

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHELLE L. LEECY)
Claimant)

VS.)

STATE OF KANSAS)
Respondent)

AND)

STATE SELF INSURANCE FUND)
Insurance Carrier)

Docket No. 201,870

ORDER

Claimant appeals from an Award by Administrative Law Judge Julie A. N. Sample dated December 18, 1997.

APPEARANCES

Matthew S. Crowley of Topeka, Kansas, appeared on behalf of claimant. Jeff K. Cooper of Topeka, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ applied the "going and coming" rule to find claimant's accident did not arise out of and in the course of her employment with respondent. On appeal, claimant argues for an award based upon a 62 percent permanent partial disability. Respondent agrees that the evidence that claimant suffered a 62 percent work disability is uncontroverted. Accordingly, the only issue for review is whether the "going and coming" rule precludes claimant from receiving compensation for her injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the ALJ's Award should be reversed. The going and coming rule does not apply.

Claimant, a State of Kansas employee, worked as a home-health-care provider for SRS. She worked exclusively from her home, traveling to her clients' homes to care for them. Claimant was injured when she slipped and fell down the steps outside her door on her way to her car to visit some clients. The date of accident was March 13, 1995.

The ALJ found claimant was on her way to assume her duties at the time of her accident. The ALJ also determined that because claimant was not on her employer's premises at the time of the accident, was not exposed to any greater risk while walking down her steps, and was not traveling for her employer but was merely walking to her car on her own property at the time of her accident, therefore, K.S.A. 44-508(f), the "going and coming" rule, precluded compensation.

Claimant argued that she was paid from the time she left her door to visit a client and therefore she had already assumed her duties as an employee at the time of the accident. Claimant's supervisor, Mary Edgerton, was deposed to testify as to when claimant was and was not working. Ms. Edgerton's testimony, however, is somewhat confusing and contradictory.

Ms. Edgerton was asked if claimant's time "on the clock" started when she left her front door or, instead, when she drove out of her driveway. She answered that claimant's time would start when she left "there." At that point Ms. Edgerton did not define what or where "there" was. But she did say claimant's time at work started when she left her home. Later, Ms. Edgerton said that at the time claimant's accident occurred, claimant would normally be considered on the clock. She also said claimant was paid and on the clock "[w]hen she walked out her door and got in her car and left." Respondent's attorney then said, "she wasn't paid for any time until she was physically driving in her vehicle to the patient or the clients, correct?" Ms. Edgerton responded: "Well ---."

Ms. Edgerton confirmed that claimant was paid both mileage and for her travel time. On page 21 of her testimony, Ms. Edgerton states claimant would be paid for travel time "from the minute she left her door." However, respondent's attorney then asked: "She [claimant] did not get paid for any work until she got in her car and left?" Ms. Edgerton answered: "Uh-huh." But on page 24, the following questions and answers appear:

Q. Is the time she [claimant] left her door to her car considered travel time?

A. They usually -- I think I give them the benefit of the doubt. If they said that they left their house at 7:50 I would presume they meant when they walked out the door.

Q. And not when they got in their car?

A. Not when they got in their car.

Ms. Edgerton also established that claimant would not be paid for taking her child to the babysitter, running personal errands or for such things as scraping her car windows off in the morning. Although Ms. Edgerton waffled somewhat as to when claimant was

technically on the clock, the Board finds from her testimony that she, like claimant, believed claimant was traveling and therefore "on the clock" from the minute she left her front door.

Respondent argues claimant had not yet assumed her duties at the time of her accident. Respondent further argues that claimant was only on the clock and paid while traveling on "official travel status." To explain this point, Dona Booe, the director of the State's independent living and health programs (SRS Dept.), was deposed. Ms. Booe explained that the "official travel policies" were set forth in the State or SRS's Personnel Manual. She stated that her understanding of the state policy manual was that the clock started, so to speak, when the worker is in his/her car traveling. Ms. Booe stated that travel was an "intricate part" of claimant's job. She did note, however, that the travel policy as well as other state policies in general are complex and that they could be interpreted differently among the local agencies or at a local level. When asked whether claimant would be considered on the clock if she was paid from the time she left her front door, as claimant argued she was since that is how she filled her time sheet out to reflect, Ms. Booe answered that in her opinion of the State's policy claimant should not be considered on the clock at the time she walked out her front door and that claimant was mistaken for reporting her time as such. Ms. Booe again stated that per the State's policy one was not considered on the clock until he/she started traveling to the job. She conceded, however, that State policies can be misinterpreted at the local level. She further stated that claimant could have taken any appropriate means of travel to and from her clients' homes and was not required to use her personal vehicle if other transportation was more convenient.

Pages 3-11 of the "Employee Handbook for Long Term Care Workers" were admitted by a December 11, 1997 Stipulation. Page 6 of the handbook states, in pertinent part:

SRS will pay for mileage in the following circumstances:

1. Mileage to the first recipient of the day will be paid for the shorter distance of either:
 - the distance from the official base station to the first recipient; or
 - the distance from the employee's home to the first recipient. . . .
3. Travel while in these instances shall be considered to be official travel status.

Claimant was on the clock and to be paid when she started "traveling" for respondent. Page 2, item #7 of SRS' Personnel Manual, which was also admitted via the December 11, 1997 Stipulation, states: "All time spent traveling on behalf of the department is paid time and is considered as hours worked for overtime compensation."

Both claimant and her immediate supervisor, Ms. Edgerton, believed claimant was traveling when she left her front door. Ms. Booe stated that in her opinion claimant was not traveling and on the clock until she was driving in her car. But Ms. Booe also stated that the State policies were complex, could be misinterpreted, and were probably applied differently by different agencies.

It appears that claimant was paid or "on the clock" for traveling either from the minute she walked out the front door or from the time she drove away from her home. Although neither the Kansas appellate courts nor the Appeals Board has addressed this specific question, several prior decisions are noteworthy.

In Shultz v. Big A Auto Parts, Inc., Docket No. 222,319 (June 1997), claimant, a traveling salesperson, was injured while getting into his own car on his own premises (his garage). Claimant was on his way to Nickerson, Kansas, for a work-related appointment at the time of the accident. In considering the application of K.S.A. 44-508(f), the coming and going rule, to claimant's accident, the Appeals Board stated:

[T]he issue is not whether claimant's injury could have just as easily occurred entering or exiting his vehicle while on a vacation trip, but rather whether the injury occurred while claimant was acting in the furtherance of his employer's business and whether it arose out of the nature, conditions, obligations and incidents of his employment.

The Board found that claimant's sole mission at the time of the accident was for his employer and that claimant had already undertaken his employment duties. K.S.A. 44-508(f) was found to not bar recovery.

Like the claimant in Shultz, the claimant in the case at hand was on the sole mission of traveling for her employer at the time of her accident. She too was injured on her premises; however, she was walking to her car and not entering it as did the claimant in Shultz. The claimant in Shultz needed his vehicle before he could assume his duties as a salesperson getting ready to travel to a meeting. The vehicle itself, i.e. entering, exiting and driving it, was a necessary and integral part of his job. Therefore, an injury entering the vehicle would be covered. In the case at hand, claimant also needed her vehicle to travel to a client's home. It is clear from the record that claimant was not going to walk to the client's home or take public transportation but rather drive herself in her own vehicle. Since claimant had not yet reached her vehicle, which was her mode of transportation or means of traveling, respondent argues that claimant had not yet assumed her duties of traveling to a client's home. The claimant in this case, however, was on the clock and being paid at the time of her accident. She and her supervisor understood her to be traveling as that term was used by the Department's policy manual.

In Heidel v. Advantage Home Care, Inc., Docket No. 222,618 (July 1997), claimant was employed as a home health aide who would provide in-home living assistance to patients. Claimant was injured while driving to the home of one of those patients to begin her workday. Although respondent argued K.S.A. 44-508(f) precluded compensation as claimant was merely on her way to see her client and had not assumed her work-related duties, the Appeals Board affirmed the ALJ's finding that travel was an integral and necessary part of claimant's employment and, therefore, her injury was covered under the Act. The facts in Heidel are similar to the case at hand in that travel was an integral and necessary part of claimants' employment. However, in the case at hand, claimant was not yet driving to her client's home. Respondent concedes that an injury occurring while

claimant was driving directly to a client's home would arise out of and in the course of claimant's employment.

Reichenberger v. Piping Design Services, Docket No. 217,814 (May 1997), is a case where claimant was injured while crossing a ditch between a parking lot and the Lear Jet building where he regularly worked. Since claimant was not on his employer's premises at the time of the accident and since no special risk or hazard existed to overcome the limitations of K.S.A. 44-508(f), the Board found claimant's injury did not arise out of and in the course of his employment but rather occurred while he was on his way to assume his duties of employment. The ALJ in the case at hand cited Reichenberger as authority for her holding. It is distinguished, however, by the fact that Mr. Reichenberger was not paid while traveling to or from work.

There are several Kansas appellate court cases that address the going and coming rule. In Madison v. Key Work Clothes, 182 Kan. 186, 318 P.2d 991 (1957), claimant was injured when she slipped and fell on ice and snow while on her way to work on a sidewalk abutting her employer's factory. The workmen's compensation commissioner denied an award. The District Court affirmed the ruling of the commissioner and the employee appealed. The Supreme Court held that where an employee fell and received injuries while she was on the way to assume the duties of her employment, the employee's injury did not arise out of and in the course of the employment and the award of compensation was properly denied.

In Walker v. Tobin Construction Co., 193 Kan. 701, 396 P.2d 301 (1964), benefits were denied to an employee who was injured while on no mission or duty for the employer and while off the employer's premises during lunchtime.

One of the issues in Soupene v. Lignitz, Docket No. 79,680 (Kan., 1998), pertained to volunteer firefighters and when they assume the duties of their employment so as to be covered under the Workers Compensation Act. The Court cited Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, 436, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984); and Chapman v. Victory Sand & Stone Co., 197 Kan. 377, 382-83, 416 P.2d 754 (1966), which held:

While the statute does not define the place where the employee is 'to assume the duties of employment,' our decisions are to the effect it is a place where an employee may reasonably be during the time he is doing what a person so employed may reasonably do during or while the employment is in progress. They require that the employee be engaged in some activity contemplated by and causally related to the employment.

Finally, when considering whether the going and coming rule precludes an award of benefits under the facts of this case, Larson's is also helpful:

Several so-called "exceptions" to the basic premises rule on going and coming are applications of this principle: employees sent on special errands; employees continuously on call; and employees who are paid for their time

while traveling or for their transportation expenses. The explanation of these exceptions, and the clue to their proper limits, is found in the principle that the journey is an inherent part of the service. 1 Larson's Workers' Compensation Law, § 16.04 (1997).

The question of whether the accidental injury arose out of and in the course of claimant's employment with respondent is a question of fact. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995). Clearly, if claimant had been injured while pulling out of her driveway or injured while off her premises traveling to a client's home, the injury would have been covered. In this instance, where the injury occurred on the steps outside claimant's house, it appears that both claimant and her immediate supervisor believed claimant was working, on duty and on the clock from the minute claimant walked out the front door to travel to a client's home. Although the director of the State's independent living and health programs believed the handbook and SRS Personnel Manual stated otherwise, the Board does not find that this specific issue is addressed anywhere in the policy handbook or personnel manual. It remains a question of fact. The claimant's understanding and practice was affirmed by her immediate supervisor. The Board finds, therefore, that claimant was traveling at the time of her accident, that the travel arose out of and in the course of her employment, and her accidental injury is covered by the Workers Compensation Act.

Some mention should be made concerning the award for temporary total disability. The record reflects respondent paid a total of \$10,541.78 in temporary total disability compensation. But this sum does not correspond with the stated 75.88 weeks of temporary total disability being paid at a rate of \$148.03 per week. Claimant alleged this represented an underpayment of temporary total disability based upon the stipulated average weekly wage of \$230.82. But apparently claimant was not taking into consideration that she was not terminated by respondent until April 30, 1996 and respondent continued to pay certain additional compensation items until that time. The record does not specify which items were continued but these presumably included health insurance, KPERs and death/disability insurance. Even if only the health insurance was continued at a cost of \$47.01 per week, the correct temporary total disability rate before April 30, 1996 would be less than that actually paid. Since respondent is not alleging an overpayment and counsel for both parties represented at oral argument that arising out of and in the course of employment was the only issue for Appeals Board review, the sum of \$10,541.78 will be ordered paid for the agreed 75.88 weeks of temporary total disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Julie A. N. Sample dated December 18, 1997, should be, and is hereby, reversed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Michelle L. Leecy, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, for an accidental injury which occurred March 13, 1995.

Claimant is awarded temporary total disability compensation for 75.88 weeks in the sum of \$10,541.78, followed by 219.55 weeks at the rate of \$153.89 per week or \$33,786.55, for a 62% permanent partial general disability, making a total award of \$44,328.33.

As of August 14, 1998, there is due and owing claimant 75.88 weeks of temporary total disability compensation in the sum of \$10,541.78, followed by 102.69 weeks of permanent partial compensation at the rate of \$153.89 per week in the sum of \$15,802.96 for a total of \$26,344.74, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$17,983.59 is to be paid for 116.86 weeks at the rate of \$153.89 per week, until fully paid or further order of the Director.

Future medical benefits may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to \$500 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Appino & Biggs Reporting Service	\$632.80
Hostetler & Associates	\$237.95
Gene Dolginoff Associates, Ltd.	\$647.75

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Matthew S. Crowley, Topeka, KS
- Jeff K. Cooper, Topeka, KS
- Julie A. N. Sample, Administrative Law Judge

MICHELLE L. LEECY

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Philip S. Harness, Director