McEvoy, Joseph, Dec'd

COURSE OF EMPLOYMENT (RCW 51.08.013; RCW 51.08.180(1))

Going and coming rule

A worker's trip to work did not become a special errand simply because he was required to open his employer's plant when he arrived, as the trip would have been made in any event. The general rule that workers are not in the course of employment while going to and from work therefore applied to preclude compensation for the worker's fatal accident while commuting to work. ***….In re Joseph McEvoy, Dec'd*, BIIA Dec., 17,774 (1963)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOSEPH A. McEVOY, DEC'D	**)**	**DOCKET NO. 17,774**
	)	
CLAIM NO. C-854232	**)**	**DECISION AND ORDER**

APPEARANCES:

Petitioner, Rita Mae McEvoy, by
Bassett, Davies, Roberts and Donaldson, per
Samuel Bassett

Employer, Sunset Distributors, by
A. W. Irving, President

Department of Labor and Industries, by
The Attorney General, per
Thomas O'Malley, Assistant

Appeal filed by Rita Mae McEvoy, widow of the deceased workman, Joseph A. McEvoy, on May 4, 1962, from an order of the supervisor of industrial insurance dated March 22, 1962, denying her claim for a widow's pension. **SUSTAINED**.

DECISION

Joseph A. McEvoy was involved in a car accident on November 6, 1961, when his car crashed into a building on Bothell Way and 133rd Street in Seattle, Washington, causing injuries from which he died the following day. His widow, Rita Mae McEvoy, filed a claim for widow's benefits with the department of labor and industries on January 29, 1962, alleging that the deceased, at the time of his fatal accident, was in the course of his employment with the Sunset Distributors, which entitled her to widow's pension benefits under the Washington Workmen's Compensation Act. The department, on March 22, 1962, entered an order denying her claim for the stated reason that at the time of his fatal injury, the deceased "was on his way to work but was not in the course of his employment."

Based on the record, it appears that there is no conflict regarding the facts, and the issue presented is one of law, that is, whether or not the deceased was in the course of his employment at the time of his fatal accident.

The record discloses that the deceased had been employed by the Sunset Distributors since 1950, and during 1960 and 1961 he was in charge of the warehouse and worked part time as a driver-salesman. Some time prior to November 6, 1961, he had also been assigned the additional duty of opening up the employer's plant prior to the arrival of the other employees at 8:00 a.m.

Although his regular work hours were from 8:00 a.m. to 4:30 p.m., it appears that he normally arrived at the plant considerably in advance of that time and made coffee for the employees who would have to change clothes and be ready to start work at 8 a.m. Also, at times, he would start to load trucks prior to the arrival of the other employees. Mr. McEvoy was paid on an hourly basis with time and a half for all time over eight hours and his pay started from the time he opened the plant.

Like other salesmen, the claimant, under a union contract, was paid a "flat fee" for use of his personal car on company business, based on an estimated monthly mileage of 750 miles, which he received regardless of the actual number of miles driven under 750 miles. He was never paid in excess of the flat fee and there was no understanding that he would be paid mileage from driving his car between his home and the plant.

On the date of his fatal accident, the deceased left home between 5:30 and 5:45 a.m., and was on his usual route to work in Ballard when he crashed into a building. The time and place of the accident indicated that he was going directly to the plant, and there was no evidence that he was on any special errand or that a delivery was to be made by him on his way to work.

R.C.W. 51.32.010 provides, in part, that "Each workman injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with this chapter...."

At the time of Mr. McEvoy's fatal injury "acting in the course of employment" was defined by R.C.W. 51.08.013 (Sec. 3 Ch. 107 Laws of 1961) as follows:

> "'Acting in the course of employment' means the workman acting at his employer's direction or in the furtherance of his employer's business which shall include time spent going to and from work on the job site, as defined in R.C.W. 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the workman is engaged in the work process in areas controlled by his employer, except parking areas, and it is not necessary that at the time an injury is sustained by a workman he be doing the work on which his compensation is based or that the event be within the time limits on which industrial insurance or medical aid premium or assessments are paid."

By inference from the above-quoted statute, and the general rule as well as the rule in this state, apart from such statute, is that a workman is not in the course of his employment while on his way to or from work off the employer's premises. Brown v. Department of Labor and Industries, 135 Wash. 327; Wood v. Chambers Packing Co., 190 Wash. 411.

A well established exception to the general rule that injuries occurring off the employer's premises are not compensable is when the journey itself is a substantial part of the service for which the worker is employed. (See Larson on Workmen's Compensation Vol. I, Sec. 16).

It appears from the notice of appeal and the record in this case that it is the petitioner's contention that this exception to the general rule is applicable here as her husband was assigned the duty of opening the employer's place of business each morning.

However, it is clear from the record that this duty did not involve a special errand or trip and that he would have made the same trip to his employer's plant if he had not been assigned the responsibility of opening the employer's place of business in the morning. In other words, this was simply an additional duty which he was required to perform after reaching the plant.

Although there are no decisions of our Supreme Court on the precise question here presented, the case of Otto v. Independent School District, 237 Iowa 991, 23 N. W. 2d 915 (1946) appears to be directly in point. In that case a school janitor was injured on his way to work in the morning. His first duty was to open the school; thereafter, although his hours were not fixed, he worked throughout the day and locked the building at the end of the day. The majority of the Court held that he was not in the course of his employment at the time of his injury. With respect to the argument made in the dissenting opinion that "the service performed by such a janitor is different from that of an ordinary day laborer, in that, as custodian of the employer's property, he must go to the building and open it or the business of the employer would be at a standstill," Larson in his Law of Workmen's Compensation (Vol I p.225) comments:

> "Tested by the present criterion, the dissent is not convincing. There are many employees, who because of their key position in an operation, might well be equally essential to the successful carrying on of the employer's business. Relative indispensability can hardly be the test of status while going and coming. This leaves the question of whether the journey itself was an important part of the service; and since it was nothing but the usual five-block walk which the janitor always had to take, there is no real distinction from the going and coming of any ordinary employee."

The same principle was involved in the case of Makal v. Indus-trial Commission, 262 Wis 215 54 N.W. 2d 905 (1952), in which a county employee, who regularly drove his car to a garage where he picked up a county-owned car, which he was required to bring to the court house, was held outside the course of his employment on the first leg of the journey in his own car, and his argument that

the journey to pick up the county car was a "special errand" was rejected, since it was really only a portion of his regular journey to and from work, without as yet having the benefit of the owner's conveyance rule.

So, in the case here under consideration, the deceased's trip to work did not become a "special errand" simply because he was required to open his employer's plant when he arrive, as the trip would have been made in any event, and, in our opinion the general rule that workmen are not in the course of their employment while going to and from work off the employer's premises is applicable. The supervisor's order of March 22, 1962, rejecting this claim must therefore be sustained.

FINDINGS OF FACT

In view of the foregoing, and after reviewing the entire record herein, the board finds as follows:

1. Rita Mae McEvoy, surviving spouse of the deceased workman, Joseph A. McEvoy, filed a claim for a widow's pension with the department of labor and industries on January 29, 1962, alleging that her husband was fatally injured on November 6, 1961, while in the course of his extra-hazardous employment with Sunset Distributors. On March 22, 1962, the supervisor of industrial insurance entered an order rejecting the claim for the reason that, at the time of his fatal injury, the claimant was not in the course of his employment. On May 4, 1962, the widow filed a notice of appeal to this board, which was granted on May 31, 1962.

2. On and for some time prior to November 6, 1961, the deceased workman was employed by the Sunset Distributors as a warehouseman and salesman-driver. He was paid wages for his regular shift from 8:00 a.m. to 4:30 p.m., and time and a half for such overtime hours that he would work before and after his regular shift.

3. Joseph A. McEvoy, in addition to his wages, was paid a flat fee for the use of his personal car on company business, based on an estimated monthly mileage of 750 miles. He had never been paid more than this "flat fee" and there was no agreement with respect to payment of mileage going to and from work.

4. On November 6, 1961, and for some time prior thereto, the deceased had been assigned the additional duty of opening the employer's plant prior to the arrival of other employees at 8:00 a.m., but it would have been necessary for him to make the trip from his home to his employer's plant each morning before 8 a.m. even though he did not have the special duty of opening the plant.

5. On November 6, 1961, at about 6:30 a.m., the deceased workman was driving on Bothell Way, from his home at Sheridan Beach in a direct

route to his place of work when his car went out of control at 133rd Street crashing into a building, and causing injuries from which Mr. McEvoy died the following day.

6. At the time of the fatal accident on November 6, 1961, Mr. McEvoy was not engaged in any special errand or trip at his employer's direction, but was simply on his regular journey to his place of work.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the board concludes:

1. The deceased workman, Joseph A. McEvoy, at the time of his fatal accident on November 6, 1961, was not in the course of his employment with the Sunset Distributors.

2. The petitioner, Rita Mae McEvoy, is not entitled to widow's benefits under the workmen's compensation act, and the supervisor's order dated March 22, 1962, denying her claim, should be sustained.

ORDER

Now, therefore, it is hereby ORDERED that the order of the supervisor of industrial insurance dated March 22, 1962, be, and the same is hereby, sustained.

Dated this 28th day of May, 1963.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R.H. POWELL Member

/s/_____
HAROLD J. PETRIE Member