[Cite as *Brown v. Lake Erie Elec. Co.*, 2010-Ohio-4950.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

DOUGLAS BROWN,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-04-030
	:	<u>O P I N I O N</u>
- vs -		10/12/2010
	:	
LAKE ERIE ELECTRIC CO., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2009CVD0413

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POWELL, J.

{¶1} Plaintiff-appellant, Douglas Brown, appeals the decision of the Clermont County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Lake Erie Electric Co. (Lake Erie). We affirm the decision of the trial court.

{¶2} Brown, an employee of Lake Erie, was a journeyman electrician who generally worked in Butler and Warren counties. On October 14, 2004, a co-worker, Joel Fellman, picked up Brown at approximately 6:15 a.m. in a van owned by Lake Erie. Fellman was driving on Interstate Route 275 toward the Cincinnati Water Treatment Plant where he and Brown were to report for the day's work. Near Exit 28, a car traveling in the opposite direction lost control, crossed the median, and hit the van head-on. Fellman and Brown were injured as a result of the collision.

{¶3} Both employees filed claims to participate in the Workers' Compensation Fund, and the district officer approved the claims for the injuries Fellman and Brown sustained in the accident. Lake Erie appealed the decision to a Staff Hearing Officer who reversed the district officer's decision and found the employees unable to participate. After the Industrial Commission denied Brown's request for a hearing, he appealed to the Butler County Court of Common Pleas, and his case was later transferred to the common pleas court in Clermont County.

{¶4} Lake Erie and Brown filed cross-motions for summary judgment, and the court found in favor of Lake Erie after determining that Brown was not eligible to participate in the Workers' Compensation Fund. Brown appealed the decision of the trial court and, according to this court's scheduling order, was required to submit his appellate brief by June 7, 2010. However, Brown's brief was filed with this court on June 8, 2010. Within Lake Erie's reply brief, it moves this court to dismiss the appeal according to App.R. 18(C).

{¶5} We decline to dismiss the appeal due to a one-day disparity between the ordered date of submission and the actual filing date. It is "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Tholen v. Walmart*,

Butler App. No. CA2009-03-090, 2010-Ohio-3256, ¶8. Although Brown was a day late in submitting his brief, we find that the nonconformance does not rise to the level of requiring dismissal of the appeal, and instead, we choose to exercise our discretion and consider Brown's assignment of error.

{¶6} "THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT-APPELLEES' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF-APPELLANT'S COMPLAINT."

{¶7} In his assignment of error, Brown asserts that the trial court erred in granting Lake Erie's motion for summary judgment. This argument lacks merit.

{¶8} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.* (1997), 118 Ohio App.3d 881, 887. Civ.R.56 sets forth the summary judgment standard and requires that there be no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, Fayette App. No. CA2007-08-030, 2008-Ohio-3077, ¶8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64.

{¶9} Before a worker can participate in the Workers' Compensation Fund, the employee must demonstrate that the injury was "received in the course of, and arising out of, the injured employee's employment." *Oberhauser v. Mabe*, Butler App. No. CA2008-11-266, 2009-Ohio-3680, ¶15. "The phrase 'in the course of employment' limits compensable injuries to those sustained by an employee while performing a required duty in the employer's service." Id. at ¶16. "The phrase,

'arising out of,' refers [to] the 'causal connection between the injury and the employment." Id. at ¶17, citing *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277-278.

{¶10} According to the "coming and going rule," "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." *Oberhauser* at ¶31. An employee with a fixed place of employment, also known as a fixed-situs employee, is one who "begins his employment duties once he arrives at his designated work place, *regardless of the fact that he may be reassigned to a different work place monthly, weekly, or even daily*." *Barber v. Buckeye Masonry & Constr. Co.*, 146 Ohio App.3d 262, 270, 2001-Ohio-4301, quoting *Ruckman v. Cubby Drilling Inc.*, 81 Ohio St.3d 117 at paragraph one of the syllabus, 1998-Ohio-455. (Emphasis in original.)

{¶11} While Brown acknowledges the coming and going rule, he contends that the trial court erred in granting summary judgment because it failed to recognize the "special hazards" exception to the general rule as set forth in *Ruckman*. Ruckman was one of several employees of Cubby Drilling involved in automobile accidents while traveling to and from work. The Ohio Supreme Court determined that Ruckman was a fixed-situs employee because his employment began once he arrived at the designated work site, and he stayed there until the end of the work day.

{¶12} However, the court noted that under limited circumstances, a fixed-situs employee can demonstrate that the injury occurred in the course of and arising out his employment despite the coming and going rule. The court first noted that

Ruckman's injury occurred in the course of his employment because as a rigger, he was required to travel to the premises of his employer's customer in order to satisfy the business obligation. The court then relied on the test set forth in *Lord v. Daugherty* (1981), 66 Ohio St. 2d 441 to determine whether Ruckman's accident during his travel to the job site arose out of his employment. The *Lord* test calls for a court to analyze (1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident. Id. at syllabus.

{¶13} The court focused on the totality of the facts and circumstances surrounding Ruckman's accident, and found that (1) the accident occurred away from the job site; (2) Cubby Drilling did not control the roadways; and (3) Ruckman's presence at the scene of the accident did not benefit Cubby Drilling. *Ruckman* at 122. Based on the totality of circumstances test, the court found that Ruckman failed to demonstrate that his injury arose out of his employment.

{¶14} However, the court went on to state that an exception to the coming and going rule exists when a "special hazard" creates a sufficient causal connection to satisfy the arising out of requirement. Id. at 124. The court considered the following factors before it determined that Ruckman's commute constituted a special hazard: the constantly changing location of the remote job sites, travel between Ohio, Pennsylvania and New York for different jobs lasting between three and ten days, significant distance between the job sites and Cubby Drilling's headquarters, Cubby Drilling's disregard for significant distances between job sites when scheduling work orders, minimum payment for travel between company headquarters and

remote sites, and Cubby Drilling's expectation that its employees commute to and from the remote sites on a daily basis. *Barber* at 271.

{¶15} After the court considered these factors, it determined that Ruckman was entitled to participate in the Workers' Compensation Fund and found that "a fixed-situs employee is entitled to workers' compensation benefits for injuries occurring while coming and going from or to his or her place of employment where the travel serves a function of the employer's business and creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public." *Ruckman* at 126.

{¶16} According to the record, Brown was a fixed-situs employee because he was required to report to a designated job site and he performed his work at that location. Brown's injury occurred in the course of his employment because as an electrician, he was required to travel to the premises of Lake Erie's customer in order to satisfy the business obligation. In the current instance, Brown was required to report to Cincinnati Waterworks in order to complete the job. Therefore Brown was injured while performing a required duty in the employer's service.

{¶17} We cannot say that Brown's injury arose out of his employment because according to the *Lord* factors, (1) the accident did not occur on or near the job site, (2) Lake Erie had no control over the roadways, and (3) Brown's presence at the scene of the accident did not benefit Lake Erie in any way. However, we note that our inquiry does not end because Brown may still demonstrate that his injuries arose from his employment with Lake Erie based on the special hazard exception set forth in *Ruckman*.

{¶18} Brown now claims that the trial court erred in granting summary

judgment in Lake Erie's favor because the special hazard exception is applicable and demonstrates that his injuries arose out of his employment. Brown asserts that the following facts establish that his travel served a function of the employer's business and created the distinctive risk recognized in *Ruckman*: assignments at remote job sites required that he take lengthy interstate commutes that significantly increased his exposure to traffic risks associated with highway travel; his employer arranged for him to work at a site outside of Butler or Warren Counties; the job site was approximately 46 miles[1] from his home; and the employer provided a service van for transportation and paid for expenses associated with operation of the van during the required commute.

{¶19} However, we find these facts distinguishable from *Ruckman*. Unlike Ruckman's travel between three states, Brown's travel was limited to Ohio, and specifically within a few counties. While Brown asserts that a job site 46 miles from his home constitutes a longer-than-average commute, the court in *Ruckman* focused on the fact that Cubby Drilling required its employees to travel hundreds of miles and sometimes required overnight stays out of town.

{¶20} Further, Brown admitted in his deposition that there is nothing unusually dangerous about driving 45 minutes to an hour to a job site or in being a passenger during a 45-60 minute commute. Brown's travel on Interstate Route 275 was essentially the same travel or commute undertaken by the general public and did not expose him to any greater risk than that imposed upon other drivers. The extenuating circumstances found within *Ruckman* that made his travel a special

1. According to stipulated driving directions provided to the trial court, the distance between Brown's home and the job site was 36 miles, while the estimated drive time was 46 minutes.

hazard do not exist in the present case.

{¶21} Because Brown was a fixed-situs employee whose injury did not arise out his employment with Lake Erie, there remain no genuine issues of material fact to be litigated. The trial court did not err in granting summary judgment in favor of Lake Erie, and Brown's assignment of error is overruled.

{¶22} Judgment affirmed.

YOUNG, P.J., and BRESSLER, J., concur.