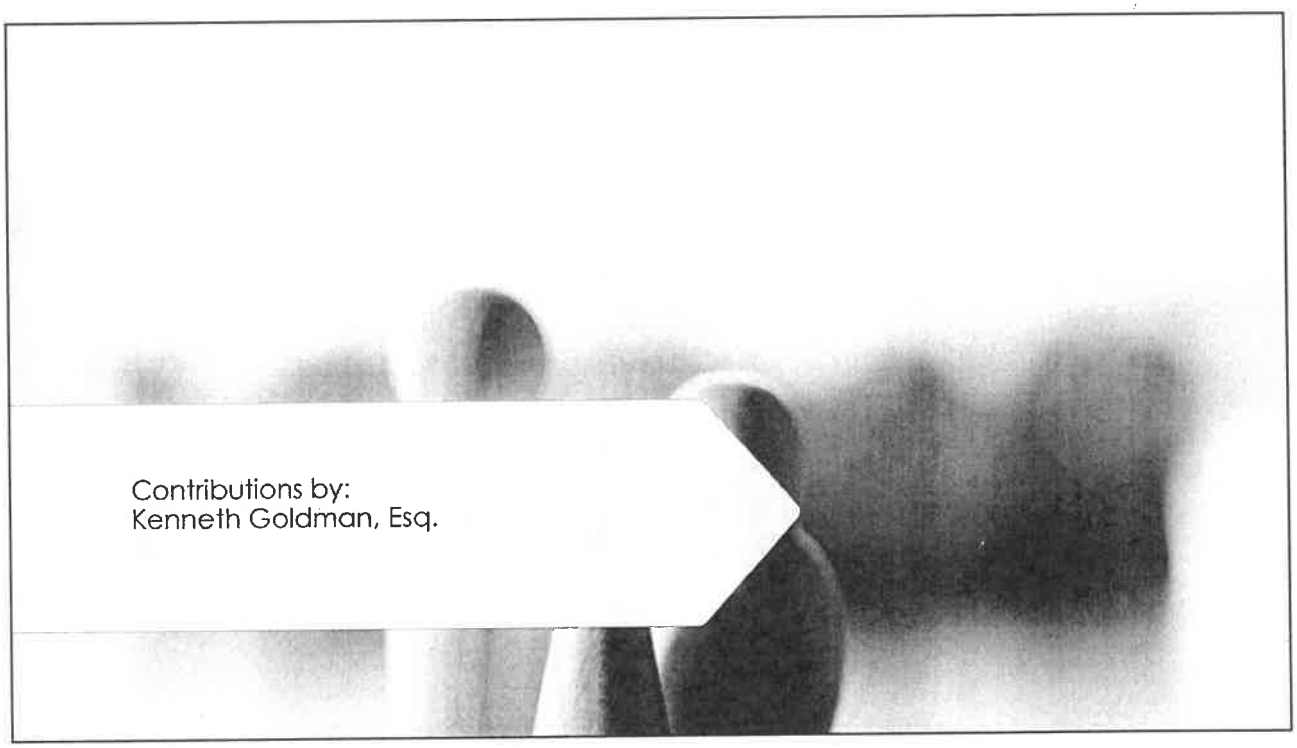
Based on the evidence produced, the decedent left the auction at 11:30 P.M., but was not intoxicated despite having several drinks at the auction, The decedent left the auction and went to a bar several miles away from the auction site where he met CE. The decedent and CE left the bar at ~12:00 A.M. and traveled to CE's home located on an Indian reservation for the purpose of sexual activity and during the sexual activity CE struck the decedent in the head with a rock causing death.

- **DID THE INJURY ARISE OUT OF AND IN THE COURSE OF EMPLOYMENT?**

ANSWERS

1. THE BREAK – WCB No. G212 4336 (May 8. 2019)
2. THE THIEF – Richardson v. Fiedler Roofing, Inc., 67 N.Y.2d 246 (1986)
3. ICED IN – Freeburn v. North Rockland CDA, 64 A.D.2d 300 (3rd Dept. 1978)
4. THE PEN – Bobinis v. State Insurance Fund, 235 A.D.2d 955 (3rd Dept. 1997)
5. THE AUCTION – Oehley v. Syracuse Boys Club, 151 A.D.2d 825 (3rd Dept. 1989)


Questions


Contributions by:
Kenneth Goldman, Esq.

WGG WOLFF, GOODRICH & GOLDMAN, LLP

Eric R. Chase, Esq.

217 Montgomery St., 4th Flr.
Syracuse, NY 13202
echase@wolffgoodrich.com
(315) 423-4400