[Cite as *Seese v. Ohio Bur. of Workers' Comp.*, 2009-Ohio-6521.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

PAUL D. SEESE,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2009-T-0018**
- vs -	:	
ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION, et al.,	:	
Appellees.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 2007 CV 00281.

Judgment: Affirmed.

Joseph A. Moro, Heller, Maas, Moro & MaGill Co., L.P.A., 54 Westchester Drive, #10, P.O. Box 4144, Youngstown, OH 44515 (For Appellant).

Richard Cordray, Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215-3428, and *Steven K. Aronoff*, Assistant Attorney General, 615 West Superior Avenue, 11th Floor, Cleveland, OH 44113-1899 (For Appellee Administrator, Bureau of Workers' Compensation).

Gregory B. Denny and *Andrew J. Wilhelms*, Bugbee & Conkle, L.L.P., 405 Madison Avenue, #1300, Toledo, OH 43604 (For Appellee Devon Industrial Group).

MARY JANE TRAPP, P.J.

{¶1} Paul D. Seese appeals from the judgment of the Trumbull County Court of Common Pleas denying his Motion for Judgment Notwithstanding the Verdict. Mr. Seese sustained injuries in a motorcycle accident en route to his regular work site on a Saturday, a day he was not normally scheduled for work. The sole issue presented in this appeal is whether the coming-and-going rule excludes him from participation in the

state's Workers' Compensation system. Because testimony presented at trial did not demonstrate he qualified under various exceptions to the coming-and-going rule, we answer the question in the affirmative.

{¶2} **Substantive Facts and Procedural History**

{¶3} Mr. Seese was employed by Devon Industrial Group, LLC, as a union carpenter foreman at the time of the incident. Devon had won a bid on a project at General Motors' Lordstown plant and Mr. Seese was assigned to work at the paint shop at the plant. He normally worked Monday through Friday. At the time of the incident, he had been commuting to Lordstown for this job for a year and half. The commute took between 15 and 20 minutes, and he would sometimes ride his motorcycle for the commute.

{¶4} In the morning of May 22, 2004, a Saturday, Mr. Seese received a telephone call from his supervisor, David DelRio. Apparently a wind storm the night before had damaged some roof paneling at the paint shop and water was dripping on the machinery at the shop. Mr. DelRio needed a carpenter to repair the paneling.[1]

{¶5} After receiving the telephone call, Mr. Seese got on his motorcycle, stopping first at a gas station to purchase gasoline and coffee. While at the gas station, Mr. DelRio telephoned again and asked Mr. Seese when he would arrive. Mr. Seese quickly resumed his trip to the plant. After traveling two miles, he stopped in the line of traffic for a red light behind a truck and then was involved in a serious accident.

{¶6} The details of the accident were not offered at trial. Mr. Seese's own testimony shows that the road conditions on that day were normal despite the wind

1. A union contract admitted at trial shows that Devon was required to offer Mr. Seese the job on an occasion like this, but he did not have to take the assignment.

storm the night before. He described it as a "beautiful" day. When asked if there were any hazards on the road, he answered: "[t]he only thing I would say is railroad tracks would be dangerous for anybody, whether you are on a vehicle or motorcycle." He stated the dangers posed by the tracks would be, however, common to the general public traveling on the road. There was no testimony or evidence indicating the road conditions were more hazardous on that day due to the wind storm.

{¶7} Mr. Seese filed a claim with the Ohio Bureau of Workers' Compensation, which was denied by the Administrator but allowed by the Industrial Commission. His employer, Devon, filed a notice of appeal with the trial court pursuant to R.C. 4123.512. Mr. Seese then filed the instant complaint, which he subsequently dismissed and then refiled. Devon's motion for summary judgment on Mr. Seese's complaint was denied.

{¶8} The matter proceeded to a jury trial and the jury returned a verdict in favor of Devon. Mr. Seese filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial. The trial court denied both motions. Mr. Seese now appeals, assigning the following error for our review:

{¶9} "The trial court erred to the prejudice of the plaintiff-appellant in denying his motion for judgment notwithstanding the verdict."

{¶10} **Standard of Review**

{¶11} We review a trial court's ruling on motion for judgment notwithstanding the verdict ("JNOV") de novo. See *Lanzone v. Zart*, 11th Dist. No. 2007-L-073, 2008-Ohio-1496, ¶56. Where a party seeks JNOV, "[t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may

reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions." *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. "A motion for *** judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *Blatnik v. Dennison* (2002), 148 Ohio App.3d 494, 504, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus.

{¶12} **The Coming-and-Going Rule**

{¶13} The sole issue presented by this appeal is whether Mr. Seese's injuries sustained while he travelled to work on a day he was not scheduled for work in response to an urgent situation at his regular work site is compensable under the Workers' Compensation program. Because he is undisputedly an employee with a fixed place of employment, a proper analysis of this issue requires a summary of the analytical framework provided by the Supreme Court of Ohio for such "fixed-situs" employees.

{¶14} "As a general rule, an employee with a fixed place of employment, who is injured while traveling to or from his place of employment, is not entitled to participate in the Workers' Compensation Fund because the requisite causal connection between the injury and the employment does not exist." *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 68. The so-called coming-and-going rule operates to bar a fixed-situs employee from participation in the Workers' Compensation program. In *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, the Supreme Court of Ohio further explained the "coming-and-going" rule as follows:

{¶15} "The coming-and-going rule is a tool used to determine whether an injury suffered by an employee in a traffic accident occurs 'in the course of' and 'arises out of' the employment relationship so as to constitute a compensable injury under R.C. 4123.01(C)." Id. at 119. "The rationale supporting the coming-and-going rule is that 'the constitution and the statute, providing for compensation from a fund created by assessments upon the industry itself, contemplate only those hazards to be encountered by the employee in the discharge of the duties of his employment, and do not embrace risks and hazards, such as those of travel to and from his place of actual employment over streets and highways, which are similarly encountered by the public generally.'" Id., citing *Indus. Comm. v. Baker* (1933), 127 Ohio St. 345, paragraph four of the syllabus.

{¶16} An analysis under the coming-and-going rule begins with the question of whether the employee has a fixed place of employment, i.e., a fixed-situs employee, as opposed to an employee with periodic reassignment of job sites. In the instant case it is undisputed that Mr. Seese had a fixed place of employment at the Lordstown plant at the time of the incident. Classification of the employee as a fixed-situs employee, however, does not end the inquiry under the coming-and-going rule. This is because the courts have carved out several exceptions to the rule. Therefore, a fixed-situs employee is not automatically barred from participation in the Workers' Compensation program.

{¶17} R.C. 4123.01(C) requires all injured employees claiming entitlement to participation in the Workers' Compensation program to demonstrate that he or she received the injury in the course of and arising out of his or her employment. A fixed-situs claimant may be able to avoid the application of the coming-and-going rule "in the

rare circumstance where he or she can nevertheless demonstrate that he received an injury 'in the course of and arising out of his employment.'" *Ruckman* at 120. The court emphasized, however, that "[s]atisfaction of both statutory elements is a prerequisite to recovery from the fund." Id. at 121.[2] See, also, *Barber v. Buckeye Masonry & Constr. Co.*, 146 Ohio App.3d 262, 269 (this court stating "while these two requirements overlap, an injured employee must prove the existence of both requirements").

{¶18} **Course of Employment**

{¶19} The "course-of-employment" inquiry involves "the time, place, and circumstances of the injury," which are factors to use "to determine whether the required nexus exists between the employment relationship and the injurious activity." As the court in *Ruckman* explained:

{¶20} "The phrase 'in the course of employment' limits compensable injuries to those sustained by an employee while performing a required duty in the employer's service. 'To be entitled to workmen's compensation, a workman need not necessarily be injured in the actual performance of work for his employer.' An injury is compensable if it is sustained by an employee while that employee engages in activity that is consistent with the contract for hire and logically related to the employer's business.

2. In a footnote, the *Ruckman* court acknowledged that a number of jurisdictions follow a "quantum theory" of work-connection, allowing the strength of either the "in the course of" or the "arising out of" element to make up for the weakness of the other element. The *Ruckman* court explained that the "quantum theory" was, in part, based on the often overlapping nature of the two elements. The court noted that in its earlier decision, *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 277, it observed that both elements merge into a test of work-connectedness, but did not waiver from its statement that both elements nevertheless must be satisfied before compensation will be allowed. *Ruckman* at footnote 3.

{¶21} "In the normal context, an employee's commute to a fixed work site bears no meaningful relation to his employment contract and serves no purpose of the employer's business. That is not the case, however, where [] the employee travels to the premises of one of his employer's customers to satisfy a business obligation." Id. at 120-121.

{¶22} "In order to avail himself of the provisions of our compensation law, the injuries sustained by the employee, must have been 'occasioned in the course of' his employment. *** If the injuries are sustained [off premises], the employee, acting within the scope of his employment, 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." Id. (internal citations omitted).

{¶23} "Under this requirement, the employee need not necessarily be injured while performing work for his employer. It is enough if the employee can show that his injury was sustained while he was engaging in an activity that is consistent with the contract for hire and logically related to his employer's business. Normally, an employee's commute to a fixed work site is not sufficiently related to the employer's business to be in the course of employment." *Werden v. Adm'r. Bureau of Workers' Comp.*, 151 Ohio App.3d 815, 2003-Ohio-1222, ¶15 (internal citations to *Ruckman*, supra, omitted).

{¶24} An example of how an injured employee with a fixed place of employment can satisfy the "course-of-employment" element was demonstrated in *Ruckman*. In that case, the employees sustained injuries from traffic accidents while travelling from their homes to remote locations where their employer assigned them to drill wells. Despite periodic reassignment of job sites, the employees' workday began and ended at the

drilling sites, and they were therefore considered by the court as fixed-situs employees. The court proceeded to analyze whether their injuries qualified under the course-of-employment analysis. It concluded the employees' injuries occurred in the course of their employment, explaining:

{¶25} "In the normal context, an employee's commute to a fixed work site bears no meaningful relation to his employment contract and serves no purpose of the employer's business. That is not the case, however, where, as here, the employee travels to the premises of one of his employer's customers to satisfy a business obligation. Under the standard announced by this court in *Indus. Comm. v. Bateman* (1933), 126 Ohio St. 279, the riggers here have established the required relationship between employment and injury to satisfy the course-of-employment requirement." Id. at 121. Quoting *Indus. Comm.* at paragraph two of the syllabus, the *Ruckman* court further explained the notion of course-of-employment:

{¶26} "In order to avail himself of the provisions of our compensation law, the injuries sustained by the employee, must have been 'occasioned in the course of' his employment.' *** If the injuries are sustained [off premises], the employee, acting within the scope of his employment, 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." Id.

{¶27} **Arising Out Of Employment**

{¶28} To satisfy the definition of injury under R.C. 4123.01(C), a claimant must also show his injury arose out of his employment. A fixed-situs employee is generally not entitled to participate in the workers' compensation fund because a causal connection does not exist between his injury and his employment to satisfy the "arising out of" requirement. *Ruckman* at 119, citing *MTD Products* at 68. The *Ruckman* court,

however, recognized three exceptions under which the employee may demonstrate the causal connection to satisfy the "arising out of employment" prong: (1) the "totality of the circumstances" test first adopted in *Lord v. Daugherty* (1981), 66 Ohio St.2d 441; (2) the "zone of employment" test, and (3) the "special hazard" test. *Ruckman* at 123.

{¶29} The totality of the circumstances test is used to determine "whether there exists a sufficient causal connection between injury and employment to justify a claimant's participation in the fund." *Ruckman* at 122. "That test requires primary analysis of the following facts and circumstances: '(1) the proximity of the scene of the accident to the place of employment, (2) the degree of control the employer had over the scene of the accident, and (3) the benefit the employer received from the injured employee's presence at the scene of the accident.'" Id. (citation omitted). The *Ruckman* court emphasized, however, these enumerated factors are not exhaustive and the test may continue to evolve. Id.

{¶30} Under the "zone of employment" exception, a fixed-situs employee is not barred from recovery pursuant to the coming-and-going rule if his injury occurs with the "zone of employment." *MTD Products* at 68, citing *Bralley v. Daugherty* (1980), 61 Ohio St.2d 302, 304.

{¶31} Regarding the "special hazard" exception, which is pertinent to the instant appeal, the Supreme Court of Ohio described the exception as: "[a] fixed-situs employee is entitled to workers' compensation benefits for injuries occurring while coming and going from or to his place of employment where the travel serves a function of the employer's business and creates a risk that is distinctive in nature from or quantitatively greater than risks common to the public." *Ruckman* at paragraph two of syllabus.

{¶32} *MTD Products* provided an example of an application of the "special hazard" exception. In that case, the Supreme Court of Ohio denied recovery because the risk encountered by the employee, who was injured while making a left turn into the employer's premises across traffic on a congested city street, was a risk neither distinctive in nature nor quantitatively greater than the risk common to the public. *MTD Products* at 69.

{¶33} At the trial in the instant case, the parties focused on whether Mr. Seese's injuries qualified under the various exceptions to the arising-out-of-employment prong of the analysis. The trial court instructed the jury, as Mr. Seese requested, on the "zone of employment" and "special hazard" exceptions to the coming-and-going rule.[3] In addition, Mr. Seese requested an instruction on the "special mission" exception. The *Ruckman* court did not mention this exception but it was discussed in a 1966 appellate decision, *Pierce v. Keller* (1966), 6 Ohio App.2d 25. There, the Third District described the "special mission" rule as follows:

{¶34} "An exception to the general rule *** that the workmen's compensation law ordinarily does not cover an employee injured while going to, or returning from, his employment exists where the injury is sustained by the employee while performing a special task, service, mission, or errand for his employer, even before or after customary working hours, or on a day on which he does not ordinarily work. For the exception to arise, the mission must be the major factor in the journey or movement, and not merely incidental thereto, and the mission must be a substantial one." *Pierce* at 29 (citation omitted).

3. Our review of the trial transcript indicates Mr. Seese did not request an instruction on the "totality of circumstances" test.

{¶35} In the *Pierce* case, the employee was a truck driver materialman for power line maintenance crews. He died of a traffic incident when traveling to work from his home while carrying certain instructions from his employer to the maintenance crew foreman at his regular work site. The Third District denied recovery in the Workers' Compensation program. It reasoned "where an employee receives accidental injuries on a highway *** while traveling from his home to the place where he reports for work, at a time outside of the hours for which he is paid wages, by a route, at a time, and by a means of transportation, selected by him and under his control, and at such time and place is carrying instructions for and at the direction of his employer, which mission is merely incidental to and not the reason for the journey, such injuries are a result of hazards which are similarly encountered by the public generally, are not a result of exposure occasioned by the nature, conditions or surroundings of his employment, do not, therefore, arise from his employment and are not compensable under the provisions of the Workmen's Compensation Act." Id. at 29-30.

{¶36} **Whether the "Special Hazard" or "Special Mission" Exception Applied to Mr. Seese's Injuries**

{¶37} The trial transcript indicates Mr. Seese attempted to show his injuries qualified under the exceptions to the coming-and-going-rule under the arising-out-of-employment inquiry.[4] He requested, and the trial court provided, instructions on the "zone of employment," "special hazard," and "special mission" exceptions to the coming-and-going rule. On appeal he only claims he is entitled to recovery under the "special

4. A fixed-situs employee must satisfy both the "course of employment" and "arising out of" elements to be entitled to recovery. In this case, the jury could have found Mr. Seese did not satisfy one or both prongs. On appeal the parties focus exclusively on the "arising out of" element. Because we conclude Mr. Seese did not demonstrate his injuries "arose out his employment" and the trial court properly denied Mr. Seese' motion for JNOV, we need not address whether the evidence demonstrated his injuries occurred "in the course" of his employment.

hazard" and "special mission" exceptions, and therefore we do not address the "zone of employment" exception.

{¶38} In support of his claim that he qualified for recovery under one of the exceptions, Mr. Seese presented testimony that he drove his motorcycle to his regular work site, a paint shop at GM's Lordstown plant, on a Saturday, after he received an urgent telephone call from his supervisor. The roof panels at the shop had been damaged by the wind storm the night before and required immediate repair. Mr. Seese himself testified, however, that the weather conditions on that day were normal and nothing inhibited his ability to see. Although he testified he observed, when he walked his dog earlier that day, that tree branches and leaves were strewn on the street due to the storm, there was no testimony showing that any debris on the street played a role in the accident. He testified the only road hazards in his commute were the railroad tracks, which he acknowledged was a risk faced by the general public.

{¶39} Furthermore, Mr. Seese testified while he stopped at the gas station, he received another call from his supervisor, which caused him to get back on his motorcycle in a hurry. No testimony, however, suggests that speed was a factor in the motorcycle accident.

{¶40} Therefore, the evidence presented at trial does not establish the requisite causal relationship between Mr. Seese's injuries and his employment for him to avoid the application of the coming-and-going rule. We recognize that *but for* his employer's need for his presence at work due to a storm, he would not have sustained the injuries. However, the courts have required an employee injured while commuting to a fixed work site to satisfy more than the but-for test in order to participate in the Workers' Compensation program.

{¶41} To qualify under the "special hazard" exception, Mr. Seese needs to show that the risk created by his traveling to his work site on May 22, 2004, was "distinctive in nature or quantitatively greater than the risk common to the general public." The evidence he presented at trial failed to meet his burden of persuasion. Had the wind storm, which precipitated the need for Mr. Seese to drive to work on that day, also made the road particularly hazardous to travel, the causal relation between the injurious activity and the employment would have been much less tenuous. Based on Mr. Seese's own testimony, however, the risk he faced driving to work that day was not distinctive or greater than the risk common to the general public.

{¶42} Mr. Seese similarly failed to demonstrate he qualified under the "special mission" exception pursuant to *Pierce.* In *Pierce,* the "special mission" involved the employee's carrying instructions from his employer to his regular work site. The court explained that the employee's carrying instructions for the employer while traveling to work from home did not qualify the employee under the "special mission" exception, because the mission was merely incidental to the journey and not the reason for the journey. Mr. Seese misunderstood the notion of "special mission." Unlike the employee in *Pierce*, Mr. Seese was *not* performing any task, mission, or errand for his employer when he sustained his injury. He was *merely* driving to work, albeit on a day he did not ordinarily work, in response to his employer's urgent need. There was no "special mission" Mr. Seese was carrying out *while* he travelled to work; commuting to work on a day not regularly scheduled does not constitute a special mission contemplated by the exception as explained in *Pierce*. The injuries Mr. Seese sustained, as his own testimony indicates, were a result of normal hazards regularly encountered by the

general public, and not a result of "exposure by the nature, conditions or surroundings of his employment." *Pierce* at 29-30.

{¶43} **On-Call Employee Exception**

{¶44} On appeal, Mr. Seese also argues, for the first time, that he was an on-call employee subject to recall by his employer at all hours and therefore his injuries qualify under the on-call employee exception applied by the First District in *Durbin v. Ohio Bureau of Workers' Compensation* (1996), 112 Ohio App.3d 62. In that case, the court stated "where an employee, who has no regular hours of employment but is on call and subject to recall by his employer at all hours, is struck by an automobile and injured while responding to a call from his employer to go to his place of employment, there is a sufficient causal connection between the injury and the employment to permit participation in the workers' compensation system." Id. at 67.

{¶45} The trial transcript reflects Mr. Seese did not request an instruction on the "on-call" exception. Therefore, he waived his right to raise any issue relating to this claim on appeal. Even if he did request the jury instruction, we note that the evidence does not support the claim that Mr. Seese was an on-call employee. On the contrary, Mr. Seese testified he worked regular hours from Monday through Friday. There was no evidence showing he had no regular hours and was subject to recall at all hours by his employer.

{¶46} Consequently, applying the standard of review for a motion for JNOV and construing the evidence most strongly in favor of his employer, we conclude the trial court did not err in denying Mr. Seese's motion for JNOV after the jury found his injuries not recoverable under the state's Workers' Compensation program. We sympathize with Mr. Seese for the serious injuries he sustained en route to work on a day he was

not scheduled for work in response to an urgent need by his employer. However, the evidence adduced at trial fails to show that his injuries were a result of his exposure to the risks and hazards beyond those faced by the general public. Therefore, the coming-and-going rule excludes his participation in the Workers' Compensation program.

{¶47} For the foregoing reasons, we overrule Mr. Seese's assignment of error and affirm the judgment of the Trumbull County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.