Cockle, Dallas, Dec'd

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

Goodwill

A salesman/truck driver, killed while helping his employer's customer start a stalled truck, was in the course of employment because he was creating goodwill in furtherance of his employer's business and was not serving any purpose of his own. ***...In re Dallas Cockle, Dec'd*, BIIA Dec., 23,791 (1967)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DALLAS WAYNE COCKLE, DEC'D	**)**	**DOCKET NO. 23,791**
	)	
CLAIM NO. F-264404	**)**	**DECISION AND ORDER**

APPEARANCES:

Petitioner, Helen C. Cockle, by
Horton and Wilkins, per
Hugh B. Horton

Employer, Ward's Plywood Mart,
None

Department of Labor and Industries, by
The Attorney General, per
Frederick B. Hayes, Gosta E. Dagg, and Thomas O'Malley, Assistants

This is an appeal filed by the petitioner, Helen C. Cockle, the surviving widow of Dallas Wayne Cockle, Deceased, on February 5, 1965, from an order of the Supervisor of Industrial Insurance dated January 27, 1965, rejecting her claim for a widow's pension. **REVERSED AND REMANDED**.

DECISION

This matter is before the Board for review and determination based on a timely Statement of Exceptions filed by the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on August 22, 1966, reversing the order from which this appeal was taken and directing the Department to allow the petitioner's application for a widow's pension.

The sole issue presented by this appeal is whether or not the deceased workman, Dallas Wayne Cockle, was acting in the course of his employment at the time of his fatal injury on December 31, 1964, which is a mixed question of fact and law.

The hearing examiner found (Finding No. 1) that while engaged in the course of his duties as a combination salesman and truck driver for the employer, the decedent stopped and assisted a customer of the employer in starting his stalled truck by towing the vehicle, and while unhitching the tow between the two vehicles, a bus struck the rear of the customer's truck, throwing it into the rear of the employer's truck, resulting in injuries to Mr. Cockle which resulted in his death. The hearing examiner further found, in substance (Finding No. 3), that in acting to assist his employer's customer in starting his stalled vehicle, the decedent was not engaged in serving any purpose of his

own, but was doing only what was normally expected of him by the requirements of his job in creating good will in furtherance of his employer's business. Based on these findings, the hearing examiner concluded that the decedent was fatally injured in the course of his employment and that the petitioner was entitled to a pension under the provisions of the Workmen's Compensation Act.

The Department has accepted to the findings above mentioned and to the conclusions based thereon "on the grounds that, under the applicable Washington law, the evidence is not sufficient to establish that the decedent was acting within the course of his employment at the time of his death on December 31, 1964."

Although the hearing examiner discussed the question of possible deviation by the decedent from the customary route of travel from the point of his last delivery in Kennewick to the point of his next delivery in Richland inasmuch as he had stopped momentarily at his home (near which he encountered the stalled truck) to give a message to his wife, he concluded that there was no actual deviation and there is no contention to the contrary made by the Department in its argument in support of its exceptions. The Department contends simply that he took himself out of the course of his employment by voluntarily assisting his employer's customer in starting his truck.

The hearing examiner noted in his decision that there were no Washington cases in point on the legal issue raised by the factual situation in this case and, feeling that this was a case of "first impression" in this state, he based his decision on what he considered the majority rule as discussed in Vol. 1, Larson's Workmen's Compensation Law, Section 27.00, page 452.23, and "more particularly" in Section 27.20, page 452.34 and Section 27.22, page 452.37. In its Statement of Exceptions, the Department contends that "None of the citations listed in the quoted sections go as far in allowing acts in the furtherance of the employer's business as the Examiner 'as a matter of first impression' would have the law of Washington go." The Department further contends that there are "many cases" (citing three such cases which will be subsequently discussed) supporting the Department's determination that the decedent was not in the course of his employment at the time of his fatal injury.

We shall first consider the Department's contention that none of the cases referred to in the sections of Larson's Workmen's Compensation Law above referred to supports the hearing examiner's conclusion in the instant case. Section 27.22(a) of Vol. 1, Larson's Workmen's Compensation Law (1966 Edition) deals with "Good will of customers and other business associates." Under this subject, the author states:

> "A number of courts have gone to considerable lengths in upholding awards for injuries occurring in the course of miscellaneous Good Samaritan activities by employees, on the theory that the employer ultimately profited as a result of the good will thus created. When the person assisted stands in some business relation to the employer, the employer benefit is relatively obvious."

After referring to cases where there was a clear business relationship involved such as assisting a patron in parking a car and taking a drunk customer home, the author refers to other cases where "The business relation was more remote, but still discernible," as for example the cases of Baumann v. Howard J. Ehmke Co., 126 Pa. Super. 108, 190 A. 343 (1937), in which the decedent, living temporarily at the farm of one of his customers, was killed while helping the customer's brother cut down a tree, and Fairchild v. Prairie Oil & Gas Co., 138 Kan. 651, 27 P. 2d 209 (1933), in which an employee of an oil and gas lessee was killed while helping some people who had the lessee's permission to cut timber on the premises. In both of these cases compensation was awarded because of the assumed incidental benefit to the employer. At this point, the author comments that "But at least one case [Borel v. U. S. Gas Co., 233 F. 2d 385 (5th cir. 1956)] has drawn the line at helping a competitor, presumably on the rather old-fashioned hard-nosed theory that the employee would have served his own employer's interests better by leaving his competitor's truck stuck in the mud." Under Section 27.22(b) which deals with "Good will of general public" Larson states that:

> "The good-will rule attains its ultimate expression, however, when it reaches out to embrace acts of gallantry directed unselfishly toward the public in general."

As an example of cases in this category, the author cites Gross v. Davey Tree Expert Co., 248 App. Div. 838, 290 N.Y. Supp. 168 (1936), in which a tree trimmer descended from his immediate duties to assist a lady in getting her car started, and in so doing, sustained an injury. The evidence showed that the claimant had received instructions "to do everything possible to obtain good will for the telephone company on the job," and the court held that he was acting in the course of his employment. The following comments of the author with respect to this case are of interest:

> This case, which evidently assumes that the lady will now return the favor and benefit the employer by increased use of the telephone, marks the furthest limit to which the good-will idea had been carried in compensation cases. Lest this be thought a freakish product of indiscriminate compensation beneficence, it should be mentioned that a

> leading case on vicarious tort liability of master for servant has carried the course of employment concept every bit as far. In Cochran v. Michaels, [110 W. Va. 127, 157, S.E. 173 (1931)], an automobile salesman ran down a third person while taking a personal friend and three other people, none of whom was a prospect for a sale, to a neighboring town for the purpose of seeing a doctor. The salesman was held, in one of the most elaborate opinions ever written on vicarious liability, to have been in the course of his employment because 'A friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted.'"

Under the same footnote in which the Gross case is cited, the recent case of Ace pest Control, Inc. v. Industrial Comm'n, 31 Ill. 2d 386, 205 N.E. 2d 453 (1965) appears in the 1967 Supplement to Vol. 1 of Larson's Workmen's Compensation Law. In that case, the decedent was driving his employer's car in the course of his employment when he stopped to help a motorist whose car was out of gas and was struck by a car. The company had no policy as to assistance of this sort, but compensation was awarded. Although not cited by Larson, the case of Morningstar v. Corning Bakery Co., 176 N.Y. S. 2d 388 is in line with the cases cited. That case involved a sales manager of an employer, who while driving his car on a business mission, was "flagged down" by a stranger with a disabled vehicle. The claimant stopped and supplied tools necessary to work on the disabled vehicle, then while standing off the road, he was struck by another automobile. In sustaining a compensation award, the court stated that where an employee in a benefit or advantage to his employer, is a natural and normal incident of employment and within the contemplation and reasonable risk thereof."

Considering particularly that the case here under consideration does not involve simply the question of whether a certain action promotes the good will of the public in general, in which the possible benefit to the employer is generally very tenuous and speculative, but rather involves the good will of customers, the Department's contention that the text statements by Larson and cases cited in connection therewith by the hearing examiner do not support his conclusion, is obviously inaccurate.

Turning next to the question of the status of the law in our own state, RCW 51.08.013 defines "Acting in the Course of Employment" in part as "...acting at his employer's direction or in the furtherance of his employer's business..." This portion of the statutory definition is simply a codification of the test previously laid down by our Supreme Court for determining whether an

employee at a given time is in the course of his employment. McGrail v. Department of Labor and Industries, 190 Wash. 272, and cases cited therein.

The first case cited by the Department in support of its contention that the employee in the instant case was not acting in the course of his employment is that of Degrugillier v. Department of Labor and Industries, 166 Wash. 579. With respect to this case the Department states in its exceptions:

> "The trial judge concluded:
>
> '. . . that his act was entirely voluntary in so far as his employer was concerned, but that, inasmuch as it was in the interests of his employer in protection and conservation of his property, he is entitled to recover.' (At p. 580.)
>
> The Supreme Court denied a claim for widow's pension because the injury did not occur in the course of employment. Mr. Cockle, like Mr. Degrugillier, was engaged in an act which was entirely voluntary in so far as his employer was concerned, but was no more acting 'in the furtherance of his employer's business . . .' than was Mr. Degrugillier." (Emphasis by the Department.)

This contention misstates and misconstrues the holding in the Degrugillier case. The full quotation of the statement of the trial judge quoted in the court's decision is as follows:

> "'It is not contended in this case that deceased was in the course of his employment at the time of his death, but the claim is prosecuted on the theory that he was at the time of his death engaged in salvaging logs which had escaped from a boom belonging to his employer; that his act was entirely voluntary in so far as his employer was concerned, but that, inasmuch as it was in the interests of his employer in protection and conservation of his property, he is entitled to recover.
>
> '. . . This is not such an emergency as is shown by the cases, where one is injured or killed in attending a fire for the protection of the employer's property or other similar cases, and in my judgment the claim cannot be allowed, and the order of the department refusing the same must be affirmed.'" (Emphasis supplied.)

The underscored portion of the first paragraph of the above-quoted statement, which, together with the entire second paragraph, was omitted in the Department's quotation, makes it clear that the statement quoted in the Department's exceptions was not the "conclusion" of the trial judge as stated by the Department, but rather a statement of the claimant's contentions and theory of the case. The omitted portion of the second paragraph of the above quotation (obtained from the record) is as follows: "I am satisfied under all the evidence disclosed by the record that the facts

here do not bring the deceased under the rule of law contended for in the cases cited by counsel for the claimant." The court then stated:

> "[1] There can be no question but that the trial judge was right in saying that decedent at the time of his injury was a mere volunteer. Nor was there any such emergency as would bring the case within the rule of cases cited by appellant. The log which he was supposed to have been re-capturing, if he was so trying, had been floating in the water for a day or so, and undoubtedly would have floated another day or two."

Assuming that the decedent died while actually attempting to retrieve a log belonging to his employer, it is clear that he was in fact acting in the interest of his employer in so doing, and the interpretation placed upon the decision by the Department would therefore entirely emasculate the present statutory definition of "acting in the course of employment" and leave only "acting at his employer's direction." It should be noted from the statement of the trial judge heretofore quoted that "It was not contended in this case that deceased was in the course of his employment" at the time of engaging in the activity which allegedly caused his death, but that he contended that he was entitled to recover as a volunteer who acted in an emergency to protect his employer's property. The specific issue passed on by the court is more clearly defined by reference to the briefs filed by the parties which reveals that the deceased workman and his brother-in-law had contracted with the Puget Timber Company to fall and peel piling on company property and were to be paid on a footage basis. After the decedent and his brother-in-law had finished their work on October 16, 1929, and went to their home several miles from the company's property where they worked, the decedent's wife told him that logs from a company log boom in the cove near their residence had gotten loose. It is clear that the attempt by the decedent to retrieve one of the logs at about 4:00 a.m., on October 17, 1929, was not within the time or space limits of his employment nor part of the duties for which he had been hired, but the decedent's brother-in-law testified that they expected to be paid "because if you're doing something for someone else you expect to be paid for it." The case did not involve simply a temporary diversion during the course of employment in furtherance of the employer's interest, but was purely and simply a voluntary act entirely unrelated to his employment. Under these circumstances, the only theory on which recovery could be had was that advanced by the appellant, namely, that her husband had acted in an emergency to protect the employer's property. See Meany v. Teading, 102 N.Y. S. 2d 514; Scott v. Rhyan (Ariz.) 275 P. 2d 891; Belle City Malleable Iron Co. v. Industrial Commission, 170 Wis. 293, 174 N.W. 899, 7 ALR

1071. The holding of the court in the Degrugillier case was simply based on the fact that there was no work-connected emergency involved and certainly has no bearing on the issue presented in the case here under consideration.

The next case cited by the Department is McGrail v. Department of Labor and Industries, supra. In that case, McGrail was employed by the highway department to drive his own truck on a road construction job pursuant to an agreement under which he was paid a specified rate per hour for driving the truck and a specified sum for hire of the truck. He was required to keep his truck in proper condition mechanically, furnish all equipment, and make necessary repairs. He sustained a fatal injury while on a personal trip after his work shift to obtain tires for his truck. After distinguishing the facts in the case from those in the case of MacKay v. Department of Labor and Industries, 181 Wash. 702 on several grounds, the court stated:

> "... But we rest our conclusion herein more particularly and with complete decisiveness upon the ground that the furnishing of the tires was related to a contract of truck hiring and not to a contract of employment, and that, when McGrail undertook the journey to Wenatchee to procure tires, he was not doing so in furtherance of his employer's interests, but solely in furtherance of his own interests as the owner and hirer of the truck. He was, therefore, not a workman in the course of his employment, within the meaning of the statute."

In other words, the decedent was working under a severable contract; one a contract of employment and the other a contract of hiring, and the court merely held that his injury was not sustained in connection with his employment contract, but was related to his truck hiring contract, which was solely in furtherance of his own interests and not in the interest of his employer. There is simply no analogy whatsoever between the cited case and that here under consideration.

Finally, the Department cites the case of Lunz v. Department of Labor and Industries, 50 Wn. 2d 273. In that case, this Board found that the decedent, who was a manger of a car-washing plant in Seattle, was not in the course of his employment when he was involved in a fatal accident while driving back to Seattle from a trip to Anacortes, where he and his brother-in-law, also an employee of the company, had delivered some tires and spent a sociable afternoon with his brother and other relatives, and the Board was sustained on appeal to the Superior Court and to the Supreme Court. The facts are set out in considerable detail in the court's opinion and will not be repeated here, but it is apparent therefrom (and was apparent to this board) that the trip in question did not in any degree further the employer's interest. In fact, it might sell be said that it was contrary to the

employer's interests to have two employees spend an afternoon driving a considerable distance, solely to do a favor for a relative involving a transaction which the evidence showed was clearly not company business. Further, the case did not involve a simple temporary deviation from the course of employment to do a favor for a customer of the employer, and the court made the following obvious understatement with respect to the decedent's widow's theory that her husband was engaged in a promotional activity in furtherance of his employer's interests:

> "... Any good will which may have been created by this accommodation would add little to that which already existed by virtue of the relationship between the parties. Furthermore, the amount of car wash business that would be given to a plant in Seattle by a customer in Anacortes, eighty miles away, would hardly justify the expenditure of an entire afternoon of the superintendent's time. The fact that the activity was tolerated by the employer does not mean that it was done in furtherance of the company's interest."

The Lunz case is clearly distinguishable on the facts from the instant case and, in our opinion, none of the cases cited by the Department supports its position.

In the case here under consideration, both the employer and Mr. Mitchell, the driver of the disabled truck, testified that Mr. Mitchell was a customer of the company and the employer testified that it was his desire to build up good will in the Tri-City area to help his business, although no specific instructions were given to employees to assist anyone who had a disabled vehicle. Mr. Cockle's lips were sealed by death, but considering the fact that he was a salesman, as well as a driver, and that Mr. Mitchell was a customer of his employer, we are convinced that his action in assisting Mr. Mitchell when he encountered his stalled truck while he was in the course of his employment, was something that he could reasonably assume he would be expected to do as part of his job in furtherance of his employer's interests. We therefore conclude that the Department's exceptions are without merit and agree with the hearing examiner's conclusions that the order appealed from should be reversed.

In the course of our consideration of the record, we have considered all evidentiary rulings of the hearing examiner adverse to the Department's position and, finding no prejudicial error involved, said rulings are hereby affirmed.

FINDINGS OF FACT

After review of the entire record herein, the Board finds as follows:

1. The petitioner herein, Helen C. Cockle, surviving spouse of the deceased workman, Dallas Wayne Cockle, filed a claim for a widow's pension with the Department of Labor and Industries on January 22, 1965, based on a fatal injury sustained by said workman while allegedly acting in the course of his employment as a truck driver-salesman for Ward's Plywood Mart, in Richland, Washington, on December 31, 1964. On January 27, 1965, the Supervisor of Industrial Insurance issued an order denying the claim for the stated reason that at the time of his fatal injury the decedent was not in the course of his employment. The petitioner filed an appeal with this Board on February 5,1965, and the appeal was granted by a Board order dated February 26, 1965.

2. After hearings were conducted in connection with the petitioner's appeal, a hearing examiner for this Board issued a Proposed Decision and Order on August 22, 1966, and a timely Statement of Exceptions thereto was filed by the Department of Labor and Industries.

3. While on his way from Kennewick to Richland to make a delivery in the course of his duties as a combination truck driver-salesman, on December 31, 1964, the deceased workman, Dallas Wayne Cockle, encountered a customer of decedent's employer whose truck was stalled near the decedent's home when he had stopped momentarily to deliver a message to his wife, and he assisted the customer in starting his vehicle by towing the vehicle a distance of about a block. He then stepped between the two vehicles and was fatally injured when a bus struck the rear of the customer's truck, driving it into the rear of the employer's delivery truck.

4. In assisting his employer's customer under the circumstances above outlined, the deceased was not engaged in serving any purpose of his own, but was doing only what he could reasonably assume would be expected of him in carrying out the duties of his employment by creating good will in furtherance of his employer's interests.

CONCLUSIONS OF LAW

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

1. The Board has jurisdiction of the parties and subject matter of this appeal.

2. At the time of his fatal injury on December 31, 1964, the deceased workman was acting in the course of his employment within the meaning of the Workmen's Compensation Act.

3. The order of the Supervisor of Industrial Insurance issued herein January 27, 1965, denying petitioner's claim for a widow's pension,

should be reversed and this claim should be remanded to the Department of Labor and Industries with direction to allow the same.

It is so ORDERED.

Dated this 29th day of September, 1967.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member

/s/_____
R. M. GILMORE Member