STATE OF VERMONT
DEPARTMENT OF LABOR

Dakota Green

v.

Oldcastle, Inc.

Opinion No. 13-17WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. JJ-00315

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Vincent Illuzzi, Esq., for Claimant
Keith J. Kasper, Esq., for Defendant

ISSUE PRESENTED:

Did Claimantôs August 19, 2016 injury arise out of and in the course of his employment for Defendant?

EXHIBITS:

Claimantôs Statement of Disputed Material Facts filed August 24, 2017

Claimant's affidavit executed on August 22, 2017 (ñClaimant's affidavitò)
Exhibit A to Claimant's affidavit: Claimant's affidavit executed on January 28, 2017
Exhibit B to Claimant's affidavit: Wage statement for the week ending August 20, 2016
Exhibit C to Claimant's affidavit: Wage statement for the week ending August 13, 2016

Defendantôs Statement of Undisputed Material Facts filed August 4, 2017

Defendantôs Exhibit A: Excerpts from Claimant's deposition
Defendantôs Exhibit B: Mitchell Morinôs affidavit, July 25, 2017
Defendantôs Exhibit C: Defendantôs ñTravel Timeò policy
Defendantôs Exhibit D: Payroll data for August 10-18, 2016
Defendantôs Exhibit E: Vermont State Police accident report, August 19, 2016

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), I find the following facts:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in the Vermont Workersô Compensation Act. *Defendant's Statement of Undisputed Material Facts ¶¶ 1-2.*

2. Judicial notice is taken of all forms and correspondence in the Departmentôs file relating to this claim.

3. Claimant began work for Defendant as a construction utility worker on June 1, 2016. *Defendant's Statement of Undisputed Material Facts ¶ 3*; Deposition of Claimant (ñ*Claimant deposition*ò) at 8, *Defendant's Exhibit A; Claimant's affidavit ¶ 15.*

4. Beginning Monday, August 8, 2016, Claimant was assigned to work at Defendantôs Canaan, Vermont jobsite. *Defendant's Statement of Undisputed Material Facts ¶ 4;* Affidavit of Mitchell Morin *("Morin affidavit") ¶ 4*, *Defendant's Exhibit B.*

5. Claimant was assigned to the Canaan jobsite every weekday from August 8, 2016 through August 19, 2016; he did not report to any other jobsites during that two-week period. *Defendant's Statement of Undisputed Material Facts ¶¶ 4, 6, 20; Claimant deposition* at 10-11, *Defendant's Exhibit A; Morin affidavit ¶¶ 4, 9, 16*, *Defendant's Exhibit B*.

6. Mitchell Morin was the superintendent or project manager for the Canaan project. While Claimant was working in Canaan, Mr. Morin supervised him. *Defendant's Statement of Undisputed Material Facts ¶ 7; Claimant's Statement of Disputed Material Facts ¶ 5; Claimant's affidavit ¶ 8; Morin affidavit ¶ 2, Defendant's Exhibit B.*

7. Defendant has a ñtravel timeò policy for hourly field employees that provides as follows:

> The Company will pay one way travel time per day based on driving miles when you work more than 45 miles from an assigned Pike[1] base. Travel time will not be paid if your one way commute is within 45 miles of your assigned Pike base. If your manager deems it appropriate, Pike would pay overnights (based on double occupancy, non-smoking rooms) in lieu of travel time when you are working more than 45 miles from your base.
> . . .
> If you are assigned to a different location for the season or an extended timeframe (more than 2 weeks) you will not be paid travel time.

Defendant's Statement of Undisputed Material Facts ¶ 28; Defendant's Exhibit C.

[1] Pike Industries, Inc. is a subsidiary of Oldcastle, Inc.

8. Claimant's assignment in Canaan was more than 45 miles from his home in Troy, Vermont. It took him between 60 and 90 minutes to drive one way from Troy to Canaan. *Defendant's Statement of Undisputed Material Facts ¶¶ 13, 14; Claimant deposition* at 5, 10, *Defendant's Exhibit A*. Thus, Claimant's daily round trip commute was between two and three hours per day.

9. Claimant did not get a hotel room in Canaan the week of August 8, 2016 or the week of August 15, 2016. *Defendant's Statement of Undisputed Material Facts ¶ 11; Claimant deposition* at 10, *Defendant's Exhibit A*. Instead, Claimant drove from Troy to Canaan and back each day, receiving a ñtravel timeò payment for one hour per day, which Defendant paid at the rate of 14 dollars per hour.[2] *Defendant's Statement of Undisputed Material Facts ¶ 12; Claimant deposition* at 10, *Defendant's Exhibit A*.

10. Mr. Morin required Claimant to arrive at the Canaan jobsite by 7:00 a.m. each day. Accordingly, from August 8, 2016 through August 19, 2016, Claimant's routine was to wake up at 4:00 or 4:30 a.m., leave his home in Troy between 5:00 and 5:30 a.m., and arrive at the Canaan jobsite by 7:00 a.m. *Defendant's Statement of Undisputed Material Facts ¶¶ 15-17, 21; Claimant deposition* at 5, 10-11, *Defendant's Exhibit A*; *Morin affidavit ¶ 13*, *Defendant's Exhibit B*.

11. Defendant did not provide Claimant with a company-owned vehicle to drive to work, nor did it tell Claimant what route to take to the Canaan jobsite. *Defendant's Statement of Undisputed Material Facts ¶¶ 22-25; Claimant deposition* at 11-12, *Defendant's Exhibit A*; *Morin affidavit ¶¶ 10-11*, *Defendant's Exhibit B*; *Claimant's affidavit ¶¶ 15-16.*

12. Defendant did not ask Claimant to pick up anything on his way to work on August 19, 2016, nor had Defendant ever asked Claimant to pick up anything or perform any errands on his way to work on any other date of his employment. *Defendant's Statement of Undisputed Material Facts ¶¶ 26-27; Claimant deposition* at 15, 17-18, *Defendant's Exhibit A*; *Morin affidavit ¶ 12, Defendant's Exhibit B.*

13. On Friday morning, August 19, 2016, Claimant drove from his home in Troy towards the Canaan jobsite in his own car, following Vermont Route 111. In the Town of Morgan, he fell asleep, drove into a signpost, woke up and flipped his car. He sustained a back injury in the accident and did not complete the morning commute that day. *Defendant's Statement of Undisputed Material Facts ¶¶ 31-32; Claimant deposition* at 14, *Defendant's Exhibit A*; *Vermont State Police accident report*, *Defendant's Exhibit E.*

[2] Claimant's wage statements show several different hourly rates: for travel time and tool box training, his hourly rate was $14.00. For other non-overtime work, his hourly rate was $24.44.

CONTESTED MATERIAL FACTS:

Claimant contests certain material facts that Defendant set forth in its Statement of Undisputed Material Facts. Contested material facts include the following:

14. Defendant contends that it assigned Claimant to work at the Canaan jobsite from August 8, 2016 through the projectôs completion, anticipated to be November 4, 2016. *Defendant's Statement of Undisputed Material Facts ¶ 5*; *Morin affidavit ¶ 17, Defendant's Exhibit B*. Claimant contends that he was assigned to every jobsite, including the Canaan jobsite, on a day-to-day basis. At the end of each workday, a supervisor would tell him where to report the next day. If later that evening the work site changed, someone would contact him by cellphone or text to let him know. Further, he contends that he was never told he would be working on the Canaan project to its completion; rather, he was expecting to return to his ñnormal crewò any day. *Claimant's Statement of Disputed Material Facts ¶¶ 3, 10-11*; *Claimant's affidavit* ¶¶ 4, 6-7, 13-14.

15. Defendant contends that Mr. Morin held safety meetings every Monday morning, at which he offered local accommodations to employees traveling more than 45 miles to the jobsite, including Claimant. *Defendant's Statement of Undisputed Material Facts ¶¶ 8-9; Morin affidavit ¶¶ 5-6, Defendant's Exhibit B.* Claimant contends that Mr. Morin did not hold any safety meetings at the Canaan jobsite and that he did not offer Claimant accommodations during that project. *Claimant's Statement of Disputed Material Facts ¶¶ 6-8, 15; Claimant's affidavit ¶¶ 9-11.*

16. Claimant contends that he was ñon the clockò during his morning commute on August 19, 2016 because he was paid for 30 minutes of travel time that day. *Claimant's Statement of Disputed Material Facts ¶ 16; Claimant's affidavit ¶¶ 19-20.* Defendant contends that Claimant was never ñon the clockò during his commute on any day. *Defendant's Statement of Undisputed Material Facts ¶ 29; Morin affidavit ¶ 8, Defendant's Exhibit B.* Defendant contends that the travel time payments to Claimant were in the nature of a subsidy or inducement, not a deliberate and substantial payment for work performed. *See Defendant's Reply Memorandum*, at 3.

17. Claimant contends that, about 95 percent of the time during his employment with Defendant, he rode to work as a passenger in a company-owned vehicle driven by a coworker. On those occasions, Defendant paid him a travel time payment, the same as it did when he drove his own car to a jobsite. *Claimant's Statement of Disputed Material Facts ¶12; Claimant's affidavit ¶ 15.* Defendant did not address this issue in its Statement of Undisputed Material Facts or Reply Memorandum.

18. Defendant contends that it did not pay Claimant for any travel time on the day of the accident because he had not commuted a minimum of 45 miles. *Defendant's Statement of Undisputed Material Facts ¶ 30; Payroll data, Defendant's Exhibit D* (not showing any wages or other sums paid to Defendant for August 19, 2016). Claimant contends that Defendant paid him for 30 minutes of travel time on that day, as he had completed about half of his morning commute. *Claimant's Statement of Disputed Material Facts ¶¶ 16-17; Claimant's affidavit ¶¶ 3, 19-20; Claimant's wage statements for weeks ending August 13, 2016 and August 20, 2016, Claimant's Exhibits B and C* (showing five hours of total ñtravel timeò for the week ending August 13 and four and a half hours of ñtravel timeò for the week ending August 20).

CONCLUSIONS OF LAW:

1. Defendant moves for summary judgment on the grounds that Claimant's injury did not occur in the course of his employment. Defendant contends that the injury occurred during Claimant's regular commute to a semi-fixed jobsite and that the going and coming rule precludes compensability of such injuries. Claimant disputes several of Defendantôs statements of material fact and contends that his injury falls under one of the exceptions to the going and coming rule.

2. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co*., 155 Vt. 44, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party of the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15.

"Arising Out of" and "In the Course of" Employment

3. Employees are entitled to workersô compensation benefits when they sustain a personal injury arising out of and in the course of their employment. 21 V.S.A. §618(a)(1). Thus, workersô compensation eligibility requires both (1) a causal connection (the ñarising out ofò component), and (2) a time, place and activity link (the ñin the course ofò component) between the claimantôs work and the accident giving rise to his or her injuries. *Cyr v. McDermott's, Inc.*, 2010 VT 19; *Miller v. IBM Corp*., 161 Vt. 213 (1993).

4. The focus of the partiesô dispute here is on whether Claimant's injury arose in the course of his employment. For that component of the test to be met, the injury must be shown ñto have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment.ò *Cyr v. McDermott's, Inc.,* 2010 VT 19*,* at ¶13, citing 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* § 12.01, at 12-1 (2009).

The Going and Coming Rule and the Premises Exception

5. For an employee with a fixed place of work, the employee is generally not within the course of employment when he or she is injured while traveling to and from work. *Miller v. IBM Corp*, 161 Vt. 213, 216 (1993). There are several exceptions to this so-called going and coming rule, however. One such exception, known as the premises exception, provides that, if an employee is injured on the employerôs premises during his or her commute, then the injury occurs in the course of employment. *Miller, supra* at 216. The premises exception does not apply in this case because Claimant was injured on a public highway, not on Defendantôs premises. Finding of Fact No. 13 *supra*.

The Traveling Employee Exception to the Going and Coming Rule

6. Another exception to the going and coming rule involves employees for whom travel is a substantial part of their service to the employer. *Freeman v. Pathways of the River Valley*, Opinion No. 09-17WC (May 31, 2017), citing 1 Lex K. Larson, *Larson's Workers' Compensation* §14.01, at 14-1 (Matthew Bender Rev. Ed.). The Commissioner in *Freeman* set forth three scenarios under which travel is a substantial part of the service to the employer: when the employee has no fixed place of employment, when the employee is on a business trip, and when the employee is running a special errand for the employer. *Id.,* at Conclusion of Law No. 5. The scenario most relevant to Claimant's case is whether he had a fixed place of employment.

Traveling Employee: No Fixed Place of Employment

7. Employees with a fixed place of employment ñchoose the route and means of their journey, and commence their work-related duties only after arriving at a specific, identifiable, employer-controlled workplace.ò *Freeman, supra,* at Conclusion of Law No. 6. For them, commuting to and from work, while obviously necessary, does not itself serve a function of the employerôs business. For that reason, an injury sustained during an employeeôs commute to a fixed workplace does not arise in the course of employment. *Id.*

8. For employees who have no designated place of employment, their workday begins and ends at home, rather than at a central office; such employees are continuously furthering their employerôs business while traveling to and from their clients or customers. For these employees, including traveling nurses or salespeople, travel is a substantial part of the service for which they are employed, and an injury that occurs while going to or coming home from work is typically considered to have arisen in the course of employment. *Id.,* at Conclusion of Law No. 7.

9. More difficult to analyze is the employment of workers who have a semi-fixed or temporary work location. A construction worker, for example, typically works at a ñfixedò jobsite until the job is completed, at which time a new, equally ñfixedò jobsite is assigned. The nature of construction work requires the employee to travel to the customer, but the commute itself does not generally serve a function of the employerôs business. *Id.,* at Conclusion of Law No. 8.

10. The Commissioner specifically addressed the semi-fixed jobsites of construction workers in *Brown v. Vermont Mechanical*, Opinion No. 09-02WC (February 25, 2002). In that case, a construction worker was injured in a motor vehicle accident on his morning commute to a Wells River jobsite. He was assigned to work at several different designated jobsites, including that one, on a regular basis. For jobsites that were more than 41 miles from his home, he received a bonus of fifty cents an hour for the hours he worked at those jobsites; for jobsites closer to home, he received no bonus. The Commissioner found as follows:

> 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. In this case, the employer exerted no control over the claimantôs commute nor imposed any requirements that increased the risk to the claimant over that of the general public. The claimantôs 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 claimantôs employment.

Brown v. Vermont Mechanical, *supra*, at Conclusion of Law Nos. 12-14.

11. Although it is likely that *Brown v. Vermont Mechanical* governs the instant case, there are material facts in dispute. The claimant in *Brown* had a semi-fixed jobsite, whereas the parties here dispute the regularity and duration of Claimant's jobsite assignment. Claimant contends that his job assignments were made on a day-to-day basis, making his status similar to that of a traveling nurse or salesperson. Defendant contends that Claimant was assigned to the Canaan jobsite through the completion of the project, anticipated to be three months, making his status similar to the claimantôs in *Brown v. Vermont Mechanical, supra*. With these material facts in dispute, this matter is inappropriate for a summary judgment determination.

Traveling Employee: Special Errands

12. Claimant also contends that his commute falls under the special errand exception to the going and coming rule because Defendant could have asked him to perform errands on his morning commute, although it never did. The ñspecial errandò exception provides that an employeeôs off-premises journey ñmay be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.ò *Larson's Workers' Compensation Law* §14.05[1] at 14-5. An injury sustained while undertaking such an errand thereby becomes compensable.

13. It is axiomatic that the special errand exception requires an employee to be on a special errand for the employer. Despite Claimant's assertion that Defendant *could have* asked him to perform a special errand, it is undisputed that he was not engaged in a special errand at the time of his injury. Accordingly, this exception to the going and coming rule does not apply.

Traveling Employee: Business Trips

14. Claimant also contends that his commute falls under the business trip exception to the going and coming rule because he was compensated for his travel time and was available to perform special errands. However, he provides no legal support for the application of the business trip exception to his situation. *Claimant's Opposition to Defendant's Motion for Summary Judgment,* at 4.

15. The business trip exception to the going and coming rule does not generally encompass an employeeôs regular commute to work, but rather contemplates that the employee is traveling away from the employerôs premises for a business purpose. *See generally Moreton v. State of Vermont, Department of Children and Families*, Opinion No. 17-14WC (December 24, 2014) (employee attending mandatory multi-day training session away from her office); *Griggs v. New Generation Communication*, Opinion No. 30-10WC (October 1, 2010) (employee injured lifting luggage on a business trip); *Larson's Workers' Compensation Law* §25.01 *et seq*.

16. Claimant's assertion that his commuting injury is compensable under the business trip exception to the going and coming rule is without merit. His assertion that he was available to perform special errands has already been addressed, and his assertion that his receipt of travel time compensation makes his injury compensable is addressed below.

Payment for Travel Time

17. Claimant asserts that Defendantôs agreement to pay for some of his travel time amounted to compensation for his commute, such that he was ñon the clockò at the time of his accident. An employer who provides transportation, either directly, by requiring the employee to drive a company car, or indirectly, by paying for the employeeôs travel time and expenses, may thereby bring what would otherwise be a normal commute within the course of employment. *Freeman, supra,* at Conclusion of Law No. 11, citing *Larson's Workers' Compensation Law, supra* at §14.07[1]. However, an employer who merely provides an inducement to an employee to take an unattractive job assignment does not thereby bring the commute within the course of the employment. *Larson's Workers' Compensation Law, supra* at §14.07[2]-[3].

18. As noted in Finding of Fact No. 16 *supra*, the parties dispute whether Claimantôs travel time payment was intended as a deliberate and substantial payment for his time, or whether it was merely an inducement to accept a less attractive job assignment. Claimant's round trip commute took up to three hours per day, but he was paid for only one hour. According to Defendant, this suggests that the travel time payment was more in the nature of an inducement, rather than a deliberate and substantial payment for his time. Defendant further contends that its offer of employer-provided accommodations to Claimant establishes that the travel time payments were an inducement. Whether Defendant actually offered Claimant accommodations during his work at the Canaan jobsite is a disputed material fact, however.

19. Defendantôs travel time policy provides that if an employee is assigned to a different location for an extended timeframe, which the policy defines as more than two weeks, the employee will not be paid travel time. *Defendant's Exhibit C.* This written policy provides some support for Claimant's contention that he was not assigned to the Canaan jobsite for an extended timeframe, because he received travel pay for the two weeks he worked there. At a minimum, the travel time policy raises a question of fact as to the nature and length of Claimant's Canaan jobsite assignment. On the other hand, the policy provides some support to Defendantôs inducement contention, as the policy does not provide for travel time to employees with longer term job assignments. For these reasons, the material facts relevant to Claimant's receipt of travel time compensation are in dispute.

Summary

20. Summary judgment is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party of the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶15. Such is the case here. Accordingly, it is not appropriate to grant Defendantôs summary judgment motion.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendantôs Motion for Summary Judgment is hereby **DENIED**.

DATED at Montpelier, Vermont this 27th day of September, 2017.

_____
Lindsay H. Kurrle
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.