



# WORKERS' COMPENSATION COMMENTARY



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## COMMERCIAL TRAVELER

*By: John C. Martin, Esq.*

"On the road again..." "I'm going on a jet plane, don't know when I'll be home again..." "red sails in the sunset..." Our culture is suffused with images of transportation and indeed, transportation and travel have played a major role in our economy, which is governed by the movement of goods and persons from one place to another. This has historically required, from time to time, the dispatching of employees from their home to unfamiliar locations for the purpose of effecting sales or purchases, disseminating or gathering information, representing an employer by serving as a representative of that employer for technical, administrative or public relations purposes.

As all workers' compensation professionals know, an employer is generally considered to be responsible for injuries that arise out of the employment and occur within the premises of the employer. Employers have also been held responsible for injuries occurring within areas around the premises over which the employer has control or arise under circumstances where the approach to the employers' premises presents a peculiar risk to the employee over and above that faced by a member of the general public.

Any injury sustained otherwise on the way to or from work unless on a specific special mission for the employer or in a company vehicle will be an injury that is not compensable.

This is logical since the employer does not control the employee's activities outside of the work place. In the commercial traveler setting, however, the law has always recognized that the employer's responsibility is more far reaching than in dealing with local travel because the employee is being placed, through his employment, in an alien environment, the elements of which are only being experienced because of the dictates of the employ-

ment.

This newsletter will discuss this subject and a recent hard fought case decided by the California Supreme Court which, it would appear, was an attempt to expand the concept which may have resulted in the limitation of the protections afforded the commercial traveler. (*LaTourette v. WCAB* (1998) 17 Cal 4<sup>th</sup> 644)

The facts of this case are quite simple. The applicant was sent to a conference in Nevada by the employer and while attending the conference he had a heart attack and was taken to the hospital. After diagnostic tests were performed it was decided that he should have open-heart surgery and this was performed two days later. He contracted an infection during the procedure. He had three other surgeries, which did him no good, and about three weeks later he died. The widow filed for death benefits and at the WCAB trial level the claim was denied because the judge determined that the original heart attack was not caused by work stress.

In a Petition for Reconsideration, the applicant's attorney argued that a finding of fact that the decedent was a commercial traveler should have been made and that it should have been found that the medical treatment received was a reasonable expectation of the needs of a commercial traveler and that the death was caused by the medical problems incurred in treating the original injury. Reconsideration was denied since the board agreed with the judge that the burden was on the applicant to prove that the original injury was caused by the stress of work in order for the subsequent injury (the infection) to have occurred in the course of employment and arise out of the employment.

A Petition for a Writ of Review was denied and the applicant filed for a hearing before the Supreme Court. The court granted the Petition for

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Review and ordered the Court of Appeal to vacate its denial and issue a writ. Months later, the Court of Appeal issued a decision affirming the decision of the WCAB, claiming that this case was an attempt to superimpose strict liability on the employer because since the heart attack was non-industrial, the subsequent medical treatment was something to which he would have been equally exposed outside of the employment. Once again, a Petition was filed with the Supreme Court and once again the Supreme Court granted the Petition for Review and set the matter for hearing.

In the commercial traveler cases wherein injury arising out of the employment has been the issue, the test has been that of "reasonable expectation." The question asked has been whether the activity, which resulted in injury, was a reasonable need of the commercial traveler and therefore an incident of the employment. Back in 1936 the Supreme Court dealt with a case in which a salesman died in a motel room because he failed to open a vent and was overcome by carbon monoxide poisoning. The use of the heater was considered a reasonable expectation of that individual's needs as a commercial traveler "and if in connection with his use of those conveniences some accident should occur, the general rule would be that injury caused thereby would be injury arising out of the employment." (*Cal Casualty Exchange v IAC (1936) 1 CCC 80*)

In another case, benefits were awarded when a commercial traveler employee died in a hotel fire while sharing a room with a woman other than his wife. It was considered that... "travelling, procuring food and shelter are all incidents of the employment, and where injuries are sustained during the course of such activities, the Workmans' Compensation Act applies." (*Wiseman v IAC (1956) 21 CCC 192*)

But the Court of Appeal in this case had made a determination that heart condition and subsequent medical treatment were "conditions to which he would have been equally exposed outside of employment." The argument was made that the injury for which benefits were sought was caused by the infection contracted in Nevada not California, that there was no evidence that it was probable that the decedent would contract an infection had he been treated in California and there is no evidence that such an infection is the prob-

able consequence of the type of medical care he received.

Quite simply, the argument was made that the employment brought the decedent to the place where he was exposed to the condition or hazard that resulted in his death. There was no precedent with regard to this issue which was being placed before the court as there are very few cases involving the interpretation of the commercial traveler's rule.

It is interesting to note that the Court of Appeal in affirming the determination of the WCAB cited two cases, in which a commercial traveler injured outside the course of conduct, was outside of the course of employment. In one of these cases, the employee was found to be on a social outing even though traveling with the employer and in the other, a personal errand was being run while on assignment in another town.

The Court does not appear to note that in those cases the commercial traveler is knowingly and voluntarily engaged in an activity which is outside of the course of employment whereas in the instant case the decedent had virtually no choice but to undergo the surgical procedure with its attendant risks at the out of town hospital.

The general rule is that a commercial traveler is considered to be acting within the course his employment during the entire period of travel on the employer's business. The acts of traveling as well as procuring food and shelter are intrinsically related to the journey and an injury sustained while engaged in such activities would indeed arise out of the employment. The need for medical care is certainly a reasonable expectation of any employee, and, as argued by the applicant in this case, "employees do not leave their health status on hold while travelling on the employer's business. The need to attend to a sudden medical emergency while on a business trip is not an unexpected or unforeseen activity." The employment brought the decedent to the place where he was exposed to the condition or hazard that resulted in his death and that, it was argued, was the causal connection.

The Court of Appeal made an interesting observation in a case where compensation was denied to an airline flight attendant who was raped while on a lay over. (*Western Airlines v WCAB (1984) 49 CCC 344*) In that case the court stated, "There are three kinds of risk - industrial, personal, and neutral. Employees should recover in the industrial risk and neutral risk

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cases..."

"The neutral categories tended to encompass those risks which are neither personal in this sense nor related to the employment and accordingly includes unknown risks."

The applicant pointed out that following that rule; the risk of injury to the decedent in this case was decidedly neutral inasmuch as it was neither personal to him nor related to his employment. The California Supreme Court ended up affirming the determination of the Court of Appeal and the WCAB. In rendering the decision, the court reached two important conclusions: first, that the risks at issue were not ones to which an average healthy traveler would be exposed but flowed out of the employee's non-industrial heart condition, and, secondly, that the infection was contracted after the conference had concluded when the business trip should have ended but was only extended because of the medical emergency.

The applicant filed a petition for rehearing and, in response to those two arguments, pointed out that the first conclusion is inconsistent with the long established rule that the employer takes the employee as found whether healthy or unhealthy and that compensation is not denied merely because the physical condition was such as to cause the individual to suffer a disability from an injury which ordinarily would have caused little or no inconvenience to another.

The applicant also argued that commercial travelers are "entitled to a cocoon of protection twenty-four hours a day." It is, in the view of the applicant, "all risk protection" but not strict liability. It was argued that the decision of the court permits the employer to discriminate against employees who have existing disabilities or medical problems because they would be reluctant to compete with healthy employees to engage in commercial travel for fear of losing the protection of the workers' compensation law should a personal medical emergency arise.

It was also pointed out that the court's ruling with regard to the timing of the injury as occurring following the conclusion of the seminar is inconsistent with the former rule of coverage throughout the period of the commercial voyage. The Applicant argued that, had the decedent recovered from the medical care for the cardiac condition and died in an

airplane crash while attempting to return home, that under the court's interpretation he would not be in the course of employment.

The petition for rehearing was denied, therefore, the California Supreme Court determination does indeed appear to have set some conservative parameters on the commercial traveler rule and places some limitation on the liability of an employer when an individual is injured while on a commercial voyage and not specifically engaged in carrying out the specific function for which the individual was sent.

This case requires that employers and insurers, in weighing the issue of compensability for commercial travelers, scrutinize the precipitating event or condition and the timing of the injury to determine whether the application of the Latourette case may rule out compensability. It is suggested that if there is any question which initially arises in this regard that the claim should be thoroughly investigated and denied if an effective argument can be made along the lines approved in this decision.

*Although it is probably somewhat heretical to say anything really positive about a member of the applicant's bar, I do wish to express my appreciation to Alfred Marotta, Esq. of Norwalk who furnished the brief filed in the LaTourette matter to assist in the preparation of this newsletter article.*

*John C. Martin*

*Next month: A supervisor's personal liability for harassment.*

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*This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any factual situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that*