("Mr. Brown"), Hazelwood's mother, an expert in accident reconstruction, and an expert in highway design and traffic engineering. Via asserted that Hazelwood was not injured by an accident arising out of his employment.

Following the hearing, the Commission found that Hazelwood did not prove that his injuries arose out of his employment and denied his claims, stating that Hazelwood "failed to establish, by a preponderance of the evidence, that [his] injuries arose from an actual risk of his presence on the street. Accordingly, we find no error . . . ." The Commission found that, "[a]fter weighing the evidence in this case, we find the evidence is simply not sufficient to show Mr. Hazelwood's speed around this curve caused or contributed to the accident."

Hazelwood's two assignments of error, first, that the Commission erred in finding his injuries did not arise out of his employment based on the evidence presented and, second, that the evidence was insufficient to prove his speed at the time of the accident, are related. Both assignments of error contend that the Commission erred in how it weighed the evidence and, as such, we will address them jointly.

II. ANALYSIS

A. Standard of Review

"Whether an injury arises out of and in the course of employment involves a mixed question of law and fact, which we review *de novo* on appeal." Snyder v. City of Richmond Police Dep't, 62 Va. App. 405, 411 (2013) (quoting Blaustein v. Mitre Corp., 36 Va. App. 344, 348 (2001)). "Accordingly, although we are bound by the [C]ommission's underlying factual findings if those findings are supported by credible evidence, we review *de novo* the [C]ommission's ultimate determination as to whether the injury arose out of the claimant's employment." Stillwell v. Lewis Tree Serv., 47 Va. App. 471, 477 (2006) (citations omitted). The existence of contrary evidence in the record is of no consequence if credible evidence

supports the Commission's finding. See City of Waynesboro v. Griffin, 51 Va. App. 308, 312 (2008).

B. The Commission's Findings

Hazelwood contends that the Commission considered only direct evidence and "improperly ignored credible, uncontradicted circumstantial evidence" in concluding that Hazelwood did not prove that his accident was due to an actual risk of his employment. Hazelwood asserts that the Commission should be reversed "due to the credible and uncontradicted direct and circumstantial evidence in the record which demonstrates Mr. Hazelwood's accident arose as a direct result of his exposure to the hazards of the Lenning Road Curve."

In its opinion, the Commission recounted the evidence that it heard. Peter Parsonson ("Parsonson"), an expert in highway safety, opined that the recommended safe speed for that curve was only 35 mph, contrary to the posted speed limit, which was 55 mph. Parsonson's opinion was that the lack of speed-reduction signage contributed to Hazelwood crossing the center line of the road.

The Commission also recounted testimony from Steven Chewning ("Chewning"), an expert in accident reconstruction, wherein he opined that the recommended safe speed for the curve was 42 mph. However, Chewning denied that 42 mph was the only safe speed for the curve. He opined that vehicles would not lose control and "spin out" unless they exceeded 79 mph while traveling the curve.

The Commission pointed out that despite expert testimony regarding what was a safe speed of travel on the curve, there was still a dearth of evidence regarding at what speed Hazelwood was actually traveling at the time of the collision. It noted that the only evidence introduced regarding Hazelwood's speed was GPS data captured *before* he entered the curve.

Further, Hazelwood's brother-in-law, Michael Malone ("Malone"), testified that Hazelwood was known for driving "super safe" and compared Hazelwood's driving to a "grandma."

Special Agent Lacks testified that he did not know why Hazelwood's vehicle crossed over the center line. Chewning also testified that he was unable to determine what caused Hazelwood's vehicle to cross the line, despite visiting the accident site in-person. Chewning stated that if a driver is traveling too fast for a curve and he spins out of control, the force and friction of the tires leaves a "very distinct set of spinning tire marks known as yaw marks or scuff marks." Chewning pointed out that no marks of that type were found at the scene of Hazelwood's accident. He also opined that drivers who enter a curve too quickly and consequently lose control of their vehicle usually "go out of the curve at the top. You're not going to go down 86.3 percent through the curve." Chewning stated that he documented the position of Hazelwood's van "down the curve" because "it was contrary to the notion that the vehicle spun out" due to excessive speed.

For an injury to be compensable under the Workers' Compensation Act, the claimant must prove by a preponderance of the evidence that (1) the claimant's injury was caused by an accident, (2) the injury was sustained in the course of employment, and (3) the injury arose out of the employment. See Southland Corp. v. Parson, 1 Va. App. 281, 283-84 (1985). The parties in the present case agree that Hazelwood satisfied the first two prongs of the compensable injury test. The issue is whether his accident "arose out of" his employment.

To determine whether an injury arose out of employment, Virginia courts employ the "actual risk" test. See Snyder, 62 Va. App. at 412. "That test 'excludes an injury which comes from a hazard to which the employee would have been equally exposed apart from the employment.'" Id. at 412-13 (quoting Bernard v. Carlson Cos.-TGIF, 60 Va. App. 400, 405 (2012)). In other words, an injury that cannot be fairly traced to the employment as a contributing

proximate cause and that comes from a hazard that the employee would have been equally exposed to apart from their employment is not a compensable injury under the Workers' Compensation Act. See id.

This Court has applied the "actual risk" test to employee travel on public streets as follows: a claimant who was injured while traveling on a public highway must establish by a preponderance of the evidence that his job (1) required his presence on the street and (2) his injury arose from an actual risk of that presence upon the street that was not common to others also present on that street. See Sentara Leigh Hosp. v. Nichols, 13 Va. App. 630, 634 (1992). Here, it is undisputed that Hazelwood met the first prong of the test because his employment required him to drive on the public road to a customer's house. However, the Commission found that Hazelwood failed to meet the second prong of the Sentara Leigh test. It found he did not prove by a preponderance of the evidence that his injury arose from an actual risk of his presence on the street. "An '"actual risk" of employment' is 'not merely the risk of being injured while at work.'" Bernard, 60 Va. App. at 405 (quoting Taylor v. Mobil Corp., 248 Va. 101, 107 (1994)). "The causative danger must be peculiar to the work and not common to the neighborhood." Id. at 406 (quoting Hill City Trucking v. Christian, 238 Va. 735, 739 (1989)).

The contours of the "arising out of" prong are well-illustrated. The test is satisfied if the claimant proves that "the employment expose[d] the work[er] to the particular danger from which he was injured, notwithstanding the exposure of the public generally to like risks." O'Donoghue v. United Continental Holdings, Inc., 70 Va. App. 95, 104 (2019) (alterations in original) (quoting Lucas v. Lucas, 212 Va. 561, 563 (1972)). The requirement is met "only . . . 'if there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed.'" Id. (quoting Virginia Tree Harvesters, Inc. v. Shelton, 62 Va. App. 524,

534 (2013)). However, "[h]azards to which the general public is equally exposed are non-compensable." Id. at 105 (alteration in original).

An employee who trips while on a staircase at work "cannot recover compensation unless something about the steps (or some other condition of the workplace) presented a hazard or danger peculiar to the worksite." Bernard, 60 Va. App. at 407. Even though the steps on which the employee tripped were provided by the employer and the employee was encouraged to use them, "if there is 'nothing unusual or wrong with the steps,'" the accident did not arise out of the employment. Id. (quoting Cnty. of Chesterfield v. Johnson, 237 Va. 180, 186 (1989)).

Therefore, under our case law, for his claims to be compensable, Hazelwood had to prove a "critical link" between the conditions of the highway and the injury he sustained. See Hill v. Southern Tank Transport, Inc., 44 Va. App. 725, 732 (2005). "[U]nder the 'actual street risk rule,' facts must exist to explain how the accident occurred. Without such an explanation, claimant *cannot prove* the second prong of the Sentara Leigh test . . . ." Id. at 732-33 (emphasis added). Hazelwood bore the burden of proving by a preponderance of the evidence that his injury was caused by a hazard on the road. See id. at 733. The Commission found that Hazelwood failed to meet his burden of proof, and he now essentially asks us to hold as a matter of law that he did.

There was no direct evidence adduced regarding what caused Hazelwood to cross the center line of the road and enter an oncoming tractor trailer's path. On brief, Hazelwood relies heavily on Parsonson's opinion that the posted speed limit at the location where the crash occurred, 55 mph, was not a reasonably safe speed for anyone to travel the curve. Parsonson stated that drivers who went over 35 mph on the curve were at an increased safety risk and that the lack of road signs warning drivers to slow down more likely than not contributed to Hazelwood's accident. He also emphasizes Chewning's testimony that the recommended safe speed for the curve was 42 mph. Although Hazelwood contends that the Commission failed to consider Parsonson's expert opinion,

it is clear from the record that the Commission did consider it but simply gave it little or no weight. As the factfinder, the Commission was entitled to determine the credibility of the witnesses and the weight to give their testimony. See Metropolitan Cleaning Corp. v. Crawley, 14 Va. App. 261, 266 (1992) ("As a fact finder, a commission established by the legislature to decide workers' compensation disputes 'acquires an expertise and accumulates an experience in [its] limited, specialized field often more extensive than that of the judiciary.'").

Moreover, lack of signage, in and of itself, is not direct evidence that Hazelwood was unwittingly driving at an unsafe speed when he entered the curve or that traveling the posted speed caused him to cross over the center line. The last available data regarding Hazelwood's speed, taken from a GPS, was captured approximately ninety seconds before the crash. It does not automatically follow that Hazelwood maintained his speed after that reading when he entered the curve. Additionally, GPS data established that Hazelwood had driven a company vehicle through the same curve at least ten times in four months prior to the accident, from which a reasonable implication can be drawn that he was familiar with safely navigating that portion of the road. The crash site was only ten minutes away from Hazelwood's home, further increasing the probability that the curve was not unfamiliar to him. In addition, although Chewning said his recommended safe speed for the curve was 42 mph, he denied that it was the "only safe speed" and opined that vehicles were unlikely to spin out unless they exceeded 79 mph. In short, Hazelwood asked the Commission to speculate regarding the speed he was going at the time of the crash and infer, based solely on that speculation, that his speed was what caused the vehicle to cross the center line. The Commission correctly declined to do so and stated that a claimant who does not prove that his injury arose from an actual risk of his presence on the street cannot collect compensation under the Workers' Compensation Act because he has not met his evidentiary burden to establish that his injuries arose out of his employment. See Hill, 44 Va. App. at 733.

Hazelwood counters on brief that "the mere nonexistence of direct evidence in the form of the claimant's memory or an eyewitness' account does not, in and of itself, preclude an award for benefits." Griffin, 51 Va. App. at 314. While that statement is accurate, it is incomplete. Our case law holds that the Commission "may find an explanation for an accident based on circumstantial evidence" when "the circumstantial evidence . . . takes the question *beyond surmise or conjecture*." Id. at 314-15 (emphasis added). Here, the record supports the Commission's finding that the circumstantial evidence did not take the question beyond surmise or conjecture. Special Agent Lacks testified that he did not know why Hazelwood's vehicle crossed the center line. Chewning also testified that he did not know why Hazelwood crossed the center line and collided with the tractor trailer. In its opinion, the Commission quoted the deputy commissioner as follows:

> Several witnesses testified they did not know why the accident occurred. Mr. Brown noted he simply did not know the circumstances leading up to the accident. Traveling too fast for the curve could certainly be a cause of the accident. However, the reason could be that Mr. Hazelwood fell asleep and crossed the center line. The reason could be that he was distracted by selecting a radio station and crossed the center line. The reason could be that he was distracted by something else and crossed the center line. We do not know that traveling too fast for the curve was the "actual risk" that caused the accident. The critical link between the employment and injuries has not been shown.

Here, the Commission evaluated the testimony by both expert witnesses, testimony from the responding officer and Hazelwood's family, as well GPS data, and determined that Hazelwood had not established by a preponderance of the evidence that his injuries were caused by speed, which is to say, the Commission did not find that his injuries were caused by an actual risk resulting from his presence on the road. On appeal, Hazelwood asks this Court to find that the circumstantial evidence presented to the Commission placed the cause of Hazelwood's accident beyond surmise or conjecture. However, "[w]e do not retry the facts before the Commission nor do we review the weight, preponderance of the evidence, or the credibility of witnesses." Caskey v. Dan River Mills,

Inc., 225 Va. 405, 411 (1983). We are bound by the Commission's findings of fact if there was credible evidence presented "such that a reasonable mind *could* conclude that the fact in issue was proved." Griffin, 51 Va. App. at 312. Conversely, where the Commission has found the evidence lacking, we will not independently evaluate the credibility of the evidence or its weight. As enumerated above, the record supports the Commission's conclusion. We must defer to the Commission's assessment of the "probative weight" of the proffered evidence; the Commission is "free to adopt that view 'which is most consistent with reason and justice.'" See id. at 312-13 (quoting Georgia-Pac. Corp. v. Robinson, 32 Va. App. 1, 5 (2000)).

III. CONCLUSION

Because the Commission's conclusion that Hazelwood failed to establish that his injuries arose from an actual risk of his presence on the street was not plainly wrong as a matter of law, nor was it unsupported by credible evidence, we find that the Commission did not err and affirm the judgment of the Commission.

Affirmed.

07/16/2021

JOHN CATTIE
300 E. KINGSTON AVE
SUITE 200
CHARLOTTE, NC 28203

RE: Workers'Compensation Medicare Set-Aside Arrangement
Claimant: [redacted]
Medicare ID/SSN: *****[redacted]
Date of Injury: [redacted]/2019
CMS Case Control Number: [redacted]

Dear Sir or Madam:

This letter is in response to your submission of a proposed Workers' Compensation Medicare Set-Aside Arrangement (WCMSA) amount, related to the above-named claimant's workers' compensation claim, received on 05/26/2021.

You proposed that no WCMSA amount is required to pay for future medical items and services, including prescription drugs, that are covered and otherwise reimbursable by Medicare (Medicare covered), related to the claimant's workers' compensation claim.

We have evaluated your proposal along with the supporting medical documentation you submitted and have determined that Medicare's interests have been adequately considered. **Therefore, no WCMSA amount is deemed necessary in this case.**

Please note that this decision regarding future medical treatment is independent of any determination regarding Medicare Secondary Payer recovery rights for conditional payments Medicare made for related items and services furnished before the date of the settlement, judgment, award, or other payment. Medicare has the right to recover (or take back) Medicare payments related to any workers' compensation settlement, judgment, award, or other payment. Any payments Medicare may have made that should have been paid from the workers' compensation settlement, judgment, award, or other payment must be repaid to Medicare.

This decision regarding the WCMSA is not effective until CMS receives a copy of the final executed WC settlement agreement. Please include the CMS Case Control Number listed at the top of this letter in any correspondence. Submit your settlement agreement via the Portal if your original submission was via the Portal. If you originally submitted outside of the Portal, submit the settlement agreement to the following address:

WCMSA Proposal/Final Settlement
P.O. Box 138899
Oklahoma City, OK 73113-8899

If your settlement agreement is 10 pages or less, you may also fax it to (405) 869-3306. **Note:** This number is not for initial submissions, only for additional documentation under 10 pages.

If you have any questions concerning this letter, please call MARIA KUEHN at (215) 861-4306.

Sincerely,

Sherri McQueen
Director, Financial Services Group
Office of Financial Management

cc: [redacted]
LAUREN CARROLL
[redacted]

And You Thought You Knew Everything

06.09.2022

Casey Ariail
Partner
River Run Law Group, PLLC
10001 Patterson Ave., Suite 100
Richmond, Virginia 23238

ATTACHMENTS

210 Va. 718
Supreme Court of Appeals of Virginia.

Robert BRISTOW
v.
Barrett C. CROSS and Century Concrete Services, Inc.

April 27, 1970.

Synopsis

Employee brought action against fellow employee and employer for injuries sustained in automobile collision. From the judgment of the Court of Law and Chancery of the City of Norfolk, Walter A. Page, J., the employee appealed. The Supreme Court of Appeals, Harrison, J., held that accident which occurred while employee was being transported, by prearrangement, from fellow employee's home to employer's office in employer's truck arose in the course of employee's employment and his proper remedy was, therefore, under the Workmen's Compensation Act.

Affirmed.

Attorneys and Law Firms

***718** ****815** Seymour M. Teach, Norfolk (Breit, Rutter, Cohen, Ermlich & Friedman, Norfolk, on brief), for plaintiff in error.

Ralph E. Lawrence, Norfolk (Williams, Worrell, Kelly & Worthington, Norfolk, on brief), for defendant in error.

Before SNEAD, C.J., and I'ANSON, CARRICO, GORDON, HARRISON, COCHRAN, and HARMAN, JJ.

Opinion

HARRISON, Justice.

Robert Bristow, plaintiff, seeks to recover damages of Barrett C. Cross and Century Concrete Services, Inc., defendants, for personal injuries sustained in an automobile accident. Defendants filed their special plea to plaintiff's motion for judgment, alleging that his remedy against them was an action under the Workmen's Compensation Act. The lower court sustained the special plea and entered final judgment for defendants, to which action we granted plaintiff a writ of error.

***719** The sole question at issue is whether plaintiff's injury arose out of and in the course of his employment, thereby barring him from maintaining a common law action against defendants.

Cross, who lived at 814 Reservior Avenue, Norfolk, Virginia, was employed by Century Concrete in a supervisory capacity. On Sunday, July 16, 1967, Bristow applied to Cross for employment by Century Concrete and was hired. Plaintiff was ****816** told to be at Cross' home the next morning when he and other employees of defendant company would be driven to its office located on Little Creek Road. Thereafter they would be transported to the job site in Hampton.

As directed, plaintiff reported to the Cross residence at 7 A.M. on the morning of July 17, 1967. Bristow and 7 or 8 other employees were being transported in a company truck driven by Cross and were en route to the company's office when a collision occurred between the truck and an automobile driven by one Roger L. Ferry.

In Kent v. Virginia-Carolina Chemical Co., 143 Va. 62, 66, 129 S.E. 330, 331, 332 (1925) we said:
'The General rule, well stated in Clapp's Parking Station v. Industrial Acc. Comm., 51 Cal.App. 624, 197 P. 369, is:

"That an employee going to or from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment.' The facts agreed upon here and set out above show that the deceased had left his employer's premises and was going home from his work.

'The cases indicate that there are three exceptions to the general rule above stated and only three.

'First. Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages.

'Second. Where the way used is the sole and exclusive way of ingress and egress, with no other way, or where the way of ingress and egress is constructed by the employer.

'Third. Where the employee on his way to or from work is still charged with some duty or task in connection with his employment.'

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Defendants take the position here that the first exception applies, i.e. that plaintiff-employee was being transported to work as an incident *720 to his employment, and that his injury arose out of and in the course of his employment.

Counsel for plaintiff cites Farm Bureau Mut. Auto Ins. Co. v. Smoot, 95 F.Supp. 600 (S.D.W.Va.1950), as expressing the transportation exception to the general rule in a manner which is presently accepted by many and possibly the majority of jurisdictions. He quotes the following extract from that case: 'The weight of authority is to the effect that an employee making use of transportation customarily and gratuitously furnished by the employer, in the absence of an express provision for same, is not acting in the course of his employment unless a duty to transport can be implied from the attendant circumstances in the contract of hiring. * * * This duty may be implied where it is shown that the transportation was provided as incident to procuring the services of an employee whose home is a great distance from the place of work. * * * It may also be implied where the transportation provided by the employer is shown to have been a necessary incident to the employment because it was the only practical means by which the employee could travel to and from the place of work. * * * At any rate, it must be shown that the transportation so furnished was a necessary incident of the employment rather than a mere favor not in furtherance of the employer's business. * * *' 95 F.Supp. at 603, 604.

Obviously the exception applies where the transportation is expressly made a part of the employment contract. In the instant case there was no express agreement between Bristow and Cross that defendants were to provide such transportation. However, this court has applied the exception in cases where the transportation **817 furnished by the employer was not an express or negotiated part of the employment contract with the employee. Hann v. Times-Dispatch Pub. Co., 166 Va. 102, 184 S.E. 183 (1936); Lucas v. Biller, 204 Va. 309, 130 S.E.2d 582 (1963); Stillwell v. Iowa Nat. Mut. Ins. Co., 205 Va. 588, 139 S.E.2d 72 (1964).

Under our decisions an injury sustained by a workman who is provided with transportation when going to and from his work, is considered as arising out of his employment when such transportation is the result of an express or implied agreement between the employer and his employee; or where the transportation is furnished by custom to the extent that it is incidental to and part of the contract *721 of employment; or when it is the result of a continued practice in the course of the employer's business which is beneficial to both the employer and the employee.

When employed on July 17, 1967, plaintiff was instructed to be at the residence of defendant Cross at 7 A.M. the following morning, at which time he and fellow employees would be transported to work. Plaintiff had previously been employed by Century Concrete and knew about the arrangement for transportation of employees, for he testified '* * * that's where we generally meet, Cross' house.'

He further said, with reference to the other employees who rode the truck: 'They got in at his (Cross') house. That's where they met him, * * *'

The evidence disclosed that plaintiff's car was not running at the time, and he said he did not have any way to get to work. Bristow also testified that while some of the other employees who were being transported owned automobiles, 'The most majority of them does not have cars'. After this statement, the following pertinent exchange occurred between counsel and plaintiff:
'Q. Was this just part of the employment, you getting in the truck and riding to work?

'A. That's right.

'Q. Sort of a fringe benefit of the job?

'A. That's right.

'Q. Saved you some gasoline money?

'A. Right. That's for the employment, the man be sure gets the men.

'Q. And gets them to work on time?

'A. That's right.

'Q. So it does a little good to both your employer and you?

'A. Oh, yes. It helps all the way around.'

Admittedly there is nothing in the record to indicate that plaintiff was required to accept company transportation. He was offered no extra compensation if he drove to and from

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work in his own car. Plaintiff's wages began from the time of his arrival at the company's office.

However, the testimony leads only to the conclusion that it was the practice of defendants to pick up their employees at the foreman's residence, and sometimes at other points, and to transport them ***722** to the company's office, then from there to the job site. This arrangement was in effect and was followed on July 17, 1967.

Manifestly this was an arrangement which was beneficial and profitable to both the employer and employee. The employer benefited in the manner suggested by the plaintiff, for by transporting its employees their presence on the job was assured. It was beneficial to the employees in that they were saved the expense and trouble of providing their own transportation. While the employees were not on the payroll during the time consumed between the drive from the Cross home to the company's office, they were nevertheless in a vehicle ****818** owned, controlled and operated by the employer, and following a route of its choosing.

The transportation was not a gratuitous gesture made by the employer at the request of Bristow or other employees. It was by prearrangement and grew out of the employment of men to work for Century Concrete. Plaintiff's riding in the vehicle was but another incident to his employment and was one of mutual benefit.

We agree with the action of the lower court in sustaining the special plea filed by defendants. The transportation furnished plaintiff to work was an incident of his employment by defendants, and the injury he sustained which occurred during the course of travel arose out of and in the course of his employment. The parties were under the canopy of the Workmen's Compensation Act, and the Industrial Commission of Virginia had exclusive jurisdiction to determine plaintiff's claim.

Accordingly, the judgment of the lower court is

Affirmed.

All Citations

210 Va. 718, 173 S.E.2d 815

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66 O.I.C. 39 (Virginia Workers' Compensation Commission), 1987 WL 489682

Industrial Commission

State of Virginia

DONALD V. ASHE, Claimant

v.

DEPARTMENT OF STATE POLICE, Employer

- Self-Insured -

Claim No. 128-32-29
October 30, 1987

***1** ARISING OUT OF/IN THE COURSE OF/§65.1-7 - Compensation benefits were awarded to a State Police Officer who slipped and fell on the ice while going to his vehicle after completing paper work at his home.

John M. McCarthy, Esquire, Senior Assistant Attorney General, 101 North 8th Street, Richmond, Virginia 23219, for the Employer.

Opinion by O'NEILL, Commissioner

The employer requests review of the opinion of the Deputy Commissioner dated June 29, 1987, which awarded compensation benefits. The employer contends that the claimant, a State trooper who was injured on February 2, 1987 when he slipped and fell on a patch of ice, was not in the course of his employment at the time of the fall and that the accident did not arise out of his employment. We find that the evidence clearly demonstrates that the accident described by the testimony in this record arose out of and in the course of the employment.

The claimant, age 43, has been employed as a State trooper by the Department of State Police since 1966. On February 2, 1987 he was scheduled to be "on call" at his residence from 4 a.m. to 7 p.m. He was also scheduled on the same date to appear in court as a witness in various matters which related immediately to his duties as a State trooper. At approximately 6 o'clock that morning he went to his State Police vehicle and retrieved paperwork which related to his court appearances scheduled for that day. He brought these materials into his house and worked on them, preparing for his testimony in court later in the morning. He placed the paperwork in a briefcase and carried it to his State vehicle just before 7 a.m. As he neared the vehicle he slipped on ice and fell, twisting his back and landing across the hood of the vehicle on his elbows. The evidence indicates that he was using both hands to carry the briefcase at the time of the fall. The claimant was able to enter his vehicle and to notify his dispatcher by pushing a button on his vehicle console to indicate that he was then on duty.

The medical evidence justifies a finding, and we find, that the claimant was disabled for his work from February 2 through February 11, 1987, when he returned to regular duty.

The employer contends that the claimant was not on duty until he entered his vehicle and advised his dispatcher of that fact. It is the employer's position that the claimant's fall did not occur in the course of his employment because he had not reached his vehicle, citing Graybeal v. Montgomery County, 216 Va. 77, 216 S.E. 2d 52 (1975). The employer states that the risk of slipping on ice "was not affected by claimant's official duty nor was it an atypical accident." Rather, it was a risk commonly assumed by employees as they travel to their place of employment. We disagree.

We find from this evidence that the duties of this trooper required him to be available to answer any call in Middlesex County between 4 a.m. and 7 p.m. on the date of the accident. We also find that the claimant engaged in physical activity on behalf

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of the employer at approximately 6 a.m. when he retrieved paperwork from his State vehicle for the purpose of preparing for his scheduled court testimony later that morning. The fact that his work on behalf of the Commonwealth was carried on in his residence does not detract from the nature of the work in which he engaged, which was not personal but was official. When he carried his paperwork to his vehicle just before 7 a.m., to commence that phase of his work which was a regularly-scheduled tour of duty in contact with a dispatcher, he had already been at work for at least an hour pursuing the specific duties assigned to him for that day.

***2** The medical evidence is not contested and we find that the Deputy Commissioner's award spanning the period February 2 through February 11, 1987 is justified by the evidence of record. We observe that the principle of law adopted in Conner v. Bragg, 203 Va. 204, 123 S.E. 2d 393 (1962), and relied upon by the employer in contesting whether the accident occurred in the course of employment, is fully supportive of our holding that the place where he was reasonably expected to be and while reasonably fulfilling the duties of his employment.

The Deputy Commissioner's opinion is AFFIRMED. Interest is payable pursuant to Code §65.1-98.1.

This case is ordered removed from the Review Docket.

66 O.I.C. 39 (Virginia Workers' Compensation Commission), 1987 WL 489682

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221 Va. 600
Supreme Court of Virginia.

GATX TANK ERECTION COMPANY et al.
v.
William H. GNEWUCH.

Record No. 791827.
|
Nov. 26, 1980.

Synopsis

Employer and insurer appealed from Industrial Commission award of compensation to employee for injury sustained when employee's truck was struck by train at crossing off employer's premises while employee was going home from work. The Supreme Court, Cochran, J., held that: (1) employer's payment of $6 per day to all employees did not qualify as payment for time consumed in travel so as to bring injury to employee within exception to general rule that employee going to and from work is not engaged in any service growing out and incident to his employment; (2) under exception to general rule that employee going to and from work is nevertheless engaged in service growing out of and incidental to his employment where way used is sole and exclusive way of ingress and egress to employer's work site, road, or segment of one, is "sole and exclusive" route whenever it is the only way for all employees to get to and from the place of employment; (3) where employee was injured as result of special hazard of railroad crossing existing near employer's premises on sole and exclusive route to and from worksite, injury was compensable; and (4) under rule that injury to employee as result of special hazard on sole and exclusive route to employer's worksite is compensable, "special hazard" refers to some extraordinary danger at particular location, but does not mean that risk to employee is different from that to which general public would be exposed at same location.

Affirmed.

Harrison, J., dissented and filed statement in which Thompson, J., joined.

Attorneys and Law Firms

****201** ***601** Harvey B. Cohen, Washington, D. C. (Alex Kozinski, Joanne F. Alper, Peter D. Trooboff, Leonard, Cohen, Gettings & Sher, Covington & Burling, Washington, D. C., on briefs), for appellants.

Peter M. Sweeny, Alexandria (Ashcraft & Gerel, Alexandria, on brief), for appellee.

Before I'ANSON, C. J., and CARRICO, HARRISON, COCHRAN, POFF, COMPTON and THOMPSON, JJ.

Opinion

COCHRAN, Justice.

In this appeal by GATX Tank Erection Company and its insurer, Travelers Indemnity Company (collectively, GATX) from an Industrial ***602** Commission award of compensation to William Gnewuch, a GATX employee, the question is whether under the uncontroverted facts the accident arose out of and in the course of his employment, as required by Code s 65.1-7.[1] Specifically, ****202** we must decide whether Gnewuch, who was injured off his employer's premises while going home from work, came within one of the recognized exceptions to the general rule that an employee is not covered by the Workmen's Compensation Act in coming to or going from work.

On September 28, 1978, Gnewuch was employed by GATX as a crane operator in the erection of fuel storage tanks at the Steuart Petroleum jobsite, in Prince William County. At the conclusion of his workday he drove his pickup truck from the construction area to return home. He proceeded north on a road that extended along the eastern side of the Richmond, Fredericksburg and Potomac Railroad Company (R.F. and P.) track, drove through an open gate that was 151 feet, 8 inches from the edge of a railway crossing, turned west onto a dirt road, and entered the crossing. His truck was struck on the crossing by an R.F. and P. locomotive at 4:05 p. m., and Gnewuch sustained permanently disabling injuries, the severity of which is not questioned.

State Trooper D. L. Powell investigated the accident. He identified photographs of the crossing and its approaches, and described the area. Powell testified that the road extending from the worksite towards the crossing and shown in photographs to have a gravel surface did not have such a surface at the time of the accident.

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According to Powell, the only means of access to the crossing from the west was by way of State Route 635, also known as Cherry Hill Road, which ended a short distance west of the crossing at a sign denoting the end of State maintenance. From that sign a dirt road extension, unnamed but sometimes referred to in the record as Cherry Hill Road Extended, continued in an easterly direction over the crossing to a dead end at the Riverside Restaurant and the Potomac River. The gravel road from the GATX work area made a "T" intersection with Cherry Hill Road Extended just east of the crossing.

Thus, a driver traversing the crossing from the west could either turn south to enter the worksite or continue east to the restaurant or the river. But a driver leaving the work area to go home, wherever he lived, could only do so by turning west on Cherry Hill Road Extended, ***603** proceeding over the crossing, and continuing west on Route 635. Likewise, a driver coming from his home, regardless of where he resided, to work at the GATX site would, of necessity, approach from the west on Cherry Hill Road Extended and cross the railroad track before turning into the gravel road leading to the worksite. The officer knew of no way for workmen arriving at or leaving the jobsite to cross the R.F. and P. track other than by Cherry Hill Road Extended.

Richard B. Sierra, Director of Employee Relations for GATX, testified to explain certain payments of $6 per day that were included in Gnewuch's paychecks. These payments, similar to payments made to other GATX employees on the Steuart Petroleum project, were made to compensate Gnewuch for "some inconvenience" in traveling to and from work at a jobsite located more than 20 miles from the Washington Beltway. The fixed amount, which was paid regardless of the number of miles travelled, bore no relationship to the actual cost of transportation. The payments were negotiated and incorporated into a collective bargaining agreement executed by GATX and the union to which Gnewuch belonged. Although the agreement expired April 30, 1978, GATX continued to make the payments. Sierra confirmed that by making such payments GATX encouraged operating engineers to accept the inconvenience of going to distant jobsites.

The Deputy Commissioner, by opinion dated May 21, 1979, found that Gnewuch had travelled the length of a private roadway from the tank area to the crossing, which was not publicly maintained; that there were no other crossings within a considerable distance; that Gnewuch was allowed an extra payment for each day of travel; and that the way used in going to ****203** and from work was the sole and exclusive means of ingress and egress. Accordingly, he ruled that Gnewuch had proved a compensable accident. On review, the Commission, by opinion dated November 21, 1979, one Commissioner dissenting, adopted the findings of fact and conclusions of law contained in the Deputy Commissioner's opinion and affirmed the award.

The legal principles pertinent to this appeal are well established. In Kent v. Virginia-Carolina Chemical Co., 143 Va. 62, 66, 129 S.E. 330, 331-332 (1925), we held that an employee going to and from work is not engaged in any service growing out of and incidental to his employment unless one of the following exceptions applies:

> "First: Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages.
>
> "Second: Where the way used is the sole and exclusive way of ***604** ingress and egress with no other way, or where the way of ingress and egress is constructed by the employer.
>
> "Third: Where the employee on his way to or from work is still charged with some duty or task in connection with his employment."

In LeWhite Construction Co. v. Dunn, 211 Va. 279, 176 S.E.2d 809 (1970), we recognized the general rule and the exceptions. The second exception was not in issue, and we affirmed the Commission's ruling that the first and third exceptions were not applicable to the facts and that the employee's injuries, therefore, did not arise out of and in the course of his employment. In the present case, the Deputy Commissioner concluded, and a majority of the Commission agreed, that Gnewuch came within the first and second exceptions.

We agree with GATX that the award cannot be justified under the first exception. The payment of $6 per day did not qualify as payment for the time consumed in travel. It was not related to travel time, distance travelled, or the transportation expense actually incurred by the employee. The payment was not reimbursement of travel expense, but was additional compensation to attract skilled workers to a remote jobsite, as the Commission had construed a similar payment of $5 per day in Pettus v. Stone & Webster Engineering Corp., 55 O.I.C. 281 (1972). So the Commission erred in ruling that Gnewuch came within the first exception defined in Kent.

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The dispositive question is whether the second exception applies. In the 55 years that have elapsed since Kent was decided, we have not had occasion to consider again the application of this exception. In Kent, we held that the employee did not come within the second exception where he sustained an injury on his way home by the "shortest and most practical route" which was not the sole or exclusive means of access. 143 Va. at 64, 129 S.E. at 331. Indeed, the bridge on which he was injured had a sign at each end warning against trespassing. One of the alternative routes was longer than the one the employee used, and the other was subject to occasional flooding, but both were available.

Our opinion in Kent, citing with approval Bell's Case, 238 Mass. 46, 130 N.E. 67 (1921), distinguished Cudahy Packing Co. v. Parramore, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366 (1923), where compensation was approved for the death of an employee killed on his way to his employer's plant while crossing a railroad track near the plant. In Parramore, the employee had no choice but to cross the track to get to work as there was no other means of ingress. In Bell's Case, however, compensation was ***605** denied for the death of an employee killed while walking home from work by one route when there were two other routes available, even though they were impracticable and dangerous.

Therefore, under the rationale for the second exception set forth in Kent, if the route in question is the only available way for an employee to get to and from work, the employer is deemed to have invited the employee to use it. The way becomes ****204** in effect a part of the employer's premises while the employee travels over it to and from the jobsite. We construe the exception to mean that a road, or segment of one, is the "sole and exclusive" route whenever it is the only way for all employees to get to and from the place of employment.[2] When the employees have no choice, the employer is deemed to have invited them to use the one available means of ingress and egress. And where, as here, an employee is injured as a result of a special hazard, e. g., a railroad crossing existing near the employer's premises, on the sole and exclusive route, the injury is compensable. Larson, Workmen's Compensation, Vol. 1, s 15.15 at 4-42 (1978). Thus, a "special hazard" refers to some extraordinary danger at a particular location, but it does not mean that the risk to the employee is different from that to which the general public would be exposed at the same location.[3]

The record in this case shows that the only way that GATX employees could go to and from the jobsite was by means of Cherry Hill Road, Cherry Hill Road Extended, and the intersecting gravel road leading into the jobsite. Cherry Hill Road was a public road, maintained by the Commonwealth; Cherry Hill Road Extended, though not publicly maintained, was used by the public. The public nature of the roads, however, is irrelevant. There were no roads turning off Cherry Hill Road Extended between the eastern end of Cherry Hill Road and the intersection with the gravel road. Therefore, Gnewuch was using the only available means of egress from the worksite when he turned west on Cherry Hill Road Extended and encountered the special hazard, ***606** viz., the railroad crossing existing near his employer's premises. We hold that he came within the second exception and was entitled to compensation.

The award of the Commission will be affirmed.

Affirmed.

HARRISON, J., dissents.

THOMPSON, J., joins in dissent.

HARRISON, Justice, dissenting.

The opinion of the majority applying the exception to the premises rule in this case results in a broadening of the rule. We consider such action to be unsound and therefore dissent.

THOMPSON, J., joins in dissent.

All Citations

221 Va. 600, 272 S.E.2d 200

Footnotes

1 Code s 65.1-7 provides in pertinent part as follows:
"Injury" defined.-Unless the context otherwise requires, "injury" and "personal injury" mean only injury by accident ... arising out of and in the course of the employment ....

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2 Under this construction, the exception is limited to ways that must be used by all employees, rather than to ways that must be used only by employees residing in uniquely remote or dangerous locations. The sole means of egress, for example, terminates at the first point where a choice of routes becomes available to employees leaving work. The employees' preference of one route rather than another is of no consequence if two or more routes are available.

3 We have adopted the "actual risk test" which requires only that the employment expose the employee to the particular danger giving rise to the injury, regardless of the exposure of the general public to similar risks. Lucas v. Lucas, 212 Va. 561, 563, 186 S.E.2d 63, 64 (1972); Immer and Company v. Brosnahan, 207 Va. 720, 725, 152 S.E.2d 254, 257-58 (1967); Dreyfus & Co. v. Meade, 142 Va. 567, 574, 129 S.E. 336, 338 (1925).

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1994 WL 410880
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Virginia.

INDEPENDENT LIFE & ACCIDENT INSURANCE COMPANY,
and
AMERICAN MOTORISTS INSURANCE COMPANY,
v.
Edward Brooke JOHNSON.

No.
0211
-
94
-
2
.
|
Aug. 2, 1994.

Present: Judges BARROW, KOONTZ and BRAY

PER CURIAM.

MEMORANDUM OPINION*

*1 Independent Life & Accident Insurance Company (hereinafter referred to as "Independent Life" or "employer") and its insurer contend that the Workers' Compensation Commission erred in finding that Edward Brooke Johnson sustained an injury by accident arising out of and in the course of his employment on January 31, 1992. Upon reviewing the record and the briefs of the parties, we conclude that this appeal is without merit. Accordingly, we summarily affirm the commission's decision. Rule 5A:27.

On appellate review, we construe the evidence in the light most favorable to the party prevailing below. *R.G. Moore Bldg. Corp. v. Mullins,* 10 Va.App. 211, 212, 390 S.E.2d 788, 788 (1990). Factual findings of the commission will be upheld on appeal if supported by credible evidence. *James v. Capitol Steel Constr. Co.,* 8 Va.App. 512, 515, 382 S.E.2d 487, 488 (1989).

In ruling that Johnson's injury arose out of and in the course of his employment, the commission made the following factual findings:

Upon review of the evidence in this record we find that the employee [,a debit insurance agent/salesman,] maintained a base of operations in his home from which he operated, using his automobile Monday through Thursday to service his accounts, collect premiums, and sell new policies of insurance. On Friday, it was his duty to deliver the premiums collected during the week, together with executed company forms to Fredericksburg where he attended a sales meeting and also obtained information and materials for the next week's work.

We find specifically that the employee's travel to Fredericksburg on Friday from his home base in Crozet was as much a part of his duty as an outside salesman as was his 250-mile weekly travel between his home base and the homes of his current and potential policyholders. The statement by the manager that travel to Fredericksburg was not included in his expense reimbursement does not eliminate that travel from status as a work activity necessary to his employment responsibilities.

The commission also held that the "going and coming rule" was not applicable to this case, and that Johnson encountered an actual risk of his employment on Friday, January 31, 1992, at the time of the automobile accident, as he pursued his employment duties. Credible evidence supports the commission's findings.

Johnson's testimony and that of his supervisor established that, at the time of the accident, Johnson was traveling to Fredericksburg for the employer's sales meeting where he was expected to turn in the premium money he had collected that week. This meeting and the duties attached to it were integral parts of his employment. He was injured on a highway that was the most direct route between his home base and the employer's office in Fredericksburg, the place where he was to perform his assigned duties. At the time of the accident, he was on his employer's mission. Thus, credible evidence proved that Johnson's injury occurred in the course of his employment.

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***2** "To satisfy the 'arising out of' prong of the compensability test, [Johnson] had to prove that 'there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.' " *Marketing Profiles, Inc. v. Hill,* 17 Va.App. ----, ----, 437 S.E.2d 727, 729 (1993)(reh'g *en banc*) (citation omitted). "It is not necessary ... that the employee show that his presence on the street or highway ... exposes him to an increased hazard peculiar to the work and not common to the public generally." *Immer & Company v. Brosnahan,* 207 Va. 720, 725, 152 S.E.2d 254, 257 (1967). An "actual risk test" has developed in street cases. *Id.* Injury under these circumstances is deemed to arise "in the course of the employment," provided the employee's "duties ... require ... [a] presence upon the public streets," and the "injury arose from an actual risk of that presence upon the streets." *Sentara Leigh Hosp. v. Nichols,* 13 Va.App. 630, 634, 414 S.E.2d 426, 428 (1992)(*en banc*).

Credible evidence proved that Johnson's employment duties required his presence on the highway. The accident occurred while Johnson was on a mission for his employer that required his presence on the road where he was subject to risks associated with the highway. He was traveling to the Fredericksburg office by the most direct route, and there was no deviation from his mission. Moreover, Johnson's description of the accident provides credible evidence to support the commission's conclusion that Johnson's injuries were caused by a risk of the street occasioned by his employment. Johnson's testimony established that an oncoming vehicle veered into his lane of travel, causing him to lose control of his vehicle.

We also agree with the commission that this case does not fall within the parameters of the "going and coming" rule. Under this rule, "an injury sustained while traveling to or from work is generally not compensable." *Sentara,* 13 Va.App. at 636, 414 S.E.2d at 429. The rationale for this rule is that the employee is not engaged in performing any service growing out of and incidental to his employment. *Id.* In this case, Johnson was traveling a direct route from his home base of business to another business site. He was not merely leaving his home to travel to a regular workplace. By traveling to Fredericksburg on Fridays to deliver the premium money to employer and to attend the sales meeting, Johnson was engaged in performing a service incidental to his employment.

Accordingly, we find that the commission did not err in finding that Johnson sustained his burden of proving an injury by accident arising out of and in the course of his employment.

For the reasons stated, we affirm the commission's decision.

Affirmed.

All Citations

Not Reported in S.E.2d, 1994 WL 410880

Footnotes

* Pursuant to Code § 17-116.010 this opinion is not designated for publication.

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143 Va. 62
Supreme Court of Appeals of Virginia

MRS. JOHN B. KENT
v.
VIRGINIA-CAROLINA CHEMICAL CO.

September 17, 1925.

***62** Absent, Burks and West, JJ.

Synopsis
Appeal from Industrial Commission.

Proceeding under the Workmen's Compensation Act by Mrs. John B. Kent for death of John B. Kent, her husband, claimant, opposed by the Virginia-Carolina Chemical Company, employer. From a judgment of the Industrial Commission denying compensation, claimant appeals. Affirmed.

VIRGINIA REPORTS SYNOPSIS

Appeal from a judgment of the Industrial Commission denying compensation under the workman's compensation act.

Affirmed.

The opinion states the case.

VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

1. WORKMAN'S COMPENSATION ACT — *Arising Out of and in the Course of Employment.* — Under section 2(d) of the workman's compensation act (Acts 1918, ch. 400), the accident resulting in injury or death of an employee must both 'arise out of' and 'in the course of' the employment, before compensation can be awarded.
2. WORKMEN'S COMPENSATION ACT — *Going to or from Work — General Rule.* — An employee going to or from the place where his work is to be performed is not, as a general rule, performing any service arising out of and in the course of his employment. But to this general rule there are exceptions.
3. WORKMAN'S COMPENSATION ACT — *Going to or from Work — Exceptions to the General Rule.* — Although the injury occurs while the employee is going to or from his work, he is entitled to compensation where the means of transportation is provided by the employer or the time consumed is paid for and included in the wages; where the way used is the sole and exclusive way of ingress and egress, with no other way; where the way of ingress and egress is constructed by the employer; and where the employee on his way to or from work is still charged with some duty or task in connection with his employment.
4. WORKMAN'S COMPENSATION ACT — *Going to and from Work — Case at Bar.* — In the instant case, a claim for compensation under the workman's compensation act, the employee was killed on his way home from his work. Fifteen minutes after leaving the plant while walking over a railroad bridge, he was struck by a train and killed. The route used by deceased over the railroad bridge was the shortest and most practical route to his home, and was the one usually taken by him. At each end of the bridge there was a large sign warning people not to trespass. There were two other possible ways between the plant and deceased's home. The employer did not pay deceased for the time consumed in going home.
Held: That deceased's death did not arise out of and in the course of his employment so as to be compensable under the workman's compensation act.
END OF VIRGINIA REPORTS HEADNOTES AND CLASSIFICATION

Attorneys and Law Firms

****331** ***63** *O. B. Harvey,* for the appellant.

J. D. Cronmiller and *R. E. Cabell,* for the appellee.

Opinion

JUDGE: CHICHESTER

CHICHESTER, J., delivered the opinion of the court.

This is an appeal from a judgment of the Industrial Commission of Virginia rendered on January 19, 1925, by which compensation was refused appellant for the death of her husband John B. Kent.

The facts of the case are agreed. Kent, at the time of his death and for about seven years theretofore, was employed as night watchman, at their plant in Lynchburg, Va., by the Virginia-Carolina Chemical Company.

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On the morning of March 31, 1924, having completed his work at the plant he started for his home in the city of Lynchburg. Fifteen minutes after leaving the plant while he was walking over what is known as the lower island bridge, he was struck by a Norfolk and Western passenger train and killed. This bridge is about 100 feet long, is a single track bridge and spans the James river.

***64** The home of the deceased was on one side of the James river and the plant of the defendant company was on the other, about three miles apart.

This route, over the Norfolk and Western R.R. bridge from the home of the deceased to the plant, was found by the Commission to be the shortest and most practical route, and it was the route usually, if not always, taken by the deceased. At each end of the bridge there was a large sign warning people not to trespass.

There were two other possible ways. One is spoken of as the county road route, and is a half mile longer than the route across the Norfolk and Western bridge. The other is called the river road and is practically the same distance as the route by the Norfolk and Western Bridge, but this latter route appears to have been subject to overflow at times.

The superintendent of the plant stated that he knew Kent had used the bridge route but he had never objected to his using it.

The company furnished no means of conveyance to and from the plant for employees living in Lunchburg, and did not pay them for the time consumed in going home or coming to the plant.

The case was first heard before the chairman of the Commission at Lynchburg who found that the deceased met his death by 'accident arising out of and in the course of his employment,' and the applicant was allowed compensation.

An appeal was taken to the full Commission and a hearing in Richmond resulted in a refusal of the claim. From the final judgment, refusing the claim, an appeal was granted by this court.

There was an able opinion filed in the case by Commissioner Park P. Deans maintaining the majority ***65** finding, and an able dissenting opinion by Chairman Bolling H. Handy.

Under section 2(d) of the Virginia workman's compensation act, (Laws 1918, c. 400), the accident resulting in injury or death of an employee must arise out of, *and* in the course of the employment, before compensation can be awarded.

The test, we think, is whether the general character of the undertaking in which the deceased was engaged at the time of the accident arose out of and in the course of his employment.

Under the facts of this case it does not appear that there should be any great difficulty in answering this question, but under the rule of liberal construction of statutes in this class of cases, the courts have allowed compensation in cases very closely analagous to the instant case, and therefore the case here is not without difficulty.

If we bear in mind, however, that under the Virginia act the accident must both 'arise out of' and 'in the course of' employment, and if we further bear in mind these salient features of this case:

1. That deceased was not at the plant or engaged in work for his employer at the time of the accident;

2. That he was on his way to his home, had left the plant fifteen minutes before the accident and had proceeded on his way for a half mile;

3. That he was walking by a way of his own choosing and not by one provided by his employer;

4. That this way was not the sole or exclusive way of ingress to, and egress from, the plant;

5. That he was not charged with any duty or task in connection with his employment on his way home which carried him over this route.

Can the accident which resulted in the death of ***66** John B. Kent be regarded as meeting both of the conditions of the Virginia statute? Unless we are prepared to say that soing to and returning from work meets both of these conditions, then we must answer the question in the negative.

The *general rule,* well stated in *Clapp's Parking Station v. Ind. Acc't. Com.*, 51 Cal.App. 624, 197 Pac. 369, is:

'That an employee going to or from the place where his work is to be performed is not engaged in performing any service

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growing out of and incidental to his employment.' The facts agreed upon here and set out above show that the deceased had left his employer's premises and was going home from his work.

The cases indicate that there are three exceptions to the general rule above stated and only three.

**332 First: Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages.

Second: Where the way used is the sole and exclusive way of ingress and egress with no other way, or where the way of ingress and egress is constructed by the employer.

Third: Where the employee on his way to or from work is still charged with some duty or task in connection with his employment.

It cannot be successfully contended that the case we are here reviewing comes literally within any of these exceptions.

This general rule, with the exceptions stated, is not contested, but it is sought to come within the second exception by implication. That is, the contention is that it should be held that where employees regularly and constantly and over a period of years use a certain method or way of approach to the place of employment *67 with the knowledge of the employer, and that when the way so used is the best way, or most practical way of approach, although there are other ways which could be used, that such route really becomes a part of the contract of employment, and that the injuries sustained upon such route, if it be one which exposes the employee to unusual hazard, are compensable. The contention is based upon the idea that the employee is, by clear implication, invited to use this way, and in effect it becomes a part of the employer's premises.

If we read the statute, in the light of the general rule, and the exceptions thereto, it would seem that the courts have gone as far as they well can, even under a liberal construction of the statute, and that to 'go one step further,' as the minority opinion holds should be done in this case in order or allow compensation, suggests the inquiry, 'when is this thing going to stop?'

An examination of the authorities to which we are referred by counsel for appellant and upon which we are asked to reverse the judgment of the Commission, will reveal that they come within one or the other of the exceptions noted above.

In the case of *Cudahy Packing Co. v. Parramore,* 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366, 30 A.L.R. 532, so much relied on by appellant, Parramore was killed on his way to his employer's plant while crossing a railroad track very near the plant and while he was pursuing the only way thereto. The court said: 'Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work, and he was in effect invited by his employer to do so.'

The case of *68 *DeConstantin v. Public Service Commission,* 75 W.Va. 32, 83 S.E. 88, L.R.A. 1916-A, 329, compensation was denied, and the dictum quoted therefrom rather supports the contention of appellees here.

In the case of *Wabash Railway Co. v. Industrial Commission,* 294 Ill. 119, 128 N.E. 290, the court found that the deceased was on the premises of the employer when the accident resulting in his death occurred.

The only other case relied on by appellant to which it is necessary to refer is that of *Green v. Albemarle Paper Manufacturing Company,* 2 O.I.C. 398, affirmed by full Commission, 459, and later affirmed upon appeal to the Law and Equity Court of the city of Richmond. In this case compensation was allowed, but upon the appeal the Commission predicated the allowance upon the conceded fact that the paper company had actually built the steps leading up to the C. & O. railway tracks, upon which claimant's decedent was killed, as a means of ingress to and egress from the plant for its employees, and after stating these facts held:

'That death resulted from an accident which arose out of and in the course of the employment, even though the day's work was over and there was a safer but more circuitous route that could have been taken by the claimant. The Commission stated the rules that while ordinarily the employment ceases with the close of the day's work, the rule has an exception covering cases where the means of egress furnished by employer exposes employees to danger and that where custom with the consent of the employer has established a means of egress that is dangerous, the employer cannot disclaim liability on account of such dangerous nature of the route.'

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There is a clear distinction between this case and ***69** the case at bar. In the instant case there was no means of ingress and egress furnished by the employer as there was in the *Green Case.* There the employer clearly invited his employees to use the right of way of the C. & O. railway in coming to and going from the plant, and to this extent made the railway part of its own premises.

In practically all cases identical, or nearly identical, with the case at bar compensation was refused. See *Mazaffe v. Kansas City Terminal Ry. Co.,* 106 Kan. 796, 189 Pac. 917; *Fumiciello's Case,* 219 Mass. 488, 107 N.E. 349; *Ocean Accident & Guarantee Co. v. Industrial Accident Commission,* 173 Cal. 313, 159 P. 1041, L.R.A. 1917 B 336; *McInerney v. Buffalo & S.R. Corp.,* 225 N.Y. 130, 121 N.E. 806; *Bell's Case,* 238 Mass. 46, 130 N.E. 67.

In the last mentioned case the facts are so identical with the case here being considered that a quotation somewhat at length is justified.

Bell, an employee of the Commonwealth Chemical Company, was proceeding to his home, and while passing over a railroad location which was necessary in order to reach his destination met with a fatal accident. ****333** As indicated in the decision, there were two other routes which might have been used although the court says they 'were impracticable and dangerous.' It will be noted in this case, too, when Bell entered the employ of the chemical company, the superintendent accompanied him and took him over the very route he used the day on which the accident later occurred. He had used this route daily in going to and from work, and with the knowledge of his employer. In the course of the opinion we find the following:

'In the present case, the employee, Bell, had ended his night's work and left his employer's premises. ***70** He was his own master * * *. In crossing railroad tracks, the employer could not confer upon its employees the right to cross the railroad location nor did it assume to possess or confer any such right. In the present case, admittedly, the general public had no right to cross the railroad tracks at the place of the accident. The chemical company acquired no such right for its officers, employees or others. Bell's contract of employment did not provide that he was to be considered in the employer's service while crossing the railroad tracks in going from the factory to his home. No such terms can be read into the contract by implication based on the failure of the chemical company to provide other ways to and from the factory that were convenient and safe. It is not to be inferred that the company assumed to give Bell a right from his contract of service.

'It follows that the employee was on his own business and not that of his employer when he was injured on the railroad tracks. His contract did not contemplate nor was he in fact engaged in any service for his employer at that place. The risk from what he suffered was not a risk of his employment. The train which injured him was not connected with its business or with the work for which Bell was employed.'

All of which applies with full force to the case at bar.

From these reasons we think the judgment of the Commission is plainly right and that it should be affirmed.

Affirmed.

All Citations

143 Va. 62, 129 S.E. 330

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211 Va. 279
Supreme Court of Appeals of Virginia.

LeWHITE CONSTRUCTION COMPANY, Inc., et al.
v.
Frank DUNN, Administrator, etc.

Oct. 12, 1970.

Synopsis

Workmen's compensation proceeding. The deputy commissioner concluded that injuries of the employee had not been shown to have arisen out of and in the course of his employment, and the full Commission affirmed. The employer appealed. The Supreme Court of Appeals, Cochran, J., held that an employee who is furnished transportation by his employer, absent express or implied agreement or custom incidental to the employment contract, is not covered by the Workmen's Compensation Act unless such transportation is beneficial to the employer. The Court also held that where the employee was going to Richmond for a weekend either in the company truck or in a private automobile and was not instructed to load or unload in Richmond and any such work, if required of him, could have been done at any time over the weekend, transportation given him on Friday was too remote to be considered incidental to a task which might have been accomplished as late as Monday morning, a weekend at home intervening, and the accident in the course of the trip to the Richmond area did not arise out of and in the course of employment.

Affirmed.

Attorneys and Law Firms

***279** ****810** John M. Oakey, Jr., Willard I. Walker, Richmond (McGuire, Woods & Battle, Richmond, on brief), for appellants.

George F. Tidey, Richmond (Somma, Tidey & McMurtrie, Richmond, on brief), for appellee.

Before SNEAD, C.J., and I'ANSON, CARRICO, GORDON, HARRISON, COCHRAN and HARMAN, JJ.

Opinion

COCHRAN, Justice.

This appeal by LeWhite Construction Company, Inc. is from an ***280** order of the Industrial Commission finding that injuries received on Friday, May 19, 1967, by Gerald K. Dunn, now deceased, did not arise out of and in the course of his employment, and denying compensation to his estate.

The record shows that at the time he was injured, Dunn had been employed as a laborer by LeWhite Construction Company, Inc. for approximately one year, though not continuously, installing signs on an interstate terstate highway near Greensboro, North Carolina.

Dunn was injured at about 9:30 p.m. on U.S. Route 360 in Nottoway County, Virginia, while returning from North Carolina for the weekend. He and a fellow employee, R. L. Garner, were riding in a pickup truck owned by LeWhite and operated by another employee, Freddie Gene Dent, when the truck was involved in an accident. All three employees resided in the Richmond area, where LeWhite's principal office was also located.

The findings of fact, made by Deputy Commissioner Wilhoit and approved by the Commission, may be summarized as follows:

LeWhite employees were required to travel to and from North Carolina by their own means and at their own expense, and it was not a regular custom for Dunn to ride back to Richmond in a LeWhite truck.

On the day of the accident LeWhite directed Dent to drive the pickup truck, pulling a trailer, to Richmond to bring ****811** back materials. Dunn and Garner had ridden from Richmond to North Carolina with Dent in his car and had paid for their transportation. They 'elected' to ride back home in the truck for the weekend and were permitted, but not instructed or requested, by LeWhite to do so.

It was not clear who would load the materials or when the loading would be done but Dunn was not instructed to assist in this work.

Dunn was not being paid when he was injured, was not on an errand for LeWhite and was not being furnished transportation as a part of his employment contract. He was commuting from the job to his home, a personal mission from which LeWhite was receiving no benefit. The hazard to Dunn

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was the same whether he rode in the truck or Dent's private car.

The Deputy Commissioner concluded, and the full Commission affirmed his holding, that the applicant had failed to prove by a preponderance of the evidence that Dunn's injuries arose out of and in the course of his employment.

***281** LeWhite contends that material findings of fact made by Deputy Commissioner Wilhoit, and adopted by the Commission, are not based upon substantial evidence and that Dunn's injuries are commensable under the Workmen's Compensation Act as a matter of law.

The findings of fact, if supported by credible evidence, are binding upon us. Robinette v. Kayo Oil Company, 210 Va. 376, 377, 171 S.E.2d 172, 173 (1969); Code s 65.1—98.

Dent and Dunn were dead at the time of the hearing. The pertinent evidence consisted of testimony given by fellow employees, H. J. Cole and R. L. Garner, Lewis White, president and sole stockholder of LeWhite, and his brother, Paul White, in charge of the North Carolina project.

Cole, who had been employed by LeWhite for about six months before being laid off two weeks prior to the accident, testified that he had worked in North Carolina with Dunn and Dent. He and Dunn usually rode in Dent's car from Richmond to Greensboro early each Monday morning and back each Friday, paying Dent for the transportation. If LeWhite had a truck returning to Richmond they were permitted to ride back in it with Dent driving. Cole had done this 'a couple times' and Dunn had been with him. On one of the trips he, Dunn and Dent had bought gas for which they had not sought reimbursement.

Garner had only worked for LeWhite the week of the accident. He testified that it was understood, when he was employed, that he must furnish his own transportation between Richmond and Greensboro. He made arrangements to pay Dent for the round trip in Dent's car and, accompanied by Dunn, rode with him to Greensboro the Sunday before the accident. He intended to return with them in the car after work on Friday.

Lewis White undertook to prove a custom of providing free transportation for employees whenever, at his convenience, there was a truck making the trip. However, he admitted that transportation between Richmond and North Carolina was regularly provded only for LeWhite superintendents, and that Dunn had been directed, when employed, to provide his own transportation.

Thus, there was credible evidence to support the finding that free transportation was not furnished Dunn as a regular custom or as part of his employment contract.

Lewis White, who was in the Richmond office testified that he expected the men riding in the truck to Richmond on May 19th to do the loading and unloading required there as a matter of 'normal ***282** procedure'. He conceded that this work could have been done any time over the weekend.

****812** Paul White testified that he 'believed' he asked Dunn and Garner 'if they wanted to' ride back in the truck on May 19th, because there was material to be loaded in Richmond. They were not being paid to ride, but Dent was being paid to drive the truck.

Garner, denying that Paul White ordered or requested them to ride in the truck, said that, since Dent was coming back in the truck, 'it was all right to ride to Richmond, so we rode with him.' Garner admitted hearing Paul White and Dent talk about bringing some materials back from Richmond in the trailer, but denied that he was ever ordered or requested to do any loading or unloading in Richmond.

The Deputy Commissioner was justified in finding, from this testimony, and reasonable inferences therefrom, that Dunn was permitted to ride in the truck for his personal convenience in returning home for the weekend, and was not instructed to do any work in Richmond.

Concluding that there was credible evidence to support the findings of fact we now consider the applicable law.

In Kent v. Vir.-Car. Chem. Co., 143 Va. 62, 66, 129 S.E. 330, 331—332 (1925), we recognized three exceptions to the general rule that an employee going to or from work is not engaged in any service growing out of and incidental to his employment, of which these two are relied upon by LeWhite: 'First: Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages.

'Third: Where the employee on his way to or from work is still charged with some duty or task in connection with his employment.'

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Most of the decisions applying the first exception have been based upon agreements, express or implied, that the employer will furnish the workman free transportation to and from his work. Stillwell v. Iowa Nat'l Mutual Ins. Co., 205 Va. 588, 139 S.E.2d 72 (1964); Scott v. Willis, 150 Va. 260, 142 S.E. 400 (1928); Russell v. Williams, 47 O.I.C. 284 (1965). Here, as the Commission found, there was no such agreement.

***283** In Bristow v. Cross, 210 Va. 718, 173 S.E.2d 815 (1970) we concluded that a workman was also covered by the Act in these instances:

'* * * where the transportation is furnished by custom to the extent that it is incidental to and part of the contract of employment; or when it is the result of a continued practice in the course of the employer's business which is beneficial to both the employer and the employee.' 210 Va. at 720—721, 173 S.E.2d at 817.

There, the employee and other workers met at the home of the employer's representative, who drove them to work. This was found to be the customary practice which not only gave the employees free transportation but benefited the employer by assuring their presence on the job. Injuries received during the course of transportation were therefore held compensable.

In Hann v. Times-Dispatch Pub. Co., 166 Va. 102, 184 S.E. 183 (1936), relied upon by LeWhite, the employer's supervisor, as he had frequently done with other tardy news-carriers, went to the home of a boy who had overslept and drove him to work. The carrier's injuries received enroute were held to be compensable as he came under his supervisor's control and was about his employer's business when he accepted the free ride. The benefit derived by the employer from such transportation is obvious.

We conclude that an employee furnished transportation by his employer, absent express or implied agreement or custom incidental to the employment contract, is not covered by the Act unless such transportation ****813** is beneficial to the employer. Here, under the Commission's findings of fact, the free transportation for Dunn was merely a favor to him which provided no benefit to his employer.

Le White finally contends that Dunn was within the exclusive coverage of the Act because on his way from work he was still charged with the duty of assisting in loading the trailer in Frichmond and switching it to the new truck for the return trip. We do not agree.

Dunn was going to Richmond for the weekend either in the truck or in a private car. He was not instructed to load or unload in Richmond. Any such work, if required of him, could have been done at any time over the weekend. Indeed, the time and place of the accident, as well as Dent's blood alcohol count of 0.24%, strongly suggested that no work in Richmond on Friday night was contemplated by any of the three employees. Hence, transportation given Dunn on ***284** Friday is too remote to be considered incidental to a task that might have been accomplished as late ad Monday morning, where a weekend at home intervened.

Under the findings of fact approved by the Commission, which we have concluded were based upon credible evidence, Dunn's injuries cannot fairly be traced to his employment as a contributing proximate cause.

Affirmed.

All Citations

211 Va. 279, 176 S.E.2d 809

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250 Va. 474
Supreme Court of Virginia.

Kimberly Dawn RAMEY,
Administrator, etc.
v.
Delmos BOBBITT, et al.

Record No. 950217.
|
Nov. 3, 1995.

Synopsis

Administrator of estate of deceased employee brought wrongful death action against employer, coworker, driver of automobile that struck and killed employee, and driver's automobile insurer. The Circuit Court, Wise County, J. Robert Stump, J., held that Workers' Compensation Act provided exclusive remedy against employer and fellow worker. Administrator appealed. The Supreme Court, Keenan, J., held that: (1) Workers' Compensation Act did not provide exclusive remedy, as accident fell within "going to and from work" rule, and (2) release of automobile driver and her insurer did not release employer and co-worker.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

****438** ***475** James R. Henderson, IV, Tazewell (Henderson and DeCourcy, on briefs), for appellant.

W. Bradford Stallard, Abingdon (Daniel H. Caldwell; Penn, Stuart, Eskridge & Jones, on brief), for appellee Delmos Bobbitt.

Ronald G. Thomason, Norton (Herndon P. Jeffreys, III; Mullins, Thomason, Harris & Jessee, on brief), for appellee Pepsi–Cola Bottling Company, Inc. of Virginia, a/k/a Pepsi Cola Bottling Company of Norton.

***474** Present: All the Justices.

Opinion

KEENAN, Justice.

In this appeal from a judgment entered in a wrongful death action, the plaintiff's decedent was struck and killed by a motor vehicle on a public street adjacent to his employer's premises ***476** while on his way to work. The primary issue on appeal is whether the trial court correctly ruled that the Virginia Workers' Compensation Act (the Act), Code §§ 65.2–100 to –1310, provided the plaintiff's exclusive remedy against the employer and a fellow worker, who was driving the employer's truck at the time of the accident.

On August 20, 1990, Kimberly D. Ramey, Administrator of the Estate of Gene Scott Ramey (the Administrator), filed a motion for judgment against Pepsi–Cola Bottling Company, Inc., of Virginia (Pepsi), and Delmos Bobbitt. The motion for judgment alleged that Bobbitt, while acting within the scope of his employment with Pepsi, wrongfully caused Ramey's death by driving a truck in a negligent manner, thereby distracting the attention of Margie H. Lawson, who was driving the car that actually struck Ramey. At the time of his death, Ramey was employed by Pepsi.

****439** Bobbitt and Pepsi filed pleas in bar, asserting that the Administrator's action was barred by the exclusivity provision of the Act, Code § 65.2–307. They also asserted that the action was barred on the grounds of accord and satisfaction, as evidenced by a release dated July 12, 1989, which was executed in connection with a compromise settlement of the Administrator's wrongful death action against Lawson in Dickenson County.

The trial court received stipulated facts concerning the accident and the circumstances of Ramey's employment with Pepsi. These facts show that Pepsi, which is in the business of bottling, selling, and distributing soft drinks, operates a manufacturing plant located on Park Avenue in the City of Norton. At the time of the accident, Pepsi did not provide a parking lot for its employees. Employees generally parked on public streets near the plant, including Park Avenue, 12th Street, and Virginia Avenue. Although the primary entrance to the Pepsi plant is located off of Park Avenue, there are also other entrances.

Ramey was a route salesman for Pepsi and was paid on a commission basis. Ramey was required to check in at the Pepsi plant each morning before beginning his daily route to pick up his loaded delivery truck and a box of tickets. However, he was not required to report to work at a particular time. The accident occurred between 8:00 a.m. and 9:00 a.m.,

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within the time period when Ramey normally reported to work.

After parking his vehicle on Virginia Avenue, Ramey walked down 12th Street and over to Park Avenue, which is adjacent to *477 the Pepsi plant. While attempting to cross Park Avenue, Ramey was struck by Lawson's vehicle as Bobbitt was in the process of "backing" a tractor-trailer truck into the Pepsi plant. Bobbitt was acting within the scope of his employment with Pepsi at the time of the accident.

When the accident occurred, Ramey was wearing a Pepsi–Cola uniform shirt, which Pepsi employees are required to wear while they are on the job. Pepsi's route sales personnel customarily dress in the uniform shirts at home and wear them when traveling to and from work, because Pepsi does not provide lockers or changing rooms for these employees.

At the time of the accident, Ramey had in his possession a check from a customer made payable to Pepsi–Cola Bottling Company. Route sales personnel generally deposit such checks at the plant before beginning their daily routes.

The trial court denied the defendants' plea of accord and satisfaction. However, the court sustained the defendants' plea that the action was barred by the exclusivity provision of the Act and entered an order dismissing the case. The Administrator appeals the trial court's dismissal of her case, and the defendants assign cross-error to the trial court's denial of their plea of accord and satisfaction.

On appeal, the Administrator argues that the trial court erred in ruling that her action was barred by the Act, because Ramey was not killed while performing an act arising out of or in the course of his employment. In support of her position, the Administrator cites the general rule that an employee going to or from the place where his or her work is to be performed is not engaged in any service growing out of and incidental to the employment. *Barnes v. Stokes,* 233 Va. 249, 251, 355 S.E.2d 330, 331 (1987).

In response, the defendants contend that Ramey was "at work" when the accident occurred, because employment includes not only the actual performance of the work but also "a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done." *Brown v. Reed,* 209 Va. 562, 565, 165 S.E.2d 394, 397 (1969) (quoting *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158, 48 S.Ct. 221, 222, 72 L.Ed. 507 (1928)). Therefore, the defendants argue, Park Avenue was in practical effect part of the employer's premises for purposes of coverage under the Act, because it was a hazard that Pepsi employees had to encounter in order to enter the Pepsi plant. We disagree with the defendants.

*478 The central question for our determination is whether Ramey's death by accident, in the **440 language of the Act, was one "arising out of and in the course of the employment." Code § 65.2–300. If Ramey's accident falls within this definition, the Administrator's exclusive remedy is under the Act. Code § 65.2–307.

Generally, an employee going to or from his or her place of employment is not performing a service arising out of and incidental to the employment. *Barnes v. Stokes,* 233 Va. at 251, 355 S.E.2d at 331; *GATX Tank Erection Co. v. Gnewuch,* 221 Va. 600, 603–04, 272 S.E.2d 200, 203 (1980); *Kent v. Virginia–Carolina Chem. Co.,* 143 Va. 62, 66, 129 S.E. 330, 331–32 (1925). This general rule is commonly referred to as the "going to and from work" rule. The Administrator and the defendants agree that none of the three exceptions to this general rule is applicable here.[1]

We hold that the present case falls within the general rule stated above. Unlike the employees in *Barnes* and *Painter v. Simmons,* 238 Va. 196, 380 S.E.2d 663 (1989), cases cited by the defendants, Ramey was not killed in an area which was, in practical effect, a part of the employer's premises.

In *Barnes,* the employee was injured on a privately owned parking lot located next to his place of employment. The employer did not own or maintain the lot, but was provided certain parking spaces in the lot as part of its lease of a portion of the adjacent building in which it conducted its business. The employer was "specifically requested" to require its employees to park their vehicles in the designated area. The accident occurred in the area of the parking lot allocated to the employer. Based on these facts, we held that the situs of the injury "was on premises of another that were in such proximity and relation to the space leased by the employer as to be in practical effect the employer's premises." 233 Va. at 252, 355 S.E.2d at 332.

*479 In *Painter,* the employee was injured on a private road which provided access to his place of employment, as well as to other businesses. At the time of the accident, he had checked in for work and was walking on the road from the location where he had checked in to another of his employer's

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facilities located on that same road. We held that the accident fell within the provisions of the Act because it occurred at a place and time where the employer expected the employee to be for employment purposes. 238 Va. at 199, 380 S.E.2d at 665.

The fact that Ramey was killed on a public street places the present case beyond the scope of *Barnes* and *Painter.* The public street was not in such relation to Pepsi's plant that it was in practical effect part of Pepsi's premises. Nor was it a place where Pepsi expected Ramey to be for employment purposes.

We disagree with the defendants' argument that the "going to and from work" rule does not apply to Ramey because he did not have fixed hours of work or a fixed place of employment. Ramey was required to report to the Pepsi plant each morning to start his work day. As stated above, the evidence showed that he customarily reported to work at the Pepsi plant between 8:00 a.m. and 9:00 a.m., and that the accident occurred within this time period. These facts are sufficient to place his actions at the time of the accident within the "going to and from work" rule.

We further disagree that our decision in *Grand Union v. Bynum,* 226 Va. 140, 307 S.E.2d 456 (1983), requires a different result. There, we held only that the employee did not die in the course of his employment because he was killed after leaving work, visiting one friend, and returning to his car to drive to the house of another friend. The fact that the employee had fixed hours of employment was relevant only in determining when he had completed his work for the day.

****441** We next consider the defendants' assignment of cross-error that the trial court erred in denying their plea of accord and satisfaction. The defendants argue that, under the terms of the release executed on July 12, 1989, the Administrator and Ramey's other statutory beneficiaries released them, as well as Margie Lawson and Nationwide Mutual Insurance Company. Specifically, the defendants point to the language of the release in which the Administrator and the other statutory beneficiaries agreed to

> ***480** release and discharge Nationwide Mutual Insurance Company and Margie Lawson[,] his or their successors and assigns, and all persons, firms or corporations who are or might be liable, from all claims of any kind or character which we have or might have against him or them, and especially because of all damages, losses or injuries to persons or property, or both, whether developed or undeveloped or known or unknown, resulting or to result from [this] accident.

On July 12, 1989, pursuant to Code § 8.01–55, the Circuit Court of Dickenson County approved a compromise settlement of the Administrator's action against Lawson. The court's order provided that

> said compromise settlement be, and the same hereby is approved, and it is further ORDERED and ADJUDGED that Margie Lawson be, and she hereby is, released and discharged of and from any and all liability and claims which might be asserted against her by Kimberly D. Ramey, [Administrator] of the Estate of Gene Scott Ramey, deceased, ... on account of the fatal injury to Gene Scott Ramey resulting from the accident set out in this proceeding.

This order also stated that "this case is continued."

On April 8, 1991, on motion of the Administrator, the Dickenson County Circuit Court entered an order amending its July 12, 1989 order "to provide that Margie Lawson and her insurer, Nationwide Mutual Insurance, and only those persons, are released by the settlement approved by [this] Court in that foregoing Order."

The defendants contend that the terms of the July 12, 1989, release preclude the Administrator's action here. They assert that, once the Dickenson County Circuit Court entered the July 12, 1989 order, the release became a binding contract. The defendants further contend that the July 12, 1989 order was a final order and that, therefore, the April 8, 1991 order was void under Rule 1:1.

In response, the Administrator argues that the July 12, 1989 order was not final because the Dickenson County Circuit Court continued the case generally and did not limit the matters over which it was retaining jurisdiction. Thus, the Administrator contends ***481** that both orders are valid, and that their terms plainly rebut the defendants' plea of accord and satisfaction.

In resolving this issue of first impression, we initially observe that Code § 8.01–55 requires, before any compromise of a wrongful death claim or action will be allowed, that the compromise must have "the approval of the court wherein any such action has been brought, or if none has been brought, with the consent of any circuit court." In addition, Code § 8.01–35.1(C) makes releases and covenants not to sue in respect to tort liability "subject to the provisions of

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Code § 8.01–55." Therefore, when a circuit court approves a compromise settlement under Code § 8.01–55, the terms of the release on which it is based likewise are subject to the court's approval.

Those portions of a release that are not made part of a wrongful death compromise settlement approved by a circuit court are not binding on the parties to the release. A contrary interpretation of Code §§ 8.01–35.1(C) and –55 would allow parties to a release effectively to circumvent the requirement of court approval by excluding any release provision from the compromise settlement.

In the present case, the July 12, 1989 order approved only the release of Margie Lawson from liability for the accident. It did not order the release of any other person or entity from liability for the fatal injury to Ramey. Moreover, since the Dickenson County Circuit Court continued the case in **442 that order, we look to the terms of its final order of April 8, 1991, which specify that only Lawson and Nationwide were released by the settlement approved by the court on July 12, 1989. Thus, we hold that the trial court did not err in denying the defendants' plea of accord and satisfaction.[2]

For these reasons, we will affirm in part, and reverse in part, the trial court's judgment and remand this case for further proceedings consistent with the principles expressed in this opinion.

Affirmed in part, reversed in part, and remanded.

All Citations

250 Va. 474, 463 S.E.2d 437

Footnotes

1 The three exceptions to the "going to and from work" rule are: (1) when the means of transportation is provided by the employer or the time consumed is paid for or included in the employee's wages; (2) when the way used is the sole and exclusive way of ingress and egress with no other way, or where the way of ingress and egress is constructed by the employer; and (3) when the employee on his or her way to or from work is still charged with some duty or task in connection with the employment. *Kent v. Virginia–Carolina Chem. Co.*, 143 Va. 62, 66, 129 S.E. 330, 332 (1925).

2 We also note that *Cauthorn v. British Leyland, U.K., Ltd.*, 233 Va. 202, 355 S.E.2d 306 (1987), cited by defendant Pepsi, is inapplicable to this analysis because the release at issue in that case was executed in 1978, prior to the enactment of Code § 8.01–35.1.

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13 Va.App. 630
Court of Appeals of Virginia.

SENTARA LEIGH HOSPITAL and
the Virginia Insurance Reciprocal
v.
Vernetta NICHOLS.

Record No. 1751–90–1.
|
Feb. 11, 1992.

Synopsis

Employer appealed from decision of the Industrial Commission, awarding benefits to claimant, a home care nurse, for injuries sustained in automobile accident while claimant was traveling from her home to patient's home. The Court of Appeals reversed, 12 Va.App. 841, 407 S.E.2d 334. On rehearing en banc, the Court of Appeals, Koontz, C.J., held that: (1) evidence was insufficient to establish that claimant was acting in course of employment at time of accident, and (2) evidence was insufficient to establish that "transportation exception" applied.

Reversed and dismissed.

Barrow, J., filed dissenting opinion in which Benton and Coleman, JJ., joined.

Attorneys and Law Firms

****427** ***632** Michelle ReDavid Rack (George J. Dancigers; Heilig, McKenry, Fraim & Lollar, on brief), for appellants.

Jeffrey A. Swartz (Rabinowitz, Rafal, Swartz, Taliaferro & Gilbert, on brief), for appellee.

Present: KOONTZ, C.J., and BAKER, BARROW, BENTON, COLEMAN, DUFF, MOON, WILLIS, ELDER and BRAY, JJ.

Opinion

KOONTZ, Chief Judge.

On July 1, 1991, a panel of this Court reversed a decision of the Virginia Workers' Compensation Commission. 12 Va.App. 841, 407 S.E.2d 334 (1991). A dissenting opinion was filed in the panel decision. Pursuant to Code § 17–116.02(D), the Court convened *en banc* to reconsider the issue of whether the commission erred in finding that the injury sustained by Vernetta Nichols, claimant, was caused by an accident which arose out of and in the course of her employment with Sentara Leigh Hospital, employer.

The relevant facts are not in dispute. Claimant was employed by employer as a private duty and home care nurse. On March 7, 1988, at approximately 6:30 a.m. claimant was injured in an automobile accident while traveling from her home to a patient's home in her personal car. She suffered major post-traumatic disc herniation as a result of this accident. Three days prior to the accident, employer directed claimant to report to this particular patient's home. On other occasions, claimant received orders from employer by telephone which would advise her "how many hours [she] would have to be [at a patient's home]" and she received the orders "on a daily or weekly basis because sometime (sic) it was just a straight case until the patient expired."

Upon these facts, it is clear that claimant's injury did not occur on employer's premises or at claimant's work place. Thus, employer asserts on appeal, as it did before the commission, that claimant was "going to" her work place when she was injured and, consequently, her injury is not compensable. In response, claimant asserts that she was not "going to" her work place, but, ***633** rather, was "on the job" serving the interests of her employer in traveling to the patient's home and was fulfilling one of the duties of her employment in doing so when her injury occurred. Consequently, she asserts her injury is compensable.

The commission rejected employer's assertion and held: "The claimant was not going to her work when she was injured. Her job was to travel to the [patients'] homes and perform nursing services. The claimant was performing her work when she was injured." Relying upon *Dreyfus & Co. v. Meade,* 142 Va. 567, 129 S.E. 336 (1925), and *Norfolk & Washington Steamboat Co. v. Holladay,* 174 Va. 152, 5 S.E.2d 486 (1939), the commission found that claimant was one of a class of employees whose duties to their employers require their presence upon the public streets and are covered from hazards incident to street travel by workers' compensation.

We begin our analysis upon well established principles that guide our resolution of this appeal. Pursuant to former Code § 65.1–7 (now Code § 65.2–101(B)(11)), in order for claimant to recover for her injuries, she must prove by a preponderance

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of the evidence an injury by accident "arising out of and in the course ****428** of" her employment. (*See also* Code § 65.2–300.) Whether an accidental injury arose out of and in the course of employment is a mixed question of law and fact and is properly reviewable on appeal. *See Classic Floors, Inc. v. Guy,* 9 Va.App. 90, 383 S.E.2d 761 (1989); *Park Oil Co. v. Parham,* 1 Va.App. 166, 336 S.E.2d 531 (1985).

"The phrases arising 'out of' and arising 'in the course of' are separate and distinct.... The phrase arising 'in the course of' refers to the time, place, and circumstances under which the accident occurred. The phrase arising 'out of' refers to the origin or cause of the injury." *County of Chesterfield v. Johnson,* 237 Va. 180, 183, 376 S.E.2d 73, 74 (1989). However, while these terms involve separate and distinct concepts, "the two are not totally independent; frequently proof of one will incidentally tend to establish the other." *V.P.I. & State Univ. v. Wood,* 5 Va.App. 72, 75, 360 S.E.2d 376, 378–79 (1987). Similarly, these terms cannot be applied properly in a vacuum; the peculiar circumstances of each case are crucial to the proper application of these terms. This is particularly so when, as here, the injury to the claimant occurs at a place other than the employer's premises or claimant's ***634** work place.

Thus, in the present case, if the commission properly found that at the time of her injury claimant was not going to work but, rather, was fulfilling her duties to her employer by traveling upon the public streets, then it necessarily follows that her injury arose "in the course of" her employment. Moreover, because the risk of injury in an automobile accident is an accepted hazard or "actual risk" to such travel any injury suffered in the course of her employment while on the public streets thus also arose "out of" her employment. However, if the commission erred in finding that claimant was within a class of employees protected from accidental injuries upon the public streets, then contrary to its finding, she was "going to" work and the compensability of her claim depends upon the applicability of the well established exceptions to the general rule that such injuries do not arise "in the course of" the employment.

In Virginia we have long recognized the general principle upon which the commission found that claimant was one of a class of employees whose duties of employment require their presence or travel upon the public streets and are covered from hazards incident to that presence or travel by workers' compensation. *See Immer & Co. v. Brosnahan,* 207 Va. 720, 152 S.E.2d 254 (1967); *Norfolk & Washington Steamboat Co. v. Holladay,* 174 Va. 152, 5 S.E.2d 486 (1939); *Cohen v. Cohen's Dep't Store, Inc.,* 171 Va. 106, 198 S.E. 476 (1938); *Dreyfus & Co. v. Meade,* 142 Va. 567, 129 S.E. 336 (1925). In such cases, once commonly referred to as "street cases," we employ the "actual risk" test to the determination of whether the injury arose "out of" the employment. *See, e.g., Hill City Trucking, Inc. v. Christian,* 238 Va. 735, 739, 385 S.E.2d 377, 380 (1989).

A review of the factual circumstances in all of the "street cases" and an effort to distinguish and reconcile them is not warranted here. In our view, the Virginia cases have not departed from the requirement that a claimant must establish by a preponderance of the evidence (1) that his or her duties to the employer require his or her presence upon the public streets, and (2) that his or her injury arose from an actual risk of that presence upon the streets in order to come within the protection of the principle established by these cases. Although closely related, these are separate factors necessary to establish a compensable claim. The focus ***635** of the present appeal is on the first factor. A claimant can carry the burden of proof on this factor by establishing that he or she is within an acknowledged class of employees, such as traveling sales personnel, truck drivers, messengers and delivery personnel, who, by the very nature of their employment, are required to be present upon the public streets and, thus, are exposed to the hazards of the streets. Depending upon the particular facts relating to the duties and nature of the employment, the list of other protected employees is potentially, and rightfully so, without limit.

****429** It may well be that many home care nurses, because of the duties of their employment, are required to travel upon the public streets and, thus, come within the protection of the "street case" principles. Nothing in the record, however, establishes that *all* home care nurses come within such a class of employees. Consequently, claimant had the burden of proving by a preponderance of the evidence that the duties of *her* employment required her to travel upon the public streets.[1] In our view, she failed to do so.

The record does not establish whether claimant was paid mileage expenses by her employer or whether her salary was adjusted in any way to compensate for her travel. Without such evidence, it cannot be assumed that her compensation began at any time other than when she began her nursing duties at a particular patient's home. Similarly, although employer required claimant to arrive at a patient's home at a specific time, the record does not establish that the particular

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manner in which claimant was dispatched to various job sites was actually furthering her employer's business interests. Moreover, claimant's testimony that she received telephone orders from employer which would advise her of "how many hours [she] would have to be [at a patient's home]" and that she received her orders "on a daily or weekly basis," does not establish that she was required to travel among various patient's homes during a given day. This evidence is just as consistent with ***636** a requirement that claimant attend a single patient for a number of hours per day or for a number of days or weeks. In the absence of evidence establishing the duties of claimant's employment, the record does not support the commission's conclusion that claimant proved that she was within the class of employees whose duties required their travel upon the public streets or that her particular employment duties required such travel. In short, the commission erred when it found that claimant was not "going to" work when the injury occurred.

We turn now to consider the compensability of claimant's injury based upon the initial determination that she was going to work when the injury occurred. "As a general rule, 'an employee going to or from the place where [her] work is to be performed is not engaged in performing any service growing out of and incidental to [her] employment.' " *Kendrick v. Nationwide Homes, Inc.*, 4 Va.App. 189, 190, 355 S.E.2d 347, 347 (1987) (quoting *Boyd's Roofing Co. v. Lewis*, 1 Va.App. 93, 94, 335 S.E.2d 281, 282 (1985)). Thus, an injury sustained while traveling to or from work is generally not compensable. *Id.* at 190–91, 355 S.E.2d at 347. An accidental injury sustained when the employee is "going to" work does not arise "in the course of" the employment simply because the employee at that time and place is not yet "on the job."[2] There are, however, three exceptions to this rule: (1) where the means of transportation used to go to and from work is provided by the employer or the employee's travel time is paid for or included in wages; (2) where the way used is the sole means of ingress and egress or is constructed by the employer; and (3) where the employee is charged with some duty or task connected to his employment while on his way to or from work. *Id.* at 191, 355 S.E.2d at 347–48.

****430** As previously noted, the burden is on claimant to establish by a preponderance of the evidence the compensability of her claim. Thus, she has the burden to prove by a preponderance of the evidence that one of these exceptions to the "going to and from work" rule applies to her claim.

***637** The applicability of the second and third exceptions may be readily eliminated. Claimant was injured on a public street. She does not assert that this street was the sole means of ingress and egress to her work site or was constructed by her employer. Moreover, claimant offered no evidence that employer requested her to perform any duty or task connected to her employment while on her way to work. Accordingly, neither of these exceptions is applicable to her claim.

With regard to the first exception, which is frequently referred to as "the transportation exception" to the going to and from work rule, it is clear that the claimant's means of transportation for going to or from work was not provided by employer. Claimant concedes that her means of transportation was her "personal car." The dispute then centers on whether claimant established by a preponderance of the evidence that the second portion of the transportation exception is applicable to her claim. That is, whether her travel time was paid for or included in her compensation.

In *Provident Life & Accident Ins. Co. v. Barnard*, 236 Va. 41, 372 S.E.2d 369 (1988), our Supreme Court concluded:

> [I]njuries sustained during the course of travel are compensable under the Workers' Compensation Act whenever the employer, for his own convenience or because of the location of the work place or places, agrees to provide the employee transportation by company vehicle or public conveyance; *or to pay the employee wages or salary for the time spent in travel required by the work; or to reimburse the employee expenses incurred in the operation of his own vehicle* in the performance of his duties.

236 Va. at 47, 372 S.E.2d at 372–73 (emphasis added).

The present case is not a case involving an employee injured while traveling from one job site to another. It is undisputed that claimant was injured while on her way from home to the job site. As we have previously noted, the record does not establish that on the day of her injury, claimant was required to travel to any other patient's home other than the particular patient's home to which she was traveling. Moreover, the record does not establish that on any other day, her duties required that she travel to the home of ***638** more than one patient rather than attending to one patient on a daily or weekly basis. Accordingly, we need not, as we did in our prior panel decision, draw a distinction, if valid, between the compensability of an injury sustained in travel to the first place of assignment and one sustained during additional travel between the homes of patients later in the

same day. *See Thomas v. Staff Builders Health Care,* 168 Mich.App. 127, 424 N.W.2d 13 (1988). We leave that issue to be resolved at another time. Here, unlike the traveling employee in *Provident Life and Accident Ins. Co. v. Barnard,* who was paid a salary to compensate for the time spent in travel as well as for the time spent at his several job sites and received a mileage allowance for the use of his personal automobile, claimant has not established by a preponderance of the evidence any such compensation. The commission is not entitled to make such an assumption. Accordingly, we find this exception is not applicable to this case.

In summary, we find that claimant has not carried her burden of proof to establish the compensability of her claim and, for the reasons stated, the decision of the commission awarding compensation benefits to claimant is reversed and her claim is dismissed.

Reversed and dismissed.

BARROW, Justice, with whom BENTON and COLEMAN, JJ. join, dissenting.

The commission found that Nichols' "job was to travel to the [patients'] homes and perform nursing services" and that she "was performing her work when she was ****431** injured." Credible evidence supports this finding which is sufficient to entitle Nichols to compensation. Therefore, I would affirm the commission.

An employee need not prove that he or she is "within an acknowledged class of employees," as the majority holds, to be entitled to compensation for injuries sustained in an automobile accident. Such an employee need only show that the employment subjected him or her to the "hazards of the street."

An employee's injury in an automobile accident is compensable if "the employment subjected the employee to the hazards of the ***639** street." *Immer & Co. v. Brosnahan,* 207 Va. 720, 725, 152 S.E.2d 254, 257 (1967). This rule applies regardless of whether the employee is subjected to these hazards "continuously or infrequently." *Id.* When first expressed, this rule required that the employee be exposed to the risk of the public streets "either frequently or continuously." *Dreyfus & Co. v. Meade,* 142 Va. 567, 576, 129 S.E. 336, 338 (1925). Frequent or continuous exposure is no longer necessary, and Virginia has joined a majority of the states in adopting a rule recognizing compensability regardless of frequency of exposure. *Immer,* 207 Va. at 725, 152 S.E.2d at 257; *see also Cohen v. Cohen's Dep't Store,* 171 Va. 106, 109, 198 S.E. 476, 477 (1938); 1 A. Larsons *Workmen's Compensation Law* § 9.10 (1990).

The necessity to show that one is within a discrete class of employees continuously or frequently exposed to the hazards of the street is an obsolete test. *Immer,* 207 Va. at 725, 152 S.E.2d at 257. It is no longer material whether an employee's "degree of exposure is increased" beyond that "common to the public generally." *Id.* A single venture into the street on a mission of the employment gives rise to compensation if an employee is injured. *Cohen,* 171 Va. at 109, 198 S.E. at 477. The only question is whether the employee's duties made it necessary for him or her to be on the street.

The majority, while paying lip service to this rule, chooses to apply instead the "going to and from work" rule. This is accomplished by grafting onto the rule expressed in *Immer* a new set of requirements. Without precedent, the majority now requires an employee injured while on the street on the mission of her employer to show that "her salary was adjusted ... to compensate her for travel," that she "was paid mileage expenses by her employer," "that the particular manner in which [she] was dispatched to various job sites was actually furthering her employer's business interest," or "that she was required to travel among various patients' homes during a given day." Until today, an employee was not required to prove these facts; she was only required to show that she was on a mission of her employer.

Nichols was a licensed practical nurse whose job required her to travel to homes of ill patients and care for them in their homes. She received her work orders on a daily or weekly basis by telephone from her office or in person at her office and was told the ***640** number of hours she was required to be at the patients' homes. She was not required to report to her office each day, and she drove to the patients' homes in her personal automobile. On the morning of the accident, having received her orders three days earlier, she was on her way to a patient's home when she was injured in an automobile accident. These undisputed facts support the commission's finding that Nichols was employed to travel to the patients' homes and provide nursing services and that she was in this employ when she was injured.

The "going to and from work" rule is not applicable. It was adopted to assist in determining when an injury arises in the *course of* employment. *Provident Life & Accident Ins. Co. v.*

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Barnard, 236 Va. 41, 45, 372 S.E.2d 369, 371 (1988). This rule denies compensation for an employee's injuries sustained while going to or from work. *Id.* Usually, when an employee is going or coming from work, he or she is not "reasonably fulfilling the duties of the employment or ... doing something reasonably incidental to it." *Briley v. Farm Fresh, Inc.,* 240 Va. 194, 197, 396 S.E.2d 835, 837 (1990). In contrast, the rule in *Immer* aids in determining when an injury ****432** "arises *out of* the employment," *Immer,* 207 Va. at 722, 152 S.E.2d at 256 (emphasis added). *Immer* allows compensation for injuries on the street while in the service of the employer.

The rule in *Immer* and the "going to and from work" rule are mutually exclusive. The rationale underlying the "going to and from work" rule recognizes that an employee going to or from his or her place of work "is not engaged in performing any service growing out of and incidental to his employment." *Kent v. Virginia–Carolina Chem. Co.,* 143 Va. 62, 66, 129 S.E. 330, 331 (1925) (citation omitted). This rationale excludes on its face that employment which by its nature subjects an "employee to the hazards of the street." *Immer,* 207 Va. at 725, 152 S.E.2d at 257. The commission's finding that Nichols' employment was of this kind distinguishes her from one who is simply going to work and not yet "engaged in performing any service growing out of and incidental to his employment."[1]

***641** Part of Nichols' job was to travel to patients' homes. She was in an automobile on a public street in the service of her employment when injured in an automobile accident, a risk of that employment. *See Norfolk & Washington Steamboat Co. v. Holladay,* 174 Va. 152, 159, 5 S.E.2d 486, 489 (1939); *Railway Express Agency, Inc. v. Lewis,* 156 Va. 800, 809–10, 159 S.E. 188, 191 (1931). I, therefore, agree with the commission that Nichols' injury was compensable.

In addition, I agree with the commission's conclusion that the employer is estopped from asserting that Nichols had not made reasonable efforts to market her remaining capacity for work. The employer paid compensation to Nichols for almost twenty-two months but did not file a memorandum of agreement. Thus, the commission found that Nichols' efforts to return to work and the employer's payment of benefits estopped the employer from not asserting this non-jurisdictional defense. *See National Linen Serv. v. McGuinn,* 5 Va.App. 265, 272, 362 S.E.2d 187, 191 (1987).

All Citations

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Footnotes

1 We do not hold, as the dissent suggests, that an employee must prove that he or she is within an acknowledged class of employees whose duties require their presence or travel upon the public streets to be entitled to compensation for injuries from an automobile accident. Rather, we hold that if the employee does not prove that he or she is within such a class of employees, then he or she must prove that the duties of the particular employment in question required the employee's travel or presence upon the public streets and, thus, exposed the employee to the actual risk of that presence or travel. We agree that a single venture onto the street *if proven to be on a mission of the employment* gives rise to compensation when the employee is injured in an automobile accident.

2 We recognize that the "going to and from work" rule is generally applicable to employees having fixed hours and place of work. For the reasons expressed throughout this opinion, we hold that claimant here established no more than that on the day of her injury her place of work was at the home of the particular patient's home to which she was traveling.

1 Even if the rationale underlying the going and coming rule did not exclude Nichols, the third enumerated exception to that rule would. *LeWhite Const. Co. v. Dunn,* 211 Va. 279, 282, 176 S.E.2d 809, 813 (1970) (where the employee on his way to or from work is still charged with some duty or task in connection with his employment); *Kent v. Virginia–Carolina Chemical Co.,* 143 Va. at 66, 129 S.E. at 331; *see also, Peterson v. Workmen's Compensation Appeal Board,* 597 A.2d 1116, 1120 (Pa.1991) (licensed practical nurse employed by nursing agency injured in automobile accident on way to work at hospital where sent by agency).

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