January 1998

Carillo v. Liberty Northwest Insurance: An Expansion of Workers' Compensation Benefits

Deborah J. Livesay

Follow this and additional works at: https://scholarship.law.umt.edu/mlr

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.law.umt.edu/mlr/vol59/iss1/8

This Note is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.
NOTE

CARRILLO V. LIBERTY NORTHWEST INSURANCE: AN EXPANSION OF WORKERS' COMPENSATION BENEFITS

Deborah J. Livesay

Legislate as we may . . . the army of the injured will still increase, the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for food.¹

I. INTRODUCTION

Workers hurt on the job often face mounting medical bills at a time when injuries impair their ability to work. Knowing they have the right to pursue the responsible party through protracted, expensive legal battles offers little comfort to those struggling to pay their bills. Before the advent of workers' compensation laws, however, injured workers had few other avenues of recovery.

Although most workplaces no longer resemble the sweat factories of the industrial age, many workers continue to spend significant portions of their day on the job. Sharing the rigors of the workplace often leads to a sense of camaraderie and friendship among co-workers. Increasingly, progressive employers no longer view an employee in terms of production alone; instead, employers recognize the value of accommodating a worker's hu-

¹ Samuel B. Horovitz, Current Trends in Basic Principles of Workmen's Compensation, 12 Law Soc'y J. 465, 469 n.6 (1947) (quoting Borgnis v. Falk Co., 133 N.W. 209 (Wis. 1911) (upholding the constitutionality of the Wisconsin compensation act)).
man side as well. This relatively recent development is illustrated by the widespread prevalence of recreational activities sponsored by or, at least, encouraged by employers. Further, most employers permit an occasional break in production to allow workers to acknowledge special occasions such as co-worker birthdays, marriages, or retirements. Employers recognize significant benefits from periodically supporting recreational or social breaks because such efforts often lead to enhanced employee satisfaction, increased productivity, and improved company loyalty.

Blue Cross Blue Shield (BCBS) of Montana apparently recognized the reality of the modern workplace and structured its business operations accordingly. The company facilitated a close-knit working relationship among workers by forming "cells" in which a group of individuals worked together under one supervisor. Carol Ann Carrillo, a systems testing specialist for BCBS, and her co-workers shared a working environment that was not just productive, but social as well. The employees routinely honored those leaving the company with going-away gifts and parties. Supervisors usually participated in these celebrations. When Carrillo's supervisor decided to leave the company, Carrillo volunteered to purchase her going-away gift during an afternoon break. Carrillo was struck by a car while walking toward a gift shop located in another BCBS building near her office. Because she believed her injuries occurred while she was performing a work-related task, Carrillo filed a workers' compensation claim. BCBS's insurer denied Carrillo workers' compensation benefits claiming that her accident did not arise out of and in the course of her employment.

The Montana Constitution entitles an individual, injured by someone other than an employer or co-worker, to recover damages from that other person despite the availability of workers' compensation benefits. The Montana Constitution entitles an individual, injured by someone other than an employer or co-worker, to recover damages from that other person despite the availability of workers' compensation benefits.
compensation. The framers of the constitution apparently added the specific reference to workers' compensation not to limit a worker's rights, but to clarify the spectrum of recovery options available to Montanans. This constitutional provision illustrates both the state's propensity for affording individuals extensive rights and the framers' desire to clarify that workers should have broad access to redress when injured on the job. Nevertheless, courts recognize that workers' compensation targets work-related injuries only and cannot cover injuries occurring under circumstances bearing little, if any, relationship to a worker's employment. The appropriateness of awarding workers' compensation benefits hinges on whether the injury "arose out of and in the course of employment." Thus, a court's interpretation of this language drives the availability of compensation by defining the scope of activities an employee may be engaged in when injured.

This Note discusses the Montana Supreme Court's expansion of workers' compensation coverage in Carrillo v. Liberty Northwest Insurance. Part II offers an historical background of workers' compensation in the United States. Part III presents the statutory scheme for workers' compensation in Montana and discusses the court's earlier interpretations of the statutes. Part IV examines the facts of the Carrillo decision, the lower court's holding, and the Montana Supreme Court's holding. Part V analyzes the Montana Supreme Court's reasoning in Carrillo. Part VI concludes by suggesting that although this decision provides a useful map for evaluating claims, future inconsistencies may result because the court did not clearly articulate the reasons behind its decision to either relax or ignore some past criteria.

11. See MONT. CONST. art. II, § 16 (1972) (stating that "no person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state").
12. See Montana Constitutional Convention § 16 Comments (1971-72) (clarifying committee's intent that the Workmen's Compensation Laws will be used to provide compensation to injured workers rather than to deprive injured workers of redress against negligent third parties simply because their immediate employer is covered by Workmen's Compensation).
14. See id.
II. HISTORICAL BACKGROUND OF WORKERS' COMPENSATION

Workers' compensation is a fault-free system for compensating employees injured in an accident arising out of and in the course of employment. The system benefits both employees and employers. Injured employees receive benefits, without the necessity of assigning blame for negligence, in exchange for giving up their right to sue the employer for damages. Similarly, in exchange for relinquishing their common law defenses, employers are freed from the cost and uncertainty of personal injury suits. Laws addressing work-related injuries evolved through three fairly distinct phases including the pre-compensation period, early employer liability statutes and modern workers' compensation laws.

A. Pre-Compensation Period

During the early nineteenth century, a negligence suit remained the sole relief for workers injured on the job. Believing that the industrialization of America furthered the common good, courts heavily favored employers in these suits, and as such, injured workers prevailed less than twenty percent of the time when suing their employers. In addition to denying standing to sue to the survivors of a worker who died as a result of a work-related injury, courts also placed the burden of establishing the employer's negligence on any employee who received a work-related injury. Because the courts were interested primarily in causation, once the worker met his or her burden, an employer defeated the claim by showing that its actions did not physically cause the injuries. The employer's arsenal of defenses, commonly called the "unholy trinity," included the contributory negligence, fellow-servant, and assumption of risk doctrines.
1. The Contributory Negligence Doctrine

The courts began using the theory of contributory negligence to relieve employers of liability in 1809.\(^26\) Even though liability was premised on the idea that the party at fault should bear the cost of occupational injuries, the burden fell on the employee to establish the employer's negligence.\(^27\) The difficulty of this burden protected many employers from liability since co-workers, often the only witnesses, were reluctant to risk losing their jobs by testifying.\(^28\) Injured workers were further disadvantaged because the employer could rebut by showing that the employee contributed to the injury.\(^29\) Even if the employer's level of responsibility was much greater than that of the employee, the negligence claim failed, thereby relieving the employer of all liability.\(^30\) As such, employees rarely prevailed in suits against their employers.

2. The Fellow-Servant Doctrine

As early as the 1700s, the theory of vicarious liability enabled an injured party to recover damages from a master for injuries caused by that master's servant or employee.\(^31\) The courts effectively abolished this liability in 1837 if the victim also happened to be a worker injured on the job.\(^32\) If some action on the part of a co-worker or fellow-servant caused the harm, the employer bore no liability even if the employer created working conditions that were inherently dangerous.\(^33\) An English Lord first articulated the fellow-servant doctrine in 1837 when deciding whether a butcher bore any liability for injuries suffered by an employee injured after a co-worker overloaded his delivery

\(^{26}\) See 1 LARSON, supra note 2, § 4.30, at 2-5 (stating that contributory negligence was first recognized as a defense against employer liability in Butterfield v. Forrester, 11 East 60 (1809)).

\(^{27}\) See SOMERS, supra note 19, at 18.

\(^{28}\) See id.

\(^{29}\) See id.

\(^{30}\) See id.

\(^{31}\) See 1 LARSON, supra note 2, § 4.20, at 2-3.

\(^{32}\) See id. § 4.30, at 2-3 (discussing Priestly v. Fowler, 150 Eng. Rep. 1030 (1837) (holding that a butcher was not liable for injuries suffered by an employee van driver even though the injuries were caused when another of the butcher's employees negligently overloaded the van)).

The court absolved the employer of liability for the worker's injuries because the injuries followed from the direct actions of the fellow employee.\(^\text{35}\) American courts quickly adopted this doctrine.\(^\text{36}\) A Massachusetts court relieved a railroad of liability to a locomotive engineer who lost his hand due to the actions of a switchman.\(^\text{37}\) The engineer and switchman never worked together and, according to one commentator, "the engineer could not have foreseen or guarded against the switchman's actions."\(^\text{38}\) Ironically, had the injury occurred to a stranger, a patron of the railroad perhaps, the railroad's liability would have been unquestioned even though an employee caused the damage.\(^\text{39}\) The courts justified the different outcomes by applying contract theory to injured employees while applying tort liability to injured strangers.\(^\text{40}\) This attitude illustrates the climate permeating the courts during the mid-nineteenth century; one favoring industrial development at the expense of injured employees.\(^\text{41}\)

3. The Assumption of Risk Doctrine

Attempting to enlarge their protective net around industrial employers, courts also allowed an assumption of risk defense against claims by injured workers.\(^\text{42}\) The defense was first articulated in Priestly v. Fowler, an English case decided in the early nineteenth century.\(^\text{43}\) The court's reasoning suggested that a freedom of contract theory governed the relationship between employees and their masters. Courts adopting this theory assumed that individual workers possessed as much knowledge as the employer about potential dangers in the workplace.\(^\text{44}\) Presuming that workers enjoyed the freedom to refuse to perform

---

34. See 1 Larson, supra note 2, § 4.30, at 2-3 (discussing the facts of Priestly v. Fowler, 150 Eng. Rep. 1030 (1837)).
35. See id.
36. See id.
38. Id.
39. See id.
40. See 1 Larson, supra note 2, § 4.30, at 2-4 (implying that all aspects of the employee's relationship with the employer was governed by the employment contract).
41. See id.
42. See id. § 4.30, at 2-4.
43. See id. § 4.30, at 2-3 to 2-4 (discussing Priestly v. Fowler, 150 Eng. Rep. 1030 (1837)).

https://scholarship.law.umt.edu/mlr/vol59/iss1/8
potentially dangerous tasks, the courts held that individuals who chose to perform those tasks also chose to personally assume the risk. The courts refused to charge an employer with negligence if they found the worker had assumed the risk of performing the task giving rise to the injury. Specifically, the Priestly Court denied an injured delivery employee recovery on the assumption that he lacked standing to sue because he knew the dangerous conditions involved in the job when he undertook its performance.

The assumption of risk doctrine, along with the contributory negligence and fellow-servant doctrines, formed the "unholy trinity" of defenses. These defenses allowed employers to conduct business without regard for employee safety, while leaving workers with little or no recourse when injured on the job. This attitude prevailed until the late nineteenth century when America's workforce looked to its legislatures for relief from the courts' pro-employer decisions.

B. Early Employer Liability Statutes

High rates of industrial injuries and deaths marked the late nineteenth century. While workers continued to bring suits, meager recoveries financially drained communities forced to support the mounting number of injured employees. Legislatures responded to increasing community outcry by passing employers' liability laws designed to level the legal playing field by reducing the employers' common law defenses. Legislatures specifically targeted the fellow-servant doctrine by directing statutes toward ultrahazardous occupations such as railroads and mining operations.

Two common law notions formed the foundation of these statutes. An employer's liability was either limited to the damage resulting from its own negligence, or limited to individuals for whom the respondeat superior doctrine made the employer

---

45. See id.
46. See Wager v. White Star Candy Co., 217 N.Y.S., 173, 175 (1924) (denying compensation for tuberculosis contracted due to damp, unsanitary workplace because girl was "fully aware of the conditions under which she worked") (cited in SOMERS, supra note 19, at 19).
47. See 1 LARSON, supra note 2, § 4.30, at 2-4.
48. See id. § 5.20, at 2-15.
49. See SOMERS, supra note 19, at 21.
50. See id.
51. See id.
generally responsible.\textsuperscript{52} None of the existing legislation offered relief for either the forty-two percent of employees injured in no-fault accidents or the twenty-nine percent who negligently caused their own injuries.\textsuperscript{53} Even those recovering under the evolving laws were often left destitute after deducting funeral, medical and legal expenses from their awards.\textsuperscript{54}

\textbf{C. Modern Workers' Compensation Laws}

Following the lead of both Germany and England, the United States first began experimenting with workers' compensation around the turn of the twentieth century.\textsuperscript{55} Increases in industrial accidents, combined with a lack of remedies available to injured employees, spurred states to create commissions responsible for investigating solutions to this problem.\textsuperscript{56}

During a 1910 conference in Chicago, representatives of these commissions drafted a Uniform Workmen's Compensation Law which "set the fundamental pattern of legislation."\textsuperscript{57} By 1920, all but eight states had adopted compensation acts and, by 1963, every state had enacted a regulatory scheme for workers' compensation.\textsuperscript{58} Employers saved the cost of defending tort liability suits by giving up the "unholy trinity" of defenses while employees' increased their chance of receiving some compensation by forfeiting their ability to sue for tort damages.\textsuperscript{59} Essentially, workers' compensation laws began to treat the cost of work-related, personal injuries as an expense of doing business which was passed on to the consumers.\textsuperscript{60}

\begin{footnotes}
\footnote{52. See 1 \textsc{Larson}, \textit{supra} note 2, § 4.50, at 2-8 (discussing the Georgia Act of 1855 (abrogating the fellow-servant defense for railway companies) and the Federal Employers' Liability Act of 1908 (stating that contributory negligence should only mitigate damages and that traditional common law defenses were inapplicable in cases of safety-statute violations)).}
\footnote{53. See \textit{id.} § 4.50, at 2-9 to 2-10 (citing German statistics indicative of American problem and confirmed, in part, by the Minnesota and Wisconsin Labor Departments).}
\footnote{54. See \textit{id.} § 4.50, at 2-10.}
\footnote{55. See \textit{id.} § 5.20, at 2-15.}
\footnote{56. See \textit{id.} "All legislation prior to the workers' compensation acts . . . [was based on the premise] that the employer was liable to the employee only for the negligence or fault of the employer or, at most, of someone whom the employer was generally responsible for under the respondeat superior doctrine." See \textit{id.} § 4.30, at 2-8.}
\footnote{57. Id. § 5.20, at 2-15.}
\footnote{58. See \textit{id.} § 5.30, at 2-25.}
\footnote{59. See \textit{id.} § 1.10, at 1-1.}
\footnote{60. See 1 \textsc{William R. Schneider}, \textsc{The Law of Workmen's Compensation} §1,}
\end{footnotes}
Eventually every state's compensation act incorporated the "arising out of and in the course of employment" standard for determining if an injury was compensable. Unfortunately, this standard created more litigation than any other in the compensation field. For ease of construction, courts traditionally interpreted the two parts of the phrase separately. "Arising out of... employment" referred to the causal connection between the injury and the employment, whereas "in the course of employment" referred to the time, place, and circumstances of the accident in relation to the employment. Although some courts insisted that the two requirements be met independently, this practice sometimes excluded injuries that were truly work-related. For instance, cases involving striking workers attacking non-striking employees attempting to get to work exemplify instances in which individuals were denied coverage because they failed the "in the course of employment" portion of the test. The failure occurred because the employees were not injured while working, but while going to work. Although employees are generally not in the course of employment at such times, these workers suffered injuries as a result of their employment. To remedy this flaw in the system, commentators suggest balancing the two parts of the requirement by allowing the strength of one portion to compensate for the deficiency of the other. Consequently, fair application of the rule that an injury arise out of and in the course of employment requires the evaluation of its two portions together instead of deciding either in a vacuum.

---

at 3 (2d ed. 1932).
61. See 1 LARSON, supra note 2, at 3-1.
62. See id.
63. See id. § 6.10, at 3-3.
64. See id.
65. See id.
66. See 2 LARSON, supra note 2, § 29.21(b), at 5-511 to 5-512 (citing Enterprise Foundry Co. v. Industrial Accident Comm'n, 275 P. 432 (Cal. 1929) (denying recovery to survivors of non-striking employee fatally shot by strikers on his way to work) and Walah v. Russek's Fifth Ave., 41 N.Y.S.2d 145 (1943) (denying compensation to survivors of employee fatally assaulted by striking workers while going home from work)).
67. See id.
68. See id.
69. See id. § 29.00, at 5-501; see also NACKLEY, supra note 13, at 13.
III. WORKERS' COMPENSATION IN MONTANA

A. Montana's Workers' Compensation Statute

Modeled after the British Compensation Act formula, Montana's workers' compensation statute requires an employer's insurance company to compensate an employee who suffers an injury arising out of and in the course of employment. Because no exact formula exists for determining whether an accident arises out of and in the course of employment, the facts and circumstances of each case are determinative. For example, a Glacier National Park hotel manager suffered injuries during a car accident while he was returning from a nearby lodge where he had replaced borrowed food, obtained money to stock the cash register, and discussed food transfers. Despite the manager consuming alcohol while at the neighboring lodge, the court decided the accident arose in the course of employment because the tasks performed just prior to injury were within his managerial discretion, and thus, reasonably connected to his employment. Conversely, the court denied coverage to an employee, injured while fighting with a co-worker, on the grounds that no reasonable connection existed between the cause of the injury and the employment.

Even though decisions are fact-specific, the pattern illustrated by these examples suggests that the "arising out of and in the course of employment" requirement contemplates that an employee be engaged in an action at least remotely connected to the employer's business. Montana's legislature and courts followed

70. See 1 Larson, supra note 2, § 6.10, at 3-1 (the British Compensation Act uses the "injury arising out of and in the course of employment" formula to determine compensation).


72. See Partoll v. Anaconda Copper Mining Co., 122 Mont. 305, 310-11, 203 P.2d 974, 977 (1949) (denying compensation to claimant for injuries sustained in automobile accident occurring after his shift because evidence was insufficient to show that employer gave claimant a letter to be mailed by claimant in another city).


74. See id.

75. See id. at 229, 815 P.2d at 586.


77. See also Pinyerd v. State Comp. Ins. Fund., 271 Mont. 115, 894 P.2d 932 (1995) (finding reasonable connection between employment and injury suffered during an assault by co-worker because company fostered intensely competitive atmosphere by pitting employees against each other for sales quotas and commissions without establishing any framework within which to compete).
this principle when considering workers’ compensation law.

1. The “Going to and from Work” Limitation

Despite the fact-specific nature of the decisions, Montana courts generally found that actions occurring as employees go to and from work fell outside the course and scope of employment. For instance, the court denied coverage to a claimant for an injury sustained while commuting to work. According to the Montana Supreme Court, only if transportation allowances are part of the employment contract, or recognized by legislative enactment, will injuries sustained while traveling to or from work be in the course of employment.

The Montana Legislature codified this “going to and from work” rule to exclude unpaid lunch breaks and the period before and after an employee’s shift from the definition of course of employment. A 1987 legislative amendment provided exceptions to this general rule for individuals whose travel relates to their employment. The exceptions include instances where (1) travel expenses are reimbursed as part of the employee’s benefits and the travel is necessitated by and on behalf of the employer as an integral condition of employment; or (2) travel is required by the employer as part of an employee’s duties. For example, if a payment for transportation is specifically provided for in an employment contract, then any injuries sustained en route are compensable because they fall within one of the delineated exceptions.

80. See id. at 365, 769 P.2d at 1259 (1989).
81. See MONT. CODE ANN. § 39-71-407(3) (1997) (stating that an employee who suffers an injury while traveling is not covered unless the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee’s benefits or employment agreement; and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or the travel is required by the employer as part of the employee’s job duties).
84. See Gordon v. H. C. Smith Constr. Co., 188 Mont. 166, 612 P.2d. 668 (1980) (finding death of employee killed while traveling en route to or from work fell within
Focusing on the level of control retained by the employer, courts draw a distinction between unpaid lunch breaks and short paid breaks. Lunch breaks, as well as travel at the beginning or end of a workday, are usually subject to the "going to and from work" rule because the employer relinquishes its authority over the employee. Injuries occurring during short paid breaks, on the other hand, fall within the purview of workers' compensation if the employer retains some authority over the employee.

2. The Montana Supreme Court's Analysis of Statutory Elements

Even if the injured employee's actions fall outside the "going to and from work" rule, the accident must still arise out of and in the course of employment if he is to recover under Montana's workers' compensation laws. Historically, Montana interpreted the terms of this requirement in the conjunctive. Accordingly, the claimant had to prove not only that the nature of the injury was work-related, but also that the injury occurred during a time and at a place associated with the employment.

The modern interpretation examines whether a reasonable connection exists between the injury and the employment. Frequently, this depends on the amount of authority exerted by the employer at the time of the injury. An injury may be compensable if (1) the activity was undertaken at the employer's request; (2) the employer, either directly or indirectly, compelled the employee's attendance at the activity; (3) the employer controlled or participated in the activity; and (4) both the employer and employee mutually benefitted from the activity. Instead of considering any one factor dispositive, courts following the mod-

---

85. See 1 Larson, supra note 2, § 15.54, at 4-181 to 4-182 (citing In re Helen F. Gunderson, No. 54-36 (U.S. Dept. of Labor, Empl. Comp. App. Bd., April 13, 1955) (stating that "drinking coffee . . . during recognized breaks in daily work hours is now so generally accepted in industrial life of our Nation as to constitute a work-related activity . . . so that engaging in such activity does not take an employee out of the course of his employment").

86. See id. § 15.54, at 4-181.

87. See id. § 15.54, at 4-181 to 4-184.

88. See Wiggins v. Industrial Accident Bd., 54 Mont. 335, 343, 170 P. 9, 9-10 (1918).


ern interpretation apply a totality of circumstances test when evaluating these factors. 91 Because the extent of employer authority is not necessarily clear, particularly with off-premises injuries, many disputed claims center around this question. 92

B. Montana's Common Law

Prior to 1996, the Montana Supreme Court had yet to decide whether injuries occurring during a short break arose out of and in the course of employment. 93 The court shed light on this issue, however, when interpreting the relationship between the workers' compensation statute and injuries sustained by employees during lunch breaks 94 and while traveling. 95

In 1947, the court held that an activity "sufficiently incidental" to employment arises out of and in the course of employment and awarded compensation to an employee injured while playing handball on his employer's premises during his lunch break. 96 Not only did the employer insist that the employees remain on the premises and on-call during their lunch breaks, but the supervisor generally allowed the employees to play handball during their lunch breaks. 97 The court found the injury incidental to employment because these factors created a sufficient causal connection between the handball game and the employment. 98 Thus, a compensable injury need not arise while an employee is performing a task directly related to employment, so long as it arises from an activity incidental to employment.

As previously mentioned, the Montana Supreme Court applied a four-part test to determine when an injury is work-related. 99 Montana first adopted this test in 1984 for a case involv-

91. See id.
92. See 1 Larson, supra note 2, § 15.54, at 4-183 to 4-192.
94. See Geary v. Anaconda Copper Mining Co. 120 Mont. 485, 188 P.2d 185, (1947).
96. Geary, 120 Mont. at 490, 188 P.2d at 187.
97. See id.
98. See id.
99. See supra text accompanying notes 90-91. See also Courser, 214 Mont. at 16-17, 692 P.2d at 419 (1984); Barthule v. Karman, 288 Mont. 477, 485, 886 P.2d 971, 976 (1994) (weighing factors and applying totality of circumstances test to decide substantial evidence existed to submit to the jury the question of whether Barthule was an employee of Karman).
ing the "going to and from work" rule, Courser v. Darby School District,\textsuperscript{100} noting that it is commonly applied in other jurisdictions.\textsuperscript{101} The factors of the Courser test include the following: "(1) whether the activity was undertaken at the employer's request; (2) whether the employer, either directly or indirectly, compelled [the] employee's attendance at the activity; (3) whether the employer controlled or participated in the activity; and (4) whether both [the] employer and [the] employee mutually benefited from the activity."\textsuperscript{102} The court said the "presence or absence of each factor may, or may not, be determinative and the significance of each factor must be considered in the totality of all attendant circumstances."\textsuperscript{103}

Applying these factors, the Courser court held that injuries suffered by a school teacher during a motorcycle accident were work-related because the accident occurred while he was returning to college for summer graduate classes.\textsuperscript{104} The court found the school district employer exerted control over the teacher by requiring that he earn a master's degree before being promoted.\textsuperscript{105} Moreover, the court found the mutual benefit element sufficiently satisfied because the claimant received a salary increase for completing the summer courses while the school district "received the benefit of maintaining a highly-qualified teaching faculty."\textsuperscript{106} By methodically comparing the facts of the case to the exceptions of the "going to and from work" rule, the court demonstrated its firm adherence to this rule for cases involving an employee injured while traveling.\textsuperscript{107} Unfortunately, the court's reasoning provided little guidance to lower courts facing decisions about the appropriateness of awarding compensation to non-traveling employees injured while off their work premises.

The court applied the Courser test nine years later when a trucker was injured in an accident after he resumed his delivery schedule following a six-hour visit with his brother.\textsuperscript{108} Finding

\textsuperscript{100} 214 Mont. 13, 692 P.2d 417 (1984).
\textsuperscript{101} See Courser, 214 Mont. at 16-17, 692 P.2d at 419.
\textsuperscript{102} Id. (citing Shannon v. St. Louis Bd. of Educ., 577 S.W.2d 949, 951-2 (Mo. 1979)).
\textsuperscript{103} Id. at 17, 692 P.2d at 419.
\textsuperscript{104} See id. at 15, 19, 692 P.2d at 418, 420.
\textsuperscript{105} See id. at 18-19, 692 P.2d at 420.
\textsuperscript{106} Id. at 17, 692 P.2d at 419.
\textsuperscript{107} See id. at 16-19, 692 P.2d at 418-20.
that his injury did not arise out of and in the course of employment, the court said he had temporarily abandoned his employment and his activities during the deviation provided no benefit to his employer. The court said that compensation for an injury incurred while traveling was only appropriate if the employer received some identifiable benefit.

The Montana Supreme Court expanded the applicability of the Courser test in 1994 by applying its factors to an injury that did not involve the "going to and from work" rule. The court upheld an award of compensation to a ranch hand injured while assisting a neighboring rancher. The court considered evidence indicating that the common practice among neighboring ranches was to allow ranch hands to help with various tasks at other ranches. A ranch hand was still considered an employee of, and was paid by, his original employer while helping the neighboring rancher. Testimony also suggested that the ranchers benefitted from helping each other. The court found that this evidence sufficiently satisfied the totality of circumstances requirement set forth in Courser.

Finally, in 1995, the court had an opportunity to decide whether an injury sustained by an employee while on break arose out of and in the course of employment. Instead of addressing the issue of whether or not the employee was on break when injured, the court applied the "going to and from work" rule. The employee was injured in a car accident after leaving work for a short time to purchase a newspaper and some pain medication. Finding that her injury occurred while on a personal errand, the court decided she was not acting in the course and scope of her employment because none of the statuto-

109. See id. at 355-57, 854 P.2d at 832; see also RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (limiting employer liability when an employee deviates from the course of his employment parallels principles of agency law which limit the master's liability for acts of a servant who has exceeded the scope of his employment).
110. See Dale, 258 Mont. at 355, 854 P.2d at 832.
112. See id. at 486-87, 886 P.2d at 977.
113. See id. at 486, 886 P.2d at 977.
114. See id.
115. See id.
116. See id.
118. See id. at 259, 901 P.2d at 1394.
119. See id. at 255-56, 901 P.2d at 1392.
ry exceptions to the "going to and from work" rule applied. 120

As the decisions discussed above suggest, the Montana Supreme Court typically evaluated the circumstances in which an employee was injured to determine if they were reasonably connected to the employment. 121 In making this determination, the court looked at whether the injuries occurred while the employee performed tasks incidental to employment, 122 while the employer exercised authority over the employee, 123 or while the employee performed a task of some identifiable benefit to the employer. 124 If the accident did not occur at the workplace, the court usually analyzed the facts under the "going to and from work" rule and denied coverage unless a designated exception applied. 125 Prior to the Carrillo decision, the court never directly addressed the issue of whether injuries suffered by an employee while on an authorized break arose out of and in the course of employment.

IV. THE CARRILLO DECISION

A. The Facts

Blue Cross Blue Shield of Montana employed Carol Ann Carrillo as a systems testing specialist in Helena. 126 To efficiently meet its business demands, BCBS organized its workforce into "cells" composed of a small group of workers and one supervisor. 127 Beth Lamping supervised Carrillo's cell. 128 Carrillo often sacrificed personal time, including time with her family, to meet the stringent demands of her job. 129 Even when working up to seventy-two hours a week, she often remained on call while
at home and cut her breaks short when needed.  

In fact, Carrillo's supervisor was the only person in her cell devoting more time to the job than Carrillo. 

BCBS realized the work environment was stressful and encouraged workers to maintain a healthy lifestyle. Carrillo took advantage of this policy by walking during ninety percent of her breaks. Apparently recognizing the close-knit working environment the cell structure facilitated, BCBS also allowed its employees, both supervisors and workers, to spend company time planning and throwing going-away parties for those employees either being promoted or leaving the company. Several employees, including Carrillo's supervisor, commented that events such as going-away parties benefited BCBS by "increas[ing] employee morale and work production."

After Beth Lamping, Carrillo's supervisor, decided to leave the company in 1993, her cell planned to give her a surprise party and a going-away gift. Although the cell saw the party and gift as a means of expressing their care and respect, they also felt such events were expected and customary. Carrillo and her co-workers decided to purchase a coffee mug for Lamping from a gift shop located a few blocks from BCBS's office. Carrillo agreed to pick up the mug. Carrillo never bought the mug nor did she return to work that day; a car struck her as she crossed an intersection near the gift shop.

B. Lower Court Rulings

Carrillo filed a timely claim with BCBS's workers' compensation insurer, Liberty Northwest Insurance (Liberty), seeking compensation for the injuries she sustained when the car struck her. Liberty denied her claim on the ground that the accident

130. See id.
131. See id.
132. See id. at 3; see also Carrillo v. Liberty Northwest Ins., 278 Mont. 1, 3, 922 P.2d 1189, 1191 (1996) (stating that although BCBS encouraged a healthy lifestyle among its employees, it did not require them to walk during breaks).
133. See Appellant's Brief at 8, Carrillo (No. 95-396).
134. See id. at 3, 6.
135. Id. at 6.
136. See Carrillo, 278Mont. at 3, 922 P.2d at 1191.
137. See Appellant's Brief at 9, Carrillo (No. 95-396).
138. See id. at 5.
139. See id. at 4.
140. See Carrillo, 278 Mont. at 2, 922 P.2d at 1190.
141. See id.
did not arise out of and in the course of employment because she had abandoned her employment. Carrillo then filed a Petition for Hearing with the Workers’ Compensation Court claiming that the accident occurred while she was on a paid break. Carrillo further contended that she had not abandoned her employment because purchasing gifts and giving going-away parties during employee breaks were customary and expected activities at BCBS.

The Workers’ Compensation Court based its decision solely on whether Carrillo met the requirements of section 39-71-407(3) of the Montana Code Annotated, and did not specifically find whether or not Carrillo was on break when injured. As noted, this section states the general rule that employees injured while traveling to and from work are not covered by the Workers’ Compensation Act unless their actions fall within one of the delineated exceptions. The exceptions include injuries sustained either during travel in which an employer provides transportation or reimburses an employee’s travel costs, or during travel “required by the employer as part of the employee’s job duties.” The Workers’ Compensation Court concluded that Carrillo was traveling when the accident occurred, but that none of the exceptions applied. Accordingly, the court ruled that her injury did not arise out of and in the course of her employment and denied her workers’ compensation benefits. Carrillo appealed the Workers’ Compensation Court’s decision.

142. See id. at 2-3.
143. See id. at 2.
144. See Appellant’s Brief at 9, Carrillo (No. 95-396).
145. See MONT. CODE ANN. § 39-71-407(3) (1997) (providing that an employee who suffers an injury or dies while traveling is not covered by this chapter unless the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee’s benefits or employment agreement; and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment or the travel is required by the employer as part of the employee’s job duties).
146. See Carrillo, 278 Mont. at 5, 922 P.2d at 1192.
147. See MONT. CODE ANN. § 39-71-407(3) (1997); see also Dale v. Trade St., Inc. 258 Mont. 349, 352, 854 P.2d 828, 829-30 (1993) (stating that the legislature amended section 39-71-407 of the Montana Code Annotated to codify exceptions to general workers’ compensation rule that actions occurring when employees are going to and from work are not within the course and scope of their employment).
149. See Carrillo, 278 Mont. at 5, 922 P.2d at 1192.
150. See id. at 4, 922 P.2d at 1191.
151. See id. at 2, 922 P.2d at 1190.

https://scholarship.law.umt.edu/mlr/vol59/iss1/8
C. Montana Supreme Court's Holding

The Montana Supreme Court reversed the Workers' Compensation Court by a narrow margin. Writing for the majority, Justice Trieweiler found the lower court erred by basing its decision solely on Carrillo's failure to meet the requirements of the "going to and from work" rule. Pointing to undisputed evidence, the court concluded that the "going to and from work" rule did not apply because Carrillo was on a fifteen-minute coffee break when her accident occurred. Accordingly, the Montana Supreme Court analyzed Carrillo on the basis of whether an employee injured during an authorized break is within the course and scope of employment. Although two other Montana cases addressed similar issues, the court considered Carrillo a case of first impression because no previous case involved an employee injured while on an authorized break. As such, the court not only looked to other jurisdictions for guidance, but relied on a respected treatise, Larson's Workers' Compensation Law, which states that short paid breaks are not typically subject to this rule or its exceptions so long as the employer retains some authority over the employee. Ultimately, the court ruled that Carrillo was entitled to workers' compensation benefits because her injury occurred while she was acting within the course and scope of her employment.

Justice Erdmann dissented. Although he agreed that section 39-71-407(3) of the Montana Code Annotated was not applicable, he believed that "the trip to obtain the [going-away gift] constituted a substantial personal deviation from employment." Thus, Justice Erdmann believed that workers' compensation should not cover Carrillo's injury because running a

152. See id.
153. See id. at 8, 922 P.2d at 1194.
154. See id. at 5-6, 922 P.2d at 1192-93 (apparently considering it significant that the Workers' Compensation Court made no specific finding that Carrillo was not on break at the time of her injury).
155. See id. at 7, 922 P.2d at 1193.
157. See Carrillo, 278 Mont. at 9, 922 P.2d at 1194.
158. See id. at 9, 922 P.2d at 1194-95. See also infra notes 183, 199-203 and accompanying text.
159. See Carrillo, 278 Mont. at 12, 922 P.2d at 1196.
160. See id. at 12, 922 P.2d at 1197 (Erdmann, J. dissenting).
161. See id. at 14, 922 P.2d at 1198 (Erdmann, J. dissenting).
162. Id. at 16, 922 P.2d at 1199 (Erdmann, J. dissenting).
personal errand during break put her outside the scope of employment.\textsuperscript{163}

V. ANALYSIS

The \textit{Carrillo} decision will undoubtedly have a significant pro-employee impact on future workers' compensation rulings. Previous holdings exposed the court's discomfort with awarding an injured employee benefits without a showing that the injury was reasonably connected to the employment.\textsuperscript{164} As noted, past decisions hinged on whether the injury was incidental to employment either because the employer directly influenced the employee's actions at the time of the injury or because the employer derived some benefit from those actions.\textsuperscript{165} By comparison, the \textit{Carrillo} decision will make qualifying for workers' compensation coverage easier in three ways. First, the court established a means for determining when an employee, injured off-premises, is on break, and therefore exempt from the "going to and from work" rule. Next, the court redefined the level of employer control necessary to constitute adequate employee influence. Finally, the court opted to virtually ignore the issue of whether the employer benefitted from the employee's actions.\textsuperscript{166}

To decide whether an injury is reasonably connected to employment, the court adopted a test promulgated by Larson's treatise on workers' compensation law and frequently applied by other jurisdictions.\textsuperscript{167} Fortunately, by applying the test, the court charted a course for Montana's trial courts by articulating the variables necessary for determining when an injury, sustained by an employee during an authorized break, arises out of and in the course of employment.\textsuperscript{168} For example, the portion focusing on employer control allows courts more latitude than that previously taken by the Montana Supreme Court when deciding related issues. The court's failure to explain why it

\textsuperscript{163} See id. at 17, 922 P.2d at 1199 (Erdmann, J. dissenting).


\textsuperscript{165} See Geary, 120 Mont. at 490, 188 P.2d at 187; see also Courser, 214 Mont. at 17-19, 692 P.2d at 419-20.

\textsuperscript{166} See Carrillo, 278 Mont. at 11-12, 922 P.2d at 1196 (referencing employer benefit merely by stating that Department of Labor acknowledges that breaks serve the employer's interests).

\textsuperscript{167} See id. at 9, 922 P.2d at 1194-95. Variables of the test are presented infra in text accompanying note 183.

\textsuperscript{168} See Carrillo, 278 Mont. at 11-12, 922 P.2d at 1195-96.
ignored the requirement that the employer derive some benefit from the employee's activities—a requirement mandated in previous workers' compensation decisions—may create confusion for lower courts in the future. Preferably, this relaxed standard indicates the court's conscious choice to make workers' compensation more readily available instead of a means for arriving at the particular result desired in this case.

A. Rationale for Determining if an Employee Is on an Authorized Break

The majority's entire decision rested on its determination that Carrillo's injuries arose out of and in the course of employment while on an authorized break, as opposed to occurring while she made a personal deviation from work. To begin this analysis the court needed to establish that Carrillo was indeed on break. Because the lower court made no specific finding as to whether Carrillo was on break, the majority made that determination itself. The court arrived at its finding by comparing the circumstances surrounding Carrillo's accident to BCBS's break policy and by accepting Carrillo's affirmative answer at trial when asked if she was on break when injured. Although BCBS did not require employees to take breaks, it allowed them to take two fifteen- to twenty-minute breaks each day. Employees were free to break in the afternoon any time between about two o'clock and three-thirty. Carrillo testified that after leaving her office building at two-fifteen, she had enough time to purchase the going-away gift, pick up a co-worker at BCBS, grab refreshments, and still make it back to work within twenty minutes. This testimony, combined with Carrillo's direct assertion that she was on break and the fact that the injury occurred during the time allotted for afternoon breaks, convinced the court that Carrillo was on break when injured.

Once the court found that Carrillo's injuries happened while she was on break, it explained how the lower court's reliance on

169. See id. at 16, 922 P.2d at 1198 (Erdmann, J., dissenting).
170. See id. at 6, 922 P.2d at 1193.
171. See id. at 5-6, 922 P.2d at 1192.
172. See id. at 6, 922 P.2d at 1192.
173. See id.
174. See id. at 6, 922 P.2d at 1193.
175. See id. at 8, 922 P.2d at 1194.
the "going to and from work" rule was erroneous. According to Larson's treatise on workers' compensation, unpaid lunch breaks, like trips at the beginning or end of a workday, are subject to the "going to and from work" rule, but shorter paid breaks are not. The distinguishing characteristics are the level of control exercised by the employer and whether the time is paid. Individuals taking unpaid lunch breaks, off-premises, typically enjoy more freedom because the employer's control is suspended. Conversely, those taking short paid breaks--even off-premises--are subject to substantial control by the employer if the employer limits the duration, distance from the business, and activities permitted during the break. The court's analysis clearly distinguished between off-premise movements during a paid break and unpaid travel subject to the "going to and from work" rule.

B. Employer's Control Over Employee's Actions

The Montana Supreme Court focused on whether an employee, injured while on break, was acting within the course of employment or was deviating from employment. In examining this question, the court concentrated on the amount of authority BCBS exercised over Carrillo's activities during the time she was injured. Relying on a list of factors discussed in Larson's treatise on workers' compensation, the court methodically applied each of the following variables to the facts of the Carrillo case.

If the employer, in all circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment . . . . [Relevant variables include] . . . whether the interval is a right fixed by the employment contract, whether it is a paid interval, whether there are restrictions on where the employee can go during the break, and whether the employee's activity during the period

176. See id.
177. See id. at 7, 922 P.2d at 1193 (citing 1 Larson, supra note 2, §§ 15.51, 15.54).
178. See id. at 8, 922 P.2d at 1194 (citing 1 Larson, supra note 2, § 15.54).
179. See id.
180. See id. at 7-8, 922 P.2d at 1193-94 (citing 1 Larson, supra note 2, § 15.54).
181. See id. at 11-12, 922 P.2d at 1195-96.
182. See id.
constituted a substantial personal deviation.\(^{183}\)

The court concluded that Carrillo satisfied each of the relevant variables.\(^{184}\) The court found Carrillo's testimony, along with the lower court's finding that employees were entitled to a fifteen-minute break in both the morning and the afternoon, satisfied the first variable requiring the right be fixed by contract.\(^{185}\) Next, the court satisfied the paid interval variable by accepting Carrillo's testimony that breaks were paid time.\(^{186}\)

The court's analysis of the third variable, whether the employer restricted the employee's freedom during breaks, illustrates its comfort with applying a less stringent standard. First, the court disposed of this variable by pointing to Carrillo's testimony that her supervisor sometimes asked her to postpone her break and occasionally called her back early.\(^{187}\) Allowing such occasional acts by a supervisor to satisfy this requirement is more relaxed than the threshold imposed by the court in previous decisions. For instance, in Geary v. Anaconda Copper Mining Co.,\(^{188}\) the employer's insistence that garage employees always remain on the premises and on-call during lunch satisfied this requirement.\(^{189}\) Similarly, the court decided the employer school district in Courser v. Darby School District\(^ {190}\) surpassed the threshold by mandating that all teachers earn master's degrees before receiving promotions and salary increases.\(^ {191}\) Unlike these earlier decisions, the Carrillo court seemed satisfied with occasional requests of a particular employee as opposed to consistent rules applied to all employees. This factor is significant, even though the earlier cases did not involve injuries occurring while an employee was on break, because requiring consistent rules might reasonably apply to a variety of employment-related injuries. The lack of such a requirement implies that a lower threshold is acceptable when an employee is injured while on break.

Finally, the court disposed of the fourth requirement—that the activity not constitute a substantial personal deviation—by

\(^{183}\) 1 Larson, supra note 2, § 15.54, at 4-183 to 4-184.
\(^{184}\) See Carrillo, 278 Mont. at 11-12, 922 P.2d at 1195-96.
\(^{185}\) See id.
\(^{186}\) See id. at 11, 922 P.2d at 1196.
\(^{187}\) See id. at 11-12, 922 P.2d at 1196.
\(^{188}\) 120 Mont. 485, 188 P.2d 185 (1947).
\(^{189}\) See Geary, 120 Mont. at 490, 188 P.2d at 187.
\(^{191}\) See Courser, 214 Mont. at 18-19, 692 P.2d at 420.
noting that BCBS, "not only acquiesced in the employees leaving the building during break, but gave them little choice because of the inadequate break facilities [provided in the building]." 192 The employer's acquiescence in the employees planning and staging going-away parties, along with the supervisor's routine participation in the parties, proved persuasive as well. 193 Unlike the dissent, 194 the majority did not think Carrillo was engaged in a personal errand simply because a supervisor had not asked her to purchase the gift. 195 Conversely, in Strickland, the court decided an employee was on a personal errand, in part, because her employer had not required her to make the trip she was on when injured. 196 Nevertheless, both the acquiescence by the employer and the regularity of the going-away parties established a reasonable basis for finding Carrillo had not substantially deviated from the course of her employment.

The court's reasoning is consistent with that used by other jurisdictions facing similar facts. 197 Like the Montana Supreme Court, many courts apply the Larson variables when analyzing this issue. 198 Courts frequently award compensation to an employee injured while on an authorized break if the employer acquiesced in the employee's participation in the activity on a regular basis. 199 Additionally, courts often mandate benefits if the employee's conduct falls short of a substantial deviation from the course of employment. 200 A Maryland court, for example,
concluded that a claimant had not abandoned his employment by going to a nearby carry-out restaurant during his break, in part, because his employer had repeatedly acquiesced in that activity in the past. Likewise, an Oregon court reached the conclusion that an injury arose out of and in the course of employment when an employee slipped while returning from a nearby restaurant where he and other employees customarily spent their fifteen-minute coffee break. The Oregon court decided the employer exercised control over the employee because a supervisor accompanied him to the restaurant, the employee was paid for the break, and the employer acquiesced in the activity. Consequently, application of the Larson variables not only enabled the court to reach a fair decision in Carrillo, but also provided direction for future courts analyzing whether an employer retained adequate control over an employee injured while on break.

C. Benefit Derived By Employer

Although the Larson criteria provide a fairly straightforward test, the court's analysis suffered because it neglected to address the issue of whether Carrillo's employer derived any benefit from her activities. Further, the specific factors analyzed by the Carrillo court were somewhat different from those used in earlier decisions. Nevertheless, each case decided by the court has consistently focused on the employer's control over the worker's activities at the time of injury.

The only significant distinction is the absence in the Carrillo analysis of any emphasis on whether or not the employer derived some benefit from the employee's actions. The only mention of employer benefit was a reference to the Department of Labor's recognition that breaks serve the interests of employer. Burying this reference in the section establishing that a break is a right fixed by contract diluted the potential strength of this point. This failure to adequately address the benefit issue is particularly unsettling in light of the testimony by several em-

201. See King Waterproofing Co., 524 A.2d at 1249.
203. See id.
204. See supra notes 99-103 and accompanying text.
ployees, including one supervisor, that going-away parties "benefit[ed] BCBS because they increase[d] employee morale and work production." 206 Perhaps the court felt restricted since the lower court made no finding of fact on this issue. If so, this is inconsistent with the court's decision to make its own finding that Carrillo was on break despite the lower court's failure to do so. 207 Regardless, the findings contained enough references to the going-away activities to justify the court addressing the issue of whether the employer derived any benefit.

By focusing on the Larson variables exclusively, the court also overlooked an opportunity to align its reasoning with its own earlier decisions on related matters and with previous holdings by other jurisdictions facing exactly the same issue. In Courser, the court awarded compensation, in part, because the employer received a benefit from the employee's activities. 208 Going even further in Dale, the court unequivocally stated that the employer must receive some identifiable benefit before an injury sustained while traveling is compensable. 209 Likewise, both Maryland and Oregon courts were swayed toward awarding compensation because an employer derived a benefit from its employee's activities. 210 A similar analysis, examining whether the employer received some benefit from the workers' activity, could prove relevant when deciding the compensability of injuries occurring while an employee is on break. Unfortunately, by failing to thoroughly address this issue, future courts are left to wonder whether or not a benefit received by an employer should play into deciding if an injury arose out of and in the course of employment. Applying the employer benefit analysis used in earlier workers' compensation decisions could have eliminated this confusion.

206. Appellant's Brief at 6, Carrillo (No. 95-396).
207. See Carrillo, 278 Mont. at 5-6, 922 P.2d at 1192-93.
VI. CONCLUSION

In Carrillo, the court expanded the scope of Montana's workers' compensation statute by distinguishing between off-premises breaks and travel subject to the "going to and from work" rule, by relaxing the requirement that the employer exercise control over the employee, and by ignoring the requirement that the employer derive a benefit from the employee's actions. The court provided a clear map for deciding when an off-premises injury, sustained by an employee during an authorized coffee break, arises out of and in the course of employment by analyzing the facts in terms of a specific set of factors. Further, this holding is fairly consistent with that of other jurisdictions interpreting similar workers' compensation statutes and with a respected workers' compensation treatise. As such, future decisions based on the reasoning in Carrillo should withstand further judicial scrutiny so long as the issue of employer benefit does not undermine the analysis.

Ultimately, this decision more closely aligns workers' compensation law with current workplace trends. As employers have begun recognizing the relationship between employee morale and business productivity, increasingly they have implemented programs providing for improved employee benefits such as recreational and social breaks, more comprehensive insurance, and flexible schedules. These shifts in employer attitudes signal a trend toward improved overall flexibility in the workplace. As such, legislatures should strive to parallel these gains when enacting laws affecting employment matters. The Montana Supreme Court's consideration of the employer's policy of requiring flexibility in the timing of daily breaks and the employer's support of going-away parties illustrates the court's willingness to acknowledge the realities of the progressive workplace and adjust relevant laws accordingly.