ORIGINAL

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TESSANN SWARTZ,

Petitioner,

v.

MCDONALD'S CORPORATION
and CORPORATE SYSTEMS,

Respondents.
_____/

CASE NO: 94,489

CLAIM NO: 265-35-3261

D/A: 3/1/96

PETITIONER'S INITIAL BRIEF ON THE MERITS

ALFRED J. HILADO, ESQ.
P.O. Box 944
Orlando, FL 32802
Counsel for Petitioner

BILL MCCABE, ESQ.
1450 West SR 434, #200
Longwood, FL 32750
Co-Counsel for Petitioner

This is a Petition for Discretionary Review from an Order of the First District Court of Appeal, Tallahassee, Florida, Opinion filed 11/12/98.

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PRELIMINARY STATEMENT

The Petitioner, TESSANN SWARTZ, shall be referred to herein as "claimant"

The Respondents, MCDONALD'S CORPORATION AND CORPORATE SYSTEMS, shall be referred to herein as "E/C" or by their separate names.

The Judge of Compensation Claims shall be referred to herein as the "JCC".

References to the Record on Appeal shall be abbreviated by the letter "V" and followed-by the applicable volume and page number.

References to the Appendix attached hereto shall be referred to by the letter "A" and followed by the applicable appendix page number. The Appendix contains the Order of the JCC dated 6/30/97 and the Opinion filed by the First District Court of Appeal on 11/12/98.

CERTIFICATE OF TYPE

This Brief is typed in Courier New, 12 pt.

STATEMENT OF THE CASE

On 9/19/96 and again on 2/12/97, claimant, TESSANN SWARTZ, filed a Petition for Benefits ("PFB") seeking various indemnity (temporary disability) benefits and medical benefits for injuries sustained in an accident on 3/1/96 (V2-204-206, 208-210). On 4/23/97, a hearing on the aforementioned PFB was held before the Honorable JCC Joseph Murphy (V1-1). At that hearing, claimant sought, inter alia, determination of the compensability of the claimed accident and injuries (V2-220, V4-618-619). The E/C defended the claim on the grounds that, inter alia, claimant did not sustain a compensable accident, and her injuries did not arise out of and in the course and scope of her employment (V2-221, V4-619, 620).

On 6/30/97, the JCC entered his Compensation Order (A-1-12, V4-618-629). In that Order, the JCC found that claimant was not involved in a compensable accident on 3/1/96 (A-10, V4-627), and that her claim was barred by the "Going and Coming Rule", F.S. 440.092(2), as amended in 1994 (A-10, V4-627).

Based on the foregoing, the JCC Ordered that claimant's claim for benefits under the workers' compensation laws of the State of Florida were denied and dismissed (V4-628, A-11).

Thereafter, claimant appealed the JCC's decision to the First DCA (V4-630-631). On 11/12/98, the First DCA, in a 2 to 1 decision (with written dissent), affirmed the JCC's Order (A-13-

26), Swartz v. McDonald's Corporation, 23 FLW D2521 (Fla. 1st DCA 1998). In affirming the JCC's Order, the First DCA held:

> " … We disagree with claimant that her drive the evening of March 1 was compensable because it had dual purposes, a business one as well as the personal one of commuting home from work …" (A-19), Swartz, supra at D2522.

The First DCA further found:

> "In the instant case, the claimant failed to establish that she was performing a necessary or essential part of her service to her employer by carrying the job fair booth home with her the evening of March 1 … Merely carrying paraphernalia or tools of her employment does not convert the claimant's trip from personal to employment travel." (A-21), Swartz, supra at D2523.

The Honorable Judge Benton, in his dissenting opinion, found:

> 'The trip Ms. Swartz was making at the time of the accident had two purposes. She was going home (although she had not yet deviated from the route that led to the job fair), at the same time that she was performing her job by transporting part of the booth." (A-24), Swartz, supra, Benton, J., dissenting at D2523-2524.

Judge Benton further stated:

> "Our Supreme Court has said that, "It is not necessary that the dominant purpose of a trip be business. All that need be determined is that an injury occurred as the result of a trip, a concurrent cause of which was a business purpose" … Because today's decision conflicts with these controlling precedents, I respectfully dissent." (A-26), Swartz, supra at D2524.

Thereafter, claimant filed a Notice to Invoke Discretionary Jurisdiction of this Honorable Court alleging that the decision of the First DCA conflicts with this Court's decision of Nikko

Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984) and Cook v. Highway Casualty Co., 82 So.2d 679 (Fla. 1955).

On 3/26/99, this court entered an Order accepting jurisdiction. In that Order, this Court directed that claimant's Initial Brief on the Merits be served on or before 4/20/99. Claimant herein filed her Initial Brief on the Merits in conformity with this Court's Order of 3/26/99.

STATEMENT OF THE FACTS

Claimant was born on 4/14/58 (V1-11) and as such, was 37 years old at the time of her hearing on 4/23/97 (V1-11).

Claimant began working for McDonald's when she was 15 years old (V1-12), as a crew person, but after 12 years, obtained a supervisor's job (Vl-12).

Claimant lived in Orlando (V1-10-11, 65). Beginning in 12/95, claimant began working for McDonald's as a human resources consultant (V1-11). McDonald's HR office was in Tampa (Vl-12, 65-67, V3-458, 462), but claimant continued to live in Orlando, where she was living through the date of her accident on 3/1/96 (V1-10-11, 65).

Part of claimant's job as a HR consultant was recruiting management personnel for McDonald's (Vl-13-14, 139-140,V3-460). The job requires a lot of travel, some of which is travel to attend job fairs (Vl-13-14).

Claimant testified that there were two HR consultants in her region, her and Barbara Lenko (Vl-16). Claimant's supervisor was Carolyn Jones (V1-14-15). Claimant's region covered South Florida to Macon, GA (V1-14-15). She had no definite hours of employment (Vl-17).

Claimant further testified that as a HR consultant, she was not required to physically come in to the Tampa location as part of her job duties (Vl-21-22). If, for example, she had a class scheduled out of the Tampa area, she could just commute directly to the site (V1-21).

Barbara Lenko was also a HR consultant out of the Tampa office (V1-137). Ms. Lenko testified that claimant was a co-employee with her on 3/1/96 (Vl-138) and confirmed that Carolyn Jones was her and claimant's boss (Vl-139). Jill Wolf was an assistant in the HR department (Vl-139, 168-169).

Ms. Lenko confirmed that the duties of a HR consultant included interviewing, hiring and recruiting management personnel for McDonald's (Vl-139-140). Ms. Lenko also confirmed that some of the duties were performed out of the Tampa office and some were performed in the Tampa office (Vl-140). In an average week, the HR consultant would spend about 3 days at the regional office and 2 days out in the field (Vl-140). When travelling, the HR utilized a company car and McDonald's paid for gas also (V1-140-141). If nothing was planned outside the

Tampa office, the HR would report to the Tampa office (V1-141). The normal hours of operation at that office were from 8:30 a.m. to 5:00 p.m. (Vl-141).

Claimant was being trained as an HR as of 3/1/96 to do the same thing as Ms. Lenko (Vl-141). Involved in claimant's training was following Ms. Lenko around to the various functions (V1-141). Ms. Lenko confirmed that traveling was part of the job (V1-151), and also that she would go straight to the site rather than to the Tampa office if appropriate (Vl-152). The job is not a 9 to 5 job (V1-153), and the HR is not required to check in with Tampa every day (Vl-153).

Carolyn Jones was the HR manager (V3-457). Ms. Jones testified that claimant was training to be an HR (V3-460). Ms. Jones confirmed that the HR is responsible for recruitment and staffing for the salaried manager and employees at McDonald's (V3-460). They are responsible for employee relations activities and to conduct some training classes as relates to HR issues (V3-460).

Ms. Jones confirmed that the HR consultants were home based in Tampa (V3-462). While in training, Ms. Jones estimated that 70% to 75% of claimant's time was spent in the HR office in Tampa, and 25% was outside of the office (V3-463). When someone becomes a full-fledged HR consultant, such as Ms. Lenko, that percentage would change and you would be in a field about 75% of

the time and in the office 25% of the time (V3-463). Ms. Jones testified that claimant was still in training as of 3/1/96 (V3-484).

Jill Wolf also worked in the HR department and was a HR coordinator (V1-168-169). Ms. Wolf's job was to support the HR manager, Ms. Jones, and the HR consultants, Ms. Lenko and claimant (V1-168-169).

On Friday, 3/1/96, there was a regional meeting in Tampa (Vl-24-25). The meeting was scheduled by the regional vice president (Vl-25). Claimant testified that she was expected to attend that meeting and, in fact, there would be repercussions if she did not attend (Vl-26-27). On 3/1/96, claimant left her home in Orlando and drove to Tampa for the meeting (Vl-24-25). She testified that she stayed for the entire meeting (Vl-27).

On 3/4/96, claimant and Ms. Lenko were scheduled to attend a job fair on International Drive in Orlando (Vl-28-29). Following the meeting in Tampa and before leaving for Orlando, claimant checked her voice mail, got some short term disability paperwork that she was going to deliver to a Gail Cook in Orlando, and spoke with Ms. Lenko concerning the job fair in Orlando that following Monday (Vl-27-28).

When attending a job fair, an HR consultant will set up a job fair booth (V1-32, V3-505). There are thingswhich identify McDonald's on the booth (Vl-32). The booth is kept in the

stockroom in Tampa at the regional office (Vl-34, 165-166). It is unrefuted that transporting the job fair booth from Tampa to the site of the job fair is the responsibility of the HR consultant (Vl-33-34, 156, 189, V3-504-505). The recruitment booth is in two boxes and will not fit in one car (Vl-30-31, 144, 156).

At the conclusion of the regional meeting in Tampa on 3/1/96, claimant and Ms. Lenko loaded a part of a job fair booth into claimant's vehicle, along with some recruitment information for the job fair to be held in Orlando on 3/4/96 (Vl-28, 30-31, 144, 156). Claimant put part of the recruitment booth in her back seat because it fit in her back seat and not in Ms. Lenko's car (Vl-30-31). Claimant explained that it would not have been possible to put all of the booth in one car and that they needed two cars (Vl-30-31).

Claimant testified that the booth is needed and used at a job fair because that is where the brand identity comes from an employment standpoint (Vl-31-32). There are things identifying McDonald's on the booth (Vl-32). Additionally, once the display booth is opened up, they put a back-drop to it with pictures of employees and managers who are working in the restaurants who have been recruited, and there is also a name across the top of it (Vl-32).

Claimant testified that it is the responsibility associated with a HR consultant to get the booth to the job fair (V1-33-34). There were no alternative plans to get the booth to Orlando for the job fair (V1-33-34). Claimant testified that the booth is kept in the stockroom in Tampa at the regional office and in order for claimant to bring the booth to any job fair, she would have to go to Tampa to pick up the booth, unless she was picking it up from another consultant (V1-34). Claimant explained that there had been no arrangements for anyone else to bring the booth to Orlando and claimant was expected to bring the booth to Orlando (V1-34-35).

Ms. Lenko also attended the regional meeting on 3/1/96 in Tampa (V1-142-143). Ms. Lenko testified that the meeting ended at approximately 3:50 p.m. (V1-143). She confirmed that there was a job fair scheduled in Orlando at the Holiday Inn off of International Drive on Monday, 3/4/96 (V1-144). Ms. Lenko confirmed that the HR consultants are required to bring materials to the job fair and claimant and Ms. Lenko had a conversation concerning who would bring what materials (Vl-144). Ms. Lenko explained that the recruitment booth is in two boxes, one fits in the back seat and was put in claimant's car, and one was put in Ms. Lenko's car (V1-144). Ms. Lenko also stated that they had a black bag, like a briefcase, that they keep with hand-outs, flyers and business cards, and everything was in one

bag and it was either in Ms. Lenko's car or claimant's car (V1-144). Ms. Lenko confirmed that all of the materials would not fit in her car and she needed claimant's assistance in order to get the booth to Orlando for the job fair (V1-156). Ms. Lenko also confirmed that it was part of their job as HR consultants to make sure the materials they need for the job fair are with them (V1-156). Ms. Lenko also confirmed that McDonald's owns the recruitment booth and it is stored in the stockroom in Tampa (V1-165-166).

Jill Wolf confirmed that transporting the recruitment booth was part of claimant's job (Vl-189).

Ms. Jones, the HR manager, also confirmed that when claimant was transporting the booth on 3/1/96, it was part of her job (V3-504-505). Ms. Jones testified that whomever was doing the job fairs would carry the booth (V3-504-505). Ms. Jones also testified that the job fairs typically require set-up of the booth (V3-505).

After claimant had loaded the recruitment booth in her car, she left the Tampa office and started driving to Orlando, at which time she was rear-ended on I-4 and I-275 in Tampa (Vl-35, 86), around 5:30 p.m. (Vl-86).

Claimant testified that following the accident, she contacted Elaine Anderson, fleet manager, while she was still at

the site (V1-36). Claimant testified that she advised Ms. Anderson that she was involved in an auto accident (V1-36).

Ms. Anderson confirmed that claimant called her between 5:00 and 6:00 p.m. on 3/1/96 advising that she was involved in an accident on I-4 (V3-439).

Claimant testified that she also attempted to call Ms. Jones, but the switchboard had closed (Vl-36). When she got home, she voice-mailed Ms. Jones (V1-36-37).

Ms. Jones confirmed that on 3/1/96, she got a voice mail message that she picked up at some time before 9:00 p.m. indicating that claimant, while enroute, had been involved in an industrial accident (V3-471-472).

Following her accident, claimant did go home, then went to the ER (Vl-44). At the hospital, claimant was given x-rays, physical exam, a few injections and a Velcro neck collar (V1-45). She was sent home and asked to follow up with her family care physician (Vl-45).

Claimant returned to work that Monday, 3/4/96, at which time she went to the job fair (Vl-54).

Ms. Lenko confirmed that claimant did meet her at the job fair on 3/4/96 (V3-147). Claimant brought in her part of the booth; Ms. Lenko brought in her part of the booth; they assembled the booth; put the printed materials on the

background, and set up the table with the paperwork they needed to distribute (Vl-147).

Claimant was also seen by Dr. Bonnie Dean, family practice physician, on 3/4/96 (V2-229, 272, V3-401). On that date, claimant was complaining of aching in the neck and low back, secondary to an auto accident on 3/1/96, when she was rear-ended by several cars going about 55 mph as she was stopped for an accident on I-4 (V2-230-233, V3-401). Claimant's chief complaint was pain in the neck and low back area (V3-401). She also had paresthesia of 3, 4 and 5 (V3-401).

Beginning on 5/20/96, Dr. Dean opined that claimant could not continue to drive, due to injuries sustained in the industrial accident (V2-249, 274, V3-408). Dr. Dean also opined that claimant could not undertake any prolonged sitting (V2-249).

Claimant continued to work for McDonald's until 6/7/96, at which time she resigned (Vl-54-55, 98, V3-473, 478-479). Claimant testified that she resigned because she had been taken off work because of the physical situation she was going through from going into spasms, fainting and passing out problems with headaches and she could not tolerate the travel necessary for her job any more (Vl-55, 98).

A more specific reference to facts will be made during Argument.

POINTS ON APPEAL

I

THE JCC ERRED, AND THE FIRST DISTRICT COURT OF APPEAL ERRED, IN FINDING THAT CLAIMANT'S INJURIES ARE NOT COMPENSABLE BASED ON THE "GOING AND COMING RULE", WHEN A CONCURRENT CAUSE OF CLAIMANT'S TRIP FROM TAMPA TO ORLANDO ON THE EVENING IN QUESTION WAS A BUSINESS PURPOSE, TO-WIT: TO TRANSPORT A RECRUITMENT BOOTH TO ORLANDO FOR A JOB FAIR TO COMMENCE IN ORLANDO THE FOLLOWING MONDAY, AND THEREFORE, CLAIMANT'S INJURY IS COMPENSABLE UNDER THE "DUEL PURPOSE DOCTRINE".

II

THE JCC ERRED IN DENYING AND DISMISSING CLAIMANT'S PETITION FOR BENEFITS AND IN DENYING CLAIMANT'S CLAIM FOR INDEMNITY BENEFITS, MEDICAL BENEFITS, PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

SUMMARY OF ARGUMENT

I

F.S. 440.092(2)(1995), which is the statute involved in this case, provides:

> "Going or Coming - An injury suffered **by** 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."**

This statute, in essence, is a codification of the longstanding *Going and Coming Rule" in workers' compensation cases. It also, however, clearly retains the dual-purpose doctrine, which is one of the exceptions to the "Going and Coming Rule".

The dual purpose doctrine provides that an injury which occurs as the result of a trip, a concurrent cause of which was

a business purpose, is within the course and scope of employment, even if the trip also served a personal purpose, such as and including going to and coming from work, Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984). Further, the Courts do not weigh the relative importance of the personal motive versus the business motive, Spartan Food Systems v. Hopkins, 525 So.2d 987 (Fla. 1st DCA 1988). So long as the business purpose is at least a concurrent cause of the trip, any injury which occurs during the trip is compensable, Gulliford, supra.

It is unrefuted that claimant had to deliver the recruitment booth to Orlando for the job fair on 3/4/96. In other words, claimant would have had to make a trip to Tampa to transport the recruitment booth back to Orlando on 3/1/96, even if there was not a regional meeting in Tampa on that date. Alternatively, if claimant did not transport the recruitment booth from Tampa to Orlando for the job fair on 3/4/96, someone else would have had to pick up the booth and transport it to Orlando for claimant. For this reason, claimant's injuries during the trip from Tampa to Orlando on 3/1/96 are compensable, Gulliford, supra.

II

The sole basis of the JCC's order denying and dismissing claimant's PFB is the JCC's finding that claimant's accident is

not compensable based on the "Going and Coming Rule". Claimant submits that the JCC erred in finding that claimant's injuries are not compensable based on the "Going and Coming Rule", and claimant adopts and realleges the arguments set forth under Point I.

Since the JCC erred in finding that claimant's injuries are barred by the "Going and Coming Rule", the JCC also erred in denying and dismissing claimant's PFB, and in denying claimant's claim for indemnity benefits, medical benefits, penalties, interest, costs and attorney's fees.

ARGUMENT

I

THE JCC ERRED, AND THE FIRST DISTRICT COURT OF APPEAL ERRED, IN FINDING THAT CLAIMANT'S INJURIES ARE NOT COMPENSABLE BASED ON THE "GOING AND COMING RULE", WHEN A CONCURRENT CAUSE OF CLAIMANT'S TRIP FROM TAMPA TO ORLANDO ON THE EVENING IN QUESTION WAS A BUSINESS PURPOSE, TO-WIT: TO TRANSPORT A RECRUITMENT BOOTH TO ORLANDO FOR A JOB FAIR TO COMMENCE IN ORLANDO THE FOLLOWING MONDAY, AND THEREFORE, CLAIMANT'S INJURY IS COMPENSABLE UNDER THE "DUEL PURPOSE DOCTRINE".

The JCC, in his Order of 6/30/97, found:

> "It is the finding of the undersigned that the claimant was not involved in a compensable accident on March 1, 1996. In reaching this conclusion, it is found that the claims are barred by operation of the "Going and Coming Rule" as found in F.S. 440.092(2), as amended 1994 . .
>
> The fact that the claimant had a booth in the back of her car on the date of accident which she intended to use the following Monday in Orlando does not turn this otherwise non-compensable going and coming case into a compensable event. The claimant made no special trip to Tampa to secure this "tool". At the time of the claimant's accident, she was on a journey which was regular and

frequent and was not prompted by any sudden call by her employer. The burden of placing a tool in her car to transport with her for use in her job the following Monday was minor when viewed in context of the claimant's usual duties and route home. The fact is abundantly clear that at the time of the accident, the claimant was off work and not engaged in any employment-related duty nor was she on any employer-requested errand. The accident and injury sustained therein were personal to the claimant and occurred at a time when claimant was returning home from her usual, normal, and customary place of employment." (V4-627-628).

The First DCA, in its opinion of 11/12/98, affirming the JCC's Order of 6/30/97, held:

" … We disagree with claimant that her drive the evening of March 1 was compensable because it had dual purposes, a business one as well as the personal one of commuting home from work . ." (A-19).

The First DCA further found:

"In the instant case, the claimant failed to establish that she was performing a necessary or essential part of her service to her employer by carrying the job fair booth home with her the evening of March 1. … Merely carrying paraphernalia or tools of her employment does not convert the claimant's trip from personal to employment travel." (A-21).

Claimant submits that the JCC's finding that the claim is barred by the "Going and Coming Rule" and the First DCA's affirmance of that finding is error and should be reversed. From a factual standpoint, the JCC has erred in finding that at the time of the accident, claimant was off work and not engaged in any employment related duty, nor was she on any employer requested errand, since the unrefuted evidence establishes otherwise.

Furthermore, both the JCC and the First DCA, in upholding the JCC, have erred in denying compensability of claimant's claim based on the dual-purpose doctrine.

If a claimant is not yet at work, or if she has completed work, injuries occurring while claimant is going to or coming from work are generally not compensable, Bechtel Construction v. Lehning, 684 So.2d 334 (Fla. 4th DCA 1996), Securex v. Couto, 627 So.2d 595 (Fla. 1st DCA 1993), F.S. 440.092(2)(1995). This is referred to as the "Going and Coming Rule". Specifically, the "Going and Coming Rule" provides that injuries sustained by an employee going to or coming from work are not compensable, Bechtel v. Lehning, supra.

As part of the massive legislative changes to the Florida Workers' Compensation Law in 1990, the aforesaid "Going and Coming Rule" was codified effective 8/1/90. F.S. 440.092(2)(1995) (which has identical language to the initial statute, F.S. 440.092(2)(1990)) provides as follows:

> "GOING OR COMING - An injury suffered by 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."**

The "Going and Coming Rule" applies in general to employees who have fairly regular or fixed hours of work, when going to or coming from their regular place of work, Advanced Diagnostics v.

Walsh, 437 so.2d 778 (Fla. 1st DCA 1983), Johnson v. Metropolitan Dade Co., 424 So.2d 911 (Fla. 1st DCA 1982), George v. Woodville Lumber co., 382 So.2d 802 (Fla. 1st DCA 1980), Bowen v. Keen, 17 So.2d 706 (Fla. 1944).

There are numerous exceptions to the "Going and Coming Rule" . One of those exceptions, which applies in the case at bar, is known as the dual-purpose doctrine. The dual purpose doctrine provides that an injury which occurs as the result of a trip, a concurrent cause of which was a business purpose, is within the course and scope of employment, even if the trip also served a personal purpose, such as, and including, going to and coming from work, Gulliford, supra. Further, the courts do not weigh the relative importance of the personal motive versus the business motive, Spartan Food v. Hopkins, supra, Gulliford, supra.

The "Going and Coming Rule" as set forth in F.S. 440.092(2)(1995) does not in any way abolish the dual-purpose doctrine. F.S. 440.092(2)(1995) speaks only to the employer provided transportation rule as set forth in such cases as Povia Bros. Farms v. Velez, 74 So.2d 103 (Fla. 1954), Dunham v. Olsten Quality Care, 667 So.2d 948 (Fla. 1st DCA 1996), Kash n' Karry v. Johnson, 617 So.2d 791 (Fla. 1st DCA 1993). As stated by the First DCA in both Dunham, supra, and Johnson, supra, if the Legislature wanted to eliminate such rules as the hazard rule,

the bunkhouse rule, premises rule (and claimant would submit, the dual purpose doctrine), the Legislature could have done so as it did in part to the traveling employee rule when it passed F.S. 440.092 (4) (1994), see e.g., American Airlines v. Lefevers, 674 So.2d 940 (Fla. 1st DCA 1996), Dunham, supra, Johnson, supra. For example, the First DCA held in Lefevers, supra, that the personal comfort doctrine and bunkhouse rule still applies. In Perez v. Publix Supermarkets, 673 So.2d 938 (Fla. 1st DCA 1996), the First DCA held that the premises rule still applied. In Johnson, supra, the First DCA held that the hazard rule still applied.

As noted hereinabove, F.S. 440.092(2)(1995) specifically provides that the "Going and Coming Rule" does not apply if the employee was

> " ... engaged in a **special errand or mission for the employer."**

See also, Hages v. Hughes Electric Service, 654 So.2d 1280 (Fla. 1st DCA 1995); Securex, Inc. v. Couto, 627 So.2d 595 (Fla. 1st DCA 1993).

It is clear that this language retains, as an exception to the "Going and Coming Rule", the dual-purpose doctrine.

The dual purpose doctrine finds its roots in an opinion written by the esteemed Justice Cardozo, wherein it was determined that an employee may be exempted from the going and

coming rule if he is injured on a trip that serves both a business and personal purpose, Mark's Dependants v. Gray, 167 N.E. 181 (NY 1929). Florida adopted this rule of law in Cook v. Highway Casualty Co., 82 So.2d 679 (Fla. 1955) and the rule has been applied numerous times since, including in Tampa Airport Hilton v. Hawkins, 557 So.2d 953 (Fla. 1st DCA 1990), Spartan Foods v. Hopkins, supra, Nikko v. Gulliford, supra, Krause v. West Lumber Co., 227 So.2d 486 (Fla. 1969). Both the First DCA and this Honorable Court have held that no nice inquiry will be made to determine the relative importance of a concurrent business and personal motive for the trip, and so long as the business purpose is at least a concurrent cause of the trip, the employer may be held liable for workers' compensation, Spartan Foods v. Hopkins, supra, Nikko v. Gulliford, supra.

The rule applies even in instances where the claimant is going to or coming from work, as affirmed by this Court in Gulliford, supra. In Gulliford v. Nikko Gold Coast Cruises, 423 So.2d 588 (Fla. 1st DCA 1982), the First DCA, relying upon Prof. Larson, explained the doctrine by noting

> "Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. This principle applies to out of town trips, to trips to **and from** work, and to miscellaneous errands such as visits to bars or restaurants motivated in part by an intention to transact business there." Gulliford, supra at 589.

Concerning carrying employment impediments to and from work, the First DCA, in Gulliford v. Nikko Gold Coast Cruises, 423 So.2d 588 (Fla. 1st DCA 1982) again quoting from Prof. Larson, stated

> " ... If it can be said that the transporting of the employment materials amounted to the performing of a business service of sufficient dimensions to bring it within the basic dual purpose rule, **in the sense that if the employee could not have combined this service with his going or coming trip, a special trip would have had to be made to accomplish the same business objective,** the journey may be within the course of employment." Gulliford, supra at 590.

This Court in Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984) affirmed the First DCA's decision in Gulliford v. Nikko Gold Coast, 423 So.2d 588 (Fla. 1st DCA 1982).

This Court's decision in Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984) is applicable to the case at bar.

Another case applicable to the case at bar is the case of Spartan Foods v. Hopkins, supra, wherein the claimant sustained injuries when she was involved in a vehicular accident while traveling to work at a Hardee's Restaurant owned by the employer in Pensacola. Claimant was assigned to this restaurant with a reporting time of 8:00 a.m., and on the day of the accident, had received a telephone call from her supervisor asking her to stop at a Hardee's in Milton to obtain extra beverage cups which she

could bring with her when she arrived at work. Hopkins left home approximately 35 minutes earlier than usual, and the trip to Milton required her to deviate from her usual route to work. Hopkins traveled to Milton and obtained the cups as requested; thereafter, returning to her normal route which she usually travels to work, when her vehicle was rear-ended while she was stopped in traffic on the interstate.

In affirming the JCC's finding of compensability, the First DCA held:

> "Although claimant had returned to her usual route to work at the time of her accident, this circumstance does not negate the errand for her employer. When **a trip is made for both a business and a personal motive, it is deemed to be an employment activity for workers' compensation purposes** .. These cases indicate that no inquiry was made as to the relative importance of either the business or personal motive beyond a determination that the business purpose would have required a trip even had the private purpose not existed … In the present case, **claimant's supervisor testified that it was essential that the extra cups be obtained for the morning shift, and that if claimant had not performed this task, someone else would have had to be dispatched for the supplies.** Claimant's special errand thus remained a concurrent cause of her trip even after she resumed her normal route to work, so as to render the journey an activity within the course of her employment excepted from the going and coming rule in accordance with Gulliford." Spartan Foods v. Hopkins, supra at 989.

This is the very factual basis which brings claimant's claim herein within the dual-purpose exception to the "Going and Coming Rule".

IF THE CLAIMANT HAD NOT TRANSPORTED THE JOB FAIR BOOTH, SOMEONE ELSE WOULD HAVE HAD TO HAVE BEEN DISPATCHED TO TRANSPORT IT.

The Honorable Judge Benton, in his dissenting opinion in Swartz, supra, quoting from Arthur Larson's Treaties on Workers' Compensation Law, stated as follows:

> "It is not necessary, under (the dual purpose doctrine) that, on failure of the personal motive, the business trip would have been taken by this particular employee at this particular time. It is enough that someone, sometime, would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but, if a special trip would have had to be made for this purpose, and if the employer got the necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or afterthought." (A-25), Swartz, supra at 2524, 1 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, Sec. 18.13 at 4-368 To 69 (1997).

As Judge Benton further noted in his dissenting opinion:

> "Ms. Swartz might have stayed the weekend in Tampa and driven directly to the job fair on Monday. But she or someone else "sometime would have had to take the trip" to transport her half of the booth to the job fair. McDonald's policies dictated that the booth be at the job fair and created the need for the trip." (A-25), Swartz, supra at D2524.

The facts in this case are unrefuted. For example, it is unrefuted by every witness who testified that it was the duty of the HR consultants to transport the recruitment booths from Tampa, where they were kept, to the site of the job fair (V1-33-34, 144, 156, 189, V3-504-505). This testimony is unrefuted.

Even Ms. Jones, the HR manager, confirmed that when claimant was transporting the booth on 3/1/96, it was part of her job (V3-504-505).

It is unrefuted that after the regional meeting on 3/1/96 in Tampa, claimant and Ms. Lenko loaded part of a recruitment/job fair booth into claimant's vehicle, along with recruitment information (Vl-28, 30). This testimony is unrefuted. Ms. Lenko confirmed that the booth is in two boxes and one was put in claimant's car and one was put in Ms. Lenko's car (V1-144). Ms. Lenko confirmed that all of the material would not fit in one car, and she needed claimant's assistance in order to get the booth to Orlando for the job fair on Monday (V1-156). Ms. Lenko testified:

> "Q. . . Ms. Jones has indicated in her testimony that she thought transporting the booths was part of your job responsibility as a human resources consultant. Would you agree or disagree?
>
> A. I would agree that it is part of our job responsibility to make sure the materials that we need for the job fair . . are there with us.
>
> Q. Was Ms. Swartz transporting part of a booth on March 1, 1996 to Orlando?
>
> A. Yes, she was.
>
> Q. And it was necessary in order to have it ready for the job fair; is that right?
>
> A. Yes, that started on Monday." (Vl-156-157).

Ms. Lenko also indicated that two vehicles were needed to transport the recruiting booth to Orlando so that she needed claimant's help to accomplish the task (V1-144). The following colloquy occurred during Ms. Lenko's testimony:

> "Q. After this meeting was finished, did you have any discussions with Ms. Swartz about the job fair that you were going to be doing on the following Monday?
>
> A. Yes, we had a job fair scheduled in Orlando at the Holiday Inn off of International Drive. We are required to bring materials to the job fair and Tess and I had a conversation in regards to who would bring what materials.
>
> Q. And, there's been a lot of testimony today about this booth.
>
> A. Uh-huh (affirmatively).
>
> Q. It's a large black box of some kind. And did you have part of this booth and Ms. Swartz have part of this booth in your various cars?
>
> A. Yes, our recruitment booth is in two boxes, one fits in the back seat and I put one in my car and Tess had one in her car." (Vl-144).

In fact, counsel for the E/C stipulated:

> " … that we told her to bring the booth and there were no other arrangements. I mean, that was the arrangement." (V1-157).

Carolyn Jones, claimant's supervisor, counted on the employees she supervised to take recruiting booths to job fairs. Ms. Jones testified:

> "Q. … Now, how would (the) booths ordinarily make it to the location of the job fair?
>
> A. However doing the job fair would carry them.

Q. Would the job fairs typically require a set up of the booth?

A. Typically, yes. . .

Q. Did you have any role of scheduling the job fair (on March 4, 1996), meaning putting it down on either Barbara Lenko's and/or Tessann Swartz' calendar?

A. Yes.

Q. Okay. How did you expect the booth to arrive at the job fair?

A. I expected the employees to carry it.

Q. Was that part of (Ms. Swartz), although minimal job duty, is that still something you would expect an (human resources) consultant to transport with them if they are going to a job fair?

A. Yes." (V3-504-505).

Clearly, one of claimant's job duties was to bring her portion of the booth to the job fair. That is what claimant was doing when the accident occurred on I-4 at the I-275 interchange, well before she reached Orlando, and the point at which she would have left the highway to go home.

Therefore, the trip claimant was making at the time of the accident had two purposes: She was going home (although she had not yet deviated from the route that led to the job fair) at the same time that she was performing her job by transporting part of the booth. As such, claimant remained in the course and scope of her employment, under the dual purpose doctrine, because she was still performing, at least in part, the business

purpose of her trip, Standard Distribution Co. v. Johnson, 445 So.2d 663 (Fla. 1st DCA 1984) (holding that, where an employee intends to deviate from his route, he remains within the course and scope of employment until a deviation actually occurs); Elviejo Arco Iris, Inc. v. Luaces, 395 So.2d 225 (Fla. 1st DCA 1981) (stating that an employee traveling his regular route home remained within the course and scope of his employment until he had completed an errand assigned by his employer).

Claimant might have stayed the weekend in Tampa and driven directly to the job fair on Monday. But she or someone else "sometime, would have had to take the trip" to transfer her half of the job fair booth to the job fair. The employer's policies dictated that the booth be at that job fair and created the need for the trip.

The JCC, in his Order, stated:

> "The fact that the claimant had a booth in the back of her car on the date of accident which she intended to use the following Monday in Orlando does not turn this otherwise non-compensable going and coming case into a compensable event. The claimant made no special trip to Tampa to secure this "tool". At the time of the claimant's accident, she was on a journey which was regular and frequent and was not prompted by any sudden call by her employer. The burden of placing a tool in her car to transport with her for her use in her job the following Monday was minor when viewed in the context of claimant's usual duties and route home. The fact is abundantly clear that at the time of the accident, the claimant was off work and not engaged in any employment related duty, nor was she on any employer requested errand." (V4-627-628).

Concerning this finding, claimant would submit that the JCC's finding that

> 'The fact is abundantly clear that at the time of the accident, the claimant was off work and not engaged in any employment related duty, nor was she on any employer requested errand." (V4-627-628),

is completely erroneous and not supported by any evidence in the record. To the contrary, the unrefuted evidence established that at the time of the accident, claimant was engaged in an employment related duty, to-wit: transporting part of the job fair booth to Orlando for the job fair which was to commence on 3/4/96. In connection therewith, the following testimony was elicited at trial:

1. Claimant testified that it is the responsibility associated with an HR consultant to get the booth to the job fair and that there were no alternative plans to get the booth from Tampa to Orlando for the job fair (V1-33-34). The booth is kept in the stockroom in Tampa at the regional office and in order for claimant to bring the booth to any job fair, she would have to go to Tampa to pick it up, unless she was picking it up from another consultant (V1-34). Claimant explained there had been no arrangements for anyone else to bring the booth to Orlando from Tampa, and she was expected to do it (V1-34-35).

2. Barbara Lenko confirmed that the HR consultants are required to bring materials to the job fairs, and claimant and

MS. Lenko had a conversation concerning who would bring what materials (Vl-144). Ms. Lenko confirmed that all of the materials would not fit in her car and that she needed claimant's assistance in order to get the booth from Tampa to Orlando for the job fair (Vl-156). Ms. Lenko confirmed that it was part of their job as HR consultants to make sure that the materials they need for the job fair are with them (V1-156).

3. Jill Wolf, assistant in the HR department, confirmed that transporting the recruitment booth is part of claimant's job (V1-89).

4. Carolyn Jones, HR manager, confirmed that when claimant was transporting the booth on 3/1/96, it was part of her job (V3-504-505). Ms. Jones testified that whomever was doing the job fairs would carry the booth (V3-504-505). She testified that the job fairs typically require set up of the booth (V3-505).

The First DCA, in upholding the JCC's finding that claimant's accident is not compensable under the dual-purpose doctrine, acknowledged this Court's decision in Gulliford, supra, wherein this Court stated that

> " ... The focus should not simply be on whether the travel might have included an incidental employment responsibility, but rather whether the concurrently undertaken task is so important to the business of the employer that the trip would have been required in any event . . . ""

The First DCA in its opinion in this case then stated:

> "In the instant case, the claimant failed to establish that she was performing a necessary or essential part of her service to her employer by carrying the job fair booth home with her the evening of March 1. For example, there is no evidence in the record that McDonald's participation in the job fair could not have occurred without the booth or that, if claimant had failed to transport the booth on her commute home, a special trip for the booth would have been required. To the contrary, the evidence shows that McDonald's has routinely participated in job fairs without using a display booth. It was certainly not established that the claimant's trip from Tampa to Orlando on March 1 would have been required even if the claimant's personal motive of going home had been removed. Merely carrying paraphernalia or tools of her employment does not convert the claimant's trip from personal to employment travel." Swartz, supra at D2523.

Claimant disagrees. As outlined hereinabove, the evidence is unrefuted from every single witness who testified in this case that claimant was performing a necessary or essential part of her service to the employer by carrying the job fair booth home with her on the evening of 3/1/96. That fact is unrefuted.

As it relates to the necessity to have a display booth at a job fair, the following testimony occurred

Carolyn Jones, claimant's supervisor, counted on the employees she supervised to take recruiting booths to job fairs. Ms. Jones testified:

> "Q. ... Now, how would (the) booths ordinarily make it to the location of the job fair?
>
> A. However doing the job fair would carry them.
>
> Q. Would the job fairs typically require a set up of the booth?

A. Typically, yes." (V3-505).

Carolyn Jones was also asked:

"Q. Other than setting up the booth and getting the materials out of your car, is there any other preparation for a job fair?

A. No." (V3-473).

Clearly, she inferred by the above testimony that the booth is necessary for a job fair.

Claimant testified as to the following concerning the booth:

"Q. Is there something about the booth in particular that would help an individual looking for employment to notice that it's McDonald's?

A. That's where our brand identity comes in from an employment standpoint. McDonald's is readily noticed versus a mom and pop restaurant out there. Our name sells us at a job fair.

Q. Let me stop you real quick. I know as I drive by McDonald's, I know what I see, but what about the booth itself? Is there something identifying McDonald's on the booth?

A. Yes . . Yes, I'm sorry, I wasn't understanding where we were going. Once we open up the display booth, we set up - we put on a back drop to it with pictures of employees and managers that are working in the restaurants that we have recruited and then we've got ou[r] name up across the top of it and it's a red background so it's our colors as well as the picture selling the job and then we've got benefits up on the booth. Depending on what we're hiring for are the pictures that we'll put up for the different job fairs. …" (Vl-31-32).

Additionally, as previously noted, every witness who testified in this case, testified that the HR consultant who

attended the job fair was expected to bring the booth to the job fair, and there is no testimony in this record that McDonald's routinely participates in job fairs without using a display booth.

Finally, claimant submits that it is clearly established that claimant's trip from Tampa to Orlando on 3/1/96 would have been required even if claimant's personal motive of going home had been removed. The unrefuted evidence establishes that the booth was required at the job fair on 3/4/96, and that claimant, as part of her job, was required to bring part of the job booth with her from Tampa to Orlando.

The JCC's finding that

> " ... the burden of placing a tool in her car to transport with her for use in her job the following Monday was minor when viewed in the context of claimant's usual duties and route home." (V4-627-628)

is error as a matter of law. The dual-purpose doctrine cases indicate that

> "No inquiry is made as to the relative importance of either the business or personal motive beyond a determination that the business purpose would have required a trip even had the private purpose not existed . .." Spartan Foods v. Hopkins, supra at 989.

As this Court stated in Gulliford, supra at 1004-1005:

> "We are persuaded that the decisions of those courts which do not require the (Industrial Relations Commission) to weigh the business and personal motives and determine which is the dominant or compelling cause of the trip, are more consistent with the remedial purposes of our workers' compensation act than is the more stringent rule . . and, we

agree with the Mississippi court that 'no nice inquiry" will be made to determine the relative importance of a concurrent business and personal motive . . So long as the business purpose is at least a concurrent cause of the trip the employer may be held liable for workers' compensation."

This Court further stated in Gulliford, supra:

" … We find that under the instant facts, the inference would be permissible that the trip would have been made even if Gulliford had not intended to go to work that day . . Since our decision in Cook, we have continued to hold that it is not necessary that the dominant purpose of a trip be business. All that need be determined is that an injury 'occurred as the result of a trip, a concurrent cause of which was a business purpose . ." Gulliford, supra at 1005.

In the case at bar, it is unrefuted that the business purpose would have required a trip from Tampa to Orlando, even had the private purpose (if there even was one) had not existed.

The JCC's finding that

"Claimant made no special trip to Tampa to secure this tool" (V4-627)

is irrelevant. It does not matter whether claimant made a special trip to Tampa to secure the tool. If it were necessary for the recruitment booth to be transported from Tampa to Orlando, whomever made the journey did so in the course and scope of their employment, because it was a business necessity to transport the booth from Tampa to Orlando for the job fair. The fact that there may have also been a personal motive involved in the trip is irrelevant, Spartan Foods v. Hopkins, supra, Gulliford, supra.

The JCC also found:

> " ... At the time of the claimant's accident, she was on a journey which was regular and frequent and was not prompted by any sudden call by her employer . ." (V4-627).

Claimant submits that the JCC's reference to the fact that the trip was not prompted by any sudden call by her employer reflects confusion between the words "special errand" and the word "mission" as set forth in F.S. 440.092(2)(1995). As previously noted, F.S. 440.092(2)(1995) exempts from the "Going and Coming Rule" situations where a claimant is engaged in a "special errand" or "mission" for the employer.

Claimant acknowledges that some cases in Florida have held, in determining whether the special errand rule applies, that irregularity and suddenness of the employer's request are essential elements, New Dade Apparel v. Delorenzo, 512 So.2d 1016 (Fla. 1st DCA 1987), Susan Lovering's Figure Salon v. McRorie, 498 So.2d 1033 (Fla. 1st DCA 1986), Elviejo Arco Iris v. Luaces, supra. Indeed, in McRorie, supra, and in Luaces, supra, a claimant's injury was found non-compensable on the grounds that the claimant was not on a special errand because there was no evidence of suddenness and irregularity in the employment duties the employee was engaged in at the time of the accident. In Delorenzo, supra, the claimant's injury was found compensable, but only because there was evidence of suddenness and irregularity in the employment duties.

On the other hand, however, there are cases where a claimant's injuries are deemed compensable when the claimant performs a regular errand or "mission" for the employer without any showing of suddenness and irregularity, Hages v. Hughes Electrical Service, supra (the claimant regularly bringing an employer's vehicle home because the vehicle had a company logo on it, and because there was no other place for the employer to keep the vehicle, held to constitute a "special errand" or "mission" for the employer); Gulliford, supra (the claimant emptying cash drawers used by employer's tour ticket sellers and locking money in his car, taking money home for the evening, and bringing money back to work on the mornings so ticket sellers would have ready supply of money on hand to make change for customers, which was done over several years, considered to be "special errand" or "mission"); Standard Dist. v. Johnson, supra, Advanced Diagnostics v. Walsh, 437 So.2d 778 (Fla. 1st DCA 1983), Poinciana Village Construction v. Gallarano, 424 So.2d 822 (Fla. 1st DCA 1982)(claimants who are required as part of their job to bring with them their own vehicle for use during the work day renders travel to and from work compensable).

Claimant submits that the only way to reconcile the above line of cases as exemplified by Gulliford, supra, from those lines of cases exemplified by Luaces, supra, to the extent that in determining whether the special errand rule applies, Courts

have found that irregularity and suddenness of the employer's request are essential elements, is that there is a distinct difference between a "special errand" and a "mission" for the employer. There is no case by this Honorable Court or by the First DCA which has addressed the distinction between these two words. Claimant submits that if a "special errand" requires "irregularity and suddenness of the employer's request", as essential elements, the same does not hold for a "mission" for the employer. Webster defines "mission" as "an act of sending; the duty on which one is sent". The fact that a mission is any duty that an employee is given is consistent with the definition of the word "employment" as set forth in F.S. 440.02(15)(a)(1995), wherein employment is defined as "... any service performed by an employee for the person employing him."

Claimant also notes that F.S. 440.092(2) (1995) states "a special errand or mission for the employer" and does not state "special errand **and** mission". Therefore, there is a clear difference between the two words, and claimant submits that the difference is that which is argued hereinabove.

Therefore, even if claimant's journey to Tampa n 3/1/96 was regular and frequent, and not prompted by any sudden call by her employer and therefore, it did not constitute a "special errand" under the line of cases that require "irregularity and suddenness of the employer's request", the trip still

constituted a special "mission" for the employer. Claimant still had a dual purpose of traveling from Tampa to Orlando, one of which was to return to home (which the JCC found non-compensable based on the "Going and Coming Rule"), but one of which was also to transport the recruitment booth from Tampa to Orlando, a necessary function, and a part of claimant's job for the job fair scheduled to be held in Orlando on 3/4/96.

As noted previously, transporting the booth to Orlando from Tampa on 3/1/96 was a necessary part of claimant's job because of the job fair scheduled in Orlando on 3/4/96. If claimant did not transport the booth, someone else would have had to do so. If claimant had not already been in Tampa, she would have had to go to Tampa to transport the booth from Tampa to Orlando for the job fair. Claimant's trip from Tampa to Orlando on 3/1/96 had a dual purpose, a concurrent cause of which was a business purpose, to-wit: transporting the booth from Tampa to Orlando for the job fair on 3/4/96. Claimant was therefore engaged in a special mission for the employer, and her injury is therefore compensable under the dual-purpose doctrine, Spartan Foods v. Hopkins, supra, Gulliford, supra, Cook v. Highway Casualty Co., supra.

It is therefore respectfully submitted that the JCC's finding, and the First DCA's affirmance of that finding, that claimant's trip on 3/1/96 did not fall within the dual purpose

doctrine, and therefore, that claimant's trip is not compensable, is in conflict with this Court's controlling precedents as set forth in Gulliford, supra, and Cook, supra, is error and should be reversed.

II

THE JCC ERRED IN DENYING AND DISMISSING CLAIMANT'S PETITION FOR BENEFITS AND IN DENYING CLAIMANT'S CLAIM FOR INDEMNITY BENEFITS, MEDICAL BENEFITS, PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

The sole basis of the JCC's order denying and dismissing claimant's PFB is the JCC's finding that claimant's accident is not compensable based on the "Going and Coming Rule". Claimant submits that the JCC erred in finding that claimant's injuries are not compensable based on the "Going and Coming Rule", since as argued under Point I, claimant submits that her injuries are compensable under the dual-purpose doctrine.

Furthermore, the First DCA has also erred in affirming the JCC's Order denying the compensability of claimant's injuries.

Since the JCC erred in finding that claimant's injuries are barred by the "Going and Coming Rule", the JCC also erred in denying and dismissing claimant's PFB, and in denying claimant's claim for indemnity benefits, medical benefits, penalties, interest, costs and attorney's fees.

CONCLUSION

The JCC erred in finding that claimant's claims are barred by the operation of the "Going and Coming Rule" as found in F.S. 440.092(2)(1995). Claimant's injuries are compensable based on the dual-purpose doctrine. A concurrent part of claimant's trip from Tampa to Orlando was for a business purpose. Had claimant not transported the recruitment booth from Tampa to Orlando, someone else would have had to do so.

WHEREFORE, claimant respectfully requests that this Honorable Court enter an Order reversing the JCC's Order of 6/30/97, reversing the Opinion of the First DCA dated 11/12/98, finding that the "Going and Coming Rule" does not apply to this case, that claimant's injuries are compensable under the dual purpose doctrine, that claimant's PFB be reinstated, and that this matter be remanded to the JCC for further proceedings consistent herewith.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 20th day of April, 1999 to: Alfredo J. Hilado, Esq., P.O. Box 944, Orlando, FL 32802 and to Scott B. Miller, Esq., 200 S. Orange Ave., 20th Floor, Orlando, FL 32801.

BILL MCCABE, ESQ.
Fla. Bar No: 157067
1450 West SR 434, #200
Longwood, FL 32750
(407) 830-9191
Co-Counsel for Petitioner

INDEX TO APPENDIX

STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
OFFICE OF JUDGE OF COMPENSATION CLAIMS
DISTRICT "D"

TESSAN SWARTZ
Claimant

Claim No.: 265-35-3261
D/A: 03/01/96

-v-
MCDONALDS CORPORATION
Employer
and
CORPORATE SYSTEMS
Carrier:

ALFRED J. HILADO, Esquire — **Attorney for claimant**
SCOTT MILLER, Esquire — **Attorney for employer/carrier**

ORDER

After due notice **to the parties,** a hearing on this claim was held in Tampa, Hillsborough County, Florida. The Parties were represented by Counsel as indicated hereinabove.

Claim was made for the following:

1. Determination of the compensability of the claimed accident and injuries.

2. Payment of Temporary Total Disability from June 1, 1996 to June 14, 1996.

3. Payment of Temporary Partial Disability from June 15, 1996 to the present and continuing.

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4. Authorization of Bonnie Muzenic-Dean, M.D. for treatment of claimant's continuing pain.

5. Authorization of Michael Broom, Orthopedist, for treatment of the claimant's continuing pain.

6. Determination of the claimant's average weekly wage and compensation rate.

7. A reasonable attorney fee for the attorney for the claimant,

8. Interest and penalties on all past due payments of compensation.

9. The cost of these proceedings.

10. The request for authorization Dr. Ronald Oppenheim was withdrawn as was the claim for authorization of a Family Physician, and Neurological Physician.

The claim was defended on the following grounds:

1. The claimant did not sustain a compensable accident.

2. The claimant's injuries did not arise out of and in the course and scope of her employment.

3. There was no medical evidence that the claimant is either temporarily and totally or temporarily and partially disabled.

4. The claims raised by petition are barred by the notice provisions of the statute found in the section 440.185 F.S., as amended 1984.

5. The treatment requested by Doctors Mutenic-Dean and Broom is neither medically necessary nor is it related to the claimant's employment.

6. There is no entitlement to the payment of penalties, interest, costs or attorney's

fees at the expense of the Employer/Carrier.

The parties entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Hillsborough County, Florida.

3. Notice of hearing was properly given as required by the Workers' Compensation Law.

4. On March 1, 1996, the Claimant was employed by the Employer herein at an average weekly age of $ 977.37 per week, inclusive of the claimant's fringe benefits, resulting in a compensation rate of $465.00 per week.

5. No disability compensation. or medical benefits have been furnished to the Employee by the Employer/Carrier.

6. If Claimants' Attorney is found to be due a fee at the expense of the Employer/Carrier, such fee may be determined by the Judge of Compensation Claims based on agreement between the parties or by the submission of one affidavit per party.

At the trial of this cause, the following documents were admitted into evidence:

Judge's Exhibits:

1. Petition received by the Division September 23, 1996 and corresponding

Docketing Order.

2. Petition received by the Division February 14, 1997 and corresponding Docketing Order.

3. Petition received by the Division February 17, 1997 and corresponding Docketing Order.

4. Uniform Pretrial Stipulation; Pretrial Compliance Questionnaire; and Order.

Claimant's Exhibits

1. Transcript of Deposition Testimony of Bonnie Muzenic-Dean, M.D. taken April 18, 1997.

2. Transcript of Deposition Testimony of Elaine Anderson taken March 21, 1997.

3. Copies of the employee's daily calendar logs for the period December 1995 through May 1996.

Employer/Carrier Exhibits

1. Transcript of Deposition Testimony of Carolyn Jones taken March 21, 1997.

After due consideration of this matter and after having the opportunity to review the documentary matters and having had the opportunity to observe the candor and demeanor of the witnesses who did appear and give live testimony before me, Tessan Swartz, Cindy Harney, Gail Cook, Barbara Lenco, and Jill Wolf, and having endeavored to **resolve** all conflicts of fact in the evidence presented herein, I do make the following findings of fact:

1. I have jurisdiction of the facts and the subject matter of this claim.

2. The stipulations as entered into by and between the parties are hereby adopted as findings of fact and incorporated herein by reference.

3. Claimant is a thirty-eight year old female. She began working for McDonalds when she was fifteen years old and at the time of her injury had been employed with McDonalds for twenty-three years. While Claimant had steady and regular promotions during her career with the employer she began to have performance difficulties once she reached mid-management positions. In December of 1995 the claimant's performance reviews indicated that she needed improvement and she was approaching what was described as a "job in jeopardy" situation which could potentially lead to her termination. In consideration of the claimant's longevity with the company the claimant was offered a position in the Human Resources Department. At the time of her accident on March I, 1996 the claimant was receiving on the job training as a Human Resource Consultant. The claimant's job responsibilities as a Human Resource Consultant were in the areas Of recruitment and staffing for the salary management employees at McDonald's She would also have been responsible for employee relations activities and provided some training classes relative to Human Resource issues.

4. Claimant's new position brought her to Tampa. The Human Resource's office is located on Westshore Boulevard in Tampa. That is where the claimant's office was located. Her business cards as a Human Resource Consultant indicated that the Westshore office was her business address. The claimant had a desk and office space

in the Human Resource office. When the claimant was not traveling to job fairs and the various stores of the employer she was required to be in the office. Although the claimant indicated she had no office to report to on a daily basis, she did testify that on March 1, 1996 she was still in training. She also testified that while in training seventy-five percent of her time was spent in the office and only twenty-five percent of her time was spent out of the office.

5. On March 1, 1996 the claimant was required to attend a regional meeting in Tampa. The inference that the claimant would ask the Court to draw is that the claimant was required to travel from her home in Orlando to Tampa to attend the regional meeting. That'this was a required meeting and exposed the claimant to travel risks to which she would otherwise not have been exposed. This Court does not accept that theory, and rather, concludes that the claimant had a three month notice of this mandatory meeting and that the purpose of the notice was to give the claimant ample opportunity to make certain that her schedule did not require her to be out of the office on March 1, 1996. There was no special trip involved due to the regional meeting. Claimant was merely required to report to her office as she would any other day when she did not have business outside of the office.

6, The claimant testified that following the meeting she checked her voice mail and spoke with a co-employee. She collected some paperwork that she needed. She loaded part of a display booth that was used at job fairs into the back of her company provided automobile and also loaded some recruitment information for a job fair scheduled to be held the following Monday in Orlando. The booth which the claimant had in her car was

used by she and her co-worker, Barbara Lenco at job fairs. From the testimony of the claimant and Ms. Lenco it is clear that the booth was a tool which they used to give brand identity to their display at these job fairs.

7. Claimant then began her normal trip back home to Orlando. She was following her normal route through Tampa and out Interstate 4. At the interchange of Interstate 4 and Interstate 75 traffic had come to a stop. While the claimant was stopped, apparently a driver was merging onto the interstate and had not realized that the traffic was stopped. The driver rear-ended the last car in claimant's line of cars causing a chain reaction of rear end collisions that ultimately reached claimant's car.

8. The claimant testified that she immediately called Elaine Anderson who was the Executive Administrative Coordinator of the fleet car program for the employer, and advised Ms. Anderson of the auto accident. Apparently claimant was interested in where she should take the car for repairs and making arrangements for a rental car,

9. The claimant did not require medical care at the time of the accident and was able to continue her journey home in her car. The claimant did seek medical care that evening at a local hospital emergency room. The claimant testified that she was examined in the emergency room and given some shots for spasms and a neck collar and then was sent home to be followed up by h&treating physician.

IO. While the employer was certainly well aware of the claimant's accident on March 1, 1996 at no time prior to her June 7, 1996 resignation did she indicate to the employer that she believed this motor vehicle accident was work related and that she should be provided with worker's compensation benefits. Nonetheless, it is clear the claimant gave

prompt and timely notice of both the accident and her injury to the employer and the employer certainly had ample opportunity to investigate the compensable nature of the accident and injuries had it chosen to do so,

11. The claimant reported to work at the job fair in Orlando on the following Monday, as scheduled, and worked a full day. Her co-worker indicated that the claimant did not appear to be in any distress or have any physical ailments or problems. The claimant continued to work though she began missing time for medical purposes, following this industrial accident. The claimant also continued to receive unsatisfactory job performance reviews and, on April 31, 1996 was advised that her job was in jeopardy and that unless her June performance rating improved she would be placed on a performance improvement plan for thirty days after which she may have been in a position to be terminated. The following week the claimant filed with Ms. Carolyn Jones, the Human Resource Manager, her letter of resignation.

12. After resigning the claimant looked for no employment, however, she testified that she was investigating the possibility of going into business. Ultimately she and a friend formed a consulting firm. They began planning this consulting business in July, 1996 and in January, 1997 actually opened an office. The claimant testified that she was hopeful that by May of 1997 her 'business would begin turning a profit. This particular entrepreneurial undertaking which the claimant and her friend have gone into is a small business management consulting firm.

13. Claimant also avers that on the date of her accident she was taking disability forms and insurance tracking forms to a McDonald's employee, Gail Cook who was a

marketing representative in the Orlando area, Ms. Cook was in the hospital and was in need of these forms. The Claimant testified that it was necessary that she get these forms to Ms. Cook and has averred that this was essentially a function that she was performing on behalf of her employer and the trip home to Orlando on the night of March 1, 1996 was really serving the dual purpose of traveling home and at the same time delivering the company forms to Ms. Cook.

14. The testimony before the court is quite clear that the claimant's mission to bring disability insurance and tracking forms to Ms. Cook was nothing more than a personal favor she had volunteered to perform for her friend. The delivering of these forms was in no way connected with her job duties nor was she requested by any individual at McDonald's to take these forms to Ms. Cook. In fact, the overwhelming testimony supports the finding that this was a very unusual method of having forms delivered Generally an employee merely calls Human Resources and requests the forms and they are immediately mailed to the employee. In fact, in the present case not only did Ms. Swartz not deliver the forms to Ms. Cook on March 1, 1996, Ms. Cook has testified that she did not receive these forms until March 7, 1996. Ms. Cook also testified that back in 1992 when she was having some medical problems she had needed forms such as those which were being brought to her by the 'claimant. Ms. Cook testified that in 1992 she simply called human resources and the forms were sent to her. It appears clear that had the claimant's mission on March 1, 1996 truly been a duty of her employment and of an urgency such as described by the claimant and Ms, Cook that the claimant would have delivered the forms, if not on March 1, 1996, certainly prior to March 7, 1996, Ms. Cook

and Ms. Swartz both live in the Orlando area. On Monday, March 4, 1996 the claimant was able to report to work and work her full day. Claimant did not have to report to work until after noon and it is reasonable to conclude that she had every opportunity to deliver the forms to Ms. Cook over the weekend or on the following Monday had that truly been her mission of March 1, 1996.

15. It is the finding of the undersigned that the claimant was not involved in a compensable accident on March 1, 1996, In reaching **this conclusion it** is found that the claims are barred by operation of the going and coming rule as found in Florida Statutes 440.092(2)F.S., as amended 1994. The claimant was not functioning in her capacity as a traveling employee at the time of the accident, She was merely returning home after a day in the office. The fact that the claimant elected to work in a position that required her to travel seventy-five percent of the time from her home in Orlando to the office in Tampa was a choice personal to the claimant: On March 1, 1996 the claimant was exposed to no greater hazard than she otherwise would on any other day when she was traveling to and from work in Tampa.

16. The. fact that the claimant had a booth in the back of her car on the date of accident which she intended to use the following Monday in Orlando does not turn this otherwise non-compensable going and coming case in a compensable event. 'The claimant made no special trip to Tampa to secure this "tool". At the time of the claimant's accident she was on a journey which was regular and frequent and was not prompted by any sudden call by her employer. The burden of placing a tool in her car to transport with her for use in her job the following Monday was minor when viewed in context of the

claimant's usual duties and route home. The fact is abundantly clear that at the time of the accident the claimant was off work and not engaged in any employment related duty nor was she on any employer requested errand. The accident and injurys sustained therein were personal to the claimant and occurred at time when claimant was returning home form work at her usual, normal, and customary place of employment.

IT IS, THEREFORE, ORDERED that the Claims for benefits under the Worker's Compensation laws of the State of Florida which have been raised by petition filed by or on behalf of the claimant are hereby denied and dismissed.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida.

JOSEPH MURPHY'
Judge of Compensation Claims

I HEREBY CERTIFY that a true copy of this has been furnished by first class mail on June 30/1997 to :

ALFRED J. HILADO, Esq., KELAHER, WIELAND & HILADO,P.A.,P.O. BOX 944, ORLANDO, FL 32802-0944.
SCOTT MILLER, Esq. ,201 S. ORANGE AVE. #640, ORLANDO, FL 32801.
TESSAN SWARTZ 6625 DOUBLETRACE LANE, , ORLANDO, FL 32819 (407) 3544888.

MCDONALDS CORPORATION 4838 W. KENNEDY BLVD., , TAMPA, FL 33609

CORPORATE SYSTEMS 3030 WARRENVILLE RD #600, LISLE, IL 60532

GLENNA KIM
Assistant td Judge

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

TESSANN SWARTZ,

Appellant,

v.

MCDONALD'S CORPORATION and CORPORATE SYSTEMS,

Appellees.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 97-3023

Opinion filed November 12, 1998.

An appeal from an order of the Judge of Compensation Claims Joseph Murphy, Judge.

Alfred J. Hilado, Orlando; Bill McCabe, Longwood, for Appellant.

Scott B. Miller and Jason D. Lazarus of Hurley, Rogner, Miller, Cox & Waranch, P.A., Orlando, for Appellees.

VAN NORTWICK, J.

In this worker's compensation appeal, Tessann Swartz, the claimant below and a former human resources trainee for appellee, McDonald's Corporation (the employer), appeals an order of the Judge of Compensation Claims (JCC) denying compensability of her petition for benefits on the ground that her claim was barred by

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the operation of the going and coming rule, section 440.092(2), Florida Statutes (1995). We affirm on all issues, although we write to address only one: Whether claimant's carrying in her car the employer's display booth for use in her employment at a job fair turned otherwise noncompensable travel from work to home into compensable employment travel? Our review of the record leads us to the conclusion that claimant established nothing more than she was carrying the paraphernalia or tools useful in her employment when she was injured in an automobile accident on her way home from work. Competent, substantial evidence supports the JCC's finding that claimant was not involved in employment related travel.

Factual and Procedural Background

Claimant, who lives in Orlando, commuted to Tampa where her human resources training primarily occurred. Much of claimant's training was on-the-job and her duties included the recruitment of new store managers, requiring her attendance representing McDonald's at various job fairs. On Friday, March 1, 1996, claimant attended a regional McDonald's meeting in Tampa. Barbara Lenco, another McDonald's human resources employee, and claimant were required to attend a job fair starting in Orlando on Monday, March 4 at 1:30 p.m. After the Friday meeting ended at 3:50 p.m., Lenco and claimant placed in claimant's car a part of a booth used to advertise McDonald's at job fairs. The

remaining part of the booth was put in Lenco's car. Claimant testified that she planned to store the part of the booth for which she was responsible at home over the weekend and on Monday travel to the job fair site with the booth. The job fair booth is normally stored in McDonald's Tampa offices when not in use.

After leaving her office on March 1, claimant began the drive to her home in Orlando. En route home, she was involved in an automobile accident on Interstate Highway 4 at approximately 5:30 p.m. the same day.

Claimant filed a petition seeking temporary disability benefits. The employer/carrier defended on the grounds that claimant's injuries did not arise out of and in the course and scope of her employment.

At the hearing, claimant testified that, when the promoters of a job fair give prospective employers enough space, McDonald's would set up a display booth advertising its name and services. At this particular Orlando job fair, McDonald's was allowed to have a booth. Both claimant and her supervisor testified that it was the responsibility of the human resources staff to take the booth to the job fair. Lenco and claimant planned to set the booth up at the job fair location on Monday. In fact, despite the accident, claimant did attend the job fair on Monday, March 4, 1996, bringing her part of the job fair booth with her.

The JCC ruled in pertinent part:

> The fact that the claimant had a booth in the back of her car on the date of accident which she intended to use the following Monday in Orlando does not turn this otherwise non-compensable going and coming case [into] a compensable event. The claimant made no special trip to Tampa to secure this "tool." At the time of the claimant's accident she was on a journey which was regular and frequent and was not prompted by any sudden call. by her employer. The burden of placing a tool in her car to transport with her for use in her job the following Monday was minor when viewed in context of the claimant's usual duties and route home. The fact is abundantly clear that at the time of the accident the claimant was off work and not engaged in any employment related duty nor was she on any employer requested errand. The accident and injuries sustained therein were personal to the claimant and occurred at [a] time when claimant was returning home from work at her usual, normal, and customary place of employment.

Going and Coming Rule

Under the going and coming rule, "injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment." Sweat v. Allen, 145 Fla. 733, 200 So. 348, 350 (1941). The going and coming rule has been codified in section 440.092(2), Florida Statutes (1995), as follows:

> 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.

"In the course of employment" *refers* "to the time, place and circumstances under which the accident occurs," Spivey v. Battaglia Fruit Co., 138 So. 2d 308, 311 (Fla. 1962), and "arising out of" refers to "origin or cause." Id.

> Since industry must carry the burden [of the expenses incident to the hazards of employment], there must then be some causal connection between the employment and the injury, or it must have had its origin in some risk incident to or connected with the employment, or have followed from it as a natural consequence.

Glasser v. Youth Shop, 54 So. 2d 686, 687 (Fla. 1951).

The going and coming rule does not apply to employee travel which is undertaken to perform a special errand or mission for the employer. D.C. Moore & Sons v. Wadkins, 568 So. 2d 998, 999 (Fla. 1st DCA 1990). A special errand may exist "if the journey was a substantial part of the service performed for the employer [or] . . . where the employee is instructed to perform a special errand which grows out of and is incidental to his employment." Id. (citations omitted).

We find unavailing claimant's contention that the record evidence below compels a finding that she was on a special errand or mission for her employer at the time of her injury. To the contrary, although carrying a booth to job fair sites was an employment duty of claimant, below even claimant's own attorney

characterized the transportation of the booth as a "minimal job duty." Further, the particular journey to Orlando on March 1 was not undertaken as a service for the employer. We find competent, substantial evidence to support the JCC's finding that claimant's travel to Orlando did not arise out of her employment or involve the performance of a special errand or mission or task outside regular hours at the request of the employer and for the employer's benefit. See Eadv v. Medical Personnel Pool, 377 SO. 2d 693, 695 (Fla. 1979); D.C. Moore & Sons v. Watkins, 568 So. 2d 998-99 (Fla. 1st DCA 1990); Bruck v. Glen Johnson, Inc., 418 So. 2d 1209. 1211 (Fla. 1st DCA 1982). As stated in Eadv, 377 So. 2d at 696, compensation will be denied under the going and coming rule where the journey is essentially for personal reasons, as the JCC found in the instant case.

Claimant also argues that under Schoenfelder v. Winn & Jorgensen. P.A., 704 So. 2d 136 (Fla. 1st DCA 1997), her travel to Orlando was excepted from the going and coming rule and, therefore, was within the course of her employment. We cannot agree. In Schoenfelder, the claimant, an attorney, began preparing for a deposition at home in the morning, and was struck by a vehicle while walking to his car to drive to the scheduled deposition of the physician at the physician's office. The claimant established that travel to various locations was a necessary part of his job. Thus, the record evidence supported

that he was not simply commuting between his house and his regular office, but was within the "time and place" of his employment at the time of his injury.

Dual Purpose Doctrine

Finally, we disagree with claimant that her drive the evening of March 1 was compensable because it had dual purposes, a business one as well as the personal one of commuting home from work. The so-called "dual purpose doctrine" provides that an, injury which occurs during travel serving both business and personal purposes is considered within the course of employment if the travel involves the performance of a service essential to the business of the employer such that the travel would be required to be undertaken by someone on the employer's behalf if it had not coincided with the claimant's personal journey. D.C. Moore & Sons, 568 So. 2d at 999. The parameters of the dual purpose doctrine are demonstrated by Gulliford v. Nikko Gold Coast Cruises, 423 So. 2d 588, 589 (Fla. 1st DCA 1982), approved sub nom., Nikko Gold Coast Cruises v. Gulliford, 448 So. 2d 1002 (Fla. 1984). In Gulliford, the claimant's duties included emptying the cash drawers used by the employer's ticket sellers, locking the money in his car, safekeeping the cash at home at night, and returning it to work in the morning. The ticket sellers were unable to open for business until the operating cash was returned. Id. 448 So. 2d at 1003. Claimant was involved in

an automobile accident while he was on his way to work with the money in his possession. This court, in ruling the accident compensable, focused on the fact that taking the employer's operating funds home was an employment duty which was part of the claimant's contract of employment. Id. 423 So. 2d at 590.

On review in the Florida Supreme Court, however, the Court explained that, in Florida, the focus should not simply be on whether the travel might have included an incidental employment responsibility, but rather whether the concurrently undertaken task is so important to the business of the employer that the trip would have been required in any event. Nikko Gold Coast Cruises v. Gulliford, 448 So. 2d at 1004 (Fla. 1984). The Court found that the concurrent task in Gulliford was essential to the employer's operations. "Even if Gulliford had not intended to come to work for the day, he would have still had to make the same trip in order to return the operational cash to the business or, make arrangements for someone else to do so." Id. The Supreme Court adopted the rationale of then Judge Cardozo in Marks' Dependents v. Gray, 251 N.W. 90, 167 N.E. 181 (N.Y. 1929), where he explained an analytical approach to the dual purpose doctrine, as follows:

> To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of

> employment, though he is serving at the same time some purpose of his own. If, however, the work has had 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.

167 N.E. at 183 (citation omitted).

In the instant case, the claimant failed to establish that she was performing a necessary or essential part of her service to her employer by carrying the job fair booth home with her the evening of March 1. For example, there is no evidence in the record that McDonald's participation in the job fair could not have occurred without the booth or that, if claimant had failed to transport the booth on her commute home, a special trip for the booth would have been required. To the contrary, the evidence shows that McDonald's routinely participated in job fairs without using a display booth. It certainly was not established that the claimant's trip from Tampa to Orlando on March 1 would have been required even if the claimant's personal motive of going home had been removed. Merely carrying paraphernalia or tools of her employment does not convert the claimant's trip from personal to employment travel. See United States Fidelity & Guar. Co. v. Rowe, 126 So. 2d 737 (Fla. 1961).

AFFIRMED.

PADOVANO, J., CONCURS; and BENTON, J., DISSENTS WITH WRITTEN OPINION.

BENTON, J., dissenting.

I cannot subscribe to the majority opinion's thesis that the trip on which Ms. Swartz had an automobile accident on March 1, 1996, did not serve a business purpose of her employer. That it also served a personal purpose I quite agree. But the rule is that an injury is compensable if the injury "occurred as the result of a trip, a concurrent cause of which was a business purpose." Nikko Gold Coast Cruises v. Gulliford, 448 So. 2d 1002, 1005 (Fla. 1984).

In training for work as a "human resources consultant" for McDonald's, Ms. Swartz attended a meeting in Tampa on Friday, March 1, 1996. After the meeting, she and Barbara Lenco, a McDonald's employee helping with the training, loaded half of a portable recruiting booth into the company car assigned to, Ms. Swartz. The booth was to be used at an Orlando job fair the following Monday. Ms. Lenco testified:

> Q. . . . Ms. Jones has indicated in her testimony that she thought transporting the booths w[as] part of your job responsibility as an [human resources] consultant. Would you agree or disagree?
>
> A. I would agree that it is part of our job responsibility to make sure the materials that we need for the job fair . . . (are] there with us.
>
> Q. Was Ms. Swartz transporting [part of3 a booth on March 1, 1996 to Orlando?
>
> A. Yes, she was.
>
> Q. And it was necessary in order to have it ready for the job fair; is that right?
>
> A. Yes, that started on Monday.

Ms. Lenco indicated that two vehicles were needed to transport the

recruiting booth to Orlando so that she needed Ms. Swartz's help to accomplish the task. McDonald's counsel stipulated that "we told her to bring the booth and . . , that was the arrangement." Carolyn Jones, Ms. Swartz's supervisor, counted on the employees she supervised to take recruiting booths to job fairs. She testified:

> Q. . . , Now how would [the] booths ordinarily make it to the location of the job fair?
> A. Whoever doing the job fair wouid carry them.
> Q. Would the job fairs typically require a setup of a booth?
> A. Typically, yes.
> . . . .
> Q. Did you have any role of scheduling th[e] job fair [on March 4, 1996], meaning putting it down on either Barbara Lenco's and/or Tessann Swartz's calendar?
> A. Yes
> Q. Okay. How did you expect th[e] booth to arrive at the job fair?
> A. I expected the employees to carry it.
> Q. Was that part of [Ms. Swartz's], although minimal job duty, is that still something you would expect an [human resources] consultant to transport with them if they are going to a job fair?
> A. Yes.

Plainly one of Ms. Swartz's job duties was to bring her portion of the booth to the job fair. That is what she was doing when the accident occurred on I-4 at the I-75 interchange, well before she reached Orlando and the point at which she would have left the highway to go home. See generally Standard Distrib. Co. v. Johnson, 445 So. 2d 663, 664 (Fla 1st DCA 1984) (holding that, where an employee intends to deviate from his route, he remains

within the course and scope of employment until a deviation actually occurs); El Vieio Arco Iris, Inc. v. Luaces, 395 So. 2d 225, 226 (Fla. 1st DCA 1981) (stating that an employee traveling his regular route home remained within the course and scope of his employment until he had completed an errand assigned by his employer)

The Workers' Compensation Law now treats even traveling employees as outside the scope of their employment, while they are going to and coming from work, Ch. 93-415, Laws of Fla., § 6, at 78 (amending section 440.092(4), Florida Statutes (1995)), but only if an exception to the going and coming rule does not apply. Although section 440.092(2), Florida Statutes (1995), states broadly that an "injury suffered while going to or coming from work is not an injury arising out of and in the course of employment," the cases are clear that the statutory codification of the going and coming rule, chapter 90-201, Laws of Florida, section 14, at 920 (reenacted in chapter 91-1, Laws of Florida, section 10, at 35), does not abrogate the exception for trips that serve a dual purpose. See Hases v. Hughes Elec. Serv., 654 So. 2d 1280 (Fla. 1st DCA 1995). See also Securex, Inc. v. Couto, 627 so. 2d 595 (Fla. 1st DCA 1993).

The trip Ms. Swartz was making at the time of the accident had two purposes. She was going home (although she had not yet deviated from the route that led to the job fair) at the same time that she was performing her job by transporting part of the booth.

As one commentator has explained,

> it is not necessary, under [the dual purpose doctrine], that, on failure of the personal motive, the business trip would have been taken by this particular employee at this particular time. It is enough that someone sometime would have had to take the trip to carry out the business mission. Perhaps another employee would have done it; perhaps another time would have been chosen; but if a special trip would have had to be made for this purpose, and if the employer got the necessary item of travel accomplished by combining it with this employee's personal trip, it is accurate to say that it was a concurrent cause of the trip, rather than an incidental appendage or afterthought.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 18.13, at 4-368 to 69 (1997) (footnotes omitted). Ms. Swartz might have stayed the weekend in Tampa and driven directly to the job fair on Monday. But she or someone else "sometime would have had to take the trip" to transport her half of the booth to the job fair. McDonald's policies dictated that the booth be at that job fair and created the need for the trip. See Marks' Dependents v. Gray, 251 N.Y. 90, 93-94 (N.Y. 1929).

The judge of compensation claims found "that the booth was a tool which they used to give brand identity to their display at these job fairs." It was adorned with the corporate logo. Whatever the benefit to recruiting may have been, transporting the booth was not "minimal" in the sense of being perfunctory or optional for an employee like Ms. Swartz. The booth was too big for one car. It appears two people loaded one half into Ms. Swartz's car. The booth differs, moreover, from a plumber's

wrenches or a salesman's sample case which is unlikely to be put to use apart from its bearer. See generally 1 Larson's, supra, § 18.24, at 4-387 to 406. Even in Ms. Swartz's absence, her employer's interests would be advanced--or so its officers and managers evidently thought--by the presence of the booth at the job fair, at least if Ms. Lenco or another was on hand to (wo)man it.

Our supreme court has said that "it is not necessary that the dominant purpose of a trip be business. All that need be determined is that an injury occurred as the result of a trip, a concurrent cause of which was a business purpose." Nikko Gold Coast Cruises, 448 So. 2d at 1005. See Cook v. Hishwav Casualtv Co., 82 So. 2d 679, 682 (Fla. 1955). Because today's decision conflicts with these controlling precedents, I respectfully dissent.