[Cite as *Smith v. City of Akron*, 2004-Ohio-4974.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

JOHN H. SMITH Appellant v. CITY OF AKRON, et al. Appellees	C.A. No. 22101 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2003 10 6132

DECISION AND JOURNAL ENTRY

Dated: September 22, 2004

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

BATCHELDER, Judge.

{¶1} Appellant, John Smith, appeals from the judgment entry and order of the Summit County Court of Common Pleas that granted summary judgment in favor of Appellees, the city of Akron and the Administrator of the Bureau of Workers' Compensation (the "BWC"). We affirm.

I.

{¶2} The relevant and undisputed facts of this case, as succinctly articulated by the trial court, are as follows:

> "[Mr. Smith] was employed by the City of Akron as a landscaper in the Parks Department. [Mr. Smith's] job requires that he carry a

> shortwave radio so that his supervisors may contact him while on assignment. [Mr. Smith] is required to report to a central location where he picks up[] his truck and receives his assignments. [Mr. Smith] was, at the time of the injury, an hourly employee entitled to a thirty minute unpaid lunch break that normally occurred from 11:30 a.m. to noon.
>
> "On April 28, 2003, [Mr. Smith] was with a crew working at the Akron Municipal Building. [Mr. Smith] and a co-worker left the work area and went to an area restaurant for lunch. As [Mr. Smith] was e[x]plaining the afternoon work itinerary to his co-worker, he fell on an uneven sidewalk in the parking lot and sustained injuries.
>
> "[Mr. Smith] reported the incident to the City of Akron and noted that the time of his accident was 11:40 a.m. advising generally that *** he sustained injuries to his left arm and wrist. [Mr. Smith] filed an application for Worker[s'] Compensation benefits, *** that was denied. *** [T]he District Hearing Officer noted that [Mr. Smith] was a fixed situs employee. Neither party disputes that the City of Akron had no control over the sidewalk where [Mr. Smith] was injured."

{¶3} A staff hearing officer at the Industrial Commission affirmed the district hearing officer's disallowance of Mr. Smith's claim. Thereafter, the Industrial Commission refused to hear further appeals from the district hearing officer's decision.

{¶4} On October 21, 2003, Mr. Smith filed a notice of administrative appeal and complaint with the Summit County Court of Common Pleas, naming the city of Akron and the Administrator of the BWC as defendants. The BWC and the city of Akron filed separate answers to the complaint.

{¶5} On February 13, 2004, the BWC and the city of Akron filed a joint motion for summary judgment. In this motion, the appellees asserted that Mr.

Smith was not entitled to participate in the workers' compensation fund because Mr. Smith's injury did not arise out of his employment with the city of Akron. Mr. Smith filed a response and cross motion for summary judgment, requesting summary judgment on the issue of whether he was within the course and scope of his employment when the injury occurred. The BWC and the city of Akron replied, countering Mr. Smith's arguments by asserting that he is a fixed situs employee.

{¶6} In a judgment entry and order dated April 26, 2004, the trial court granted summary judgment in favor of the city of Akron and the BWC. The court concluded that Mr. Smith did not establish a causal connection between his injury and his employment and that as such his injuries did not arise out of the course and scope of his employment. The court also found that Mr. Smith was a fixed situs employee. This appeal followed.

{¶7} Mr. Smith timely appealed, asserting one assignment of error for review.

II.

Assignment of Error

"THE TRIAL COURT'S FINDING THAT APPELLANT WAS A FIXED SITUS EMPLOYEE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND CONSTITUTES REVERSIBLE ERROR."

{¶8} In his sole assignment of error, Mr. Smith challenges the trial court's grant of summary judgment to the city of Akron, asserting that the trial court erred when it found that he is a fixed situs employee. We disagree.

{¶9} Appellate review of a lower court's entry of summary judgment is de novo, applying the same standard used by the trial court. *McKay v. Cutlip* (1992), 80 Ohio App.3d 487, 491. Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The movant must point to some evidence in the record of the type listed in Civ.R. 56(C) in support of his motion. Id.

{¶10} Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that

shows a genuine dispute over the material facts exists. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶11} In support of his sole assignment of error, Mr. Smith argues that he is a non-fixed situs employee. Generally, an employee who sustains an injury while traveling to and from a fixed place of employment, i.e., fixed situs, is precluded from participating in the workers' compensation fund. *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117. This is so because "'the requisite causal connection between injury and the employment does not exist.'" Id. at 119, quoting *MTD Prods., Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 68. This general concept is referred to as the "coming-and-going" rule. *Ruckman*, 81 Ohio St.3d at 119. Mr. Smith asserts that he is not a fixed situs employee, and that therefore, he is not subject to the "coming and going" rule. To determine whether an employee is a fixed situs employee, the pertinent question is "whether the employee commences his [or her] substantial employment duties only after arriving at a specific and identifiable work place designated by his [or her] employer." Id., citing *Indus Comm. v. Heil* (1931) 123 Ohio St. 604, 606-07. It is irrelevant that the employee may be reassigned to a different workplace on a monthly, weekly, or daily basis. *Ruckman*, 81 Ohio St.3d at 119. Each particular job site may constitute a fixed place of employment. Id. at 120.

{¶12} It is undisputed that Mr. Smith began his work day by arriving at a specified central location, where he received his itinerary and job instructions. On

the day in question, Mr. Smith first trimmed hedges at the Akron Municipal Building, and was scheduled to proceed to another job site later that day. Between these two job sites, Mr. Smith decided to go to lunch. Despite each job's limited duration, it is undisputed that each landscaping project was at a specific and fixed location. See id. The evidence in the record does not indicate that Mr. Smith had any duties to carry out away from each work site to which they were assigned. Therefore, we find that the trial court properly concluded that Mr. Smith was a fixed situs employee. As such, the "coming-and-going" rule applies to Mr. Smith, unless he can establish that one of the exceptions to the rule applies. The general rule governing fixed situs employees does not operate as a complete bar to an employee that is injured commuting to and from work. *MTD Prods., Inc.*, 61 Ohio St.3d at 68.

{¶13} Mr. Smith argues, that, even if it is determined that he is a fixed situs employee, his injury nevertheless occurred within the course of and arose out of his employment, and that therefore he is entitled to participate in the workers' compensation fund. See *Ruckman*, 81 Ohio St.3d at 120. "[T]he Work[ers'] Compensation Act does not create a general insurance fund for the compensation for injuries in general to employees but only for those injuries which occur in the course of *and* arise out of the employment." (Emphasis added.) *Lohnes v. Young* (1963), 175 Ohio St. 291, 292. See *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 278; R.C. 4123.01(C).

{¶14} Normally, an employee's commute to a fixed work site bears no meaningful relationship to his employment and serves no purpose of the employer's business. *Ruckman*, 81 Ohio St.3d at 120. Moreover, an injury sustained in an off-premises excursion does not occur within the course of employment. *Eagle v. Indus. Comm.* (1945), 146 Ohio St. 1, 3 (holding that "when appellee entered a restaurant of her own choice (and over which premises her employer had no control) for the purpose of getting her lunch she was not in the course of her employment"); *Trotter v. Ohio Bur. of Workers' Comp.* (Apr. 2, 1992), 8th Dist. Nos. 60325 & 60388 (stating that an employee's injury is not compensable if the injury is sustained while he or she is traveling to or from lunch away from the premises of the employer).

{¶15} Ohio courts have recognized several exceptions to the "coming-and-going" rule which, if established, may warrant compensation under the workers' compensation fund: (1) the injury occurred within the "zone of employment"; (2) the injury was sustained because of a "special hazard" created by the employment; and (3) the "totality of the circumstances" surrounding the accident creates a causal connection between the injury and employment. See *MTD Prods., Inc.*, 61 Ohio St.3d at 68-70.

{¶16} Mr. Smith insists that the "special hazard" exception applies to his case. The "special hazard" exception applies where, but for the employment, the employee would not have been at the location where the injury occurred, and the

risk involved is "distinctive in nature or quantitatively greater than the risk common to the public." Id. at 68, citing *Littlefield v. Pillsbury Co.* (1983), 6 Ohio St.3d 389, paragraph two of the syllabus. However, we do not agree with Mr. Smith that this exception applies to grant him compensation. Mr. Smith's commute from the site to a restaurant approximately two or three miles away from the site on his unpaid lunch break has no connection with his employment with the city of Akron, and he was not present at the restaurant "but for" his employment. See *MTD Prods., Inc.*, 61 Ohio St.3d at 68. Furthermore, it can hardly be said that any distinctive hazard, quantitatively greater in risk that that faced by the rest of the public, was present during Mr. Smith's walk from his car to the restaurant, much less created by Mr. Smith's employer.

{¶17} Mr. Smith proposes that the injury sustained during this lunch break occurred within the course and scope of his employment because at that time, he was explaining job responsibilities to a new employee and thus was actively engaged in his employment. Under the "totality of the circumstances" test, a court must assess the following factors surrounding the accident, in order to determine whether a sufficient causal connection exists between the injury and the employment: (1) the proximity of the scene of the accident to the place of employment; (2) the degree of control the employer possesses over the scene of the accident; and (3) the benefit the employer received from the employee's presence at the scene of the accident. *Lord v. Daugherty* (1981), 66 Ohio St.2d

441, syllabus. However, there is no evidence in the record to suggest that the employer had specifically required Mr. Smith to discuss employment matters during the unpaid lunch break. See *Adkins v. First Natl. Bank* (Oct. 29, 1998), 8th Dist. No. 73535. Furthermore, even if the city of Akron arguably received a benefit from this act, we cannot conclude that this creates a sufficient causal connection between Mr. Smith's injury and his employment. See, e.g., id., supra; *Lord*, 66 Ohio St.2d at syllabus.

{¶18} Additionally, Mr. Smith contends that because he carried with him a work radio which he constantly monitored, that he was "persistently 'on call'" during his lunch break and that therefore he was furthering his employer's business. However, an employee with a fixed place of employment is not within the course of employment when traveling to and from work, despite the fact that he is on call. *Lohnes v. Young* (1963), 175 Ohio St. 291, 294.

{¶19} In light of the foregoing, we cannot conclude that Mr. Smith has sufficiently demonstrated that the "coming and going" rule should not apply to bar his participation in the workers' compensation fund, or that his injury occurred within the course of and arose from his employment. We conclude that no genuine issue of material fact remained to be litigated in this case, and that the city of Akron was entitled to judgment as a matter of law. Therefore, we find that the trial court did not err in granting summary judgment in favor of the city of Akron and the BWC. Accordingly, Mr. Smith's sole assignment of error is overruled.

III.

{¶20} Mr. Smith's sole assignment of error is overruled. The judgment entry and order of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

Exceptions.

WILLIAM G. BATCHELDER
FOR THE COURT

WHITMORE, P.J.
SLABY, J.
CONCUR

APPEARANCES:

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