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SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

TESSANN SWARTZ,

Petitioner,

v.

MC DONALD'S CORPORATION
and CORPORATE SYSTEMS,

Respondents.
_____/

DOCKET NUMBER: 94,489

'CLAIM NO: 265-35-3261

D/A: 03/01/96

RESPONDENTS' BRIEF ON THE MERITS

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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".

The First District Court of Appeals shall be referred to herein as the "First DCA".

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 10cpi.

STATEMENT OF THE CASE

The employer/carrier agrees with the claimant's Statement of the Case in most part. However, the employer/carrier would like to emphasize certain parts of the Record which were omitted. Specifically, in affirming the JCC's Order, the First DCA addressed the "dual purpose" doctrine and emphasized:

> "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 McDonalds' participation in the job fair could not have occurred without the booth or that, if the 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." (A-21) (Emphasis added).

STATEMENT OF THE FACTS

The employer/carrier agrees with the claimant's recitation of the facts in general. However, the employer/carrier must clarify the claimant's job description at the time of the accident. On March 1, 1996, the claimant was not a human resources consultant, but was a human resources consultant in training. (V3-484). The human resources manager, Carolyn Jones, testified that while in training, the claimant would have spent 70-75% of her time in the Human Resources Office in Tampa, Florida, and 25% of the time outside of the office. (V3-463). Further, on the date of the motor vehicle accident, the claimant's primary location for work was in the office located in Tampa, Florida. The claimant had a cubicle in the regional offices in Tampa, Florida. (Vl-65). The claimant received her work mail at her address in Tampa, Florida. (Vl-66). The claimant's assistant, Jill Wolf, was located in Tampa, Florida. (Vl-66). The claimant's business card indicated that her address was in Tampa, Florida, and the receptionist in the Tampa office fielded calls for the claimant at that location. (V1-67).

While the auto accident occurred on Friday, March 1, 1996, the job fair was not to occur until the following Monday, March 4, 1996. (Vl-144). The record indicates that McDonald's could have participated in the job fair even without the booth. The claimant testified that she had been to job fairs in the past, and that not all job fairs permit the use of booths. (Vl-29, 33, 91). The claimant described that:

"When we are allowed at the job fairs, when the job fairs give us the space, we have booths..." (Vl-29)

Q. Okay. And at this particular job fair in -- on March 4, 1996 was a booth anticipated to be there?

A. Yes, we were allowed to have it.

The claimant further described:

"If they're doing a job fair and we're allowed to have a booth, if it's a table booth or if it's the tall booth, we bring that..." (Vl-33).

Ms. Barbara Lenco, the human resources consultant who was training the claimant, inferred in her testimony that the booth was not an integral part of the job fair:

Q. "And, at a job fair, is there any presentation or speech or anything like that that needs to be done by either you or Ms. Swartz?

A. No, we basically answer questions that the individual may have in regards to our business, our company." (Vl-144-5).

When asked about whether certain materials were necessary for a job fair, such as resumes, background information, completed applications, etc., Ms. Lenco responded:

"Obviously, it would be convenient, but if we do not have the materials or the information, we would just ask them to fill out another' application and get another resume from them at that time, and that has happened on several occasions." (Vl-158).

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

POINTS ON APPEAL

I. **THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA AS THE FACTS OF THE CLAIMANT'S ACCIDENT DO NOT FIT WITHIN THE "SPECIAL ERRAND" EXCEPTION TO THE "GOING AND COMING" RULE.**

II. **THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA BASED UPON THE APPLICATION OF SECTION 440.092, FLORIDA STATUTES, AND THE DOCTRINE OF EXPRESS10 UNIUS EST EXCLUSIO ALTERIUS.**

III. **THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA AS THE FACTS OF THE CLAIMANT'S ACCIDENT DO NOT FIT WITHIN THE "DUAL PURPOSE" EXCEPTION TO THE "GOING AND COMING" RULE.**

SUMMARY OF ARGUMENT

The facts of this motor vehicle accident do not fit within the "special errand" exception to the "going and coming" rule. At the time of the auto accident, the claimant was not performing a sudden or irregular task or a task which placed an increased burden on the claimant in context of her typical trip home. The claimant was driving her normal route home on a Friday afternoon for the weekend at the typical time of day that she would be traveling. The alleged burden of placing a display booth in the trunk of her car does not transform this non-compensable trip home into a compensable event.

The doctrine of expressio unius est exclusio alterius requires a finding that the "dual purpose" rule no longer exists. A clear and unambiguous interpretation of sect. 440.092(2) indicates that the legislature decided not to include the "dual purpose" doctrine as an exception to the "going and coming" rule. Neither this Court nor the First DCA can speculate as to why the legislature chose not to include the "dual purpose" exception.

If the "dual purpose" exception still exists, it does not apply to the facts in the case at bar. The transportation of the display was not a necessary or essential task. The Record suggests that the job fair could have gone forward even without the booth or the materials. If the claimant's task was not essential to the business purpose, then it is not a concurrent cause of the trip, and therefore the "dual purpose" doctrine does not apply.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA AS THE FACTS OF THE CLAIMANT'S ACCIDENT DO NOT FIT WITHIN THE "SPECIAL ERRAND" EXCEPTION TO THE "GOING AND COMING" RULE.

For an injury to arise out of and- in the course of one's employment, there must be some causal connection between the injury and the employment, or the injury must have had its origin in some risk incident to or connected with the employment, or that it flowed from it as a natural consequence. Sweat v. Allen, 200 So. 348 (Fla. 1941). This Court has also held that the applicability of the "going and coming" rule and its exceptions depends upon the nature and circumstances of the particular employment, and no exact formula can be laid down which will automatically solve every case. Id. Finally, this Court has emphasized there must necessarily be a line beyond which the liability of an employer cannot continue, and the question as to where the line is drawn is usually one of fact. Bowen v. Keen, 17 So.2d 706 (Fla. 1944).

Additionally, this Court has focused upon the suddenness and irregularity of the special errand when determining whether a particular journey falls within the exception to the "going and coming" rule. Eady v. Medical Personnel Pool, 377 So.2d 693 (Fla. 1979). If the particular journey is a regular or a frequent one, there is a strong presumption that the "going and coming" rule applies. Id. at 696. The focus is also on the "relative burden" on the employee compared with the extent of the task to be performed. Id. The First DCA has followed suit in ruling that

when an employee is injured on a regular and frequent journey and when he is not subject to a sudden call by the employer, and the burden of the errand is minor in the context of the employee's usual route home, then the accident is not compensable under the special errand exception. El Viejo Arco Iris, Inc. v. Luaces, 395 So.2d 225 (Fla. 1st DCA 1981); Susan Loverings Figure Salon v. McRorie, 498 So.2d 1033 (Fla. 1st DCA 1986).

In El Viejo, the special errand included the claimant's trip to the store to pick up supplies. Id. Once the supplies were purchased, the claimant merely resumed his usual trip home that he would have made regardless of the special errand. Id. In McRorie, the claimant was a manager of a hair salon who stayed late after her shift ended at 9:00 P.M. to do paperwork. Id. at p. 1034. On her regular route home, she was hit by a drunk driver and injured. Id. The First DCA reversed the JCC and found the accident not compensable under the "going and coming" rule. Id. The Court reasoned that the Record was devoid of any evidence indicating that the claimant was responding to a sudden call from the employer to run a special errand or mission at an irregular hour. Id.

When finding accidents compensable under the "special errand" rule, the First DCA reverses again on the suddenness, irregularity, and increased burden factors. Electronic Service Clinic v. Barnard, 634 So.2d 707 (Fla. 1st DCA 1994); Tampa Airport Hilton Hotel v. Hawkins, 557 So.2d 953 (Fla. 1st DCA 1990); and New Dade Apparel, Inc. v. DeLorenzo, 512 So.2d 1016 (Fla. 1st DCA 1987). The DeLorenzo case involved a claimant who was asked by his supervisor

to return to work early from his vacation and was injured en route to work. 512 So.2d at 1017. Absent the employer's request, the claimant would not have returned to work until the following Monday, and therefore the Court found the accident compensable under the "special errand" rule. Id. In the Hawkins case, the claimant was asked to attend a special staff meeting well in advance of her normal time when she was supposed to report to work. 557 So.2d 953. The Court agreed with the JCC when he found:

> "The expense and inconvenience caused this employee in having to go to the employer's premises, a considerable distance, at a time in which the employee would otherwise have been off, and the subjection of the claimant to the hazards of this travel for the benefit of the employer, was a "special inconvenience and hazard'." Id. at p. 954.

The most instructive application of the "special errand" rule appears in the Barnard, supra, case. In Barnard, the claimant was a traveling repair technician who was required to make an additional round trip to the employer's premises at the end of the day in order to return the company truck, 634 So.2d 707. At the time of his accident, he was on his normal route home. Id. The employer/carrier asserted that since the claimant had completed his errand, and was on his normal route home, that the El Viejo decision applied, making the accident non-compensable. Id. at p. 709. The First District Court of Appeals rejected the employer/carrier's argument and ruled that the critical question is not the completion of the errand's objective, but the completion of the errand's burden. Id. In El Viejo, the objective of the errand (bringing the plumbing tools to work the following day) had not

been completed, but the burden of the errand was completed. Therefore, the accident in El Viejo was not compensable. Id. In Barnard, the objective of the errand had been completed, but the burden placed upon the claimant making the additional round trip late at night would not have been completed until he arrived home. Id. at p. 710.

There was nothing sudden or irregular about the errand which the claimant was performing at the time of her accident in the case at bar. Moreover, there certainly is no evidence to suggest that the errand created an additional burden upon the claimant when viewed in context of the claimant's usual route home. At the time of the claimant's auto accident, the claimant was en route from her regular place of business, on her regular route home, and at the normal time of day when she would be traveling. The record clearly establishes that the claimant spent 70% - 753 of her time at the human resources office in Tampa, Florida. (V3-463). The claimant retained a cubicle in Tampa where she received her mail and telephone calls. (Vl-65-6). Her business card indicated that she worked in Tampa, Florida, and she was assigned an assistant who was also located in the Tampa office. (Vl-66). The claimant testified at the trial that she was driving directly home at 5:30 P.M. on Interstate 4 at the time of the accident and was not on her way to the job fair location. (Vl-86-7). Finally, as the First DCA noted in its opinion, the claimant's own attorney characterized the transportation of the booth as a "minimal job duty". (Al-17-18). In sum, the claimant was on an errand that was neither special,

sudden or irregular. The errand did **not** create an additional burden nor expose the claimant to increased hazards. The claimant in this case was merely driving home *on* a Friday afternoon at rush hour on her normal route at her normal time of day. The claimant was exposed to the same risks and hazards of traveling on public highways as any other typical commuter. The fact that the claimant had a piece of the employer's display booth in the trunk of her car cannot transform this routine trip home into a compensable event.

In his Order, the JCC found the following:

> "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." (A-10-11).

The First DCA affirmed by holding:

> "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." (A-18).

The findings of the JCC and the First DCA are supported by the Record and consistent with the law on the "special errand" exception to the "going and coming" rule. Accordingly, the decisions below should not be overturned by this Court.

11. THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA BASED UPON THE APPLICATION OF SECTION 440.092, FLORIDA STATUTES, AND THE DOCTRINE OF EXPRESS10 UNIUS EST EXCLUSIO ALTERIUS.

The "going and coming" rule is based upon the recognition that injuries suffered while going to or coming from work are essentially similar to other injuries suffered off duty and away from the employer's premises, and like those other injuries, are usually not work related. Therefore, "going and coming" injuries are as a rule, not compensable. Eady v. Medical Personnel Pool, 377 So.2d 693 (Fla. 1979). However, this Court also realized that numerous exceptions to the "going and coming rule" allow compensation in certain circumstances. Id. atp. 695. In addition to the "special errand" exception discussed in Eady, supra, this Court recognized the following exceptions as well: Grillo v. Gorney Beauty Shops, Co., 249 So.2d 13 (Fla. 1971) (traveling employee); Huddock v. Grant Motor Company, 228 So.2d 898 (Fla. 1969) (transportation furnished by employer); and Naranja Rock Company v. Dawal Farms, 74 So.2d 282 (Fla. 1954) (special hazard). Id.

In 1990, the Florida Legislature amended the Workers' Compensation Statute to codify the "going and coming" rule and its numerous exceptions. Section 440.092(2), Fla. Stat. (1990) provides:

> "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."

The traveling employee exception was also addressed by the legislature when it adopted Section 440.092(4), Fla. Stat. (1990). Finally, the "premises rule" is referred to by the legislature in Section 440.092(3), Fla. Stat. (1990). However, the legislature specifically omitted the "special hazard" exception, the "dual purpose" doctrine, and the "personal comfort" doctrine, all of which have been used by the Courts prior to 1990 as exceptions to the "going and coming" rule. See e.g. Toyota of Pensacola v. Maines, 558 So.2d 1072 (Fla. 1st DCA 1990); Holly Hill Fruit Products, Inc. v. Krieder, 473 So.2d 829 (Fla. 1st DCA 1985).

A. The application of expressio unis est exclusio alterius abolishes the "dual purpose" exception.

Expressio unius est exclusio alterius is a doctrine of statutory construction which translated from the Latin means: "express mention of one thing is the exclusion of another". In other words, when the legislature clearly establishes one or more exceptions to a general rule, the Courts must assume that the legislature thoroughly considered and purposely limited the field of exceptions. Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952). This maxim precludes the Court from writing into law any other exception or creating by judicial fiat any other exceptions to the general rule. Id. Stated another way, when a statute enumerates things on which it is to operate, it is ordinarily construed as excluding from its operation all those things not expressly

mentioned. Rebich v. Burdines and Liberty Mutual Insurance Company, 417 So.2d 284 (Fla. 1st DCA 1982). If there is any doubt as to the legislative intent, the doubt should be resolved against the power of a Court to supply any missing words. Id.

The doctrine of expressio unius est exclusio alterius has been applied by this Court and the First DCA when interpreting Chapter 440, Florida Statutes. In Dobbs, supra, this Court focused upon Section 440.19(1), Fla. Stat. which deals with the statute of limitations. At that time, the Statute provided a two year statute of limitations "except that if payment of compensation has been made without an award on account of such injury or death, a claim may be filed within two years after the date of the last payment." This Court declined to entertain any other exceptions to the statute of limitations and held that: "The legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions, it would have done so clearly and unequivocally." Id. at p. 342,

In Rebich, supra, a claimant's treating physician appealed an Order finding that certain claims for payment of services were barred by the two year statute of limitations. 417 So.2d 284. The physician argued that a physician's claim did not come within the ambit of Section 440.19, and therefore he was not bound by the two year statute of limitations. Id at 285. The First DCA agreed and held that when a Court construes a statute it may not insert words or phrases in that statute that to all appearances were not in the

mind of the legislators. Id. The Court also cited to the corollary doctrine, expressio unius est exclusio alterius, confirming that when a statute enumerates certain things on which it is to operate, it is to be construed to exclude from its operation all those things not expressly mentioned. Id.

In Section 440.092, Fla. Stat. (1990), the legislature codified the "going and coming" rule and its numerous exceptions. In Section 440.092(2), Fla. Stat. (1990), the legislature specifically excluded from the "going and coming" rule those employees engaged in "special errands or missions". "Traveling employees" were excepted in Section 440.092(4), Fla. Stat. (1990). The legislature does not mention any other exceptions. The Petitioner cites to several cases from the First District Court of Appeals which have held that the codification of the "going and coming" rule set forth in Section 440.092(2) does not in any way abolish or abrogate the special hazard rule, bunk house rule, or premises rule. Dunnam 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. Specifically, the claimant relies upon the language of the First DCA in Dunnam which states that: "Had the legislature intended to abolish or limit the "special hazard" rule, it would expressly have done so." 667 So.2d at 951. (citing, University of Florida Institute of Agricultural Services v. Karch, 393 So.2d 621, 622), (Fla. 1st DCA 1981)).

The claimant's and the First DCA's reliance upon the Karch opinion is misplaced. In fact, the reasoning in the Karch case

supports the adherence to the doctrine of expressio unius est exclusio alterius. In **Karch**, the First DCA affirmed the rule that the Workers' Compensation Act applies to all employment unless specifically excluded. Street v. **Safeway** Steel Scaffold Company, 148 **So.2d** 38 (Fla. 1st DCA 1962). The First DCA then focused on the exceptions to that general rule contained in Section **440.09(2)**, Fla. Stat. (1977). Since the claimant did not fall within one of the enumerated exceptions contained in Section **440.09(2)**, the First DCA held that the claimant was not precluded from obtaining workers' compensation benefits. In doing so, the First DCA relied upon the doctrine of expressio unius est exclusio alterius. 393 **So.2d** at 622.

In Kash **N'** Karry, and **Dunnam**, supra, the First DCA asked the wrong question, and therefore its reasoning is flawed. In both Kash **N'** Karry, and **Dunnam**, supra, the First DCA asked why the legislature did not abolish or limit the "special hazard" rule when it could have? In short, the Court treated the "special hazard" rule as the general rule instead of the exception. Instead, the First DCA should have asked why did the legislature did not include the "special hazard" rule as an exception to the general rule that "going and coming" employees are not covered? The doctrine of expressio unius est exclusio alterius answers the question by establishing that the First DCA cannot guess what the legislature may have intended. Instead, the First DCA must interpret the statute literally and exclude from its operation all those things which are not expressly mentioned.

Therefore, in the case at bar, the general rule is that claimants are not covered while going to or coming from work. The only exceptions to this rule have been codified in Section 440.092, Fla. Stat. Since the "dual purpose" doctrine does not appear within one of the exceptions specified in Section 440.092, one cannot infer that the legislature intended that exception to remain in effect.

B. The term "special errand or mission" does not contemplate the "dual purpose" doctrine.

This Honorable Court has accepted jurisdiction based upon the alleged conflict between the First DCA's opinion contained in Swartz v. McDonald's Corporation, 23 FLW (D) 2521, (Fla. 1st DCA 1998) and this Court's decisions of Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984); and Cook v. Highway Casualty Company, 82 So.2d 679 (Fla. 1955). Both the Gulliford and the Cook decisions were decided prior to the codification of the "going and coming rule" in 1990. According to the doctrine of expressio unius est exclusio alterius, the "dual purpose" exception to the "going and coming rule" no longer exists and so the decision of the First District Court of Appeal no longer expressly or directly conflicts with prior decisions of this Court contained in Gulliford and Cook, supra.

The Petitioner argues, in her Initial Brief that the "special errand" exception to the "going and coming" rule contained in Section 440.092(2) (1995) specifically includes the "dual purpose" doctrine. The Petitioner argues that the reference to "special

errand or mission for the employer" contemplates either the "special errand" rule or the "dual purpose" doctrine. However, the claimant has failed to point out any First DCA or Supreme Court of Florida decision which has drawn a distinction between special errands and missions. Further, the claimant has failed to point out any statutory section within Chapter 440, which supports a distinction between special errands and missions. To the contrary, the definitions of these two terms are synonymous. The American Heritage Dictionary defines "errand" as "a short trip taken to perform a specific task." Similarly, "mission" is defined as "a task assigned to an individual or a group". This Court has not drawn any distinction between the terms "special errands" or "missions".

The leading case from this Court regarding the "special errand" exception used the two terms synonymously when it stated: "The Going and Coming Rule does not apply to employees on special errands or missions for the employer." Eady v. Medical Personnel Pool, 377 So.2d 693 (Fla. 1979). The Eady case dealt solely with the "special errand" exception analysis and did not mention the "dual purpose" doctrine at all. Id. The First District Court of Appeal has also used the term "special errand" and "mission" synonymously. In D.C. Moore and Sons v. Wadkins, 568 So.2d 998 (Fla. 1st DCA 1990), the Court reads: "In the instant case, the special mission exception is inapplicable because decedent's trip home to retrieve the keys was wholly personal". (emphasis added). See also, Freeman v. Manpower, Inc., 453 So.2d 208 (Fla. 1st DCA

1984); Gray v. Dade County School Board, 433 So.2d 1009 (Fla. 1st DCA 1983); and Tampa Ship Repair and Dry Dock Company v. Young, 421 So.2d 706 (Fla. 1st DCA 1982). A sampling of several courts around the country illustrates the interchangeable use of "errand" and "mission". In Tramel v. State Farm Fire & Casualty Company, 830 S.W.2d 764 (Tex. Civ. App. 1992), the Texas Court of Appeals refers to the special errand as a "special mission". In Baroyd v. Workers Compensation Appeals Board, 175 Cal. Rptr. 633 (Cal. 2d Dist. Ct. App. 1981), the California Second District Court of Appeals also referred to it as the "special mission" exception to the "going and coming rule". Finally, the Oklahoma Court of Appeals referred to a special errand analysis as the "special task" exception to the "going and coming rule". Schell v. Blue Bell, Inc., 637 Okl. App., 637 P.2d 914 (Ct. App. 1981).

In sum, the term "special errand or mission" which is contained in Section 440.092(2), Fla. Stat. (1995), does not specifically mention nor contemplate inclusion of the "dual purpose" doctrine. The statute refers to the word "mission" as a synonym of "errand" just as this Court did in its opinion of Eady v. Medical Personnel Pool, 377 So.2d 693 (Fla. 1979). The statute clearly lists specific exceptions to the "going and coming" rule and excludes the "dual purpose" doctrine. Despite the First DCA's opinions to the contrary, the "dual purpose" doctrine has been abolished and is not applicable to the case at bar,

III. THIS COURT SHOULD AFFIRM THE OPINIONS OF THE JCC AND THE FIRST DCA AS THE FACTS OF THE CLAIMANT'S ACCIDENT DO NOT FIT WITHIN THE "DUAL PURPOSE" EXCEPTION TO THE "GOING AND COMING" RULE.

If this Court should find that the "dual purpose" doctrine has not been abolished, the claimant's industrial accident is still not compensable under this exception to the "going and coming" rule. The "dual purpose" doctrine has its origins in the case of Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1920). In Gray, plumber's helper intended to visit his wife in another town at the end of a work day. Id. The employer instructed the claimant to fix some faulty faucets while in the town of his destination. The claimant was injured in a car accident while on the way to his out-of-town destination. Id. The job was described as a "trifling" one, a job which would have been postponed until some other time if the claimant had not stated he was going to make the trip anyhow. Id. In denying compensability, Judge Cardozo focused upon the necessity of the employment related travel. Although the service to the employer does not need to be the sole cause of the journey, it at least must be a "concurrent cause". Id. at p. 183. Judge Cardozo then described that a concurrent cause must carry with it the inference that the trip would have had to have been made even though the private errand had been cancelled. Id. Professor Larson has explained the "dual purpose" doctrine in the following way:

> "It is not necessary, under this formula, 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... if a special trip would have had to be made for this purpose, and if the employer got this 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." 1 Larson's Workers' Compensation Law Sec. 18.13 at 4-368, 369 (1997). (Emphasis added).

Therefore, both Judge Cardozo and Larson emphasized the necessary nature of the business purpose. In other words, the errand or the trip must be done by someone in order to accomplish the business purpose or the business mission at the other end of the journey.

Inquiring as to the sufficiency of the concurrent cause, is not the equivalent of weighing the business and personal motives of the trip. Professor Larson makes it very clear that:

> "Once this test (concurrent cause test) is satisfied, there is no occasion to weigh the business and personal motives to determine which is dominant." 1 Larson's Workers' Compensation Law, Sec. 18.14 at 4-369 (1997).

This Court summarized the "dual purpose" analysis very well in its decision of Nikko Gold Coast Cruises v. Gulliford, 48 So.2d 1002 (Fla. 1984). The Gulliford Court referred to Judge Cardozo and reiterated that the service to the employer must not be the sole cause of the journey, but at least it must be a concurrent cause. 448 So.2d at 1005. The Court then referred to its decision in Cook v. Highway Casualty Company, 82 So.2d 679 (Fla. 1955), and affirmed that:

> "We agree with this Mississippi Court that "no nice inquiry" will be made to determine the relative importance of a concurrent cause and a personal motive... so long as the business purpose is at least a concurrent cause of the

> trip." Id. at 1004. (citing, Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 55 So. 2d 381).

In other words, the claimant must prove that the business purpose is a sufficient concurrent cause before the "dual purpose" doctrine will even apply. Further, the concurrent cause test has nothing to do with weighing the relative importance of the business motive with the personal motive. The concurrent cause test is the test which requires that if this particular claimant had not delivered the display booth on this particular trip, then someone, sometime, would have had to make the trip in order to accomplish the business mission. 1 Larson's Workers' Compensation Law, Sec. 18.13 at 4-368, 369 (1997). In the instant case, the claimant fails the "concurrent cause" test. The First District Court of Appeals reached that conclusion not by weighing the personal motive versus the business motive, but by looking at whether the task was essential or necessary enough to accomplish the business purpose. (A-21). The facts of the Gulliford case exemplify what is required in order to pass the "concurrent cause" test. While distinguishing the Gulliford case from the facts of U.S. Fidelity and Guaranty Company v. Rowe, 126 So.2d 737 (Fla. 1961), this Court pointed out the following:

> "There was a complete understanding between himself and his employer as to the essential nature of his task...it was absolutely necessary that the cash be returned to the business each morning in order for the ticket sellers to be able to open their windows...the business could not begin operation without it." 448 So.2d at 1004.

On the other hand, in Rowe, the claimant was a teacher in a nursery school who had collected $30.00 in fees on the Friday before the Monday morning injury. 126 So.2d 737. There was no reference to the necessity of the $30.00 being delivered on Monday morning, and there is no evidence of the essential nature of that task. As stated by this Court in Gulliford in distinguishing Rowe:

> "There is likewise no indication that she was required to bring the fees back the next working day or that the return of the fees was necessary, or even helpful to the functioning of the nursery school. As far as we know, the claimant could have left the fees at home that Monday, and it would have had the same incidental effect on the operation of the nursery school as if she had forgotten her keys or any other paraphernalia of her employment." Gulliford, 448 So.2d at 1004.

In applying the "dual purpose" doctrine, jurisdictions across the country have focused on the necessary element of the business purpose. Armstrong v. Liles Construction Company, 389 S.W. 2d 261 (Tenn. 1965); Brown v. Arapahoe Drilling Company, 70 N.M. 99, 370 P. 2d 816 (1962); and Corp v. Joplin Cement Company 337 S.W. 2d 252 (Mo. 1960). In Corp, the claimant was a foreman at a construction site, who was injured while traveling to work and carrying building supplies. 337 S.W. 2d at 253. The accident was held compensable under the "dual purpose" doctrine, and the Supreme Court of Missouri emphasized that the building material involved was not "trifling or insignificant, but substantial and, according to the testimony, necessary for the completion of the...project." Id. at 257. In Brown, the claimant was a driller in charge of a crew on a drilling rig and was injured on his trip home while

carrying a drilling report or daily log which needed to be delivered to the company offices the following day. 370 P. 2d at 817. The New Mexico Supreme Court found the accident compensable under the "dual purpose" doctrine and relied upon the fact that had the claimant not been able to perform the task, then some other employee would have had to do the act. Id. at 819. (Emphasis added). Armstrong involved a claimant who was an assistant supervisor at a construction project, who would frequently pick up various pieces of small equipment in the evening on the way home and bring them to the job site the following day. 389 S.W. 2d at 262. One morning while driving to work with some equipment in his car, the claimant was killed, and the Tennessee Supreme Court found that the accident did not fall within the "dual purpose" doctrine. Id. at p. 266. In its reasoning, the Court cited to 99 C.J.S. Workmen's Compensation Sec. 221A, pp. 733, 734, and 735 which recite the "dual purpose" doctrine as follows:

> "The mission for the employer must be the major factor or, at least a concurrent cause of the journey; it is insufficient if the, employer's business is merely incidental to what the employee was doing for his own benefit, and an injury suffered by the employee on such a trip does not arise out of, or in the course of, the employment." (Emphasis added).

The Court concluded that trips to purchase supplies for the job were merely an incidental benefit to the employer and the business purposes were not the "prime mover" of the deceased, rather it was his desire to go home for the evening. 389 S.W.2d at 266.

Based upon the evidence in the Record, the claimant fails the "concurrent cause" test. There is no evidence to suggest that the business purpose of the claimant's trip was essential or even necessary. The employer/carrier concedes that the Record contains evidence that the recruiting booth was helpful and beneficial to the employer when they participated at job fairs. The claimant correctly testified that the booth displayed brand identity, and it was helpful for an individual who was looking for employment to notice that it was a McDonald's booth. (Vl-31-2). The claimant also testified that as a human resources consultant, she was responsible for bringing her part of the booth to the job fair. (Vl-33-4). However, there is nothing in the Record suggesting that the job fair would not have taken place had the claimant either forgotten or lost her portion of the recruitment booth. To the contrary, the Record clearly establishes that McDonald's attends job fairs without recruitment booths. The claimant testified that booths are brought to the job fairs only when they are allowed and only when they are given adequate space. (Vl-29, 33). The human resources consultant, Ms. Barbara Lenco, testified the main purpose of a job fair is to answer questions that individuals have with regard to the business or company, and that there are no presentations or speeches of any kind. (Vl-144-5). Ms. Lenco even inferred that a job fair could take place without some of the written materials such as resumes, background information, completed applications, etc.:

> "Obviously, it would be convenient, but if we do not have the materials or the information,

> we would just ask them to fill out another application and get another resume from them at that time, and that has happened on several occasions." (Vl-158).

Therefore, not only could the job fair take place without half of the booth, it could take place without any booth. Moreover, the job fair could have taken place without the booth and without a lot of the written materials according to Ms. Lenco. In sum, the recruitment booth is certainly helpful, and it is certainly beneficial to the employer, but it is not essential and it is not necessary in order to complete the business purpose of the claimant's journey. The purpose of the journey was not to deliver the equipment, but to participate in the job fair. As confirmed by the testimony from the claimant and her supervisor, the objective of the job fair could have been accomplished regardless of the display booth. (Vl-29, 33, 144, 145, 158). From this testimony, we can infer that McDonalds' objective at the job fair would have been accomplished even if the claimant's portion of the display booth and/or materials were destroyed in the accident. From Ms. Lenco's testimony, we can infer that the McDonald's objective at the job fair would have been accomplished even if the claimant failed to appear at all on Monday, March 4, 1996. (Vl-144, 145, 158).

The claimant was merely carrying a tool of the trade or piece of employment related paraphernalia for the employer which created an incidental benefit but was certainly not an essential task. Professor Larson summarizes the cases on carrying "employment

impedimenta" and pronounces the rule that these accidents are generally non-compensable:

> "The mere fact that claimant is, while going to work, also carrying some of the paraphernalia of the employment does not, in itself, convert the trip into part of the employment. For example, the mere fact that at the time of the accident the employee had with him some of the tools of the trade, such as a steam fitter's hard hat, a pocket rule, and a level, all belonging to the employer, does not make the accident compensable." 1 Larson's Workers' Compensation Law Sec. 18.24(a) at 4-387, 392. (1997).

The above rule of law contains the reasoning used by this Court in denying compensability in the case of U. S. Fidelity and Guaranty Company v. Rowe, 126 So.2d 737 (Fla. 1961). In Rowe, the claimant was a nursery school teacher who was charged with the responsibility of collecting $30.00 in fees and retaining possession of that money from the end of the day on Friday and returning the money on the employer on the following Monday. Id. While returning to work on the following Monday morning, the claimant was involved in an accident which this Court found was not compensable under the "going and coming" rule. Id. at 738. First, the Court focused upon lack of an increased risk because of this errand because the claimant was not taking any additional risk that she would otherwise have been taking when carrying money and returning to her job on Monday morning. Id. The Court then emphasized the insignificant nature of the task itself when it stated:

> "If there can be recovery under the facts in this case, then there could be recovery in the case of any employee who carried about with,

> him 'any of the paraphernalia' of his employment, and who sustained an injury while absent for any reason from his work." Id. at 738.

Unlike the Gulliford decision, there was no evidence in Rowe that the $30.00 was essential to the operation of the business. For instance, there was no evidence, as in Gulliford, that employees had to go to the accident site to collect the $30.00 from Mrs. Rowe in order to open the business on Monday morning. Likewise, there is no evidence in this case that the display booth was an essential element to the operation of the job fair. The display booth is merely a tool and merely a piece of employment related paraphernalia. Under the reasoning of this very Court, the transportation of such a booth cannot rise to the level of a concurrent cause thereby creating a "dual purpose".

If this Court ultimately finds the claimant's automobile accident as compensable under the "dual purpose" doctrine, then the exception would swallow the rule. The "dual purpose" exception was never intended to be interpreted so broadly as to include an employee traveling home at a normal time of day, on the normal route while carrying non-essential employment paraphernalia. For example, suppose an associate in a law firm plans to attend a mediation with a partner on a Monday morning. The prior Friday afternoon, the associate is instructed to bring a calculator, a pencil and a pad of paper home with him over the weekend so he can meet the partner at the mediation on Monday morning, and assist him with the calculations. If this associate has these materials in his car and is injured in a car accident during rush hour on Friday

afternoon, then the claimant would argue that it was a compensable accident despite the fact that the mediation could go forward without the calculator, pencil, pad or even the associate. Further, if the associate had all of those materials at his home and did not need to bring them from the office on Friday afternoon, then his journey home that afternoon would not be compensable since he was not transporting these materials at the time. This is an inequitable and illogical result.

As a further example, suppose the claimant in this case was asked not to bring a display booth but some business cards to be used at the job fair on Monday morning. On Friday afternoon, the claimant takes twenty business cards and puts a rubber band around them and throws them in the front seat of her car. If the claimant suffers an accident on her normal route home at the normal time of day with the business cards in her front seat, then the claimant would argue that the motor vehicle accident was a compensable event. However, if the claimant had the same business cards at home and did not need to transport them from the office; then the accident would not be compensable. Again, this is an absurd result, and a result which is surely not contemplated by the Statute or any of the case law cited regarding the "dual purpose" doctrine.

The JCC below found that the fact that the claimant was carrying a booth in the back of her car on the date of the accident did not transform her typical trip home into a compensable event. (A-lo). The First District Court of Appeals analyzed the "dual

purpose" doctrine based upon the law established in the cases of Gulliford and Cook, supra, and held:

> "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." (A-21).

Based upon the evidence in the Record, the JCC did not err as a matter of law denying compensability. Further, in affirming the JCC's decision to deny compensability, the First DCA did not create a conflict with the Gulliford and Cook decisions, supra, but merely distinguished this particular case on its facts from the facts of the prior decisions. Therefore, the decisions of the JCC and the First DCA should be affirmed.

CONCLUSION

The claimant was injured while driving home on a Friday afternoon at her regular hour, on her regular route home, and not in response to a special request from her employer. The only difference between her trip home on March 1, 1996, and every other trip home on a typical day was the fact that she was carrying a piece of equipment for her employer in the trunk of her car. There is a complete lack of evidence suggesting any suddenness, irregularity or increased hazard placed upon the claimant's trip home on the date of the accident. Therefore, the facts in the Record do not support a finding of compensability pursuant to the "special errand" exception to the "going and coming" rule.

The clear and unambiguous language of Section 440.092(2), Fla. Stat. (1995) establishes that the "dual purpose" doctrine no longer exists. Even if it does exist, the transportation of the display booth on the date of the accident was not a necessary or essential task. In light of the overall objective of the job fair, the display booth merely constitutes an incidental benefit to the employer. In sum, the claimant's journey home on Friday afternoon at her normal hour on her normal route fails the "dual purpose" exception as well.

The decisions of the JCC and the First DCA are sound and based upon established precedent. Denial of compensability in this particular case does not create a conflict with any prior cases from this Court and should therefore be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail to ALFRED J. HILADO, ESQUIRE, P.O. Box 944, Orlando, FL 32802-0944, and BILL MC CABE, ESQUIRE, 1450 West SR 434, #200, Longwood, FL 32750, this 26th day of May, 1999.

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