2021 IL App (1st) 200502WC-U
No. 1-20-0502WC
Order filed January 8, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MARVIN A. BRUSTIN, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION (Brustin & Lundblad, Ltd., Defendant-Appellee).	))))))))))	Appeal from the Circuit Court of Cook County. No. 19L50264 Honorable Daniel P. Duffy, Judge, Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Presiding Justice Holdridge and Justices Pierce, Hudson, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: Because the facts of this case do not come within any recognized exception to the going and coming rule, petitioner is not entitled to workers' compensation benefits for injuries he sustained when he fell at a bus stop while waiting for a bus to ride to work.

¶ 2 Petitioner, Marvin A. Brustin, is an attorney and the president of respondent, Brustin & Lundblad, Ltd., a law firm in Chicago. As petitioner was at a bus stop, watching for

the arrival of a bus to ride to the office, he tripped on the edge of a sidewalk slab and fell, injuring his left shoulder. Pursuant to the going and coming rule (see *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 81 (1995)), the Illinois Workers' Compensation Commission (Commission) denied his claim for compensation. He sought judicial review in the Cook County circuit court, which confirmed the Commission's decision. Petitioner appeals.

¶ 3 We conclude that the facts of this case do not come within any recognized exception to the going and coming rule, which provides that "[i]njuries sustained by employees away from the workplace during travel to and from work are, generally, not compensable." *Id.* Therefore, we affirm the circuit court's judgment, which confirmed the Commission's decision.

¶ 4 I. BACKGROUND

¶ 5 Petitioner, age 81, testified that, although he no longer did day-to-day legal work at the firm, he supervised the office, tried cases, and dealt with major clients. His working hours were 9 a.m. to 5 p.m. Monday through Friday and half a day on Saturday. These were merely his usual working hours. He put in whatever amount of time was necessary to get the work done.

¶ 6 As petitioner described himself, he was an "on-call employee," meaning that, in the event of an emergency or if a problem arose that "ha[d] to be handled in some delicate or important fashion," he "would be available to be on-call to solve the problem or participate in the solution." Respondent had an answering service, and petitioner could be reached at home.

¶ 7 Petitioner lived in a high-rise at the corner of East Bellevue Place and inner Lake Shore Drive, where he occasionally met with clients or prepared opening statements and closing arguments. At 10 a.m. on Thursday, October 27, 2011, a client, Casey Boback, had an appointment to see petitioner. The appointment was to take place not in petitioner's apartment but in respondent's offices on North Dearborn Street. A little before 8 a.m. that day, petitioner

was at home when he received a call from respondent's office manager informing him that Boback already had arrived and was waiting for him. Boback was the business agent of a local labor union and a large source of business for respondent, and respondent had a rule that important clients such as Boback were not to be kept waiting.

¶ 8 Accordingly, petitioner got dressed in a hurry and walked briskly to a bus stop. The day was fair. The Michigan Avenue bus was the most direct and efficient way to get to the office, and petitioner had a Chicago Transit Authority bus pass, issued to him by respondent. As he was watching for the southbound bus, he tripped on the edge of a sidewalk slab and fell on his left shoulder. He was helped to his feet by bystanders. He found he was in so much pain that he had to support his left arm with his right hand. He took a cab to the hospital and, on the way, called on his cell phone to let the office manager know he was unable to meet with Boback.

¶ 9 Petitioner was diagnosed with a torn rotator cuff, for which he was prescribed physical therapy. He still has pain, weakness, and stiffness in his left shoulder and arm.

¶ 10 II. ANALYSIS

¶ 11 A. The Dispute Over What Is the Applicable Standard of Review

¶ 12 Petitioner contends that "the essential facts are undisputed" and that our standard of review, therefore, should be *de novo*. *Martinez v. Industrial Comm'n*, 242 Ill. App. 3d 981, 985 (1993).

¶ 13 Respondent disagrees that the essential facts are undisputed. To accept as true the propositions that come only from petitioner's testimony, one would have to believe his testimony—which, respondent contends, need not be believed in its entirety (for example, that it was necessary for petitioner to hurry to the office instead of having the other partner meet with Boback).

¶ 14 The Commission, however, found petitioner to be credible. In his decision, the arbitrator characterized petitioner's testimony as "very forthright" and "sincere," and the Commission affirmed and adopted the arbitrator's decision. Respondent does not maintain that the Commission's factual findings are against the manifest weight of the evidence or that its assessment of petitioner's credibility is unreasonable. Nor does respondent challenge any of the inferences the Commission drew. Consequently, the question on appeal is whether the facts found by the Commission come within any legally recognized exception to the going and coming rule (see *Lee*, 167 Ill. 2d at 81). That question is one of law, and, accordingly, the standard of review is *de novo*. See *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13; *Martinez*, 242 Ill. App. 3d at 985.

¶ 15 B. A Usual Access Route

¶ 16 According to petitioner, his "fall was related to his employment just the same as if he was an employee who fell because of a hazardous condition on the work premises." He compares himself to the employee in *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 908 (2006), who tripped on a metal strip in a walkway on the employer's premises. The appellate court held in that case: "When *** an injury to an employee arriving for work takes place in an area of the employer's premises which constitutes a usual access route for employees and is caused by some special risk or hazard located thereon, the 'arising out of' requirement of the Act is satisfied." *Id.* at 912.

¶ 17 Petitioner also compares himself to the employee in *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill. App. 3d 486, 488 (2004), who tripped on the edge of a sidewalk slab as she was walking to the workplace from an employer-owned parking lot. The appellate court held in *Litchfield Healthcare*: "When, as in this case, an injury to an employee takes place

in an area which is the usual route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment." *Id.* at 491.

¶ 18 The sidewalk in *Litchfield Healthcare* was on the employer's premises (*id.* at 490), as was the walkway in *University of Illinois* (*University of Illinois*, 365 Ill. App. 3d at 912). By contrast, the sidewalk where petitioner tripped was not on the employer's premises. Rather, the sidewalk was a considerable distance from the office. (Petitioner was about to take a bus to the office.) Thus, the sidewalk was not, properly speaking, an *access route* to the employer's premises. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/access (last visited Nov. 13, 2020) (defining "access" as "a way or means of entering or approaching"). In that respect, this case is significantly different from *University of Illinois* and *Litchfield Healthcare*.

¶ 19 C. Employees Who Are Actively at Work While En Route

¶ 20 Petitioner also compares himself to police officers who sustained injuries in traffic accidents while returning to the police station after a lunch break (*City of Springfield v. Industrial Comm'n*, 244 Ill. App. 3d 408, 409 (1993)), commuting from their home to the police station (*Keller v. Industrial Comm'n*, 125 Ill. App. 3d 486, 486 (1984)), or traveling to assist another police officer at a traffic stop (*Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC). Those three police officer cases are distinguishable, however, in that the police officers, while en route, already were performing a service for their employer—while traveling, they already were doing their job.

¶ 21 In the first case, *City of Springfield*, 244 Ill. App. 3d at 411, the employer required the police officer to have the police radio on at all times. The appellate court held that "[a]ctively monitoring the police radio during the course of [the] claimant's return trip to the station [was]

sufficient evidence upon which the Commission could draw the conclusion that the employer intended to retain authority over [the] claimant at the time his injuries arose." *Id.* Petitioner argues that, similarly, "the respondent law firm retained control over [him] by monitoring [his] activity via cell phone." There appears to be no evidence, however, that anyone at the law firm had supervisory control over petitioner, who, to quote from the arbitrator's decision, was the "president" and "senior attorney" of the firm. It was petitioner who "supervise[d] the office," not the other way around. Besides, carrying a cell phone—on which petitioner could have been called by anyone—was not fairly comparable to actively monitoring the communications on a police radio.

¶ 22 In the second case, *Keller*, 125 Ill. App. 3d at 487, the police officer was driving his personal car from his home to his workplace, the sheriff's office. Because the police officer was required to make arrests outside his shift hours whenever circumstances so warranted, his personal car was equipped with police lights and a police radio. *Id.* at 486. As the police officer was on his way to the sheriff's office, a reckless driver sped by on the icy road. *Id.* at 487. The police officer pulled off the road with the intent to turn around and pursue the reckless driver, but another car skidded on the ice and struck the police officer's car. *Id.* at 487-88. The appellate court held that, "from the moment [the police officer] sought to perform his proper duties" of stopping and ticketing a traffic offender, "he was acting in the course of his employment" and, therefore, he was entitled to compensation for his injuries. *Id.* at 489. This was another case, then, in which a police officer already was performing a service for the employer while on his way to the police station. By contrast, petitioner was performing no service for his employer while on his way to the office. He was simply en route from his home to the workplace.

¶ 23 In the third case, *Johnson*, 2011 IL App (2d) 100418WC, ¶¶ 6-8, the police

officer was on his shift when, in violation of the employer's policy, he left his patrol area without permission and drove to an adjoining county to pick up his personal mail. As the police officer was exiting the post office, the dispatcher radioed him to assist with a traffic stop. *Id.* ¶ 6. An assignment from the dispatcher was equivalent to an order from the sheriff and had to be obeyed. *Id.* ¶ 22. Accordingly, the police officer got in his squad car and set out for the traffic stop. *Id.* ¶ 7. On the way, he was broadsided at an intersection. *Id.* ¶ 8. The question on appeal was whether the "personal deviation," the unauthorized trip to the post office, should defeat the police officer's claim for workers' compensation benefits. See *id.* ¶ 15. The appellate court held that the police officer was entitled to compensation because, when he was injured, the "personal deviation" had ended. *Id.* ¶ 25. "[A]t the time of his injury," he "was a deputy sheriff, driving a Will County sheriff's patrol car, and responding to an assignment from his dispatcher to assist another deputy sheriff." *Id.* ¶ 28.

¶ 24 Petitioner likens himself to this police officer in *Johnson*. Petitioner argues that, like the police officer, he was attending to his personal affairs when he received a call from the office requiring him to rush to his place of duty and that he was injured en route. In *Johnson*, though, at the time of the accidental injury, the police officer was on his shift (*id.* ¶ 34 (McCullough, J., dissenting), operating a squad car issued to him by his employer (*id.* ¶ 28). When the police officer was injured, he already was on duty, doing what he was paid to do. By contrast, petitioner was not on his shift when he fell. Nor was he operating any employer-issued equipment. He was simply on his way to work.

¶ 25 D. On-Call Employees

¶ 26 Petitioner maintains that he is entitled to compensation because he is an on-call employee like the resident maintenance manager in *Lubin Management Co. v. Industrial*

Comm'n, 200 Ill. App. 3d 432, 433 (1990). The claimant in *Lubin* was indeed "on call 24 hours a day for emergencies." *Id.* Nevertheless, he recovered compensation not simply because of his status as an on-call employee. Rather, he recovered compensation because he was injured while doing what, by his employer's implied approval, had become an optional part of his job (*id.* at 436): giving a stranded tenant a ride back to the apartment complex (*id.* at 434). In comparison, petitioner was injured while going to his job, not while doing his job. On-call employees are not categorically exempt from the going and coming rule.

¶ 27 A case from New Jersey that petitioner cites, *Sabat v. Fedders Corp.*, 383 A.2d 421, 423 (N.J. 1978), recognizes an exception to the going and coming rule for *some* on-call employees. (This was before a 1979 amendment to New Jersey statutory law that limited compensation to accidents occurring "when the employee is engaged in the direct performance of duties assigned or directed by the employer." N.J. Stat. Ann. § 34:15-36 (West 2010). Even under the exception in *Sabat*, however, the mere status of being an on-call employee is insufficient to defeat the going and coming rule. *Sabat*, 383 A.2d at 424. There must be, in addition, a "showing of frequent and substantial disruption of the off-duty life of an employee whose continued availability is essential to the operational efficiency of his employer's business." *Id.* It does not appear that petitioner made such a showing.

¶ 28 E. A Special Mission

¶ 29 In petitioner's view, he deserves compensation because, when he fell, he was on a special mission. He quotes Larson's description of the special mission rule (or the "special errand rule," as it sometimes is called):

> "The special errand rule may be stated as follows: When an employee, having identifiable time and space limits on his employment, makes an off-premises

> journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself." 1 A. Larson, Workmen's Compensation Law § 16.11 (1985).

¶ 30 According to a Maryland case that petitioner discusses in his brief, three factors are relevant to determining whether the journey itself should be regarded as an important part of the service. *Barnes v. Children's Hospital*, 675 A.2d 558, 565 (Md. Ct. Spec. App. 1996).

¶ 31 The first factor is "the relative regularity or unusualness of the particular journey." (Internal quotation marks omitted.) *Id.* If it was a journey the employee normally made in the course of his or her employment, there is a "strong presumption" that the journey falls within the going and coming rule. (Internal quotation marks omitted.) *Id.*

¶ 32 The second factor is "the relative onerousness of the journey compared with the service to be performed at the end of the journey." (Internal quotation marks omitted.) *Id.* If the service to be performed at the end of the journey was trivial compared to the time and trouble of making the journey, this factor would tend to suggest that the journey itself was the essence of the service and that the mission was special. *Id.* If, on the other hand, the service to be performed at the end of the journey was substantial, the journey might be less substantial or onerous by comparison, and the case for characterizing the mission as special might be less compelling. *Id.* The Maryland court quotes the following example from Larson:

> " 'If a janitor walks five blocks to spend two hours working at a church in the evening, it would be difficult to conclude that the journey is a significant part of

> the total service. But if a janitor makes a longer journey merely to spend one instant turning on the lights, it is easier to say that the essence of the service was the making of the journey.' " *Id.* (quoting 1 A. Larson, *supra*, § 16.13, at 4-208.26).

"[T]he 'onerousness' of the journey," *Barnes* further explains, "depends not only on its length but also on the circumstances under which it is made, *i.e.*, the time of day, whether it is a regular workday, or the conditions of travel." *Id.*

¶ 33 The third factor, according to *Barnes*, is "the suddenness of the call to work or whether it was made under an element of urgency." (Internal quotation marks omitted.) *Id.* If the employee "must drop everything and travel to the workplace, this indicates that the travel itself could be part of the service rendered." *Id.* Suddenness and urgency do not necessarily make the mission special, but they are factors to consider. *Id.* at 566.

¶ 34 Suddenness and urgency are the only factors in petitioner's case that weigh in favor calling the mission special—and, according to petitioner's own cited authority, *Barnes*, "the suddenness of the call and the urgency of the trip are not dispositive." *Id.* The other two factors in *Barnes* would militate against a conclusion that the mission was special. (It is unnecessary to decide whether the factors in *Barnes* should be incorporated into Illinois law. Petitioner's argument, with its reliance on *Barnes*, can be evaluated on its own terms.) The journey from petitioner's apartment to the office was hardly unusual for him. It was a journey he took six days a week. See *id.* at 565; *cf. Benjamin H. Sanborn Co. v. Industrial Comm'n*, 405 Ill. 50, 52-53 (1950) (noting that "this was the first time during the [22] years of [the secretary's] employment she had been instructed to take a certified check home for the express purpose of delivering it to the postal authorities when [her coworker] took the [postage] machine to the post

office").

¶ 35 Also, further lessening the relative substantiality of the journey, the service that petitioner was to perform at the end of the journey was significant. See *Barnes*, 67 A.2d at 565. Boback was an important client who brought a lot of lucrative business to the law firm. The journey itself—the route of petitioner's ordinary commute—was not a substantial service compared to the service to be performed at the end of the journey. See *id.* Granted, Boback's appointment was not until 10 a.m., and the telephone call that petitioner received at home just before 8 a.m., informing him that Boback already had arrived, may have put petitioner in a rush, prompting him to leave for the office a couple of hours sooner than he had planned. Normally, however, petitioner arrived at the office by 9 a.m. So, this was not a radical change from his routine.

¶ 36 The cases that petitioner cites are distinguishable in that he was not ordered to return to work late at night to finish an overtime project. *Cf. International Art Studios v. Industrial Comm'n*, 83 Ill. 2d 457, 459 (1980). Nor was he ordered to come to work four hours early, in the small hours of the morning. *Cf. Thurston Chemical Co. v. Casteel*, 285 P.2d 403, 405 (Okla. 1955). Nor was he ordered to come to work on a day when he did not normally come to work. *Cf. Benjamin H. Sanborn*, 405 Ill. at 52; *Barnes*, 675 A.2d at 562. Nor was he ordered to travel to a destination other than the office. *Cf. Benjamin H. Sanborn*, 405 Ill. at 52; *Mason v. N.Y. Abstract Co.*, 200 N.Y.S.2d 677, 677-78 (N.Y. App. Div. 1960). Nor was he required to travel on icy roads. *Cf. Benjamin H. Sanborn*, 405 Ill. at 53; *Kyle v. Greene High School*, 226 N.W. 71, 71-72 (Iowa 1929). In short, nothing was special about this mission other than it commenced a couple of hours earlier than petitioner had anticipated—and, as the Commission noted, quoting 1 A. Larson, Workmen's Compensation Law § 16.12 (1972), "[t]he special

mission rule 'is ordinarily held inapplicable when the only special component is the fact that the employee began work earlier.' "

¶ 37 F. Traveling Employees

¶ 38 Petitioner claims that, like the employee in *Kertis*, 2013 IL App (2d) 120252WC, he is entitled to compensation because he was injured while traveling between offices. He characterizes the library of his residence as an office of his employer.

¶ 39 The comparison to *Kertis* is problematic for two reasons. First, the two offices in *Kertis* were two branch offices of the employer's bank, neither of which was the employee's residence. See *id.* ¶ 5. Second, in *Kertis*, the employee's " 'job duties required him to travel to and from the two bank locations.' " *Id.* ¶ 18.

¶ 40 In the present case, the record appears to lack any evidence that respondent required petitioner (1) to make the library of his apartment a branch of respondent's law office and (2) to travel to and from the law office and his library on job-related business. We acknowledge petitioner's testimony "that he ha[d] a library in his home," where "he occasionally [saw] clients," and that he "customarily prepare[d] opening statements and closing arguments there" (to quote from petitioner's brief). This does not prove, however, that respondent explicitly or practically "required" petitioner to use the library of his home for those purposes. *Id.* Petitioner did not testify that it was "an essential element" of his job to meet with clients in the library of his home and to prepare opening statements and closing arguments in the library of his home as opposed to performing those duties in respondent's offices on North Dearborn Street. *Id. Kertis*, therefore, is distinguishable, and petitioner is not a " 'traveling employee' " as described in that case. See *id.* ¶ 16 (defining a " 'traveling employee' " as "one whose work *requires* him to travel away from his employer's office" (emphasis added)).

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the circuit court's judgment, which confirmed the Commission's decision.

¶ 43 Affirmed.