STATE OF MICHIGAN

COURT OF APPEALS

CHARLES J. BROWN,

Plaintiff-Appellant,

v

HENKELS & McCOY and LIBERTY MUTUAL INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
March 16, 2001

No. 224072
WCAC
LC No. 98-000713

Before: Smolenski, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the opinion and order of the Worker's Compensation Appellate Commission reversing the magistrate's open award of benefits. We reverse and reinstate the award.

Plaintiff, a pipefitter, was employed by defendant Henkels & McCoy, who provided plaintiff with a ¾ ton pickup truck. In connection with his use of the truck, plaintiff signed an agreement drafted by defendant stating: "You have been assigned a vehicle for the convenience of the company. Your Class 1 Driver status is a privilege and not a benefit." Plaintiff used the pickup for transportation to and from work and to store his tools, making it unnecessary for him to first drive to defendant's offices and then to the work site. Plaintiff testified that he would sometimes pick up pipefitting supplies on his way to and from work. However, plaintiff was not compensated for the drive to or from work and was responsible for the costs of fueling and maintaining the vehicle. On the morning of December 18, 1995, plaintiff was seriously injured in a head-on automobile accident.

Plaintiff filed a petition for hearing with the bureau, alleging a disability on the basis of residual problems attributable to the injuries he suffered in the accident. The magistrate found that plaintiff remained partially disabled from fractured bones in his feet, but that he had otherwise recovered from his injuries. The magistrate determined that plaintiff's injuries occurred in the course of his employment because defendant supplied the truck and "was deriving a benefit from plaintiff's activities in driving that company truck directly to the job site."

Defendant appealed the decision to the commission, which, in a split decision, reversed the magistrate's finding that the injury occurred in the course of plaintiff's employment. The

majority concluded that the magistrate's analysis assumed facts not in evidence and found that the benefit derived by defendant from plaintiff's use of the truck was "speculative." The commission also found as a matter of law that the magistrate erred by concluding that "the mere fact of plaintiff driving the employer's vehicle was sufficient to meet the test for compensability," and reversed the award of benefits. The dissent argued that under "well established principles" of Michigan law, "the employer that undertakes to provide transportation to and from work on a regular basis, transforms that trip into work related travel." The commission did not address defendant's claim that the magistrate erred in finding the existence of a continuing disability.

The WCAC's factual findings, made within its authority, are conclusive in the absence of fraud; judicial review is limited to whether the commission applied the correct legal standard and whether there is any evidence in the record to support its findings. MCL 418.861a(14); MSA 17.237(861a)(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000); *Holden v Ford Motor Co*, 439 Mich 257, 269; 484 NW2d 227 (1992). However, questions of law involved in any final order of the WCAC are reviewed de novo. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000). Whether an employee's injuries arose in the course of his employment presents a question of law if the facts are not in dispute; otherwise, such issues present mixed questions of fact and law. *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).

Plaintiff argues that the WCAC erred as a matter of law and exceeded the scope of its authority in finding that his injuries did not occur in the course of his employment. We agree.

Generally, injuries sustained by an employee while going to and coming from work are not compensable under the worker's compensation act. *Camburn v Northwest School District (After Remand)*, 459 Mich 471, 478; 592 NW2d 46 (1999); *Botke v Chippewa Co*, 210 Mich App 66, 69; 533 NW2d 7 (1995). However, exceptions to the general rule have been established where

> (1) the employee is on a special mission for the employer, (2) the employer derives a special benefit from the employee's activity at the time of the injury, (3) the employer paid for or furnished employee transportation as part of the employment contract, (4) the travel comprised a dual purpose combining employment-related business needs with the personal activity of the employee, (5) the employment subjected the employee to excessive exposure to traffic risks, or (6) the travel took place as a result of a split-shift working schedule or employment requiring a similar irregular nonfixed working schedule. [*Collier v J A Fredman, Inc*, 183 Mich App 156, 160; 454 NW2d 183 (1990); *Forgach v George Koch & Sons Co*, 167 Mich App 50, 59; 421 NW2d 568 (1988).]

Konopka v Jackson Co Rd Comm, 270 Mich 174; 258 NW 429 (1935), held that where the transportation to and from work is furnished by the employer, a traffic accident while going to or coming from work arises in the course of the employment. See also *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606, 608-609; 295 NW 331 (1940) (employee covered by worker's compensation act where his contract of employment provided for free transportation in one of the

employer's trucks to and from the home city); *Lemanski v Frimberger Co*, 31 Mich App 285; 187 NW2d 498 (1971) (employer paid for employee's transportation to and from the job site pursuant to contract); *Stark v L E Myers Co*, 58 Mich App 439, 442-443; 228 NW2d 411 (1975) (stating that one of the relevant considerations is "[w]hether [the] employer paid for or furnished employee transportation"); *Torres v Armond Cassil Co*, 115 Mich App 690, 694; 321 NW2d 776 (1982) (employee covered by act because employer furnished transportation on a daily basis); and *State Farm Mutual Automobile Ins Co v Roe (On Rehearing)*, 226 Mich App 258, 263-265; 573 NW2d 628 (1997). Thus, plaintiff in this case clearly comes within the exception where the employer furnishes the employee's transportation to and from work, and the WCAC erred as a matter of law in finding that this could not form the basis for the magistrate's opinion.

The commission cited *Forgach v George Koch & Sons Co*, 167 Mich App 50, 59; 421 NW2d 568 (1988), as support for its decision; however, we do not read that case as requiring that more than one of the exceptions to the going and coming rule be met. Even if *Forgach* could be interpreted as requiring that a claimant meet more than one of the exceptions, the evidence in this case established that the employer received a special benefit from plaintiff's use of the truck. The WCAC erred in failing to consider the import of the parties' agreement regarding the vehicle, which expressly stated that plaintiff's use of the truck was for "the convenience of the company." This evidence, coupled with testimony establishing that plaintiff's use of the truck enabled him to work more efficiently, constituted competent, material, and substantial evidence in support of the magistrate's finding that the employer derived a special benefit from plaintiff's use of the truck. Because the magistrate's findings must be considered conclusive by the commission if supported by such evidence, MCL 418.861a(3); MSA 17.237(861a)(3), the WCAC exceeded the scope of its authority in engaging in de novo fact-finding.

Reversed and remanded for consideration of the remaining issue. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald