From: Don Drinko
Sent: Wed 12/2/2015 4:14 PM
Gallagher Sharp Shop Talk: Workers' Compensation

QUESTION: Under what circumstances can an employee create a "special hazard" sufficient to overcome the general proposition that a "fixed site" employee injured while coming to or going home from work is not in the course and scope of employment?

In the oft-quoted case of *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 1998-Ohio-455, the Supreme Court of Ohio explained at length its interpretation of the "coming and going" rule as it applied to Ohio workers' compensation claims. "As a general rule, an employee with a fixed place of employment, who is injured while traveling to or from his place is employment, is not entitled to participate in the Workers' Compensation Fund because the requisite causal connection between injury and the employment does not exist." *Id.* The basis for this rule was to remove the risks of travel that are faced on a daily basis by the public at large from workers' compensation claims. In its decision, the *Ruckman* court also reaffirmed both the "totality of the circumstances" approach and the "special hazard or risk" exception to this rule, as first described in *MTD Products v. Robatin* (1991),61 Ohio St.3d 66, which held that when an employer creates a "special hazard" for its employees, the employee is entitled to coverage when that "special hazard" results in injury. This exception is again based upon the fact that the risk faced by claimants in such situations is demonstrably greater than that faced by the public. Recently, the Fifth Appellate District considered a case involving whether the location of a drilling rig, the hours required to be worked, and a *per diem* that had yet to be paid, had collectively created a "special hazard" justifying an exception to the "coming and going" rule.

Perry v. Kilbarger Constr. Inc., 2015-Ohio-4661, arose from a 2007 incident in which three drilling riggers who were driving home together from a rig located approximately two hours away from their residences were involved in an accident when the driver fell asleep. The accident resulted in the death of one worker and injuries to the other two. All three filed workers' compensation claims which were contested by the employer, who claimed that the accident did not arise out of employment because it occurred while commuting. Over the employer's objection, all three claims were allowed. The employer appealed the captioned case involving one of the employees, and the parties filed motions for summary judgment. The employer contended that, as a "fixed site" employee on the rig, the claimant was not entitled to workers' compensation benefits for an injury that occurred on his way home. The claimant conceded that he was a "fixed site" employee and that the accident occurred while commuting, but argued that the terms of employment created a "special hazard." There was no dispute that the claimant lived more than two hours/90 miles away from the rig site, the accident occurred after the claimant had worked a 16-hour day, the accident occurred approximately an hour and a half after that day was concluded, and the employees were not paid for driving time. In 2011 the trial court granted summary judgment to the claimant, finding he was in the scope of employment at the time of the accident. Due to procedural issues, the decision was not journalized until 2013, at which time an appeal as of right was filed by the employer to the Fifth Appellate District.

The Fifth District affirmed, finding that the employer's contention that the accident did not "arise out of" employment must fail because the employer's terms of employment, including mandatory travel, long hours, and insufficient benefits, had in effect created a "special hazard" under *Ruckman*. The employer acknowledged that it had hired the claimant knowing he would have a lengthy commute to the rig sites, which were to have been moved to locations near the site in question. The job required work well beyond a standard 9-hour day (the claimant had worked 16 hours on the date of the accident) and there was no provision for transportation. The Court also found that a *per diem* which would have been sufficient for overnight housing near the site had been promised but had yet to be paid. "Given the facts that working at various sites necessitated travel, and the very nature of the employment mandated lengthy travel, the crew members were not compensated for housing, and appellant required the crew members to work long hours and extras (*sic*) hours, we find the special hazard rule has been fulfilled." *Id.* at p. 10. In essence, the Court determined that because the riggers established a risk that was quantitatively greater than risks common to the general public, they were entitled to participate in the Fund.

Perry, like *Ruckman*, concerned circumstances that were extreme in nature with regard to work site and circumstances. However, in this era of mobility and non-traditional work hours, employers should be aware that creating a "special hazard" is both possible and avoidable. 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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