STATE OF MICHIGAN

COURT OF APPEALS

KEVIN S. CONNER

Plaintiff-Appellant,

and

AMERISURE INSURANCE COMPANY,

Intervening Party,

v

MIKE PULLEY, VERN WALLICK CONSTRUCTION, and MERIDIAN MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
January 21, 1997

No. 184952
WCAC NO. 92-000338

Before: Markey, P.J., and Michael J. Kelly, and Michael J. Talbot*, JJ.

PER CURIAM.

In this worker's compensation case, plaintiff argues that he was wrongfully denied benefits for a back injury that plaintiff claims arose out of and in the course of plaintiff's employment. We affirm the decision of the Worker's Compensation Appellate Commission, which affirmed the magistrate's decision.

On October 21, 1989 plaintiff was employed as a painter by defendant Mike Pulley, d/b/a Mike's Painting. Plaintiff was employed to paint the interior of a personal residence under construction. Mike Pulley was a subcontractor on the project. The general contractor was defendant Vern Wallick Construction. In order to reach the construction project where plaintiff was working, the workers had to drive their vehicles over a muddy path across adjacent property. Wallick obtained permission from the owner of the adjacent property for workers to use the property to gain access to the construction site.

* Circuit judge, sitting on the Court of Appeals by assignment.

Michael Landis was a masonry worker employed by another subcontractor on the project. On the morning of October 21, 1989, Landis approached the construction site in order to check on his work schedule. Landis did not claim to be coming to work and he was, in fact, not scheduled to work that day. As Landis approached the construction site, his vehicle became mired in the mud on the adjacent property, about "63 paces" from the property line of the property where plaintiff was working.

Plaintiff and Landis knew each other. From his work site plaintiff observed Landis' predicament. Plaintiff left his work and unsuccessfully tried to help free Landis' truck. Plaintiff apparently injured his back while doing so. Landis eventually freed his vehicle with the help of a friend who used a truck with a winch.

The magistrate found that plaintiff's actions did not benefit his employer[1] and plaintiff's injury did not occur on the employer's premises. The finding that plaintiff's actions in attempting to help Landis provided no benefit to plaintiff's employer is amply supported by the record. MCL 418.861a(3); MSA 17.237(861a)(3). Wallick testified that the construction project gained nothing by plaintiff's efforts to free Landis' vehicle and that plaintiff was not performing his job when he tried to help Landis. Wallick further testified that if he or Mike Pulley had been present, plaintiff, who was paid by the hour, would not have been permitted to leave his job to help Landis.

Plaintiff was denied benefits by the magistrate because the magistrate found that plaintiff's injuries did not arise out of and in the course of plaintiff's employment. The WCAC reached the same conclusion. Plaintiff contends that he was within the scope of his employment when he tried to help Landis and that his injury occurred on the work "premises." Plaintiff further contends that the magistrate and the WCAC mistakenly believed that plaintiff's actions had to provide a direct benefit to plaintiff's employer in order for plaintiff's actions to be within the course of his employment.

Worker's compensation benefits are payable based upon an injury "arising out of and in the course of employment. . . ." MCL 418.301(1); MSA 17.237(301)(1). An employee is presumed to be in the course of his employment "while on the premises where the employee's work is to be performed." MCL 418.301(3); MSA 17.237(301)(3). The determination whether an employee's injury arose out of and in the course of employment may be a question of law, a question of fact, or a mixed question of law and fact. *Koschay v Barnett Pontiac, Inc*, 386 Mich 223, 225; 191 NW2d 334 (1971); *Zarka v Burger King*, 206 Mich App 409, 411; 522 NW2d 650 (1994). Where the facts are undisputed, as in the instant case, the determination is one of law for the courts to decide. *Zarka, supra* at 411.

There are situations in which an employee's conduct does not directly benefit the employer but the conduct is nevertheless considered within the scope of the employee's employment. For example, "horseplay" situations can result in compensable injuries. See *Crilly v Ballou*, 353 Mich 303; 91 NW2d 493 (1958). But the facts of this case fall within the recognized proposition that an employee helping another with an entirely personal matter is acting outside the course of the employee's employment. This proposition is set forth in 1A Larson, Workmen's Compensation, §27.15, p 5-358 as follows:

> If the aid takes the form of merely helping the co-employee with some matter entirely personal to the co-employee, it is outside the course of employment, unless the deviation involved is insubstantial. (Footnotes omitted.)[2]

Included in the examples cited by Larson are cases in which benefits were denied where a foreman was injured while driving a worker home who had a bad cold and where an employee was injured while delivering a pay envelope to a co-employee who lived nearby.

In *Feiber v Leonard, Ralph & Jones*, 284 Mich 381; 279 NW 870 (1938), our Supreme Court reached a result consistent with the proposition quoted above from Larson. The plaintiff-employee in *Feiber* was in the course of his employment when he came across a co-employee (who was not within the course of his employment) whose car was stalled in the snow. The plaintiff unsuccessfully tried to help extricate the co-employee's car. The plaintiff's exertions led to a heart "dilatation" and death the next morning. Worker's compensation benefits were denied because it was determined that the plaintiff's injury did not arise out of and in the course of his employment. *Id*. at 381-382. *Feiber* is fairly analogous to the instant case and indicates that the magistrate and the WCAC correctly resolved the instant case.

Plaintiff relies in part on *Nemeth v Michigan Building Components*, 390 Mich 734; 213 NW2d 144 (1973), but *Nemeth* is consistent with the general proposition quoted above and with the decision of the magistrate and the WCAC. In *Nemeth,* the plaintiff-employee was injured while using his employer's radial saw to do some work for a fellow employee. The plaintiff obtained his employer's permission to use the saw after hours to do the work. The Court found that the plaintiff's injury arose out of and in the course of employment because the plaintiff's actions furthered the employer's interest in establishing "employee good will." *Id*. at 735-738. This constituted a sufficient nexus between the employment and the injury to establish that the injury occurred in the course of employment.

Nemeth is significantly distinguishable from the case at bar because the employee in *Nemeth* obtained permission to act on behalf of a co-employee, the plaintiff-employee was injured on his employer's equipment while he was clearly on the employer's premises, and the plaintiff-employee's conduct was found to benefit the employer. In contrast, plaintiff here left his work, without permission, to do something that his employer had no interest in and provided no benefit to plaintiff's employer. The facts of the instant case do not provide the nexus which existed in *Nemeth.*

Nor is plaintiff persuasive in arguing that he was injured while on the premises of his employer so that he has the benefit of the presumption in §301(3). Case law has at times extended the meaning of "premises" to encompass areas outside the employer's actual property based upon the "zone, environment and hazards" of the employee's labor. *Smith v Greenville Products Co*, 185 Mich App 512, 514-515; 462 NW2d 789 (1990). Plaintiff's job site was the house he was painting. His employer's "premises" was arguably the property on which the house was being constructed. Plaintiff has not presented authority which would extend the concept of an employer's "premises" to the adjacent property that employees cross in order to reach a job site. There were undoubtedly public roads as well that employees had to travel over before they could reach the job site. The location

where plaintiff was injured was not a location within the zone, environments and hazards of plaintiff's labor. Indeed, the evidence established that plaintiff had to cease working and leave his job in order to assist Landis, that there was no benefit to the employer from plaintiff's actions, and that the employer would have refused a request to help Landis if plaintiff had asked.

The lack of merit in plaintiff's position is illustrated by *Hicks v General Motors Corp*, 66 Mich App 38; 238 NW2d 194 (1975), another case plaintiff relies upon. The plaintiff-employee in *Hicks* was leaving his employer's parking lot after work when the muffler fell off the employee's truck in the area of the exit gate to the parking lot. The employee parked his truck across the street and was injured when returning to retrieve his muffler. This Court found a "sufficient nexus" between the employee's employment and his injury to conclude that the injury was a circumstance of the employment. *Id*. at 40-43. The muffler of the employee in *Hicks* fell off while the employee was still on the employer's premises and while the employee was doing something (leaving the plant parking lot) the employee had to do. Plaintiff in the instant case left his work in order to perform a favor for a friend. The nexus in the instant case is far weaker than the nexus in *Hicks*. Moreover, the *Hicks* court found that the employee was not merely on a personal mission, but rather, by removing the muffler, the employee eliminated a traffic hazard from the driveway of the employer's parking lot that posed a risk to other employees, thus providing a benefit to the employer. *Id*. at 43-44. No similar benefit resulted from the conduct of plaintiff here.

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] Although plaintiff worked for Mike Pulley, Pulley did not carry worker's compensation insurance and therefore the general contractor on the project, defendant Vern Wallick, was plaintiff's statutory employer pursuant to MCL 418.171; MSA 17.237(171).

[2] This is not to say that we conclude that Landis was a co-employee of plaintiff. This determination does not have to be made in order to decide this case. To the extent Landis is assumed to be a co-employee, however, the assumption can only benefit plaintiff's case.