

**From:** Don Drinko  
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**Gallagher Sharp Shop Talk: Workers' Compensation**

**QUESTION: If an employee is struck by a car while crossing a public street after work, would this be a compensable workers' compensation claim in Ohio?**

In this inquiry, the important piece of information is where the employee was going, and not where the accident took place. Recall that under Ohio law, the "coming and going" rule precludes an employee at a "fixed site" from participating in the workers' compensation fund for injuries which occur while traveling to or from work. *MTD Prods., Inc. v Robatin*, 69 Ohio St.3d 66 (1991). However, there are three exceptions to the "coming and going" rule, two of which were considered recently by the Second Appellate District in a case involving an employee who was off the clock and leaving her job when she was struck by a vehicle on a public street.

*Molton v Kroger Co.*, 2017-Ohio-565, arose when a claimant, who did not own a vehicle and took a public bus to and from work, was struck by a vehicle and fatally injured in October, 2013. At the time of the incident, the claimant had finished her shift, punched out, and was crossing a street outside of the designated crossing area in order to reach her bus stop. As a result of the incident, the claimant's son filed an application for workers' compensation benefits with the BWC, but the employer contested the claim based upon the "coming and going" rule. A DHO initially denied the claim, and this decision was affirmed throughout the administrative process. The claimant filed an appeal to the Montgomery Court of Common Pleas pursuant to R.C. §4123.512, but the trial court granted the employer's motion for summary judgment. This prompted an appeal as of right to the Second District Court of Appeals.

The Second District affirmed, finding that the "coming and going" rule precluded the receipt of compensation. The parties did not dispute the facts giving rise to the claim, but the claimant alleged that the location of the incident on a public street was not determinative, citing *Baughman v Eaton Corp.*, 62 Ohio St. 2d 62 (1980), wherein the Supreme Court of Ohio found that an employee hit by an automobile while crossing a public street between the entrance to the employer's plant and an employer-controlled parking lot was entitled to benefits. The Court in *Molton* distinguished *Baughman*, noting that that the "zone of employment" exception to the "coming and going" rule did not apply because the employer clearly did not have control of the street or the bus stop, and there was no evidence that the employer required or encouraged her to take the bus. The Court also distinguished several other cases involving "non-continuous" parking lots controlled by the employer. Finally, the Court applied the "totality of the circumstances" exception and found it lacking, concluding that the claimant was injured in a location over which the employer had no control and that the employer received no benefit from her presence in the street. There is no dispute that when she was struck, her shift had ended, she had clocked out, and she was on her way home and not engaged in any employment-related activities.

This decision reaffirms the "coming and going" rule, and in particular seems to indicate that *Baughman* should be construed to be limited to its peculiar set of facts.

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.

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