Martin, Marlene

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

Dual purpose doctrine

A worker injured commuting to work by her regular route was not brought within the course of employment simply because she intended to deposit mail for her employer enroute. The personal commuting trip would have gone forward and the worker would have followed the same route even in the absence of the business errand. **….*In re Marlene Martin*, BIIA Dec., 85 2862 (1987)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: MARLENE ANN MARTIN	**DOCKET NO. 85 2862**
CLAIM NO. S-844887	**DECISION AND ORDER**

APPEARANCES:

Claimant, Marlene Ann Martin, by
Richard R. Roth

Self-Insured Employer, Group Health Cooperative, by
Schwabe, Williamson, Wyatt & Lenihan, per
Gary D. Keehn

This is an appeal filed by the claimant on October 3, 1985 from an order of the Department of Labor and Industries dated August 13, 1985, which set aside and held for naught a prior order dated May 22, 1985, and ordered the claim remain rejected for the reason that at the time of the injury the claimant was not in the course of employment. Affirmed.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on July 30, 1986, in which the order of the Department dated August 13, 1985 was reversed, and the claim remanded to the Department of Labor and Industries with instruction to issue an order requiring the self-insured employer to accept this claim as an industrial injury on the ground claimant was in the course of her employment at the time of

her injury.

The Board has reviewed the evidentiary findings in the record of the proceedings and finds that no prejudicial error was committed; accordingly, said rulings are hereby affirmed.

The Proposed Decision and Order found that the claimant was acting with a "dual purpose" at the time and place she was injured on the morning of March 22, 1985, i.e., (1) commuting via her usual personal-journey route to reach her employer's business premises and go to work, and (2) intending to mail some business correspondence which she was carrying, the first thing that morning to meet a mailing deadline. On this basis, the Proposed Decision found her to be acting "in part" in furtherance of her employer's business and thus in the course of employment.

However, the long-established "dual purpose rule," conceived by Judge Cardozo in the landmark case of Marks v. Gray, 251 N.Y. 90, 167 N.E. 181 (1920), and since followed in countless numbers of workers' compensation cases (including this Board's decision In re Clayton Henneman, Docket No. 55,132, 8/14/80), when correctly applied to the facts of this case, compels the opposite result. Judge Cardozo held:

> "The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own . . . If however, the work has no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

This principle is as applicable to trips going and coming between

work and home as it is to other types of dual-purpose trips or errands. Vol. 1, Larson's Workmen's Compensation Law, Sec. 18.00, page 4-251. Larson sets forth the test at Sec. 18.21, page 4-277:

> "When an employee, in the course of his normal journey off the premises to and from work, performs some concurrent service for his employer, the question whether the trip becomes an exception to the usual rule excluding off-premises going and coming journeys is determind by the same principles that apply to out-of-town trips under Marks v. Gray. In all such cases, we start with a personal motive--that of getting (or coming from) home--which would have caused the employee to take the trip in any case. The question then becomes: was the business mission of such character or importance that it would have necessitated a trip by someone if this employee had not been able to handle it in combination with his homeward (or business-ward) journey?"

The answer to the foregoing question, in the case before us, is clearly "no".

The claimant commuted to work that day at the same time, regardless of the intent to mail the envelopes, and she would have used the same off-premises route she chose, even if she was not carrying some business memos. If another Group Health employee had undertaken the mailing task, that employee would not have necessarily taken the same route as did the claimant the morning of her injury, nor would the mailing task have necessitated any trip off the office premises. Nor did mailing the envelopes by the claimant compel her to mail them when she did, on her way to work; she could just as easily have placed them in the mail after she had arrived at her office. In summary, then, claimant was simply in her personal commute to work at the time and place of her injury, and such exact trip would have occurred even in the absence of any business errand. The injury did not occur in the course of her employment. The Department properly

rejected the claim.

In conclusion, if allowance of this type of claim were held correct under the law, it could put tens of thousands of persons within the course of their employment while commuting to and from home and work, seriously emasulating the long-recognized going-and-coming exclusion. It is common knowledge that many people, particularly in office and service-type occupations--professionals, executives, managerial, administrative assistants, teachers, etc., etc.--in fact almost any employee whose work is not strictly physical -- have occasion to carry office work home with them. Simply by carrying such work while engaged in their normal personal commute to and from their regular place of employment does not expand the Act's coverage to such commuting. Such a result appears to be a ludicrous extension of the course of employment concept, with potentials for abuse and with far-reaching consequences.

FINDINGS OF FACT

Finding 1 of the Proposed Decision and Order entered in this matter on July 30, 1986 is hereby adopted by the Board and incorporated herein by this reference. In addition, the Board finds:

> 2. On March 22, 1985 the claimant was employed in Seattle by Group Health Cooperative as Office Manager and Executive Secretary to the Senior Vice President for Operations. At the time she was injured on March 22, 1985, the claimant had been employed in that capacity for 18 months.
>
> On March 21, 1985, the day prior to her injury, the claimant was called into the office of Ann Smith, Administrative Assistant to the Senior Vice President for Operations. Ms. Smith informed Ms. Martin that she would need Ms. Martin's help to retype a memo, xerox copies of the memo and mail the copies to business addressees. The work had

to be completed and the copies mailed by the next morning to meet Ms. Smith's deadline. Ms. Martin was able to complete the retyping and xeroxing in the office on March 21, 1985, but did not have time to place the memos in their envelopes, stamp the envelopes, and mail them by 5:00 p.m. that day. She informed Ms. Smith that she would perform those tasks at home and mail the memos in the morning mail in order to comply with the deadline. While Ms. Martin was at home the evening of March 21, 1985, she folded the memos, placed them in envelopes and stamped the envelopes. She went to work the following day, March 22, 1985, per usual custom, in her carpool. The carpool car was parked in a parking lot close to the office building at 300 Elliott Avenue West, in which Group Health leases space for its operations office. The claimant exited the car, walked across the street and proceeded to walk down a cement driveway which led to the underground parking area of the building at 300 Elliott Avenue West. As the claimant reached the lower end of the driveway, she caught her heel in a metal grate and experienced a sharp pain in her back. She continued to walk into the underground parking area, toward the elevator leading to the Group Health offices on other floors within the building.

Ms. Martin proceeded through the parking area to the elevator, rode the elevator to the first floor, exited the elevator, deposited the mail in the first floor mail drop, re-entered the elevator and proceeded to her fifth floor office. Later that day she was taken to the hospital for treatment of her back.

Group Health maintains offices on the second, third and fifth floors of the building at 300 Elliott Avenue West. The mail drop on the first floor is a faster pick-up than the mail drop on the fifth floor.

Regular working hours in the operations division at Group Health are from 8:00 a.m. to 5:00 p.m. Group Health management expects work to be completed within those hours. Ms. Martin would, however, often be assigned work between 3:00 and 4:00 p.m. which would have to be completed, and in the early morning mail the following day. During March of 1985 she took work home three to four nights a week. Although her supervisors did not specifically direct her to work overtime, they

were aware that work was done at home by the claimant as well as other employees.

3. On March 22, 1985 the claimant sustained a sudden and tangible happening of a traumatic nature when she was walking down a concrete driveway into the premises of 300 Elliott Avenue West, caught her heel in a metal grate, and experienced a sharp pain in her low back.

4. As a proximate result of the incident on March 22, 1985, the claimant sustained a condition diagnosed as a low back strain.

5. At the time and place the claimant sustained her low back strain on March 22, 1985, she was enroute to work, and intended to mail memos in the first floor mail drop at 300 Elliott Avenue West to comply with the mailing deadline established by her employer. She could have mailed the memos after arriving at her office, or she could have used a different route to reach the mailbox, or other employees could have mailed the memos at the start of work that day.

6. At the time and place the claimant sustained her low back strain on March 22, 1985, she was following her customary route to go to work at Group Health. This route was the shortest available route between her carpool parking lot and the Group Health Operations Office. She would have used this same route, at the same time, regardless of whether she was carrying, and intending to mail, memos for her employer.

7. The mailing of the memos would not have necessitated this particular trip to accomplish the mailing, if the claimant had not handled such task at the end of her personal commuting trip.

8. At the time and place the claimant strained her low back on March 22, 1985, the claimant was commuting to work, and not acting at her employer's direction or in furtherance of her employer's business.

CONCLUSIONS OF LAW

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

2. On March 22, 1985 the claimant was not acting in

the course of her employment with Group Health Cooperative at the time and place she sustained an injury to her back, within the contemplation of RCW 51.08.013.

3. The order of the Department of Labor and Industries dated August 13, 1985, which set aside and held for naught the prior order dated May 22, 1985, and ordered the claim remain rejected for the reason that at the time of the injury the claimant was not in the course of her employment, is correct and should be affirmed.

It is so ORDERED.

Dated this 11th day of February, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
GARY B. WIGGS Chairperson

/s/_____
PHILLIP T. BORK Member

DISSENT

I dissent from the Board's majority decision, and I am not at all concerned that allowance of claims with factual situations of this type may have far-reaching consequences in expanding the Act's coverage. The Proposed Decision and Order summarized this case well in stating:

"The evidence, however, also establishes that Ms. Martin was acting with a dual purpose as she was walking down the driveway toward the parking garage on March 22, 1985. She intended to go to work via her customary route, and she intended to mail the memos first thing that morning to comply with a mailing deadline established by her employer. Consequently at the time of the claimant's injury she was acting in part in furtherance of her employer's business. The fact that she was simultaneously proceeding to work and to the mail drop does not negate the business purpose of compliance with the mailing deadline."

RCW 51.08.013 provides that "acting in the course of employment" means, among other things, "the worker acting . . . in the furtherance of his or her employer's business." The claimant was so acting when she was injured. So be it!

I would adopt the Proposed Decision and Order totally, and thereby reverse the Department's order of August 13, 1985, and direct allowance of this claim.

Dated this 11th day of February, 1987.

/S/_____
FRANK E. FENNERTY, JR., Member