STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

KENYON ROBERTSON	)	
	)	
VS.	)	W.C.C. 02-08219
	)	
CARDI CORPORATION	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the appeal of the petitioner/employee from the denial of his original petition for workers' compensation benefits in which he alleges that he was injured as a result of a motor vehicle accident that occurred as he was attempting to enter the employer's construction site on Interstate Route 95. After reviewing the record and considering the arguments of counsel, we deny the employee's appeal and affirm the decision and decree of the trial judge.

There is little dispute regarding the facts. The employee testified that he had been working for the respondent as a carpenter apprentice/laborer for about two (2) years or more. In the fall of 2002, he was assigned to a work site located under a bridge in Pawtucket, Rhode Island, between the northbound and southbound lanes of Interstate Route 95. His workday started at 6:30 a.m., and he drove his own vehicle to the job site. Prior to October 28, 2002, he had reported to work at this site five (5) or six (6) times. The entrance to the work site was a space between the Jersey barriers surrounding the work site which was large enough for a

vehicle to slow down and pull inside the barriers from the high speed lane on the northbound side of Route 95.

The employee stated that on October 28, 2002, he was in the northbound high speed lane of Route 95 and stopped his vehicle while he waited for a Cardi Corporation pickup truck to pull into the opening to the work site. He indicated that he was about ten (10) feet from the opening. He had his hazard lights on, but a vehicle came up from behind him and rear-ended the employee's vehicle. Mr. Robertson got out of his car, as did the other driver. After some words were exchanged, the other driver got in his vehicle and drove off. Co-workers of the employee, who were already inside the job site, called the police and moved the employee's car inside the Jersey barriers. An ambulance took the employee to the hospital.

William Marley, a labor foreman for Cardi Corporation, testified that on October 28, 2002, he was driving a company truck to the work site on Route 95 North and towing a light tower. He turned left into the work site and backed up the light tower and pickup truck alongside the Jersey barrier. He asserted that the employee's vehicle was about one hundred (100) feet from the opening to the job site. At that time, he saw the employee standing outside of his vehicle on the other side of the barrier speaking to the man who had just rear-ended the employee's vehicle. Mr. Marley exited the pickup truck, asked the employee if he needed assistance, and then called 9-1-1.

Michael McGowan, a laborer for Cardi Corporation, was a passenger in the pickup truck driven by Mr. Marley. He testified that he saw Mr. Robertson sitting in his vehicle in the high speed lane as Mr. Marley was backing up the pickup truck inside the work area. Mr. McGowan estimated that the employee's vehicle was fifty (50) to one hundred (100) feet from the opening to the job site.

The trial judge denied the employee's petition for weekly benefits, noting that the particular facts of his case did not satisfy the requirements needed to make an exception to the application of the "going and coming" rule, which generally operates to deny compensation for injuries sustained while going to or coming from the workplace.

> "The petitioner was not injured, as he argues, during the period of his employment. The workday had not started when the accident occurred, and the employee was not in the workplace at the time that it occurred. The employee was not performing a task incidental to his job duties and the employer was not exercising control that would satisfy the second criterion of DiLibero." (Tr. Dec. p. 7)

The employee claimed an appeal from this decision and has filed three (3) reasons of appeal in which he alleges that the trial judge's conclusion that he was not injured during the course of his employment was clearly erroneous.

The scope of appellate review of a trial judge's decision is set forth in the Workers' Compensation Act. Section 28-35-28(b) of the Rhode Island General Laws states that the findings of fact made by a trial judge are final, unless the appellate panel finds them to be clearly erroneous. The Appellate Division is barred from undertaking a *de novo* review of the evidence absent an initial finding that the trial judge was clearly wrong. Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). Reviewing the decision of the trial judge in this matter with this standard in mind, we conclude that the trial judge's findings are not clearly erroneous.

The issue in this case is whether the particular circumstances of the employee's injury are sufficient to warrant granting an exception to the "going and coming" rule. The "going and coming" rule is a basic policy which operates to deny workers' compensation benefits to employees who are injured while traveling, on foot or in a vehicle, to and from the actual workplace. Over the years, the courts have allowed exceptions to this general rule based upon

very specific fact patterns which established a sufficient nexus to the employment to render the claim compensable. In one (1) of the earlier cases allowing such an exception, the Rhode Island Supreme Court established three (3) criteria to be considered in determining whether a sufficient nexus to the employment existed:

1. Did the injury occur within the period of employment?
2. Did the injury occur at a place where the employee might reasonably have been expected to be?
3. At the time of the injury, was the employee fulfilling his job duties or performing some task incidental to those duties or to the conditions under which those duties were to be performed?

See DiLibero v. Middlesex Construction Co., 63 R.I. 509, 9 A.2d 848 (1939).

It has been well-established that the "period of employment" includes a reasonable time both before and after an employee's regular hours of work. Branco v. Leviton Mfg. Co., Inc., 518 A.2d 621 (R.I. 1986). Mr. Robertson had obviously not yet started his workday as he was still in his personal vehicle on Route 95. The employee argues that because the accident occurred within twenty (20) minutes of when his shift began, it was within a reasonable time of the start of his workday. However, the court's expansion of the "period of employment" beyond the normal work hours has generally occurred in circumstances where the employee is still on the employer's premises or in an area that the employer controls or has directed the employee to travel through. See Rico v. All Phase Electric Supply Co., 675 A.2d 406 (R.I. 1996; Branco v. Leviton Mfg. Co., Inc., 518 A.2d 621 (R.I. 1986); DiLibero v. Middlesex Construction Co., 63 R.I. 509, 9 A.2d 848 (1939).

With regard to the second prong of the DiLibero criteria, the employee argues that because the only entrance to the work site was from the northbound lane of Route 95 that he was in a place where the employer would reasonably expect him to be when the accident occurred. However, this rationale would impose liability on an employer any time an employee was in a motor vehicle accident while approaching the driveway or entrance to the employer's property. A factor to consider regarding this condition is the element of control by the employer of the route taken by the employee and whether the risk to which the employee is exposed is common to the general public.

In DiLibero, the employee was a laborer working on the construction of a water system along several miles of public highway. A large portion of the highway was closed to public traffic because different parts of the highway were in different stages of construction. The employee finished his work shift and was walking through the construction site on his way home when he fell in a trench. The path traveled by the employee was the only way to exit the section of highway where he was working.

The Rhode Island Supreme Court affirmed the trial justice who granted the employee's petition for workers' compensation benefits. The court noted that the employee was at a place where the employer would reasonably expect him to be because the accident occurred in an area controlled by the employer which was near the place the employee was actually working. In addition, the employee was fulfilling the duties of his employment or doing something incidental thereto because

> ". . . he was promptly going home, without deviation, along the only available route by which he could leave the premises where he had actually been working and which were under the control of the respondent. The accident therefore was clearly in the course of the employment. . . ." Id. at 517, 9 A.2d at 851.

In further explaining why the injury sustained by the employee in DiLibero was an exception to the "going and coming" rule, the Court stated:

> "The petitioner's employment called for actual work in this area and in or upon this highway. The extent of the area or field of employment found by the trial justice to be under the respondent's control was reasonably defined and not unreasonably extended. The causative danger or hazard was not common to the public generally, as stated in many of the cases cited, but was one peculiar to the nature of the petitioner's employment, which then called for him to be in and upon the highways of this particular area, which was obstructed." Id. at 517, 9 A.2d at 851.

In the present case before the Appellate Division, the employer clearly did not have control over the northbound left lane of Route 95. There were apparently some warning signs indicating the area of construction, but this certainly does not rise to the level of having control of the travel lane. Furthermore, the hazard of traveling in the high speed lane, or anywhere on the highway, is a danger and hazard to the public in general. The fact that the employee must travel on the public highway and slow down and exit the highway at some point is not such a unique risk or danger associated only with his employment that would warrant an exception to the general rule regarding traveling to and from work.

In order to qualify for workers' compensation benefits, an accident while traveling on the public highways generally should be at the direction, express or implied, of the employer, or bestow some benefit on the employer beyond the mere fact of the employee's arrival at the workplace. Travel to work for the simple purpose of arriving at work cannot be considered fulfilling one's job duties or performing some task incidental to those duties or the conditions under which those duties are to be performed.

In a rare exception to the "going and coming" rule, the Rhode Island Supreme Court granted benefits to a visiting nurse who was severely injured in a motor vehicle accident while

traveling from one (1) client's home to another. The employee was not paid for travel time or reimbursed for any travel expenses. However, the Court noted that the employer dictated the employee's daily schedule and she had not deviated from that schedule, so the employer could reasonably have expected her to be where the accident occurred. The accident was within the period of employment because it occurred while driving between patients' homes. In satisfying the third criteria of DiLibero, the Court stated:

> "Finally, because travel from one patient's home to another was an integral and a necessary part of the employment contract and conferred an added benefit on Aquidneck in pursuing its business, the risk of travel on public roads must be considered a condition incident to Toolin's employment." Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639, 641 (R.I. 1995).

Clearly, the circumstances of the present case are not similar to those of Toolin or DiLibero. The employee urges the panel to conclude that the location of the entrance to the job site off of the high speed lane of the highway creates a special risk to employees working at that site and, therefore, the employer should be responsible for injuries resulting from any accidents which occur while entering the job site. However, we see no difference between this situation and the unfortunate employer whose entrance to the premises requires negotiating a dangerous intersection or cutting across traffic at a blind turn. There is not a sufficient nexus or causal connection between an injury resulting from a motor vehicle accident caused by a third party and the employment under these circumstances to find an exception to the application of the general "going and coming" rule.

Based upon the foregoing, 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, copy of which is enclosed, shall be entered on

Rotondi and Bertness, JJ. concur.

ENTER:

_____
Rotondi, J.

_____
Olsson, J.

_____
Bertness, J.

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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 March 29, 2004 be, and they hereby are, affirmed.

Entered as the final decree of this Court this day of

BY ORDER:

_____
John A. Sabatini, Interim Administrator

ENTER:

_____
Rotondi, J.

_____
Olsson, J.

_____
Bertness, J.

I hereby certify that copies were sent to Marc B. Gursky, Esq., and Francis T. Connor, Esq., on

_____