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

QUESTION: Can an employee's status as a "fixed situs" employee change from day-to-day based upon her activities?

Many workers' compensation issues arise from injuries that occur during an employee's personal time, including the paid lunch hour. Employees who are injured while going to or coming from lunch or during preparation of lunch will often file workers' compensation claims, and the status of the employee as a "fixed situs" (*e.g.,* one location) employee will often determine whether an injury is compensable. Recently, the Eighth Appellate District was presented with a case involving a social worker who was injured in a traffic accident during lunch hour, and whether the fact that she was normally tasked with travelling during work hours would outweigh the facts of her claim.

Ghillie v. Cuyahoga County, 2014-Ohio-4383, involved a social worker who was injured in an automobile accident while en route to purchase lunch. A workers' compensation claim was filed that was contested by her employer who contended that as a "fixed situs" employee, the claimant was not entitled to workers compensation coverage for injuries occurring off the employer's premises and outside of its control. In addition, the employer maintained that an employee who leaves the workplace to pick up lunch is not entitled to workers' compensation coverage under Ohio law. Finally, the employer contended that the claimant did not satisfy the "totality of the circumstances" test. The claimant maintained that, as a social worker who is required to visit clients, she was not a "fixed situs" employee and that the employer encouraged employees to eat lunch while performing other tasks. She also maintained that it was not unusual for employees to eat lunch in their cars, and that she planned to conduct an unannounced "visit" with a client after she obtained her lunch on the date of injury. Therefore the accident had a causal connection to her employment. The employer countered that while the claimant's position required travel, on the day of the accident it was a required "writing day," the claimant had spent the entire morning in the office, and that there was no evidence that the injury occurred on the way to an appointment. A DHO denied the claim, but an SHO reversed the decision and allowed the claim, prompting an appeal by the employer pursuant to R.C. 4123.512. The employer filed a motion for summary judgment which was granted by the trial court. The Court concluded that the claimant was on an "exclusively personal errand" when the incident occurred, prompting an appeal by the claimant to the Ohio Court of Appeals, Eighth Appellate District.

The Eighth District reversed the grant of summary judgment, remanding the matter back to the trial court for trial on the issues. The Court found that there were genuine issues of material fact as to whether the claimant was a "fixed situs" employee on the day of the accident, referring to testimony from her supervisor that it was "possible" that she was conducting a visit before or after lunch despite an absence of evidence to this effect. There was testimony in the record that the claimant's job took her outside of the office at least 50 percent of the time, that it was not uncommon for her lunch hour to be spent in her car doing other work-related duties, that there was no requirement that social workers report on their activities or follow a prescribed schedule, and that approval for changes in schedule were normally made after the fact. The Court cited the "coming and going" rule and its application only to "fixed situs" employees, something that was not the case here. As a social worker, the claimant was tasked with appearing at court and at homes for various reasons. The Court also cited testimony from the

claimant's supervisor that "it was possible" that something was said during a morning meeting which may have prompted a trip outside the office, and that the claimant would probably have been entitled to make the trip without pre-notification. The Court cited *Klamert v. Cleveland*, 186 Ohio App.3d 268, 2010-Ohio-443, for the proposition that "the determination of whether one is a fixed-situs or nonfixed-situs employee must be made in light of the overall employment duties, not from an overly constrained examination of the activities on one day when an accident happens to occur." The Court concluded that genuine issues of material fact existed for trial as to whether the claimant was a "fixed situs" employee.

The take-away from *Ghillie* and its ilk is that courts will take a dim view of the argument that an employee who travels regularly can be said to be a "fixed situs" employee on any given day. The employer's case was certainly undercut by the testimony of her supervisor.

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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