STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

NANCY ALMEIDA	)	
	)	
VS.	)	W.C.C. 02-04628
	)	
BLACKSTONE VALLEY ADVOCACY	)	

DECISION OF THE APPELLATE DIVISION

SOWA, J. This matter came to be heard before the Appellate Division on the petitioner/employee's appeal from an adverse decision and decree of the trial court entered on June 2, 2003. The matter was heard in the nature of an employee's original petition seeking workers' compensation benefits for a June 2, 2002 injury described as a cervical, dorsal, and lumbar sprain/strain. Specifically, the employee is seeking partial disability compensation benefits from July 9, 2002 through August 5, 2002. At the conclusion of the pretrial conference, the trial judge denied the employee's petition, and the employee filed a claim for trial in a timely manner.

The trial judge, in a decree entered on June 2, 2003, found that the employee failed to prove by a fair preponderance of the credible evidence that she suffered a personal injury on June 2, 2002 arising out of and in the course of her employment. Accordingly, the trial judge denied and dismissed the employee's petition. The employee then filed this timely claim of appeal.

The facts in this case are not in dispute. The employee, Ms. Nancy Almeida, testified that she was employed by the respondent/employer, Blackstone Valley Advocacy, as an

advocate. That job entailed providing support to domestic violence victims during court proceedings, on the telephone, and at the shelter operated by Blackstone Valley Advocacy. The employee stated that in her role as an advocate, she was required to work from 9:00 a.m. to 5:00 p.m., Monday through Friday, and, additionally, she was periodically scheduled for a weekend "on call" shift. She testified that, at the time of trial, she had worked in this capacity for approximately one (1) year.

The employee stated that the shelter served homeless women and children and victims of domestic violence. The shelter remained open at all times. Ms. Almeida's office was in close proximity to the shelter but in a different building. The employee testified that an "on call" shift involved carrying a beeper on the assigned weekend and responding to any accompanying problems that arose at the shelter. An "on call" shift would begin at the conclusion of her shift on Friday evening and would end at the commencement of her Monday morning shift. The "on call" assignment rotated among all employees. Management posted the schedule of the same at the year's outset. The employee stated that she would be assigned for an "on call" shift approximately every eight (8) weeks. When "on call," she must be available to respond to any and all pages on her beeper, remain in the state, and cover shifts at the shelter when necessary.

The employee testified that on Sunday, June 2, 2002, she was involved in a car accident while traveling to the shelter in her car. On that particular day, she was "on call" and had been beckoned in to work by another employee, Olga. The employee testified that Olga needed someone to relieve her at the shelter because her replacement was unable to work, and she could not find anyone else to cover the shift. The employee stated that Olga had requested that the employee come to work as soon as possible.

The employee testified that at the time Olga paged her, she had been viewing houses in West Warwick. She stated that subsequent to Olga's second page she picked her daughter up, fed her, and took her home. She testified that after attending to her parental responsibilities, she departed her home en route to Central Falls, the location of the shelter. She stated that the car accident occurred during this journey approximately four (4) to five (5) miles from the shelter. She testified that the accident occurred at approximately 5:00 p.m., nearly one and one-half (1 ½) hours after Olga's second page. The employee stated that, due to the motor vehicle accident, she never arrived at the shelter that night. She stated that the accident resulted in her absence from work until August of 2002, when she returned to the same position in the same capacity.

The employee testified that she received no monetary remuneration for her time "on call." She stated that the "on call" shift was an element of her weekly job. She testified that in lieu of wages for time spent at the shelter during "on call" shifts, employees received "comp time," that the employees could use to substitute for scheduled weekly hours. She stated that "comp time" must be used during the week following the "on call" shift.

On cross-examination, the employee testified that her position did not require her to travel to victims' homes. The employee stated that her employer did not reimburse her for mileage traveled to or from the shelter during either her regular weekly shifts or an "on call" shift. She further testified that the employer did not require her to have an automobile in order to execute her employment duties.

The employee presented an affidavit signed by Dr. David Kerzer. Dr. Kerzer stated that the June 2, 2002 motor vehicle accident was the proximate cause of the employee's injuries and disability.

The trial judge determined that the sole issue to be resolved was whether the going-and-coming rule precluded the employee's compensation for injuries she sustained while traveling to her workplace on June 2, 2002. The trial judge correctly stated that the going-and-coming rule in essence denies an employee compensation for injuries that occur during the commute to or from the workplace unless the employee can establish a nexus between the injury and the employment. DiLibero v. Middlesex Construction Co., 63 R.I. 509, 9 A.2d 848 (1939); Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639 (R.I. 1995).

The trial judge found that the employee failed to prove that she suffered injuries arising out of and in the course of her employment. The trial judge demarcated the facts of this case from Toolin, *supra*, and from Costigan v. Alternative Care, Inc., W.C.C. No. 94-02209 (App. Div. 12/19/97), where the Rhode Island Supreme Court and the Appellate Division of the Workers' Compensation Court respectively held that the integral nature of travel in relation to job duties militates in favor of compensability. The trial judge reasoned that in the case at bar travel was not essential to the employee's tasks nor was the employee required to have a motor vehicle to execute her duties. Accordingly, the trial judge determined that the employee's injuries were not compensable as her travel did not constitute an exception to the going-and-coming rule.

In conformity with R.I.G.L. § 28-35-28(b), the Appellate Division must accept the trial judge's findings on factual matters absent clear error. Diocese of Providence v. Vaz, 679 A.2d 879, 881 (R.I. 1996). The Appellate Division is authorized to conduct a *de novo* review only when a finding is made that the trial judge was clearly wrong. Id. (citing R.I.G.L. § 28-35-28(b); Grimes Box Co. v. Miguel, 509 A.2d 1002 (R.I. 1986)). If the record before the Appellate Division exhibits evidence sufficient to support the trial judge's findings, the decision must

stand. Cognizant of this legal duty imposed upon us, we have carefully reviewed the entire record of this proceeding. For the following reasons, we find no merit in the employee's appeal, and we, accordingly, affirm the trial judge's decision and decree.

In support of her appeal, the employee asserts that the trial judge erroneously applied the going-and-coming rule to the facts of this case, or, in the alternative, the trial judge misapplied the rule as delineated in Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639 (R.I. 1995). We disagree.

The going-and-coming rule of workers' compensation undertakes to bar compensation when injury befalls during the employee's commute to or from the workplace. Toolin, 668 A.2d at 640. Due to the rule's rigidity, the Rhode Island Supreme Court has willingly elucidated exceptions to its operation that hinge on the peculiarities of each case. Id. The Court has established that an employee, otherwise without recourse by virtue of the going-and-coming rule, is entitled to compensation benefits if he or she can evince a nexus or causal connection between the injury and the employment. Id. (citations omitted).

To ascertain whether a nexus or causal connection exists between the injury sustained and the employment, the Court scrutinizes the facts and circumstances appertaining to the accident in light of three (3) criteria first enunciated in DiLibero, 63 R.I. at 514-15, 9 A.2d at 851. First, the Court determines whether the accident occurred during the period of employment. Next, the Court evaluates the situs of the accident to establish whether it happened at a location where the employee might reasonably have been expected to be. Finally, the Court explores whether the employee was reasonably executing his or her occupational responsibilities at the instance of injury or was fulfilling an endeavor attendant to those conditions under which those duties were to be performed. Toolin, 668 A.2d at 641 (citations omitted). When these elements

are satisfied, the going-and-coming rule ceases to operate and the employee is entitled to workers' compensation benefits.

DiLibero and its progeny permit compensation in finite circumstances. In Toolin, the Rhode Island Supreme Court deemed a nursing assistant's injuries compensable. In that particular case, a nursing assistant was involved in an automobile accident while traveling from one (1) patient's home to another to render care. Id. at 640. The employee traveled in her own vehicle and her employer did not compensate her for travel time or reimburse her for travel-related expenses. Id. However, the employer did direct the employee to the locations and times of her assignments and required the employee to have an operational automobile. Id. The Court held that these facts fell under the ambit of DiLibero because the employee only traveled to the patient's home at her employer's direction, the employer controlled the employee's daily schedule from which the employee did not deviate, and the employer required her to have her own vehicle. Id. at 641. The Court further reasoned that travel, a fundamental aspect of the employee's position, bestowed a benefit upon the employer. Id. at 641. Thus, the Court concluded that risks inherent in travel were a condition incident to employment, and, accordingly, the injuries sustained warranted compensation. Id.

In the instant case, the employee merely traveled from an arbitrary location to the workplace. At the time of the accident, she had not embarked upon any of her job responsibilities. The employee was, quite literally, "going" to her job. As the Rhode Island Supreme Court has declared, sanctioning recovery for injuries sustained during an employee's commute "would open a veritable Pandora's box that would inevitably lead to the 'portal-to-portal' type of rule of compensation. . . ." Kyle v. Davol, Inc., 121 R.I. 79, 82, 395 A.2d 714, 715 (1978).

The trial judge found that Ms. Almeida failed to demonstrate a nexus between her injury and her employment at the shelter as outlined by the DiLibero criteria. The employee contends that the criteria were in fact met as her situation is analogous to the Toolin decision. Again, for the following reasons, we disagree.

Applying the DiLibero criteria to this case, we find no causal connection between the employee's injury and her employment; hence, these facts are clearly distinguishable from Toolin. To determine whether the injury occurred within the employment period we examine the precise time of the accident. In Toolin, the Court found that the injury occurred during the employment period because the accident took place while the employee was traveling from one patient's home to another patient's home at the employer's direction. Toolin, 668 A.2d at 641. Here, the employee was not in transit between job duties. She was merely making her way to the workplace, where she would remain for the duration of her shift. It is well-settled that, "'. . . workmen's compensation was not intended to protect . . . against all the perils of [the] journey.'" Kyle, 121 R.I. at 81-82, 395 A.2d at 715 (quoting 1 Larson, *The Law of Workmen's Compensation* § 15.11 at 4-3 (1978)). Therefore, the accident occurred during the trip to the workplace but not within the employment period.

Next, we inspect the situs of the accident to ascertain whether it occurred at a place where the employee might reasonably be expected to be. The Toolin Court found that the employee's accident happened at a place where she was reasonably expected to be as the employer controlled the employee's daily schedule and directed her from job site to job site. Toolin, 668 A.2d at 641. The court concluded that given the employer's exertion of control, the employee might reasonably be expected on a public thoroughfare between patients' homes at that particular morning hour. Id. In this case, however, the accident occurred at an incidental location

approximately four (4) to five (5) miles from the workplace. The employer in no manner controlled the employee's activities or directed her travels outside of the workplace. The employee was free to make her way to the workplace by whatever course she deemed appropriate. The employer's control commenced only upon the advent of the employee's work-related activities within the shelter, and at no point sooner. Thus, the situs of the injury is outside the employer's dominion.

Finally, we must analyze the employee's actions to ascertain whether the employee was reasonably fulfilling her employment duties or performing some duty incidental thereto. In Toolin, the Court held that, notwithstanding the absence of any remuneration for travel time, travel was an integral and necessary element of a visiting nursing assistant's employment that bestowed a benefit upon the employer in fulfilling its business objectives. Id. Here, on the other hand, the employee was not required to travel from site to site. Once she arrived at work she remained there throughout her shift. Further, she was neither compensated for travel nor required to have any particular means of getting to the workplace. She could have gone to work via foot or public transportation so long as she reported for duty at the obligatory hour. The employee confronted the same risks as any other member of the public body traveling along public roadways. Accordingly, travel was not an integral component of the employee's job. Consequently, the employee has not succeeded in satisfying any elements of the DiLibero test.

As the employee has failed to satisfy the DiLibero test, she has not proven the requisite nexus between her injury and her employment. Therefore, we find that her injury did not arise out of and in the course of her employment, and her claim is barred by the going-and-coming rule. For the aforesaid reasons, the employee's appeal is denied and dismissed and the decision and decree of the trial judge is affirmed.

In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on

Salem, J. concurs. Olsson, J. dissents.

ENTER:

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Sowa, J.

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Salem, J.

D I S S E N T I N G O P I N I O N

OLSSON, J. I must respectfully disagree with my colleagues' analysis in this matter. The circumstances of this matter involve more than the routine application of the DiLibero factors and the going-and-coming rule. I am unaware of any previous case, at the Appellate Division or the Rhode Island Supreme Court, dealing with the situation of an "on-call" employee who is injured while responding to a call to report to the employer's premises. I believe that the particular facts of Ms. Almeida's case call for the application of the "special errand" rule, an exception to the going-and-coming rule, to award compensation benefits for her incapacity resulting from the motor vehicle accident on June 2, 2002.

In his treatise on workers' compensation, Professor Larson states the special errand rule as follows:

> "When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time making the journey, or the special

> inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."

Larson's Workers' Compensation Law, § 14.05[1], p. 14-5. The mere fact that an employee is "subject to call" does not, in and of itself, provide the exception to the going-and-coming rule. Rather, the determinative factors are whether the employee was on an errand as a result of a call and what the nature of the errand was. Id., § 14.05[6], p. 14-16.

Although there are many cases from courts across the country discussing the special errand or special mission doctrine, one Maryland case bears a striking similarity to the facts of the present matter. In Barnes v. Children's Hospital, 109 Md.App. 543, 675 A.2d 558 (1996), the court provides a clear and concise discussion of the doctrine along with citations to cases from other states. Barnes involved a salaried employee who was the director of computer and information systems at the hospital. Her normal working hours were 8:00 a.m. to 4:30 p.m., Monday through Friday, but she carried a beeper provided by the employer and was considered to be "on call" at all times. It was not unusual for the employee to be called outside of her regular work hours, but she was usually able to resolve any situation over the telephone. One Saturday, while the employee was on a shopping trip with her daughter and granddaughter, she was paged by the hospital's comptroller and told that she was needed at the hospital to work on a monthly accounts receivables report because the person who usually did this task was on vacation. Prior to driving her family home and proceeding to the hospital, the employee realized she needed gasoline and drove to a station. She was injured as she stepped out of her car and slipped on a puddle of oil. The appellate court reversed the trial judge and found the employee's injury to be compensable because she was on a special mission for the employer.

In determining whether the special mission exception applied, the Maryland court considered three (3) factors:

> "(1) the relative regularity or unusualness of the particular journey;"
>
> "(2) the relative onerousness of the journey compared with the service to be performed at the end of the journey;"
>
> "(3) the suddenness of the call to work or whether it was made under an element of urgency."

Id. at 557-558, 675 A.2d at 565 (quoting 1 Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 16.13 at 4-208.24 and 4-208.26, § 16.15 at 4-208.39 (1992)). No one factor is necessarily determinative and the specific facts of each case must be carefully evaluated in assessing whether an exception to the going-and-coming doctrine should be allowed.

Evaluating Ms. Almeida's case in light of these three (3) factors leads to the conclusion that her case falls within the special errand or special mission exception to the going-and-coming rule. First, although being on call occurred on a regular basis, approximately every eight (8) weeks, there was no testimony that the employee was regularly called in to work in the shelter on her on call weekends. In addition, the employee's job duties during her regularly scheduled hours did not include staffing the shelter. She testified that during the week she worked as a domestic violence advocate in an adjacent building. Covering another employee's shift at the shelter was not a relatively regular occurrence.

In assessing the "onerousness" of the journey, consideration is given not only to the length of the trip, but also the circumstances under which it is undertaken, such as the time of day, the travel conditions, and whether it is a regular work day. Ms. Almeida was called in to work for several hours on a Sunday, a day on which she did not normally work. At the time of

the page, she was looking at prospective homes and had to immediately drop her personal business. She altered her plans so that she could pick up her daughter earlier than originally scheduled, get her something to eat, and take her home, before the employee headed to the shelter. As in Barnes, the journey was sufficiently onerous to qualify as a special mission or special errand.

The suddenness or urgency of the call to work is another factor to consider. An emergency situation is not required in order to qualify for the special mission exception. In the present matter, Ms. Almeida was called in to work because an employee of the shelter was unable to relieve Olga, a co-worker, whose shift had ended. Olga had unsuccessfully attempted to contact another employee to cover the shift and, apparently as a last resort, had paged Ms. Almeida to come in. Olga told her to come in as soon as possible. Although the situation would not be termed an "emergency," there was an element of urgency to the request. Ms. Almeida had to put aside her private business and report to work as quickly as she could. Failure to comply with the request would result in discipline or loss of her job. Under the circumstances, there was a sense of urgency on the part of the employer in having Ms. Almeida report to the shelter so that it would be adequately staffed.

These particular circumstances taken together lead to the conclusion that this was a special journey made at the request of the employer, and Ms. Almeida was acting in the course of her employment while engaged in that journey. Clearly, the employer benefited by Ms. Almeida responding to the call to work at the shelter. As the on-call employee for that weekend, she had to be available to work at any time in the event that a co-worker was unable to report to work at the shelter. Rather than holding over an employee from the prior shift and presumably paying overtime wages, the employer compensated Ms. Almeida by granting her compensatory

time off during the following week. For example, if she worked four (4) hours at the shelter after being called in, on the following Monday she could leave work four (4) hours early and still get her regular pay for that time.

I believe the evidence presented in this matter leads to the conclusion that Ms. Almeida was engaged in a special errand for the employer when she was involved in the motor vehicle accident, and therefore, her injury arose out of and in the course of her employment. I would point out that I am not advocating a broad pronouncement that any injury occurring while an employee is "on call" is compensable. The application of any exception to the going-and-coming rule is dependent upon an in-depth evaluation of the particular circumstances of each case. In the present matter, based upon the foregoing analysis, I would reverse the decision of the trial judge denying workers' compensation benefits.

For these reasons, I must respectfully dissent.

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Olsson, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

NANCY ALMEIDA)
)
VS.) W.C.C. 02-04628
)
BLACKSTONE VALLEY ADVOCACY)

FINAL DECREE OF THE APPELLATE DIVISION

This cause came on to be heard by the Appellate Division upon the appeal of the petitioner/employee and upon consideration thereof, the appeal is denied and dismissed, and it is:

ORDERED, ADJUDGED, AND DECREED:

The findings of fact and the orders contained in a decree of this Court entered on June 2, 2003 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Administrator

ENTER:

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Sowa, J.

_____
Salem, J.

I hereby certify that copies were mailed to John F. Cascione, Esq., and Bruce J. Balon, Esq., on

_____