In the
Supreme Court of Ohio

ORIGINAL

VISITING NURSE ASSOCIATION OF MID-OHIO, et al.,	:	Case No. 2013-0892
	:	
Appellant,	:	On Appeal from the Richland County Court of Appeals, Fifth Appellate District
v.	:	Case No: 2012-CA-56
TAMARA FRIEBEL,	:	
and	:	
ADMINISTRATOR BUREAU OF WORKERS' COMPENSATION,	:	
Appellees.	:	

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SUPREME COURT OF OHIO

MEMORANDUM IN REPONSE TO JURISDICTION OF APPELLEE STEPHEN P. BUEHRER, ADMINISTRATOR, OHIO BUREAU OF WORKERS' COMPENSATION

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INTRODUCTION

The Administrator, Bureau of Workers' Compensation ("Administrator") was a Defendant-Appellee in the lower courts, and has been designated an Appellee in this Court. For reasons that follow, the Administrator should be realigned as an Appellant for purposes of this appeal. Although the Administrator did not oppose Plaintiff-Appellee Tamara Friebel's, right to participate in the workers' compensation system, the court of appeals' opinion created a "dual-intent" doctrine in workers' compensation law that is inconsistent with existing law and cannot stand. The Administrator's first duty is to the law, not the outcome of a particular claim. The Administrator therefore urges this Court to reverse the court of appeals decision granting summary judgment and remand for factual development that may or may not prove Ms. Friebel's right to participate. If the Court accepts jurisdiction, the Administrator asks that he be realigned as an appellant.

This appeal concerns workers' compensation coverage for the non-fixed situs employee also known as the "traveling employee." The trial court granted summary judgment in favor of the employer because it reasoned that the employee was on a personal errand; that is, she was not traveling to the work site at the time of the motor vehicle accident. However, the Court of Appeals reasoned that a non-fixed situs employee (or "traveling employee") is, even while on a personal errand, still covered by Ohio's workers' compensation laws. It is well established that an employee, while on a personal errand, is ***not covered*** under workers' compensation laws. Simply stated, a personal errand is not for the benefit of the employer.

In order to be compensable, i.e., covered by the workers' compensation law, the injury must be "received in the course of, and arising out of" that employment. R. C. 4123.01(C). See *Fisher v. Mayfield*, 49 Ohio St. 3d 275, 276, 551 N.E.2d 1271 (1990). "This standard ensures that employees are only compensated when their injuries are ***causally related*** to the activities,

conditions, and environment of their employment." *Powers v. Frank Z. Chevrolet*, 100 Ohio App. 3d 718, 721 (2nd Dist.1995). (Emphasis added).

Here, the court of appeals held that, even though the employee was injured while on a personal errand, the employee had "dual intent," apparently both a personal and a business purpose, and therefore, her travel is still covered by workers' compensation law. However, there is no legal authority for the notion of "dual intent" in workers compensation law.

In summary, the Administrator does not oppose the Court accepting jurisdiction of the employer's appeal. First, the Court should hold that the law in Ohio does not permit workers' compensation coverage based on an employee's alleged "dual intent." Second, the Court should clarify the scope of workers' compensation coverage applicable to the non-fixed situs employee, also known as the "traveling employee." Finally, this Court should reverse the court of appeals decision and remand the case to the trial court for further proceedings consistent with the relevant facts and the law applicable to the "traveling employee."

STATEMENT OF THE CASE AND FACTS

The essential facts are not in dispute. Appellee Tamara Friebel ("Friebel") is employed by Appellant Visiting Nurses Association of Mid Ohio ("VNA") "as a home health nurse." *Friebel v. Visiting Nurse Assn.. of Mid Ohio*, 5 Dist. No. 2012-CA-56, 2013-Ohio-1646, ¶ 2 (hereinafter "*Friebel*"). She travels to the residences of six to eight patients each day and provides "in-home health care services." Id.

On January 22, 2011, Friebel was traveling in her own personal vehicle when she was involved in a motor vehicle accident. (Id., ¶ 4). She stated that she was on her way to her first customer/patient of the day; however, she also had children in the vehicle. Id. Her plan was to take the children to the shopping mall, drop them off and then travel to her first appointment.

(Id., ¶ 4). The motor vehicle accident occurred ***before*** she arrived at the mall. Id. The accident occurred on the same road that she would have traveled to arrive at the residence of her first customer/patient. (Id., ¶¶ 4-5). On weekends, VNA paid Friebel for "travel time and mileage from the time she left her home to the time she returned to her home." (Id., ¶ 3). This accident occurred on a Saturday.

The Administrator, based on limited evidence, allowed the employee's workers' compensation claim. However, on the employer's appeal to the Industrial Commission ("commission"), when the employer became actively involved, the issue was whether the injury was sustained in the course of and arising out of employment. A district hearing officer ("DHO") for the commission vacated the Administrator's order and denied the claim. On further appeal to the commission, a staff hearing officer ("SHO") reversed the district hearing officer's decision and allowed the claim for a cervical strain. Neither the DHO nor the SHO decisions were based on a so-called "dual intent" doctrine. The employer, VNA, appealed to common pleas court under R.C. 4123.512. VNA filed a motion for summary judgment. The trial court granted summary judgment in favor of VNA. On Friebel's appeal, the court of appeals, in a 2-1 decision, reversed the summary judgment and awarded judgment to Friebel based on a so-called "dual intent" doctrine.

The court of appeals reasoned that Friebel was injured "in the course of, and arising out of"employment because she "had *dual intentions* when she left her home." (Id., ¶ 21, italics added). The court held that the "coming and going" rule did not apply because she was not a fixed situs employee because "travel to and from the patient homes was a fundamental and necessary part of her employment duties." (Id., ¶ 29).

However, the dissent correctly reasoned that there is no legal recognition/authority for so-called "dual intent." (Id., ¶ 36). The dissent noted the intent of the injured worker should not control the legal outcome because intent is "very difficult (to) determine." (Id., ¶ 36). Finally, the dissent disagrees with the majority's use of the law concerning "frolic and detour" because the injured worker had not yet deviated from her route of travel. (Id., ¶ 35).

VNA filed a discretionary appeal to this Court.

STATEMENT OF THE LAW

Ohio law clearly establishes that for the "fixed situs" employee, "coming and going" type travel (to and from work travel) is not compensable under Ohio workers' compensation law. *Ruckman v. Cubby Drilling*, 81 Ohio St.3d 117 (1998). However, case law is less definitive as to when, or under what circumstances, the travel of a "non-fixed situs" employee is *not* compensable under Ohio workers' compensation law.

Whatever rule of law this Court announces for the non-fixed situs employee, it should be consistent with the Court's rationale for the "coming and going" rule. The "coming and going" rule states that an injury sustained by a fixed situs employee while traveling on a public road to or from the place of employment, is <u>not</u> an injury "in the course of, and arising out of" employment. Id, p. 119. To determine whether the employee is "fixed situs," the issue is whether the employee "commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer." *Ruckman*, at 119. The rationale is that "coming and going" travel is not for the benefit of the employer; and, that type of travel is no more risky than that experienced by the general public. Id.

For non-fixed situs employees, the "coming and going" rule is not specifically applicable because the travel to various work sites or locations throughout the work day is presumed to be

for the benefit of the employer. However, the fact that the employer reimburses for mileage, or pays for travel time does not mean that an employee is entitled to participate in the workers' compensation system for all travel. *Ruckman*, at 121, footnote 1. To be more specific, the traveling or non-fixed situs employee, "must, at the time of his injury, have been *engaged in the promotion of his employer's business and in the furtherance of his affairs*." *Indus. Comm. v. Bateman* , 126 Ohio St. 279, 185 N.E. 50 (1933) (emphasis added), cited in *Ruckman*, at p. 121.

Here, the court of appeals' so-called "dual intent" doctrine extends workers' compensation coverage to travel that is admittedly personal to the employee. The creation of such doctrine violates and contravenes established Ohio workers' compensation law.

The case should be sent back to the trial court for further proceedings to determine whether the employee, at the time of her injury, was engaged in an activity for the benefit of her employer in accordance with established Ohio workers' compensation law.

CONCLUSION

For the above reasons, this Court should accept jurisdiction.

Respectfully submitted,

MICHAEL DEWINE (0009181)
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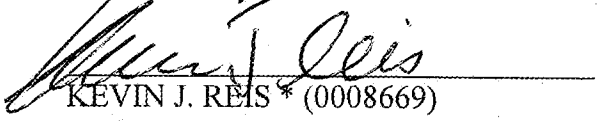

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I certify that a copy of the foregoing was served on this 2ND day of July, 2013, to:

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