

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GWENDOLYNN GILHAM	:	JUDGES:
	:	William B. Hoffman, P.J.
Plaintiff-Appellant	:	Julie A. Edwards, J.
	:	Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008 CA 00211
CAMBRIDGE HOME HEALTH CARE, INC.,	:	
et al.,	:	
	:	
Defendant-Appellee	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Civil Appeal From Stark County Court Of
Common Pleas Case No. 2008 CV 01265

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 15, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

RICHARD L. WILLIGER
2070 East Avenue
Akron, Ohio 44314

THOMAS P. MAROTTA
DIANA L. MUHLBERG
Willacy, Lopresti & Marcovy
700 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113

For Workers' Compensation Section

MICHAEL J. REIDY
Millisor & Nobil Co., L.P.A.
9150 South Hills Blvd., Suite 300
Cleveland, Ohio 44147

SCOTT W. JOHNSON
615 Superior Avenue
N.W. State Office Building
11th Floor
Cleveland, Ohio 44113

Edwards, J.

{¶1} Appellant, Gwendolynn Gilham, appeals from the August 29, 2008, Judgment Entry of the Stark County Court of Common Pleas granting summary judgment in favor of appellee, Cambridge Home Health Care Services.

STATEMENT OF FACTS AND CASE

{¶2} Appellant, Gwendolynn Gilham, has been employed by appellee, Cambridge Home Health Care, Inc., as a home health aide since 1999. As a home health care aide, appellant provides in-home health care services to appellee's clients. As a home health care aide, appellant travels in her personal vehicle to the patient's homes according to a schedule provided by appellee.

{¶3} Pursuant to her job description, appellant is only paid for the time she spends with each client. Therefore, appellant's billable time begins when she arrives at the patient's home and ends when she leaves the patient's residence. Upon completion of her work, the patient signs a time sheet confirming the time spent and the services performed. Appellant is not paid for her travel time between clients and is not reimbursed for travel expenses.

{¶4} Each Friday, appellant picks up her patient schedule and supplies at appellee's Canton, Ohio office. Her scheduled work week then begins on Saturday. Although appellant picks up her schedule at the Canton office, she has no workspace, desk or office in appellee's Canton facility and travels directly from her home to a patient's home in her own personal vehicle.

{¶5} On October 20, 2007, appellant was scheduled to visit the home of two patients. After leaving the home of the first patient, where she remained from 7:00 a.m.

to 11:00 a.m., appellant headed to the home of the second patient. Along the way, she stopped to pick up a sandwich for lunch. Approximately three miles from the first patient's residence, appellant was involved in a motor vehicle accident.

{¶6} As a result of the accident, appellant sustained injuries, including cervical sprain/strain and left shoulder sprain/strain. Subsequent to the accident, appellant requested workers' compensation benefits for her injuries, claiming that they occurred during the course of her employment as a home health care aide. Appellee, a self-insured employer, rejected the claim as not arising out of the course of appellant's employment. The matter was referred to the Industrial Commission of Ohio for adjudication.

{¶7} On February 7, 2008, the Industrial Commission Staff Hearing Officer disallowed appellant's claim. In disallowing the claim, the hearing officer held that the evidence established that appellant was a fixed-situs employee. The hearing officer further found that appellant did not sustain the injuries in the course of, and arising out of, her employment because her claim was barred by the "going-and coming" rule. The Industrial Commission refused further appeal.

{¶8} Subsequently, on March 11, 2008, appellant filed an appeal with the Stark County Court of Common Pleas. The parties filed cross-motions for summary judgment. Pursuant to a Judgment Entry on August 29, 2008, the trial court granted summary judgment in favor of the appellee and against the appellant. In its decision, the trial court found that appellant was a fixed-situs employee and, as such, was subject to the "coming-and-going" rule. The trial court further held that appellant had failed to establish a causal connection between her injury and her employment.

{¶9} It is from this judgment that appellant now appeals, setting forth the following assignment of error:

{¶10} “THE TRIAL COURT’S FINDING THAT APPELLANT WAS A FIXED-SITUS EMPLOYEE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IS CONTRARY TO LAW AND CONSTITUTES REVERSIBLE ERROR.”

{¶11} Appellant, in her sole assignment of error, argues that the trial court erred in granting summary judgment in favor of the appellee. Appellant specifically argues that the trial court’s finding that she was a fixed-situs employee is against the manifest weight of the evidence. Appellant also argues that even if she could be classified as a fixed-situs employee, her employer received a significant benefit from her self-transportation between job sites, thereby establishing and requiring an exception to the coming-and-going rule.

{¶12} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36, 506 N.E.2d 212. As such, an appellate court conducts a de novo review of a trial court's summary judgment. See, e.g., *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241. Accordingly, appellate courts independently review the record to determine whether summary judgment is appropriate and need not defer to the trial court's decision. *Brown v. Scioto Cty. Bd. of Comms.* (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted summary judgment, an appellate court must review the Civ.R. 56 standard, as well as the applicable law.

{¶13} Civ.R. 56(C) provides:

{¶14} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, 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 or stipulation construed most strongly in the party's favor.”

{¶15} Thus, a trial court may not grant summary judgment unless the evidentiary materials demonstrate that: (1) no genuine issue as to any material fact remains to be litigated; (2) after the evidence is construed most strongly in the nonmoving party's favor, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party; and (3) the moving party is entitled to judgment as a matter of law. *Vahila v. Hall*, 77 Ohio St.3d 421, 429-30, 1997-Ohio-259, 674 N.E.2d 1164.

{¶16} Appellant argues that she is not a fixed-situs employee and, therefore, is not subject to the “coming and going” rule. Generally, pursuant to such rule, an employee who sustains an injury while traveling to and from a fixed place of employment, i.e., fixed-situs, is precluded from participating in the workers' compensation fund. *MTD Product, Inc. v. Robatin* (1991), 61 Ohio St. 3d 66, 68, 572

N.E. 2d 661; *Ruckman v. Cubby Drilling, Inc.*, 81 Ohio St.3d 117, 1998-Ohio-455, 689 N.E.2d 917. This is so because “the requisite causal connection between injury and the employment does not exist.” *Ruckman*, 81 Ohio St.3d at 119, quoting *MTD Prods., Inc. v. Robatin* (1991), 61 Ohio St.3d 66, 68, 572 N.E.2d 661. This general concept is referred to as the “coming-and-going” rule. *Ruckman*, 81 Ohio St.3d at 119, 689 N.E.2d 917.

{¶17} In *Ruckman v. Cubby Drilling, Inc.* (1998), 81 Ohio St.3d 117, 1998-Ohio-455, 689 N.E.2d 917, the Supreme Court set forth the test for determining whether an employee is a fixed-situs employee. The Court stated that “[i]n determining whether an employee is a fixed-situs employee and therefore within the ‘coming-and-going’ rule, the focus is on whether the employee commences his substantial employment duties only after arriving at a specific and identifiable work place designated by his employer.” The Court further stated that “[t]he focus remains the same even though the employee may be reassigned to a different work place monthly, weekly, or even daily. Despite periodic relocation of job sites, each particular job site may constitute a fixed place of employment.” *Id.* at 119, 689 N.E.2d 917. In *Ruckman*, the claimants were injured in traffic accidents while traveling from their homes to remote drilling sites. They had been assigned by their employer to drill wells on such sites. The Ohio Supreme Court held that, although their work at each drilling site was of limited duration, the claimants were fixed-situs employees within the meaning of the coming-and-going rule because they had no duties to perform away from the drilling sites to which they were assigned and their workday began and ended at the drilling sites.

{¶18} In the case sub judice, the facts are undisputed. Each Friday, appellant travels to appellee's Canton office to pick up her weekly client schedule. Appellant does not have a work space, desk and/or office in the Canton facility. After the appellant receives her schedule, she travels to each client's home and provides individual home health care services. Appellant travels directly to patients' homes and is not required to report to appellee's facility before or after she cares for the patients. In each case, the appellant's billable time begins when the appellant reaches the residence and terminates when appellant leaves the residence. Furthermore, appellant is not compensated for travel time or travel expenses between client visits. Appellant sustained her injuries in an automobile accident which occurred between client visits, i.e. after she left one client's residence, picked up a sandwich for lunch and was traveling to the second client's home. Moreover, appellant had no duties to perform outside of the homes of her patients. As noted by appellee, appellant "commenced her 'substantial employment duties' only after arriving at her patient's residence and ended those duties when she left the residence." Therefore, we find that the trial court properly concluded that appellant was a fixed-situs employee.

{¶19} Appellant next argues that even if she is a fixed-situs employee, she falls within an exception to the coming-and-going rule. The general rule governing fixed-situs employees does not operate as a complete bar to workers' compensation participation if an employee can establish that one of the exceptions to the rule applies. *MTD Prods., Inc.*, 61 Ohio St.3d at 68, 572 N.E.2d 661.

{¶20} Ohio courts have recognized several exceptions to the fixed-situs employee "coming-and-going" rule which, if established, may warrant compensation

under the workers' compensation fund. Those exceptions are as follows: (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. See *MTD Prods., Inc.*, 61 Ohio St.3d at 68-70, 572 N.E.2d 661.

{¶21} Appellant specifically argues that totality of circumstances surrounding the accident created a causal connection between her injury and her employment. In *Bralley v. Daughtery*, (1980) 61 Ohio St.2d 302, 401 N.E.2d 448, the Supreme Court set forth the “totality of circumstances test” used to establish a causal connection between an injury and employment. Pursuant to *Bralley*, supra, the circumstance which the court must consider in determining whether a causal connection exists include: (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.

{¶22} Appellant argues that there is a causal connection between her injury and her employment because appellee received a significant benefit from appellant’s self-transportation between job sites. In a similar case, *Crockett v. HCR Manorcare, Inc.*, Scioto App. No. 03CA2919, 2004-Ohio-3533, the appellee was a home health care aide injured in a motor vehicle accident on her way home from a patient’s residence. At the time of the accident, the appellee was between two work sites. The court found that the accident occurred on a public highway, that the employer exercised no control over the scene of the accident, and that the employee’s presence at the scene of the accident served no benefit to the employer. *Id.* The court further reasoned that, while an

employer may benefit in some sense in the employee reaching the next customer, the benefit is not sufficient to establish an exception to the coming-and-going rule. *Id.* See, also, *Mitchell v. Cambridge Home Health Care, Inc.*, Summit App. No. 24163, 2008-Ohio-4558.¹

{¶23} In the case sub judice, appellant was traveling on a public roadway several miles from the assigned work site. There was no evidence to establish that appellee had any control over appellant's manner of travel. Furthermore, the only benefit which appellee arguably received from appellant's presence at the scene of the accident was that appellant was on her way to the residence of the next scheduled client to perform her billable services. In *Crockett*, this benefit has been found to be insufficient to establish an exception to the coming-and-going rule. For these reasons, we find that the trial court did not err in finding that, based upon the totality of circumstances, appellant's travel between her first and second clients did not establish a causal connection between her injuries and her employment as a home health care aide.

{¶24} Accordingly, we find that the trial court did not err as a matter of law in granting summary judgment in favor of appellee.

¹ We note that in *Mitchell*, the appellant, a home health aide worker, admitted that she was a fixed-situs employee.

{¶25} Appellant's sole assignment of error is, therefore, overruled.

{¶26} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Delaney, J. concurs and

Hoffman, P.J. dissents

JUDGES

JAE/d1202

Hoffman, P.J., dissenting

{¶27} I respectfully dissent from the majority opinion. I believe reasonable minds could differ on whether the exception to the coming-and-going rule regarding the “totality of the circumstances” applies in this case.²

{¶28} While it is clear the employer had no control over the scene of the accident, it seems equally clear to me the employer does benefit by the injured employee’s ability to travel from one of Appellee’s clients to another within the same workday. Appellant was injured “in a pursuit or undertaking consistent with [her] contract of hire and which in some logical manner pertains to or is incidental to [her] employment.” *Hampton v. Trimble* (1995), 101 Ohio App.3d. 282. The fact the accident occurred within several miles of the assigned work site can be argued both as a reason to support or to deny application of the exception. I find it to be neutral and of little value in weighing the factors.

{¶29} I further find the majority’s reliance on *Crockett* unpersuasive. The fact the employee in *Crockett* was on her way home from a patient’s residence is significantly different from an employee traveling from one patient’s home to another patient’s home.

HON. WILLIAM B. HOFFMAN

² I agree with the trial court’s analysis of why the “zone of employment” and “special hazard” exceptions do not apply in this case.

