

ARTICLE

RECENT OHIO APPELLATE DECISIONS: HOW THE “GOING AND COMING RULE” GOT UP AND WENT

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Even though the employment necessitates the worker's incidental journey from home to the workplace, workers' compensation has never protected against the perils of that journey. Fulton, Philip J. *Ohio Workers' Compensation Law*, (2d Ed., Anderson 1998), §7.7, p.183, citing, Larson, *Lex Larson's Workers' Compensation Law*, §15.11.

That is, until now. Over the course of the last 70 years, Ohio's general rule has been that an employee who is injured while traveling to or from a fixed and limited place of employment is not injured in the course of employment. The rule has all but disappeared from our jurisprudence. An analysis of whether a claimant is a “fixed situs” employee is no longer included in the vernacular of the Industrial Commission decisions or the appellate decisions reviewing the Commission's orders. Today's judicial directives contain an entirely different analysis, a blended standard of law, known as the “totality of the circumstances test.” This three-prong standard emanates from the Lord v. Daugherty decision, a 1981 Ohio Supreme Court opinion. In theory, it is a simple, unified standard. In application, it has become a strict liability standard for Ohio's employers. Its evolution has accomplished exactly what Ohio Supreme Court Justice Matthias warned about in 1933, “the right to recover...would rest upon the theory that the employee is in the course of his employment from the time he starts from home, notwithstanding he has no duty to perform until he reaches the plant of his employer.” Indus. Comm. v. Baker (1933), 127 Ohio St. 345, 350. Moreover, courts which have elected not to apply the Lord test have focused instead on the exceptions to the going and coming rule, rather than the underlying principle that compensability is determined by the presence of a causal connection to the workplace.

The implementation of the Lord test has caused much chagrin amongst lower court judges. In Franklin

County, the following was recently included in the judge's order denying summary judgment for the employer, “[the employer] advances the argument that the ‘totality of circumstances’ exception was intended to apply to non-fixed or semi-fixed situs employees and that Ohio courts have ‘repeatedly abused’ this exception by improperly applying it to fixed situs employees. But as this alleged ‘abuse’ has been carried out by the Ohio Supreme Court... this Court will adhere to their binding precedents.” Baxter v. PAA, et al., Franklin County Common Pleas Case No. 07CVC045266, April 16, 2008 Decision and Entry, p.8. Other examples of the erosion of the “going and coming” rule abound.

In an April 2, 2008 Hamilton County case, the appellate court held that the “coming and going [sic] rule” did not prevent compensability of a claim by an employee who was injured on a public road which “transected” the employer's property. Collins v. W.S. Life Ins. Co. 2008 WL 1913388 (April 2, 2008, Ohio App. 1st Dist). Although this court identified the Lord test as one of the “three exceptions to the going and coming rule,” rather than the court-mandated legal standard for evaluation of non-premises compensability, it did not apply the test to the facts, having found that the “first exception,” the “zone of employment” exception, was met. In Collins, the employee had parked her car in the employer's garage, and was injured after falling on the public sidewalk adjacent to her workplace. The import of this Hamilton County decision is that workers' compensation coverage is available to employees even where their injuries occur on a public roadway over which the employer exerts no control.

In another decision issued that same day, the Lucas County appellate court reached the opposite conclusion. That court's opinion determined that an employee who slipped and fell on an icy public sidewalk adjacent to her workplace was not entitled to participate in workers' compensation because the hazard or risk of injury at that location was no greater than the risk faced by the public at large. Millsap v. Lucas County, 2008 WL 1921719 (May 2, 2008, Ohio App. 6th Dist). Unlike the Hamilton County court, this decision found only two exceptions to the going and coming rule, neither of which were

met by the facts of this case. The court focused its attention on the ownership and control over the location of the injury, concluding that neither was had by the employer.

Interestingly, the opinion places a great deal of emphasis on a Third District opinion where the employer neither owned nor controlled the sidewalk just outside of the store where the injury occurred, but had instructed its employees to salt the sidewalk upon arrival at work. Despite the fact that claimant was not performing that duty at the time of the injury, the court awarded the right to participate in workers' compensation. Neither Millsap, nor the case upon which it relied, employed the use of the Lord test.

Once upon a time, with few exceptions, injuries sustained while traversing to or from employment did not bear the requisite causal relationship to the workplace. The myriad of recent decisions, however, employ a *de facto* strict liability standard to claims where employees are injured during the workplace commute. Without clarification from the Ohio Supreme Court, Ohio employers have no true guideline against which to measure compensability of injuries occurring while employees are coming

to or going from work. The current case law does, however, answer the age old conundrum, "Why did the chicken cross the road?" To get workers' compensation, of course.