Workmen's Compensation Act—Injury Arising Out of and in the Course of Employment—Injured on Transportation Train.

An employe who is injured while traveling in a car furnished by his employer, who is transferring a camp from one place to another, although such transportation is without charge and the employe receives no pay during such time, is injured "in the course of his employment."

March 28, 1917.

Industrial Accident Board,
Helena, Montana.

Gentlemen:

You have submitted to me the files in connection with the claim of William Boyce, employe of the Mann Lumber Co., for compensation for an injury.

As nearly as I can ascertain from the files, it appears that Boyce on November 30th, was riding in the camp cook car belonging to the Mann Lumber Co., which was being transported from Haugan to Henderson over the Milwaukee Railroad; that Boyce had not been paid off and was going to Henderson to work in the logging camp there, of the Mann Lumber Co.; that his pay ceased on the night of November 29th, when he finished work at the place he was engaged, and that his pay would begin again when he started work at the place to which he was being moved; that at the time of the accident, he was in the cook car sitting by the stove, and was under the influence of intoxicating liquor, and that he had been cautioned by the cook to look out for the hot water barrel; and that when this train took the siding at Henderson, the front trucks of the cook car left the tracks, overturning the hot water upon Boyce and scalding him. It is contended by the Insurance Company, the Mann Lumber Company being subject to the provisions of Compensation Plan No. 2, that the injury did not arise out of and in the course of his employment.

The question as to whether or not the accident happened in the course of his employment, is somewhat analagous to the question of whether or not the relationship of master and servant still existed within the meaning of the fellow servant rule of the common law. In the case of O'Brien v. Boston & Albany Railroad, 138 Mass. 387, the foreman of a gang of men employed by a railroad in track repairing, ordered them to quit work at fifteen minutes before the usual hour to take a train which was to carry them to a certain station, without payment of fare, according to a monthly custom, to receive their wages. One of the men, while running along the track to catch the train was corporation, at the time he was injured and was a fellow servant with others whose act caused the injury.

In McGuirk v. Shattuck, 160 Mass., 45, a woman employed as a laundress, while being conveyed, either gratuitously or as a part of the contract of employment, from her house to that of her employer, in

his wagon driven by his coachman, was injured by the negligence of the coachman. It was held that she was a fellow servant of the coachman and was to be regarded as in the service of her employer at the time of the accident. The Court used the following language:

> "* * * Whether the transportation of the plaintiff was entirely gratuitous, as it seems to have been, or whether it was in pursuance of such an understanding between the parties that it may be deemed to have been a part of the contract, in either case it was incident to the service which the plaintiff was to perform, and closely connected with it."

The following quotation is from the case of Cicalese v. Lehigh Valley Railroad Co., 75 N. J. Law at 900-1:

> " * * * The relation of master and servant continues during the carriage of the servant to and from his work, when done by the master, or with his consent, where from the character of the service such transportation is beneficial both to the master and servant. In the case under review the servant was working at different points along the railroad of the defendant, and it was the custom of defendant to furnish a sufficient number of hand cars to take all of the men belonging to the gang to a destination convenient to their homes, and the furnishing of such cars by defendant, and their use by the plaintiff for such purpose, being a custom availed of by both parties, it became an element of the employment, accepted and acted on by the parties as a part thereof.
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> In Bowles v. Ind. Ry. Co., 27 Ind. App. 672, the plaintiff was a workman engaged in the construction of a trolley line, and was transported to and from his work in a wagon drawn by horses furnished by defendant. While plaintiff was being carried to his work the horses ran away, and he was injured. In holding that the relation of master and servant continued to exist during such conveyance, the court said: 'In view of the migratory character of the service, such transportation facilitated the prosecution of the work, and was beneficial to both employer and employes. It was by the conduct of the parties, if not by their express agreement, an ingredient and instrumentality of the employment. * * * * It was arranged between the employer and employe that the latter would thus go and come with his fellow-workmen, thereby expediting the work with greater convenience for all concerned.' "

It has been held in two English cases, that a miner injured while riding from his home to the mine on a train provided by the employer, in accordance with the terms of the contract of employment, suffers injury from an accident, arising out of the employment.

In Donovan's Case, 217 Mass., 76, 104 N. E., 431, ANN. Cases, 1915 C. 778, 4 N. C. C. A. 549, it was held that if the workmen employed by one, whose business was cleaning out catch basins, were accustomed to be transported in a wagon furnished by their employer to and from the catch basins to be cleaned, and such employes with the knowledge

and consent of their employer could go back at the end of each day's work in this wagon to the employer's barn, if they wished to do so, this can be found to have been one of the incidents of their employment; and, if one of these workmen is injured while thus going home in the wagon at the end of his day's work, his injury can be found to have been one "arising out of and in the course of his employment" within the meaning of the provision of the workmen's compensation act.

In this case, the Massachusetts Court expressed the rule as follows, on pages 77 and 78:

> "There have been several decisions in England as to when and how far an employee can be said to have been in the employ of his master, while traveling to and from his work in a vehicle or means of conveyance provided by the latter, and how far injuries received in such a conveyance can be said to have arisen out of and in the course of the employment. Many of these decisions have been cited and discussed by Professor Bohlen in 25 Harvard Law Review, 401, et seq. From his discussion and the cases referred to by him, and from the later decisions of the English courts, the rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract. * * * The finding of the Industrial Accident Board that Donovan's transportation was 'incidental to his employment' fairly means, in the connection in which it was used, that it was one of the incidents of his employment, that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it well may be regarded as having been adopted by them as one of its terms."

Honnold on Workmen's Compensation, Section 110, quotes in part from the general rule of the Massachusetts court, and then adds: "Pursuant to this rule, an employe is in the course of employment if he has a right to the transportation, but not if it is gratuitous or a mere accomodation."

In view of the fact that the injured employe in this case was being transported by the Lumber Company from one place of employment to another place of employment in cars belonging to the Company, although he may not have received pay for that day, yet the

transportation was a part of his contract of service, and therefore, I am of the opinion that the injury was received "in the course of his employment".

Respectfully,
S. C. FORD,
Attorney General.