[Cite as *Bennett v. Goodremont's, Inc*, 2009-Ohio-2920.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark A. Bennett	Court of Appeals No. L-08-1193
Appellant	Trial Court No. CI0200605864
v.	
Goodremont's, Inc., et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 19, 2009

* * * * *

Paul E. Hoeffel, for appellant.

Richard Cordray, Ohio Attorney General, and Joshua W. Lanzinger, Assistant Attorney General, for appellee Administrator, Bureau of Workers' Compensation.

Roman Arce and James H. Irmen for appellee Goodremont's, Inc.

* * * * *

HANDWORK, J.

{¶ 1} In this workers' compensation case, appellant, Mark A. Bennett, appeals the trial court's entry of summary judgment in favor of his employer, Goodremont's, Inc., and

the Administrator of the Bureau of Workers' Compensation. For the reasons that follow, we reverse the judgment of the trial court.

{¶ 2} On March 29, 2006, Bennett filed a workers' compensation claim against Goodremont's, Inc., for injuries Bennett sustained in a motor vehicle accident that occurred while Bennett was traveling from his home in Swanton, Ohio to Goodremont's place of business in Toledo.

{¶ 3} On April 5, 2006, the Bureau of Workers' Compensation disallowed Bennett's claim. Bennett appealed this decision to the Industrial Commission. An Industrial Commission district hearing officer also disallowed the claim. Bennett appealed the district hearing officer's decision. Once again, the claim was disallowed, this time by an Industrial Commission staff hearing officer. The staff hearing officer's decision was appealed to the Industrial Commission of Ohio. The Industrial Commission of Ohio declined to hold a hearing on the matter.

{¶ 4} On September 22, 2006, Bennett appealed the denial of his claim to the Lucas County Court of Common Pleas. Both Goodremont's, Inc. and the Administrator of the Bureau of Workers' Compensation filed motions for summary judgment. The trial court granted these motions, finding that Bennett's claim is barred by the "coming-and-going" rule.

{¶ 5} The relevant facts of this case, viewed in a light most favorable to Bennett are as follows. Bennett began his employment as a photocopier salesman with Goodremont's, Inc. on January 23, 2006. Goodremont's, Inc. provided Bennett with a

particular sales territory for which he was responsible. Bennett testified that his office was at his home, and that this office (which was located in his sales territory) was where he would set up appointments with customers.

{¶ 6} On a typical day, Bennett would meet with established clients at their place of business and would demonstrate copiers that he had previously had shipped to those locations or else he would work to find new clients, sometimes by phone, and at other times by in-person visits "in the field". He stated that oftentimes he would travel directly from his home office to a client's place of business, without making any stop at Goodremont's, Inc.'s main office location.

{¶ 7} At the time of the subject accident -- during which Bennett was injured as the result of another driver rear-ending his car -- Bennett was traveling from his home to Goodremont's main office location, where he was scheduled to demonstrate a photocopier for a prospective customer.

{¶ 8} On appeal, Bennett raises the following assignments of error:

{¶ 9} I. "THE COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THE PLAINTIFF TO BE A TRAVELING SALESPERSON BUT DENIED HIS CLAIM ON THE BASIS OF THE COMING-AND-GOING RULE."

{¶ 10} II. "THE COURT ERRED IN AWARDING SUMMARY JUDGMENT TO DEFENDANTS WHERE THERE EXISTED QUESTIONS OF FACT AS TO THE PLAINTIFF'S STATUS AS A NON-FIXED SITUS EMPLOYEE, FIXED SITUS EMPLOYEE, OR SEMI-FIXED SITUS EMPLOYEE."

{¶ 11} III. "THE COURT ERRED IN APPLYING THE *MINTON* CASE AS ITS BASIS FOR GRANTING SUMMARY JUDGMENT."

{¶ 12} Because Bennett's assignments of error all concern the trial court's disposition of the motions for summary judgment and, in particular, the issue of whether Bennett was injured in the course of and arising out of his employment, we address the assignments of error together.

{¶ 13} An appellate court reviewing a trial court's granting of summary judgment does so de novo, applying the same standard used by the trial court. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Civ.R. 56(C) provides:

{¶ 14} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as considered in this rule. * * *"

{¶ 15} Summary judgment is proper where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg v. Allstate Ins. Co.* (July 12, 2001), 10th Dist. No. 00AP-1243, citing *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629.

{¶ 16} The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of fact as to an essential element of one or more of the non-moving party's claims. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once this burden has been satisfied, the non-moving party has the burden, as set forth at Civ.R. 56(E), to offer specific facts showing a genuine issue for trial. Id.

{¶ 17} "The test of the right to participate in the Workers' Compensation Fund is not whether there was any fault or neglect on the part of the employer or his employees, but whether a 'causal connection' existed between an employee's injury and his employment either through the activities, the conditions or the environment of the employment." *Bralley v. Daugherty* (1980), 61 Ohio St.2d 302, 303. For purposes of the Ohio workers' compensation statutes, "'[i]njury includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." R.C. 4123.01(C). The Ohio Supreme Court has expressly recognized the conjunctive nature of the coverage formula of "in the course of and arising out of" employment. *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277. Thus, "all elements of the formula must be met before compensation will be allowed." Id. In applying the workers' compensation statutes, we are cognizant that in Ohio such statutes are to be liberally construed in favor of employees. R.C. 4123.95.

{¶ 18} In the instant case, the trial court granted summary judgment in favor of appellees on the basis of the coming-and-going rule. The Ohio Supreme Court has

described the coming-and-going rule as "a tool used to determine whether an injury suffered by an employee occurs 'in the course of' and 'arise[s] out of' the employment relationship so as to constitute a compensable injury under R.C. 4123.01(C)." *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 119. The rule provides that, in general, "an employee with a fixed place of employment, who is injured while traveling to or from his place of employment, is not entitled to participate in the Workers' Compensation Fund because the requisite causal connection between injury and the employment does not exist." *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 68. The rationale underlying the rule is that Ohio workers' compensation statutes contemplate only those hazards that are encountered by an employee in the discharge of employment duties, and not those hazards or risks that are encountered similarly by the public generally, such as those hazards or risks involved in travel to and from the place of employment. *Ruckman* at 119.

{¶ 19} To determine whether an employee is a fixed-situs employee and, thus, subject to the coming-and-going rule, the focus must be on "whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer." *Ruckman*, supra, at 119-120. Consideration of an employee's "substantial employment duties" requires more than just a look at what the employee was doing when the incident that precipitated the claim occurred; rather, it requires examination of the employee's duties as a whole and consideration of whether such duties were such as to make travel to and from the

employee's home an integral part of the employee's employment. *Buchett v. S.E. Johnson Companies, Inc.* (Jan. 13, 1995), 6th Dist. No. 94OT014; but see *Minton v. Fidelity and Guaranty Ins. Underwriters, Inc.*, 2d Dist. No. 04CA13, 2004-Ohio-5814 (finding that relevant inquiry centered upon employee's activities at the time he was killed). Where traveling itself is part of the employment, either by virtue of the nature of the occupation or by virtue of the contract of employment, the employment situs is non-fixed, and the coming-and-going rule is, by definition, inapplicable. See *Lippolt v. Hague*, 10th Dist. No. 08AP-140, 2008-Ohio-5070, ¶ 12, citing *Fletcher v. Northwest Mechanical Contr., Inc.* (1991), 75 Ohio App.3d 466, 473.

{¶ 20} The facts in the instant case, viewed in a light most favorable to Bennett, demonstrate that Bennett was, in fact, a traveling salesman, who did not commence his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer, see *Ruckman*, supra. Rather, the traveling itself, to and from his clients' places of business, was a fundamental part of his employment. See *Lippolt*, supra. On the basis of these facts, a reasonable factfinder might well conclude that Bennett's employment situs was non-fixed, in which case the coming-and-going rule would not apply to preclude recovery for Bennett. Because there remains a genuine issue of fact with respect to this issue, the trial court's granting of summary judgment on the basis of the coming-and-going rule was clearly inappropriate.

{¶ 21} We note that the trial court, in granting appellees' motions for summary judgment relied heavily on *Minton v. Fidelity and Guaranty Ins. Underwriters, Inc.*,

supra. Our review of *Minton* reveals that the case, although in many ways similar to the one at hand, is factually distinguishable and, more importantly, legally infirm.

{¶ 22} We begin by noting that this court in *Fletcher*, supra, first recognized the existence of "semi-fixed" situs employment (in which the employee works for varying times and at various sites), then applied the concept to its holding, wherein it was stated that the coming-and-going rule would not preclude compensation to a semi-fixed situs employee for whom travel was a necessary and required part of employment. See, *Fletcher*, supra, at 471-474.

{¶ 23} In a later case, the Seventh District Court of Appeals correctly observed that the Supreme Court of Ohio in *Ruckman*, supra, "appears to have rejected the *Fletcher* concept of 'semi-fixed situs' as a relevant factor in determining whether the employee was acting in the course and scope of employment." *Powell v. Grange Mut. Ins. Co.*, 7th Dist. No. 04 CO 8, 2005-Ohio-2957, ¶ 23.

{¶ 24} The court in *Minton*, supra, like the trial court in the instant case, relied on the concept of "semi-fixed situs" in determining whether the employee was acting in the course and scope of employment. Because we believe such reliance was in error, we decline to apply the law as set forth in *Minton* to the instant case.

{¶ 25} Regarding factual differences between the two cases, we note that Jeffrey Minton, the employee in the *Minton* case, although a salesman, like Bennett, reported to the company office every morning and spent 90 percent of his time there. Bennett, by

contrast, did not report to the company office on a daily basis and, further, was required to spend 80 percent of his time in the field.

{¶ 26} Also, Minton, at the time of his accident, was traveling from his home to his employer's office, not to make a sale for his employer's benefit, but rather to meet with representatives of a vendor. Bennett, on the other hand, was traveling from his home office to his employer's office in order to demonstrate a product to a potential customer.

{¶ 27} Given the factual differences between this case and *Minton*, together with the problems inherent in the *Minton* analysis, we find that the trial court erred in relying upon *Minton* as its basis for granting summary judgment.

{¶ 28} For all of the foregoing reasons, appellant's first, second, and third assignments of error are found well-taken.

{¶ 29} The judgment of the Lucas County Court of Common Pleas is reversed. This case is remanded to the trial court for additional proceedings consistent with this decision. Appellees are ordered to divide the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _______________________________
JUDGE

Arlene Singer, J. _______________________________
JUDGE

Thomas J. Osowik, J. _______________________________
CONCUR. JUDGE

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