[Cite as *Cunningham v. Lukjan Metals Prods., Inc.*, 2010-Ohio-822.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

DEBORAH F. CUNNINGHAM,	:	**O P I N I O N**
Appellee,	:	
		CASE NO. 2009-A-0033
- vs -	:	
LUKJAN METALS PRODUCTS, INC., et al.,	:	
Appellants.	:	

Administrative Appeal from the Court of Common Pleas, Case No. 2009 CV 1490.

Judgment: Affirmed.

Walter Kaufmann, Boyd, Rummell, Carach & Curry Co., L.P.A., Huntington Bank Building, 4th Floor, P.O. Box 6565, Youngstown, OH 44501-6565 (For Appellee).

John F. Burke, III, Mansour, Gavin, Gerlack & Manos, 2150 Illuminating Building, 55 Public Square, Cleveland, OH 44113-1994 (For Appellant Lukjan Metals Products, Inc.).

Richard Cordray, Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215-3428 and *Stuart A. Saferin*, Assistant Attorney General, State Office Building, 11th Floor, 615 West Superior Avenue, Cleveland, OH 44113-1899 (For Appellant Marsha P. Ryan)

MARY JANE TRAPP, P.J.

{¶1} Lukjan Metals Products, Inc., et al., appeal from a judgment of the Ashtabula County Court of Common Pleas in favor of Deborah F. Cunningham, an employee of Lukjan. Ms. Cunningham was injured in an automobile accident while on a temporary assignment for Lukjan in North Carolina. The Industrial Commission ruled

that she was not eligible to participate in the Workers' Compensation program on the basis of the "coming and going" rule. Ms. Cunningham appealed that decision to the trial court, which granted her summary judgment.

{¶2} Ms. Cunningham's co-worker, Raymond A. West, Jr., was also injured in the same accident. The trial court similarly granted him summary judgment after the Industrial Commission rejected his claim. We have considered Lukjan's appeal in that case and affirmed the trial court, in *West v. Lukjan Metals Prods.*, 11th Dist. No. 2009-A-0014, 2009-Ohio-5761. For the same reasons, we affirm the trial court in the instant appeal.

{¶3} The facts and circumstances surrounding the injuries sustained by Mr. West and Ms. Cunningham are described in *West* as follows:

{¶4} "West, Mary Ann Runnion, Deborah Cunningham, and Karen Fields were employees at the Lukjan plant in Conneaut, Ohio. They were sent to North Carolina, on a one-week temporary assignment, to assist with the training of the North Carolina Lukjan employees and to complete production runs at the North Carolina Lukjan plant. Prior to this trip, West had been on three or four similar week-long trips to assist at the North Carolina plant.

{¶5} "West, Runnion, Cunningham, and Fields departed Conneaut on February 19, 2007, in a rental car, rented and paid for by Lukjan. They were paid for travel time until they reached their destination in North Carolina: a rental house, chosen and paid for by Lukjan, for West, the only male employee on the trip; and a motel for the remaining three female employees, also reserved and paid for by Lukjan. The employees were required by Lukjan to stay in these accommodations, located

approximately 10 to 15 minutes away from the plant, during their week long assignment in North Carolina.

{¶6} "In addition to the lodging expenses, Lukjan also paid for all meals for the four employees. During the stay in North Carolina, in addition to driving the rental vehicle, Runnion kept track of all payroll information, accounting for the hours of the four employees, and she was to provide the payroll information to Lukjan upon return to Ohio." *West* at ¶2-4.

{¶7} On February 23, 2007, after working at the North Carolina Lukjan plant, Ms. Runnion, the supervisor, drove Mr. West, Ms. Cunningham, and Ms. Fields to their accommodations, dropping off Mr. West first at the rental house before returning to the motel where the three female employees stayed. Mr. West was in the front passenger seat of the Lukjan rental vehicle, and Ms. Cunningham and Ms. Fields were in the backseat of the vehicle. On the way to the rental house, the vehicle was involved in an accident. All four employees sustained injuries in the accident, which was later determined to be the fault of the other vehicle.

{¶8} The Industrial Commission denied Ms. Cunningham's right to participate in the Workers' Compensation program, finding that her claim was barred by the "coming and going" rule. The staff hearing officer found that Ms. Cunningham did not sustain a compensable injury because her injury occurred during her return trip to her temporary lodging.

{¶9} Ms. Cunningham appealed the Industrial Commission's denial to the Ashtabula County Court of Common Pleas. Both Lukjan and the Bureau of Workers' Compensation answered and denied the material allegations of her complaint. Ms.

Cunningham then filed a motion for summary judgment, which was opposed by Lukjan. The trial court granted Ms. Cunningham summary judgment, finding that her participation in the Workers' Compensation program is not barred by the "coming and going" under the "zone of employment" exception as well as the "totality of the circumstances" test.

{¶10} Lukjan timely appeals and raises the following assignment of error:

{¶11} "The trial court erred when it granted Plaintiff-Appellee's motion for summary judgment."

{¶12} We review de novo a trial court's order granting summary judgment. *Hapgood v. Conrad*, 11th Dist. No. 2000-T-0058, 2002-Ohio-3363, ¶13, citing *Cole v. Am. Industries and Resources Corp.* (1998), 128 Ohio App.3d 546. "A reviewing court will apply the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law." Id. citing *Parenti v. Goodyear Tire & Rubber Co.* (1990), 66 Ohio App.3d 826, 829.

{¶13} Pursuant to Civil Rule 56(C), summary judgment is proper when (1) the evidence shows "that there is no genuine issue as to any material fact" to be litigated, (2) "the moving party is entitled to judgment as a matter of law," and (3) "it appears from the evidence *** that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence *** construed most strongly in the party's favor."

{¶14} As we stated in *West*, "[t]o qualify for workers' compensation, an employee must suffer an injury 'in the course of, and arising out of,' his employment. *** An 'injury' is limited to those injuries that are received 'in the course of' *and* 'arising out of' the injured employee's employment. 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." Id. at ¶16 (internal citations and quotations omitted).

{¶15} Lukjan contends that Ms. Cunningham's claim was barred by the "coming-and-going" rule. "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." *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 119. Lukjan cites to *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St.3d 66, which states, "[a]s 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." Id. at 68.

{¶16} As we noted in *West*, the courts have recognized three exceptions to the "coming and going" rule: (1) when the injury occurs within the "zone of employment"; (2) when the employment creates a "special hazard"; or (3) there is a causal connection

between the employee's injury and employment based on the "'totality of the circumstances' surrounding the accident." Id. at ¶18, *citing Weiss v. Univ. Hosps. of Cleveland* (2000), 137 Ohio App.3d 425, 430-431, citing *MTD* at 68-70.

{¶17} In *West*, we determined Mr. West's injury qualifies for workers' compensation under both the "zone of employment" test and the "totality of circumstances" test. Our analysis there applies equally to Ms. Cunningham's injury. Regarding the "zone of employment" exception, we stated:

{¶18} "West contends that he meets the requirements of the 'zone of employment' exception. We agree. [*MTD*] states that '[t]he general rule *** does not operate as a complete bar to an employee who is injured commuting to and from work if the injury occurs within the "zone of employment."' 61 Ohio St.3d at 68 (citation omitted). A critical inquiry of the 'zone of employment' analysis is whether the employer had control over the area where the accident occurred. Id. at 69.

{¶19} "In the present case, the fact that the accident happened on a public street and not on Lukjan's property does not end the inquiry. See *Baughman v. Eaton Corp.* (1980), 62 Ohio St.2d 62, 63 (Finding the appellee eligible for worker's compensation when '[a]ppellee parked his automobile in the only employer parking lot then available to him free of charge[,] [h]is injuries occurred on the public street as he proceeded, without deviation, toward the plant entrance prior to the commencement of his shift. *** [A]ppellee could not reach the plant entrance without crossing the public street.').

{¶20} "West's accident occurred in a car, rented by Lukjan and driven by a Lukjan employee, traveling from the Lukjan plant to the temporary residence where West was required to stay, a place chosen and paid for by Lukjan. *** [The employees]

had no other means of traveling between the Lukjan plant and the temporary residence, other than the vehicle furnished by Lukjan. Lukjan had a great deal of control over the accommodations, work schedule, meals, vehicle, and driver of the vehicle. See *Weiss*, 137 Ohio App.3d at 431 ('the control element can be satisfied if, because of conditions created by the employer in the "zone of employment", the employee has no choice as to how to travel to his or her employment'); *Gonzalez v. Admr., Bur. of Workers' Comp.*, 7th Dist. No. 03 MA 86, 2004-Ohio-1562, at ¶15 ('[c]ontrol can be established either over the physical location or by showing that because of conditions created by the employer, the employee has no choice as to how to travel to his or her employment'); *Meszaros v. Legal News Publishing Co.* (2000), 138 Ohio App.3d 645, 648 (finding that an injury occurred within the zone of employment where the employee 'had no choice' as to where to park).

{¶21} "Accordingly, West was in the 'zone of employment' at the time of the accident." *West* at ¶19-21.

{¶22} Regarding the "totality of circumstances" test, we provided the following analysis:

{¶23} "Lukjan also contends that '[a]pplication of the *Lord* factors to the present situation does not support [West's] right to participate in the Ohio workers' compensation fund.' Lukjan argues that a sufficient causal connection between the injury and employment did not exist to justify West's participation in the Fund.

{¶24} "We disagree. West would qualify for the Workers' Compensation under the 'totality of circumstances' test. 'While not dispositive of cause, the following factors [(the *Lord* Factors)] are relevant to the inquiry: "(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."' [*Rantamaki v. Conrad*, 11th Dist. No. 2005-A-0040, 2006-Ohio-1010, ¶10-11], quoting *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, at the syllabus. '[W]hen applying the analysis set forth above, a reviewing court must examine the separate and distinct facts of each case. *** This is because workers' compensation cases are, to a large extent, very fact specific. As such, no one test or analysis can be said to apply to each and every factual possibility. Nor can only one factor be considered controlling. Rather, a flexible and analytically sound approach to these cases is preferable. Otherwise, the application of hard and fast rules can lead to unsound and unfair results.' *Fisher v. Mayfield* (1990), 49 Ohio St.3d 275, 280.

{¶25} "Based on the discussion above, Lukjan had control over the scene of the accident. Furthermore, Lukjan received an economic benefit from the cost savings associated with requiring their workers to travel together in one vehicle. Additionally, the accident was in proximity to the Lukjan North Carolina plant; the vehicle was en route from the plant to West's lodging, which was located a reasonable distance from the plant, when the accident occurred.

{¶26} "When considering the totality of the facts and circumstances of this case, we find that the test set forth in *Lord* has been met. Thus, West has shown a sufficient causal connection between the injury and his employment to warrant a conclusion that the injury was in the course of and arose out of his employment." *West* at ¶23-26.

{¶27} Ms. Cunningham was injured in the same automobile accident while on the same temporary assignment for Lukjan; therefore, our analysis in *West* is equally

applicable in the instant case. We note additionally that a key factor in both the "zone of employment" and "totality of circumstances" analysis is the degree of control exercised by the employer over the circumstances surrounding the injury. The control exercised by Lukjan played an even more prominent role in Ms. Cunningham's injury, because the Lukjan-rented vehicle was driven by the company supervisor, Ms. Runnion, who drove Mr. West to his rental house first before driving the female employees to their motel, and the accident occurred en route to Mr. West's rental house. Ms. Cunningham had even *less* control than Mr. West over the route and the manner in which she returned to her temporary residence on the day of the incident.

{¶28} Given the evidence in the record, there is no genuine issue of material fact as to whether Ms. Cunningham's injuries occurred "in the course of" and "arising out of" her employment. She is entitled to participate in the Workers' Compensation Fund and the trial court properly granted her summary judgment.

{¶29} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

COLLEEN MARY O'TOOLE, J.,

concur.