IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHARLES GARRETT,	)	
	)	07A-04-004 (JTV)
Claimant	)	
Below-Appellant,	)	
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Employer	)	
Below-Appellee.	)	

Submitted: May 15, 2008
Decided: August 29, 2008

Walt F. Schmittinger, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Claimant Below-Appellant.

Francis X. Nardo, Esq., Tybout, Redfearn & Pell, Wilmington, Delaware. Attorney for Employer Below-Appellee.

Upon Consideration of Appellant's
Appeal From Decision of Industrial Accident Board
AFFIRMED

VAUGHN, President Judge

Garrett v. State
C.A. No. 07A-04-004 (JTV)
August 29, 2008

OPINION

The claimant, Charles Garrett, appeals from a decision of the Industrial Accident Board which denied his Petition to Determine Compensation Due. The Board found that the claimant was not acting within the course and scope of his employment when he was injured. It concluded that the claimant's injury fell within the "coming and going rule," under which an injury occurring during a commute to or from work is not compensable.[1]

FACTS

On February 13, 2006, the claimant was injured when he slipped and fell on ice in the Delaware Technical and Community College Terry Campus parking lot in Dover. At the time, he worked for the State of Delaware in the Department of Children, Youth and their Families in Newport, New Castle County. The claimant elected to participate in the Fleet Link Program, which is operated by the State's Fleet Services, to commute from his home in Dover to his place of employment in Newport. The State did not require the claimant to participate, and he was not paid for his time while riding in the vanpool. He paid Fleet Services a monthly fee for the vanpool. The riders took turns driving. Fleet Services organized the vanpool, and paid the insurance, maintenance, and fuel from the fees paid by the riders. Subject to Fleet Link's approval, the riders choose the pick-up and drop-off locations. The

[1] The Board held that claimant was "not acting within the course and scope of his employment when he was injured on February 13, 2006, as he was on the Del Tech property for his own personal convenience to meet his vanpool for his regular commute to work in Newport because he did not want to drive to Newport on his own." *Garrett v. State*, IAB Hearing No. 1281876 (Mar. 26, 2007), at 10–11.

vanpool that the claimant participated in departed from Del Tech with stops in Smyrna and Middletown before arriving in Newport. Previously, the vanpool met at the Dover Kmart. The participants moved their stop to Del Tech for safety reasons.

THE CLAIMANT'S CONTENTIONS

The claimant contends that he was within the course and scope of his employment when he, a state employee, was injured on state property while preparing to board a state-owned and controlled van to travel to his place of state employment in Newport. The claimant supports his contention by marshaling facts showing that the vanpool is a state enterprise made available to state employees. It is advertised on bulletin boards at state work places and mentioned to employees as a benefit during state job interviews. Although the participants in the program can select a pick-up or drop-off site (as they apparently did here when they moved from Kmart to Del Tech), such sites must be approved by the State (Fleet Services). As mentioned above, Fleet Services charges the state employee for participating in the vanpool, maintains and insures the vehicles, and provides the fuel. Therefore, the claimant contends, the "premises rule" applies, making the injury compensable.

STANDARD OF REVIEW

The Court reviews Board decisions to determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.[2] Substantial evidence is such relevant evidence as a

[2] *Bear-Glasgow Dental, L.L.C. v. Edwards*, 2007 WL 1651988, at *2 (Del. Super.).

reasonable mind might accept as adequate to support a conclusion.[3] The Court does not "weigh the evidence, determine questions of credibility, or make its own factual findings."[4] In reviewing the record for substantial evidence, the Court must consider the record in the light most favorable to the party prevailing below.[5] Errors of law are reviewed de novo.[6] Absent errors of law, the standard of review for a Board's decision is abuse of discretion, which occurs when the Board "exceeded the bounds of reason in view of the circumstances."[7]

DISCUSSION

Generally, an employee is entitled to receive workers' compensation benefits for injuries arising out of and in the course of employment.[8] "Arising out of" refers to the origin of the accident and its cause.[9] "In the course of employment" refers to the time, place, and circumstances of the injury.[10] Delaware follows the going and coming rule, which precludes an employee from receiving workers' compensation benefits for injuries sustained while commuting to and from the employee's place of

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[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[5] *Spencer v. Suddard*, 1997 WL 817886, at *2 (Del. Super.).

[6] *Snyder v. Wyoming Concrete*, 2007 WL 1153057, at *2 (Del. Super.).

[7] *Id.*

[8] 19 *Del. C.* § 2304.

[9] *Stevens v. State*, 802 A.2d 939, 945 (Del. Super. Ct. 2002).

[10] *Id.*

employment.[11]

However, under the premises exception, an injury occurring on the employer's premises while the employee is beginning or ending a commute to or from work is compensable.[12] The employer's premises includes parking lots owned, controlled, or maintained by the employer.[13] Under the "control by use" principle, parking lots not owned by the employer may be part of the employer's premises when exclusively used, used with the owner's special permission, or just used by the employees.[14]

The Board concluded that the cases discussing the premises exception were distinguishable from this case and that applying it here would be an unwarranted extension of the rule. I agree with the Board's conclusion.

In *Tickles v. PNC Bank*,[15] there were two buildings at the employer's premises, Building 103 and Building 400. The employer's operations were being transitioned from Building 103 to Building 400, and the employee's job had been moved from 103 to 400. The buildings were apparently adjacent to each other, or at least considered to be in the same complex. Employees frequently walked between the two buildings

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[11] *Id.*

[12] *Rose v. Cadillac Fairview Shopping Ctr. Props. (Del.) Inc.*, 668 A.2d 782, 787 (Del. Super. Ct. 1995).

[13] *Id.*; *see also Bernadette's Hair Designers v. Incollingo*, 1990 WL 105023, at *2 (Del. Super.) (finding that the parking lot was part of the employer's premises where the employer instructed the employees as to where to park).

[14] *Rose*, 668 A.2d at 787.

[15] 703 A.2d 633 (Del. 1997).

by traversing the parking lot adjoining Building 103. The employee was being driven to work by a friend. They stopped so that the employee could go into Building 103 to use an ATM machine. Due to inclement weather, the friend waited while the employee used the ATM machine so that the friend could then drive her over to Building 400. The employee fell while attempting to reenter the vehicle. The Supreme Court held that the premises exception applied. That case is distinguishable from this one because in *Tickles,* there was a business relationship between the two buildings and the entire premises could be viewed as one extensive work place. In this case, there is no such business relationship between the Department of Youth, Children and their Families at its Newport location and Del Tech in Dover.

In *Cox v. Quality Car Wash*,[16] the employee was injured in a parking lot which was not owned by the employer but which was adjacent to or near the employer's premises and was routinely used by the employees. That case is also distinguishable because the parking lot in that case could be viewed as an extension of the work premises, whereas the vanpool pick-up point in this case cannot.

In *Stevens v. State of Delaware*,[17] a vanpool of employees commuting to work stopped at a WAWA convenience store on the way. One of them was injured there while preparing to enter the van to commute to work. This Court held that the premises exception did not apply to the accident in that case because the WAWA was not the employer's premises. While the case is distinguishable from this one because

[16] 449 A.2d 231 (Del. 1982).

[17] 802 A.2d 939 (Del. Super. Ct. 2002).

the WAWA was private property and was not the pick-up point, it is significant that the Court noted that "premises" under the premises rule refers to "the entire area devoted by the employer to the industry with which the employee is associated."[18] In this case, the employee is associated with that part of the State's work which relates to the Department of Children, Youth and their Families at Newport, and the Del Tech parking lot has no relation to that activity.[19]

The only relationship between the employee's work premises and the Del Tech parking lot is that they are both state owned. There is no business relationship between them. A part of the rationale of recognizing parking lots as part of the business premises is that by establishing or sponsoring a parking lot, the employer creates the necessity for the employees to encounter hazards lying at the parking lot or between the parking lot and the main work premises.[20] That factor is not present here. The pick-up points are not established by or sponsored by the State. The State simply reserves the right to approve the site after it is selected by the employees.

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[18] *Id.* at 946 (quoting 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 13.04, at 13-38 (2001)).

[19] It would appear to follow that a pick-up point which is on private property is not within the premises rule. If the claimant's argument were accepted, it would seem to follow that an employee injured at the former Kmart pick-up site for the vanpool in this case would not be covered for workers' compensation, while one injured at the Del Tech pick-up site would be. This does not seem to be a sound basis upon which to distinguish employees who are covered by workers' compensation from those who are not.

[20] 1 LARSON, *supra* note 18, § 13.01[2][b], at 13-10 (2007).

Finally, the Court finds that the personal comfort doctrine[21] relied upon by the claimant does not apply because the claimant was not on the employer's premises at the time he was injured.[22]

For the foregoing reasons, the Board's decision is ***affirmed.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File

[21] The personal comfort doctrine has been summarized as follows: "Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred." *Stevens*, 802 A.2d at 949. Delaware courts have recognized that incidental acts of personal convenience or comfort, such as eating, drinking, smoking, seeking toilet facilities, and seeking fresh air or temperature control, occur in the course of employment. *Post v. Cook*, 2006 WL 2337359, at *3 (Del. Super.).

[22] "For the 'personal comfort' doctrine to apply, workers' compensation claimants with fixed hours and places of work normally must have been on their employer's "premises" at the time of injury and must have been performing an act that "ministers" to their personal comfort." *Stevens*, 802 A.2d at 949.