STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. WORKERS' COMPENSATION COURT
APPELLATE DIVISION

WILLIAM P. McGLOIN	)	
	)	
VS.	)	W.C.C. 05-00652
	)	
TRAMMELLCROW SERVICES, INC.	)	

DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter came to be heard before the Appellate Division upon the appeal of the petitioner/employee from a decision of the trial judge which determined that the employee's injury was not compensable under any exception to the "coming-and-going" rule, nor was it compensable under the theory that he was acting as a "Good Samaritan." After a thorough review of the record and consideration of the arguments of the parties, we deny the employee's appeal and affirm the decision and decree of the trial judge in this matter.

The employee testified that at the time of his injury he had been employed by the employer for six (6) months, and had worked for the employer's predecessor in the same position for four and a half (4 ½) years. The employee was a road technician and his duties included maintaining the ATM locations, landscaping, snow removal, maintenance of heating, ventilation and air conditioning, certain janitorial services, furniture moving and maintenance of common areas. The job required a significant amount of lifting, bending and carrying. The employee's normal daily hours were from 8:00 a.m. to 4:30 p.m., though he was on-call seven (7) days a

week, twenty-four (24) hours per day. Mr. McGloin worked out of a van supplied by Trammellcrow.

On January 6, 2005, between 7:30 and 7:40 in the morning, the employee started up his company van in the parking lot of his apartment building and cleared off the snow that had fallen overnight. After backing the van out of his parking space, he noted that a woman's vehicle was stuck in the snow and blocking his exit from the parking lot. He got out of the van and assisted the motorist by pushing on the rear bumper of her vehicle. This maneuver successfully freed the vehicle and the motorist drove away, however, Mr. McGloin ended up on the ground. As he got up, he experienced severe pain in his low back.

After pulling his van back into a parking space, the employee returned to his apartment and contacted a co-worker to cover his duties that day. He also called his supervisor and explained what happened and that he would be out of work that day (Thursday) and likely the next day. The employee has not returned to work since the date of the incident.

Michael Fossa, the employee's direct supervisor and operations manager for Trammellcrow, testified that he received a call from the employee the morning of January 6, 2005 informing him about the incident. Mr. McGloin never indicated to Mr. Fossa that he believed it was a work-related injury. Mr. Fossa explained that generally the employee can schedule his own work day based upon the work orders which are received with a certain priority attached. If there is any type of emergency call, Mr. Fossa would redirect the employee's attention as needed. He testified that there were no emergency calls on January 6, 2005.

Jill Santopietro, the human resources manager for the employer, testified that the employee called her on January 11, 2005 and stated that he had been hurt the previous Thursday and sought medical treatment the day prior to his call. Ms. Santopietro asked him if the injury

was work-related and the employee said it was not. She advised him to contact the employer's short term disability carrier. He followed her advice and also filed a claim for Temporary Disability Insurance benefits with the State of Rhode Island. Thereafter, Mr. McGloin began receiving short term disability benefits, but the company withheld the amount that he would have been entitled to receive from the state. When Ms. Santopietro spoke with the employee on January 24, 2005, he was upset with receiving the reduced benefits and indicated that he was considering filing a workers' compensation claim because he needed the money.

Ms. Santopietro explained that the employee was paid hourly for forty (40) hours a week plus overtime. She further testified that the company policy was that it did not pay an employee for the first thirty (30) minutes of travel time when commuting to the first facility to begin the work day.

The trial judge, citing the three (3) criteria set forth in DiLibero v. Middlesex Construction Co., 63 R.I. 509, 9 A.2d 848 (1939), determined that there was no nexus between the injury sustained by the employee and his employment. Also, the trial judge found the employee was precluded by the going and coming rule because the circumstances did not qualify for any exception and the so-called "Good Samaritan" rule did not apply to this case. Accordingly, the trial judge ordered that the petition be denied and dismissed. The employee promptly filed this claim of appeal.

Pursuant to R.I.G.L. § 28-35-28(b), a trial judge's findings on factual matters are final unless the Appellate Division concludes they are clearly erroneous. See Diocese of Providence v. Vaz, 679 A.2d 879 (R.I. 1996). The Appellate Division may only conduct a *de novo* review of the record after 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)). Such review, however, is

limited to the record made before the trial judge. Vaz, *supra* (citing Whittaker v. Health-Tex, Inc., 440 A.2d 122 (R.I. 1982)).

The employee has filed four (4) reasons of appeal. We will address the first and fourth reasons of appeal initially as they both involve the employee's contention that the court should apply a so-called "Good Samaritan" rule to his claim for benefits.

In his first reason, the employee argues that the trial judge improperly precluded him from introducing evidence demonstrating that the employer had a company policy encouraging employees to be good citizens and assist individuals in trouble if they came across them in the course of their employment. He further contends that the trial judge then cited the lack of proof of such a policy as the basis for denying the employee's claim. We find no merit in his contention.

The employee attempted to introduce evidence through the cross-examination of Mr. Fossa, the operations manager, that the company had such a policy. Counsel for the employer objected to this line of questioning and the trial judge sustained the objection. On direct examination of Mr. Fossa, counsel for the employer never inquired on the subject. Clearly, the subject matter of the questions asked of Mr. Fossa by counsel for the employee was beyond the scope of direct examination.

In addition, the employee was never questioned regarding any "Good Samaritan" policy during his testimony, which preceded that of Mr. Fossa. Mr. McGloin never indicated that he was acting in accordance with such a policy. When questioned as to his intentions in assisting the motorist in the parking lot, he responded:

> "Essentially just get her off and on her way because of the slope in that driveway and essentially I just wanted to get her off and on her way so I could jump in my vehicle and go about my day." Tr. 28.

The employee did make an offer of proof after the trial judge sustained the objection.

> "May I just make that offer, Judge, for the record that if the witness were the [sic] answer the proceeding [sic] two questions, he would have answered that there was no provision for helping; there was a policy they should help people. That's all I have." Tr. 65.

Unfortunately, the offer of proof is contradictory, whether due to inadvertence on the part of the attorney or typographical error during transcription. This panel has no way of determining what information would have been provided by Mr. Fossa in response to counsel's questioning. In addition, there is still no indication that the employee was aware of such a policy or acting in accordance with it.

> "The purpose of the offer of proof is to enable the court to determine the materiality, relevance, and competence of the evidence that was excluded upon presentation so that we may determine whether defendant was prejudiced by the exclusion."

State v. Almeida, 111 R.I. 566, 570, 304 A.2d 895, 898 (1973). The offer of proof in the present matter does not provide sufficient information to the court to support a determination that the testimony was erroneously excluded. It is well-established that ". . . the admission of evidence rests in the sound discretion of the trial justice and will not be disturbed absent a showing of an abuse of that discretion." New Hampshire Ins. Co. v. Rouselle, 732 A.2d 111, 113 (R.I. 1999). Our review of the record reveals no error or abuse of discretion by the trial judge in sustaining the objection to the questions posed to Mr. Fossa regarding the so-called "Good Samaritan" policy.

In the fourth reason of appeal, the employee urges the court to adopt the position that his injury is compensable because he was acting as a Good Samaritan, regardless of whether the employer has a policy encouraging such activity. However, the employee never stated that he acted out of some sense of compassion and kindness in assisting the motorist in the parking lot.

We do not even know if the motorist asked for assistance. From what we can discern from the record, Mr. McGloin took it upon himself to try to get the vehicle out of the way so that he could get on his way to work.

The employee cites two (2) cases in support of his argument, Ace Pest Control, Inc. v. Industrial Commission, 32 Ill.2d 386, 205 N.E.2d 453 (1965), and Gurskey v. Blackstone Valley Electric Co., W.C.C. No. 93-01587 (App. Div. 7/6/95). However, in both of those cases, the employees had already begun their work day and the "going-and-coming" rule was not implicated. In awarding compensation, the courts also considered that the employer was in the type of business providing general consumer services and the employees were bestowing good will and some potential benefit to the employer by assisting someone while wearing a company uniform and driving a company vehicle advertising the employer's business.

In the present matter, Mr. McGloin had not yet started his work day. He acknowledged that he was not on his way to a particular call or job, but was headed to a central location to better respond to any snow removal problems that might arise. The "going-and-coming" rule is clearly implicated. He was injured on private property while leaving his residence. The employer, Trammellcrow, does not provide general consumer services, but provides maintenance and property management services to Bank of America branches. All of these factors make the present matter distinguishable from the Ace Pest Control and Gurskey cases.

We are not persuaded by the employee's argument that public policy considerations warrant the adoption of a general "Good Samaritan" rule to apply to Mr. McGloin's situation. Our workers' compensation system is based upon the principle that the employee must establish a nexus or causal connection between the injury sustained and his employment. Under certain factual circumstances, such as in Gurskey, an injury which occurs while an employee is

rendering aid to an individual may be compensable. However, we decline to adopt a general rule allowing compensation in all such cases. Although we acknowledge the humanitarian purpose behind the Workers' Compensation Act, we are also mindful that this legislation was never intended to provide general health and accident insurance to employees. Geigy Chemical Corp. v. Zuckerman, 106 R.I. 534, 541, 261 A.2d 844, 848-49 (1970).

In his second reason of appeal, the employee contends that the trial judge erroneously concluded that Mr. McGloin was not paid for his travel time and therefore the "going-and-coming" rule precluded him from receiving compensation benefits. The parties stipulated that the injury occurred between 7:30 a.m. and 8:15 a.m. (Tr. 51.) Mr. McGloin testified that he exited his apartment about 7:30 a.m. to go down to the parking lot. (Tr. 21). He stated that he noted the vehicle stuck in the driveway around 8:00 a.m. (Tr. 22). On cross-examination, the employee indicated that he was unaware that the company policy was that he was not paid for the first thirty (30) minutes of commuting time, although Ms. Santopietro testified that this policy was in effect during Mr. McGloin's employment.

The trial judge noted in her decision that the employee's injury occurred during the first half hour of his work day and he was not paid for that time. Based on the testimony in the record, we cannot say that this statement is incorrect. In any case, this is only one (1) of several factors to consider in determining whether the injury occurred during the course of his employment. One might argue that the employee had not yet begun his commute to work since he was not even in his van when the incident occurred and he was still in the parking lot of his apartment complex. In reading the decision of the trial judge, it is clear that the question whether or not the employee would be paid for the period when he was injured was not the deciding

factor. We believe this reference simply supports the conclusion that the injury occurred outside the period of employment.

The employee's third reason of appeal alleges that the trial judge erred in failing to find that the employee's injury occurred within the scope of his employment and that an exception to the going-and-coming rule should apply and compensation be awarded. Simply stated, the going-and-coming rule operates to bar compensation for an injury which occurs while the employee is going to or coming from the workplace. Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639, 640 (R.I. 1995). To establish an exemption from the rule, an employee must prove that the injury occurred during the period of employment, at a place where the employee might reasonably be expected to be, and while fulfilling the duties of his employment or performing some task incidental thereto. DiLibero v. Middlesex Construction Company, 63 R.I. 509, 516-517, 9 A.2d 848, 851 (1939). If these three (3) elements are satisfied, then the employee qualifies for an exception to the going-and-coming rule and is entitled to workers' compensation benefits.

As noted above, the testimony in this matter establishes that this incident did not occur during the period of employment. The fact that the employee had pulled his van out of the parking space did not initiate his work day. He had not yet initiated his journey to work on the public roads. The employee seems to take the position that the period of employment began when Mr. McGloin stepped out of his apartment building. We believe that adopting such a position would lead to the type of "portal-to-portal" rule of compensation which our Supreme Court has consistently resisted. *See* Kyle v. Davol, Inc., 121 R.I. 79, 395 A.2d 714 (1978).

More significantly, the employee was not fulfilling the duties of his employment or any task which may be considered incidental thereto at the time of his injury. The employee was

outside of his company vehicle, in the parking lot of his apartment complex, assisting an unknown motorist. He was not driving the company van or responding to a work call of any type. He was not acting at the direction of his employer. We cannot find any connection to the employment under the circumstances.

The employee argues that travel in the company van was an integral part of his job and he should be compensated because he was operating the van when he encountered the vehicle which was blocking his ability to get to work. He cites the decisions in Toolin v. Aquidneck Island Medical Resource, 668 A.2d 639 (R.I. 1995), and Chivers v. Dependable Nursing Services, Inc., W.C.C. 96-04902 (App. Div. 11/26/97), in support of his claim. Those cases are fact specific and we find the facts of the present case to be distinguishable.

In Toolin, the Rhode Island Supreme Court awarded workers' compensation benefits to a visiting nurse who was injured in an automobile accident while traveling from one assignment to the next at the direction of her employer. The Court emphasized that travel on the public roads to patient's homes "was an integral and a necessary part of the employment contract and conferred an added benefit on Aquidneck in pursuing its business . . . ." Toolin, 668 A.2d at 641. Therefore, the risks inherent in such travel were a condition incident to employment and the injury sustained during the travel was compensable. Although we might agree that travel between bank branches was an integral part of Mr. McGloin's job, he was not injured while traveling on the roadways. He was performing an activity outside his vehicle which was not an incident of his employment and consequently does not satisfy the nexus requirement.

In Chivers, the employee was a visiting nurse who was injured in a motor vehicle accident while driving from an assignment to the employer's office to retrieve her paycheck. The Appellate Division awarded workers' compensation benefits, citing the fact that the receipt

of wages is an integral part of the employment. Therefore, the employee was injured while performing a task incidental to her employment. In the present matter, Mr. McGloin was simply on his way to a location from which he could readily respond to calls for his services. The act of pushing another motorist's car from the snow so that he could exit the parking lot of the apartment complex where he lived cannot be considered an integral part of his employment, or a task incidental to performing his job duties. Rather, the particular circumstances of Mr. McGloin's injury clearly warrant the application of the "going-and-coming" rule which precludes the recovery of workers' compensation benefits.

Based upon the foregoing discussion, we conclude that the trial judge's findings are not clearly erroneous and we, therefore, deny and dismiss the employee's appeal. 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

Connor and Hardman, JJ. concur.

ENTER:

_____
Olsson, J.

_____
Connor, J.

_____
Hardman, 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 September 27, 2005 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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Olsson, J.

_____
Connor, J.

_____
Hardman, J.

I hereby certify that copies of the within Decision and Final Decree of the Appellate Division were mailed to Gregory L. Boyer, Esq., and Megan J. Goguen, Esq., on

_____