MASSACHUSETTS Lawyers Weekly

Spouse of day laborer killed in collision awarded comp

Board decides 'going-and-coming' rule inapplicable

By: Pat Murphy July 16, 2020

The "going-and-coming" rule did not bar a workers' compensation claim for survivor spouse benefits brought by the wife of a day laborer killed in a collision that occurred when he was being transported from a New Hampshire job site by his alleged employer, the Department of Industrial Accidents Reviewing Board has ruled.

The claimant, Xiuhua Feng, sought survivor spouse benefits for the death of her husband, Yong Zheng, in January 2018. An administrative judge had found that the going-and-coming rule applied to bar the claim because the employee's accident occurred during a commute from his workplace; his actual job duties did not require him to travel; and he was not engaged in employment at the time of the crash.

But the DIA Reviewing Board concluded that the going-and-coming rule did not apply because the employer-provided transportation to and from the job site was an implied "incident" of the decedent's employment.

"Where the employer provides transportation to and from work for the employee, as one of the express or implied terms of the contract of employment, it has long been held that an injury, occurring while the employee is so transported, arises in the course of his employment," Administrative Law Judge Bernard W. Fabricant wrote for the unanimous three-judge panel.

The eight-page decision is *In Re: Feng, Xiuhua*, Lawyers Weekly No. 25-012-20**.**

Important win for day laborers?

The board's decision is important because it expands the protections of the state's workers' compensation statute for day laborers, said Richard H. Schwartz, who represents the claimant in *Feng*.

"Day workers are now going to be covered if they sustain injuries when they are being transported by their employer from that street corner to the worksite, and when they are being transported back to that same corner at the end of the work day," the Lynnfield attorney said.

Schwartz said it was important for the board to distinguish the "traveling employee" precedent — applicable to workers such as sales people who have multiple appointments at multiple locations during the work day — relied on by the single administrative law judge who originally denied his client's claim for survivor benefits.

"Mr. Zheng was not a traveling employee," Schwartz said. "He was a worker who was going to go to a particular work site. And not only was he going to go to that work site, he was going to be driven there. There was an expectation on the part of the employer that Mr. Zheng was obligated to get into the employer's van to be driven to the work site."

W. Todd Huston, a workers' comp defense attorney in Worcester, noted that the Workers' Compensation Trust Fund failed to appeal the implicit finding by the hearing judge that Zheng was an employee and not an independent contractor. Because arguing independent contractor status is normally one of the first lines of defense in day laborer cases, Huston was cautious about overstating the practical impact of the DIA Reviewing Board's decision in *Feng*.

On the other hand, Huston said *Feng* is problematic for defense lawyers.

"Essentially, the board characterized transportation as employment," Huston said. "They've carved out another exception to the going-and-coming rule, which essentially says that commuting is not covered by workers' compensation. This case says that in circumstances where transportation is provided [by the employer], it's covered under workers' compensation."

Fall River workers' compensation attorney Deborah G. Kohl said the board reached the "absolutely correct" decision in *Feng*.

"It's always been my understanding from the case law that, if the employer picks you up and is transporting you, as soon as you get in the vehicle you are on the clock and it's not 'coming and going,'" Kohl said.

The board in its decision sought to draw a distinction between traveling employees and employer-provided transportation as an incident of employment, according to Kohl.

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>
> ***— W. Todd Huston***

Justin P. Starr, a workers' comp defense attorney in Boston, said going-and-coming cases tend to be fact-specific, making it difficult to generalize.

"But you're seeing more of these 'group transportation' cases involving employees," Starr said. "This [decision] is the first crack at that issue."

Survivor spouse claim

According to the administrative record, on Jan. 9, 2018, the alleged employer, Ming G. Chen, contacted three people including the claimant's decedent to meet him at a designated location in Boston's Chinatown for the purpose of performing construction work at an undisclosed location. After picking them up in his van, Chen drove to a Chinese restaurant in New Hampshire where all four men performed renovation work installing sheetrock.

At approximately 5 p.m., the four men left the restaurant to return to Boston in the van. At approximately 5:50 p.m., the van was involved in an accident near a New Hampshire toll booth. The claimant's husband was killed in the crash.

In Re: Feng, Xiuhua

THE ISSUE Does the "going-and-coming" rule bar a workers' compensation claim for survivor benefits brought by the wife of a day laborer killed in a collision that occurred when he was being transported from a job site by his alleged employer?

DECISION No (Department of Industrial Accidents Reviewing Board)

LAWYERS Richard H. Schwartz of Lynnfield (claimant)

Kathleen G. McNeill for the Workers' Compensation Trust Fund

The claimant later testified that her husband worked for Chen, an uninsured employer, at various job sites for approximately 10 days prior to the accident. On the date of the crash, her husband left their Quincy home at 7 a.m. and took public transportation to Chinatown, she said.

The claimant further testified that Chen paid her $2,000 in cash for the nine days that her husband worked. Chen also paid her $30,000 for funeral and other expenses.

The claimant subsequently filed a claim for survivor spouse benefits pursuant to G.L.c. 152, §31. The claimant then filed an appeal when her claim was denied.

Administrative Judge Joseph M. Spinale conducted a hearing de novo in October 2018. Spinale found that the decedent worked in construction "performing whatever tasks the boss asked him to do," including "renovating, painting and sheet-rocking." The length and duration of each job varied, and the employee worked an average of six days a week from 2013 until December 2017 and was always paid in cash.

Spinale dismissed the claim as barred by the going-and-coming rule, finding the employee "was not engaged in an activity that constituted a critical and substantial incident of his employment for which he received compensation," as he "was merely commuting home at the time of the accident."

Incident of employment

Generally, the going-and-coming rule provides that when the employee has a fixed place of employment and fixed hours of work, injuries going to and from work do not ordinarily arise in the course of employment.

In addressing the claimant's appeal from Spinale's decision, Judge Fabricant wrote that the traveling employee cases relied on by the hearing judge were "inapposite to the issue at hand." The hearing judge should have focused on whether the transportation provided to the decedent was simply an incident of his employment, Fabricant said.

"If it was an incident of the employment, the claim would be compensable as an injury arising 'out of and in the course of' employment, even though the employee is not engaged in the actual performance of his duties at the moment of the injury," Fabricant wrote.

Fabricant cited the Supreme Judicial Court's 1914 decision *Donovan's Case* for the proposition that employer-provided transportation may be an express or implied term of employment. Fabricant also noted that the board in a 2000 case, *Mikel v. MBTA*, held that transportation specifically reserved solely for employees may be considered an incident of employment as a matter of law.

"The common thread connecting these 'incident of employment' cases is that the transportation has not just been offered by the employer, but that the facts fairly lead to the conclusion that the employer's expectation is that the employee will use that transportation," Fabricant wrote. "As the facts here indicate, without refutation, that the employer expected his workers actually required that transportation be provided to and from a heretofore unknown worksite, we hold that said transportation was, as a matter of law, an incident of the employment."

Issue: JULY 20 2020 ISSUE

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