IN THE COMMONWEALTH COURT OF PENNSYLVANIA

L&L Boiler Maintenance, Petitioner	:	
v.	:	No. 243 C.D. 2008
Workers' Compensation Appeal Board (Erb), Respondent	:	Submitted: May 16, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: August 14, 2008

L&L Boiler Maintenance (Employer) petitions for review of an order of the Workers' Compensation Appeal Board (Board), which affirmed the decision of a workers' compensation judge (WCJ) granting the Claim Petition of William Erb (Claimant). We affirm.

On October 10, 2005, Claimant filed a Claim Petition against Employer alleging that he sustained injuries in a motor vehicle accident while operating a company vehicle in the course and scope of his employment as a boiler mechanic on May 18, 2005. In response, Employer filed an answer denying the material allegations contained therein. A pre-trial conference was held on November 3, 2005, at which time counsel for both parties agreed that the case would be bifurcated and the WCJ would first decide whether or not Claimant was

in the course and scope of his employment at the time of the motor vehicle accident.

A hearing on the issue of course and scope of employment was held before the WCJ on January 24, 2006. At this hearing, Claimant testified and presented two co-workers as witnesses. In opposition thereto, Employer presented the testimony of the company's owner, Bruce Miller. The relevant testimony and evidence is summarized as follows.

Claimant testified that he sustained an injury to his head, ribs, and right knee in a motor vehicle accident, which occurred while he was driving Employer's company truck from outside Allentown, Pennsylvania, where he was working for Employer on a four-day job, to a restaurant for dinner with his wife. Claimant testified that Employer's place of business is located in Montoursville, Pennsylvania, but that he works very few days at the home office and primarily performs his work on boilers located at remote jobsites for periods of one to thirteen weeks. Claimant testified that when working outside of Montoursville, he stayed at hotels as required by Employer and used Employer's vehicle for travel. Claimant testified that Employer's policy did not specify how far he could drive the company vehicle from his lodging to get a meal. Claimant testified that he and other co-workers often used company vehicles to travel for meals and that one co-worker used the company vehicle to visit shopping malls, to which Employer's owner was made aware and did not object. The WCJ accepted as credible the testimony of Claimant.

Miller testified that Claimant was required to stay in a hotel while he was working near Allentown and that Employer paid his room and board, but that Claimant was not paid for time spent traveling for meals. Miller further testified that Employer's policy is "[n]o private use of company vehicles, period." On

cross, Miller acknowledged that while working out of town, Employer's employees use the company vehicle to travel to restaurants and that Employer's written regulations do not say how far employees may travel for meals.

Employer presented its Work Rules and Regulations, which prohibit the use of company vehicles for personal use and indicate that unauthorized use of company vehicles may result in a disciplinary deduction from payroll. Employer also presented a MapQuest printout, which indicated that the distance between Claimant's hotel and the accident site was 55.37 miles.

Based upon the testimony and evidence presented, the WCJ determined that Claimant did not abandon his employment with Employer by driving the company vehicle to meet his wife at a restaurant. The WCJ concluded that Claimant was within the course and scope of his employment when he sustained the injury and an interim decision to this effect was circulated on April 7, 2006. Thereafter, a hearing on the remaining aspects of the case was held. By final decision dated April 10, 2007, the WCJ granted Claimant's Claim Petition.

From this decision, Employer filed an appeal with the Board, which affirmed. This appeal now follows.[1] Employer raises the following issues for our review:

> 1. Whether the WCJ committed an error of law in determining that Claimant was in the course and scope of his employment at the time of the motor vehicle accident that caused Claimant's injuries.

[1] This Court's scope of review is limited to determining whether there has been a violation of constitutional rights, errors of law committed, or a violation of appeal board procedures, and whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Lehigh County Vo-Tech School v. Workmen's Compensation Appeal Board (Wolfe), 539 Pa. 322, 652 A.2d 797 (1995).

2. Whether the WCJ's determination that Employer approved of travel otherwise personal to its employees is supported by substantial competent evidence of record.

Employer contends that the WCJ committed an error of law in determining that Claimant was in the course and scope of his employment at the time of the motor vehicle accident because Claimant was not a traveling employee and substantial evidence does not support the WCJ's finding that Employer approved Claimant's personal travel with the company vehicle.

With respect to a claim petition, the claimant bears the burden of proving that his or her injury arose in the course of employment and was related thereto. Krawchuk v. Philadelphia Electric Co., 497 Pa. 115, 439 A.2d 627 (1981). Whether an employee is within the course of his employment when an injury occurs is a question of law to be determined on the basis of findings of fact. Thomas Jefferson University Hospital v. Workmen's Compensation Appeal Board (Cattalo), 601 A.2d 476 (Pa. Cmwlth. 1991); Newhouse v. Workmen's Compensation Appeal Board (Harris Cleaning Service, Inc.), 530 A.2d 545 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 517 Pa. 627, 538 A.2d 879 (1988).

The analysis differs for a stationary employee as compared to a traveling employee. Beaver & Casey, Inc. v. Workmen's Compensation Appeal Board (Soliday), 661 A.2d 40 (Pa. Cmwlth. 1995). We determine whether a claimant is a traveling employee on a case by case basis considering whether the claimant's job duties involve travel, whether the claimant works on the employer's premises or whether the claimant has no fixed place of work. Id.; Lang v. Workmen's Compensation Appeal Board (United States Steel Corp.),

529 A.2d 1161 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 518 Pa. 614, 540 A.2d 535 (1988).

The course of employment is necessarily broader for traveling employees and is liberally construed to effectuate the purposes of the Workers' Compensation Act[2] (Act). Roman v. Workmen's Compensation Appeal Board (Department of Environmental Resources), 616 A.2d 128 (Pa. Cmwlth. 1991); Aluminum Co. of America v. Workmen's Compensation Appeal Board, 380 A.2d 941 (Pa. Cmwlth. 1977). When a traveling employee is injured after setting out on the business of his employer, it is presumed that he was furthering the employer's business at the time of the injury. Roman; Investors Diversified Services v. Workmen's Compensation Appeal Board (Howar), 520 A.2d 958 (Pa. Cmwlth. 1987). The employer bears the burden of rebutting this presumption. Roman; Aluminum Co. To meet its burden, the employer must prove that the claimant's actions were so foreign to and removed from his usual employment that they constitute an abandonment of that employment. Roman; Port Authority of Allegheny County v. Workmen's Compensation Appeal Board (Stevens), 452 A.2d 902 (Pa. Cmwlth. 1982). An employer must present evidence that the traveling employee engaged in reckless, imprudent or dangerous conduct. Evans v. Workmen's Compensation Appeal Board (Hotwork, Inc.), 664 A.2d 216 (Pa. Cmwlth. 1995).

A traveling employee need not be engaged in the actual performance of work at the moment of an injury to be considered in the course of employment. Evans. For traveling employees, temporary departures from the work routine for the purpose of administering to personal comforts, including authorized breaks for

[2] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §§1 - 1041.4; 2501-2708.

lunch, will not interrupt the continuity of the employee's course of employment. Beaver; Roman; Port Authority. On the other hand, if a stationary employee leaves the employer's premises during authorized breaks for personal reasons, i.e., reasons unrelated to his required job duties, the employee is not within the course of his employment. Beaver; Pesta v. Workmen's Compensation Appeal Board (Wise Foods), 621 A.2d 1221 (Pa. Cmwlth. 1993).

Generally, if the claimant's job requires travel, the claimant is considered a traveling employee for purposes of the Act. See, e.g., Pesta (shipping and receiving department worker whose job duties do not require travel is a stationary employee); Roman (inspector whose job duties require travel to construction sites and layovers at hotels in the vicinity is a traveling employee); Southland Cable Company v. Workmen's Compensation Appeal Board (Emmett), 598 A.2d 329 (Pa. Cmwlth. 1991) (cable installer who does not work on the employer's premises is a traveling employee); Lang (metallurgist whose job duties require travel between two plants on a regular basis is a traveling employee); Roadway Express, Inc. v. Workmen's Compensation Appeal Board (Seeley), 532 A.2d 1257 (Pa. Cmwlth. 1987), petition for allowance of appeal denied, 519 Pa. 662, 546 A.2d 623 (1988) (truck driver who has no fixed place of work is a traveling employee); Collins v. Workmen's Compensation Appeal Board (American Society for Testing and Materials), 512 A.2d 1349 (1986) (office worker whose job duties do not involve travel is a stationary employee).

Relying upon Beaver, Employer argues that Claimant is not a "traveling employee." In Beaver, the claimant was a pipe crew laborer who reported to work each day by driving directly from his home to a particular construction site until Employer's sanitary pipe contract was completed, but would occasionally work at the home office. The claimant was involved in a car accident

during his lunch break while at a job site. We determined that the claimant had a fixed place of work and best fit under the category of stationary employee because he did not have to change job sites frequently nor did he have to travel daily between multiple job sites. Beaver. Thus, like other stationary employees, the claimant left a fixed place of work each day to eat his lunch and afterwards returned to the same location. Having determined that the claimant had a fixed place of work and thus was not a traveling employee, we concluded that the claimant was not entitled to benefits for the injury he sustained during his lunch break. Id.; See Foster v. Workmen's Compensation Appeal Board (Ritter Brothers), 639 A.2d 935 (Pa. Cmwlth.), petition for allowance of appeal denied, 539 Pa. 683, 652 A.2d 1327 (1994) (journeyman carpenter who travels directly from his home to a construction site each day until the employer's contract is completed has a fixed place of work because he reports to the same job site every day for an indefinite period and because he does not have the prospect of frequently changing job sites or of travel between multiple job sites).

The instant matter is distinguishable from Beaver. Here, Claimant's uncontradicted testimony was that he worked primarily at remote jobsites and was only rarely stationed at Employer's main office. When Claimant had to go to a jobsite that was more than 50 miles away, he would stay at a hotel near the job location, which was paid for by Employer, until the job was completed. The week of Claimant's injury, Claimant working for Employer on a four-day assignment near Allentown, Pennsylvania. Because Allentown was located over 50 miles away from Employer's Montoursville office, Employer authorized and paid for Claimant's stay at a hotel near the jobsite. Unlike the claimant in Beaver, Claimant herein was not assigned to this jobsite for an extended period of time and due to the distance, Claimant stayed at a hotel and did not travel to the jobsite from

his home. Based upon our review, the evidence is sufficient to support a finding that Claimant was a "traveling employee."

As a traveling employee, Claimant was entitled to the presumption that he was within the course and scope of his employment when he sustained his injury. Thus, Employer had the burden of establishing that Claimant's actions were so foreign to and removed from his usual employment that they constituted an abandonment of employment. The WCJ credited the testimony of Claimant and Miller that Employer's practice was to allow employees to use company vehicles to travel to restaurants while working at remote jobsites without any specific limitations as to distance. Claimant credibly testified that he was injured while traveling to a restaurant while working for Employer at a remote jobsite.[3] We, therefore, conclude that the WCJ did not err in determining that Claimant was in the course and scope of his employment at the time of the motor vehicle accident that caused Claimant's injuries.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

[3] While the accident occurred 50 miles from the city in which Claimant was assigned to work, Claimant credibly testified that he was meeting his wife for dinner at a halfway point between Allentown and Hershey, where his wife was staying on a business trip, and returning to the hotel afterwards. R.R. at 12, 13, 17. Claimant resided in Montoursville, Pennsylvania (R.R. at 6), which the Court notes is approximately 130 miles from the Allentown worksite.

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O R D E R

AND NOW, this 14th day of August, 2008, the order of the Workers' Compensation Appeal Board, at No. A07-0951, dated January 9, 2008, is AFFIRMED.

JAMES R. KELLEY, Senior Judge

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HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE COHN JUBELIRER **FILED: August 14, 2008**

I respectfully dissent. I believe that, in this case, the Claimant so disregarded Employer's clear intent that he stay within the area of his assigned jobsite that he abandoned his employment. By holding otherwise this Court stretches the meaning of "in the course of his employment" in Section 301(a) of the Workers' Compensation Act[1] beyond what the Legislature could have intended, even for traveling employees.

[1] Act of June 2, 1915, P.L. 736, as amended, 77 P.S. § 431.

As the majority rightly states, there is a presumption that a traveling employee injured after setting out on his employer's business is injured in the course of his employment. Buckeye Pipe Line Co. v. Workers' Compensation Appeal Board (Abt), 714 A.2d 1143, 1145 (Pa. Cmwlth. 1998). This presumption may be rebutted on a showing that "the claimant's actions were so foreign to and removed from his usual employment that they constitute an abandonment of that employment." Id. In order to show that the employee abandoned his employment, the employer must show that the employee's activities were "a very distinctive break" from his employment duties. Id. In this case, I believe Employer sustained its burden in showing that Claimant's excursion was so distinctive a break from the behavior Employer could reasonably expect from Claimant that it constituted an abandonment of Claimant's employment.

In this case Employer showed, and Claimant himself acknowledged, that it had a policy that when employees were working at a jobsite more than fifty miles from Employer's home office in Montoursville, the employees were to stay at a hotel. (WCJ Decision, Findings of Fact (FOF) ¶¶ 33, 45, April 7, 2006; WCJ Hr'g Tr. at 15, 36.) Employer also showed that when employees were working away from the home office, they were expected not to drive home. (FOF ¶ 33; WCJ Hr'g Tr. at 36.) Employer showed that the accident took place at a site more than 50 miles from the hotel accommodations Employer had provided for Claimant. (FOF ¶ 20.) That Employer provided its employees with lodging when they were more than 50 miles from the home office and did not permit them to drive home demonstrates that it did not want or expect its employees to drive long distances from the area of the jobsite for personal reasons. Here, Claimant drove the company truck over 50 miles to meet

his wife for dinner.[2] (FOF ¶ 18, 20.) More than a mere side trip or break for personal comfort, this is a very distinctive break from the area where Employer intended Claimant to be.

I believe that this case is similar to one of the few recent published cases in which this Court has denied benefits to a traveling employee. In Carr v. Workmen's Compensation Appeal Board (May Department Store), 671 A.2d 780 (Pa. Cmwlth. 1995), the claimant, who was in Billerica, Massachusetts for a seminar, went sightseeing to Boston in the evening after the seminar and was injured in a car accident on the way back to her hotel. This Court held that she was not within the scope of her employment because she "was not required by her employment to leave her hotel and travel over thirty-five miles to Boston for an evening of sightseeing and drinking." Id. at 782. Likewise in this case, although it was perfectly reasonable for the Claimant to leave his hotel for dinner, it was neither reasonable nor necessary for him to take Employer's van and drive over fifty miles to meet his wife for dinner.

For these reasons, I would find that Claimant was not acting within the course of his employment when the accident occurred.

RENÉE COHN JUBELIRER, Judge

[2] Claimant drove 55.37 miles before having his accident. (FOF ¶ 20.) I would take judicial notice that the entire distance from the Sleep Inn in Allentown to Hershey, is approximately 75 miles. Claimant asserted that he only intended to drive 38 miles and meet his wife halfway between Hershey and his hotel. (FOF ¶¶ 17, 20.) While 38 miles is almost exactly half the distance between Claimant's hotel and Hershey, the fact that Claimant had already driven over 50 miles when he had his accident belies his testimony regarding his intention.