4045 SERVANT: SCOPE OF EMPLOYMENT WHILE TRAVELING

The first question to be resolved by you is whether the trip in question was that of the employer or the employee. If the trip is determined to be the employer's, the employee is engaged in his or her employer's business and acting within the scope of his or her employment while going to or returning from the place where his or her employer's business required him or her to go. If it is the employee's trip, he or she is not within the scope of his or her employment while traveling on the trip.

If the work of the employee for his or her employer creates the necessity for travel, the employee is in the course of his or her employment while traveling on the trip, even though he or she is serving at the same time some purpose of his or her own. If, however, the work of the employee for his or her employer has had no part in creating the necessity for travel, the travel then becomes the personal trip of the employee and outside the scope of his or her employment.

In case it is the employer's trip and the employee makes any detours for purely personal objectives, such detours must be separated from the main trip and the employee held to be outside the scope of his or her employment during such detours. If it is the employee's own trip, then detours which are made for the purpose of dispatching business for his or her employer are within the scope of his or her employment.

COMMENT

This instruction and comment were originally published in their present form in 1962. Editorial changes were made in 1994 to address gender references in the instruction. No substantive changes were made to the instruction. The comment was updated in 2020.

The instruction is taken substantially from Barrager v. Industrial Comm'n, 205 Wis. 550, 553, 238 N.W. 368 (1931). The second paragraph is from Matter of Marks v. Gray, 251 N.Y. 90, 167 N.E.

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181 (1929), approved in Barrager and Fawcett v. Gallery, 221 Wis. 195, 201, 265 N.W. 667 (1936). Also see Fultz v. Lange, 238 Wis. 342, 298 N.W. 60 (1941), and Price v. Shorewood Motors, 214 Wis. 64, 251 N.W. 244 (1934).

Wis. Stat. § 102.03(1)(f) (1959), a section of the Workmen's Compensation Act, defines conditions of liability for compensation purposes when a servant's employment requires him or her to travel. This definition is somewhat broader than the common law rule, and care must be exercised not to employ the standard of the act in cases other than compensation cases. Butler v. Industrial Comm'n, 265 Wis. 380, 61, N.W.2d 490 (1953), distinguished liability under common law from liability under the Compensation Act. For cases arising under § 102.03(1)(f), see Turner v. Industrial Comm'n, 268 Wis. 320, 67, N.W.2d 392 (1954); Simmons v. Industrial Comm'n, 262 Wis. 454, 55, N.W.2d 358 (1952); Hansen v. Industrial Comm'n, 258 Wis. 623, 46, N.W.2d 754 (1951); 1957 Wis. L. Rev. 260. See also the unpublished decision (three-judge) Brown v. Muskego Norway School Dist. Group Health Plan, 389 Wis.2d 377, 936 N.W.2d 418 (Table), 2019 WI App 65.

"Personal comfort doctrine" as it related to Wis. Stat. § 102.03(1)(f): First recognized in Milwaukee Western Fuel Co. v. Industrial Commission, 159 Wis. 635, 150 N.W. 998 (1915), the personal comfort doctrine is devised to:

Cover the situation where an employee is injured while taking a brief pause from his labors to minister to the various necessities of life. Although technically the employee is performing no services for his employer in the sense that his actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form or better work from a happy and rested workman, and on the theory that such a minor deviation does not take the employee out of his employment. Marmolejo v. DILHR, 92 Wis. 2d 674, 678, 285 N.W.2d 650 (1979) (quoting Comment, Workmen's Compensation: The Personal Comfort Doctrine, 1960 WIS.L.REV.91, 91).

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