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Beyond Idle Connections: AOE/COE—Pervasive Concepts in Worker's Compensation

INTRODUCTION

An employee is injured; the first requirement for invoking workers' compensation is satisfied. But the origin of the injury is unrelated to his employment or the employee is off duty, away from his place of work or engaged in some personal activity when the injury occurs. In any case, the facts fail to satisfy the statutory prescription that the injury arise out of and in the course of the employment (AOE/COE). The employer insists on strict adherence; yet the injury itself is properly a cost of the product or service and extraordinary circumstances suggest special consideration. Liberal construction seems appropriate and, therefore, an exception is created to meet the needs of the particular case. Subsequent cases are compared and classified until a special rule begins to take shape. And in all this, the law finds no predictability except in the underlying concept, for which reason, and because of its presence, the case remains precedent.


2. See notes 25-41 infra, and accompanying text. The standard is commonly abbreviated AOE/COE.

3. See note 27 infra.

4. For a discussion of the development of legal concepts see generally E.
The foregoing is a script from which many exceptions and special rules have arisen as courts have labored with the troublesome issue of what constitutes a compensable injury. The basic concern is the relationship between the injury and the employment; not so much whether a relationship exists, but whether the relation is sufficient to justify the extension of workers' compensation benefits. Recent California cases, however, evidence a trend toward the extension of such benefits beyond the stated scope of the Workers' Compensation Act, resulting from remote and often fictional contacts with employment as if some idle connection alone were sufficient.

The primary purpose of this comment is to identify the underlying explanations most commonly given in support of an exception or special rule in Workers' Compensation cases. Before doing so, an attempt will be made to define the AOE/COE standard and explain why Professor Arthur Larson's "quantum theory of work-connection" is antithetical to the purpose of workers' compensation.

**CONDITIONS OF COMPENSATION LIABILITY**

At common law, a master was not an insurer of his servants' safety and the scope of his liability was limited. The common law, however, typically recognized a duty of reasonable care whenever there existed a special relationship between the parties, particularly where some economic benefit was derived from that relationship. Thus the employee, like a contractual bailee or invitee, could at least demand that the employer "use reasonable care for the safety of his employees while they were engaged in

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**LEVI, AN INTRODUCTION TO LEGAL REASONING** 1-8 (1971). See also M. SMITH, A GENERAL VIEW OF EUROPEAN LEGAL HISTORY AND OTHER PAPERS—JURISPRUDENCE (1927), reprinted in A. VANDERBILT, STUDYING LAW—Elements of Law (1945):

In connection with the development of the rules of the unwritten law there also gradually appears a set of more general rules described as principles. These present themselves as propositions of which the ordinary rules are merely corollaries; and from these principles are frequently derived, in case of need, entirely new rules. The eternal existence of these principles is asserted with even greater energy and persistence than is in the eternal existence of the special rules; but here also is recognized that no particular statement of a principle is definitive. Id. at 189.

5. See notes 22-24 infra.


9. See PROSSER, supra note 7, at 386.
The performance of their work." The employer was frequently able to escape liability, however, through the common law defenses of contributory negligence, assumption of risk and the fellow-servant rule. "The result was that for the great majority of industrial accidents there was no recovery, either because no lack of proper care could be charged against the employer, or because the workman was taken to have assumed the risk." The objection to the common law remedy seems best expressed by the following indictment:

[Recovery by the injured employee was difficult. Litigation was expensive to both employer and employee. The just employer was fearful of assisting his injured employee lest the former thereby admit liability for the injury. Court costs and lawyer's fees generally absorbed the benefit of the employee's verdict if he got one. Unscrupulous attorneys took advantage of the necessities of the injured workmen to drive hard bargains with them, and in turn sought to negotiate extortionate settlements with employers. Deserving injured employees often recovered little or nothing, and employers were frequently compelled to pay large judgments for trivial injuries.]

A. Nature of Workers' Compensation

Workers' compensation is a system of compulsory liability insurance designed to compensate and rehabilitate, rather than indemnify, those employees who incur a compensable injury justifying the extension of benefits and the correlative imposition of economic cost upon the consumer. It is predicated upon the social policy that, as among the alternatives available, the financial burden of labor's casualties is best allocated to the cons-

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11. Id. at 3-5. See, e.g., Hanna, supra note 1, at § 1.02(4).
12. Prosser, supra note 7, at 526.

The protection provided to employees waned as the need for it grew. While still asserting the general principle of liability, the courts added the limitation that the law would presume that the contract of employment with its attendant salary agreement contemplated that the employee would assume: (1) any special or unusual risk where he either knew of its presence, or it was his duty in the course of his employment to know it; and (2) the ordinary risks which were incidental to his employment and which he could avoid with ordinary care on his part. Campbell, supra note 10, at 3-4.
sumer as a special tax[^15] on the product or service.[^16] It abolishes the common law defenses and imposes a strict liability on the employer, thereby eliminating any consideration of negligence.[^17] In exchange, the benefits afforded under the Act constitute the employee's exclusive remedy against the employer.[^18] Additionally, it is designed primarily to function as an administrative system that will provide limited benefits promptly so that the injured worker can be returned to the work force without unnecessary delay.[^19]

Thus, in terms of recovery, the primary concern is not the particular conduct of the parties.[^20] It is no longer controlling whether the employee knew of or could foresee the risk.[^21] Rather, compensability depends upon the existence of an employment relationship and whether there is a sufficient relationship between the injury and the employment to justify, as a matter of public policy, the added cost to the consumer.[^22] The employer is not the insurer of the employee at all times during the employment contract, but only where the statutory standards for compensability have been satisfied.[^23] Yet, as is so often the situation

[^15]: See generally, Church v. Arko, 75 Cal. App. 3d 291, 142 Cal. Rptr. 92 (1977); Prosser, supra note 7, at 530, where the underlying theory is summed up by the catch phrase, “the cost of the product should bear the blood of the workman.”


[^19]: Administration of workers' compensation in California is primarily the responsibility of the Workmens' Compensation Appeals Board (Hereinafter referred to as "Appeals Board" and cited as W.C.A.B.) which was formerly the Industrial Accident Commission (Hereinafter referred to as the "Commission" and cited as I.A.C.).

[^20]: See 1 Larson, supra note 14, at § 2.10. There are instances where the conduct of the parties is of direct concern as, for example, in cases involving the additional issue of serious and willful misconduct of either the employer or employee. But such concern only arises after the injury itself has been found compensable. See 1 Herlick § 1.4.

[^21]: See generally, note 14, supra.

[^22]: See Campbell, supra note 10, at 112; 1 Larson, supra note 14, at § 1.20.

[^23]: Hanna, supra note 1, at § 9.01(1)(d); California Casualty Indemnity Ex-
in the treatment of legal concepts through case law, the rationale becomes obscured as reasoning by example creates new meanings wholly distinct from the original purpose.  

B. The AOE/COE Standard

Every injury happening to an employee while at work is not compensable. It must both arise out of and occur in the course of the employment. The two elements must coexist. They must be concurrent and simultaneous.

The statutory requirements for compensability demand more than a showing of AOE/COE. But the courts are charged with liberally construing the code so as to extend benefits to those employees injured in the course of their employment. Consequently, the additional requirements that the injury be “proximately caused” by the employment and occur while the
employee is “rendering service” to the employment, have been de-emphasized in those cases where the injury nevertheless occurred in the course of employment. An injury arises out of employment when its origin is in a risk connected with and incidental to the employment. It must stem from or be produced by some risk or hazard having a causal relation to the employment of the injured worker. Thus, without some further showing of a causal connection between the injury and the business of the employer, it is not alone sufficient that the employment brought the employee to the place of the injury. But the employment need not be the sole cause; it is sufficient if the employment was a contributing or concurrent cause. Nor is it required that the injury be of a kind contemplated by the employer or peculiar to the employer’s business, so long as the risk is not common to the community as a whole.

(1974). In distinguishing the two, Hanna says that an injury could arise out of employment but not be proximately caused by the employment, yet the reader is not referred to any examples. See Hanna, supra note 1, at § 8.03(5)(b). An injury can “arise out of” but not occur during the “course of” the employment. See note 41 infra, and accompanying text. In an effort to avoid the requirement, the courts have said that the common law rules of proximate cause are not applicable in workers’ compensation. See Truck Insurance Exchange v. I.A.C., 27 Cal. 2d 813, 816, 167 P.2d 705, 706 (1946). It seems that the proximate cause requirement, if applicable at all, merely emphasizes that the injury must both arise out of and occur in the course of employment. See Employers’ Liability Assurance Corp. v. I.A.C., 37 Cal. App. 2d 567, 569, 99 P.2d 1089, 1090 (1940), and Colonial Insurance Co. v. I.A.C., 29 Cal. 2d 79, 83, 172 P.2d 884, 887 (1946) respectively; see also Madin v. I.A.C., 46 Cal. 2d 90, 92, 292 P.2d 892, 894 (1956); Bingham v. W.C.A.B., 261 Cal. App. 2d 842, 68 Cal. Rptr. 410 (1968).

29. CAL. LAB. CODE § 3600(b) (West 1971); see note 25, supra. The “rendering service” requirement was doomed from the beginning because of the mistaken belief that the carpenter had to be swinging the hammer when he stubbed his toe! For a history of the demise of the rendering service requirement see 2 Hanna, supra note 1, at § 8.04 et seq.

30. See, supra note 26, and accompanying text.

31. CAL. LAB. CODE § 3600(b) (West 1971); California Casualty Indemnity Exchange v. I.A.C., 190 Cal. 433, 436, 213 P. 257, 257-58 (1923) (The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course). See generally, Employer’s Liability Assurance Corp. v. I.A.C., 37 Cal. App. 2d 567, 99 P.2d 1089 (1940); In re McNicol, 215 Mass. 497, 102 N.E. 697 (1913). Contra Madin v. I.A.C., 46 Cal. 2d 90, 94-95, 292 P.2d 892, 895 (1956).

32. See Hanna supra note 1, at § 10.01(2). “An accident arises out of the employment when it results from: (1) an usual or normal risk incidental to the kind of work being done, or (2) a risk of extraordinary character to which the nature of the employment peculiarly and specifically exposes the injured employee,” Camp- bell, supra note 10, at 108.


35. Employers’ Mutual Liability Insurance Co. of Wisconsin v. I.A.C., 41 Cal.
An injury arises in the course of employment where the employee, at the time of the injury, is engaged in an activity related to and within the reasonable contemplation of the employment contract. The concern is with the time, place and circumstances of the injury rather than with its origin and cause. It is the dimensional component and as such, generally precludes compensation for injuries occurring away from the work place or during off-duty hours. Those activities which the employee engages in for his or her own personal purposes or convenience are, likewise, viewed as noncompensable unless that activity provides some real benefit to the employment.

The distinction between the AOE and COE components is illustrated by comparing the facts in American Motorists Ins. Co. v. Steel and Madin v. I.A.C. While these cases are diametrically different, they both address the same issue; whether the product or service of the employment should bear the burden of the employee's injury.

The Steel case involved a riveter whose duties called for the riveting of metals used in the construction of airplanes. In the course of the work day, metal shavings would accumulate on his person, clothing, hair and eyebrows. No facilities were provided by the employer for changing clothes or removing the metal shavings at the end of the work day. While enroute home, after the work day had ended, a metal shaving struck the riveter's eye...
causing a severe injury. The Texas court, in denying compensation, held that although the injury "originated in the work . . . of the employer, it definitely appears that no damage was done to his eye until at a time when he was not in any way about his master's business."43 Had the riveter been on the employer's premises during work hours, it is improbable that compensation would have been denied.44

In Madin, a husband and wife were employed on a twenty-four hour "on-call" basis as caretakers and managers of an apartment building. For being available to meet any problems that might arise, they received 10% of the gross rentals and a discount on the unit they occupied. On the morning of the injury, the couple were sleeping when an errant bulldozer rammed through their bedroom wall. The managers' employer had no control over, or interest in, the bulldozer, which had previously been parked on adjacent property and started by some mischievous children.

In granting compensation, the Madin court tacitly admitted that the accident did not originate from a force connected with the employment.45 After distinguishing prior cases requiring more than a mere causal relationship,46 the court created the fictional "positional risk doctrine," finding the employer's premises were made

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43. 229 S.W.2d at 390.
44. Under Cal. Lab. Code §§ 3208 and 3208.1 (West Supp. 1978), injury includes any injury or disease arising out of employment which is either "specific", resulting from one insult (incident or exposure) or "cumulative", resulting from repetitive mental or physical insults. However, as the Steel case shows, the mechanics of injury are such that the insult may occur at one time and the resulting harm at another. California seems frequently to avoid problems such as that in Steel through what might be called the "consequential injury" rule. See generally State Compensation Insurance Fund v. I.A.C. (Wallin), 176 Cal. App. 2d 10, 1 Cal. Rptr. 73 (1959) (carpenter injuring eye at work, later amputates finger at home with power saw and recovers benefits); Laines v. W.C.A.B., 48 Cal. App. 3d 872, 122 Cal. Rptr. 139 (1975) (second injury while en route to doctor's office for treatment of prior industrial injury held compensable).
45. 46 Cal. 2d 90, 96, 292 P.2d at 892, 896.
46. The problem facing the Madin court can be seen in the following language of the opinion:

The statement in Liberty Mutual Insurance Co. v. Industrial Acc. Com. (Dahler), 39 Cal. 2d 512, 247 P.2d 697 (1952), that there must be some connection between the injury and employment other than that the employment brought the injured party to the place of injury, is not of importance here because the court was there speaking of course of employment and held that the employee was at the time engaged in a personal recreational activity of his own off his employer's premises and "unrelated to the employment." 46 Cal. 2d at 94, 292 P.2d at 894.

But Dahler was actually concerned with both AOE and COE (dishwasher engaged in personal recreational activity on own free time away from work place). Once more, the language of concern originated in California Casualty Indemnity Exchange v. I.A.C., 190 Cal. 433, 213 P. 257 (1923), where it is stated that the risk producing the injury must have its origin in the employment. Id. at 438, 213 P. at 257.
unsafe because of the uncontrolled bulldozer.\textsuperscript{47} Such a distinction, however, seems to lack any real difference, for the bulldozer alone did not create a risk distinct in nature or quantitatively greater than that shared by the Madin's neighbors.\textsuperscript{48}

C. Quantum Theory of Work-Connection

Cases such as \textit{Madin} and \textit{Steel} prompt the call for a single test of work-connection. As a result, Professor Arthur Larson has suggested that the AOE and COE components be merged together into a single compensation formula:

One is almost tempted to formulate a sort of quantum theory of work-connection: that a certain minimum quantum of work-connection must be shown, and if the 'course' quantity is very small, but the 'arising' quantity is large, the quantum will add up to the necessary minimum, as it will also when the 'arising' quantity is very small but the 'course' quantity is relatively large. \textsuperscript{[B]}ut if both the 'course' and 'arising' quantities are small, the minimum quantum will not be met.\textsuperscript{49}

In support of his theory, Professor Larson reviews cases in which there was either a strong AOE or COE component and demonstrates how an "insistence on independent satisfaction"\textsuperscript{50} has often barred compensation. Delayed-action injuries like that in \textit{Steel}, are portrayed by Professor Larson to depict the "inherent flaw"\textsuperscript{51} in the COE component. The theory appears appealing; but hard cases often make for bad law and "no exact formula can be laid down which will automatically solve every case."\textsuperscript{52}

Admittedly, a strict AOE/COE analysis of cases like \textit{Madin} and \textit{Steel} does occasionally operate to deny compensation to injuries within the purpose of the Act. But to allow a few perplexing cases to set aside an otherwise workable formula and supplant it with an arbitrary standard of "work-contacts" would produce an

\begin{enumerate}
\item[47.] The doctrine provides that the causation requirements for a compensable injury are met where the employment brought the employee into a position of danger, even though not within the control or foreseeability of the employer. \textit{See} \textit{Workers' Compensation in Workmen's Compensation, supra note 6} at 968.
\item[48.] \textit{See} \textit{General Insurance Company of America v. W.C.A.B. (Chairez), 16 Cal. 3d 595, 601, 546 P.2d 1361, 1364, 128 Cal. Rptr. 417, 420 (1976)}.
\item[49.] 1 A. \textit{LARSON, THE LAW OF WORKMEN'S COMPENSATION § 29.10} (2d ed. 1978) (Hereinafter cited as 1A \textit{LARSON}).
\item[50.] \textit{Id.} at § 29.21.
\item[51.] \textit{Id.} at § 29.22. As a solution, Professor Larson suggested that the COE component be removed so that a mere causal connection is required. \textit{Id.} But one might do better to recognize that the mechanics of injury are such that in some cases it is best to look to the initial insult; rather than risk departure from the central purpose.
\item[52.] \textit{Campbell, supra} note 10, at 116.
\end{enumerate}
even greater injustice.\textsuperscript{53}

The real concern with utilizing a work-connectedness approach is illustrated by the cases of Levine \textit{v. W.C.A.B.}\textsuperscript{54} and General Insurance Company of America (Chairez) \textit{v. W.C.A.B.}\textsuperscript{55} wherein, compensation was ultimately denied by the California Supreme Court after a lower court had found a “quantum of work connection.”

In Levine, the applicant was a social worker who allegedly developed a “depressive neurosis with anxiety”\textsuperscript{56} from the grave stress of seeing her co-worker husband being mistreated by their mutual employer, the County Department of Public Social Services. Holding that the injury arose out of and in the course of \textit{her} employment, the court impliedly found a “triangularity”\textsuperscript{57} of work connection and concluded that even if she had been emotionally involved with her husband’s difficulties without being employed, “her familiarity with and involvement in the employment situation made its contribution to the acute stress.”\textsuperscript{58}

The quantum of contacts sufficient to justify compensation was apparently the existence of an employment relationship and a familiarity with the troubles of a co-employee. But compensability depends on more than the mere existence of an employment relationship. There must be a \textit{causal} connection between the injury and the claimant’s employment.\textsuperscript{59}

In Chairez, the decedent was a delivery and serviceman employed six days a week, his work day beginning at 8:00 A.M. He used his own vehicle to commute to and from work. As there was no parking provided by the employer, employees were required to park their vehicles on streets adjacent to that on which the business was located. It was customary for the first employee arriving at the business to prepare the morning coffee. Because of a fuel shortage, the decedent departed for work early so as to avoid the long lines at the service station. Arriving for work, the decedent

\textsuperscript{53} “The great majority of all work injuries, however, are non controversial because they clearly both arise out of and are proximately caused by the employment. It is only the borderline cases which require consideration ... “. \textit{HANNA, supra} note 1, at § 10.01 [1].


\textsuperscript{55} 51 Cal. App. 3d 159, 123 Cal. Rptr. 913 (1975), \textit{rev’d and vacated}, 16 Cal. 3d 595, 546 P.2d 1361, 128 Cal. Rptr. 417 (1976) (Hereinafter referred to as \textit{Chairez}).

\textsuperscript{56} There was opposing medical testimony of low anxiety and no psychiatric impairment due to industrial factors, but this was held “not germane to the question of the causation of the condition which the board assumed to exist,” 42 Cal. Comp. Cases at 232-33.

\textsuperscript{57} \textit{Id.} at 236.

\textsuperscript{58} \textit{Id.} Query: Was this a case of a \textit{weak AOE} and \textit{strong COE}?

\textsuperscript{59} \textit{See HANNA, supra} note 1, at § 9.01(1)(a); \textit{see also} note 133 \textit{infra}. 

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parked his car on the street in front of the employer's premises and was struck and killed by a passing motorist as he alighted from his car.

Under the so-called "going and coming" rule,60 injuries incurred during a routine commute to a fixed place of business at fixed hours are not compensable in the absence of special circumstances.61 The rationale is that the employment does not play any special role in routine local commutes other than the customary need for the employee's presence at the work place.62

The appellate court,63 after conceding that the case involved a routine commute and a risk common to traffic and motoring generally, held that certain "peculiarities"64 (i.e., making coffee and failure to provide parking), "saturated as they are with 'work connectedness', constitute such a distinct 'arising out of' and 'causal connection' that . . . compensation [is] warranted."65 In reversing the appellate decision, the California Supreme Court rejected the contention that the employment created a "special risk" by carefully noting that even though there was a causal connection between Chairez' injury and his employment, in that but for his job he would not have been in that particular position, the risk itself was not "distinctive in nature or quantitatively greater than risks common to the public."66 Hence, although there was held to be some employment-injury connection, there was no risk peculiar to the employment.67

In sum, the quantum theory affords an opportunity to ignore factors necessary and relevant to a determination of compensability. It avoids legal analysis in terms of purpose and rationale,

60. See generally, HANNA, supra note 1, at § 9.03(3)(b); Hinojosa v. W.C.A.B., 8 Cal. 3d 150, 501 P.2d 1176, 104 Cal. Rptr. 456 (1972).
61. Id. at 157, 501 P.2d at 1181, 104 Cal. Rptr. at 461.
62. Id. The employment relationship is deemed suspended while the employee is off the premises or commuting to and from work unless there are special circumstances. See note 98, infra.
64. Id. at 165, 123 Cal. Rptr. at 916.
65. Id. at 166, 123 Cal. Rptr. at 916.
67. The Supreme Court also rejected the contention that the decedent was on a "special mission" (an exception to the going and coming rule) saying, "Preparing coffee was, at most, part of the routine duties of the first arriving employee . . . [and] did not require a special trip to the office . . . ." 16 Cal. 3d at 601, 546 P.2d at 1364, 128 Cal. Rptr. at 420.
D. Pervasive Concepts

Cases are frequently encountered in which the circumstances are such as to mistakenly cause courts to treat the AOE/COE components together, as though a discussion of one involves the other. Indeed, a review of such cases shows that where an exception or special rule is at issue, the AOE/COE standard is often given only perfunctory attention. This is due partly to the realization that the outcome of each case must depend upon its own particular circumstances and that no one formula can resolve every case. The better reasoned opinions, however, evidence an effort to explain the justification for extending benefits in terms of the policy and rationale of the Act. It seems, therefore, that emanating from these cases and operative throughout most of the exceptions to the AOE/COE standard, is a common theme: An injury is deemed compensable when it results from either a special risk incidental to the employment or an activity which was of special benefit to the employment or reasonably contemplated by the employment and incidental thereto.

When one or more of these basic concepts exists, the injury is typically and appropriately deemed a cost of the employer's prod-

68. See notes 57 and 64 supra, and accompanying text.
71. See supra note 52.
72. See, e.g., cases cited at note 70, supra.
73. Compare CAMPBELL, supra note 10:

A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in the fulfillment of his contract of service; or when it is either as ordinary risk directly connected with the employment or an extraordinary risk which is only indirectly connected therewith. [Id. at 124]. . . . The hazard may be incidental to the industry, yet be no greater than it is ordinarily under a similar condition affecting human action unrelated to an employment. [Id. at 125].
Where some advantage to the employer, even though slight can be shown in the workman's conduct, his act ordinarily cannot be regarded as being purely personal and wholly unrelated to his employment. [Id. at 124].
[It is of material assistance . . . to determine the scope or sphere of employment contemplated by the parties. [Id. at 117-18]. . . . The employee must be doing that which his employment calls for in the way he is expected to do it, or doing what one so employed may reasonably do at that time and at a place where he may reasonably be during such employment. [Id. at 110].
uct or service.\textsuperscript{74} One need only review a few of the more notable exceptions and the cases from which they arise to appreciate this proposition.\textsuperscript{75}

1. Reasonably Contemplated Activity

An injury is frequently said to be compensable where “the particular act is reasonably contemplated by the employment”\textsuperscript{76} or incurred while the employee was “doing those reasonable things which his contract of employment expressly or impliedly authorizes him to do.”\textsuperscript{77} Thus, injuries caused by an employee’s intoxication are not compensable\textsuperscript{78} unless the consumption of alcohol was condoned\textsuperscript{79} or permitted,\textsuperscript{80} since such conduct is then deemed contemplated\textsuperscript{81} as a condition of the employment. Similarly, as a general rule, an injury incurred during “horseplay” is not compensable unless the employee was an innocent victim or the conduct would reasonably have been contemplated given the age of the participants or condonation by the employer.\textsuperscript{82} And, even though injuries resulting from altercations between employees over personal matters are usually non-compensable, it is generally held that where the employee was intervening either for

\textsuperscript{74} See text accompanying notes 5 & 22 supra.
\textsuperscript{75} See, e.g., Atolia Mining Co. v. I.A.C., 175 Cal. 691, 167 P. 148 (1917) (shot firer returning to work place after hours to make place safe for next shift); Nurmi v. I.A.C., 137 Cal. App. 221, 30 P.2d 529 (1934) (carrying gun to protect employer’s property).
\textsuperscript{78} Cal. Lab. Code § 3600(8) (West 1971). See generally, 1 Larson, supra note 14, at § 34.00; 2 Hanna, supra note 1, at § 10.02(2); 2 Witkin, supra note 6, at 1026; 2 Herlick, supra note 14, at § 10.4.
\textsuperscript{79} Tate v. I.A.C., 120 Cal. App. 2d 657, 261 P.2d 759 (1953).
\textsuperscript{81} Id. at 683-85, 527 P.2d at 620-22, 117 Cal. Rptr. at 68-70.
his own protection or for that of a co-worker, his injury is compensable since his intervention enables the work to continue, thereby benefiting the employment.\textsuperscript{83} Such activities, "though not part of the required duties of the employee, are nevertheless normal and proper and reasonably to be expected."\textsuperscript{84}

Typically, the concept of a "reasonably contemplated activity" is used to determine an injury compensable where there was some question as to the manner or location of performance\textsuperscript{85} or where the benefit from the activity was primarily to someone other than the injured employee and of only circumstantial benefit to the employment.\textsuperscript{86} The concept has also been used, however, as additional support for compensation where the activity bestowed some special benefit to the employment.\textsuperscript{87} And, it has even operated to create a "constructive" COE component in what might be called, "consequential injuries."\textsuperscript{88}

2. Special Benefit

Where the activity of an employee bestows some "special benefit to the employment"\textsuperscript{89} which is sufficiently direct\textsuperscript{90} and extraordinary,\textsuperscript{91} the resulting injury is deemed compensable. The benefit must be incidental to the employment,\textsuperscript{92} however, to have

\footnotesize{\textsuperscript{83} HANNA, supra note 1, at § 10.03(1)(a), citing Kaiser Co., Inc. v. I.A.C., 65 Cal. App. 2d 218, 150 P.2d 562 (1944).}

\footnotesize{\textsuperscript{84} WITKIN, supra note 6, at § 131. See also infra note 86.}

\footnotesize{\textsuperscript{85} See, e.g., Lizama v. W.C.A.B., 40 Cal. App. 3d 363, 115 Cal. Rptr. 267 (1974); Phoenix Indemnity Co. v. I.A.C., 31 Cal. 856, 193 P.2d 745 (1948); compare cases cited supra, at note 75.}

\footnotesize{\textsuperscript{86} WITKIN, supra note 6, at § 131. Injuries that result from humane or friendly acts for the benefit of others are compensable where reasonably contemplated by the employment. Id. Such acts should be distinguished from those acts of primary benefit to the injured employee. But see County of Los Angeles v. I.A.C., 89 Cal. App. 736, 739, 265 P. 362, 363 (1928) (election officer injured while fetching water for unconscious co-worker).}

\footnotesize{\textsuperscript{87} See supra note 75, and accompanying text.}

\footnotesize{\textsuperscript{88} See note 44, supra.}


\footnotesize{\textsuperscript{92} See CAMPBELL, supra note 10, at 120.}
the proper nexus with the product or service. The “special benefit concept” is most often applicable in those cases where the circumstances of the employment or method of performance are special. Thus, in Madin, since the employees were on duty twenty-four hours a day, their presence at the time of the injury bestowed a special benefit to the employer and in turn made the risk extraordinary. Madin, therefore, is just one example of the possible interplay between the “special benefit” concept and the other concepts of special risk or contemplated activity.

The “going and coming” rule is riddled with “special benefit” exceptions. Among them are the “special errand,” “special mission,” “special assignment,” “special call,” “transportation” and “commercial traveler” exceptions. All of these exceptions are nestled within the concept of benefit to the employment. Thus, where an employee is sent on an errand or mission, or undertakes a special assignment which is either expressly or impliedly contemplated by the terms of the employment, there is said to be a departure from the routine commute. An injury arising therefrom is held compensable because of the special benefit to the employer.

In Hinojosa v. W.C.A.B. a farm laborer, who was impliedly required to furnish his own transportation to and from various fields during the work day, was granted compensation for injuries incurred in an auto accident which occurred while driving home at the day’s end. The theory for allowing compensation was that by using his own vehicle the claimant bestowed a special benefit upon his employer.

93. See text accompanying notes 133-148, infra.
94. See note 42, supra.
95. Id. note 48.
96. See note 97, infra.
97. See text accompanying notes 60-62, supra. The “going and coming” rule is supported by the concept of reasonable contemplation. That is, the routine commute is not within the reasonable contemplation of the employment contract. But where the commute is extraordinary, the rationale of the “going and coming rule” has ceased.
100. 8 Cal. 3d 150, 501 P.2d 1176, 104 Cal. Rptr. 105 (1972).
101. Id. at 152, 501 P.2d at 1178, 104 Cal. Rptr. at 109.
102. Id. at 157, 160, 501 P.2d at 1183, 104 Cal. Rptr. at 109.
Likewise, in *Bramall v. W.C.A.B.* injuries to a legal secretary suffered in an auto accident which occurred while returning home from work were deemed compensable due to the benefit to her employer in having two fifty page depositions translated promptly later that evening after dinner. The fact that doing the work at home was to her personal convenience did not preclude recovery because the "dual purpose" rule does not require an examination into the dominant purpose unless it clearly appears that there was no benefit to the employer.

The benefit to the employment, however, need not be immediate. In *Dimming v. W.C.A.B.*, an employee's education program was held to be a sufficiently direct benefit to the employment to justify compensation where there was encouragement and financial assistance from the employer as well as the expectation of more effective work performance. Although fringe benefits such as vacation pay or company paid health insurance were considered too indirect, the decedent's education activity directly related to his job performance and, therefore, even though college attendance alone may be routine, it constituted a special activity in relation to his job duties. Hence, his return home from school when the accident occurred was not a routine commute.

3. Special Risk

When an injury is incurred as a result of some special risk, "distinctive in nature or quantitatively greater than risks common..."
to the public,

it is considered attributable to the employment. Utilization of the “special risk concept” is illustrated by those cases where the force producing the injury was extraneous to the employment, but the employment itself operated to bring the employee within reach of the peril or hazard. The concept seems to be predicated on the notion that where the employment functions as a conduit or link between the risk and the injury, the loss is fairly chargeable to the product or service. The “special risk concept” is necessarily limited, therefore, to the extraordinary risk to which the general public is not exposed.

In California Compensation and Fire Co. v. W.C.A.B. (Schick), the decedent’s former husband, who was familiar with her duties as an estimator for a manufacturer of table pads, rented an apartment under an assumed name and ordered a table pad, knowing that the decedent would be sent to make the necessary measurements. When she arrived, she was shot and killed. Even though the shooting originated out of a personal grievance, unconnected with her employment, her death was compensable because her job duties placed her in an isolated location and the nature of the work facilitated the assault. By comparison, in Greydanus v. I.A.C., the employee was on a routine commute to work when his vehicle was struck by another as he was turning toward the employer’s premises. Unlike Madin, Bramall, Hinojosa or Dimmig, there was no special benefit to the em-


114. The concept had its beginning as the “peculiar risk” doctrine but when risks came before the courts that were not peculiar to the employment, the jump was made to the “actual risk” doctrine. Madin followed, and with it the need for yet another adjective to deal with the extraordinary. See generally, Bianchi, Workmen’s Compensation Meaning of the Phrase ‘Arising Out of Employment’ As Used in the California Labor Code, 8 Hastings L.J. 49 (1956).

115. The courts have also used the “special risk” concept in occupational disease cases to limit recovery to those cases of “special exposure.” See comment, Infectious Diseases and California Workmen’s Compensation, 7 U.C.D.L. Rev. 24, 26 (1974).


117. Id. at 160, 436 P.2d at 70, 65 Cal. Rptr. at 158.


119. See note 42, and text accompanying note 95, supra.

120. See note 104, supra.

121. See text accompanying note 102, supra.

122. See note 111, supra.
ployment. The employer's dairy business, however, was situated such that in order to enter the drive way it was necessary for employees to make a dangerous left turn. Thus, the employment facilitated a risk to which the general driving public was not subjected.\(^{123}\)

The three concepts of special risk, special benefit and contemplated activity, are readily distinguished through an analysis of the circumstances in *Lizama v. W.C.A.B.*\(^{124}\) Lizama was a 22 year old Mexican-American who spoke little English and who had been employed for two months when the injury occurred. After completing his assigned work and “punching out” on his time card, he proceeded to a table saw which he had never used before and, while cutting a piece of wood for the construction of a small lunch bench, cut his left hand. His purpose in making the bench was “so I could sit up and eat . . . because there were no tables or anything available, and I had my little stove there that I would warm my lunch.”\(^{125}\) There was a sign near the saw, in English, which prohibited use of the saw without authorization. Although, there was conflicting testimony as to whether or not such authorization existed, the compensation judge resolved the issue in the employee's favor under Labor Code § 3202,\(^{126}\) concluding that there was at least implied permission to operate the saw for his personal use.\(^{127}\)

An analysis of *Lizama* in terms of the AOE/COE standard demonstrates that:

1. The force producing the injury was under the control and management of the employer;
2. The injury occurred on the employer's premises but after work hours; and,
3. The activity of the employee at the time of injury involved the pursuit of a primarily personal interest.

Hence, the injury did not originate while the employee was about his master's business. The circumstances equally show, however:

1. An implied permission to use the saw;
2. A lack of any meaningful warning against its use and the attendant risks; and,
3. A general lack of supervision over “clocked-out” employees who remained on the business premises.

The injury, therefore, was compensable under the concept of a reasonably contemplated activity.

When injuries are sustained on the employer's premises after

\(^{125}\) *Id.* at 365, 115 Cal. Rptr. at 268.
\(^{126}\) *See* note 27, *supra*.
\(^{127}\) *See* note 124 *supra*, at 127.
work hours during the pursuit of primarily personal interests, compensation is generally denied. But when, as in Lizama, the employee’s presence and activity could reasonably have been contemplated, the injury is deemed compensable despite the technical failure under the COE component. The special risk concept was not relevant because the risk originated out of the employment. And, the activity was of no real or extraordinary benefit to the employment. Had Lizama returned to the work area after “punching out” to get training in operating the saw or to finish cleaning up his work area, the special benefit concept would have applied.

4. Incidental to the Employment

Under California Labor Code Section 3600(b), compensability is limited to those injuries incidental to the claimant’s employment. “A risk is incidental to the employment when it belongs to or is connected with what a workman has to do in fulfilling his contract of service.” An act is incidental to the employment if it is one reasonably contemplated by the nature of the employment contract. It follows as a general rule that an employment relationship is suspended while an employee engages in purely personal acts unrelated to the obligations of the employment contract. Were it otherwise, an employer would be a statutory provider of accident, health and life insurance by the mere existence of an employment relationship.

Some activity, though purely personal to the employee, is nonetheless compensable when “reasonably attributable to the employment or properly incidental thereto.” That is, the

128. See Herlick, supra note 1, at § 10.13.
129. Supra, note 124.
130. See note 75, supra.
131. See note 107, supra.
132. Herlick, supra note 1, at 10.13 “(I)f the activity is within reasonable contemplation of the employee’s assignment, and a benefit is realized by the employer, it will be considered,” compensable. Id.
133. See note 26, supra, Hanna, supra note 1, at § 9.01(1)(a).
135. See Campbell, supra note 10, at 122. For the test in determining whether particular act is reasonably contemplated by the employment. See infra note 151.
136. See Hanna, supra note 1, at § 9.02(2)(b).
employment relationship is not suspended where the employer expressly or impliedly permits the employee to remain at the work place for their mutual convenience or where the conduct is reasonably to be anticipated given the nature or terms of the employment.

In Fremont Indemnity Co. v. W.C.A.B. (Makaeff), a plant manager for a computer components corporation died from injuries suffered while operating a Tri-Sport, three-wheeled, self-propelled vehicle, which was the personal property of the corporation's president. The vehicle was not in any way related to the business and there was no evidence that it was generally available for the personal use of the employees. Makaeff, the plant manager, had previously declined an offer to take the vehicle to the desert saying it was a "deadly weapon," but then later suggested that his visiting nephew tune it when the president commented that it needed to be serviced. The nephew worked on and test drove the vehicle on a grassy area near but not on the corporate premises. Makaeff then approached, got on the vehicle and crashed into a fence in an area off the employer's premises. It was admitted that there was "no evidence that Makaeff was ordered or even requested to undertake the repair job or to have it done by his nephew." It was found, however, that both the nephew and Makaeff had at least implied permission to operate the vehicle.

139. By "work place" is meant that place where the contract of employment contemplates the rendition of services. Fireman's Fund Indemnity Company v. I.A.C. (Elliot), 39 Cal. 2d 529, 531, 247 P.2d 707, 708 (1952). Thus, in determining what constitutes the "work place" in a particular case, it is necessary to look at the nature of the employment to determine what is contemplated.

140. See note 145, infra.
141. See supra notes 76-88, and accompanying text.
143. Id. at 173, 137 Cal. Rptr. at 848.
After noting that the primary difficulty with finding Makaeff's death to be compensable was that the vehicle was the employer's personal property, unrelated to his business, the court affirmed the award of death benefits under the "personal comfort doctrine." The holding is apparently premised upon the notion that the Act applies to those purely personal acts which are "a normal human response to a particular situation" and "helpful services to the employer's business." The personal comfort doctrine was judicially formulated to meet those situations where the injury happened to occur while the employee was undertaking a momentary departure from his or her assigned duties to pursue some activity of a purely personal nature but nevertheless of circumstantial benefit to the employment. The doctrine was first recognized by the California Supreme Court in Whiting-Mead Commercial Co. v. I.A.C., 178 Cal. 505, 173 P. 1105 (1918), quoting from Archibald v. Ott, 77 W. Va. 448, 87 S.E. 791 (1916):

Such acts as are necessary to the life, comfort and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of his work. 178 Cal. at 507, 173 P. at 1006 (emphasis added).

The personal comfort doctrine does not concern special risks or special benefits: the risks are those normally attendant to routine human conduct and the particular act does not bestow a special benefit to the employment. The connection with the employment is admittedly remote and while this would normally preclude compensation, such acts are nevertheless deemed compensable because they are impliedly contemplated by the employment and are for the mutual convenience of employer and employee. The benefit to the employment is the convenience in not shutting down the wheels of production or removing the worker from the work place every time there is a necessity to answer the calls of nature, get a drink of water, change clothes or get some fresh air. See, Hanna, supra note 1, at § 9.02(2)(a). However, the doctrine's rationale stems from the mutual convenience in allowing such personal acts at the work place. Specifically, since the doctrine extends benefits for purely personal acts of remote, but mutual, benefit by furtherance of the employment, it is appropriately limited to those situations where the particular act producing the injury (1) was primarily personal to the injured employee, (2) occurred at the work place, while the employee was earning the consideration given under the contract of employment, and (3) was necessarily contemplated to be of mutual convenience and therefore incidental to the employment. See Hanna, supra.

146. Makaeff, supra note 142, at 176, 137 Cal. Rptr. at 850, citing North American Rockwell Corp. v. W.C.A.B., 9 Cal. App. 3d 154, 159, 87 Cal. Rptr. 744, 745 (1970) (claimant injured helping another employee start his car while on the employer's parking lot shortly after the work shift had ended). North American, extended compensation primarily under the concept of reasonably contemplated activity:

In our view a contract which contemplates the use of a parking area on the premises where employees and automobiles gather must necessarily envision that on occasion an automobile will not function and that employees in the vicinity will go to the aid of the one who has trouble.
to the employer in that they aid in the efficient performance by
the employee." The California Supreme Court, however, in
Liberty Mutual Insurance Co. v. I.A.C., (Dahler) rejected a simi-
lar contention upon the following observation:

(The claimant's) theory of compensation rests on the imposition of liabil-
ity arising solely from the mere existence of the employment relationship
and permits of no logical limitation, for carried to its conclusion, it would
include an injury as a compensable claim if it occurred in pursuance of
any recreational activity available in the general area regardless of con-
nection with the employment.

CONCLUSION

The rules governing compensability must grow as legal reason-
ing endeavors to meet conflicting demands. As long as the analy-
sis in this area utilizes remote connections and purely verbal
distinctions, however, there can be no conceptual structure or
doctrine that is more than a pretense, no concepts that can justify
the extension of benefits in terms of policy, no doctrines that can
give emphasis to the relevant conditions for compensability and
afford predictability. If the present system is to be retained, then
the AOE/COE standard should give way only in those few cases
with special circumstances, where the spirit and purpose of the
Act would be better served by the extension of benefits.

Certainly no one test or formula can meet the needs of every
case. A mere measurement of strengths and weaknesses, how-
ever, with no mechanism to discern which factors are absent and
which need to be present, gives no real assurance of adherence to
the underlying concepts of workers' compensation. What is
needed then, is a concepts analysis by which compensability can
be determined in those borderline cases which create most of the

id. at 159, 87 Cal. Rptr. at 777.
147. Id., citing Cordova supra note 139. In dictum, the Makaef court discussed
the rule stated by Professor Larson that injuries resulting from orders which ben-
efit the employer privately be deemed compensable where the employee is given
an order creating a "Hobson's choice." See Larson, supra note 14, at § 27.40.
Then, after admitting that the Larson rule lacks support in California, the court
decided that the issue need not be decided because if there was no feeling of obli-
gation, then Makaef must have rode (the dangerous weapon) "to relax, take his
mind off his work, during an authorized work break." Id. But see Wilson v.
W.C.A.B., 16 Cal. 3d 181, 545 P.2d 225, 127 Cal. Rptr. 313 (1976) (refusing to create a
"white collar" exception).
149. Id. at 518, 247 P.2d at 700. (emphasis added). Makaef involved an em-
ployee operating a privately owned motor vehicle unrelated to the business, with
the implied permission of the owner, away from the work place and of no real ben-
efit to the employment. Indeed, the ultimate effect was to create a white-collar ex-
ception and provide insurance coverage on a privately owned vehicle at the
expense of the consumer of computer components!
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litigation. The following is offered as an impetus for further consideration.

Where one or more of the technical requirements of the AOE/COE standard appear lacking, but the circumstances are such as to compel further inquiry, then in keeping with the policy of extending benefits for work incurred injuries, it should further be determined;

(1) Whether the employee was nevertheless exposed to some special risk, distinctive in nature and quantitatively greater than risks common to the public, or,
(2) Whether the activity engaged in which ultimately produced the injury, though maybe not in actual performance of the job duties, was nevertheless of a special benefit to the employment or reasonably contemplated by the employment and incidental thereto.\textsuperscript{150}

In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is \textit{contemplated by the employment}, should be resolved in favor of the employee.\textsuperscript{151}

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Since the AOE/COE formula provides a simplified method of determining compensability in keeping with the Act's administrative purpose, the above concept analysis should only be considered where the following questions cannot be answered in the affirmative:

AOE: Did the injury arise out of the claimant's employment?
(1) Did the injury originate from some risk directly attributable to the employment? (origin factor)
(2) Was there a causal connection between the risk and the injury? (causation factor)

COE: Did the injury arise in the course of the claimant's employment?
(1) Did the injury occur while the claimant was receiving the consideration contemplated under the contract of employment? (time factor)
(2) Was the claimant at the work place contemplated by the terms of the employment? (place factor)
(3) Was the claimant doing those things reasonably contemplated by the contract of employment? (activity factor)