

January 2011

## It Has to End Somewhere: Feiereisen v. Newpage Corp. and the Scope of the Employment Contract

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### Recommended Citation

Benjamin R. Hutchinson, *It Has to End Somewhere: Feiereisen v. Newpage Corp. and the Scope of the Employment Contract*, 64 Me. L. Rev. 325 (2011).

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IT HAS TO END SOMEWHERE: *FEIEREISEN V. NEWPAGE CORP.* AND THE SCOPE OF THE EMPLOYMENT CONTRACT

*Benjamin R. Hutchinson*

- I. INTRODUCTION
- II. WORKERS' COMPENSATION AND THE EMPLOYMENT CONTRACT
  - A. *Workers' Compensation in Maine and What Defines an Employee*
  - B. *The Employment Contract and Workers' Compensation in Other Jurisdictions*
- III. THE *FEIEREISEN* DECISION
- IV. ANALYSIS
  - A. *The Public Streets Rule and the Exceptions Thereto*
  - B. *Why the Employment Contract Should Not Be Extended to Include Travel to and From Mandatory Mediation*
- V. CONCLUSION

## IT HAS TO END SOMEWHERE: *FEIEREISEN V. NEWPAGE CORP.* AND THE SCOPE OF THE EMPLOYMENT CONTRACT

*Benjamin R. Hutchinson\**

### I. INTRODUCTION

In January of 2008, Kurt Feiereisen was driving to attend a mediation meeting regarding his workers' compensation claims when he was injured in a car accident.<sup>1</sup> At the time, Feiereisen was pursuing three separate claims against Newpage Corporation for bodily injuries that he had sustained while working for the company during the years of 1987, 1997, and 2007.<sup>2</sup> In June of 2008 he petitioned for compensation awards related to the injuries from all four occasions.<sup>3</sup> The hearing officer granted awards for the three earliest injuries, but denied compensation for the injury sustained during the car accident in 2008, claiming that this injury did not occur during the course of employment.<sup>4</sup> Feiereisen appealed the decision of the hearing officer, and the Law Court granted review, seeking to address the sole question of whether "the injury resulting from a car accident that occurred en route to a workers' compensation mediation arose out of and in the course of employment."<sup>5</sup>

The Law Court answered that question in the negative, and affirmed the decision of the Workers' Compensation Board.<sup>6</sup> Justice Gorman,<sup>7</sup> writing for the majority, asserted that because Newpage had neither control over the risk of the car accident, nor responsibility over the automobile or the driving public at the time, it could not be held responsible for the injuries that Feiereisen sustained in the accident.<sup>8</sup> There were dual rationales for arriving at this conclusion. First, the majority discussed the "public streets rule"<sup>9</sup> and the exceptions thereto,<sup>10</sup> and ultimately decided that Feiereisen's injuries from the car accident were not covered by any exception to the rule.<sup>11</sup> Next, the majority debated whether the mediation

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\* J.D. Candidate 2012. The author would like to thank Professor Jennifer Wiggins for advising on this case note.

1. Feiereisen v. Newpage Corp., 2010 ME 98, ¶ 3, 5 A.3d 669.

2. *Id.* ¶¶ 2-3.

3. *Id.* ¶ 4.

4. *Id.*

5. *Id.* ¶ 5.

6. *Id.* ¶ 13.

7. It is interesting to note that Justice Gorman was formerly a member of the Maine Workers' Compensation Commission. *Supreme Court Justice Biographies*, MAINE.GOV (2011), [http://www.courts.state.me.us/maine\\_courts/supreme/justices\\_bios.html](http://www.courts.state.me.us/maine_courts/supreme/justices_bios.html).

8. Feiereisen, 2010 ME 98, ¶ 13, 5 A.3d 669.

9. *Id.* ¶ 7. The public streets rule asserts that an accident occurring during travel to and from a place of employment and off the employer's premises is not compensable. *Id.* (citing Waycott v. Beneficial Corp., 400 A.2d 392, 394 (Me. 1979)).

10. *Id.* ¶ 8.

11. *Id.* ¶ 13.

was in the “interests of the employer”<sup>12</sup> and ultimately decided that because Feiereisen’s participation in the mediation was not in the interests of the company, it was not part of the employment contract.<sup>13</sup>

Justice Jabar was joined by Justice Alexander in dissent.<sup>14</sup> The dissent focused on a “significant [statutory]”<sup>15</sup> change in worker’s compensation law”<sup>16</sup> and asserted that travel to the mediation meeting was “incident to employment.”<sup>17</sup> The dissent further argued that the statute altered the impact of prior case law upon Feiereisen’s situation,<sup>18</sup> and indicated that attendance at mandatory mediation should fall within the scope of the employment contract.<sup>19</sup> The dissent was reinforced by an exception to the public streets rule, under which it was claimed that Feiereisen’s car accident occurred during an “activity incident to employment.”<sup>20</sup>

This Note begins in Part II with a discussion of the history of workers’ compensation in Maine, with particular focus on the scope of the employment contract, and then goes on to discuss the treatment of the same subjects in other jurisdictions. In Part III, this Note evaluates the *Feiereisen* decision, with focus on how the Law Court determined the scope of employment under relevant legal principles, and how that determination affected the compensability of injuries that occur during travel to workers’ compensation mediation. Part IV provides an analysis of the public streets rule and the exceptions thereto, and discusses why the employment contract should not include travel to and from mandatory mediation. This Note, in Part V, concludes that the majority opinion used a sound approach to define the scope of the employment contract for the purposes of workers’ compensation claims, and that an injury resulting from a car accident that occurred en route to a mediation meeting should not be compensable.

## II. WORKERS’ COMPENSATION AND THE EMPLOYMENT CONTRACT

### A. Workers’ Compensation in Maine and What Defines an Employee

Workers’ compensation is in essence a statutorily-mandated agreement between the employer and employee to compromise in the event the employee suffers injury or disease in the course of employment<sup>21</sup>:

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12. *Id.* ¶¶ 10-11.

13. *Id.* ¶ 13.

14. *Id.* (Jabar, J., dissenting).

15. ME. REV. STAT. tit. 39-A, § 313 (2010) (dealing with the reciprocal obligations of employer and employee to attend workers’ compensation mediation).

16. *Feiereisen*, 2010 ME 98, ¶ 19, 5 A.3d 669 (Jabar, J., dissenting).

17. *Id.* ¶ 22.

18. *Id.* ¶¶ 18-19 (citing *Dorey v. Forster Mfg. Co.*, 591 A.2d 240 (Me. 1991)). *Dorey* held that an injury incurred by an employee while she was retrieving records to pursue a workers’ compensation claim did not arise out of and in the course of employment. *Dorey*, 591 A.2d at 241-42.

19. *Feiereisen*, 2010 ME 98, ¶ 22, 5 A.3d 669 (Jabar, J., dissenting).

20. *Id.*

21. See Stephen W. Moriarty, *Workers’ Compensation and Employer Immunity: The “Theoretical Superstructure” Endures*, 13 ME. B. J. 290, 290 (1998). “Stated simply, the Workers’ Compensation Act gives employees injured on the job an administrative remedy, without regard to fault, in exchange for employer immunity from civil damages for the injury.” *Id.*

Once a workers' compensation act has become applicable . . . it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.<sup>22</sup>

The first workers' compensation statute in Maine took effect on January 1, 1916.<sup>23</sup> Since that date, "employers have been immune from civil actions which otherwise could have been brought by employees who have sustained occupational injuries or diseases."<sup>24</sup> The exclusivity and immunity provisions of the statute "reflect a legal and social compromise shared with virtually all other jurisdictions in the country."<sup>25</sup> The current version of the Workers' Compensation Act (the Act) in Maine was passed in 1992.<sup>26</sup>

The entitlement of an injured employee to workers' compensation does not come without preconditions; it is governed under an applicable section of the Act, which reads: "[i]f an employee . . . receives a personal injury arising out of and in the course of employment or is disabled by occupational disease, the employee must be paid compensation and furnished medical and other services by the employer who has assented to become subject to this Act."<sup>27</sup> The decision on whether or not an employee is entitled to workers' compensation is by necessity a multi-layered analysis. In determining the scope of activities considered to be within the employment contract, the words "arising out of and in the course of employment" are construed as having central importance.<sup>28</sup> Prior to even considering whether or not an activity arose out of and in the course of employment, a definition of the employment contract itself must be taken into account.

The scope of the employment contract is partially defined by the extent to which the employer consents<sup>29</sup> to accept responsibility over the actions of an

22. 6 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 100.01[1] (2009).

23. Moriarty, *supra* note 21, at 290; see P.L. 1915, ch. 295, § 48.

24. Moriarty, *supra* note 21, at 290.

25. *Id.* See also 1 ARTHUR LARSON & LEX K. LARSON, *Larson's Workers' Compensation Law* § 1.01 (2009).

26. ME. REV. STAT. tit. 39-A, § 1 (2010). See also Maine Bureau of Insurance, *An Employers' Guide to Workers' Compensation Insurance in Maine*, MAINE.GOV (Dec. 15, 2011), <http://maine.gov/pfr/insurance/consumer/workcomp.htm>.

27. ME. REV. STAT. tit. 39-A, § 201(1) (2010). The "arising out of and in the course of employment" language is a relic from the original Workers' Compensation Act in Maine. See Helen B. Mailman's Case, 118 Me. 172, 180, 106 A. 606, 610 (1919).

28. See *Standring v. Town of Skowhegan*, 2005 ME 51, ¶ 11, 870 A.2d 128; *Cox v. Coastal Prods. Co.*, 2001 ME 100, ¶ 8, 774 A.2d 347; *Husvar v. Engineered Prods., Inc.*, 2000 ME 132, ¶ 5, 755 A.2d 498; *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158-59 (Me. 1995); *Morse v. Laverdiere's Super Drug Store*, 645 A.2d 613, 614 (Me. 1994); *Somes v. Flint Logging*, 635 A.2d 941, 942 (Me. 1993); *Comeau v. Me. Coastal Servs.*, 449 A.2d 362, 365-67 (Me. 1982); *Nadeau v. S. Berwick*, 412 A.2d 392, 393-94 (Me. 1980); *Metcalf v. Marine Colloids, Inc.*, 285 A.2d 367, 369 (Me. 1972).

29. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. f (Tentative Draft No. 2, 2009). "An employer must consent to receive the services of an employee. Consent to accept services can be manifested through overt action or statement or through acquiescence." *Id.*

employee, and this concept is described in the doctrine of *respondeat superior* liability.<sup>30</sup> Mere receipt of payment for services is often not enough to be considered an employee.<sup>31</sup> This limitation on the scope of the employer/employee relationship is intended to prevent the employer from remaining vicariously liable for the acts of the employee over which the employer has no control.<sup>32</sup> Thus, a “right-to-control” test was the early common law solution to defining the employment contract.<sup>33</sup> There are seminal cases from England which influenced the development of this doctrine in the United States, especially with regard to its treatment of the differentiation between employees and independent contractors.<sup>34</sup> As suggested by the Restatement (Third) of Employment Law:

Distinguishing employees from independent contractors by focusing primarily on the master’s right to control the “physical conduct” of employees is an understandable approach to setting the scope of the principal’s vicarious or “respondeat superior” liability. Such enterprise liability would seem appropriately predicated on the principal’s ability to control potentially tortious acts of its agents. . . . The right-to-control test was first developed in part to protect consumers or purchasers from vicarious liability for the acts of service providers they could not control.<sup>35</sup>

With a more developed understanding of why and how the employment contract must be defined, we are better equipped to investigate the scope of the contract, and to determine what actions do and do not arise out of and in the course of employment. This determination is influenced to a large extent by the law of master and servant, also known as the law of agency. In short, the terms of employment are those dictated by the master.<sup>36</sup>

Since *Comeau v. Maine Coastal Services*<sup>37</sup> was decided in 1982, the Law Court has used the same set of standards to determine whether an injury arose out of and in the course of employment.<sup>38</sup> These eight factors include:

30. *Id.*, reporters’ notes, cmt. a.

31. *Id.* cmt. b. “A statute . . . may contain express exclusions from its definition of ‘employee’ for purposes of the statute’s coverage. The National Labor Relations Act, for instance, excludes agricultural laborers, domestic servants, and supervisors, as well as independent contractors.” *Id.* cmt. h.

32. *Id.*, reporters’ notes, cmt. a.

33. *Id.*

34. *Id.* See, e.g., *Quarman v. Burnett*, (1840) 151 Eng. Rep. 509 (K.B.); 6 M. & W. 499 (involving a failed attempt to hold the hirer of a horse-pulled coach vicariously liable for the negligence of the driver); *Laugher v. Pointer*, (1826) 108 Eng. Rep. 204 (K.B.); 5 B. & C. 547 (same).

35. RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. a (Tentative Draft No. 2, 2009).

36. RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a (1957).

The word ‘employment’ means the subject matter as to which the master and servant relation exists. The phrase ‘scope of employment’ means the extent of this subject matter and denotes the field of action within which one is a servant. The manifestations of the master determine what conduct may be within the scope of employment, since it includes only acts of the kind authorized, done within limits of time and space which approximate those created by the authorization.

*Id.*

37. 449 A.2d 362 (Me. 1982).

38. See *Feiereisen v. Newpage Corp.*, 2010 ME 98, ¶ 6, 5 A.3d 669; *Strandring v. Town of Skowhegan*, 2005 ME 51, ¶ 11, 870 A.2d 128; *Cox v. Coastal Prods. Co.*, 2001 ME 100, ¶ 8, 774 A.2d

(1) Whether at the time of the injury the employee was promoting an interest of the employer, or the activity of the employee directly or indirectly benefited the employer; (2) Whether the activities of the employee work to the benefit or accommodate the needs of the employer; (3) Whether the activities were within the terms, conditions or customs of the employment, or were acquiesced in or permitted by the employer; (4) Whether the activity of the employee serves both a business and personal purpose, or represents an insubstantial deviation from the employment; (5) Whether the hazard or causative condition can be viewed as employer or employee created; (6) Whether the actions of the employee were unreasonably reckless or created excessive risks or perils; (7) Whether the activities of the employee incidental to the employment were prohibited by the employer either expressly or implicitly; (8) Whether the injury occurred on the premises of the employer.<sup>39</sup>

This list was cumulative when it was drawn up by the Law Court in 1982, and was supported by relevant Law Court decisions dating from 1921 through 1980.<sup>40</sup> As such, it stands as a strong comprehensive history of workers' compensation and scope of employment jurisprudence in Maine. It should be noted that although the *Comeau* factors have often been cited by the Law Court,<sup>41</sup> the application of the factors to a particular case also demands a factual inquiry into the circumstances of the injury as they relate to the employment situation. As stated in *Comeau*, "[t]hese considerations as well as others do not create a dispositive checklist; rather, they are but factors on the scale weighing toward or against a finding that the injury arose out of and in the course of employment."<sup>42</sup> Some of the difficulties that stem from the phrase "[arising] out of and in the course of employment" are discussed below.

#### *B. The Employment Contract and Workers' Compensation in Other Jurisdictions*

The right-to-control doctrine that evolved from common law has helped to define the employment contract for well over a century.<sup>43</sup> In connection with common law notions of agency, the doctrine finds various formulations in Supreme Court decisions through the latter half of the 1900s.<sup>44</sup> Still, it is not an exclusive

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347; *Husvar v. Engineered Prods., Inc.*, 2000 ME 132, ¶ 5, 755 A.2d 498; *Moore v. Pratt & Whitney Aircraft*, 669 A.2d 156, 158 (Me. 1995); *Morse v. Laverdiere's Super Drug Store*, 645 A.2d 613, 614 (Me. 1994); *Somes v. Flint Logging*, 635 A.2d 941, 942 (Me. 1993).

39. *Comeau*, 449 A.2d at 367 (internal citations omitted).

40. *See id.*

41. *See supra* note 38.

42. *Comeau*, 449 A.2d at 367.

43. *See Sproul v. Hemmingway*, 31 Mass. 1 (14 Pick.) (1833). The owners of a vessel that was being towed by steamboat and damaged another vessel were not liable to the owners of the damaged vessel for the negligence of the steamboat operators, because the operators were neither subject to the control of the owners nor carrying on business for the owners' profit at the time of the accident. *Id.* at 5. *See also Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523–24 (1889). In *Singer*, the Supreme Court used the right-to-control test to hold a manufacturer of horse drawn wagons liable for the negligent operation of one of the wagons by a traveling salesperson working exclusively in the interests of the manufacturer, even though the manufacturer was not in physical control of the wagon. *Id.*

44. *See, e.g., Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (interpreting, for purposes of the Employee Retirement Income Security Act of 1974, the term 'employee' in line with common law notions of agency); *Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)

standard, and other tests have been used in the courts.<sup>45</sup> For instance, the right-to-control test has been used in combination with an “economic realities” test in federal courts<sup>46</sup> as well as state courts.<sup>47</sup>

Virtually all jurisdictions in the country adhere to the doctrine of immunity and exclusivity in workers’ compensation.<sup>48</sup> Similarly, the “arising out of and in the course of” language used in Maine since the state’s adoption of statutory workers’ compensation is paralleled in other state statutes.<sup>49</sup> The phrase is an “axiom” of compensation law.<sup>50</sup> Even so, it is “one of the most familiar and most troublesome concepts” in the field.<sup>51</sup> In the words of former Supreme Court Justice Frank Murphy, the phrase is “deceptively simple and litigiously prolific.”<sup>52</sup> Whether or not an injury arising out of and in the course of employment qualifies for compensation is not governed by a bright line rule; it is a case by case analysis, and oftentimes a muddled one.<sup>53</sup>

It is beyond the scope of this Note to undertake a comparative analysis of workers’ compensation jurisprudence from all fifty states. However, as it is

(interpreting, for purposes of the Copyright Act of 1976, the term ‘employee’ in line with common law notions of agency).

45. See Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 310 (2001) (stating “[C]ontrol over work was never the exclusive test of status for either *respondeat superior* or other statutory purposes. . . . [B]y the end of the nineteenth century the courts had already identified and assembled most of the other basic ‘factors’ recognized today as evidencing one or the other type of worker status.”).

46. For examples of opinions that utilize a combination of the economic realities test and the common law test, see *Worth v. Tyler*, 276 F.3d 249, 263 (7th Cir. 2001); *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998); *Dole v. Snell*, 875 F.2d 802, 804-05 (10th Cir. 1989); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988); *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1534-35 (7th Cir. 1987). See also, e.g., *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 980 (10th Cir. 2002); *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999); *Wilde v. Cnty. of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994); *Frankel v. Bally, Inc.*, 987 F.2d 86, 89-91 (2d Cir. 1993); *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 218-19 (6th Cir. 1992).

47. See, e.g., *Ark. Transit Homes, Inc. v. Aetna Life & Cas.*, 16 S.W.3d 545, 547-48 (Ark. 2000); *Re/Max of N.J. v. Wausau Ins. Co.*, 744 A.2d 154, 157 (N.J. 2000); *Whittenberg v. Graves Oil & Butane Co.*, 827 P.2d 838, 844-45 (N.M. Ct. App. 1991); *S.G. Borello & Sons, Inc. v. Dep’t of Indus. Relations*, 769 P.2d 399, 403-04 (Cal. 1989); *Anton v. Indus. Comm’n of Ariz.*, 688 P.2d 192, 194-95 (Ariz. Ct. App. 1984); *Woody v. Waibel*, 554 P.2d 492, 496 (Or. 1976).

48. Moriarty, *supra* note 22, at 290.

49. See, e.g., ALA. CODE § 25-5-1(9) (2011); ALASKA STAT. § 23.30.395(2) (2011); ARIZ. CONST. art. XVIII, § 8; ARKANSAS CODE ANN. § 11-9-102(4)(A) (West 2011); COLO. REV. STAT. ANN. § 8-40-201(14) (West 2011); DEL. CODE ANN. tit. 19, § 2301(4) (West 2011); FLA. STAT. ANN. § 440.01 (2011); GA. CODE ANN. § 34-9-1 (West 2011); KAN. STAT. ANN. § 44-501(a) (West 2010).

50. *McNamara v. Town of Hamden*, 398 A.2d 1161, 1163 (Conn. 1978).

51. *Eady v. Med. Pers. Pool*, 377 So. 2d 693, 695 (Fla. 1979).

52. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947).

53. See *Herbert v. Fox & Co.*, [1916] 1 A.C. 405 (H.L.) 419 (appeal taken from Eng.) (noting that “[t]he few and seemingly simple words ‘arising out of and in the course of the employment’ have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute.”). See also *Cudahy Packing Co. of Neb. v. Parramore*, 263 U.S. 418, 424 (1923) (“Whether a given accident is so related or incident to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case.”).

pertinent to the discussions in Parts I, III, IV, and V of this Note, a comparative analysis of some cases that involve travel to and from work related appointments is warranted. This particular subset of workers' compensation cases receives differing treatment depending on jurisdiction, and like so many other types of workers' compensation cases, seems in large part dependent upon judicial interpretation of the omnipresent statutory phrase "arising out of and in the course of employment." To further focus this inquiry, only cases involving injuries sustained while traveling to or from an appointment related to a prior compensable injury will be discussed.

As a general rule:

[A]n injury or death occurring in the use of the public streets or highways in going to and returning from the place of employment generally is not compensable under workers' compensation law because, in most instances, such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject, rather than risks and hazards having to do with and originating in the work or business of the employer.<sup>54</sup>

This principle, known as the "public streets rule" or the "going and coming rule," is widely accepted.<sup>55</sup> However, a uniform application of the rule poses problems, and there are a number of exceptions.<sup>56</sup> Common exceptions include: proof of a causal connection between employment and injury,<sup>57</sup> employees who travel as part of their job,<sup>58</sup> transportation provided by the employer,<sup>59</sup> employer reimbursement of transportation expenses,<sup>60</sup> employees on a special mission for the employer,<sup>61</sup> and injuries occurring on the premises of or within the zone of employment.<sup>62</sup> As a result of the many exceptions to the rule, the interpretation and inclusion of a particular exception will vary by jurisdiction. Jurisdictions are even split on the specific question of the compensability of injuries sustained en route to receive medical treatment for prior compensable injuries.<sup>63</sup> To reiterate, this is a vast and

54. 82 AM. JUR. 2D *Workers' Compensation* § 269 (2003) (footnote omitted).

55. *See id.*

56. *See id.* § 272.

57. *See, e.g.,* *Torres v. Aulick Leasing, Inc.*, 628 N.W.2d 212, 218 (Neb. 2001); *Rico v. All Phase Elec. Supply Co.*, 675 A.2d 406, 408 (R.I. 1996).

58. *See* 82 AM. JUR. 2D *Workers' Compensation* § 272 (2003).

59. *See, e.g.,* *Governair Corp. v. Dist. Court of Okla. Cnty.*, 293 P.2d 918, 920-21 (Okla. 1956).

60. *See, e.g.,* *Firestone Tire & Rubber Co. v. Crawford*, 339 S.E.2d 292, 294 (Ga. Ct. App. 1985).

61. *See, e.g.,* *Pittsburgh Hyatt House, Inc. v. Workmen's Comp. Appeal Bd.*, 437 A.2d 461, 463 (Pa. Commn. Ct. 1981).

62. *See* 82 AM. JUR. 2D *Workers' Compensation* § 283 (2003).

63. For examples of opinions holding that injuries sustained en route to medical treatment for prior compensable injuries do not arise out of or in the course of employment, see *Dean v. Chrysler Corp.*, 455 N.W.2d 699, 700 (Mich. 1990); *Bankers Inv. Co. v. Boyd*, 560 P.2d 958, 960-62 (Okla. 1977); *Whittington v. Indus. Comm'n*, 468 P.2d 926, 927-28 (Ariz. 1970); *Kiger v. Idaho Corp.*, 380 P.2d 208, 209-11 (Idaho 1963); *Combined Ins. Co. v. Peoples*, 428 S.E.2d 391, 391-92 (Ga. Ct. App. 1993); *Hicks v. Spectra Physics*, 843 P.2d 1009, 1010-11 (Or. Ct. App. 1992); *Allstate Ins. Co. v. Theriot*, 362 So. 2d 1214, 1215-17 (La. Ct. App. 1978), *rev'd on other grounds*, 376 So. 2d 950 (La. 1979); *Carlson v. Young*, 171 N.E.2d 736, 737-39 (Ohio Ct. App. 1959); *Pittsburgh Hyatt House*, 437 A.2d at 462-64. For examples of opinions holding that injuries sustained en route to medical treatment for prior compensable injuries do in fact arise out of or in the course of employment, see *Case of McElroy*, 494 N.E.2d 1, 5 (Mass. 1986); *Moreau v. Zayre Corp.*, 408 A.2d 1289, 1294-95 (Me. 1979); *Charles N.*

convoluted field of law, and there are no bright line tests readily applicable to any particular case, regardless of jurisdiction.<sup>64</sup> Rather, a fact intensive inquiry is always necessary, and an examination of the particulars of the employment relationship and the circumstances surrounding the injury must be undertaken in order to decide whether or not the injury is compensable.<sup>65</sup>

### III. THE *FEIEREISEN* DECISION

In *Feiereisen*, the Law Court endeavored to resolve a single question: “whether the injury resulting from a car accident that occurred en route to a workers’ compensation mediation arose out of and in the course of employment.”<sup>66</sup> Kurt Feiereisen was first injured while working as a belt driver in the shipping department at the Newpage Corporation (formerly known as the Rumford Paper Mill) in 1987.<sup>67</sup> This incident resulted in damage to his neck, mid-back, and left arm.<sup>68</sup> The same injury recurred in 1997.<sup>69</sup> After the 1997 injury, he was transferred to a light duty position at the company, and worked in the guardhouse at the Farrington Mountain Landfill station until 2007, when as a result of poor ergonomic conditions he sustained further gradual injury to his back.<sup>70</sup> In 2008, when driving to the Lewiston Regional Office of the Workers’ Compensation Board to attend a mediation meeting regarding his three previous injuries, Feiereisen was involved in a car accident and injured his left shoulder.<sup>71</sup> He was unable to work during the subsequent seven months, then resumed light duty work only on a periodic basis.<sup>72</sup> Prior to returning to work, he filed a petition for compensation relating to four dates of injury, including the car accident.<sup>73</sup> The hearing officer at the Workers’ Compensation Board granted the petitions for the three injuries sustained prior to 2008, but denied the petition relating to the car accident because he found that the injury did not arise out of and in the course of

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Clark Assocs. v. Dependent of Robinson, 357 So. 2d 924, 929 (Miss. 1978); Immer & Co. v. Brosnahan, 152 S.E.2d 254, 259 (Va. 1967); Thibault v. Bostrom, 134 N.W.2d 308, 310 (Minn. 1965); Taylor v. Centex Constr. Co., 379 P.2d 217, 224 (Kan. 1963); Preway, Inc. v. Davis, 736 S.W.2d 21, 21-23 (Ark. Ct. App. 1987); Fenton v. SAIF Corp., 741 P.2d 517, 520 (Ore. Ct. App. 1987); Telcon, Inc. v. Williams, 500 So. 2d 266, 266-68 (Fla. Dist. Ct. App. 1986); Camp v. Lockheed Elecs., Inc., 429 A.2d 615, 622 (N.J. Super. Ct. App. Div. 1981); Augustine v. NYS Elmira Corr. Facility, 410 N.Y.S.2d 141, 142 (N.Y. App. Div. 1978); Laines v. Workmen’s Comp. Appeals Bd., 122 Cal. Rptr. 139, 144 (Cal. Ct. App. 1975). *But see* 1 ARTHUR LARSON & LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 10.07 (2009) (stating that most jurisdictions agree that injuries sustained when traveling to or from a medical appointment for a compensable work related injury are also compensable).

64. *See* Cudahy Packing Co. of Neb. v. Parramore, 263 U.S. 418, 424 (1923).

65. *See, e.g.*, Rhodes v. Workers’ Comp. Appeals Bd., 148 Cal. Rptr. 713, 716-17 (Cal. Ct. App. 1978); Madden v. Mountain W. Fabricators, 977 P.2d 861, 864-65 (Colo. 1999); Wiley Mfg. Co. v. Wilson, 373 A.2d 613, 621-22 (Md. 1977).

66. Feiereisen v. Newpage Corp., 2010 ME 98, ¶ 5, 5 A.3d 669.

67. *Id.* ¶ 2.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* ¶ 3.

72. *Id.*

73. *Id.* ¶ 4.

employment.<sup>74</sup> The Law Court granted Feiereisen's timely appeal.<sup>75</sup>

Feiereisen argued that an exception to the "public streets" rule applied to his car accident.<sup>76</sup> To support this argument, he relied on the precedent set by the Law Court in *Moreau v. Zayre Corp.*, which stated that an injury sustained in a car accident by an employee who was driving home from medical treatment for an earlier compensable injury was also compensable.<sup>77</sup> The rationale behind the *Moreau* decision was that the employer had a statutory obligation to provide medical services, and the employee had a reciprocal obligation to accept those services, so the travel to the medical appointment fell within the scope of the employment contract.<sup>78</sup> Feiereisen applied this rationale to his car accident, and asserted that, because his participation at the mediation was mandatory, travel to the meeting was part of the employment contract.<sup>79</sup> He further attempted to distinguish the mediation from litigation and claimed that part of the legislative intent behind mandatory mediation was to facilitate cooperation between the employer and employee in place of litigation.<sup>80</sup>

In response, Newpage argued that the case was instead governed by *Dorey v. Forster Manufacturing Co.*, which held that an injury sustained by an employee while she was retrieving records to pursue her workers' compensation claim did not arise out of and in the course of employment and was not compensable.<sup>81</sup> In *Dorey*, the Law Court asserted that, because the retrieval of documents was not done for purposes of medical treatment, but rather, to have them available at an "informal conference" for purposes of pursuing a claim that the employer was "actively contesting," the action was not "implied into the contract of employment."<sup>82</sup> The Law Court also observed in *Dorey* that other jurisdictions have held that actions taken in furtherance of a workers' compensation claim against an employer do not arise out of and in the course of employment.<sup>83</sup>

The majority of the Law Court held in favor of Newpage and affirmed the decision of the hearing officer.<sup>84</sup> Justice Gorman, writing for the majority, decided that an injury sustained during travel to workers' compensation mediation did not arise out of and in the course of employment.<sup>85</sup> The majority opinion gave

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74. *Id.*

75. *Id.* ¶ 5.

76. *Id.* ¶¶ 8-9.

77. *Id.* (citing *Moreau v. Zayre Corp.*, 408 A.2d 1289, 1291, 1295 (Me. 1979)).

78. *Moreau*, 408 A.2d at 1294.

79. *Feiereisen*, 2010 ME 98, ¶ 11, 5 A.3d 669.

80. *Id.* ¶ 12.

81. *Id.* ¶ 10 (citing *Dorey v. Forster Mfg. Co.*, 591 A.2d 240, 241 (Me. 1991)).

82. *Dorey*, 591 A.2d at 241-42.

83. *Dorey*, 591 A.2d at 242 n.1. See *Hendrickson v. George Madsen Constr. Co.*, 281 N.W.2d 672, 672, 675 (Minn. 1979) (deciding that an employee's fatal heart attack occurring shortly after testimony at a workers' compensation hearing did not arise out of and in the course of employment). See also *Keovorabouth v. Indus. Comm'n of Ariz.*, 214 P.3d 1019, 1023-24 (Ariz. Ct. App. 2009) (holding that an injury sustained by an employee when traveling to a workers' compensation proceeding did not arise out of and in the course of employment); *Douglas v. Spartan Mills, Startex Div.*, 140 S.E.2d 173, 175-76 (S.C. 1965) (holding that an injury sustained by an employee when traveling to a workers' compensation hearing was not compensable because the travel was for personal benefit).

84. *Feiereisen*, 2010 ME 98, ¶ 13, 5 A.3d 669.

85. *Id.* ¶ 1.

numerous reasons for arriving at this conclusion, including that the statutory mandate to participate in mediation did not transform the travel thereto into part of the employment contract,<sup>86</sup> that the travel served only Feiereisen's own purpose and did not benefit Newpage,<sup>87</sup> that injuries occurring at dispute resolution events are not covered under workers' compensation,<sup>88</sup> and that the accident fell within the "public streets rule" and fit no exception to that rule.<sup>89</sup>

In deciding that the applicable statute<sup>90</sup> did not go so far as to include workers' compensation mediation in the employment contract, the majority was careful to note that although mediation was intended to make the compensation process "less adversarial and more flexible and realistic," it ultimately retained its semblance to litigation.<sup>91</sup> As such, travel to the meeting did not benefit or promote "the interests of" Newpage.<sup>92</sup> The majority also considered the mediation hearing to be part of a dispute resolution system which was separate from the employment setting covered by workers' compensation.<sup>93</sup>

In the majority opinion, Justice Gorman included a brief analysis of the public streets rule and its exceptions.<sup>94</sup> The essence of the rule, as stated in *Waycott v. Beneficial Corp.*, is that "an accident occurring off the employer's premises while an employee is merely on his way to or from his place of business is not, without more, compensable."<sup>95</sup> The rationale behind the rule is that "while outside the business premises and not engaged in any work-related activity an employee is not within the spatiotemporal boundaries of employment . . . [and] there is an insufficient connection with the employment context to warrant compensation for an injury occurring in such circumstances."<sup>96</sup> The majority declined to apply any of the exceptions to the rule,<sup>97</sup> stating that Newpage could not have controlled or affected the risk of Feiereisen's accident and had no responsibility over the automobile or the driving public at the time.<sup>98</sup>

In dissent, Justice Jabar, joined by Justice Alexander, found that the statutory obligation to participate in mediation led to the inclusion of travel to mediation as part of the employment contract.<sup>99</sup> The dissent equated the statutory duty of the employer to provide medical care, as described in *Moreau*,<sup>100</sup> with the statutory duty of both the employer and employee to attend the mediation of workers' compensation claims.<sup>101</sup> This equation was drawn, in part, through the "significant

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86. *Id.* ¶ 11.

87. *Id.*

88. *Id.* ¶ 12.

89. *Id.* ¶ 13.

90. ME. REV. STAT. tit. 39-A, § 313 (2010).

91. *Feiereisen*, 2010 ME 98, ¶ 12, 5 A.3d 669.

92. *Id.* ¶ 13.

93. *Id.* ¶ 12.

94. *Id.* ¶¶ 7-8.

95. 400 A.2d 392, 394 (Me. 1979). *See also Feiereisen*, 2010 ME 98, ¶ 7, 5 A.3d 669.

96. *Waycott*, 400 A.2d at 394. *See also Feiereisen*, 2010 ME 98, ¶ 7, 5 A.3d 669.

97. *See infra* note 119 and accompanying text.

98. *Feiereisen*, 2010 ME 98, ¶ 13, 5 A.3d 669.

99. *Id.* ¶ 14 (Jabar, J., dissenting).

100. *Id.* ¶¶ 16-17.

101. *Id.* ¶ 22. *See* ME. REV. STAT. tit. 39-A, § 313 (2010) (mandating that parties cooperate in mediation and imposing sanctions for a failure to do so).

relationship” exception to the public streets rule.<sup>102</sup> Under this exception, the dissent noted that when there is “a significant relationship between injury and employment,” certain injuries sustained by an employee on the way to or from a place of business have been considered compensable.<sup>103</sup> In short, the dissent followed *Moreau* by implying that an injury occurring during travel to mediation for a prior work related injury would also arise out of and in the course of employment.<sup>104</sup>

Justice Jabar also distinguished *Dorey*, claiming that because title 39-A, section 313 of the Maine Revised Statutes was passed<sup>105</sup> after *Dorey* was decided, deference to legislative intent should ensue.<sup>106</sup> In other words, the dissent argued that the viability of *Dorey* was diminished by the statutory change. The legislative intent behind the statute was also referenced by the dissent in order to refine the distinction between litigation and mediation; the dissent claimed that the collaborative aspects of mediation distinguished it from litigation.<sup>107</sup> The dissent concluded by enumerating cases from other jurisdictions wherein compensation was available for injuries sustained during travel to and from work related activities,<sup>108</sup> and asserted that the reciprocal obligations mandated by statute were “inherent in the contract of employment” and that travel to and from mandatory mediation fell within an exception to the public streets rule.<sup>109</sup>

#### IV. ANALYSIS

##### *A. The Public Streets Rule and the Exceptions Thereto*

The public streets rule is a necessary limitation on the scope of the employment contract for purposes of workers’ compensation. The simple rationale behind the rule is that an “insufficient connection” exists between the perils that one encounters as a member of the traveling public and the risks that one incurs when engaging in work-related activities to justify compensating employees for injuries that arise during travel to and from work.<sup>110</sup> To reiterate, the principle was nicely illustrated in *Waycott* and restated in *Feiereisen*: “an accident occurring off the employer’s premises while an employee is merely on his way to or from his place of business is not, without more, compensable.”<sup>111</sup> The phrase “without

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102. *Feiereisen*, 2010 ME 98, ¶ 15, 5 A.3d 669 (Jabar, J., dissenting) (quoting *Waycott v. Beneficial Corp.*, 400 A.2d 392, 394 (Me. 1979)).

103. *Id.* (quoting *Waycott*, 400 A.2d at 394).

104. *Id.* ¶ 16.

105. Section 313 was enacted as part of a change in the Workers’ Compensation law following the recommendations of a Blue Ribbon Commission, effective Jan. 1, 1993. *Id.* ¶ 19.

106. *Id.*

107. *Id.* ¶ 20.

108. *Id.* ¶ 21. The dissent cited the following cases: *Turner v. Indus. Claim App. Office*, 111 P.3d 534, 537-38 (Colo. Ct. App. 2004) (involving travel from a vocational evaluation); *American Mfrs. Mut. Ins. Co. v. Hernandez*, 642 N.W.2d 584, 590-91 (Wis. Ct. App. 2002) (involving travel to medical evaluation); *Woodrum v. Premier Auto Glass Co.*, 660 N.E.2d 491, 493 (Ohio Ct. App. 1995) (involving travel from a medical examination).

109. *Feiereisen*, 2010 ME 98, ¶ 22, 5 A.3d 669 (Jabar, J., dissenting).

110. *Waycott v. Beneficial Corp.*, 400 A.2d 392, 394 (Me. 1979).

111. *Feiereisen*, 2010 ME 98, ¶ 7, 5 A.3d 669 (quoting *Waycott*, 400 A.2d at 394).

more” suggests that the nuances and idiosyncrasies of the doctrine are all contained in its exceptions.

The *Feiereisen* Court stated that when a “sufficient connection” existed between employment and employee travel, that exceptions to the rule were recognized.<sup>112</sup> The opinion then listed a number of recognized exceptions,<sup>113</sup> but isolated the one announced in *Moreau*<sup>114</sup> as central to *Feiereisen*’s argument. Despite the fact that the employee in *Moreau* was driving to a medical appointment regarding a prior injury for which she had not yet filed a petition, the Law Court held that the compensability of the prior injury was a determining factor, and that the statutory obligation of the employer to provide and the employee to receive medical treatment was part of the employment contract.<sup>115</sup> The major and obvious difference between *Moreau* and *Feiereisen* is the purpose behind the travel that gave rise to the injury. The medical purpose of the appellant’s travel in *Moreau* was deemed within the scope of the employment contract, and the mediation purpose of the appellant’s travel in *Feiereisen* was not.<sup>116</sup> In neither context did the employer control the risk of the accident; it is implied that there is something essentially different between medical treatment and mediation.

The Law Court in *Feiereisen* recognized that the legislative intent behind mandatory mediation under 39-A M.R.S. § 313 was to promote collaboration and replace litigation whenever possible, but ultimately decided that mediation retained enough litigation-like qualities to preclude it from being covered under a workers’ compensation scheme.<sup>117</sup> It is interesting to note that when the Law Court made the distinction that “injuries occurring during attendance at dispute resolution events are not compensable,”<sup>118</sup> it diverged from a discussion of the public streets rule. If this distinction is applied to *Moreau*, it should follow that had the injury in *Moreau* occurred at the doctor’s office instead of on the way home from the office, it would also have been compensable.<sup>119</sup> This is to say, that a doctor’s office is

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112. *Id.* ¶ 8.

113. *Id.* See, e.g., *Cox v. Coastal Prods. Co.*, 2001 ME 100, ¶ 10, 774 A.2d 347 (applying a “dual purpose” exception to a trip that served both business and private purposes); *Abshire v. City of Rockland*, 388 A.2d 512, 514-15 (Me. 1978) (applying a “special errand” exception to travel undertaken at the request of the employer); *Oliver v. Wyandotte Indus. Corp.*, 308 A.2d 860, 863 (Me. 1973) (applying a “special hazard” exception when the risks of employment continue after the employee has entered the public way); *Brown v. Palmer Constr. Co.*, 295 A.2d 263, 267 (Me. 1972) (applying a “traveling employee” exception to injuries that arise from the necessity of sleeping and eating away from home).

114. *Moreau v. Zayre Corp.*, 408 A.2d 1289 (Me. 1979).

115. *Id.* at 1291, 1294. See also ME. REV. STAT. tit. 39-A, § 206 (2010) (relating to the duties and rights of parties as to medical and other services).

116. *Feiereisen*, 2010 ME 98, ¶ 13, 5 A.3d 669.

117. *Id.* ¶ 12.

118. *Id.* (emphasis added).

119. The questions then arise: would the employer or the doctor’s office be responsible for the injury? Did the injury occur in the parking lot, the waiting area, or the examination room? As one can imagine, this situation might implicate medical malpractice insurance as well. It is easy to get carried away with such a hypothetical, but the point is that when dealing with workers’ compensation, as suggested by the title of this Note, “it has to end somewhere.” The use of the word “at” by the Law Court may have been inadvertent, but it does raise further questions, many of which are beyond the scope of this Note.

sufficiently connected to employment to fall within the employment contract, but that a dispute resolution event is not. The implicit logic behind this divergence is that the statutory obligation of the employer to provide and the employee to submit to medical treatment is in the interests of the employer, but that the statutory obligation of both employer and employee to appear at the mediation of an active workers' compensation claim against the employer is not in the interests of the employer.

The *Feiereisen* decision hinged upon the interests of the employer: because Feiereisen's action of driving to the mediation hearing did not promote the interests of Newpage, no exception to the public streets rule was implicated.<sup>120</sup> Once *Moreau* was implicitly distinguished, the case fell neatly within the ambit of the proscriptive rule, and the potential expansion of the employment contract was curtailed as in *Dorey*.<sup>121</sup> To quote the Law Court: "Feiereisen's travel that day served only his own purpose: to proceed with his claim for benefits by participating in the current-day equivalent of *Dorey's* informal conference, i.e., a mediation session. It did not 'benefit' Newpage any more than his attendance at a hearing would benefit Newpage."<sup>122</sup> Thus, by relying upon the relative simplicity of the public streets rule itself, the Law Court was able to avert the complications of statutory interpretation that were raised by the dissent.

*B. Why the Employment Contract Should Not Be Extended to Include Travel to and From Mandatory Mediation*

There is a strong public interest in limiting the scope of the employment contract to activities that are undertaken in the interest of the employer. Without this limitation, the incentive for an employer to retain employees would diminish in proportion to the increased scope of employment. One can easily imagine that the ordinary course of business in the marketplace would become unmanageable if an employer were responsible for all acts and injuries of an employee as he or she pursued interests outside of work.

While the majority opinion drew a clear boundary to the scope of the employment contract, the dissent pushed the limits of this scope, spurred on by the legislative impetus behind title 39-A, section 313 of the Maine Revised Statutes.<sup>123</sup>

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120. *Id.* ¶ 13.

121. *Id.* ¶¶ 11, 13.

122. *Id.* ¶ 11.

123. ME. REV. STAT. tit. 39-A, § 313 (2010) (providing, in part: "The mediator shall by informal means, which may include telephone contact, determine the nature and extent of the controversy and attempt to resolve it. The mediator . . . may require that the parties appear and submit relevant information. . . . The parties shall cooperate with the mediator assigned to the case. The assigned mediator shall report to the board the failure of a party to cooperate or to produce requested material. The board may impose sanctions against a party who does not cooperate or produce requested materials, including the following: A. Assessment of costs and attorney's fees; B. Reductions of attorney's fees; or C. If the party is the moving party, suspension of proceedings until the party has cooperated or produced the requested material. . . . The employer or representative of the employee, employer or insurer who participates in mediation must be familiar with the employee's claim and has authority to make decisions regarding the claim. The board may assess a forfeiture in the amount of \$100 against any employer or representative of the employee, employer or insurer who participates in mediation without full authority to make decisions regarding the claim. If a representative of the employer, insurer or

The dissent initially distinguished *Moreau* from *Dorey*,<sup>124</sup> but then implied that the two cases were analogized by the enactment of the statute,<sup>125</sup> which Justice Jabar claimed made a “significant change in the workers’ compensation law.”<sup>126</sup> This change, according to the dissent, made mediation, as a cooperative process supported by possible sanctions against non-cooperation, “distinctly different from other stages of litigation.”<sup>127</sup> Based upon this interpretation of the statute, the dissent viewed the mediation as within the scope of the employment contract, as was the medical treatment in *Moreau*, and stated that travel to mediation fell within an exception to the public streets rule.<sup>128</sup> In other words, the dissent suggested that section 313 nullified the majority’s reliance on prior case law, by reasoning that the mandatory mediation imposed by the statute should not be equated to the informal conference in *Dorey*.<sup>129</sup>

Under a customary understanding of the agency relationship, section 313 does not alter the interests of the employer as is suggested by the dissent. Thus, the “interests” of the employer are not implicated by mandatory participation in mediation.<sup>130</sup> Even though non-participation may bring monetary sanctions, and the employer will be responsible for paying the costs of treating the employee’s injury if the employee prevails, the mediation itself is not in furtherance of the employment enterprise as a going concern. It is not the exclusive interests of the employer and employee that are at stake during mediation: a public policy interest in favor of mediation, contrived by the Legislature, is also involved. Is the employer forced to accept the Legislature’s notion of what is and what is not in his or her best interests as an employer? A much broader debate emerges as a result of such questions, and implicates the tension between the principle of freedom of contract and governmental regulation of business. The debate over the respective strengths and weaknesses of these often conflicting forces is beyond the scope of this Note.

Regardless, the section of the statute which mandates that the parties cooperate in mediation and imposes sanctions for noncompliance mentions nothing of the employment contract.<sup>131</sup> A mere mandate to cooperate at a dispute resolution event does not, in the words of the majority, “transform *Feiereisen*’s attendance at mediation into an obligation that is reciprocal to any employer action or

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employee participates in mediation or any other proceeding of the board, the representative shall notify the employer, insurer or employee of all actions by the representative on behalf of the employer, insurer or employee and any other actions at the proceeding.”).

124. *Feiereisen*, 2010 ME 98, ¶¶ 16-18, 5 A.3d 669 (Jabar, J., dissenting).

125. ME. REV. STAT. tit. 39-A, § 313 (2010).

126. *Feiereisen*, 2010 ME 98, ¶ 19, 5 A.3d 669 (Jabar, J., dissenting).

127. *Id.* ¶ 20.

128. *Id.* ¶ 22.

129. *Id.* ¶ 19. See *id.* ¶¶ 10-11, 5 A.3d at 673-74.

130. The majority and dissent may have differing conceptions of what the word ‘interest’ means in this instance. Compare *id.* ¶ 11 (majority opinion) (adopting a meaning that is more akin to “benefit”), with *id.* ¶¶ 18-20 (Jabar, J., dissenting) (contrasting the notion of a selfish benefit to either party, as presented by the majority, with a more neutral concept that applies to the collective well being of both parties (as they pursue a legislatively coerced reconciliation)).

131. ME. REV. STAT. tit. 39-A, § 313(4) (2010).

obligation.”<sup>132</sup> In the event of statutory ambiguity, it is inappropriate to project onto the law an implication about the scope of the employment contract, especially when the only recognized legislative intent was to “encourage mediation.”<sup>133</sup> The two policy interests at stake here, the policy of not unduly broadening the scope of employer liability and the policy of encouraging mediation of compensation claims, are not necessarily competing. If the statute is taken at face value, there is no reason why both policies cannot work in harmony. Mediation can be encouraged, and, for purposes of workers’ compensation claims, be considered outside the scope of the employment contract. The words of the statute do nothing to either confirm or dispel this possibility.

## V. CONCLUSION

Though the enactment of section 313 arguably does create a legal difference between mandatory mediation and informal mediation conferences, the scope of the employment contract for purposes of workers’ compensation is not necessarily impacted by the change, and it seems clear that in this case the majority made the correct decision. From a policy perspective, and given Feiereisen’s twenty year history with work related injuries,<sup>134</sup> it was entirely prudent to prevent the expansion of the employment contract into arenas wherein the employee was acting outside of the interests of the employer.

The majority drew a rather strict line on this matter, whereas the dissent looked to the statute for guidance. But by reading too deeply into the purposes behind the legislation, the dissent created an extension of the employment contract where none was warranted. The broad consent of the employer to participate in a workers’ compensation program should not extend the scope of the employment contract to include such unforeseen particularities as the travel of the employee to a mandatory mediation meeting.

Under the doctrine of *respondeat superior*, the employer is held liable for the actions of the employee when the employee is acting within the scope of his or her duty to the employer.<sup>135</sup> Therefore, when the employee is working in the interest of and furthering the goals of the employer, the employer retains an obligation of responsibility over the actions of the employee, and also, as pertinent to workers’ compensation, over the safety of the employee. When the employee acts beyond the scope of employment, the employer is not liable for his or her actions or safety.

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132. *Feiereisen*, 2010 ME 98, ¶ 11, 5 A.3d 669.

133. *Id.* ¶ 19 (Jabar, J., dissenting).

134. Though there may not be any factual support for the notion that Feiereisen was malingering, the mere duration and repetition of his petitions for workers’ compensation may have been a further and unstated rationale for the Law Court to limit the scope of his employment contract with Newpage. For statutory authority relating to another possible unstated rationale of the Law Court, the possibility of double recovery under automobile liability insurance and workers’ compensation, see generally ME. REV. STAT. tit. 39-A, § 107 (2010) (stating that the employee must repay to the employer the value of any compensation paid which is subsequently recovered from the third party liable for the injury). The Law Court did not address the issue of whether the January 2008 car accident was a result Feiereisen’s own negligence, whether he was injured by the negligence of a third party tortfeasor, or whether the accident involved contributory negligence on the part of both parties. See generally, *Feiereisen*, 2010 ME 98, 5 A.3d 669.

135. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. a (Tentative Draft No.2, 2009).

The “interests of the employer” standard helps to draw a clear line between an employee getting paid to work for an employer, and an employee seeking payment when he or she is injured during employment. When an employee brings a workers’ compensation claim against his or her employer, it seems inappropriate to claim that he or she is working *in the service of* the employer. This determination should be quite straightforward: if the employer is contesting the claim, then the employee is not acting in the service of the employer by attending a mediation hearing. The employee nearly rises to the level of an adverse party in such instances, and should no longer be considered to be under the control of the employer. The reciprocity requirement imposed by statute is a mutual obligation similar to that guaranteed by contract, but more closely resembling the compulsion to show up in court before an adverse party. The statute is not geared toward preserving the employment relationship at the time of mediation, but rather, toward preserving the just and orderly pursuit of the mediation itself, and in doing so, requiring that both parties to the action participate. The employer does not give voluntary consent to authorize the actions of the employee at this point, but is required by statute to relinquish the “right to control.” Arguably, it is the Legislature, and not the employer, that exercises the “right to control” at this juncture. The statute may actually deprive the employer of the ability to consent to mediation, thus driving the mediation outside the scope of the employment contract. It is unjust to fuse an independent consent to mediation with the statutory obligation to concede to mediation.

Fulfilling an obligation and fulfilling an obligation under a contract can be one and the same thing. They can also, as in this case, be different things. If viewed independently of the prior employment relationship, the obligation to participate in mediation lacks consideration for the employer. This is to say, that the employer receives nothing in return for attending mediation, other than the prospect of avoiding litigation and possibly relieving the company of an outstanding compensation claim. The agreement to immunity under workers’ compensation law, that is, the agreement that the employee may not sue the employer for injuries sustained during employment, is not sufficient consideration to extend the scope of the employment contract so far beyond the benefit which the employer receives from his or her business as a going concern. The mediation is a mere remedial measure, not an *ex post facto* extension of employment. In order to retain the idea that employer and employee work together to further the interests of a single enterprise, the limits of the employment contract must be drawn to exclude such a quasi-adversarial proceeding as mandatory mediation, and clearly must exclude the travel to and from such an event.

