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# Exception to the Going and Coming Rule: Special Hazard or Risk

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**EXCEPTION TO THE GOING AND COMING RULE:  
SPECIAL HAZARD OR RISK**

**I**N *LITTLEFIELD V. PILLSBURY CO.*,<sup>1</sup> the Ohio Supreme Court specifically adopted the “special hazard or risk”<sup>2</sup> exception to the “going and coming” rule.<sup>3</sup> This exception extends workers’ compensation coverage to claims for injuries sustained in accidents occurring outside an employer’s premises, before or after work, if the injury occurs because of a hazard created by the employment.<sup>4</sup>

In *Littlefield*, plaintiff-appellant, Ronald Littlefield was employed as a grain operator for defendant-appellee, The Pillsbury Company, of Cincinnati, Ohio. Pillsbury’s employees were allowed two fifteen minute paid breaks as well as an unpaid one half hour break for lunch. It was the “customary and accepted practice” to tack an unused break period onto lunch time.<sup>5</sup> Unless employees brought their own lunches, they had to leave the premises to obtain lunch. Pillsbury occasionally paid for food and beverages at the closest available luncheon facility for those “employees who worked extra hours, and on other occasions at the discretion of Pillsbury.”<sup>6</sup>

On the date of the accident, Littlefield was scheduled to work a twelve hour day. He had in fact worked through his normal morning break as well as his normal lunch period. At approximately 1:45 p.m., Littlefield and another employee left the Pillsbury plant to obtain lunch at the closest available luncheon facility, which was approximately one-eighth of a mile from the Pillsbury plant on River Road in Cincinnati, Ohio.

Upon returning to the Pillsbury plant by the most direct route possible, the car in which Littlefield was a passenger paused on River Road before turning left into the sole entrance to the plant. River Road is a four lane public highway with heavy truck traffic. While waiting to turn left into the Pillsbury entrance, the car was struck from the rear by a truck.

An injury, in order to be compensable in Ohio, must occur in the “course

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<sup>1</sup>6 Ohio St. 3d 389, 453 N.E.2d 570 (1983).

<sup>2</sup>See generally, 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 15.13 (1983).

<sup>3</sup>See generally, *id* at §§ 15.00-15.54.

<sup>4</sup>6 Ohio St. at 393, 453 N.E.2d at 575.

<sup>5</sup>*Id.* at 389, 453 N.E.2d at 570.

<sup>6</sup>*Id.* at 389-90, 453 N.E.2d at 570.

of, and arising out of the injured employee's employment."<sup>7</sup> The Ohio Supreme Court has set forth the test for participation in the Workers' Compensation Fund as "not whether there was any fault or neglect on the part of the employer or the employees, but whether a 'causal connection' existed between an employee's injury and his employment either through the activities, the conditions or the environment of the employment."<sup>8</sup>

To determine whether an injury has occurred in the "course of and arising out of employment," the Ohio Supreme Court has used the "going and coming rule." This rule asserts that:

[w]here an employee, having a fixed and limited place of employment, sustains an injury while traveling to and from his place of employment such injury does not evidence the required causal connection to the employment; it therefore does not arise out of and in the course of his employment and is not compensable.<sup>9</sup>

To avoid strict application of this general rule, however, the majority of jurisdictions have followed the "special hazard or risk" exception to compensation. This exception states that when the normal route "which employees must traverse to reach the plant" creates special hazards then "the special hazards of that route become the hazards of employment."<sup>10</sup>

Although the Ohio Supreme Court had not specifically enunciated the special hazards exception prior to *Littlefield*, it had allowed compensation for injuries that occurred off the premises when there had been a causal connection between the injuries and the employment.<sup>11</sup> This is, in effect, the special hazard doctrine.

The most commonly used special hazard test consists of a two part analysis. The first part determines whether or not there is a "zone of employment," or a close association between the access route and the employer's premises. The second part forms a basis for causation between the special hazard and the off-premises location.<sup>12</sup>

<sup>7</sup>OHIO REV. CODE ANN. § 4123.01(C)(Page Supp. 1983).

<sup>8</sup>*Bralley v. Daugherty*, 61 Ohio St. 2d 302, 303, 401 N.E.2d 448, 449 (1980); See also *Fox v. Indus. Comm.*, 162 Ohio St. 569, 573, 125 N.E.2d 1, 4 (1955). *Indus. Comm. v. Gintert*, 128 Ohio St. 129, 132, 190 N.E. 400, 402 (1934); *Indus. Comm. v. Wiegandt*, 102 Ohio St. 1, 7, 130 N.E. 38, 39 (1921).

<sup>9</sup>*Bralley v. Daugherty*, 61 Ohio St. 2d at 303-304, 401 N.E.2d at 450 (1980); See also *Lohnes v. Young*, 175 Ohio St. 291, 194 N.E.2d 428, 430 (1963); *Simerlink v. Young*, 172 Ohio St. 427, 429, 178 N.E.2d 168, 169 (1961); *Indus. Comm. v. Gintert*, 128 Ohio St. 129, 132, 190 N.E. 400, 402 (1934); *Indus. Comm. v. Baker*, 127 Ohio St. 345, 349, 188 N.E. 560, 562 (1933). See generally, 82 Am. Jur. 2d *Workmen's Compensation* § 255 (1976).

<sup>10</sup>See generally, LARSON, *supra* note 2.

<sup>11</sup>See *Bralley v. Daugherty*, 61 Ohio St. 2d at 304, 401 N.E.2d at 450 (1980); See also *Marlow v. Goodyear Tire & Rubber Co.*, 10 Ohio St. 2d 18, 21, 225 N.E.2d 241, 244 (1967); *Sebek v. Cleveland Graphite Bronz Co.*, 148 Ohio St. 693, 698, 76 N.E.2d 892, 894-95 (1947); *Gregory v. Indus. Comm.*, 129 Ohio St. 365, 369, 195 N.E. 699, 701 (1935); *Kasari v. Indus. Comm.*, 125 Ohio St. 410, 413, 181 N.E. 809, 810 (1932).

<sup>12</sup>LARSON, *supra* note 2; YOUNG, *WORKMEN'S COMP. LAW OF OHIO* § 5.7 (2d Ed. 1971).

When the injury occurs at a point off, but in close proximity to, the employer's premises, that point may be considered to be within the "zone of employment." This extends the environment of the employment beyond the employer's premises.<sup>13</sup> The clearest case for compensability is found when the off-premises route is the *only* means of access to the employer's premises.<sup>14</sup> This is due to the fact that:

[E]mployment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance.<sup>15</sup>

Thus, the use of the off-premises route bears a causal connection to the employment. In determining whether or not hazards existing at the injury site are attributable to the employment, the courts often consider whether the injured employee was subjected to any greater hazard than was a member of the general public.<sup>16</sup>

Although the Ohio Supreme Court applied the analysis contained in this test, it specifically adopted a two-prong test first devised by the California Supreme Court in 1976.<sup>17</sup> The special hazard rule will apply "(1) if 'but for' the employment, the employee would not have been at the location where the injury occurred; and, (2) if the 'risk is distinctive in nature or quantitatively greater than risks common to the public.'"<sup>18</sup>

The majority found, in an opinion written by Chief Justice Celebrezze and joined by Justices Sweeney and J.P. Celebrezze, that the facts of this case satisfy the two-prong test.<sup>19</sup> The majority announced:

<sup>13</sup>YOUNG, *supra* note 12, § 5.8; *see also* Baughman v. Eaton Corp., 62 Ohio St. 2d 62, 63, 402 N.E.2d 1201, 1202 (per curiam 1980); Kasari v. Indus. Comm., 125 Ohio St. 410, 412-13, 181 N.E. 809, 810 (1932); Indus. Comm. v. Barber, 117 Ohio St. 373, 381, 159 N.E. 363, 365 (1927); Blair v. Daugherty, 60 Ohio App. 2d 165, 168, 396 N.E.2d 238, 240 (1978); *contra*, Becton, Dickinson, & Co. v. Indus. Comm., 54 Ohio App. 2d 186, 187, 376 N.E.2d 961, 962-64 (1977)(where the court found lack of control by the employer).

<sup>14</sup>LARSON, *supra* note 2.

<sup>15</sup>Bountiful Buick Co. v. Giles, 276 U.S. 154, 158 (1928).

<sup>16</sup>YOUNG *supra* note 12, at § 5.13; LARSON, *supra* note 2.

<sup>17</sup>General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 3d 595, 600, 128 Cal. Rptr. 417, 419-20, 546 P.2d 1361, 1363-64 (1976); *See also* Parks v. Workers' Comp. Appeals Bd., 33 Cal. 3d 585, 590, 190 Cal. Rptr. 158, 161, 660 P.2d 383 (1983).

<sup>18</sup>Parks, 33 Cal. 3d 585, 598, 190 Cal. Rptr. 158, 161, 660 P.2d 383, 385 (1983). As of this writing, no state other than Ohio has adopted the California test.

<sup>19</sup>6 Ohio St. 3d at 395, 453 N.E.2d at 576.

It is clear that 'but for' his employment, Littlefield would not have been making a left turn into the plant . . . [A]lthough the risk attendant to the busy road was common to the general public using it, Littlefield's risk was peculiar and to an abnormal degree. That is, his risk was 'quantitatively greater' than that to which other motorists occasionally driving down the road are subjected.<sup>20</sup>

The court further found that "[t]he regular exposure to the common risk plus the risk of making a left turn creates a greater degree of risk and sustains the causal relationship between the employment and the accident resulting from the risk."<sup>21</sup>

Typically awards should not be made solely upon a showing that an injury took place in an area that was the sole or usual route to the employer's plant. Several cases have held, however, that the necessity of making a left hand turn across traffic in a public street in order to enter the employer's premises is a special hazard of the employment.<sup>22</sup>

The majority also supported its finding by comparing facts of the *Littlefield* case with those of *Industrial Commission v. Henry*.<sup>23</sup> Justice C. Brown, in his concurring opinion, emphasized that "[t]o deny compensation to Littlefield would be a retreat from *Henry* into some era of the Dark Ages of jurisprudence, completely ignoring the rules pertaining to causal connection between an employee's injury and his employment."<sup>24</sup>

In *Henry*, the court permitted compensation to an employee injured while crossing a railroad track immediately adjacent to the sole means of ingress and egress to his employer's plant. In both cases, therefore, the accident occurred immediately adjacent to the sole means of ingress and egress of the employer's plant. In *Henry*, the employee left the employer's premises for breakfast at a nearby restaurant after approximately an hour on the job. The accident occurred as he returned to work. The employer acquiesced to the off-premises breakfast practice because it contributed to the workers' efficiency. The Ohio Supreme Court thus concluded that it was a custom incidental to the employment.<sup>25</sup>

In *Littlefield*, Pillsbury occasionally paid for food and beverages at the closest available luncheon facility from which Littlefield was returning when he was injured. On the day of the accident Littlefield had worked through his normal paid morning break as well as his normal lunch period. Because Littlefield had worked many more hours before his break than the worker in *Henry*,

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<sup>20</sup>*Id.* at 394, 453 N.E.2d at 575.

<sup>21</sup>*Id.*

<sup>22</sup>See LARSON, *supra* note 2.

<sup>23</sup>124 Ohio St. 616, 180 N.E. 194 (1932).

<sup>24</sup>6 Ohio St. 3d at 395, 453 N.E.2d at 576.

<sup>25</sup>*Indus. Comm. v. Henry*, 124 Ohio St. 616, 621, 180 N.E. 194, 196 (1932).

the break should have contributed more to Littlefield's productivity and should similarly be considered incidental to the employment.<sup>26</sup>

Young's treatise on Ohio workers' compensation law recognizes a recent trend in analysis, a "totality of the circumstances" concept, which is similar to that used by the Ohio Supreme Court in *Littlefield*.<sup>27</sup> Understandably confused by the development of the special hazard concept in cases leading up to *Littlefield*, the Ohio courts have simply considered all of the relevant circumstances in cases to reach "reasonable" and "rational" decisions.<sup>28</sup>

Justice Locher, in a strong dissent to *Littlefield*, predicted that the "decision will ruin the Workers' Compensation Fund in Ohio . . . . In effect the majority has legislated a universal super-insurance without actuarial basis via the Workers' Compensation Fund."<sup>29</sup> Among the "[e]ndless ramifications" certain to follow, according to Justice Locher, are claims against employers based on damages done to third parties,<sup>30</sup> injuries sustained inside employees' homes,<sup>31</sup> and the injuries of an employee who negligently makes a left-hand turn from a public road anywhere along that employee's commute to or from work or during his lunch hour.<sup>32</sup>

Justice Locher examined the majority's analysis and found that the first prong of the test, "but for" the employment, the employee would not have been at the location where the injury occurred, does not establish a sufficient criterion for a "causal connection" between the employment and the resultant injury.<sup>33</sup> He then distinguished the California cases from which the majority adopted the two prong test.<sup>34</sup> He stated that while there was a direct relationship between the employment and the injury in the California cases, "[t]here [was] no evidence that the oncoming traffic or the truck which injured Lit-

<sup>26</sup>6 Ohio St. 3d at 395, 453 N.E.2d at 576.

<sup>27</sup>YOUNG *supra* note 12, at § 5.7 (Supp. 1982)

<sup>28</sup>See *Lord v. Daugherty*, 66 Ohio St. 2d 441, 423 N.E.2d 96 (1981); *Baughman v. Eaton Corp.*, 62 Ohio St. 62, 402 N.E.2d 1201 (1980); *Bralley v. Daugherty*, 61 Ohio St. 2d 302, 401 N.E.2d 448 (1980); *Blair v. Daugherty*, 60 Ohio App. 2d 165, 14 Ohio Op. 3d 132, 396 N.E.2d 238 (1978).

<sup>29</sup>6 Ohio St. 3d at 396, 453 N.E.2d at 577 (Locher, J., dissenting).

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* at 397, 453 N.E. 2d at 577.

[E]mployees who bathe at home before leaving for work each morning because they are expected to "look good on the job" will have viable workers' compensation claims should they slip in the bathtub. Their employment creates the "distinctive" risk of good hygiene, and recovery — under the majority view — naturally follows. *Id.*

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 397-398, 453 N.E.2d at 578, Justice Locher argues that "the 'but for' rule in tort law is only used to exclude negligent defendants from liability rather than establish a basis for liability." See W. PROSSER, *LAW OF TORTS* (4th Ed. 1971) 238-239, Section 41; *RESTATEMENT (SECOND) OF TORTS*, § 432(1); See also *McNees v. Concinnati Street Ry. Co.*, 152 Ohio St. 269, 89 N.E.2d 138 (1949), requiring a "proximate causal relationship between the employment and the injury."

<sup>34</sup>*Parks*, 33 Cal. 3d 585, 190 Cal. Rptr. 158, 660 P.2d 382; *General Ins. Co.* 16 Cal. 3d 595, 128 Cal. Rptr. 417, 546 P.2d 1361.

tlefield had any relationship to Pillsbury's business."<sup>35</sup>

Justice Locher distinguished four Ohio cases on the basis that they allowed recovery where the employee was on the employer's premises<sup>36</sup> or on property owned, maintained and controlled by the employer.<sup>37</sup> Littlefield, by contrast, was off the premises when he was injured.<sup>38</sup> In another Ohio case,<sup>39</sup> recovery was allowed where an employee was required to cross a public street in order to report for work. Justice Locher argued that Littlefield was not required to leave the premises for lunch, but could have brought his lunch and used the facility provided by Pillsbury.<sup>40</sup>

Finally, Justice Locher distinguished *Henry* on the basis that the employee in *Henry* was on duty and in the service of the company performing his work when he was injured. It was a custom for the men to go to get their breakfast while waiting for their orders to be filled. The employer acquiesced to this practice. Thus, "it was a custom incidental to the employment, and the employer contemplated that Henry should act according to the custom."<sup>41</sup> Justice Locher found that although fifteen minutes of the time Littlefield took for lunch was paid break time and even though other similarities existed between the facts in *Littlefield* and those found in the cases explored by the majority, this did not establish as a matter of fact that Littlefield was "on duty" and "in the service of the company performing" his work when he was injured.<sup>42</sup> Therefore, Justice Locher concluded, *Henry* was not controlling.<sup>43</sup>

Justice Holmes also wrote a dissenting opinion to *Littlefield* in which he emphasized that Littlefield was not on premises controlled by the employer nor was he performing services for Pillsbury. The choice of going out for lunch and using the road in question, moreover, "[was] not a risk incident to his employment (if it is a risk at all)."<sup>44</sup> Justice Holmes further asserted:

The majority of this court has literally blown away a plethora of Ohio case law which has continuously held that the right of an employee to participate in the Workers' Compensation Fund is based upon whether

<sup>35</sup>6 Ohio St. 3d at 398, 453 N.E.2d at 579. Justice Locher also questions the majority's reliance on California authority: "We should recognize that California permits employees to recover for injuries occurring within. . . a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done," *Id.* (Citing *Parks*, 33 Cal. 3d at 590, 190 Cal. Rptr. at 161, 660 P.2d at 385.

<sup>36</sup>Gregory v. Indus. Comm., 129 Ohio St. 365, 195 N.E. 699 (1935); *Kasari v. Indus. Comm.*, 125 Ohio St. 410, 181 N.E. 809 (1932).

<sup>37</sup>*Marlow v. Goodyear Tire & Rubber Co.*, 10 Ohio St. 2d 18, 225 N.E.2d 241 (1967); *Indus. Comm. v. Barber*, 117 Ohio St. 373, 159 N.E. 363 (1927).

<sup>38</sup>6 Ohio St. 3d at 400, 453 N.E.2d at 580.

<sup>39</sup>*Baughman v. Eaton Corp.*, 62 Ohio St. 2d 62, 402 N.E.2d 1201 (1980).

<sup>40</sup>6 OHIO ST. 3d at 402, 453 N.E.2d at 581.

<sup>41</sup>*Henry*, 124 Ohio St. at 620-21, 180 N.E. at 196.

<sup>42</sup>6 Ohio St. 3d at 403, 453 N.E.2d at 582.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 404, 453 N.E.2d at 583.

or not there is a real causal connection between the employee's injury and his employment. . . . The only concluding comment that I can make is — what next!<sup>45</sup>

To the extent that the Ohio courts have allowed compensation for injuries occurring off the employer's premises when there was a causal connection between the injuries and the employment,<sup>46</sup> Ohio had already implicitly recognized a special hazard concept.<sup>47</sup> The adoption of the special hazard rule is consistent then with the test the Ohio courts have used in the past to determine the right to workers' compensation. This test is whether a causal connection exists between an employee's injury and the activities, conditions or environment of the employment.<sup>48</sup> Thus, while not actually changing the law, *Littlefield* articulates a more sharply focused test by adopting the two-prong test originally devised by the California Supreme Court.<sup>49</sup>

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<sup>45</sup>*Id.* at 404-5, 453 N.E.2d at 583.

<sup>46</sup>*See supra*, note 11 and accompanying text.

<sup>47</sup>LARSON, *supra* note 2 at n.23.

<sup>48</sup>*See supra*, note 5; *see also* YOUNG, *supra* note 12, at § 5.13.

<sup>49</sup>*See supra*, notes 17 through 21 and accompanying text.

