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Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Can an employee who performs work intermittently at different locations and on different shifts receive workers' compensation benefits for an injury occurring while traveling to or from work?

It has been some time since we discussed the “coming and going” rule and its application to Ohio claims. As many of you know, the “coming and going” rule provides that “an employee with a fixed place (“*fixed situs*”) of employment who is injured while travelling to or from that place of employment is not entitled to benefits, because “the requisite causal connection between the injury and employment does not exist.” *Ruckman v Cubby Drilling, Inc.*, 81 Ohio St. 3d 117 (1998). In essence, the law recognizes that everyone must travel to and from work. There is a rarely used “special hazard exception” when the travel creates a risk that is “distinctive in nature from or quantitatively greater than the risk common to the public.” *Littlefield v Pillsbury Co.*, 6 Ohio St. 3d 389 (1983). Recently, the Eleventh District Court of Appeals considered a case involving a claimant who was asked to travel to different stores to work, and to work nights, and whether an injury that occurred when the employee was driving home was compensable.

Green v Marc Glassman, Inc., 2017-Ohio-9343, concerned an employee who worked as a stocker at a retail store in Alliance, Ohio. At some point, the claimant was asked to assist management in setting up cash registers at other stores, including one located approximately 90 minutes from his home store. The work had to be done on the night shift, and the claimant was paid mileage. On the way home from one such posting, at approximately 3:05 a.m., the claimant fell asleep and drove into a large ditch, suffering a laceration and open fracture of his left foot. He applied for workers' compensation benefits, which were granted by the Industrial Commission. The employer filed an appeal in the Portage County Court of Common Pleas, alleging that the “coming and going” rule prohibited compensation. Ultimately, the trial court granted a motion for summary judgment in favor of the employer denying the claim. This prompted an appeal as of right to the Eleventh District Court of Appeals.

The Eleventh District affirmed, finding that even when construing evidence most strongly in favor of the claimant, the claim was not compensable. The Court first dispensed with the issue of whether the claimant was actually a “fixed site” employee, finding that his employment duties were performed only after arriving at a specific and identifiable workplace. The Court cited previous decisions, including *Cubby Drilling, supra*, finding that this test resolves the issue, even if a claimant is reassigned to a different work place monthly, weekly or even daily. Status also is not changed by the fact that the claimant was asked to work a different shift because his duties after arriving at the location remained the same. The Court also dispensed with the claimant's argument that travel at long distances in the early morning hours created a “special hazard,” finding that the risks he endured were not quantitatively greater than the risk common to the public. While a 90 minute commute at night may be longer than a typical commute, it does not create or constitute a risk that is particularly distinctive. The Court also referenced the factual basis for the “special hazard” exemption in *Cubby Drilling*, which included multiple days of overnight travel at multiple industrial locations. This was simply not the case here.

It is notable that the Court in *Green* failed to address an ancillary issue brought up by the claimant: that the claimant was paid mileage for his travel. This argument would likely also have been dismissed, as the payment of mileage would likely be seen as reimbursement for an out-of-pocket expense (i.e., the use of a personal vehicle) and not an indicator of payment for travel.

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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