FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2632

DSK GROUP, INC., and ZURICH AMERICAN INSURANCE COMPANY,

Appellants,

v.

JORGE ZAYAS HERNANDEZ,

Appellee.

On appeal from an order of the Office of the Judges of Compensation Claims.
Stephen L. Rosen, Judge.

Date of Accident: August 9, 2018.

April 27, 2022

TANENBAUM, J.

Jorge Zayas Hernandez is an electrician. DSK Group, Inc. is an employee-leasing company that provided Hernandez to KBF Renovations, Inc., a company that does residential remodeling. As Hernandez drove from his home to the first remodeling job of the day, a drunk driver collided with Hernandez's car, causing him bodily injury and lost work. The question here is whether section 440.092(2), Florida Statutes (the "'going or coming' exclusion") excludes Hernandez's injury from compensability under the Workers' Compensation Law ("WCL"). The judge of compensation

claims ("JCC") rejected Hernandez's contention that he was a "traveling employee," which the statute spells out as an exception to the "going or coming" exclusion. Instead, the JCC labeled Hernandez as a "field employee," as opposed to "one who works directly at the employer's premises during the workweek." He, in turn, characterized Hernandez as being on the job from the moment he started his car at home in the morning. The JCC concluded on this basis that Hernandez was not subject to the "going or coming" exclusion, but he made no reference to a statutory exception besides the "traveling employee" one that the JCC already had determined did not apply. DSK and its carrier appeal. Because the JCC's conclusion was error, we reverse.

The facts are undisputed. As part of the arrangement between DSK and KBF, Hernandez received an hourly wage and was compensated only for his actual work done at different job sites. The job sites were the homes KBF had contracted to renovate, and KBF would direct Hernandez to which homes he would be working on each day. Occasionally, Hernandez would have to drive to the KBF office to pick up supplies or to attend a safety meeting before going to a job site. At the same time, Hernandez routinely drove from his house to the first job site in the morning, and then from job site to job site throughout the day. Hernandez supplied his own car to do this. As he drove to the first job, between jobs, and from the last job back to his home, his car typically would be loaded with equipment and materials that KBF supplied for his use at the jobs.

Hernandez was an hourly employee. He was paid only for the time he was "on the clock." This time ran from when he "punched in" using his cell phone after he arrived at the first house of the day to begin work. He had to "punch out" for his lunch break, but he otherwise would be on paid time until he clocked out as he left the last job site of the day to drive home. For the most part, there was a fixed schedule, and work hours typically were 7:00 a.m. to 3:30 p.m. He received no compensation for the time he spent driving from his house to the first job of the day and none for the time he spent driving from the last job of the day to his home.

According to unrebutted testimony, KBF did not provide gas reimbursement to Hernandez and employees like him. Instead, KBF provided a gas credit card in its name to Hernandez (as with

other workers) to help offset some of his fuel expenses. The card had a monthly limit of $165. According to Hernandez, KBF's policy was that he could use the card to pay only for gas used in connection with work, even though there was no real way to measure that. Hernandez testified that the amount was not enough to cover what he considered to be his total monthly gas expense, and he regularly had to use his own credit card to put gas in his car. There was no evidence that KBF reimbursed Hernandez for any incurred costs based on how many miles he drove to the first job, between jobs, or home from the last job, so there was nothing from which to conclude that the $165 company card allowance covered the fuel costs for Hernandez's daily commute between home and the job sites.

One morning, while Hernandez was driving his car from his home to the first job site of the day, he suffered injuries as a result of a collision with an oncoming drunk driver. He filed a petition for benefits under the WCL, which the carrier controverted on behalf of KBF. Hernandez relied solely on the "traveling employee" exception in section 440.092(4), Florida Statutes, to get around the "going or coming" exclusion in subsection two of the same statute. The JCC determined that Hernandez did not meet the criteria to be treated as a "traveling employee." Without identifying an alternative statutory exception, the JCC nevertheless refused to apply the "going or coming" exclusion and concluded that Hernandez's accidental injury was compensable. From what we can tell, the JCC relied on three facts to reach his conclusion: 1) that Hernandez worked as a "field employee" rather than at KBF's premises; 2) that Hernandez transported materials and tools in his car; and 3) that KBF provided Hernandez the $165 gas allowance. We now explain why this conclusion was incorrect.

To begin, the pertinent statutory language regarding the "going or coming" exclusion states as follows:

> An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the employee,

> unless the employee was engaged in a special errand or mission for the employer.

§ 440.092(2), Fla. Stat. The Legislature enacted the quoted text in 1990. *See* ch. 90-201, § 14, at 920, Laws of Fla. In doing so, it codified a long-standing, judicially created rule. *See Sweat v. Allen*, 200 So. 348, 350 (Fla. 1941) ("The authorities all seem to hold that, as a general rule, injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment." (citing *Voehl v. Indem. Ins. Co. of N. Am.*, 288 U.S. 162, 169 (1933))).

The rule was to apply to the case of "an ordinary workman going to work." *Id.* It is "grounded in the recognition that injuries suffered while going to or coming from work are essentially similar to other injuries suffered off duty away from the employer's premises and, like those other injuries, are usually not work related." *Eady v. Med. Pers. Pool*, 377 So. 2d 693, 695 (Fla. 1979). This court later adopted a deputy commissioner's explanation of the purpose behind the rule: "Considering the fact that millions of workers are involved in travel to and from work each day and are subjected to the hazards of the highway, the system could not afford to cover the thousands of accidents which routinely occur." *Dr.'s Bus. Serv., Inc. v. Clark*, 498 So. 2d 659, 661 (Fla. 1st DCA 1986). There also is "the enormous difficulty of determining the compensability of claims involving the homeward journey when millions of workers scatter in all directions to engage in shopping and the like." *Id.* at 661–62.

Now that the rule has been codified as *legislative* policy, the JCC was not free to refuse application of the statutory rule on a basis not spelled out in the text. The JCC mistakenly understood the "going or coming" exclusion to apply only to workers who commute between home and the employer's premises. By its terms, application of the statutory exclusion does not turn on whether the employer owns the location where the work is to be performed. *Cf. Kelly Air Sys., LLC v. Kohlun*, 47 Fla. L. Weekly D668 (Fla. 1st DCA Mar. 16, 2022) ("Not all employees travel to a fixed location to punch a timecard and begin their workday."). It applies when an employee suffers injury while he is "going to or coming from *work*." § 440.092(2), Fla. Stat. (emphasis supplied); *see Kelly Air*,

47 Fla. L. Weekly at D670 ("Work begins when the employee starts to be compensated in the normal course of the workday and excludes uncompensated travel to and from the place where compensation begins."). There is no question that Hernandez's *work* did not start until he arrived at the first job of the day and clocked in. For the time he was on the clock throughout the day, KBF compensated him, and it paid him to do renovation work at the houses it assigned. The driving that Hernandez did to get to the first job site of the day, and the driving he did to get home from the last site of the day, was "going to" and "coming from" the "work" he was paid to do when he was at the job sites. No textual basis exists to support what appears to be the JCC's exception for "field employees" who perform work away from an employer-owned location.

On appeal Hernandez attempts to salvage the compensability determination by arguing the JCC reached the right result but should have and could have done so by applying the "traveling employee" exception. That statutory exception reads as follows:

> An employee who is required to travel in connection with his or her employment who suffers an injury while in travel status shall be eligible for benefits under this chapter only if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment. This subsection applies to travel necessarily incident to performance of the employee's job responsibility but *does not include travel to and from work* as provided in subsection (2).

§ 440.092(4), Fla. Stat. (emphasis supplied). The highlighted text precludes application of the exception to an employee's travel between home and work. That is, the "traveling employee" exception cannot apply to an injury an employee suffers while traveling to where he will *start* the activity for which the employer has agreed to pay him. *Cf. Kelly Air*, 47 Fla. L. Weekly at D669–70 (explaining how subsection four expressly excludes travel to and from work from putting an employee "into a travel status" and precludes compensability for injuries occurring during that travel, "even where the employee regularly works in a travel status").

Undeterred, to support his argument in favor of this

exception, Hernandez relies on three decisions of this court: *Schoenfelder v. Winn & Jorgensen, P.A.*, 704 So. 2d 136 (Fla. 1st DCA 1997); *Florida Hospital v. Garabedian*, 765 So. 2d 987 (Fla. 1st DCA 2000); and *McCormick v. Florida Auditor General*, 772 So. 2d 612 (Fla. 1st DCA 2000). All three decisions, though, found compensability because the employee was already in a compensated work status at the time of the accidental injury, a fact that distinguishes them from the facts of this case.

In *Schoenfelder* the employee was a lawyer who had brought a case file home one evening to prepare for a deposition that was to occur the next morning. He began that preparation at home before leaving for the deposition. As he then walked to his car to drive from his house to the deposition (read: while he was "traveling"), the lawyer was hit by a car. This court concluded that the "going or coming" exclusion did not apply and reversed the denial of compensability because he was in a compensated work status at the time of the accident. There was "no significant break or interruption in [the lawyer's] employment activity." *Schoenfelder*, 704 So. 2d at 137. He "had begun his *work* at home" and was still doing it when he was injured while preparing to travel to another location to continue that work. *Id.* (emphasis supplied). The analysis distinguished *Glasser v. Youth Shop*, 54 So. 2d 686 (Fla. 1951), where the employee "had *completed the work* that he had commenced at home after arising from sleep and was injured thereafter while descending the stairs for breakfast before leaving for the store where he worked." *Schoenfelder*, 704 So. 2d at 137 (emphasis supplied).

The employee's compensation status in connection with her travel also lies behind *Garabedian*, the next decision cited by Hernandez to support application of the "traveling employee" exception. The employee was a home health aide who was injured while driving to her home from a mandatory staff meeting. Her job required that she travel to patients' homes to assist them with various needs. Occasionally, the employee had to visit the employer's office, but her work otherwise involved her traveling between patients' homes and performing errands for those patients. Regularly, the employee would call in the morning into the main office from home to get her assignments for the day, then travel from her home to the first patient's home, and from there,

travel between the homes of the other patients assigned for the day. After the last patient, the employee would return to her home, *where she performed additional compensated work deemed essential to her job*. The employer compensated the employee for her work in the patients' homes, for the work she did at her own home, and for her travel between the patients' homes and the office. It did not pay or reimburse her for her travel to the first patient's home each day or for her travel from her last appointment of the day back to her own home.

On the day of the accident, the employee had been at the employer's office for a staff meeting, for which she was paid. The accident occurred while she was driving from the office to her home. After the accident, the employee continued to her home and engaged in the work she usually did there at the end of the day. The employer compensated her both for her time attending the meeting and for her time working at home, but not the time she spent driving in between, which is when the accident happened. Nevertheless, this court found *Schoenfelder* persuasive. *See Garabedian*, 765 So. 2d at 990. Notably, this court characterized as irrelevant the fact that the work the employee performed at home could have been done elsewhere. *Id.* The location or locations of the work did not matter, provided the employee was doing the work "in a method and manner authorized by the employer." *Id.* (internal quotation and citation omitted). If the travel occurred between compensated employment activities without "significant break or interruption," then the travel was not going to or coming from work. *Id.* Essentially, it is travel *between* compensated, authorized tasks on behalf of the employer and can qualify for the exception found in section 440.092(4), Florida Statutes.

The last case that Hernandez relies on for the "traveling employee" exception is *McCormick*. In this case too, though, the compensated travel status of the employee made all the difference. The employee was a salaried state auditor who suffered injury in a car crash on the interstate while driving home from a field audit. The employee had an office at the employer's premises, not far from her home. When she was not doing field audits, she regularly commuted between home and the office on a normal schedule. The employer did not pay her extra or reimburse her for mileage for this ordinary commute.

The employee, however, spent most of her days conducting field audits in surrounding counties. When she did a field audit, her schedule mirrored that of the entity she was auditing, and during the audit, each day she would drive the significant distance, usually on highways, between her home and the location of the audit. The employer did not pay her above what she received as base salary to work on these audits, but whenever she was out working at a field audit, the employer reimbursed her for her mileage and gave her a per diem to cover lunch. Even though the employee had completed her work for the day and was driving home when the accident occurred, this court concluded the accident was compensable. *See McCormick*, 772 So. 2d at 614. It based that conclusion on these facts: the trip home being compensated (she was salaried); the trip being reimbursed (mileage and per diem); and the employee routinely having had to make long drives on the highway to comply with her employer's needs (rather than make her short commute between her home and the office). *See id.* at 613–14. This all meant that her drive, even though it was to her home, was part of her *work*, rather than coming *from* work. *See id.* The compensated status of the travel made her a "traveling employee," excepted from the "going or coming" exclusion. *Id.* at 614; *accord Kelly Air*, 47 Fla. L. Weekly at D670.

Though Hernandez relies on all three of these cases to support his argument that he was a "traveling employee," they instead highlight how the employee must be in a compensation status of some sort, while traveling, to qualify for that label. Indeed, the compensation status requirement lies in the text of the "going or coming" exclusion; it applies if the employee is going "to work" or "from work." *See Kelly Air*, 47 Fla. L. Weekly at D670. As we already noted, "work" does not reference a particular location. It references an exchange of the employee's labor for the employer's payment of wages, and the compensated labor can be "work" wherever it is performed if it is done in a way authorized by the employer. *See id.* (explaining that "'work' generally means the performance of an act or service in exchange for sufficient consideration," so "[i]f an employee is engaged in conduct which entitles her to remuneration under the terms of employment, then that employee is 'at work'"); *cf. Evans v. Handi-Man Temp. Servs.*, 710 So. 2d 132, 134 (Fla. 1st DCA 1998) (explaining that the

employee's "journey home from work" did not begin until he ceased traveling between "necessary employment activities" at "employer-designated" places, "for purposes of the going and coming rule"); *see also Garabedian*, 765 So. 2d at 990.

Put simply, if an employee is being compensated or reimbursed for his time traveling, or if he is traveling between two compensated activities, then he would not be traveling to or from work—even if the travel is to or from his home. This is the essence of the statutory "traveling employee" exception. An employee can rest assured that an accidental injury he suffers while traveling remains compensable, regardless of where he is traveling from or to, if the travel itself is part of the work. *Cf. Kelly Air*, 47 Fla. L. Weekly at D670 (noting how "compensation for travel can put an employee into a travel status," such that "being in a travel status means the employee is working or at 'work'").

With the purpose of the "traveling employee" exception in mind, we see that Hernandez easily falls outside it. In contrast to the employees in *Schoenfelder*, *Garabedian*, and *McCormick*, the undisputed facts here show that Hernandez was not in some compensation status at the time of his crash. Hernandez was not compensated in any way for his time spent driving to the first job or from the last job of the day; was not directly reimbursed for the mileage between his home and the first or last job; and did not engage in any compensated employment activity at home before he left for or returned from other compensated employment activity. None of the evidence regarding the monthly $165 company credit card allowance for gas demonstrated that the employer intended to reimburse Hernandez for any specific mileage cost he incurred between his home and the job sites. Hernandez, then, could not have been a "traveling employee" at the time of the crash because he had not yet clocked in and arrived at "work." *Cf. Kelly Air*, 47 Fla. L. Weekly at D670 (holding that employee was not in a travel status and could not "be said to have still been 'at work'" at the time of his injury because he "had clocked out for the day" and was not being compensated for his drive home from work).

Hernandez in fact was a typical commuting employee, whose compensated hours started only upon his arrival at work and ended upon his departure for home at the end of the day. He truly

was "an ordinary workman going to work," *Sweat*, 200 So. 2d at 350, when he was injured in the car crash. Section 440.092(2), Florida Statutes, unambiguously excludes that accidental injury from compensability.* The JCC erred in his conclusion to the contrary.

REVERSED.

BILBREY and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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* Before we conclude, we easily dispose of Hernandez's alternative argument—that he fits within the exception for an employee "engaged in a special errand or mission" because his travel had a "dual purpose." *See* § 440.092(2), Fla. Stat.; *Swartz v. McDonald's Corp.*, 788 So. 2d 937, 945 (Fla. 2001) (discovering within the phrase "special errand or mission" the continued existence of the pre-statute, judicially created "dual purpose doctrine"). He bases this argument on the fact that he routinely carried materials in his car for his use at work. At best, however, the evidence showed that the materials aided him personally in his work but were not necessary for KBF's overall continued operations. The materials in essence were "employment-related paraphernalia," or "tools of employment," and the supreme court continues to recognize a bar to compensability for an employee injured while merely carrying them during travel (but not yet working). *Swartz*, 788 So. 2d at 950; *see also U.S. Fid. & Guar. Co. v. Rowe*, 126 So. 2d 737, 738 (Fla. 1961).