From: Don Drinko
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Gallagher Sharp Shop Talk: Workers' Compensation
Question: What is the current status of the "coming and going" rule, when applied to on-street or public parking?

It has been some time since we discussed the "coming and going" rule, which in Ohio states that "fixed site" employees are not eligible for workers' compensation benefits for injuries occurring while going to or returning from that fixed employment site because no causal connection between the injury and employment exists. *MTD Products, Inc. v. Robatin,* 61 Ohio St.3d 66, 572 N.E.2d 661 (1991). There are generally three (3) exceptions to this rule, including 1) the "zone of employment" exception, referring to areas adjacent to employment and within the control of the employer; 2) the "special-hazard exception" referring to special hazards incident to employment; and 3) the "totality of the circumstances" exception. Today, we will discuss a recent case decided by the Second Appellate District which discussed whether a public parking area adjacent to a place of employment that is used by employees is within the "zone of employment," so as to avoid the "coming and going" rule.

Foster v. Bur. Of Workers' Comp., 2013-Ohio-4075, involved an employee who fell on snow-covered ice and was injured, resulting in a fractured vertebrae. There was no dispute that the employee was a "fixed site" employee, working in an office building shared by several tenants. Parking areas surrounded the building, which were neither restricted nor assigned, and which were available to the public at large. Her employer leased office space, and did not own or control the parking areas. The claimant would normally park in a marked space along an access road in front of the building. When she fell, she filed a workers' compensation claim which was denied by her employer based upon the "coming and going" rule. The claimant argued that she was injured in an employee parking area immediately adjacent to her work, and that while her employer did not own the parking area, it did not own its office space either. The administrative claim was denied, and upon appeal a trial court granted summary judgment to the employer, prompting an appeal as of right.

The Second District affirmed, concluding that the fall in a parking area outside the control of her employer did not qualify for the "zone of employment" exception to the "coming and going" rule. The claimant did not dispute that she was a "fixed site" employee, and that her duties did not commence until she arrived at work. At the time of the fall, the claimant had not commenced her duties, and therefore the "coming and going" rule would normally apply. The Court also considered each of the exceptions enumerated above, and found all to be lacking. In particular, it dismissed the "zone of employment" exception, noting that the parking area in question was not under the control of the claimant's employer. It noted that the requirement of control was necessary to apply the "zone of employment" exception because with control comes both the "opportunity to correct the problem, and the responsibility to do so." The parking area was non-exclusive, and the person responsible for it would have been the landlord. The court also dismissed the other exceptions as inapplicable to this case.

Foster is in line with most other decisions governing non-exclusive parking areas. However, one must be aware of factual variances, including whether or not parking lots are controlled by the employer, whether parking spaces are assigned, and whether travel between buildings or facilities is required, calling into question whether an employee is truly a "fixed site" employee.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

Donald G. Drinko, Esq.
Certified Workers' Compensation Specialist,

Ohio State Bar Association
Gallagher Sharp
1501 Euclid Avenue
Cleveland, OH 44115
Direct: 216.522.1326
ddrinko@gallaghersharp.com