IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Progress Avenue Exxon, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 620 C.D. 2010
	:	Submitted: August 27, 2010
Workers' Compensation	:	
Appeal Board (Gaiski),	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: November 3, 2010

Progress Avenue Exxon, Inc. (Employer) petitions for review from an order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of a Workers' Compensation Judge (WCJ) granting a Claim Petition filed by Mark Gaiski (Claimant). We affirm.

Claimant filed a Claim Petition alleging he sustained a back injury on February 10, 2008 as a result of a slip and fall. He sought ongoing total disability. At hearing, Claimant testified that he worked part time for Employer performing miscellaneous tasks around the station including

cleaning and pumping gas.[1] He also did some towing. According to Claimant, he would work at Employer's shop from 3:00 p.m. to 7:00 p.m. on Fridays and 8:00 a.m. to 12:00 p.m. on Saturdays. Claimant asserted that he clocked in and out when he worked on Employer's premises. Claimant elaborated, however, that once he clocked out on a Friday or a Saturday, he remained "on call" to perform any towing work available. He further was "on call" all day Sunday although the shop was not open. Claimant earned an hourly wage when he worked on site. He received 35% of the fee for any tows he performed while "on call." Claimant stated he was not required to clock in or clock out when performing any towing related tasks. On occasion, he would bring a tow truck home to have it available in the event he was required to tow a vehicle. The remaining times such service was required, he would drive to the station first to get a tow truck before heading to the vehicle requiring assistance.

Claimant further testified that when he was "on call," the towing phone line would be transferred over to his cell phone so he would receive towing calls directly. Claimant stated that he would answer the calls, be provided with information about the tows, and have the opportunity to accept or reject the jobs.

Claimant stated that on Sunday, February 10, 2008, he received a phone call indicating that there was a car involved in an accident that needed to be towed. Claimant accepted the job. He walked out of his

[1] Claimant testified that he was also employed full time by R&R Plastering and worked forty hours per week for this employer.

residence and headed towards the parking lot to get his personal vehicle. He did not have a tow truck with him and needed to get it from Employer's premises. Claimant slipped on the ice en route to his personal vehicle and landed on his back.

Employer presented the testimony of its owner, Paul Palanzo, who acknowledged Employer has an after-hours towing program. He agreed that when a call comes in regarding a tow, the driver decides whether to take the job or not. According to Mr. Palanzo, he felt that the towing program was not profitable because many people whose vehicles were towed were unable to pay the fee. He added that he considered discontinuing this service but conceded that as of the date of hearing, he continued to have tow truck drivers "on call." Employer also presented the testimony of Timothy O'Sheehan, one of its current tow truck drivers, who offered similar testimony concerning the after-hours towing program.

In a decision circulated May 28, 2009, the WCJ granted Claimant's Claim Petition. He credited Claimant's testimony.[2] The WCJ rejected the testimony of Mr. Palanzo and Mr. O'Sheehan to the extent their statements were inconsistent with the testimony of Claimant. The WCJ found Claimant's injury occurred while in the course and scope of his employment. He specifically found "[t]his Judge finds Claimant was injured

[2] A WCJ is free to accept or reject, in whole or in part, the testimony of any witness. Greenwich Collieries v. Workmen's Compensation Appeal Board (Buck), 664 A.2d 703 (Pa. Cmwlth. 1995). His credibility determinations are not reviewable by this Court. Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post Gazette), 954 A.2d 726 (Pa. Cmwlth. 2008).

in the course and scope of his employment on February 10, 2008, when he answered his cell phone, received a call, accepted a call and proceeded to his personal vehicle with the intention of driving to Employer's shop to carry out the call." Dec. dated 5/28/09, p. 5. Based on the credible medical evidence of record, he determined Claimant sustained a back injury that necessitated surgery. The WCJ found Claimant was entitled to total disability from February 10, 2008 through August 24, 2008 and partial disability thereafter based on Claimant's return to work with an alternative employer.

The Board affirmed. In so doing, it concluded that Claimant accepted a job that was financially beneficial to Employer and that he was furthering its business at the time of his injury. This appeal followed.[3]

Employer argues on appeal that the Board erred in affirming the WCJ's determination that Claimant was acting in the course and scope of his employment at the time of his injury. It contends that Claimant was not furthering Employer's business or affairs at the time he slipped and fell on the ice. Instead, it asserts Claimant was en route to a fixed place of employment and that injuries sustained to and from work are not subject to an award of workers' compensation benefits. It further suggests that Claimant was not required to come to work and that he could have declined the request for a tow altogether if he desired.

[3] Our review is limited to determining whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence and whether constitutional rights were violated. Gentex Corp. v. Workers' Compensation Appeal Board (Morack), 975 A.2d 1214 (Pa. Cmwlth. 2009).

Claimant responds by saying that his "on call" status renders him entitled to benefits and that he "was furthering the business of [Employer] from the very moment he accepted the call to make a tow and began to take actions toward completing the job..." Respondent's brief, p. 3.

Section 301(c)(1) of the Pennsylvania Workers' Compensation Act, Act of June 2, 1915, P.L. 736, as amended, 77 P.S. §411(1), states in pertinent part:

> (1) The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employee... arising in the course of his employment and related thereto.... The term "injury arising in the course of his employment," as used in this article... shall include all... injuries sustained while the employee is *actually engaged in the furtherance of the business or affairs of the employer*, whether upon the employer's premises or elsewhere. (Emphasis added).

The issue of whether the claimant was in the course of his employment when injured is a question of law subject to this Court's plenary review. Sekulski v. Workers' Compensation Appeal Board (Indy Assoc.), 828 A.2d 14 (Pa. Cmwlth. 2003). Our determination must be based on the WCJ's findings of fact. Jamison v. Workers' Compensation Appeal Board (Gallagher Home Health Serv.), 955 A.2d 494 (Pa. Cmwlth. 2008).

For a stationary employee, the general rule is that an injury sustained while he is going to or coming from work does not occur in the course of employment. Mackey v. Workers' Compensation Appeal Board (Maxim Healthcare Serv.), 989 A.2d 404 (Pa. Cmwlth. 2010). The courts

have created exceptions to the "coming and going" rule. Id. at 407. An injury sustained traveling to and from work will be compensable if one of the following exceptions is met: (1) the claimant's employment contract includes transportation to and from work; (2) the claimant has no fixed place of work; (3) the claimant is on a special mission for employer; or (4) special circumstances are such that the claimant was furthering the business of the employer. Clear Channel Broadcasting v. Workers' Compensation Appeal Board (Perry), 938 A.2d 1150 (Pa. Cmwlth. 2007); Sloane Nissan v. Workers' Compensation Appeal Board (Zeyl), 820 A.2d 925 (Pa. Cmwlth. 2003); William F. Rittner Co. v. Workmen's Compensation Appeal Board (Rittner), 464 A.2d 675 (Pa. Cmwlth. 1983).

As pointed out by Employer, neither the WCJ, nor the Board clearly indicates the basis for their determination that Claimant was acting in the course and scope of his employment at the time of his injury. No analysis is developed concerning the fact that Claimant had to go to Employer's fixed work site before embarking on the trip to tow a vehicle in order to distinguish this matter from the general principle that injuries sustained traveling to and from work are not compensable per Mackey. There is no discussion of whether Claimant falls within one of the four exceptions to the "coming and going" rule espoused in Clear Channel Broadcasting, Sloane Nissan, and Rittner. These deficiencies do not preclude effective appellate review of this matter inasmuch as the issue of whether Claimant was in the course of his employment at the time of his injury is a question of law subject to our plenary review. Sekulski. Of

course, our determination must be based on the WCJ's findings of fact. Jamison.

It cannot be disputed that Claimant had a fixed place of employment. He worked at Employer's shop approximately four hours per day each Friday and Saturday. If Claimant would have sustained his injury either on the way to the shop for his standard shift or on his way home after clocking out, there is little question that he would be precluded from receiving benefits based on the traditional rule that injuries sustained going to or coming from work are not compensable. Mackey. We further recognize that even though Claimant was operating under "on call" status at the time he did sustain his injury, he was nonetheless en route to his fixed place of employment to get a tow truck before he could head out to reach the vehicle in need of a tow. Consequently, Claimant would have to fall into one of the four exceptions to the "coming and going" rule in order to be eligible for benefits. Clear Channel Broadcasting; Sloane Nissan; Rittner.

There is no indication that Claimant works under an employment contract or that such contract includes transportation to and from work. Moreover, Claimant has a fixed place of work where he conducts his primary duties; *i.e.*, Employer's station. Claimant was not on a special mission for Employer. Indeed, the testimony of record indicates that being "on call" after his shift on Friday and Saturday as well as all day Sunday in order to receive towing jobs was part of Claimant's regular duties. Claimant's own statements suggest that when Claimant was "on call," the

tow line was transferred to his cell phone and that on numerous occasions he took the tow truck home with him anticipating jobs.[4]

Nonetheless, we believe special circumstances evidencing that claimant was furthering the business of the employer at the time of his injury exist in the record. The special circumstances entitling an employee to benefits for injuries sustained during a commute must involve an act in which the employe was engaged by order of the employer, express or *implied*, and not simply for the convenience of the employee. Williams v. Workers' Compensation Appeal Board (Matco Elec. Co., Inc.), 721 A.2d 1140 (Pa. Cmwlth. 1998).

Claimant and Employer engaged in a voluntary towing program where Claimant would receive phone calls outside of the station's regular operating hours in regard to a request for a tow. Although Claimant could turn down a request for a tow, in the instant matter he did accept the job. Consequently, it was anticipated that Claimant would receive 35% of the towing fee with the remaining 65% being paid to Employer. Claimant was furthering Employer's business when he agreed to tow the vehicle.[5]

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[4] For an assignment to constitute a special mission, it cannot be part of the employee's regular duties. City of Phila. v. Workers' Compensation Appeal Board (Stewart), 728 A.2d 431 (Pa. Cmwlth. 1999); see also Action, Inc. v. Workmen's Compensation Appeal Board (Talerico), 540 A.2d 1377 (Pa. Cmwlth. 1988).

[5] The fact that Claimant had the option of turning down the towing assignment is of no significance. Employer offered the towing program. Its intention was to receive 65% of the towing fee. This percentage of the towing fee, if paid, would directly benefit Employer. Although Mr. Palanzo suggested he considered eliminating the towing program because he believed it was not profitable, in part because many customers would not pay the towing fee, it cannot be ignored that this service would only have been

Although Claimant would benefit from this transaction, it was not solely for his convenience. The fact that Employer authorized the voluntary towing program and would collect 65% of the towing fee establishes that there was an implied consent given by Employer to generate revenue. Williams.

The only possible way Claimant could complete the task he accepted was to first travel to Employer's fixed location and pick up the tow truck prior to heading to the location of the disabled vehicle. Consequently, we agree with Claimant that once he accepted the job and took action toward completing his task, he was furthering Employer's business affairs. Claimant was injured while walking to his personal vehicle en route to pick up the tow truck. His injury occurred after agreeing to perform towing work. Claimant's injury is compensable as it took place after setting forth on the business of Employer.[6] Consequently, we affirm the order of the Board.

JIM FLAHERTY, Senior Judge

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offered in the first instance with the intention of making a profit. We cannot see any reason why the financial success or lack thereof of the towing program should affect whether Claimant was acting in the course and scope of his employment at the time of injury when he accepted the call for a tow.

[6] We are careful to point out that while we believe Claimant's injury occurred in the course and scope of his employment, the mere fact that he maintained "on call" status is not dispositive of this matter in and of itself. Simply because an employee has "on call" status does not mean that he is automatically considered furthering the business or affairs of his employer at the time of a sustained injury. Sekulski, 828 A.2d at 17. Rather, consideration must be given to the factors that constitute exceptions to the "coming and going" rule. Id. at 18.

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O R D E R

AND NOW, this 3rd day of November, 2010, the order of the Workers' Compensation Appeal Board in the above-captioned matter is AFFIRMED.

JIM FLAHERTY, Senior Judge