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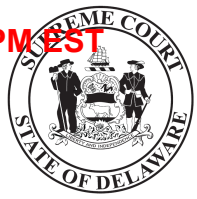

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARY E. SPELLMAN,	:	**No. 315, 2012**
	:	
Employee-Below, Appellant,	:	**Court Below - - Superior Court**
	:	**of the State of Delaware**
v.	:	**in and for Sussex County**
	:	**C.A. No. S11A-08-001 RFS**
CHRISTIANA CARE HEALTH SERVICES,	:	
	:	
Employer-Below, Appellee.	:	

EMPLOYER-BELOW, APPELLEE'S

SUPPLEMENTAL OPENING MEMORANDA

Dated: 2/08/13

By: **/ S / Maria Paris Newill**

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Regardless of whether an employee is bound by the "going and coming" rule or is a "traveling employee" who may be exempt from said rule, there remains the requirement that the employee be injured "arising out of" and "in the course of" employment. Dravo Corp. v. Strosnider, 45 A.2d 542 (Del. Super. 1945). An injury occurring while an employee is on his way to work or on his way home from work is not compensable under the "going and coming" rule. Histed v. E.I. DuPont de Nemours & Co., 621 A.2d 340 (Del. 1993). Delaware law requires that for an injury to be compensable, it must have arisen by accident occurring "out of and in the course of employment." 19 Del. C. §2304. There must exist a causal relationship between the injury and the employment. Sometimes a determination can be made as to whether someone is in the course and scope of their employment [hereinafter "scope of employment"] without considering the "going and coming" rule or "traveling employee" exception. The "traveling employee" exception is an exception to the "going and coming" rule, not an exception to the course and scope requirement which triggers entitlement to workers' compensation benefits [hereinafter "W.C."].

Delaware Courts have recognized that questions relating to "course and scope" of employment are highly factual to be resolved under the totality of the circumstances. Histed, 621 A.2d 340. In Bedwell v. Brandywine Carpet Cleaners, it was stated that all injuries "on the road" are not compensable 684 A.2d 306 (Del. Super. 1996). Only those reasonably related to the employer's business are compensable. Id. The workers' compensation does not cover traveling employees at all times when they are not in their homes, rather, only when engaged in acts reasonably incident to their job. In Devine v.

Advanced Power Control, Inc., there is the indication that if employee had an identifiable point in time where employment began, then regardless of whether they were a traveling worker, the requirement to check in at a certain place in the morning caused the journey to that place to be outside the scope of employment. 633 A.2d 1205 (Del. Super. 1995). Arguably, the reverse would also apply: if there is an identifiable point in time where employment ends, the journey home would be outside of the scope of employment. It appears, therefore, that there should be a clear distinction between traveling employees for whom there is an identifiable point where employment begins or ends as compared to traveling employees who do not have an identifiable time and place. This brings us full circle back to the point that it is a factual finding for the Industrial Accident Board [hereinafter "Board"] to consider questions relating to scope of employment based on the totality of the circumstances. If the Board concludes that the employee is not in the scope of employment, then there is no workers' compensation coverage. Sometimes, but not always, the Board will go to the "going and coming" rule and "traveling employee" exception to determine whether there was a special errand, mixed purpose, short personal comfort stop or other peculiarity bringing the employee within the scope of employment as opposed to whether the employee was merely "commuting" and/or on a personal deviation which was so great that the intent was to abandon the job temporarily, and therefore, the conduct cannot be considered an incident of employment. Bedwell, 684 A.2d 306.

The Supreme Court correctly understood all that which is outlined above as evidenced by the decisions in Coates v. Murphy, 270 A.2d 527 (Del. 1970) and Clough v.

Interline Brands, Inc., 925 A.2d 477 (Del. 2007). In both cases, the Supreme Court held that the mere fact that an individual is a traveling employee, away from their home, does not, in and of itself, automatically entitle them to W.C. benefits should they sustain an injury. Id. Rather, the purpose for the travel determines whether it is the employment or something else that impels the journey and exposes the traveler to risk.

In Coates, the Court found that the primary purpose was to go home to have lunch with a spouse, which controlled over the simultaneous but incidental, business purpose, resulting in denial of W.C. benefits. 270 A.2d 527. The primary purpose was found to be "personal", therefore, the Court correctly determined in Coates that the accident while traveling for lunch was not compensable and not within the scope of employment. Id. This is identical to our case where the primary purpose of the Appellant's travel was to go home to get a cup of coffee, prepare for a doctor's appointment and go to the appointment. (IAB O. p. 10, B-10). It was the factual finding of the Board that the Appellant's personal errand was not reasonably related or incident to the employer's business or in furtherance of that business so that there was no mixed or dual purpose. (IAB O. p. 10, B-10).

Turning to the more recent Decision in Clough, the Supreme Court found that the employee was a traveling employee who had used a personal car for work earlier on the day of accident, however, at the time of the accident, he was not driving to a business appointment or in furtherance of the employer's business. 925 A.2d 477. The Court held that where there was no indication that the employee was in the scope of his employment or acting in furtherance of his employer's business at the time of the

accident, there was no entitlement to compensation. Id. It was factually agreed that the employee had completed his workday and was on his way home. Id. The mere fact that he was a traveling employee did not trigger compensation for the ride home as there was an identifiable point where employment ended, and therefore, the usual "going and coming" rule applied to the commute home. Id. The Supreme Court indicated that nothing in the record suggested that the employee was doing anything other than driving home, which served no interest of the employer. Id. In finding that the record does not reflect any purpose of the employer at the time of the accident, compensation was correctly denied.

In our case, the Appellant had a clear, identifiable point when employment began each day, when it ended, when she was on the clock being paid for her time/mileage, as well as when the reverse was true – off the clock and not receiving mileage. [IAB Tr. pp. 40-42; 42-44, B-51-53, 53-55.] It is clear when the Appellant was subjected to risk of a normal commute like any other employee so that the "going and coming" rule should apply, as opposed to the periods of time the Appellant's travel between clients became such a substantial part of the service for which the Appellant was employed so she was compensated (i.e., receiving pay for travel/mileage). Accordingly, a factual finding could be made when the travel itself is a large part of the job so as to trigger the right to compensation and when it was not part of the job.

There may be individuals, such as an ice cream truck driver, who can pull out of their driveway, immediately begin ringing their bell and selling ice cream and continue to do so until they return safely to their driveway such that there is reasonably the

expectation of workers' compensation coverage from leaving home to returning home. These types of employees are the exception rather than the rule. For the vast majority of employees, even traveling employees, there is the ability for the Board to factually determine the identifiable point when employment began, whether there was a personal deviation from scope of employment and/or when employment ended for the day. While the Superior Court in the Devine case recognizes that there are times when the travel itself is a large part of the scope of employment, the Supreme Court Decisions in Coates and Clough correctly conclude that there is no reason to entirely exempt traveling employees from the "going and coming" rule or personal deviation rules as traveling employees' risk in "commuting" or during a personal deviation is no different from any other employee including, but not limited to, those having a fixed employer's premise. These Supreme Court decisions recognize that there is no legal justification for traveling employees to be covered merely because they are "traveling employees" and regardless of whether they are or are not about their employer's business. No legal basis has been provided to establish why the mere fact that an individual travels when they are in the scope of their employment entitles them to be covered by W.C. benefits while in their "commute" and during a time they are considered "going and coming" when the vast majority of hardworking Delawareans are not covered during a nearly identical commute. All injuries "on the road" are not compensable, only those reasonably related to employer's business are compensable and the workers' compensation statute should not cover traveling employees at all times when they are

not in their homes but, rather, only when they are engaged in acts that further their employer's purpose. Bedwell, 684 A.2d 306.

The Supreme Court, relying upon Coates and Clough, should affirm the Decision in this case and conclude that the Board and Superior Court correctly focused on that there was an identifiable point when employment ended such that they concluded the Appellant was on a personal deviation taking her out of the scope of her employment so that no W.C. benefits were due.

CONCLUSION

Reading the record as a whole, there is substantial evidence to support the factual conclusion that the Appellant's accident did not arise out of or in the course of her employment, as it occurred while "off the clock" and on her way home for coffee and then to a personal appointment. She was not on a special errand related to work, she was not on a mixed purpose trip as the Board found no benefit that adheres to her employer, she was not on a personal comfort stop, was not on a minor personal deviation and/or was not traveling between client appointments. These facts, combined with the fact that the Appellant was not being paid mileage or for her time at the time of the accident (when she is usually paid for both if she is in furtherance of her employer's business), led to the finding that the Appellant was not in the scope of employment. The Superior Court and Board also found that the Appellant's departure to go home and to a doctor's appointment was so great a deviation as to be a temporary abandonment of her job. Only by this Court replacing its own factual findings for those

of the Board would there be a basis to overturn this Decision. Therefore, the Board's and Superior Court's Decisions should be affirmed in their entirety.

Dated: 2/08/13

Respectfully submitted,

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