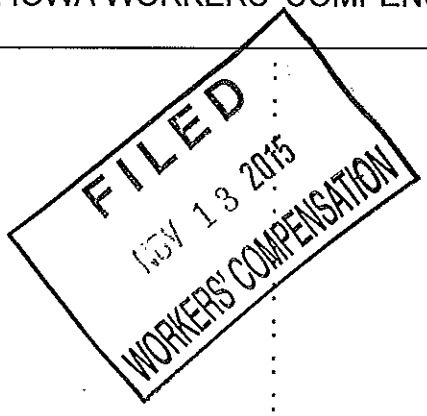
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MONTRECE WARE,

Claimant,

vs.

PEPPER JAX GRILL,

Employer,

and

SPARTA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5050005

ARBITRATION

DECISION

Head Note Nos.: 1104, 1107

STATEMENT OF THE CASE

Montrece Ware, claimant, filed a petition in arbitration and seeks workers' compensation benefits from defendants, Pepper Jax Grill, as the employer, and Sparta Insurance Company, as the insurance carrier. Hearing was held on August 26, 2015.

Claimant testified on his own behalf. Defendants called Cauley Shaffert, Justin Palladino, Schuyler Burrus, and Michael Whiteside to testify. The evidentiary record also includes claimant's exhibits 1 through 7 as well as exhibit B and defendants' exhibit A.

The parties also submitted a hearing report, which contains numerous stipulations. The parties' stipulations are accepted. No factual findings or conclusions of law will be made in this decision regarding the parties' stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's February 19, 2014 injury arose out of and in the course of his employment.

2. Whether the injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

3. The proper commencement date for permanent disability benefits, if any are awarded.

4. The applicable gross average weekly earnings and corresponding weekly compensation rate.

5. Whether interest should be assessed for past due weekly benefits.

6. Whether claimant is entitled to an award of past medical expenses.

7. Whether claimant is entitled to reimbursement of medical mileage expenses.

8. Whether claimant is entitled to an award of an independent medical evaluation fee pursuant to Iowa Code section 85.39.

9. Whether claimant is entitled to alternate medical care into the future.

10. Whether defendants are entitled to a credit for disability payments or medical expenses paid pursuant to a group insurance policy.

11. Whether defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13 for unreasonable denial or delay in payment of weekly benefits.

12. Whether costs should be assessed and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Montrece Ware suffered a low back injury when he slipped and fell on ice in an abandoned car lot parking area on February 19, 2014. On that date, Mr. Ware was employed by and scheduled to work at the Pepper Jax Grill in Davenport, Iowa. At approximately 6:00 a.m. on the morning of February 19, 2014, Mr. Ware slipped and fell on ice at his girlfriend's house. Although he felt symptoms in his low back, he attempted to report to work that date. (Claimant's testimony)

When reporting to work at Pepper Jax Grill, Mr. Ware parked his vehicle in an abandoned car lot located near the intersection of 53rd and Elmore in Davenport, Iowa. This is a major intersection in Davenport, and Elmore Avenue is a four-lane road at this location. In relation to the employer's restaurant, the abandoned car lot was located across Elmore Avenue. (Claimant's testimony; Exhibit 7; Ex. B) This lot was not owned by Pepper Jax Grill, nor was it maintained or otherwise controlled by Pepper Jax Grill. (Testimony of Cauley Schaffert) When claimant exited his vehicle in the abandoned car lot, he slipped on ice and fell again sustaining further injury to his low back. Claimant

estimated that he was approximately 100 feet away from the employer's premises when he fell. (Claimant's Testimony)

Claimant testified that management instructed him to park in the abandoned lot where he fell. However, claimant was not able to provide the name of any management personnel that instructed him to park in the abandoned car lot. The employer offered the testimony of four witnesses, who all testified that claimant was instructed not to park in the "prime" parking in the parking lot immediately adjacent to the Pepper Jax Grill. The employer's witnesses testified that employees were not instructed that they had to park in any specific location, including the abandoned car lot. (Testimony of Cauley Schaffert, Justin Palladino, Schuyler Burrus and Michael Whiteside)

The employee handbook provides that the employees may not park in the "prime locations," but does not otherwise specify where the employees must park when reporting for work. (Ex. A) There was clearly limited parking available to customers and employees near the employer's premises. However, the employer's witnesses testified that there was other alternate parking areas behind an adjacent motel in which claimant could have parked. Ultimately, claimant used his own judgment and selected a parking place in the abandoned car lot on the opposite side of Elmore Avenue.

On the other hand, claimant's supervisor and the general manager of this particular restaurant location, Michael Whiteside, also parked in the abandoned car lot on the same day claimant fell and was injured. Mr. Whiteside actually observed claimant after the fall and assisted him into the restaurant. Management for the employer clearly knew that employees did park in the abandoned car lot.

Ultimately, the issue of whether claimant was instructed to park in the abandoned car lot requires a credibility determination. Claimant asserts that he was specifically instructed by management to park in that lot during his training. The employer's witnesses deny that claimant was instructed to park in any specific location.

I did not identify any reason to disbelieve the testimony of the employer's witnesses on this issue. Claimant, on the other hand, was not able to identify any specific management person that instructed him to park in the abandoned car lot. Claimant also offered some contradictory testimony during the trial. Specifically, claimant initially denied that he injured his low back as a result of the first fall at his girlfriend's house. However, when confronted with contents of Exhibit 4, page 14, claimant changed his testimony to admit that he did suffer numbness after the initial fall at his girlfriend's house. When considering the relative credibility of the competing witnesses' testimony, I accept the testimony of the four witnesses offered by the employer over the testimony offered by claimant.

Therefore, when considering the testimony of all of the witnesses as well as the terms of the handbook, I find that the employer instructed claimant that he could not park in the prime locations immediately adjacent to the restaurant. However, I find that the employer did not specifically instruct, or require, its employees to park in an

abandoned car lot that the employer did not own, control, or maintain. While the lot was likely an obvious place for employees to park, and the general manager obviously knew other employees actually were parking in that lot, claimant did not prove that the employer instructed employees to park in the abandoned car lot.

Claimant estimated that he was approximately 100 feet from the entrance to the employer's restaurant when he fell the second time. The evidence is clear that Pepper Jax Grill did not own, maintain, or control the abandoned lot where claimant fell.

The evidence demonstrates that claimant's work duties were performed inside a restaurant for the employer. He worked for Pepper Jax Grill as a cook and concedes that he was not engaged in any of his typical work duties as a cook at the time he fell and was injured. (Claimant's testimony)

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The course of employment commences after the employee reaches the premises where his actual work begins and is carried on and ceases when he leaves. Generally, an injury sustained en route from an employee's home to his or her place of employment is not in the course of employment. Otto v. Independent Sch. Dist., 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946). An employee who has a fixed place to work and fixed hours to work is not covered by workers' compensation on the way to and from work. Waterhouse Water Cond. v. Waterhouse, 561 N.W.2d 55, 57-58 (Iowa 1997); Frost v. S.S. Kresge Co., 299 N.W.2d 646, 648 (Iowa 1980); Quaker Oats Co. v. Ciha, 552 N.W.2d 143,150-51 (Iowa 1996)

This legal proposition is frequently referred to as the "coming and going" rule. Bailey v. Batchelder, 576 N.W.2d 334, 339 (Iowa 1998) ("under 'the going and coming' rule, workers' compensation does not cover an injury occurring off of the employer's premises, on the way to or from work."). The rationale for the going and coming rule is that as an employee travels to work he or she is engaged in his or her own business,

and the employment commences only after the employee reaches the employer's premises. See Otto v. Independent Sch. Dist., 237 Iowa 991, 994, 23 N.W.2d 915, 916 (1946).

However, there are recognized exceptions to the general coming and going rule. Travel between two separate premises of an employer which results in injury during the travel is held to be covered under a divided premises exception. Thus, an employer may be liable if it operates a parking lot and an employee is injured between the lot and his work site. Frost, 299 N.W.2d at 649. Once an employee reaches the premises of the employer, including a parking lot, the workers' compensation act governs.

In this situation, Pepper Jax Grill did not own, operate, maintain, or control the abandoned lot where claimant fell. Therefore, I conclude that the divided premises exception to the going and coming rule is not applicable to the facts of this case.

Another exception to the going and coming rule is the zone of protection exception. This exception applies when the injury occurs so closely related in time, location, and employee usage to the work premises as to bring the injury within the zone of protection of workers' compensation even though the injury occurred on property not belonging to the employer. Frost, 299 N.W.2d at 649-650. Underlying this exception to the going and coming rule is the notion that the course of employment should extend to any injury that occurs at a point where the employee is within the range of dangers associated with the employment. Bailey v. Batchelder, 576 N.W.2d 334 (Iowa 1998).

In Frost v. S.S. Kresge Co., 299 N.W.2d 646 (Iowa 1980), the Iowa Supreme Court found that an injury occurred in the course of a claimant's employment despite the fact that the claimant fell on a public sidewalk adjacent to the employer's building. The court said that the site of the injury was so closely related in time, location, and employee usage to the work premises as to bring the claimant within the zone of protection. Id at 648.

The zone of protection exception has been applied in numerous cases before this agency to expand the area in which employees are considered to be in the course of their employment. Cecil v. J.C. Penney Co., Inc., File No. 1043187 (Arb. November 8, 1995) (fall outside entrance to mall area after leaving work); Brown v. Tim Clark Auto Sales, Inc., File No. 1003234 (App. April 27, 1994) (fall outside of sales office); Griffin v. Reese Brothers, Inc., File No. 985486 (Arb. June 3, 1992) (fall stepping from a common use elevator before entering employer's leased premises); Junker v. Iowa Dept. of Human Services, File No. 923648 (Arb. April 11, 1991) (fall 100 feet from entrance to building on way back from break); Tilley v House of Large Sizes, File No. 877011 (Arb. February 5, 1990) (fall on way to work in common shopping mall walk area); Dorpinghaus v. Univ. of Iowa Hospitals and Clinics, File No. 771007 (Arb. January 20, 1988) (slip & fall walking between parking lot and building).

The zone of protection exception to the going and coming rule has limits, however. In Keever v. University of Iowa Hospitals and Clinics, 2005 WL 2369870 (Iowa App. 2005) (unpublished decision), the Iowa Court of Appeals held that an employee who parked off the employer's premises at a location some distance from the employer's premises and in an area not controlled by the employer was not within the course of his employment when injured on his way into work. The Court of Appeals noted in Keever that the distance from the employer's premises was greater than the 12-20 feet in Frost, that the employer did not control the location of the claimant's fall, and that the claimant was traversing a route of his own selection. Id.

In Frost, the Iowa Supreme Court distinguished Otto v. Independent School District, 237 Iowa 991, 23 N.W.2d 915 (1946), by noting that the claimant in Otto fell somewhere up to five blocks away from his employer's premises. The Court noted that the zone of protection rationale "obviously becomes more attenuated as the distance between the place of injury and the business premises increases." Frost, 299 N.W.2d at 650.

The dissent in Frost predicted the very dilemma presented in this case when it stated, "the [zone of exception] exception established in division III does not provide ascertainable standards or guidelines for determining the scope of coverage of chapter 85. How close in time, how near in location, and how heavy the employee usage are questions that need to be answered. There are no objective criteria for determining where the zone of protection begins and where it ends." Id. at 651.

Indeed, the issues identified by the dissent in Frost are the very issues that must be considered in this case. There are not objective criteria available to determine how far the zone of protection extends beyond an employer's premises. The facts of this case can be distinguished from both Frost and Keever. This case falls somewhere between the facts in Frost and Keever, and there are not objective criteria for the undersigned to apply to determine whether the zone of protection extends to cover claimant in this situation.

Instead, the undersigned must apply the general principles of the going and coming rule, as well as the zone of protection exception to that rule to determine whether claimant's injury occurred in the course of his employment. Acknowledging the going and coming rule and given the limitations of the zone of protection exception, the question to be answered in this case is whether claimant was in a location that was within the range of dangers associated with his employment such that the zone of protection should be expanded to find claimant was in the course of his employment when he fell in the abandoned car lot's parking area across from his employer's premises. Bailey v. Batchelder, 576 N.W.2d 334, 339 (Iowa 1998).

In this case, claimant was clearly attempting to report to work when the injury occurred. Claimant was within the proximity of his employer's premises when he fell. Claimant was also injured in the same lot where his supervisor parked on the date of

injury. Given that claimant's supervisor parked in the same lot, the employer clearly knew that its employees were parking in this lot. Given that the fall occurred minutes before claimant's scheduled shift, it was foreseeable to the employer that claimant would be reporting to work at that time.

On the other hand, the dangers claimant faced in the abandoned parking lot were not dangers typically associated with his employment. They were dangers associated with traveling to his work. Claimant fell on premises not owned, maintained, or controlled by the employer.

The parking lot where claimant fell is located across a major four-lane road in Davenport. Specifically, claimant fell in an abandoned car dealership parking lot located across the street from the employer's premises. The employer did not instruct claimant to park in that lot, though claimant's supervisor also parked in that empty lot.

The distance between the location of claimant's fall and the employer's premises was approximately 100 feet. Claimant was clearly much farther away from the employer's premises than the 20 feet outlined in Frost. Yet, he was much closer to the employer's restaurant entrance than the five blocks outlined in Otto. It is clear that the parking lot where claimant fell is not contiguous to the employer's premises. I found that claimant was not told specifically where he should park when coming to work, though he was told specifically where he could not park.

Having considered the dangers involved in the icy abandoned parking lot, I conclude they were not the type of dangers associated with claimant's employment activities. Considering that the lot where claimant fell is across a major, four-lane road in a large metropolitan area and that the employer did not instruct employees to park in that area and that the employer did not own, maintain, or otherwise control that parking area, I conclude that claimant has not proven that the zone of protection exception to the going and coming rule should extend to cover his injury. Therefore, I conclude that claimant failed to prove his injury occurred in the course of his employment.

Having reached this legal conclusion, all other disputed issues are moot.

ORDER

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from these proceedings.

All parties shall pay their own costs.

Signed and filed this 13th day of November, 2015.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.