STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-18394
Travis Brown	)	
	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: R. Tasha Wallis
	)	Commissioner
Vermont Mechanical/Encompass	)	
	)	Opinion No. 09-02WC

Submitted on the briefs

APPEARANCES:

Arend R. Tensen, Esq. for the claimant
Alison A. Brodie, Esq. for the defendant

ISSUE:

Was Travis Brown injured in the course of his employment when he was required by his employer to travel to a designated job site and suffered an injury while traveling?

STIPULATION OF FACTS:

1. At the time of the alleged accident, Travis Brown (claimant) was an employee within the meaning of the Workers Compensation Act (Act).

2. At the time of the alleged accident, Vermont Mechanical/Encompass was an employer within the meaning of the Act. The company is engaged in the construction business.

3. Claimant's employment required him to work at several different, designated job sites on a regular basis, including the Wells River site mentioned below, to perform construction work.

4. On or about June 10, 1998 claimant was commuting by motorcycle from his home in Barre, Vermont to a Wells River job site to which he had been assigned by his employer.

5. The distance to the job site was approximately 30 miles each way.

6. While en route, claimant sustained an injury when his motorcycle collided with a school bus. The accident occurred at approximately 6:38 a.m. at the junction of Route 302 and Route 25 in Waits River, Vermont.

7. As a result of the accident claimant sustained multiple, serious injuries.

8. The accident report lists the primary cause of the accident as excessive speed by claimant. The investigating officer, John R. Imburgio, recommended that claimant be cited for speeding. Claimant did not in fact receive a citation.

9. According the terms of claimant's employment agreement, claimant should be provided a bonus when required to travel 41 or more miles each way to a job site. This bonus took the form of an extra $0.50 or more for the hours actually worked at the job site.

10. Claimant received compensation in accordance with the terms for the agreement described above for the occasions when he traveled 41 or more miles each way to a job.

11. Claimant was not entitled to bonus pay for his travel time on June 10, 1998 according to the terms of the agreement.

DISCUSSION:

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

2. Additionally, the claimant must prove that his injury arose out of and was incurred in the course of his employment. 21 V.S.A. § 618. The "arising out of" requirement is one of positional risk fulfilled when an injury "would not have occurred *but for* the fact that the conditions and obligations of the employment placed claimant in the position where [claimant] was injured." *Miller v. International Business Machines Corp*. 161 Vt. 213, 214. (1993) (citations omitted).

3. An injury occurs "in the course of" employment "when it occurs within the period of time when the employee was on duty at a place where the employee may reasonably be expected to be while fulfilling the duties of [the] employment contract." Id. at 215 (citing *Marsigli Estate v. Granite City Auto Sales, Inc*., 124 Vt. 95, 98 (1964)).

4. The "in the course of" requirement of the instant case invokes the "going and coming rule" which is applicable to employees with fixed hours and place of work. The rule provides that ordinarily an employee may not recover for an injury incurred off the premises while going to and from work, but may recover for injuries incurred on the premises, 1 Larson's Workers' Compensation Law, § 13; *Miller*, 161 Vt. 213. (injury on a private access road controlled by the employer compensable).

5. The Vermont Supreme Court in *Miller* reasoned that the on-premises exception to the going and coming rule

> promotes the broad policy of remediation because it covers workers for part of the necessary job-related activity of commuting to and from work. It clearly delineates the employer's liability for injuries to commuting employees as coextensive with the employer's premises. By limiting liability to areas within the employer's control, this test incorporates a fair compromise in allocation the cost of worker injuries.

Id. at 216

6. Although the general rule excludes off-premises injuries incurred while commuting to work, exceptions to that rule have been found. For example:

> The rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed.

1 Larson's Workers' Compensation Law, chapter 14.

7. An analysis of the issue presented requires a consideration of the nature of the work site. It is not "fixed" in the same sense that the *Miller* situation was, with a permanent site. But it is fixed in the sense that an employee chooses how to get to work, has control over the means of transportation, and travels to a single site each day, although the site changes depending on where a given construction project might be. See, *Fletcher v. Northwest Mechanical Contr., Inc*. 599 N.E.2d 822 (Ohio App. 6 Dist. 1991) (describes a semi-fixed work site).

8. If the premises rule is extended to a construction or similar site, the going and coming rule would limit compensable claims to those on the site. Although Vermont courts have not answered the precise question whether an injury incurred en route to a construction work site is compensable, several other jurisdictions, including Ohio, have. In *Fletche*r, the Ohio Court of Appeals reversed a trial court judgment in favor of the employer in a case involving an injury to a worker commuting to a semi-fixed job site. The court concluded that one injured while traveling to a semi-fixed work site was injured in the course of his employment "if making the journey is a substantial part of the service for which the worker is employed." *Fletcher*, 599 N.E. 822. The court reasoned that such a result was justified because the employer benefited by having the work performed at the various sites. The risk to the claimant was not that associated with the ordinary fixed site employment, but rather was dependent on the wishes of a customer who determines the time and place and with whom the employer has a contract.

9. In other cases, special circumstances led courts to award benefits to workers injured en route to construction or drilling sites, often turning on whether the site could be considered fixed, in which case the going and coming rule would apply. For example, claimants prevailed in a case involving what the court determined was excessive travel over a three state area, sometimes to remote sites and often necessitating overnight accommodations, in *Ruckman v. Cubby Drilling*, Inc, 689 N.E. 2d 917 (Ohio App.1998). Similarly, judgment for a claimant was made in a case where an employer gave the employee specific instructions to use a different vehicle, in *Jackson, v. Long*, 289 So. 2d 205 (LaApp.1974); and when an employer instructed the worker to bring a car and use it to transport materials owned by the employer. *Devine v. Advanced Power Control, Inc.* 663 A.2d. 1205 (Del. Super 1995).

10. More recently, the Ohio Court of Appeals again visited the issue in an unpublished decision, *Barber v. Buckeye Masonry & Construction Co*., 2001 WL 1182827 (Ohio App. October 5, 2001) when it considered the compensability of an injury incurred in the course of traveling to a construction site for his employer. The employee was not compensated for travel time or expense and reported directly to the job site without first reporting to the employer's permanent work place. He was not required to transport any equipment or materials. En route from his home to the construction site, the claimant was injured in a motor vehicle accident. The court denied benefits. After examining other cases, the court reasoned that the employer had absolutely no control over the driver causing the accident or the scene of the accident. The employer did not benefit from the claimant's presence at the site of the accident because he was not on the clock. No special hazard was associated with the trip. The claimant did not face the possibility of extended travel or remote travel or of an overnight stay. Because the claimant's travel in *Barber* was the same commute undertaken by the general public and exposed the claimant to no greater risk than the general public, the court held that the injury did not arise out of his employment. Id. at 4.

11. I find the reasoning of *Barber* persuasive, especially viewed through the lens of *Miller*. The Vermont Workers' Compensation Act is to be construed liberally to accomplish the humane purpose for which it was passed, but a liberal construction does not mean an unreasonable or unwarranted construction. *Herbert v. Layman,* 125 Vt. 481 (1966); Rule 1, Vermont Workers' Compensation and Occupational Disease Rules. A reasonable construction requires balancing the interests of worker and employer and, as the *Miller* court concluded, "limiting liability to areas within the employer's control incorporates a fair compromise in allocating the costs of worker injuries." 161 Vt. 216. Such a construction would justify extending the going and coming rule to commuting injuries if the employer benefits from the worker's journey in ways beyond mere attendance, or when the employer in some way puts the employer at risk by, for example, by making the trip an urgent one.

12. An injury sustained en route to a construction or similar job site on a public highway shall not be compensable unless the employer exercises control over the commute or imposes requirements that increase the risk to the worker beyond that of a normal commute on a public highway.

13. In this case, the employer exerted no control over the claimant's commute nor imposed any requirements that increased the risk to the claimant over that of the general public.

14. The claimant's position at the time of the accident was no different from one commuting to a fixed work site and for whom the going and coming rule would bar a claim for an off-premises injury. Therefore, the injury did not occur in the course of the claimant's employment. And there were no extenuating circumstances from which I conclude that the injury arose out of the claimant's employment. See, *Miller*, 161 Vt. at 216.

15. Without the requisite proof that the accident arose out of and was incurred in the course of his employment the claimant cannot prevail.

ORDER:

THEREFORE, this claim is DENIED.

Dated at Montpelier, Vermont this 25th day of February 2002.

_____
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 court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.