

Workmen's Compensation—Compensation for Off-Premises Work Break Injury—*Pacheco v. Orchids of Hawaii*.¹—Claimant's decedent was killed in an automobile accident while driving from her employer's premises to a bank at which she intended to cash her paycheck during an unpaid coffee break. The sole restriction which the employer placed upon coffee breaks was a fifteen-minute time limitation. On the day in question, the deceased had been ordered to work overtime, and thus would have been unable to cash her check after working hours. The supervisor had seen the deceased and three co-employees leave the employment premises together and cautioned them to hurry so as to return within fifteen minutes. The decedent's dependents filed a claim for compensation before the Director of the Department of Labor and Industrial Relations.

The Supreme Court of Hawaii, in affirming a decision for the claimant by the state Labor and Industrial Relations Appeals Board,² HELD: that decedent's death was caused by accidental injury "arising out of and in the course of the employment,"³ and thus the dependent claimants were entitled to recover under the state's workmen's compensation act.⁴ The court reached this result by adopting the general rule that "an employee, who is allowed to venture off-premises during an authorized work break, and who is injured in the course of reasonable and necessary activity incidental to such break,"⁵ comes within the purview of the statute.

A discussion of the issues presented in *Pacheco* requires a brief preliminary statement of the general policies of workmen's compensation. Workmen's compensation legislation was enacted in most states in the early 1900's to correct the inadequacies of the common law tort remedies in providing satisfactory relief to the victims of industrial accidents.⁶ Under the tort doctrines of contributory negligence, the fellow servant rule,⁷ and assumption of risk,⁸ it was extremely difficult for an injured employee or his survivors to recover against an employer. As a result, an injured employee was often a potential member of the welfare rolls.⁹ Workmen's compensation legislation, in seeking to remedy the inadequacies of the common law, established a no fault doctrine of recovery for employment-related injuries. Employers were required by statute to purchase workmen's compensation insurance, the costs of

1 — Hawaii —, 502 P.2d 1399 (1972).

2 The Appeals Board had reversed the Director's denial of compensation. Id. at 1400.

3 Hawaii Rev. Stat. § 386-3 (1968).

4 502 P.2d at 1401.

5 Id.

6 For a more detailed account of the historical development of workmen's compensation law, see 1 A. Larson, *The Law of Workmen's Compensation* §§ 4-5 (1972); W. Prosser, *Law of Torts* §§ 81-82 (3d ed. 1964).

7 This rule provided that an employer was not liable for employee injuries caused by the negligence of another employee. Prosser, *supra* note 6, § 81.

8 The employee was said to have assumed the risk of injury by taking the job. Id.

9 1 A. Larson, *supra* note 6, § 2.20.

which were passed on to the consuming public—"The cost of the product should bear the blood of the workman."¹⁰

The workmen's compensation acts of forty-one of the fifty states¹¹ and the Longshoremen's and Harbor Workers' Compensation Act¹² provide that compensation is to be awarded for personal injuries "arising out of and in the course of employment."¹³ The courts, as a general rule, have interpreted this statutory language to require that a substantial degree of "work relatedness" be attached to the activity in which the injury is incurred.¹⁴ Courts differ as to what constitutes a work related activity. Most jurisdictions have found no work relatedness in an off-premises activity unless there is *benefit* to the employer from the activity or *control* by the employer over the activity.¹⁵ To generalize further, however, would be quite meaningless, since this area of the case law is filled with fine distinctions based on individual fact situations.

A clear illustration of the problems that arise in applying the work relatedness test in an off-premises workmen's compensation case is the situation in which an employee is injured or killed during a work break while off the employer's premises. A substantial majority of the jurisdictions have denied compensation in this situation.¹⁶ In a minority of jurisdictions, however, a trend has been developing toward allowing compensation for off-premises work break injuries. *Pacheco v. Orchids of Hawaii*¹⁷ is a significant development in this trend because it broadens the concept of work relatedness further than ever before, by granting compensation in a situation in which the employee used her break for a personal errand rather than for refreshment or relaxation. The

¹⁰ Of unknown origin, quoted by Prosser, *supra* note 6, § 81.

¹¹ See 1 A. Larson, *supra* note 6, § 6.10.

¹² 33 U.S.C. § 902(2) (1970).

¹³ The other states have statutes containing substantially similar language. See, e.g., Utah Code Ann. § 35-1-44 (1953): "injuries arising out of or in the course of employment"; N.D. Cent. Code § 65-01-02 (1960): "injuries arising in the course of employment"; Wis. Stat. § 102.03(1)(c)1 (Supp. 1972): "injuries growing out of and incidental to his employment." Under the statutes of the majority of the states, the injury must arise both out of *and* in the course of employment. This note will not concern itself with these distinctions since the actual results are for the most part the same despite the language differences. For a fuller discussion of these distinctions see Fisher, *Injuries Arising Out Of and In the Course of Employment*, 26 Mo. L. Rev. 278 (1961). See also 1 A. Larson, *supra* note 6, chs. III-IV.

¹⁴ See 1 A. Larson, *supra* note 6, §§ 7, 14.00.

¹⁵ Compensation denied because no employer benefit found: see, e.g., *Kunce v. Junge Baking Co.*, 432 S.W.2d 602, 610 (Mo. App. 1968); *Scott v. Industrial Comm'n*, 62 Ohio L. Abs. 11, 13-14, 105 N.E.2d 881, 883 (Ct. App. 1951). Compensation denied because no employer control found: see, e.g., *Union Camp v. Blackmon*, — Ala. —, 270 So.2d 108, 110 (1972); *Salmon v. Bagley Laundry Co.*, 344 Mich. 471, 475, 74 N.W.2d 1, 3 (1955).

A rule that often limits compensation to on-premises injuries is the "going and coming" rule which provides that off-premises injuries are not compensable when incurred by an employee while going to or coming from work.

¹⁶ E.g., *Union Camp v. Blackmon*, — Ala. —, 270 So. 2d 108 (1972); *Salmon v. Bagley Laundry Co.*, 344 Mich. 471, 74 N.W.2d 1 (1955).

¹⁷ 502 P.2d 1399.

court attempted to justify its holding by squeezing the fact situation into the confines of one of the theories developed by minority jurisdictions to circumvent the majority rule.¹⁸

This note will examine the *Pacheco* majority and dissenting opinions in light of the trend toward compensating off-premises work break injuries. Throughout this examination, the various rationales utilized by courts to find sufficient work relatedness in off-premises activities will be appraised. Finally, a recommendation will be made for the widespread adoption of the rule that compensation be awarded for short off-premises work break injuries, provided that the employer has consented to the break and that the activity is not unusual or unreasonable.

Because this was an issue of first impression in Hawaii, the *Pacheco* decision relied in great measure upon certain holdings of the New York courts.¹⁹ Those courts have adopted a very liberal policy regarding the award of compensation for off-premises work break injuries, basing their holdings on the notion that a short off-premises break does not interrupt the employment relationship. *Caporale v. Department of Taxation & Finance*²⁰ allowed compensation for an injury sustained during a short off-premises break. The *Caporale* court held that employment had not been interrupted because (1) the authority of the employer continued during the break; (2) the break was of brief duration; and (3) the distance traveled from the employment premises was not great.²¹ *Caporale* was followed by *Bodensky v. Royaltone, Inc.*,²² the case principally cited by the *Pacheco* majority, in which recovery was allowed in a factual situation similar to that in *Pacheco*. An employee was injured while crossing a street during an employer-approved fifteen-minute coffee break. The court noted that departures from the employment premises to satisfy personal comfort were increasingly prevalent during coffee breaks, and that such breaks could not today be called separations from employment, especially when the custom is

¹⁸ See *State Compensation Ins. Fund v. Workmen's Compensation Appeals Bd.*, 67 Cal. 2d 925, 434 P.2d 619, 64 Cal. Rptr. 323 (1967); *Sweet v. Kolosky*, 259 Minn. 253, 106 N.W.2d 908 (1960); *Whitehurst v. Rainbo Baking Co.*, 70 N.M. 468, 374 P.2d 849 (1962); *Caporale v. Department of Taxation & Finance*, 2 App. Div. 2d 91, 153 N.Y.S.2d 738 (1956), aff'd, 2 N.Y.2d 946, 142 N.E.2d 213, 162 N.Y.S.2d 40 (1957); *Desautel v. Workmen's Compensation Bureau*, 72 N.D.2d 35, 4 N.W.2d 581 (1942); *Jordan v. Western Elec. Co.*, 1 Ore. App. 441, 463 P.2d 598 (1970); *Van Roy v. Industrial Comm'n*, 5 Wis. 2d 416, 92 N.W.2d 818 (1958).

¹⁹ The New York decisions, of course, do not enjoy a precedential status in Hawaii. New York, however, a largely populated industrialized state, has many decisions on the specific issue of the compensability of off-premises work break injuries, and was the first state to enact workmen's compensation legislation. See 1 A. Larson, supra note 6, § 5.20.

²⁰ 2 App. Div. 2d 91, 153 N.Y.S.2d 738 (1956), aff'd, 2 N.Y.2d 946, 142 N.E.2d 213, 162 N.Y.S.2d 40 (1957).

²¹ Id. at 92, 153 N.Y.S.2d at 740. In two brief per curiam decisions, the New York Appellate Division had allowed recovery for off-premises work break injuries. *Rucker v. Nassau-Beekman Realty Corp.*, 272 App. Div. 982, 73 N.Y.S.2d 275 (1947); *Sullivan's Estate v. Motor Realty Corp.*, 272 App. Div. 986, 73 N.Y.S.2d 276 (1947).

²² 5 App. Div. 2d 733, 168 N.Y.S.2d 908 (1957).

known by the employer.²³ Thus the New York courts have enunciated three clear standards for determining whether a break is part of the employment situation. The facts of *Pacheco* clearly meet these criteria as set forth in *Caporale*—the break was brief; the employee went only a few blocks from the plant; and the employer consented to the trip.²⁴

However, the dissent in *Pacheco* would have disallowed the claim on the basis of *Balsam v. Division of Employment*,²⁵ another New York case, which denied compensation to a claimant who was permitted by his employer to go to a particular coffee shop during his fifteen-minute break, but who instead went to cash a check at a bank, where he slipped on the floor and injured himself. The court declined to extend the *Caporale* rule to a situation in which an "employee when injured had deviated from a prescribed sphere of recreational endeavor to embark upon a purely personal mission."²⁶ The dissent in *Pacheco* maintained that Mrs. Pacheco had deviated from the prescribed sphere of the coffee break by going to the bank. The majority, on the other hand, distinguished *Balsam* quite adequately: in *Pacheco*, the employee could go wherever she pleased during the break so long as she returned to work on time, whereas in *Balsam* consent was only given for the employee to go to a designated coffee shop.²⁷ This distinction is a valid one because in the case of a prescribed course of conduct the boundaries of the employment situation have been predetermined by the employer and made a part of the working conditions.²⁸

The dissent in *Pacheco* was willing to allow compensation for an off-premises coffee break, provided the break was actually used for refreshment or relaxation. It argued, however, that activity incidental to the coffee break, *i.e.*, activity not undertaken directly pursuant to obtaining refreshment or relaxation, should not be compensated. In so contending, the dissent stated: "Drinking coffee or relaxing during a coffee break is itself one step removed from employment. A trip to a bank to cash a paycheck during a coffee break is still another step removed. In my view, a line must be drawn at this point."²⁹ The dissent

²³ Id. at 733, 168 N.Y.S.2d at 909.

²⁴ The dissent argued that there was no evidence that the supervisor knew where the deceased was going, and thus did not really consent. 502 P.2d at 1403. However, it could be argued that there was implied consent in that the deceased could go wherever she pleased during the break.

²⁵ 24 App. Div. 2d 802, 263 N.Y.S.2d 849 (1965).

²⁶ Id. at 803, 263 N.Y.S.2d at 850.

²⁷ 502 P.2d at 1401.

²⁸ The distinction, however, may not be so clear-cut in reality. An employer might allow off-premises breaks, prescribing a particular restaurant, but in practice might know of and tolerate the custom of employees going other places. Arguably, there is implied employer consent in this situation, placing the case in line with *Pacheco* and *Bodensky*. Perhaps *Pacheco* and *Balsam* would be analogous if the decedent in the former had been killed after the fifteen-minute limitation on her coffee break had expired, for then she would have deviated from a prescribed course of conduct.

²⁹ 502 P.2d at 1406.

attempted to emphasize the necessity of applying this remoteness test to an individual's activities during a coffee break by maintaining that the majority decision would permit recovery where an employee injured himself sky-diving or drag racing during his coffee break. The unlikelihood of these examples detracts from the validity of the point being made—namely, that in a number of cases employees may engage in unusual or unexpected activities during their breaks.⁸⁰ The dissent was concerned that the majority decision would open the floodgates by allowing compensation when the employee is injured in bizarre, dangerous off-premises activity. This problem of lawful but dangerous off-premises break activity is discussed by Larson in his treatise on workmen's compensation. Larson points out that an employee might be barred from recovery if he engages in unusual or unreasonable activity while engaged in something incidental to employment, but not while directly in performance of work duties.⁸¹ Activities such as sky-diving or drag racing could be described as unusual or unreasonable on a coffee break—an event incidental to employment—but it is highly questionable whether going to the bank to cash a paycheck would.

A further concern of the dissent is that the majority holding will have the opposite of its intended effect.⁸² Employees will lose rather than gain from the decision because employers, desiring lower workmen's compensation insurance premiums, will henceforth limit off-premises coffee breaks to a particular restaurant. Employees will lose the freedom to go wherever they wish during coffee breaks, a freedom which the dissent considered very important.⁸³ While the dissent's argument is not without merit, it appears doubtful that insurance rates would be appreciably higher in jurisdictions following *Pacheco* than elsewhere. No substantially greater risk is incurred in driving to a bank to cash a paycheck than in driving to a restaurant for a cup of coffee.⁸⁴ It is questionable whether a decision against recovery should be justified on such speculative grounds. Furthermore, it would be a violation of the strong policy in favor of compensating workers⁸⁵ upon which workmen's compensation is based to deny a deserving employee compensation because of possible increases in insurance rates.

⁸⁰ Recently, a couple was married during the groom's coffee break. N.Y. Times, Mar. 25, 1973, at 46, col. 7.

⁸¹ 1 A. Larson, *supra* note 6, § 21.80. Larson states that although courts do this, they seldom expressly declare that they are doing it. *Id.* at § 21.81. Under workmen's compensation doctrine, an employee can recover for an injury, even if it results from unreasonable or unusual practices, provided it is incurred while in direct performance of employment duties. *Id.* at § 21.80. Activity in performance of employment duties by definition arises out of and in the course of employment.

⁸² 502 P.2d at 1406-07.

⁸³ "Employees are not machines to be limited to such a narrow gauge." *Id.* at 1407.

⁸⁴ The expense of workmen's compensation insurance is on the average only one percent of the payroll expenses. An increase in premiums for compensating off-premises injuries could only be a fraction of this one percent. Report of the National Commission on State Workmen's Compensation Laws, ch. 7, gal. 13 (1972).

⁸⁵ See *id.* at ch. 1, gal. 10.

In *Pacheco*, the majority further bolstered its decision by finding that the employer derived a benefit from the employee's off-premises coffee break. In a number of cases allowing compensation for off-premises injuries, the employee had performed some service for the employer's benefit while off the premises.³⁶ Analogizing from these cases, courts have argued that an employee who is permitted a coffee break performs his work more efficiently because he is rested and his morale has been uplifted by the interruption from the work's routine.³⁷ Those jurisdictions that have refused to adopt this argument have done so on the theory that the employee is acting entirely on his own, with no control imposed upon him by the employer.³⁸

An argument that the employer derived a benefit from Mrs. Pacheco's trip to the bank would appear tenuous. The court, however, suggested that an employee who utilizes a coffee break to attend to pressing personal business is able to perform better at his job because his mind is freed of the anxiety which would have disturbed him had he not taken care of the matter. As the dissent points out, this argument could lead to excessive results.³⁹ For example, an employee might derive peace of mind leading to more efficient work performance by attending to certain business of a personal nature during the weekend. Clearly, injury incurred in such activity would not be compensable. Or an employee might injure himself falling out of bed while asleep at night. Although an employee needs sufficient sleep to be a satisfactory worker, recovery assuredly would be out of the question.⁴⁰

The majority also found a substantial benefit accruing to the employer in the fact that the entire plant shut down for fifteen minutes so that all the employees could break at once. The logic behind this argument is somewhat tortured: (1) the employer benefits from the increased productivity of workers who are refreshed by coffee breaks, and (2) it would be an inconvenience, or added expense, if the employees went for breaks at different times of the day, as there would be

³⁶ E.g., *Malinski v. Industrial Comm'n*, 6 Ariz. App. 387, 433 P.2d 38 (1967); see generally 1 A. Larson, *supra* note 6, §§ 16, 18.

³⁷ For an interesting illustration of the benefits that an employer can derive by permitting, or in fact ordering, his employees to take a coffee break, see *Mitchell v. Greinetz*, 235 F.2d 621, 625 (10th Cir. 1956), where the court stated:

We may well take judicial knowledge of the fact . . . that coffee breaks or short rest periods are rapidly becoming an accepted part of employment generally. While no doubt they are beneficial to the employees, they are equally beneficial to the employer in that they promote more efficiency and result in greater output, and that this increased production is one of the primary factors, if not the prime factor, which leads the employer to institute such break periods.

³⁸ *Greenfield v. Manufacturers Cas. Co.*, 198 Tenn. 452, 281 S.W.2d 47 (1955) (employee eating meal in restaurant afforded no business benefit to employer); see *Hedgewood v. H.A. Pittman*, 471 P.2d 888 (Okla. 1970) (claimant who went out to street to turn off car headlights which were accidentally left on stretches employer benefit argument too far in maintaining that anxiety about lights would have interfered with work performance).

³⁹ 502 P.2d at 1404.

⁴⁰ This latter example is Larson's. 1 A. Larson, *supra* note 6, § 15.53.

sporadic interruptions in the flow of operations. Therefore, by stopping the entire production line for fifteen minutes, the employer gains the benefit of (1) and avoids the detriment of (2). Although each of these propositions may be individually true, it hardly follows from their combination that Mrs. Pacheco's coffee break benefited the employer because he found it more convenient to let everyone break simultaneously.

A few courts have found an employer benefit justifying the award of compensation where the employer had a special arrangement with a bank for cashing the employees' paychecks during break time. In *Watson v. American Can Co.*,⁴¹ the claimant was injured while returning from a bank where she had cashed her paycheck during her lunch break. The employer had at one time paid its employees in cash. Following a payroll robbery, the company arranged payment by check with a particular bank, which hired extra personnel during the lunch period on payday. Compensation was awarded because the employer was said to have gained a benefit by avoiding the risk of payroll robbery in paying by check and the special arrangement with the bank was part of the scheme of gaining this employer benefit. *Watson* was followed by *Flamholtz v. Byrde, Richards, & Pound, Inc.*,⁴² where the employee was injured on the way to cash a paycheck at a bank at which the employer provided signature cards to facilitate the process. Employer benefit justifying compensation was found in the arrangement enabling the company bookkeeper to avoid the necessity of carrying large amounts of cash. *Pacheco* is distinguishable from these cases, in that there was no pre-arrangement between the employer and a particular bank.

Still other situations in which some courts have found an employer benefit are those in which the employee was required to work overtime (as was the deceased in *Pacheco*) or in which the conditions of work are so pressing that the mealtime break is impinged upon. In *Clark v. Employers Liability Assurance Corp.*,⁴³ the employee, having had to stay overtime because of uncompleted work, was injured in a motorcycle accident while traveling to a restaurant for supper. The court stated: "When he left the repair shop with his work unfinished in order to get a meal necessary for carrying on his work into the night, plaintiff was doing something in furtherance of his job and his employer's business."⁴⁴ In *Vaughn v. Highlands Underwriters Insurance Co.*,⁴⁵ the employee, a truck driver, had to work a fifteen-hour shift. Normally, he ate on the road, but on the day in question he was delayed at the employment premises because the plant assembly line was broken down.

⁴¹ 23 App. Div. 2d 423, 261 N.Y.S.2d 306 (1965), aff'd, 18 N.Y.2d 758, 221 N.E.2d 463, 274 N.Y.S.2d 683 (1966).

⁴² 37 App. Div. 2d 645, 322 N.Y.S.2d 382 (1971).

⁴³ 27 So.2d 464 (La. App. 1946).

⁴⁴ Id. at 466.

⁴⁵ 445 S.W.2d 234 (Tex. Ct. Civ. App. 1969).

His supervisor told him to go out and eat, whereupon he was injured on the way to a cafe. The court deemed it necessary for the welfare of the business that the employee be afforded an opportunity to eat, especially where the sojourn was undertaken at the direction of the supervisor.⁴⁶ The rationale of these decisions seems to be that the employee is eating a non-scheduled meal in circumstances where his normal eating time has been superseded by work exigencies. This rationale was a factor in *Pacheco*, although not a controlling one, in that the deceased could not cash her check after work because she was required to work overtime. Her coffee break was the only time she had that day in which to do it. Other courts have refused to hold that an off-premises meal taken under these circumstances arises out of and in the course of employment any more than any other off-premises meal.⁴⁷ The distinction is not a major one. An employee might have to eat an off-premises meal if he has to work overtime; likewise, he might normally eat an off-premises lunch or supper in the regular course of affairs. The difference in the overtime situation is that a special employment exigency forces the employee to eat at a restaurant, when he might normally have returned home.

The broadest rule permitting workmen's compensation recovery for injuries incurred in activity not directly related to employment, whether on or off the premises, is the personal comfort doctrine. Included within the scope of this rule are such activities as eating,⁴⁸ getting a drink of water, resting, washing, smoking, seeking fresh air, coolness, or warmth—and taking a coffee break.⁴⁹ Although various theories have been advanced in explanation of the doctrine, policy considerations are probably the most important. One writer has stated: "The real reason [for the personal comfort doctrine] is that a working man must live and recognizing this, the employer has provided both physical conveniences and the opportunity to enjoy their use. Modern industrial conditions provide the real basis for compensation and should be recognized."⁵⁰

Courts do not generally apply the personal comfort doctrine to injuries incurred off the employment premises.⁵¹ However, if an employee is to be compensated for on-premises personal comfort related injuries, there is no obvious reason why off-premises activities are any less relevant to personal comfort.⁵² In *Van Roy v. Industrial Commis-*

⁴⁶ Id. at 237.

⁴⁷ See *Jamison v. Temporary Comm'n on Agriculture*, 308 N.Y. 683, 124 N.E.2d 321 (1954); *Greenfield v. Manufacturers Cas. Co.*, 198 Tenn. 452, 281 S.W.2d 47 (1955).

⁴⁸ The eating referred to is that which takes place while the employee is at the work locus, taking a momentary pause from actual work.

⁴⁹ See generally Comment, *Workmen's Compensation: The Personal Comfort Doctrine*, 1960 Wis. L. Rev. 91, 92.

⁵⁰ Id. at 98.

⁵¹ Cf. 1 A. Larson, *supra* note 6, § 21.21a.

⁵² See Comment, *supra* note 49, at 105.

sion,⁵³ the Wisconsin court applied the personal comfort doctrine to an off-premises work break injury. The court reasoned that accidents arising out of activities incidental to employment are compensable as activities ministering to personal comfort are incidental to employment.⁵⁴ So long as the employee's activity does not amount to a deviation removing the employee from the employment relationship, his act is incidental to employment.⁵⁵ The court then held that off-premises trips for coffee or other refreshment, when consented to by the employer or supervisor, are not deviations from employment.⁵⁶ *Van Roy* expressly rejected the ground often relied upon by courts to deny off-premises awards, *i.e.*, that the employer has no control over the employee in such circumstances.⁵⁷

California has also adopted a policy of allowing compensation for off-premises work break injuries, relying in part upon the personal comfort doctrine. In *Western Greyhound Lines v. Industrial Accident Commission*,⁵⁸ a woman bus driver was assaulted while drinking coffee between trips in a restaurant across the street from the bus terminal. The court stated that acts for an employee's personal comfort, even if performed off-premises, do not interrupt the continuity of employment.⁵⁹ The court also pointed to (1) the benefit that the employer derived by the bus driver's refreshing herself; (2) the fact that the employer was aware that the employees customarily ate in this restaurant; and (3) the fact that the employee was being paid for the break time.⁶⁰ The fact that coffee was available at the terminal canteen was deemed irrelevant by the court.⁶¹

Although the majority in *Pacheco* did not expressly refer to the personal comfort doctrine, it could have drawn on some of the reasoning behind the rule. A court hearing a workmen's compensation case should begin with the basic assumption that a working man or woman

⁵³ 5 Wis. 2d 416, 92 N.W.2d 818 (1958).

⁵⁴ Id. at 421, 92 N.W.2d at 821.

⁵⁵ Id. at 422, 92 N.W.2d at 821.

⁵⁶ Id. at 424, 92 N.W.2d at 822.

⁵⁷ Id. at 423, 92 N.W.2d at 822. New Mexico has adopted a policy similar to Wisconsin's in *Whitehurst v. Rainbo Baking Co.*, 70 N.M. 468, 374 P.2d 849 (1962), and *Sullivan v. Rainbo Baking Co.*, 71 N.M. 9, 375 P.2d 326 (1962).

⁵⁸ 225 Cal. App. 2d 517, 37 Cal. Rptr. 580 (1964).

⁵⁹ Id. at 520, 37 Cal. Rptr. at 582. See also *State Compensation Ins. Fund v. Workmen's Compensation Appeals Bd.*, 67 Cal. 2d 925, 434 P.2d 619, 64 Cal. Rptr. 323 (1967), in which the California Supreme Court allowed compensation for an off-premises work break swimming accident primarily on the basis of the personal comfort doctrine.

⁶⁰ 225 Cal. App. 2d at 519-21, 37 Cal. Rptr. at 581-82. See also *Jordan v. Western Elec. Co.*, 1 Ore. App. 441, 463 P.2d 598 (1970), in which compensation was allowed because the off-premises break was on paid time; the foreman knew about it but did not forbid it (thus impliedly consenting); employees customarily took such breaks; and, the employer derived a benefit from the break. The personal comfort doctrine was referred to.

⁶¹ 225 Cal. App. 2d at 520, 37 Cal. Rptr. at 582. It was noted that there was evidence that the coffee offered at the canteen often was of poor quality. The court in *Pacheco* also apparently did not place any importance on the fact that refreshment facilities were located on the premises.

"has to live," and that there are certain activities which are part of the work experience. A trip to the coffee shop is recognized as such an activity and, it is submitted, a trip to a bank to cash one's paycheck should be recognized as another.

In addition to the employer benefit theory and the personal comfort doctrine, some courts have found sufficient work relatedness to award compensation for an off-premises work break injury by using a contract theory. In *Sweet v. Kolosky*,⁶² an employee injured himself in a fall on the way to a drug store for coffee during a coffee break. The written employment agreement provided that employees could take two fifteen-minute coffee breaks per day, one in the morning and one in the afternoon. Employees customarily went to the drug store because there were no on-premises refreshment facilities. The court awarded compensation because the only way the employee could enjoy his contractual right to a coffee break was to go off-premises.

In *Pacheco*, the employer's policy was to allow fifteen-minute breaks during which the employee was free to go off-premises, although refreshment facilities were present on the premises. Thus, in *Pacheco* it would seem that the employee had only a privilege to go off-premises as opposed to the contractual right which existed in *Kolosky*. Furthermore, it was not necessary to go off-premises in *Pacheco*, as it was in *Kolosky*, because of the existence of on-premises refreshment facilities. Narrowly interpreted, *Kolosky* would limit recovery to situations in which the employee had a contractual right rather than a privilege to go off-premises. It can be argued that more work relatedness is present when there is a right because the employer is contractually bound to honor it.⁶³

A broader reading of the contract theory used in *Kolosky* would permit recovery if the accident arose out of activities expressly or impliedly contemplated by the employment contract.⁶⁴ It is submitted that every employment contract expressly or impliedly permits an employee to do what his employer consents to. Thus if the employer consents to the off-premises break, compensation should be allowed because the contract contemplates that the employee will enjoy privileges which the employer grants him. This is a very broad theory of recovery, and would include the *Pacheco* situation. It seems, however, that the *Kolosky* court would limit recovery to situations in which the break is a contractual right. It explicitly stated that compensation should be

⁶² 259 Minn. 253, 106 N.W.2d 908 (1960).

⁶³ See *Reinert v. Industrial Accident Comm'n*, 46 Cal. 2d 349, 294 P.2d 713 (1956), in which an employee of a summer camp was awarded compensation for an off-premises injury incurred while horseback riding, because the use of this facility was part of the employee's compensation. The court noted that the employee necessarily would travel beyond the employment premises if she took advantage of this right.

⁶⁴ See *Union Camp v. Blackmon*, — Ala. —, 270 So.2d 108, 113 (1972) (dissenting opinion); *Desautel v. Workmen's Compensation Bureau*, 72 N.D. 35, 4 N.W.2d 581 (1942).

denied where the employee's excursion has no relation to his rights and privileges under the employment contract.⁶⁵

The contract theory and the personal comfort doctrine provide alternative rationales to the one used by the court in *Pacheco* for a broad-based rule allowing off-premises work break injury compensation. It is submitted that the *Pacheco* rationale is the preferable approach because it is more direct in permitting recovery where "an employee is allowed to venture off-premises during an authorized work break, and who is injured in the course of reasonable and necessary activity incidental to such break."⁶⁶ Rather than depend on the theory that the break is an incident of the employment contract, or that the break is a matter of personal comfort, or that the employer derived a benefit from the break, it is more sensible and direct to simply allow recovery for short off-premises breaks on a per se basis, provided that they are consented to by the employer and the employee does not engage in unreasonable or unusual activity. Insofar as the *Pacheco* decision relies on the employer benefit theory, it weakens the thrust of its argument. As discussed above, the court is forced to stretch this theory inordinately to encompass the facts of the case.⁶⁷

Many considerations weigh in favor of the approach set forth above. Coffee breaks have become an institution for the American worker. A worker on such a break does not really consider his employment relationship to be terminated while he temporarily goes off-premises for refreshment or on an errand. The reasons for drawing the line of compensation protection at the employer's threshold when the employee arrives or departs at the beginning and end of the day⁶⁸ are not present in the work break situation. When an employee departs from work, his work day has ended. He is as free from the work relationship as he can be. If the line were not drawn at the employer's threshold, difficult problems would ensue as to when the period of compensation coverage began or ended.⁶⁹ This line drawing problem is not present in the work break situation because a line need not be drawn at all if a general rule is adopted allowing compensation for short off-premises activities which are consented to by the employer and which are not unreasonable or unusual.

With the exception of eight states,⁷⁰ the general rule is adhered to that off-premises work break injuries are noncompensable. The unfavorable consequence of this rule is that employees injured in such situations are in danger of becoming dependents of public welfare.⁷¹ The policy of workmen's compensation should be to protect as many

⁶⁵ 259 Minn. at 256, 106 N.W.2d at 910-11.

⁶⁶ 502 P.2d at 1401.

⁶⁷ See discussion in text at notes 39-40 supra.

⁶⁸ See note 15 supra.

⁶⁹ An example of such a line-drawing problem would arise when the employee does not go directly home from work.

⁷⁰ See note 13 supra.

⁷¹ See note 9 supra.

workers as possible so that such a result may be avoided, and thus the widespread adoption of the liberal rule here enunciated is desirable.

Another desirable policy is national uniformity of workmen's compensation law. Conflicts of law problems can arise if an employee has contacts with more than one jurisdiction and recovery is allowed in one and barred in the other. It was easier for the court in *Pacheco* to adopt the rule that it did because the case was one of first impression in Hawaii. Other states with entrenched histories of following the majority rule against off-premises injury compensation are less likely to follow the liberal trend.

A major step toward national uniformity in adopting the liberal rule would result from the implementation of the recommendations of the Report of the National Commission on State Workmen's Compensation Laws.⁷² The Report, concerned with all branches of workmen's compensation law, finds that existing state workmen's compensation laws are proving inadequate and suggests the appointment of a new commission to encourage and assist the states in adopting the recommendations of the Report.⁷³ Further, the Report suggests that if by 1975 the states have not significantly adopted the most essential of the recommendations, Congress should enact legislation designed to guarantee compliance.⁷⁴ The Report does not specifically recommend that a rule favoring compensation for off-premises work break injuries be adopted. The Report does state that "[d]esigners of a program which covers work-related injuries . . . must decide where and how to draw the line between those which are and those which are not work-related."⁷⁵ It goes on to say that although the states have adopted conflicting interpretations of the phrase "arising out of and in the course of" in many areas where the issue arises (one of which is the off-premises work break situation), "it is impossible to devise a tidy rule which will end the controversies."⁷⁶ However, this impossibility does not apply to the work break situation. The adoption of a recommendation that off-premises work break injuries of a limited duration be compensable, when the employer consented to the break and when the activity engaged in by the employee is not unusual or unreasonable, ought to be considered by the Commission. Such a recommendation might not be considered essential by the Commission, and accordingly state compliance might not be made compulsory. (The Commission thinks that all its recommendations are important but that only some are essential, and compliance should be mandatory only for the essential recommendations.)⁷⁷ Yet the adoption of such a recommendation would be likely to have a significant impact

⁷² Report of the National Commission on State Workmen's Compensation Laws (1972).

⁷³ Id. at ch. 7, gal. 18.

⁷⁴ Id. at ch. 7, gals. 20-21.

⁷⁵ Id. at ch. 2, gal. 10.

⁷⁶ Id. at ch. 2, gal. 12.

⁷⁷ Id. at ch. 7, gal. 19.

upon future state legislation and court decisions, owing to the prestige and authority over desirable policy which the Commission possesses.

In conclusion, a court desiring to extend workmen's compensation coverage to an off-premises work break injury could reach such a result by relying on the employer benefit theory, the personal comfort doctrine, or the contract theory. Alternatively, rather than stretch a fact situation to fit one of these theories, a court could simply announce the general rule that a short off-premises break that is consented to by the employer and that is not unusual or unreasonable is part of the work relationship. It is submitted that this latter alternative is the more desirable because it is more consistent with a liberal policy in favor of compensating injured workers, and because in recent years work breaks have in fact become a part of the work relationship. It is further submitted that the National Commission on State Workmen's Compensation Laws should adopt a recommendation in favor of this rule, since such a proposal would encourage the extension of the liberal trend.

ARNOLD E. COHEN

Federal Rules of Civil Procedure—Discovery—Denial of Discovery Pertaining to Subject Matter Jurisdiction and Standing—Mandamus as a Means of Review—*Investment Properties International, Ltd. v. IOS, Ltd.*¹—Investment Properties International, a Canadian corporation, and its subsidiaries brought an action for damages against the respondents, IOS, also a Canadian corporation, and its subsidiaries in the United States District Court for the Southern District of New York.² The complaint alleged violations of section 10(b) of the Securities Exchange Act of 1934³ and Rule 10b-5 promulgated thereunder,⁴ as well as violations of the Sherman Antitrust Act.⁵ Plaintiffs' request for a preliminary injunction was denied on the grounds that it was unlikely that plaintiffs would be able to establish standing and subject matter jurisdiction. Plaintiffs thereupon sought to depose certain officers of the defendants, the examination to be limited to the threshold issues of standing and subject matter jurisdiction. The district court, on motion by defendants, vacated plaintiffs' notice of deposition "without prejudice to further discovery if it is determined that this Court has jurisdiction of the subject matter of this action."⁶ Plaintiffs then sought

¹ 459 F.2d 705 (2d Cir. 1972). The factual description of the case given in the text relies in part on the report of the denial of plaintiffs' motion for a preliminary injunction in [1970-1971 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,011 (S.D.N.Y., April 21, 1971).

² The district court opinion is unreported. The text follows the summary of the case in 459 F.2d at 706.

³ 15 U.S.C. § 78j(b) (1970).

⁴ 17 C.F.R. § 240.10b-5 (1972).

⁵ 15 U.S.C. §§ 1-7 (1970).

⁶ As quoted by the court of appeals in 459 F.2d at 707.