IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2011 MTWCC 7

WCC No. 2010-2512

TIMOTHY JAMES CHARLSON

Petitioner

vs.

MONTANA STATE FUND

Respondent.

ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT

Summary: Petitioner worked on two different job sites for his employer. Petitioner was injured in an automobile accident while traveling to one job site to start his shift. Petitioner moves for summary judgment, arguing that his injury should be compensable as a work-related injury under the exception to the "going and coming" rule found at § 39-71-407(3)(a)(ii), MCA. Respondent opposes Petitioner's motion, arguing that Petitioner was simply driving to work to report for his regular shift and his injury is not compensable under the "going and coming" rule.

Held: Petitioner's automobile accident which occurred on his way to work is not compensable under § 39-71-407(3)(a)(ii), MCA. Simply traveling to the workplace prior to the start of a work shift does not make travel part of an employee's job duties. Respondent's cross-motion for summary judgment is granted.

Topics:

> **Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407.** Under the "going and coming" rule, an employee traveling to or from a regular work place is not covered by the WCA. An exception recognizes compensation benefits for injuries sustained during travel necessitated by performance of a special assignment incidental to regular employment. Where Petitioner was traveling to a job site to begin a regular work shift, he does not fall within this exception.

Employment: Course and Scope: Coming and Going. Under the "going and coming" rule, an employee traveling to or from a regular work place is not covered by the WCA. An exception recognizes compensation benefits for injuries sustained during travel necessitated by performance of a special assignment incidental to regular employment. Where Petitioner was traveling to a job site to begin a regular work shift, he does not fall within this exception.

Employment: Course and Scope: Travel. Where Petitioner was injured while traveling to work – not while traveling between job sites during his work shift – his injury is not compensable under the "going and coming" rule.

Employment: Course and Scope: Coming and Going. When work does not begin until the worker arrives at the workplace, merely traveling to that workplace does not produce a special benefit to the employer and does not constitute an exception to the "going and coming" rule.

¶ 1 Petitioner Timothy James Charlson moves this Court for summary judgment pursuant to ARM 24.5.329. Charlson alleges that he suffered a compensable industrial injury when he was in a car accident while on his way to report to one of his employer's two job sites prior to the start of his work shift.[1] Respondent Montana State Fund (State Fund) opposes Charlson's motion and has cross-motioned for summary judgment, arguing that Charlson's accident is not compensable under the "going and coming" rule.[2]

Undisputed Facts[3]

¶ 2 Guns & Hoses hired Charlson to work as a full-time carpenter in June 2009. At that time, its principal place of business, and the primary residence of business owner John Whitefield, was 1104 South Montana Avenue, Apartment D18, in Bozeman.

¶ 3 Charlson worked at two different job sites while Guns & Hoses employed him. The first project involved framing and sheathing a home located in Bozeman. The

[1] Motion for Summary Judgment, Docket Item No. 23, and Brief in Support of Motion for Summary Judgment (Opening Brief), Docket Item No. 24.

[2] Respondent State Fund's Motion for Summary Judgment with Supporting Brief and Response Brief to Petitioner's Brief in Support of Motion for Summary Judgment (Response Brief), Docket Item No. 27.

[3] As set forth in Opening Brief at 1-3, and endorsed in Response Brief at 2-4.

second project involved the construction of a multi-unit residential building located approximately a quarter-mile south of Emigrant, Montana.

¶ 4 Whitefield supervised his employees on both job sites. On some occasions, Whitefield worked at one location with some of his employees while the other employees worked at the other job site.

¶ 5 Charlson spent time at both the Bozeman and Emigrant job sites. On many occasions, Charlson would not know which project he would be working on until the night before his shift. On other occasions, Whitefield called Charlson in the morning and told him to which job site he was to report. On some mornings, Whitefield contacted Charlson and asked him to travel to a different location.

¶ 6 Charlson did not have a permanent residence during the time he worked for Guns & Hoses. After Whitefield contacted Charlson, Charlson would travel to either Bozeman or Emigrant to be available for work.

¶ 7 Guns & Hoses did not provide Charlson with a vehicle and did not compensate Charlson for his time or vehicle mileage when traveling to either job site in the morning or while traveling home after the work day.

¶ 8 On the evening of Sunday, July 12, 2009, Whitefield called Charlson and told him to report to the Emigrant job site the next morning.

¶ 9 At approximately 7:15 a.m. on July 13, 2009, while en route to the Emigrant job site, Charlson was involved in a high-speed automobile collision near Emigrant. Charlson suffered severe injuries as a result of that accident.

Analysis and Decision

¶ 10 This case is governed by the 2009 version of the Montana Workers' Compensation Act (WCA) since that was the law in effect at the time of Charlson's injury.[4]

¶ 11 For the Court to grant summary judgment, the moving party must establish that no genuine issues of material fact exist and that the moving party is entitled to judgment

[4] *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

as a matter of law.[5] The material facts necessary for disposition of this case are undisputed. Accordingly, this case is appropriate for summary disposition.

¶ 12 Charlson argues that his injury should be compensable under the WCA because he contends that the facts of his case do not fall under the "going and coming" exception codified in § 39-71-407(3)(a), MCA.[6] Conversely, State Fund argues that Charlson was in a "going and coming" status at the time of his injury and it is therefore not compensable under the WCA.[7] The "going and coming" rule denies benefits for injuries sustained by an employee traveling to and from his regular work place.[8] The pertinent statute states:

> An employee who suffers an injury or dies while traveling is not covered by this chapter unless:
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> (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as part of the employee's benefits or employment agreement and the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or
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> (ii) the travel is required by the employer as part of the employee's job duties.

¶ 13 Charlson alleges that his claim falls under the exception found in § 39-71-407(3)(a)(ii), MCA, because he "had to travel a significant distance to an irregular job site" and that his employer benefited from his travel.[9]

¶ 14 State Fund disputes Charlson's characterization of his employment as requiring him to report to "irregular" job sites. State Fund asserts that Charlson had two "regular" job sites and that his activity at the time of his injury was no more than simply coming to

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[5] ARM 24.5.329; *Farmers Union Mut. Ins. Co. v. Horton*, 2003 MT 79, ¶ 10, 315 Mont. 43, 67 P.3d 285.

[6] Opening Brief at 4.

[7] Response Brief at 1.

[8] *State Comp. Mut. Ins. Fund v. James*, 257 Mont. 348, 350, 849 P.2d 187, 188 (1993). (Citation omitted.)

[9] Response to Respondent State Fund's Motion for Summary Judgment and Reply to State Fund's Response Brief to Petitioner's Brief in Support of Motion for Summary Judgment (Reply Brief) at 1-2, Docket Item No. 28.

work to start his shift – an activity which State Fund argues does not fall under one of the statutory exceptions to the "going and coming" rule.[10]

¶ 15 Charlson further argues that travel was required as part of his job duties, making his injury compensable under § 39-71-407(3)(a)(ii), MCA. Charlson argues that he did not know until the evening before his accident which job site he would report to the following morning, and that his lack of a "regular place of work" made travel an integral part of his employment.[11] Charlson contends that the factors set forth in *Courser v. Darby School District*[12] apply to his situation and render his claim compensable. The *Courser* factors are:

> (1) [W]hether the activity was undertaken at the employer's request;
>
> (2) whether employer, either directly or indirectly, compelled employee's attendance at the activity;
>
> (3) whether the employer controlled or participated in the activity; and
>
> (4) whether both employer and employee mutually benefitted from the activity.[13]

¶ 16 Charlson argues that the *Courser* factors support the compensability of his claim because his travel to the Emigrant job site was at Whitefield's request, his attendance at either the Emigrant or Bozeman job was "compulsory," Whitefield controlled where Charlson would travel, and both Whitefield and Charlson benefited from the arrangement.[14]

¶ 17 State Fund responds that the *Courser* factors are inapplicable to Charlson's claim. State Fund argues that the *Courser* test is meant to be applied in situations where a worker is participating in an activity outside of his or her normal job duties to determine if that activity is "work-related." State Fund notes that in *Courser*, the claimant was injured not while performing his normal job duties but while attending university classes at the encouragement of his employer. State Fund contends that the

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[10] Response Brief at 8.

[11] Opening Brief at 5.

[12] 214 Mont. 13, 692 P.2d 417 (1984).

[13] *Courser*, 214 Mont. at 16, 692 P.2d at 419.

[14] Opening Brief at 7-13.

Courser test is not intended to be applied to "going and coming" situations. State Fund argues that if the *Courser* test were applied to "going and coming" situations, simply showing up for work could meet the criteria.[15]

¶ 18 In *Courser*, the Montana Supreme Court determined that the claimant's attendance at a summer school graduate program was a work-related activity. The court noted that under the "going and coming" rule, an employee traveling to or from a regular work place is not covered by the WCA. The court further noted, however, that one of the exceptions to the rule "recognizes compensation benefits for injuries sustained during travel necessitated by performance of a special assignment which is incidental to the employee's regular employment."[16] Although Courser's attendance at a summer graduate program fell into this exception, in the present case, Charlson was not traveling for a "special assignment . . . incidental to [his] regular employment," nor was he participating in any other activities outside his normal job duties. Charlson was traveling to his employer's job site to begin a regular work shift. *Courser* does not apply to his situation.

¶ 19 This Court and the Montana Supreme Court have, in other instances, considered what types of situations fall under the exception to the "going and coming" rule found in § 39-71-407(3)(a)(ii), MCA. In *State Compen. Mutual Ins. Fund v. James*, the Montana Supreme Court held that it would construe the phrase "as part of" from the language "travel required by the employer ***as part of*** the employee's job duties" to mean "in the course and scope of" employment.[17]

¶ 20 In *James*, the claimant was travelling from her home to her workplace because the manager called and asked her to fix a computer problem on a day when she was not scheduled to work. James was injured in a car accident on the way to her workplace.[18] In considering whether James' injuries were compensable, the Montana Supreme Court noted that the "going and coming" rule denies benefits for injuries sustained by an employee traveling to and from his regular workplace.[19] Although James argued that the facts of her case should except her from the "going and coming" rule since she was responding to a "special 'call in'" which had placed her "in the path of

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[15] Response Brief at 9-10.

[16] *Courser*, 214 Mont. at 15-16, 692 P.2d at 418-19.

[17] 257 Mont. 348, 352, 849 P.2d 187, 190. At the time of the *James* decision, the pertinent language was found in § 39-71-407(3)(b), MCA, which has since been renumbered as § 39-71-407(3)(a)(ii), MCA.

[18] *James*, 257 Mont. at 349-50, 849 P.2d at 188.

[19] *James*, 257 Mont. at 350, 849 P.2d at 188.

harm," the court concluded that simply traveling to her regular workplace did not constitute travel as part of her job duties.[20] The court reasoned, "Here Ms. James was not required to travel between various areas during the course and scope of her employment. She was simply traveling to her job site in Butte when the accident occurred."[21] The court added that at the time of the accident, James was on her way to her regular work place, and was simply traveling from her home to the location where she normally worked.[22]

¶ 21 State Fund argues that *James* is on point with the facts of the present case. Charlson disagrees, arguing that his situation is distinguishable from *James* because he did not have a "regular workplace." Charlson contends that, since he did not know from day to day which job site Whitefield would send him to, he did not have a "regular place of work" and travel was an integral part of his employment.[23] Charlson further contends that travel was part of his job duties because his employer benefited from Charlson's ability to work at either of two job sites depending on the employer's needs. Charlson argues that since having transportation to his job was critical to his job, it must be considered part of his job duties.[24]

¶ 22 State Fund disputes Charlson's assertion that he had no "regular workplace." State Fund contends that Charlson had two regular job sites at which he worked. State Fund argues that a claimant can have more than one job site and a claimant's travel to and from a job site prior to and after his or her shift still falls under the "going and coming" rule. State Fund points to *Hampson v. Liberty Northwest Ins. Corp.* in which this Court held that a home health nurse who traveled between his home and clients' homes to provide healthcare fell within the "going and coming" rule when he was in a car accident while driving to his home from a client's home after his shift ended.[25] In reaching its determination, this Court reasoned:

> Section [39-71-407(3)(a)(ii), MCA,] is a two-pronged requirement. First, the travel must be required by the employer. Second, the travel must be part of the claimant's job duties. The travel in this case was required in

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[20] *James*, 257 Mont. at 350, 353, 849 P.2d at 188, 190.

[21] *James*, 257 Mont. at 352, 849 P.2d at 189.

[22] *Id*.

[23] Opening Brief at 5.

[24] Reply Brief at 3.

[25] 2002 MTWCC 57.

> the sense that the employer required claimant to show up for work. But such requirement has never been considered sufficient to bring travel to and from work under the umbrella or workers' compensation coverage. The reason that mere travel to and from work has never been considered sufficient to afford coverage for that travel is . . . [because] ordinarily work does not begin until the worker arrives at the workplace and work ends when he departs the workplace, thus travel to and from work is not "part of the employee's job duties."[26]

¶ 23 This Court further noted that Hampson's work did not begin until he arrived at his client's house, and ended when he left the client's house after his shift ended. The Court explained, "It makes no difference where the claimant's place of work is so long as the actual job duties begin only upon arrival at the workplace and end upon departure from the workplace."[27] Although Hampson argued that the "going and coming" rule did not apply because his employer could assign him to a different client, this Court held that an employer's authority to reassign a worker to a different workplace does not change the "going and coming" rule. The Court distinguished Hampson's situation from that of the claimant in *Parker v. Glacier Park, Inc.*, in which the claimant was injured while traveling between hotels, and the travel between the hotels was a specific requirement of his job.[28]

¶ 24 State Fund further relies upon *Kuhrt v. State Compen. Ins. Fund*,[29] in which this Court held that an employee's fall while walking from her parked vehicle to her workplace was not compensable. The Court rejected Kuhrt's argument that, by parking on the street where her employer suggested she park, that she was "benefitting" her employer. The Court noted that "going to and from work, absent payment for the travel, is not a part of an employee's job duties."[30] Similarly, in *Heath v. Montana Mun. Ins. Auth.*, the Court held that a claimant's injuries suffered in a fall while walking from her vehicle's parking place to her workplace prior to the start of her shift was not compensable. The Court stated, "At the time of her fall, petitioner's shift had not begun, she was not being paid, and she was performing no work-related duties."[31] The Court

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[26] *Hampson*, ¶ 26. (Internal citations omitted.)

[27] *Hampson*, ¶ 27.

[28] *Hampson*, ¶ 28 (*citing Parker*, 249 Mont. 225, 815 P.2d 583 (1991)).

[29] 1997 MTWCC 72.

[30] *Kuhrt* at 3. (Citations omitted.)

[31] *Heath v. Montana Mun. Ins. Auth.*, 1997 MTWCC 52 at 3.

further noted that an employee's traveling to and from work does not in itself provide a special benefit to the employer.[32]

¶ 25 State Fund reiterates that Charlson was injured while traveling to work – he was not injured while traveling between job sites during his work shift. State Fund argues that this distinction makes Charlson's case comparable to *Hampson* rather than a case like *Parker* where the employee was within his job duties while traveling between two hotels owned by his employer and where his job entailed traveling between his employer's hotels.[33]

¶ 26 *James*, *Hampson*, *Kuhrt*, and *Heath* consistently hold that travel to and from work does not fall within the exception to the "going and coming" rule found at § 39-71-407(3)(a)(ii), MCA. In *Heath*, this Court noted that, like Charlson, the claimant's shift had not begun, she was not being paid, and she was performing no work-related duties at the time of her accident. Although Charlson argues that his willingness to travel to either of two job sites at his employer's request provided a special benefit to his employer, this Court in *Heath* held that traveling to and from work does not produce a special benefit to the employer.

¶ 27 Most similar to Charlson's case is *Hampson*, in which this Court considered, and rejected, both parties' argument that their employer's authority to reassign them to a different workplace made their travels to and from their job sites part of their "job duties" under § 39-71-407(3)(a)(ii), MCA. As the above-cited cases hold, when work does not begin until the worker arrives at the workplace, merely traveling to that workplace does not constitute an exception to the "going and coming" rule. For this reason, I am denying Charlson's motion for summary judgment and granting State Fund's cross-motion for summary judgment in this matter.

ORDER

¶ 28 Petitioner's motion for summary judgment is **DENIED**.

¶ 29 Respondent's cross-motion for summary judgment is **GRANTED**.

¶ 30 Pursuant to ARM 24.5.348(2), this Order is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

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[32] *Heath* at 5.

[33] Respondent State Fund's Reply Brief in Support of its Motion for Summary Judgment at 3-4, Docket Item No. 29.

DATED in Helena, Montana, this 25th day of February, 2011.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Lucas J. Foust
Daniel B. McGregor
Submitted: January 18 and 20, 2011