[Cite as *Miller v. Bur. of Workers' Comp.*, 2010-Ohio-1347.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

RICHARD MILLER Appellant v. ADMINISTRATOR, BUREAU OF WORKERS' COMPENSATION and THE CITY OF AKRON Appellee	C.A. No. 24805 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2008-08-5773

DECISION AND JOURNAL ENTRY

Dated: March 31, 2010

Per Curiam.

{¶1} Appellant, Richard Miller, appeals from the judgment of the Summit County Court of Common Pleas, granting summary judgment in favor of Appellees, the Bureau of Workers' Compensation ("BWC") and the City of Akron. This Court reverses.

I

{¶2} On February 29, 2008, Mr. Miller slipped and injured his back in the parking lot of the Akron Family Restaurant while ending one of his paid, fifteen-minute breaks. Mr. Miller, an employee of the City of Akron, filed a workers' compensation claim with the Industrial Commission, but the Industrial Commission denied his claim. The Industrial Commission further denied Mr. Miller's appeal, so Mr. Miller filed an appeal in the Summit County Court of Common Pleas on August 15, 2008. On April 30, 2009, BWC and the City of Akron filed a joint motion for summary judgment, arguing that Mr. Miller's injury did not arise out of the course

and scope of his employment. On May 11, 2009, Mr. Miller filed a combined motion in opposition and cross-motion for summary judgment. On May 22, 2009, the trial court granted BWC and the City of Akron's joint motion for summary judgment.

{¶3} Mr. Miller now appeals from the trial court's judgment and raises two assignments of error for our review. For ease of analysis, we consolidate Mr. Miller's assignments of error.

II

Assignment of Error Number One

"THE TRIAL COURT ERRED WHEN IT APPLIED THE 'COMING AND GOING RULE' IN GRANTING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT."

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN NOT GRANTING MILLER'S CROSS MOTION FOR SUMMARY JUDGMENT AS HE WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME AT THE TIME (sic) OF HIS INJURY."

{¶4} In his first and second assignments of error, Mr. Miller argues that the trial court erred by granting BWC and the City of Akron's motion for summary judgment and by denying Mr. Miller's cross-motion for summary judgment. Specifically, he argues that his injury is compensable because it occurred in and arose out of the course and scope of his employment. We agree.

{¶5} "Appellate review of a lower court's entry of summary judgment is de novo[.]" *Smith v. Akron*, 9th Dist. No. 22101, 2004-Ohio-5174, at ¶9. See, also, *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶6} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains 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 viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). Id. Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. Id. at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶7} In his deposition testimony, Mr. Miller explained that he worked for the City of Akron as a "housing rehab specialist." He commenced his work day at One Cascade Plaza in Akron and performed many of his duties there. Mr. Miller's job entailed inspecting the homes of individuals seeking housing assistance from the City. Mr. Miller estimated that he spent approximately forty percent of his time conducting inspections at people's homes. According to Mr. Miller, he scheduled his own inspections and generally performed one inspection in the morning and one in the afternoon. Mr. Miller drove his own vehicle to inspections, but the City of Akron paid him mileage. Mr. Miller testified that he worked from 8:00 a.m. to 4:30 p.m. each day and received two paid, fifteen-minute breaks each day.

{¶8} On the day of his accident, Mr. Miller testified that he left his office at One Cascade Plaza at about 9:30 a.m. to inspect a house on South Hawkins Avenue in Akron. Mr. Miller decided to take his paid coffee break before inspecting the home. He stopped at the Akron Family Restaurant for a cup of coffee on the way to the inspection site. Mr. Miller remained at the restaurant to drink his coffee and departed after about fifteen minutes. When leaving the restaurant to get back in his car and drive to the inspection site, Mr. Miller slipped on some ice in the parking lot and injured his back.

THE COMING AND GOING RULE

{¶9} In concluding that Mr. Miller was not entitled to compensation, the trial court referred to the coming and going rule as follows: "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 Worker's Compensation Fund because the requisite causal connection between the injury and the employment does not exist." *Mitchell v. Cambridge Home Health Care, Inc.*, 9th Dist. No. 24163, 2008-Ohio-4558, at ¶8. The trial court also concluded that no exceptions to the coming and going rule applied to Mr. Miller.

{¶10} Mr. Miller argues that the trial court incorrectly applied the coming and going rule under circumstances where Mr. Miller was on the job at the time he was injured and was taking a permissible paid coffee break that was incidental to his employment. We agree that the trial court incorrectly concluded that the coming and going rule applied under the circumstance of this case.

{¶11} It is well settled that "[a]n injury sustained by an employee is compensable under the Workers' Compensation Act only if it was received in the course of, and arising out of, the injured employee's employment." (Internal quotations and citations omitted.) *Fisher v.*

Mayfield (1990), 49 Ohio St.3d 275, 276. In applying that standard, we must be mindful that the workers' compensation statute is to be liberally construed in favor of awarding benefits. Id. at 278. The general premise underlying the coming and going rule is that when an injury occurs while going to or coming from work, it is not compensable because it is not deemed to either arise out of or to be in the course of the employee's employment. *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 119. The classic application of the coming and going rule entails a situation where the employee is leaving home to travel to work or where the employee is on the way home after the work day has ended. See id. The rationale for excluding compensation when a person is off of the work premises and is not "on the clock" is to make a clear delineation between an injury that is related to the time and place of employment and an injury that is not. Id. On the one hand, compensation under the statute is not limited to injuries occurring at the precise moment that the employee is engaged in his work duties. As Professor Larson points out, whether an injury was sustained in "[t]he course of employment is not confined to the actual manipulation of the tools of the work, nor to the exact hours of work." 1 Larson, Larson's Workers' Compensation Law (2009) 13-2 to 13-3, Section 13.01[1]. Conversely, there is general agreement that workers' compensation "was not intended to protect against all the perils of that journey." Id.

{¶12} The tension between the proper scope of compensation while going to and coming from work was encountered by the Supreme Court of Ohio in two cases decided within two years of each other. In *Inglish v. Indus. Comm. of Ohio* (1932), 125 Ohio St. 494, 503-04, a school teacher left school and was injured on his way home. The evidence established that the teacher was carrying home additional work to be completed at home in the evening. Id. The completion of the work was a requirement of his employment and the work could not be completed during

the work day. Id. at 503. Furthermore, it was impossible to complete the work at school because there was no light available. Id. The *Inglish* Court determined that the teacher's injury arose out of and in the course of his employment in view of the following facts: (1) the employee had his work papers with him when injured; (2) the employee had to work at home because there was no light at the school; (3) the employee had taken a direct and necessary route home; (4) the employee was furthering the interests of the employer by taking the work home; and (5) work at home was as much a part of his employment as it was during the school hours. Id. at 503-04.

{¶13} Two years later, in *Indus. Comm. of Ohio v. Gintert* (1934), 128 Ohio St. 129, paragraph three of the syllabus, the Supreme Court reluctantly overruled *Inglish* in a case involving a school teacher who was injured on her way to work. As the teacher in *Inglish*, the teacher in *Gintert* had worked at home and had her work with her at the time of her injury. Id. at 132. The *Gintert* Court was clearly concerned that the suspension of the coming and going rule in *Inglish* would translate into compensation for "any clerk, stenographer, bookkeeper or of any other employee employed in an office, bank, store, factory, or other place of employment who carried home any books, papers, statements, etc., for any purpose at all connected with his duties[.]" Id. at 133.

{¶14} In light of the inherent problem associated with where the line must be drawn when leaving home to go to work and leaving work to return home, courts have generally arrived at a compromise in which an employee who has fixed hours and a fixed place of work and is going to or from work is covered only if the employee is on the employer's premises. 1 Larson, Larson's Workers' Compensation Law (2009) 13-3, Section 13.01[1]; see, e.g., *Griffin v. Hydra-Matic Div., Gen. Motors Corp.* (1988), 39 Ohio St.3d 79, syllabus (claim allowed to employee who was on the way home and slipped in employer's parking lot). Significantly, the coming and

going rule is not absolute and many exceptions have been developed to overcome the bright line quality of the rule. Thus, an employee who is on the way to work may be compensated even where the injury itself does not occur on the employer's premises and even when the employee has not actually commenced work. See, e.g., *Baughman v. Eaton Corp.* (1980), 62 Ohio St.2d 62, 62-63.

{¶15} Although the coming and going rule typically applies to those situations in which an employee with a fixed workplace is on the way to work to commence the work day or is leaving work at the end of the workday, the rule has been applied by way of analogy to unpaid lunch breaks taken off of the employer's premises on the theory that the trip back and forth from the premises is similar to a trip to and from work at the beginning and end of the workday. 1 Larson, Larson's Workers' Compensation Law (2009) 13-53, Section 13.05[4] (treating the coming and going rule as substantially identical whether the trip involves the lunch period or the beginning or end of the work day "can be justified because normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee's freedom of movement so complete that the obligations and controls of employment can justifiably be said to be in suspension during this interval"). Thus, since the employee who has left the premises for a longer duration, is "off the clock" and is not limited in any way by any requirement of the employer, the employee's injury cannot be viewed as arising out of or in the course of employment. Id. at 13-48 to 13-49, Section 13.05[1]. However, the same is *not* true of coffee breaks and other breaks taken for the employee's personal comfort, even when the employee is injured while off of the employer's work premises. See id. at 13-53 to 13-58, Section 13.05[4]. Unlike the unpaid lunch break, it is generally accepted that although an employee is not technically performing his work duties during a break, taking a break for personal comfort is

deemed to be incidental to the employment and therefore in the course of and arising out of the employment. See id. Thus, in examining whether an off-premises break arises out of and in the course of the employment, the issue cannot be resolved solely through the mere determination of the fixed status of the employment and automatic application of the coming and going rule. The court must inquire into the specific circumstances of the injury to determine work-connectedness. Such factors could include the time of the break, whether the break is a right fixed by the employment contract, whether it is a paid break, whether there are any restrictions as to where the employee can take the break, and whether the employee's activity during the break constituted a substantial personal deviation. Id. at 13-54, Section 13.05[4].

{¶16} *Indus. Comm. of Ohio v. Henry* (1932), 124 Ohio St. 616, appears to be one of the earliest cases in which the Supreme Court of Ohio confronted an off-premises break occurring after the employee commenced employment. In *Henry*, compensation was awarded to the employee who, after arriving at his workplace and completing a few tasks, left the employment premises to go to breakfast at a nearby restaurant. Id. at paragraph one of the syllabus. Henry, the employee, was injured while on the way back to work. Id. In finding that the injury arose out of and was in the course of employment, the Supreme Court of Ohio placed primary emphasis upon the fact that it was customary for Henry to breakfast at the restaurant and the employer was aware of and acquiesced to this habitual practice. Id. at 620-21. The Court also examined whether there was any substantial deviation from the break but determined that Henry had taken a direct and necessary route to return to work. Id. at paragraph one of the syllabus. Since Henry had already arrived at work, had begun to perform some of his work obligations, and *then* took a break, it would have been illogical to have applied the coming and going rule.

{¶17} Courts outside this jurisdiction have also found that the coming and going rule is inapplicable to a case in which an employee is already at work and subsequently in the process of taking a coffee break off of the employment premises. See, e.g., *Misek v. CNG Financial* (Neb. 2003), 660 N.W.2d 495, 501 ("[R]eliance on these cases was misplaced because the going to or coming from work rule is inapplicable to the present case. Misek was already at work, and was in the process of taking a rest or coffee break when her injury occurred."); *King Waterproofing Co. v. Slovsky* (Md.App. 1987), 524 A.2d 1245, 1248 ("We believe the off-premises accident that occurred during the break in this case presents a situation to which the 'going and coming' rule and its exceptions do not apply. The better analysis, in our view, is to consider whether the appellee sustained his accidental injury while engaged in some personal comfort activity incidental to his employment."); *BeVan v. Liberty N.W. Ins. Corp*. (Mont. 2007), 174 P.3d 518, 2007-MT-357, at ¶24-25 (statutory coming and going rule though applicable to lunch breaks, does not apply to breaks of shorter duration such as coffee breaks).

{¶18} We recognize that the trial court did not have any precedent from our jurisdiction that mirrored the facts of this case. Thus, the trial court relied upon *Mitchell v. Cambridge Home Health Care, Inc.* in reaching its decision. The *Mitchell* Court relied upon the reasoning contained in *Smith v. Akron*. Both cases are clearly distinguishable from the facts of this case, as neither case involved an injury that occurred during a permissible paid break taken during the course of an employee's employment. However, because the trial court relied upon *Mitchell* and implicitly *Smith*, we pause to consider the impact those decisions had upon the trial court's application of the coming and going rule.

{¶19} In *Mitchell*, this Court considered a claim of Mitchell, a home health worker who was injured after she had completed her work and was leaving the client's home. *Mitchell* at ¶2.

Mitchell argued that the coming and going rule did not apply to her in part because the rule applied to public highways and parking lots, not the common areas of a building. Id. at ¶13. She also suggested that the hallway and elevator where she was injured were part of her work situs. Id. at ¶10. The *Mitchell* Court determined that the coming and going rule was not so limited and so long as the injury took place outside of the work situs, the location of the injury was irrelevant. Id. at ¶14. Quoting *Smith* at ¶11, this Court further stated that it had recognized that "'each particular job site may constitute a fixed place of employment' when an employee has more than one job site." Id. Further, "[i]f an employee leaves a fixed situs without any duties to carry out, then the coming and going rule applies." (Internal citation and quotation omitted.) Id. The Court concluded that even if the hallway and elevator were a part of the employee's work situs, it was clear that Mitchell was not performing any services when injured, had left for the day, and was traveling from her place of actual employment when injured. Id. at ¶15.

{¶20} In *Smith*, a City of Akron employee was injured while on his unpaid lunch break. *Smith* at ¶2. The trial court denied compensation on the ground that Smith's injury did not arise out of and in the course of his employment. Id. at ¶6. The trial court also found that Smith was a fixed situs employee. Id. On appeal, Smith challenged the trial court's finding that he was a fixed situs employee given that he was a landscaper who was required to go to many locations in the course of his work. Id. at ¶8. The *Smith* Court disagreed and found that he was a fixed situs employee because he began his work day at a central location where he received his itinerary and job instructions. Id. at ¶12. The Court then concluded that the coming and going rule applied to bar compensation. Id. In this respect, the *Smith* Court's decision could be viewed as consistent with the many jurisdictions that have extended the coming and going rule to the unpaid lunch situation.

{¶21} However, the *Smith* Court also stated that "each landscaping project was at a specific and fixed location" thereby suggesting that the concept of a fixed situs extends to *every* location that an employee might go to in a given work day while in the midst of performing his work duties. Id. The *Smith* Court relied upon *Ruckman*, 81 Ohio St.3d 117, when analyzing both Smith's status as a fixed situs employee and the application of the coming and going rule.

{¶22} *Ruckman* dealt primarily with the issue of whether an employee with a changing employment situs is a fixed situs employee in the context of the generic coming and going situation, namely the commute from home to work. Id. at 120. The *Ruckman* Court held that the manner to determine fixed situs status is to examine whether the employee commences his substantial work duties after arriving at a fixed and identifiable work place. Id. at 119. It held that if the employee commences work at a fixed and identifiable location, then the employee is a fixed situs employee. Id. at 120. This would be true regardless of whether the fixed situs for commencing employment changed monthly, weekly or even daily. Id. Thus, the *Ruckman* Court ultimately determined that the riggers who were reporting daily to a different fixed work site and who apparently had no duties outside the work site, were fixed situs employees. Id. Accordingly, the coming and going rule was applicable to their commute from their homes to the work site. Id.

{¶23} Thus, while *Ruckman* held that an employee's work situs may change daily, it did not hold that an employee's fixed work situs may change on the hour within the same work day. In this regard, the *Smith* Court's statement that "each landscaping project was at a specific and fixed location[,]" *Smith* at ¶12, is a substantial leap from *Ruckman* because *Smith* suggests that the coming and going rule would apply to an employee who had already arrived at a fixed work location and who was en route to a specified location to perform his work duties. However,

Ruckman does not support that conclusion and did not address this situation at all. *Ruckman* considered the classic commute-from-home-to-work scenario. *Ruckman,* 81 Ohio St.3d at 119. Upon finding that the riggers were fixed situs employees notwithstanding the daily change in their work situs, the *Ruckman* Court found that the general coming and going rule would apply as they commuted from their homes to their work situs. Id. at 120. *Ruckman* did not hold that although an employee may be deemed a fixed situs employee, the coming and going rule would apply to each place an employee must go in the performance of his work duties during the work day, in effect creating multiple fixed situses during a given workday. The *Ruckman* Court stated that "[d]espite periodic relocation of job sites, each particular job site may constitute a fixed place of employment." Id. When viewed in the context of the factual circumstances of that case, the *Ruckman* Court was explaining why the riggers were fixed situs employees since their employment required them to go to a different work site on a daily basis. The Court clarified that each new situs could constitute a fixed place of employment even when the situs might vary monthly, weekly, or daily. Id. Thus, any suggestion that each of Mr. Miller's inspection sites constitutes a new fixed place of employment and that Mr. Miller was somehow "commuting" to his inspection site amounts to an incorrect reading of *Ruckman* and a distortion of the basic purpose of the coming and going rule. The suggestion in both *Mitchell* and *Smith*, that "each particular job site may constitute a fixed place of employment[,]" throughout the work day, id., goes well beyond the context in which the coming and going rule was stated in *Ruckman*.

{¶24} Further, *Ruckman* clearly did not address the issue of an employee's paid respite from work which is the factual scenario at issue in this case. The holding in *Ruckman* does not suggest that an employee who is taking a paid coffee break off of the premises and who because of his employment has reason to be off the premises, is subject to the coming and going rule. In

this regard, *Smith* is also clearly distinguishable from this case given that Smith had left his work duties to take his *unpaid lunch* break.

{¶25} In light of the above, we find it illogical to apply the coming and going rule to a fixed situs employee who is clearly not commuting to or from work simply because his work duties take him off the fixed premises for some portion of the work day. Mr. Miller was not commuting to or from work. He was not injured while away from the premises on an unpaid lunch break, nor was he returning to his employment after a prolonged cessation of his work during which time he was not on the clock and subject to his employment duties. Rather, as in *Henry*, Mr. Miller had already arrived at work, had begun his work day and was later injured while taking a permissible paid coffee break that was incidental to his employment.

ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

{¶26} Mr. Miller argues that the trial court should have granted his cross motion for summary judgment and thus erred in failing to find that he was in the course and scope of his employment. In order to be compensable, Mr. Miller's injury must have occurred in the course of and arising out of his employment. R.C. 4123.01(C). The "in the course of" and "arising out of" prongs of the coverage formula are distinct requirements that must be satisfied. *Fisher*, 49 Ohio St.3d at 277. Further, "'[i]n applying it [the coverage formula], this court must be guided by the *** fundamental principle that the requirement is to be liberally construed *in favor of awarding benefits*.'" (Emphasis in original.) Id. at 278, quoting *Maher v. Workers' Comp. Appeals Bd.* (Cal. 1983), 661 P.2d 1058, 1060.

{¶27} The parties have stated that there is no dispute of fact. On the day in question, Mr. Miller arrived to his fixed work situs at the Cascade Plaza. His normal work hours were 8:00 a.m. to 4:30 p.m. Mr. Miller's work as a housing inspector required him to conduct several

inspections off of the Cascade Plaza work premises, one in the morning and one in the afternoon. It is also undisputed that Mr. Miller was permitted to take two paid fifteen-minute coffee breaks. Further, the City does not contend that Mr. Miller was not permitted to take his break off of the employment premises or that Mr. Miller was in violation of any employment protocol for having taken his break at the Akron Family Restaurant.

ARISING OUT OF

{¶28} The "arising out of" prong employs a totality of the circumstances approach to determine "whether a causal connection existed between an employee's injury and his employment." *Fisher*, 49 Ohio St.3d at 277. While the Supreme Court in *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, syllabus, articulated three particular factors important for consideration in a totality of the circumstances analysis, it also stated that an employee's right to participate in the fund "depends on the totality of the facts and circumstances surrounding the accident[.]" It did not limit a court's review of an employee's case to only those three factors enunciated in the syllabus. Id. Thus, inherent to determining if an employee's injury arose out of his employment is an examination and consideration of *all* the facts and circumstances of that case. The Supreme Court has emphasized this, pointing out that due to the fact-specific nature of these cases, "no one test or analysis can be said to apply to each and every factual possibility." *Fisher*, 49 Ohio St.3d at 280. This makes sense given that the factors considered in *Lord* may not be particularly relevant in other circumstances.

{¶29} In the case sub judice, Mr. Miller was injured after he had already started his work day, during a paid break. There is no dispute that Mr. Miller was taking a permissible coffee break at an offsite restaurant and his employer did not have any policy preventing Mr. Miller from taking his break wherever and whenever he chose to do so. Mr. Miller's employer

did have a break room onsite; however, it did not require its employees to take their breaks there. Forty percent of Mr. Miller's job entailed traveling to homes to inspect them. Thus, a central portion of Mr. Miller's duties required him to travel away from his office. Travel was such a significant part of Mr. Miller's job that his employer reimbursed his mileage for his travel to inspection sites. Therefore, it is not surprising or unexpected that one of Mr. Miller's breaks occurred while Mr. Miller was not at his office.

{¶30} In examining the totality of the circumstances of this case, it is evident that a causal connection of Mr. Miller's injury to his employment exists. Mr. Miller was required to leave his office building in order to satisfy the duties of his employment. Further, consistent with his employment contract, he was entitled to take a fifteen-minute coffee break at a time and location of his choosing. Mr. Miller then sustained an injury at a time when he was engaged in the permissible activities of employment. The risk of his injury was a risk inherently related to the nature of his employment and he would not have sustained the injury had he not been required to leave the office in order to satisfy his work duties. In examining the *Lord* factors specifically considered in that case, namely "(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[,]" the arising out of element is also satisfied. *Lord*, 66 Ohio St.2d at syllabus. With respect to proximity to the scene to the employment, id., it is apparent that Mr. Miller was at a place he could reasonably be expected to be at the time of injury in light of his employment duties and given that he had not deviated from his employment to engage in some activity of a purely personal nature. In addition, he was at a location that was reasonable in light of the location of the inspection site. With respect to the degree of control factor, id., the City had

control over the time and place where Mr. Miller could take his break and elected not to place any restriction upon Mr. Miller. Finally, Mr. Miller's employer derived a benefit from Mr. Miller taking a coffee break given that an employer derives a benefit when its employee takes a break from his work duties. *King Waterproofing Co.*, 524 A.2d at 1249 ("The break was intended to benefit both King, the employer, and its employees inasmuch as the opportunity to take a brief respite would ostensibly renew the employees' vigor[.]").

{¶31} The instant case is also similar conceptually to both *Hirschle v. Mabe*, 2d Dist. Nos. 22954 & 22975, 2009-Ohio-1949 and *Henry*, 124 Ohio St. 616.

{¶32} *Hirschle* involved a woman who went to her place of employment to pick up her paycheck on her day off. *Hirschle* at ¶2-3. She slipped and fell in the employer's parking lot on the way back to her car. Id. at ¶3. Employees were given the option of having their paychecks directly deposited into their accounts, mailed to their homes, or the employees could pick their paychecks up. Id. at ¶2.

{¶33} In affirming the trial court's award of benefits, the appellate court noted that it was the employer who allowed the employee to choose the method by which payment would be received. Id. at ¶15. The employee chose one of the allotted options. The court reasoned that because the employee had chosen one of several permissible options the injury arose out of her employment. Id.

{¶34} As noted above, in *Henry*, the Supreme Court concluded that Henry's "accident arose out of and in the course of [Henry's] employment[]" because his injury occurred after Henry began his employment for the day and after he, "left the premises of the employer to get his breakfast at a restaurant, in accordance with a custom acquiesced in by the employer, and

while returning to the premises of the employer by a direct and necessary route *** was struck by a train[.]" *Henry,* 124 Ohio St. at paragraph one of the syllabus.

{¶35} Here, like the employees in *Hirschle* and *Henry*, Mr. Miller was engaging in an activity, i.e. a paid break offsite, to which he was entitled as an incident of his employment and in which he was engaged in after he had already begun the duties of his employment. Mr. Miller's duties involved regular travel to off-premises locations. His employer was aware of the essential nature of his travel and reimbursed him for the mileage. Further, although Mr. Miller had the choice to have a coffee break in the office premises, he also had the option of taking his paid break off of the premises. Mr. Miller reasonably exercised an option given to him by his employer.

{¶36} Several courts outside of this jurisdiction have considered the issue and have also found that an off-premises injury while taking a break arises out of the employment. See, e.g, *Misek*, 660 N.W.2d at 500 (employee's injury during off-premises break arises out of employment where reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort that do not conflict with employer's instructions and that an employee may normally be expected to indulge in under the conditions of his work); *King Waterproofing Co.*, 524 A.2d 1249-50 (employee's injury sustained off premises during coffee break arose out of employment where injury was sustained at a place where employee could have been in attending to his personal comfort during his paid break); *BeVan* at ¶17 (A court must evaluate four factors in determining whether employee's injury sustained during off premises break is compensable: "(1) whether the employee was paid during the break, (2) whether the employment contract entitled the employee to the break, (3) whether restrictions limited where the employee could go during the break, and (4) whether the

employee's activity constituted a substantial personal deviation"). Under the totality of the circumstances presented, this Court concludes that Mr. Miller's injury arose out of his employment.

IN THE COURSE OF

{¶37} "The 'in the course of' prong is construed to relate to the time, place and circumstances of the injury[.]" *Fisher*, 49 Ohio St.3d at 277. "To be entitled to workmen's compensation, [an employee] need not necessarily be injured in the actual performance of work for his employer. It is sufficient if he is injured in a pursuit or undertaking consistent with his contract of hire and which in some logical manner pertains to or is incidental to his employment." *Sebek v. Cleveland Graphite Bronze Co.* (1947), 148 Ohio St. 693, paragraph three of the syllabus, overruled on other grounds. "The general rule is that injuries [that occur] to an employee during an intermission or break for rest or refreshment arise in the course of employment[.]" *Bauder v. Mayfield* (1988), 44 Ohio App.3d 91, 99-100; *Taylor v. Indus. Comm. of Ohio* (1920) 13 Ohio App. 262, 270 (taking a break for coffee is an activity that is deemed reasonably incidental to the work of the employer). See, also, 1 Larson, Larson' Workers' Compensation Law (2009) 13-53 to 13-58, Section 13.05[4]. Here, because the employer permitted Mr. Miller to take his paid break wherever and whenever he wanted, it is logical, reasonable, and foreseeable that Mr. Miller, whose job involved travel to homes to conduct inspections forty percent of the time, would take his paid break offsite on his way to or from a home inspection. See *Hirschle* at ¶21. Further, Mr. Miller's injury occurred while he was being paid for his break at a time and place where he could reasonably be taking such a break.

{¶38} As the Second District Court of Appeals has aptly pointed out "[a]n activity engaged in voluntarily is not necessarily engaged in for purely personal reasons[.]" Id. at ¶24.

"The focus of the 'in the course of' inquiry is the context of the accident causing the injury. That the injury occurs while engaging in a voluntary activity is irrelevant." Id. at ¶27. Having placed no restriction upon where Mr. Miller could take his paid break, his employer should not be surprised that Mr. Miller exercised a permissible choice in taking an offsite break on route to his inspection site. See id. at ¶35. As Mr. Miller was conducting himself in a manner consistent with his employment, it is his employer that "should shoulder the risk of an injury like that suffered by [Mr. Miller]." Id.; see, also, *Lemming v. Univ. of Cincinnati* (1987), 41 Ohio App.3d 194, 195.

{¶39} We are mindful of that we must be guided by the longstanding and fundamental principle of liberal construction in favor of awarding benefits. We conclude that Mr. Miller's injury occurred in the course of and arose out of his employment. As such, Mr. Miller's assignments of error are sustained.

III

{¶40} Miller's assignments of error are sustained. The judgment of the Summit County Court of Common Pleas is reversed and remanded for the entry of judgment consistent with the foregoing opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

EVE V. BELFANCE
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

WHITMORE, J.
DISSENTS, SAYING:

{¶41} I respectfully dissent as I would overrule Miller's assignments of error and affirm the lower court's award of summary judgment in favor of the City of Akron and the Bureau of Workers' Compensation.

{¶42} To be eligible to participate in the Workers' Compensation Fund, an employee must have suffered an injury that occurred in the course of and arose out of the employment. *Smith v. Akron*, 9th Dist. No. 22101, 2004-Ohio-5174, at ¶13, quoting *Lohnes v. Young* (1963), 175 Ohio St. 291, 292. See, also, R.C. 4123.01(C). "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 injury and the employment does not exist." *MTD Products, Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 68. This is because usually "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." *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 121. If the coming and going rule applies and no exception exists, an employee's injury is not compensable. *Smith* at ¶13.

{¶43} Miller concedes that he was a fixed situs employee, but argues that he was not subject to the coming and going rule at the time of his accident because he "was *not* coming to or going from work at the time he was injured." Miller and the majority interpret the coming and going rule far too narrowly. "This Court has recognized that '[e]ach particular job site may constitute a fixed place of employment' when an employee has more than one job site." *Mitchell v. Cambridge Home Health Care, Inc.*, 9th Dist. No. 24163, 2008-Ohio-4558, at ¶14, quoting *Smith* at ¶11. Miller was a fixed situs employee and received his injury while resuming his commute to an inspection on South Hawkins Avenue, a fixed situs. There is no evidence in the record that he was required to perform any duties while traveling from one work site to another. Accordingly, the trial court correctly determined that Miller was subject to the coming and going rule and had to prove an exception to the rule.

> "Ohio courts have recognized several exceptions to the 'coming-and-going' rule which, if established, may warrant compensation under the workers' compensation fund: (1) the injury occurred within the 'zone of employment'; (2) the injury was sustained because of a 'special hazard' created by the employment; and (3) the 'totality of the circumstances' surrounding the accident creates a causal connection between the injury and employment." *Smith* at ¶15.

Miller argues that he satisfied either the special hazard or the totality of the circumstances exception to the coming and going rule.

Special Hazard Exception

{¶44} "The 'special hazard' exception applies where, but for the employment, the employee would not have been at the location where the injury occurred, and the risk involved is 'distinctive in nature or quantitatively greater than the risk common to the public.'" *Smith* at

¶16, quoting *MTD Products, Inc.*, 61 Ohio St.3d at 68. Miller argues that this exception applies because he was exposed: (1) "to the risks of travel to a greater degree than that of the general public who most likely would not be required to travel daily from their fixed situs places of employment"; and (2) "to greater risks while taking his authorized break since he was doing so in the field, and had to travel to a restaurant for his coffee break in contrast to the general public who *** would not have to leave their premises in order to seek refreshment during their breaks." Travel alone does not amount to a special hazard. See, e.g., *Ruckman*, 81 Ohio St.2d at 125 ("[T]he risks associated with highway travel are not distinctive in nature from those faced by the public in general."). Miller testified that he scheduled his own inspections and generally only performed one inspection in the morning and one in the afternoon. Moreover, his morning inspection on the date of his injury was located on South Hawkins Avenue, an area in close proximity to his office in Cascade Plaza. There is no evidence that he was exposed to any greater traffic risks than any other fixed situs employee who commutes from situs to situs. Compare id. (concluding that travel created special hazard for riggers who did not know the location of future assignments and were required to engage in lengthy commutes to remote sites). Additionally, Miller's argument that he was required to travel to a restaurant for his coffee break contradicts his own deposition testimony. Miller admitted in his deposition that his office had a coffee break room, but he made the personal choice to stop and get coffee elsewhere. Based on the foregoing, I would conclude that the special hazard exception does not apply in this case.

Totality of the Circumstances

{¶45} Under the totality of the circumstances test, a reviewing court determines whether a sufficient causal connection exists between the employee's injury and his employment by assessing the facts and circumstances surrounding the accident, including: "(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." *Lord v. Daugherty* (1981), 66 Ohio St.2d 441, syllabus. Miller argues that this exception applies because: (1) his stop at the Akron Family Restaurant only constituted a slight deviation from his route to his inspection job; (2) the City of Akron exercised control over the scene of the accident by virtue of Miller carrying a cell phone and being "on call" at all times during his break; and (3) the City of Akron received a benefit from him taking a break while out in the field instead of him having "to schedule his off site inspections around his two breaks each day."

{¶46} Miller injured himself "some distance away from [his] assigned work site." *Ruckman*, 81 Ohio St.3d at 122. There is also no evidence that the City of Akron had any control over the Akron Family Restaurant's parking lot, and the fact that Miller was on call during his break does not change that conclusion. *Lohnes*, 175 Ohio St. at syllabus ("An employee who has a fixed and limited place of employment is not in the course of his employment when traveling to and from work, even though such employee is on 24-hour call[.]"). Finally, Miller's argument that the City of Akron benefitted from his off-site break at the Akron Family Restaurant is not persuasive. Even if employers generally benefit from their employees taking breaks to replenish themselves, Miller testified that his office had its own coffee room and that he could have taken his break in the coffee room on the day of his injury. He chose to stop on his way to an inspection and take his break at an off-site location rather than take his break first and then travel to the inspection. Because Miller scheduled his own inspections, his schedule was flexible and he could choose when and where to take his breaks. It is unclear how the City of Akron benefitted from Miller's choice to take his break at the Akron Family Restaurant. Therefore, I

would conclude that the totality of the circumstances exception to the coming and going rule does not apply in this case.

{¶47} This Court has its own timely precedent, which bears upon the question presented on appeal. This Court has recognized that "an injury sustained in an off-premises excursion does not occur within the course of employment." *Smith* at ¶14. Miller's coffee break was an off-premises excursion outside the scope of his employment. The majority's rule seems to be that because the City of Akron did not specifically forbid Miller from taking an off-premises break, Miller's break was part in parcel to his employment. The majority's interpretation of the coming and going rule places this Court on a dangerous path, the end result of which is the characterization of an employer as the general insurer of its employees. "[T]he Work[ers'] Compensation Act does not create a general insurance fund for the compensation for injuries in general to employees but only for those injuries which occur in the course of and arise out of the employment." (Emphasis omitted.) Id. at ¶13, quoting *Lohnes*, 175 Ohio St. at 292. Because Miller's injury did not occur in the course of and arise out of his employment, I would overrule his assignments of error and affirm the lower court's judgment. As such, I respectfully dissent.

APPEARANCES:

DEAN R. WAGNER, and ERICA ANTOINIOTTI, Attorneys at Law, for Appellant.

RICHARD CORDRAY, Attorney General, and MARK FELLENBAUM, Assistant Attorney General, for Appellee.

CHERI CUNNINGHAM, Director of Law, and MICHAEL J. DEFIBAUGH, Assistant Directors of Law, for Appellee.