BUSINESS & LABOR
EXHIBIT NO. 5
DATE 2-12-09
BILL NO. SB 371

Labor-Management Advisory Council on Workers' Compensation

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July 2008

LABOR-MANAGEMENT ADVISORY COUNCIL ON WORKERS' COMPENSATION

Prepared by Diana Ferriter

COURSE AND SCOPE OF EMPLOYMENT **July 1, 2008**

SUMMARY:

Determination of whether an injury is within the course and scope of employment is fact specific to the case at hand and the practices of the employment. It appears from a survey of other states and review of the case histories in Arkansas, Missouri, and Oklahoma, Montana's Supreme Court has rendered decisions consistent with other states' Courts. It may be impossible to legislatively define "course and scope" to satisfy the interests of business and injured workers.

In addition, it's unknown what impact these fact specific Court decisions have on the costs to the system and the impact to injured workers in Montana.

Recent Supreme Court Cases:

BeVan v. Liberty Northwest Insurance Corp., December 21, 2007 – Date of Injury 5-19-2005

Petitioner was a customer service and sales representative for Blackfoot Telephone Communications. She was involved in a motor vehicle accident during an authorized paid break as she returned to work. Respondent denied liability on the grounds that Petitioner was outside the course and scope of her employment.

Affirmed: Petitioner was within the course and scope of her employment when she was involved in a motor vehicle accident during an authorized paid break.

WCC applied four factors in Carrillo v. Liberty Northwest Insurance, (1996).

SC: Factors in *Carrillo* (d.o.i. 3-2-1993) apply to injuries occurring during authorized breaks. SC referenced Larson's Treatise on Workers' Compensation in distinguishing between paid breaks and unpaid lunch breaks. SC determined traveling language in 39-71-407, MCA, does not apply during paid breaks.

Evaluate four factors to determine whether an employee's injury while on break is compensable:

1) whether the employee was paid during the break;
2) whether the employment contract entitled the employee to the break;
   Bevan's employer testified break was paid and employees are encouraged to take breaks;
3) whether restrictions limited where the employee could go during the break;
   Bevan was allowed compensation since employer set "boundaries within which the break could be taken and set limitations on the duration of the breaks" – duration 15

minutes and conditioned on the availability of breaks on adequate coverage, occasionally resulting in postponement or loss of the break;

4) whether the employee's activity constituted a substantial personal deviation;
Bevan's deviation was not a substantial personal deviation because she regularly left work on her breaks; she would have returned from break within the allotted 15 minutes ` but for the car accident; employer clearly acquiesced to its employees leaving the premises during break; and because of the employer's convenience she could not take a normal break nor could go home on her lunch hour because of a required lunch break meeting.

No Changes in 39-71-407(1), MCA, between 1993 and 2005 that would impact the four factors regarding breaks.

39-71-407. Liability of insurers—limitations. (1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

Michalak v. Liberty Northwest Insurance Corporation, January 3, 2008 – Date of Injury 7-23-2005.

Petitioner attended a company picnic hosted by his employer at the employer's lake home and was injured while riding a wave runner on the water. Respondent denied liability.

Affirmed: Section 39-71-118, MCA, which defines "employee" does not preclude Petitioner from receiving benefits because he was acting within the course and scope of his employment at the time of his injury even though he was engaged in a recreational activity.

SC referenced its decision in *Connery v. Liberty Northwest Insurance Corp, (1996) in support of its determination that,* "Section 39-71-118(2)(a), MCA (2005), defines 'employee' and 'worker' to exclude a person who is 'participating in recreational activity and who at the time is relieved of and is not performing prescribed duties . . . ' Thus, a person injured while participating in recreational activities still qualifies as an 'employee' and retains workers' compensation coverage if the person is injured while performing 'prescribed duties'." Legislature did not define "prescribed duties". The Court further noted, "Any attempt at a uniform definition of an employee's 'prescribed duties' will, inevitably, fail to account for all of the potential fact patterns that could arise. The definition of an employee's 'prescribed duties' is fact-intensive, and will vary considerably from case to case."

SC applied Courser's (d.o.i. 6-26-1981) traditional four-factor "course and score" analysis to determine if Michalak was performing "prescribed duties".

1) whether the activity was undertaken at the employer's request;
Michalak's employer picnic was an annual event since 1980; employer selects date and pays the picnic expenses; employer furnishes paddle boats and wave runners because, "people are more likely to come"; employer notifies employees about picnic through notices placed in their paychecks; notice requests a head-count;

2) whether the employer, directly or indirectly, compelled the employee's attendance at the activity;

Michalak's employer indirectly compelled his attendance at the picnic because his supervisor asked him to oversee the wave runners;

3) whether the employer controlled or participated in the activity;
Michalak's employer selects the date of the picnic and pays the picnic expenses and has a policy against employees bringing items to the picnic. Employer hosts picnic at his home and claimed the expenses as a business tax deduction;

4) whether the employer and the employee mutually benefited from the activity;
Employees and employer mutually benefited from the picnic because it was good for morale and promotes good relations between employees.

No Changes in 39-71-407, MCA, between 1981 and 2005 that would change *Courser's* four "course and scope" factors.

Changes in 39-71-118, MCA were made in 1993 to read, "(2) The terms defined in subsection (1) do not include a person who is: (a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment; or (b) performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities." This is the language SC determined in *Connery* that *Courser's* four "course and scope" factors were needed to define "prescribed duties".

Larson's Treatise discusses injuries that occur on a break and also injuries that occur when participating in recreational activities.

"Course of Employment – An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto."

"Going to and from Work – As to employees having fixed hours and place of work, injuries occurring on the premises while they are going to and from work before or after working hours or at lunchtime are compensable, but if the injury occurs off the premises, it is not compensable subject to several exceptions. Underlying some of these exceptions is the principle that course of employment should extend to any injury which occurred at a point where the employee was within range of dangers associated with the employment."

"Work Connection as to Activity – A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to the employment if it carries out the employer's purposes or advances its interests directly or indirectly. Under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment."

BRIEF SYNOPSIS OF ARKANSAS/MISSOURI/OKLAHOMA CASE HISTORY ON "COURSE AND SCOPE" IN WORKERS' COMPENSATION LAW

PREPARED BY LEA COLES, ATTORNEY WITH DEPARTMENT OF LABOR & INDUSTRY

ARKANSAS

An "injury" does not include an injury which was inflicted upon the employee at a time when employment services were not being performed. [1] The term course of employment or employment services is not defined in the statute. However, a review of the case history shows that Arkansas courts look to various factors to determine if an injury arises out of employment.

In **Jivan v. Economy Inn & Suites**, (hereinafter Jivan) the Supreme Court determined that an employee is acting within the course of employment if:

(1) the employee was doing something that is generally required by the employer when injured (i.e. performing employment services); and
(2) the injury occurred within the time & space boundaries of the employment when the employee was carrying out the employers purpose of advancing the employer's interest directly or indirectly. [2]

The Court in Jivan also stated that "in order for an injury to arise out of employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. [3] In Jivan, an assistant manager of a hotel was injured while off duty. By following the above noted provisions, the Court determined that the individual was acting within the course of employment when injured. Specifically, the employment contract required the assistant manger to live on-site at the hotel. Thus, despite the fact the injury occurred when the employee was off duty, the Court found that a residential employee indirectly advances the interests of the employer. [4]

In **Engle v. Thompson Murray, Inc. & Continental Casualty Co.**, the court determined that Engle was acting within the course of employment when injured. In this case, the employer designated a block of time during which employees were expected to engage in activities at a lake. Thus, the court determined that when injured the employee was engaging in conduct permitted and anticipated by the employer, so the injury was covered. [5]

In **Southwest Arkansas Dev. Council, Inc. v. Tidwell**, the court found that when injured Tidwell was acting within the course of employment. Factually, Tidwell worked as an in-home client service assistant. While in route to another client's home, Tidwell stopped at a gas station to purchase a soft drink. While pulling out of the gas station, Tidwell was struck by another vehicle and injured. Specifically, the court determined that the job entailed traveling between client homes and although stopping for a soft drink may be a deviation from employment; once Tidwell had returned to her car and was back on the roadway, she was carrying out the employer's purpose. [6]

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[1] *Ark. Code Ann.* §11-9-102(4)(B)(iii) & *Ark. Acts 796* (1933).
[2] *Jivan v. Economy Inn & Suites & CCMSI*, 370 Ark. 414 (2007) citing (*Wallace v. West Fraser S. Inc.* 365 Ark. 68 (2006)).
[3] *Id.* citing (*Deffenbaugh Indus. v. Angus*, 313 Ark. 100 (1993)).
[4] *Id.*
[5] *Engle v. Thompson Murray, Inc. & Continental Casualty Co.*, 96 Ark. App. 200 (2006).
[6] *Southwest Arkansas Dev. Council, Inc. v. Tidwell*, 95 Ark. App. 27 (2006).

MISSOURI

The term "injury" is defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The prevailing factor is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. [7]

An injury shall be deemed to arise out of and in the course of the employment only if:

(1) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
(2) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life. [8]

Where the employee's participation in a recreational activity or program is the prevailing cause of the injury, benefits or compensation otherwise payable for death or disability are forfeited regardless that the employer may have promoted, sponsored or supported the recreational activity or program, expressly or impliedly, in whole or in part. [9] The forfeiture of benefits or compensation shall not apply when:

(1) The employee was directly ordered by the employer to participate in such recreational activity or program;
(2) The employee was paid wages or travel expenses while participating in such recreational activity or program; or
(3) The injury from such recreational activity or program occurs on the employer's premises due to an unsafe condition and the employer had actual knowledge of the employee's participation in the recreational activity or program and of the unsafe condition of the premises and failed to either curtail the recreational activity or program or cure the unsafe condition. [10]

Under sub-part (1) of the recreation exception the court typically looks to see if: (a) did the employee voluntarily attend the event? (i.e. no direction or order by the employer to attend) AND (b) did the employer receive a mutual benefit by employee's attendance at the event? (i.e. benefit to employer must be substantive-a mere benefit of boasting morale among co-workers, is not typically substantive). [11] In the case of **Belkouch v. Missouri Clippers, Inc. & State Farm Fire & Casualty Co.**, the court followed the recreation exceptions and determined that the employee was not acting within the course and scope of employment when she was injured while attending an off-site employer sponsored retreat. In particular, under sub-part one of the statute, the facts of the case showed that the employer did not direct or require the employee to attend the retreat and the employee chose to attend it voluntarily. The court also found that there was no substantive benefit to the employer by the employee's attendance to

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[7] Section 287.020, RSMo.
[8] *Id.*
[9] Section 287.120.7, RSMo.
[10] *Id.*
[11] *Belkouch v. Missouri Clippers, Inc. & State Farm Fire & Causality Co.*, MO Labor & Industrial Relations Commission (June 19, 2006).

the retreat. Additionally, under sub-part two and three of the statute, there was no travel or wages paid to the employee and the event occurred off employer premises. [12]

Missouri also has a course and scope exception for what is commonly titled the "special task" exception. [13] Under this exception an employee's injury will be compensable if the injury occurred in the course of performing a special task, errand in connection with employment, or one undertaken under special circumstances to suite the employer's convenience. [14] In applying the special task exception the court in **Shinn v. General Binding Corp.**, determined that an employee's injury was compensable when she was injured on a lunch break. Factually, on the lunch break the employee deposited a check into the employer's payroll account and thereafter, stopped at a restaurant and fell, sustaining an injury. [15]

Another course and scope exception that Missouri follows is titled "concurrent purpose" where an employee's injury is covered if he/she was injured while performing a mission for the employer combined with a personal trip. [16] In **Gingell v. Walters Contracting Corp.**, at the employer's request an employee showed up early at a location where an employer sponsored picnic was to later take place, in order to pay an ice vendor. After paying the ice vendor and before the picnic started, the employee was injured while participating in an unrelated recreational activity. The court concluded that by following the "concurrent purpose" exception, the question is not when the injury occurred was there a failure of the personal motive, but whether the business task would still have to be completed, and if so, then the employee's injury is typically compensable, as was the case at hand. [17]

OKLAHOMA

The term "injury" or "personal injury" means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result there from. [18] Only injuries having as their source a risk not purely personal but one that is causally connected with the conditions of employment shall be deemed to arise out of the employment. [19]

When determining the issue of course and scope, the courts in Oklahoma typically follow the **Larson Treatise** for determining if a recreational or social activity falls within the course and scope of employment. Under this Treatise the court looks to see if:

(1) did the activity occur on the premises during a lunch or recreation period as a regular incident of the employment; or
(2) did the employer, by expressly or impliedly, require participation, or make the activity part of the services of an employee, and bring the activity within the orbit of the employment; or
(3) did the employer derive substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. [20]

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[12] *Id.*
[13] *Ludwinski v. Natl. Courier & Ins. Co. of North America*, 873 S.W. 2d 890 (1994).
[14] *Id.* citing (*Shinn v. General Binding Corp.*, 789 S.W. 2d 230 (1990)).
[15] *Id.*
[16] *Id.* citing (*Gingell v. Walters Contracting Corp.*, 303 S.W. 2d 683 (Mo. App. 1957)).
[17] *Id.*
[18] Okla. Stat. Tit. 85, section 3 (Supp. 1977).
[19] *Id.*
[20] See *Warthen v. Southeast Oklahoma State University*, 1981 OK. CIV. APP. 76, citing (*Larson Treatise* Vol. 1A, § 22.00).

The courts in Oklahoma seem to apply the Larson Treatise provisions noted above in an effort to comply with the statute requirement that there be some "causal connection" between the employment and the injury. The Oklahoma Supreme Court also noted in a decision that typically when an employee is compelled to attend an event related to employment, they will almost always be compensated. [21] Furthermore, the Larson test is used because as noted, "no one factor is dispositive and cases go both ways depending on the circumstances and factors present in each case." [22]

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[21] *Id.* citing (B & B Nursing Home v. Blair, 496 P.2d 795 (Okl. 1972)).
[22] *Id.*

February 12, 2009
Department of Labor & Industry
Employment Relations Division
Jerry Keck, Administrator

SB371
Statistics from ERD's Database and the Workers' Compensation Court

	FY06	FY07	FY08 Not Finalized
2007 Annual Report:			
Pg. 22 No. of Reported Claims:	32,903	30,970	31,522
Pg. 23 No. of **Insurer Initial Denials for Course & Scope**:	**419**	**431**	**392**
No. of **Mediations** filed for Course & Scope:			
No. re Travel	5	6	6
No. re Deviation	4	2	3
No. re Alcohol & Drugs	1	2	0
No. re Other (work v. non-work activity)	67	39	49
Total	**77**	**49**	**58**
No. of Petitions in **Work Comp Court** re Course & Scope:			
No. re Travel	0	0	2
No. re Alcohol & Drugs	0	3	0
No. re Other (work v. non-work activity)	67	27	40
Total	**67**	**30**	**42**
No. Recorded in ERD Database as **later paid/settled:** **May be result of Mediation or Court**	**62**	**53**	**32**
Percentage of Insurer Denials later paid/settled: (Paid or Settled ÷ Insurer Denials)	**14.8%**	**12.3%**	**8.2%**