FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-0976

KELLY AIR SYSTEMS, LLC, AMTRUST NORTH AMERICA OF FLORIDA, and TECHNOLOGY INSURANCE COMPANY,

Appellants,

v.

DORINDA KOHLUN, as claimant for Aaron Kohlun, Injured Employee,

Appellee.

On appeal from the Judges of Compensation Claims.
Frank J. Clark, Judge.

Date of Accident: August 6, 2020.

March 16, 2022

LONG, J.

This workers' compensation case involves interpretation of the going-and-coming and the traveling employee provisions of section 440.092, Florida Statutes (2020). Appellants seek review from a nonfinal order by the Judge of Compensation Claims (JCC) finding Aaron Kohlun's injuries compensable under those provisions. We reverse.

Kohlun was employed as an air conditioning service technician by Kelly Air Systems, LLC (Kelly). Kohlun's responsibilities included performing service calls for the company within a four-county area. Kelly provided Kohlun with a company vehicle for his use. Per Kelly's employment manual, Kohlun had the exclusive ability to drive his employer-provided car to and from work and to make incidental personal trips on the way to and from work, including stopping for gas or groceries. Kohlun was not required to drive Kelly's vehicle to and from work but was permitted to do so at his convenience. At the time of Kohlun's injury, he was traveling from his final service call location and had clocked out of work for the evening by reporting to his supervisor that he had finished his work for the day.

The Going-and-Coming Provision

This Court reviews statutory interpretation questions de novo. Generally, Florida's workers' compensation system compensates employees for injuries resulting from their work. That is, injuries "arising out of and in the course of employment." § 440.02(19), Fla. Stat.; *see also* § 440.09(1), Fla. Stat. The going-and-coming provision statutorily defines *out of* workers' compensation coverage injuries that occur while an employee is traveling to and from work:

> (2) Going or coming. -- An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the employer.

§ 440.092(2), Fla. Stat. This section excludes injuries sustained during travel "going to or coming from work" from compensability because, according to the plain language of the statute, these injuries do not arise out of and in the course of employment. It is immaterial whether the employer provided the means of transportation to the employee because the claims are not compensable so long as the employee is going to work or coming

from work. However, the section includes a compensability condition on employer provided transportation—the means of transportation must be "available for the *exclusive personal use* by the employee." *Id.* (emphasis added).

Below, the JCC determined that section 440.092(2) did not apply because, while Kohlun had exclusive personal use of the vehicle for travel to and from work, he did not have unrestricted freedom to use the vehicle outside of travel to and from work. But the provision only addresses travel to and from work and an analysis that looks beyond that context reaches outside the scope of the statute.

In applying the provision, this Court has often simply restated the statutory language. Our decisions concerning the application of section 440.092(2) typically go no further. *See Wilcox v. AG Mart Produce*, 942 So. 2d 959, 962 (Fla. 1st DCA 2006) ("The going and coming rule applies only where a claimant maintains exclusive personal use of the vehicle."). This Court has stated that "it is a question of fact whether the employee has exclusive personal use of a vehicle." *Gulbrandsen v. Carlton Wilbert Vault, Inc.*, 742 So. 2d 294, 295 (Fla. 1st DCA 1998). Factual considerations have included whether "personal use of the vehicle was allowed and was intended to be part of claimant's compensation" and whether "practical restrictions on claimant's use of the vehicle" existed. *Wilcox*, 942 So. 2d at 962.

While courts have discussed the application of section 440.092, few decisions offer substantive guidance on the definition or interpretation of "exclusive personal use." *See Swartz v. McDonald's Corp.*, 788 So. 2d 937 (Fla. 2001); *Evans v. Handi-Man Temporary Servs.*, 710 So. 2d 132 (Fla. 1st DCA 1998). In *Securex, Inc. v. Cuoto*, 627 So. 2d 595 (Fla. 1st DCA 1993), we affirmed a finding of compensability under section 440.092(2) because the employee did not have exclusive personal use of the carpool transportation that was provided to him by the employer. But the Court did not offer anything further than saying "[g]enerally, the term 'exclusive use' means something more than the degree of possession or control found here." *Id*. at 597.

While these cases do not clearly define "exclusive personal use," the statutory framework provides important guidance to resolve the question presented here. Exclusive personal use should be interpreted in the context of the going-and-coming statutory provision where it is found. This means that the evaluation is whether the employee had exclusive personal use of the transportation while going to and coming from work.

Like in *Cuoto*, an employer-provided bus or carpool that transports employees is not available for any one of the employee's exclusive personal use. Applying the terms contextually, exclusive personal use means that an injury is not compensable where the employee's transportation is available *exclusively* to that employee and that the employee can use the transportation as if it were personal property *for the purpose* of going to and coming from work.

Here the JCC found that Kohlun was free to use the employer provided vehicle at his convenience for travel to and from work. He was similarly free to stop when it suited him and run personal errands in a way one would expect of exclusive personal use. He did not have to share the vehicle with others or pick up fellow employees. And the vehicle's use was not conditioned on the completion of additional tasks for the benefit of the employer. The question is not whether an employee can use the vehicle to take his family on vacation. The question is whether it is available for his exclusive personal use for travel to and from work—here it was.

The Traveling Employees Provision

Understanding the scope of the going-and-coming provision, we now look to see how it relates to the traveling employees provision. The provision permits compensability for employees while in a "travel status." Section 440.092(4) provides:

> (4) Traveling employees. -- An employee who is required to travel in connection with his or her employment who suffers an injury while in travel status shall be eligible for benefits under this chapter only if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment. This

> subsection applies to travel necessarily incident to performance of the employee's job responsibility but does not include travel to and from work as provided in subsection (2).

§ 440.092(4), Fla. Stat.

Below, the JCC concluded that Kohlun's injuries were compensable under section 440.092(4) because Kohlun was a "traveling employee." But here the question is not whether the employee is a "traveling employee"—it is whether, at the time of the injury, the employee was in a "travel status." This question applies to all employees because it is not a matter of classifying the *type* of employee. Rather, it is the *status* of the employee at the time of the injury. The language of the statute is clear that injuries occurring while the employee is in "travel status" can be compensable.[1] The provision is also clear that an employee is not in travel status when he is traveling to or from work. This means that injuries suffered while traveling to and from work, even where the employee regularly works in a travel status, are not compensable. Travel to and from work is expressly excepted and does not put the employee into a travel status.

Generally, the "rule is firmly established that the going-and-coming rule does not apply to [traveling employees], because they are deemed to be in continuous conduct of [their] employer's business." *Longo v. Associated Limo*, 871 So. 2d 943, 944 (Fla. 1st DCA 2004) (citation omitted). That is, an employee can be in a compensable status while traveling, so long as they are not traveling to or from work. In *Longo*, a taxi driver was injured during a break in between taxi fares. *Id.* At the time of the injury, Longo was traveling from the location of his last fare toward the location of his next fare. *Id*. Based on the facts of the case and the nature of his employment, he "was deemed as a matter of law to be in the service of his employer" during the break. *Id.* But, of

[1] Being in "travel status" is not sufficient alone. The injury must also "arise[] out of and in the course of employment while he or she is actively engaged in the duties of employment." § 440.092(4), Fla. Stat.

course, the going-and-coming provision could not have applied to Longo because he was neither going to nor coming from work.

We also considered the going-and-coming and the traveling employee provisions in *McCormick v. State Auditor General*, 772 So. 2d 612 (Fla. 1st DCA 2000). In *McCormick*, the employee worked as a state auditor, spending most of her time doing field audits requiring travel. At the time of the injury, McCormick was traveling from a job site after completing her work for the day. *Id.* at 613. For this travel, McCormick received compensation. The Court reversed the JCC's order denying compensability under the going-and-coming provision and instead determined that McCormick was in a travel status at the time of the injury. *Id.* The Court reasoned that McCormick was in a travel status because she was being compensated for the travel.[2] *Id.* at 614.

The Relationship Between the Two

Precisely where then is the line between the going-and-coming provision's exclusion from compensability and the traveling employees' inclusion for compensability. Sections 440.092(2) and (4) clearly exclude workers' compensation for travel to and from work for all employees, including employees that travel as a part of their assignments. The distinction point is arrival at and departure from "work."

[2] *McCormick* also reasoned that application of the going-and-coming provision should include some boundaries for the length of, and hazards associated with, travel to and from work. However, this dictum suggested supplementing the statutory analysis with subjective non-statutory factors—length and hazards of travel. This language in *McCormick* has caused some confusion, including here where the JCC struggled to determine the "precise distance" required to make travel to and from work sufficiently lengthy or hazardous to except it from the going-and-coming provision. We clarify that the analysis does not include any extra-statutory requirements beyond the language of the written law. As seen *infra*, defining work by the receipt of compensation is statutorily based and was sufficient to resolve the dispute in *McCormick*.

The question becomes—when does work begin and when does it end? Not all employees travel to a fixed location to punch a timecard and begin their workday. Workers' compensation covers injuries that "aris[e] out of work performed in the course and the scope of employment." § 440.09, Fla. Stat. Generally, for purposes of workers' compensation, an employee "means any person who receives remuneration from an employer for the performance of any work or services while engaged in any employment." § 440.02(15)(a), Fla. Stat. When and where work begins and ends is, therefore, the product of the agreement reached between the employer and the employee. That is, "work" generally means the performance of an act or service in exchange for sufficient consideration. If an employee is engaged in conduct which entitles her to remuneration under the terms of employment, then that employee is "at work."

Reading the sections together, "going to and coming from work" contemplates *uncompensated* travel that is *not otherwise connected with employment*. Work begins when the employee starts to be compensated in the normal course of the workday and excludes uncompensated travel to and from the place where compensation begins. As *McCormick* explained, compensation for travel can put an employee into a travel status and bring an employee within the scope of section 440.092(4). In that sense, being in a travel status means the employee is working or at "work." Like the exclusive personal use analysis, the question of when and how work begins is different for each employer. Determining that point in time is ultimately a product of the factual inquiry by the JCC.

Conclusion

Here the JCC erred in determining that after Kohlun became a "traveling employee," his status, as a matter of law, continued into his travel to and from work. After reviewing the factual findings and applying the relevant statutory provisions, we conclude that Kohlun was not in a travel status at the time of the injury and that the going-and-coming provision did apply. Kohlun had clocked out for the day and was driving from work at the time of the injury. He was traveling in an employer provided vehicle available for his exclusive personal use for travel to and from work.

He was not otherwise being compensated for his travel and cannot be said to have still been "at work." For these reasons, Kohlun's injury is not compensable.

REVERSED and REMANDED.

OSTERHAUS and WINOKUR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Rayford H. Taylor of Hall, Booth, and Smith, P.C., Atlanta, Georgia; Judith M. Blinderman of Kurkin, Forehand, and Brandes, LLP, Aventura, for Appellants.

Nicholas A. Shannin, of Shannin Law Firm, P.A., Orlando, for Appellee.