STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Alonzo Kidder	)	State File No. P-18195 & P-18196
v.	)	
Vermont Castings	)	By: Margaret A. Mangan
	)	Hearing Officer
and	)	
	)	For: R. Tasha Wallis
Chad Lawrence	)	Commissioner
v.	)	
Vermont Castings	)	Opinion No 18A-01WC

AMENDED ORDER

This case came on for formal hearing on the sole issue of whether the vanpool accident in which the claimants were involved on January 26, 2000 arose out of and in the course of their employment with Vermont Castings. On June 28, 2001, in Opinion No. 18-01WC, this Department held that it did. The specific order reads: " I conclude that the claimants' injuries arose out of and in the course of their employment. As such, the defendant is ORDERED to pay all related workers' compensation benefits." The defendant now asks that the order be amended to reflect the intent not to consider whether any benefits are due these claimants.

What injuries the claimants may have suffered was not addressed in the decision. What, if any, benefits are due these claimants was not considered. If the parties cannot resolve those issues informally, they may return for another hearing. To assure that the order is consistent with the pretrial decision to limit the issues and for the sake of clarity, the order is amended as follows.

ORDER

THEREFORE, based on the Foregoing Findings of Fact and Conclusions of Law, I conclude that the January 26, 2000 vanpool accident arose out of and in the course of claimants' employment with Vermont Castings.

Dated at Montpelier, Vermont this 12th day of September 2001.

_____
R. Tasha Wallis
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

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v.	)	
	)	By: Margaret A. Mangan
Vermont Castings, Inc.	)	Hearing Officer
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and	)	For: R. Tasha Wallis
	)	Commissioner
Chad Lawrence	)	
	)	Opinion No.18-01WC
v.	)	
	)	
Vermont Castings, Inc.	)	

Hearing Held in Montpelier on November 9, 2000
Record Closed on December 19, 2000

APPEARANCES:

Richard E. Davis, Jr., Esq. for the claimants
James E. Preston, Esq. for Vermont Castings, Inc

ISSUE:

Did the claimants' injuries arise out of and in the course of employment?

EXHIBITS:

Claimants' Exhibits:
1. Vermont Castings internal memorandum from Bob Wright to Dale Trombley
2. Second Vermont Castings internal memorandum from Bob Wright to Dale Trombley
3. Memorandum from Bob Wright to Tanya LaFrance
4. Bar graph representing employees by location

Defendant's Exhibits:
A. Vermont Rideshare Brochure: “What happens if I miss my ride home?”
J. Vermont Casting memorandum with attachments
G. Vanpool Leasing Materials

FINDINGS OF FACT:

1. At all times relevant, Vermont Castings, Inc., ("VCI") was an employer within the meaning of the Vermont Worker's Compensation Act and Rules.

2. On January 27, 2000, claimants Alonzo Kidder and Chad Lawrence were employed by VCI. Both had been employed by VCI for a short period of time prior to the accident and worked at the VCI foundry.

3. At the time of the accident, both claimants lived in Barre, Vermont. Neither claimant had a Vermont driver's license, owned or had access to a vehicle, and otherwise did not have access to reliable transportation. The lack of transportation was an impediment to claimants' efforts to secure employment.

4. In 1998, VCI first expressed a desire to institute a vanpool to provide transportation for its employees to and from work at its business operations located in Randolph, Vermont and Bethel, Vermont.

5. The vanpool came to be established as the result of a number of factors considered by the VCI, and the decision to form the vanpool was both economically and policy driven. The vanpool was initially proposed as a possible means to address employee retention issues.

6. An early internal memorandum generated in connection with VCI's consideration of the vanpool concluded that:

> The vanpool would provide an additional benefit for employees and will help in our goal to reduce turnover. The program would also allow additional people to consider working at Vermont Castings who may otherwise decline due to transportation issues. The program's success can be measured by reduction in turnover versus cost of operation. If the program is not successful the vans can be sold and most of the investment avoided. *Claimant's Exhibit # 1.*

7. Vermont Public Transportation Association ("VPTA") soon became involved in the formation of the vanpool. The primary contact person at VPTA was Pat Crocker. VPTA is affiliated with Rideshare Vermont. In the course of its contact with VCI, VPTA extolled and emphasized the social benefits of instituting a vanpool program, including, but not limited to: reduced traffic; reduced emissions; the promotion of broad use of public transit; and reduced fuel consumption. An additional important consideration was that the vanpool served to benefit individuals without transportation. These policy concerns were communicated to VCI in meetings, and also are expressly set forth and emphasized in VPTA, Vermont Rideshare and other materials which VCI received in connection with the vanpool.

8. After considering the benefits of a vanpool, VCI decided to move forward with the program.

9. The vanpool started in November 1999 when VCI signed a leasing agreement with VPSI, a Massachusetts-based company that provides vanpool and related leasing services to businesses. For a monthly lease fee VCI received vans with established mileage. A consideration for VCI in deciding to form the vanpool was that VPSI provided liability coverage for the vanpool in the amount of $5 million dollars. VCI was required to report any accident to VPSI, which it did in this case following the accident.

10. VCI looked to its own workforce for drivers to operate the vans used in the pool. Existing employees were paid $125.00 per week to drive the vans, with the additional incentive that the drivers could take the vans home on weekends for their own use during non-work hours with a mileage limit.

11. The vanpool operated on a regular and reliable schedule, much the same as a common bus route. Employees who used the vanpool, including the claimants, relied on the vanpool to get to and from work.

12. The vanpool serviced certain geographical areas in and around Central Vermont, generally those with the highest concentration of employees, stopping for pick ups and drop offs in the Barre area at Dunkin' Donuts and Howard's Market, and in Berlin, Vermont at Shoney's Restaurant, and a location in Northfield, Vermont.

13. VCI charged the claimants $10 a week for participation in the vanpool.

14. The only purpose an employee would have in utilizing the vanpool would be transportation to and from VCI for work.

15. Claimants were picked up and dropped off at the Dunkin' Donuts in Barre, Vermont. VCI provided vans for the vanpool but did not control the selected route. The route was determined by the driver or the passengers. The VCI expressed concern that there be a timely arrival at work.

16. While in the van, the claimants had no obligation to conduct or perform any VCI work, nor were they paid for their time in the van.

17. Approximately 30-40 employees at the Bethel Foundry, where the claimants worked, used the vanpool on a daily basis. The vanpool ran during two shifts and was usually full during the second shift, with 15 employees usually riding in the pool.

18. Claimants Kidder and Lawrence worked the second shift at the VCI foundry in Bethel, Vermont.

19. Claimants Kidder and Lawrence both indicated that but for the Vanpool, neither of them could have accepted employment at VCI as they had neither a license nor a car.

20. VCI attempted to operate the vanpool without showing a profit or a loss, simply hoping to break even on the undertaking.

21. On January 26, 2000, claimants boarded the van at Dunkin' Donuts in Barre, Vermont on their way to work at the Bethel foundry. The van proceeded to Berlin at Shoney's for a pick up, and was on its way down West Hill in Berlin towards Riverton when the driver lost control of the vehicle and an accident occurred in which both claimants sustained injuries.

22. The vanpool was an experiment, and VCI's representative testified that the program would need to "cost-justify" itself. VCI did not profit from the vanpool program and despite charging $10 a week per rider per week the vanpool was a financial drain on VCI. The costs of the lease, the drivers, and gasoline, created a situation where VCI could not justify the vanpool.

23. On February 28, 2000, Tanya LeFrance informed VPSI that "due to lack of cost justification" VCI would terminate its lease.

CONCLUSIONS OF LAW:

1. In this case, the heart of the controversy is whether the accident arose out of and in the course of employment when the injuries sustained by the claimants occurred while they were passengers traveling to work in an employer-provided vanpool.

2. In worker's compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal relationship between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

3. The claimant must prove that his injury: 1) arose out of and 2) in the course of his employment. The phrases "arose out of" and "in the course of" are two elements of a single inquiry into whether an injury is work-related. *Miller v. IBM*, 161 Vt. 213, 214 (1993); *Clodgo v. Rentavision, Inc.*, 166 Vt. 548 (1997).

4. "The statutory phase 'arising out of an in the course of employment' …is deceptively simple and litigiously prolific." *Kenney v. Rockingham School District*, 123 Vt. 344, 345 (1963).

Course of Employment

5. In this case, it must first be established whether claimants were injured in the course of their employment. Relevant literature demonstrates that in order to establish this, it is important to determine the employer's control over the conveyance. 1 *Larson's Worker's Compensation Law* § 15.01.

6. According to Oxford English Dictionary, the definition of 'control' means "to exercise restraint or direction upon the free action of; to hold sway over, exercise power or authority over; to dominate, command." *III The Oxford English Dictionary* 853 (2d ed. 1989) (as cited in *Goines v. State*, 89 Md. App. 104, 111 (1991)).

7. If the trip to and from work is made in a vehicle under the control of the employer, an injury during that trip is incurred in the course of employment." The reason for the rule depends upon the extension of risks under the employer's control. 1 *Larson's* at § 15.01.

8. The case of *Miller v. IBM* presented a situation in which the claimant was injured while driving to lunch on a road owned by the employer. The court in *Miller* relied on the fact that one of the conditions of claimant's employment (travel on and off the premises) contributed to his injury, and that the defendant had the opportunity to control that condition. The court stated that the defendant played a part in creating a circumstance which could reasonably be calculated to cause an injury. The court developed a proportional relationship between the liability of the employer and the employer's ability to control the injury-causing instrument. *See generally Miller v. IBM,* 161 Vt. 213 (1993).

9. The *Miller* case is distinguished from the present case in that the injury in *Miller* took place on the employer's premises, and thus, is called the "premises rule"; nonetheless, the case demonstrates a broadening of the types of risks determined by the courts to be under the employer's control and therefore compensable. *Id.* at 224. By limiting liability to areas within the employer's control, a fair compromise is reached concerning the allocation of the cost of worker injuries. *Id.* at 216.

10. Normally, an employee is not able to recover under Worker's Compensation for accidents that occur on public roads while traveling in conveyances under the employee's control. This is the "coming and going" rule. An employer's conveyance exception to workers' compensation "coming and going rule" compensates for injuries that an employee sustains while commuting to and from work while under the control of the employer. The exception applies when such transportation is incidental to employment as a result of express or implied agreement, custom or continued practice of parties, without regard to whether transportation is provided for free or paid for by employee and whether alternate forms of transportation are available. The employer conveyance exception applies whether or not the accident took place on the employer's premises and acts as an exception to the premises rule. 1 *Larson's* at §15.03.

11. The employer conveyance exception focuses upon control over the means of transportation. The transportation becomes incidental to the parties contract of employment. Where the employer furnishes the driver of the vehicle, the employee's case is stronger because then the employer's agent has control over the acts and movements of the employee. Larson points out that the exception applies even if the employer charges the employee for the transportation, "Since the element of control of the risk in the employer-operated-vehicle case is an independent ground of liability, the employer remains liable for the journey even though he charges the employee an amount for the trip sufficient to cover its cost...Control of the conditions of transportation remains as a ground of liability." 1 *Larson's* at §17.12.

12. If there is nothing more in the facts than the mere availability of transportation in the employer's conveyance, which the employee forgoes in favor of using his or her own conveyance, then workers compensation cannot be used to recover in the event of an accident. This is consistent with the present analysis of the underlying rationale of the employer-conveyance exception: plainly, the employee is not subject to the hazards of his employer while traveling in their own vehicle. 1 *Larson's* at § 17.13.

13. In this case, many factors indicate that VCI was in control of the conveyance within the meaning of the Worker's Compensation Act. For instance, the vans were leased by VCI for the express purpose of transporting employees to and from work everyday, the VCI regulated the number of times each working day that the bus ran and determined where the stops were to be made. The VCI, therefore, directed its operations. Finally, the employees had come to rely on the vanpool service in order to get to and from work. Although it did not need to do so, VCI voluntarily undertook responsibility for transporting its employees daily. This made certain that the VCI employees would arrive for work on time. Furthermore, those employees who would not have been able to work at the VCI foundry without the provision of transportation could now do so.

14. By providing the vanpool service, VCI undertook responsibility for the transportation of those employees who utilized the vanpool and, by doing so, the risks and hazards of the commute came under VCI's control. Left to arranging their own way to work, the employees would have been exposed to the same risks and hazards as other commuters—problems that could and would have been dealt with by the employees themselves. By riding the employer-provided vanpool, the employees were subjected to risks and hazards different from other commuters; they were exposed to dangers that were under VCI's control, risks confronted solely because they were employed by VCI.

15. VCI argues that the transportation was provided as a courtesy to its employees and not a contractual obligation allowing employees to recover under Worker's Compensation. However, the distinction between transportation provided by contract and transportation provided without agreement as a courtesy is being increasingly questioned. This is the result since the fundamental reason for extension of liability—the extension of the actual employer-controlled risks of employment—is not affected by the question whether the transportation was furnished because of obligation or out of courtesy. *Constantine v. Sperry Corp.*, 539 N.Y.S. 2d 499, 504 (1989).

16. Professor Larson specifically addresses whether the provision of transportation in the employer's conveyance needs to be contract-based: “The provision of transportation by the employer may come about as a result of custom and usage, as well as by express contract, as when employees, working at some distance from their homes, engage in the known and habitual practice of riding on the employer's trucks. . . [A]n isolated and unauthorized ride in the employer's conveyance has usually been held to be outside the course of employment.” 1 *Larson's* at § 17.01.

17. Claimants were riding in the van that was contracted for them by their employer at the time they were injured. They both rode the van everyday with the knowledge and consent of the employer. By providing the van, the defendant undertook responsibility for the daily transportation of at least half of the employees, and, thus, the transportation was incidental to the claimants' employment. The van was under the control of the employer at all times, despite not actually predetermining the exact route the vanpool would take.

18. A very similar case is presented in *Holcomb v. Daily News*, in which a claimant was killed on his way to work when he fell out of an employer-owned delivery truck that he had hailed for a ride to work as it was passing him on a delivery route. While there was no contract provision in which the employer agreed to furnish transportation, the delivery trucks picked up employees "frequently and regularly" with the knowledge and acquiescence of the employer. The court stated, "An employer who assumes by custom or contract the responsibility to transport his employees must likewise assume the responsibility for the risks encountered in connection with the transportation. This is especially true when the employer is in exclusive control of the conveyance." *Holcomb v. Daily News*, 384 N.E.2d 665 (1978).

19. In *Holcomb*, it was a common practice of the employer to transport its employees to and from work, and "that the employer in effect acquiesced in such course of conduct and that this practice was advantageous to it." *Id.* at 668.

20. In the case of contractual obligation or obligation by custom, the employer, having assumed the responsibility to transport employees, must likewise bear the responsibility for the risks encountered, especially when the employer is in exclusive control of the conveyance, so that the injured employee may recover workmen's compensation. *Id.* at 669.

21. The transportation provided by VCI became an incident of the claimants' employment and accordingly VCI assumed the risk of injury in the event of an accident.

Arising Out of

22. VCI's control over the vanpool establishes that the claimants were injured in the course of their employment. The second factor to determine is if the injury arose out of the employment.

23. Focusing merely on what the claimant was doing at the time of his injury is overly restrictive in determining whether the claimant sustained injury "arising out of" employment. Ordinarily, if injury occurs during the "course of employment" it also "arises out of it," unless circumstances are so attenuated from the condition of employment that cause of injury cannot reasonably be related to employment. *Shaw v. Dutton Farm*, 160 Vt. 594 (1993).

24. The court in *Miller v. IBM*, adopted a "but for" test to determine whether or not the injury arose out of the employment pursuant to 21 V.S.A. § 618. This test is relevant to the present case and as applied demonstrates that the claimants would not have been injured, but for the necessary transportation to and from work provided by VCI. *Miller*, 161 Vt. at 223.

25. The claimants were placed in a “positional risk” situation which exists when the employees are subjected to risk of injury at work in a “but for” sense. “An injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where the claimant was injured.” *Id.* at 222. This theory supports compensation for cases in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when the employee was injured by some neutral force. The “neutral” in this context means “neither personal to the claimant nor distinctly associated with the employment.” 1 *Larson's* at § 6.50.

26. This positional- risk analysis is adopted rather than a tort-type proximate causation, especially in light of the broad, remedial purposes of workers' compensation law. *Id.*

27. The defendant argues that while utilizing the vanpool the claimants were not responsible or in any way obligated to perform job duties. However, even if the worker's activity leading to the injury is not work per se, the causal connection is not necessarily broken. *Shaw,* 160 Vt. at 599.

28. The fact that the claimants were not engaged in work-related business, did not received any wages during the time of transportation, deducted $10 from their pay check to utilize the vanpool, and were not required to use the vanpool are not critical issues. “Any act outside an employee's regular duties, which is undertaken in good faith to advance the employer's interest, whether or not employee's own assigned work is thereby furthered, is within the course of employment.” 1 *Larson* at § 27.

29. Several cases downplay the relevance of the employee's performance when determining if the accident arose out of the employment. “An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.” *Kenney,* 120 Vt. at 346.

30. Additionally, “An injury suffered by an employee while performing an act for the mutual benefit of himself and his employer was compensable as arising out of and in the course of employment, even though the advantage to the employer was slight.” *Shaw,* 160 Vt. at 237.

31. Finally, “where the trip or attendance is one in which the employer ordered or directed, or is for the sole benefit of the employer and his employee, compensation may be recovered. This applies even if the trip was wholly voluntary if it is regarded as incident to his employment.” 7 *Schneider's Worker's Compensation*, 1665.

32. For instance, the case of *Mann v. Board of Education* involved a principal who was injured while traveling in response to an invitation from the registrar of the state university as part of a plan for preparing the students for university work. The principal's attendance for this purpose was wholly voluntary but it was regarded as incident to his employment. *Mann v. Board of Education,* 266 Mich. 271 (1934).

33. The defendant argues that the vanpool was a great benefit provided for the employees, with little benefit to VCI. It is true that the workers had their own motivation for using the vanpool, such as the use of efficient inexpensive, transportation. At least half of the employees could not have gotten to work without the vanpool. The vanpool provided additional societal benefits such as decreased pollution and a reduction in traffic. Nonetheless, VCI benefited from these arrangements as well.

34. The vanpool benefited the employer by ensuring that the employees arrived on time and in an orderly fashion. The vanpool was also utilized in order to reduce employee turnover by providing existing employees without cars or license transportation, and allowed for additional people to consider working at the company who previously could not because of transportation issues. VCI used an advertisement which ran in the newspaper stating VCI provided transportation to and from work in order to induce those without transportation to work for VCI.

35. It is apparent that the claimants only benefited from the vanpool regarding their employment with VCI. The only purpose for an employee to utilize the vanpool would be for transportation to and from VCI for work. The vanpool made stops on a timetable that was regular and reliable and, accordingly, relied upon by the employees. Neither of the claimants would have applied for or maintained employment at VCI had the transportation not been offered.

36. A case very similar in the facts is *Constantine v. Sperry Corporation*. *Constantine* concerns an employee who was riding in a van leased by the employer for transporting employees to and from work in an effort to lessen congestion in the parking lot. A fellow employee operated the van. A passenger employee was injured when the van got into an accident. The court determined that the injuries arose out of and in the course of employment because the employer leased the van with the purpose of lessening traffic congestion in the parking lot. The court determined that the employee's sole remedy was under the Worker's Compensation Act. *Constantine v. Sperry Corporation*, 149 A.2d 394, 539 N.Y.S.2d 499 (1989).

37. Based on VCI's control over the vanpool and the benefits it received from the arrangement, the claimants injuries arose from and in the course of their employment.

38. While the defendant may have had every expectation that the liability insurer would handle recovery for the accident, it is well within the scope of the Worker's Compensation Act for the claimants to receive compensation for their injuries under the Act.

39. The Worker's Compensation Act, being remedial in character, is to be construed liberally to accomplish the economic and humanitarian objects of the act. *Matter of Husted v. Seneca Steel Serv.*, 41 N.Y.2d 140, 145 (1976).

40. Worker's Compensation is the proper avenue of recovery for the claimants. “The purpose of worker's compensation law is to provide, not only for the employees a remedy which is both expeditious and independent of proof of fault, but also provides for employers a liability which is limited and determinate. *Morriseau v. Legac*, 181 A.2d 53 (1962).

41. Under the facts of the case, coverage must be extended to the injuries sustained by the claimants in the automobile accident of January 27, 2000. This conclusion is well supported by the reasoning adopted by the majority of other state jurisdictions and the leading authority in this area. *Lee v. BSI Temporaries*, 688 A.2d 968 (1997); *Smithey v. Hansberger*, 938 P.2d 498 (1996); *Alitalia Linee Aeree Italiane v. Tornillo*, 603 A.2d 1335 (1992); *Doctor's Business Service, Inc., v. Clerk*, 498 So.2d 659 (1986); 1 *Larson's Worker's Compensation Law* § 15.01.

ORDER

Based on the Foregoing Findings of Fact and Conclusions of Law, I conclude that the claimants' injuries arose out of and in the course of their employment. As such, the defendant is ORDERED to pay all related workers' compensation benefits.

Dated at Montpelier, Vermont this 28th day of June 2001.

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R. Tasha Wallis
Commissioner

Appeal:
Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior (county) court or questions of law to the Vermont Supreme Court. 21 V.S.A.§§ 670, 672.