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 REPLY 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”.

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.

The Petitioner’s Initial Brief on the Merits will be referred to by the letters “IB” and followed by the applicable page number.

The Respondents Answer Brief on the Merits will be referred to by the letters “AB” and followed by the applicable page number.

CERTIFICATE OF TYPE

This Brief is typed in Courier New, 12 point.

STATEMENT OF THE CASE and STATEMENT OF THE FACTS

Claimant adopts and realleges the Statement of the Case and Statement of the Facts as set forth in the Initial Brief.

The E/C state in their AB that Claimant testified she had been to job fairs in the past and that not all job fairs permit the use of booths (AB-viii). Although some jobs fairs may not have permitted the use of booths, this job fair did (V1-29).

The E/C state in their AB that the record indicates that McDonald's could have participated in the job fair even without the booth (AB-viii). Claimant disagrees. There is no portion of the record that states McDonald's could have participated in this job fair without the booth. To the contrary, the record establishes that when allowed, as it was at this job fair, it was required to have a recruiting booth.

Claimant's supervisor, Carolyn Jones, testified as follows:

> "Q. Would the job fairs typically require a set up of a booth?
>
> A. Typically, yes." (V3-505).

Claimant made it clear that this job fair allowed a booth. The following colloquy occurred during Claimant's testimony:

> "Q. Okay. And at this particular job fair and B on March 4, 1996, was a both anticipated to be there?
>
> A. Yes, we were allowed to have it." (V1-29).

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

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 THE 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 "DUAL PURPOSE DOCTRINE".

The E/C, relying upon Eady v. Medical Personnel Pool, 377 So.2d 693 (Fla. 1979), argue that this Court has focused upon the suddenness and irregularity of the special errand when determining whether an journey falls within the exception to the "Going and Coming" rule (AB-3-4). The E/C is mixing apples and oranges. Eady, supra, is not a "dual purpose doctrine" case, but rather a "special errand" case. The special errand exception to the going and coming rule does generally require irregularity and suddenness of the employer's request, Eady, supra. This is not the case for the dual purpose doctrine, Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984), Hages v. Hughes Electrical Service, 654 So.2d 1280 (Fla. 1st DCA 1995). In Gulliford, supra, this Court held that the dual purpose doctrine applied to a Claimant who was involved in an auto accident while following his normal route from home to work, because he was bringing money back to work that was needed so ticket sellers would have a ready supply of money on hand to make change for customers, a task that he did every day. In

Gulliford, supra, this Honorable Court found that the dual purpose doctrine applied even though there was no suddenness or irregularity in Claimant's activities, and suddenness and irregularity were not even factors to be considered in determining whether or not the dual purpose doctrine applied.

Similarly, the cases of El Viejo Arco Iris, Inc. v. Luaces, 395 So.2d 225 (Fla. 1st DCA 1981) and Susan Lovering's Figure Salon v. McRorie, 498 So.2d 1033 (Fla. 1st DCA 1986), other cases relied upon by the E/C (AB-4), also deal with the special errand exception to the going and coming rule, not the dual purpose doctrine.

Claimant also notes that F.S. 440.092(2)(1995), the statute involved in this case, provides that the going and coming rule does not apply in instances where the injured worker is on a "special errand" or a "mission" for the employer. Whether a claimant is on a mission for the employer has nothing to do with irregularity and suddenness of the employer's request as is required for a special errand. Therefore, the E/C's argument as it relates to "suddenness or irregularity" (AB-3-7) has no bearing to the dual purpose doctrine which is the basis of Claimant's contention that her injuries are compensable.

The E/C next argue, for the first time in this case before any Court, that the dual purpose exception to the going and coming rule was abolished by the Florida Legislature when it

passed F.S. 440.092(2)(1990)(AB-9-13). Neither the JCC nor the First DCA held that the dual purpose doctrine was abolished but instead found that Claimant's case did not come within the dual purpose doctrine exception to the going and coming rule (V4-627-628, A19). Secondly, the going and coming rule as set forth in F.S. 440.092(2)(1995)(exact same language as when originally passed in 1990) 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 and Johnson, 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, the First DCA held that the hazard rule still applied.

Clearly, the dual purpose doctrine also still applies since it was not specifically eliminated by the Legislature.

The E/C argue that the First DCA's reasoning is flawed in Johnson and Dunham, because the First DCA asked the wrong question (AB-12). Claimant disagrees. The First DCA's reasoning in Dunham and Johnson is not in any way flawed, and as noted by the First DCA in those cases, if the Legislature wanted to eliminate such exceptions to the going and coming rule, it could have done so as it did in part to the traveling employee rule. Furthermore, the dual purpose doctrine is retained as an exception to the going and coming rule by the last sentenced in F.S. 440.092(2)(1995) which specifically exempts from the going and coming rule situations where

> A Y the employee was engaged in a special errand or **mission** for the employer."

The E/C argue that the term "special errand" or "mission" does not contemplate the dual purpose doctrine (AB-13-15). The E/C argue that there is no distinction between special errands and missions and that Claimant has failed to point out any First DCA or Supreme Court case which has drawn a distinction between special errands and missions (AB-14). As discussed in the IB, there is no case that has specifically discussed the difference between "special errands" and "missions" (IB-33-35). However, as argued in the IB, there clearly is a difference between

special errand and mission; otherwise, it would be impossible to reconcile cases such as New Dade Apparel v. DeLorenzo, 512 So.2d 1016 (Fla. 1st DCA 1987), Susan Lovering's v. McRorie, supra, and El Viejo v. Luaces, supra (cases dealing with the special errand rule dealing with irregularity and suddenness of the employer's request), with such cases as Nikko v. Gulliford, supra, Hages v. Hughes, supra, Standard Distribution Co. v. Johnson, 445 So.2d 663 (Fla. 1st DCA 1984), Advanced Diagnostics v. Walsh, 437 So.2d 778 (Fla. 1st DCA 1983), and Poinciana Village Construction v. Gallarano, 424 So.2d 822 (Fla. 1st DCA 1982) (cases where claimant's injuries going to or coming from work were held compensable, even though there was no suddenness or irregularity to the Claimant's activities). 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. Further, the Legislature used the word Aor" between special errand Aor" mission. The Legislature did not use the word "and". Use the word "or" indicates that alternatives were intended, i.e., there is a difference between special errand and mission, Sparkman v. McClure, 498 So.2d 892 (Fla. 1996), Ft. Walton Beach Medical Center v. Dingler, 697 So.2d 575 (Fla. 1st DCA 1997).

The E/C next argue in their AB that if the dual purpose doctrine has not been abolished, then Claimant's accident does

not come within the dual purpose exception to the going and coming rule (AB-16). Claimant disagrees. The unrefuted facts fall squarely within the dual purpose doctrine because it was necessary to have the booth at the job fair on 3/4/96 and if Claimant had not transported the booth, someone else would have had to have been dispatched to transport it.

The E/C argue that there is no evidence to suggest that the business purpose of Claimant's trip was essential or even necessary (AB-21). Claimant disagrees for the following reasons:

1. 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 fairs (V1-33-34, 144, 156, 189, V3-504-505).

2. 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 (V1-28, 30, 144). All of the materials would not fit into one car and Ms. Lenko needed Claimant's assistance in order to get the booth to Orlando for the job fair on Monday (V1-144, 156).

3. Even counsel for the E/C conceded at the original hearing that it was stipulated that Claimant was told to bring

the booth and there were no other arrangements. Counsel for the E/C stated

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

4. The unrefuted testimony establishes that it was necessary to have a display booth at the job fair, when one was allowed. The following colloquy occurred during the testimony of Ms. Jones, Claimant's supervisor:

> "Q. Do you have any knowledge as to whether or not Ms. Swartz, after leaving the meeting on March 1, 1996, was transporting a booth back for the job fair on March 4?
>
> A. Yes, she was.
>
> Q. Okay. Now, how would those booths ordinarily make it to the location of the job fair?
>
> A. Whoever was doing the job fair would carry them.
>
> Q. Would the job fairs typically require a set up of a booth?
>
> A. Typically, yes." (V3-504-505).

Ms. 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).

It is unrefuted that the job fair that Claimant was going to on 3/4/96 required the set up of a booth. Claimant testified

> "Q. Okay. And at this particular job fair and B on March 4, 1996, was a booth anticipated to be there?

A. Yes, we were allowed to have it." (V1-29).

3/1/96 was a Friday and the job fair was to begin on the next workday, Monday, 3/4/96. Had Claimant not brought the booth back with her on 3/1/96, someone at some time would have had to have been dispatched to Tampa to pick up the booth and bring it to the job fair in Orlando by 3/4/96.

The E/C argue that there is nothing in the record suggesting that the job fair would not have taken place had Claimant either forgotten or lost her portion of the booth, and instead the record establishes that McDonald's attends job fairs without recruitment booths (AB-21). Claimant testified:

> "When we're allowed at the job fairs, when the job fairs give us the space, we have booths that we'll B display booths B that we'll put up to sell the fact that McDonald's is there and get some brand identity to sell ourselves a little bit." (V1-29).

Therefore, there may be some job fairs where there is not room to set up a booth, and then, under those circumstances, a booth will not be brought. However, the job fair in question did allow booths and it was anticipated to have a booth there (V1-29). In fact, Ms. Jones testified that whoever was doing the job fair would carry the booths to the job fair (V3-505). She also testified that the job fairs do typically require the set up of a booth (V3-505).

The E/C argue that Ms. Lenko inferred that a job fair could take place without some of the written materials such as

resumes, background information, completed applications, etc. (AB-21-22). The portion of the record quoted by the E/C for this statement does not deal with the job fair booth, nor does it deal with the handouts, flyers and business cards handed out at the job fairs. Instead, it simply deals with completed applications from prospects wanting to work for McDonald's. The following is the actual colloquy which occurred during Ms. Lenko's testimony that includes that portion of the record that the E/C cites for their contention that a job fair could take place without some of the written materials such as resumes, background information and completed applications:

> "Q. The materials that you just described, I think you said that you didn't know whether you were carrying the paper materials or whether Ms. Swartz was carrying the paper materials?
>
> A. I don't remember.
>
> Q. Do you know whether or not there was any resumes or applications that had already been sent over and you were meeting people at the job fair for the Orlando job fair?
>
> A. I don't remember.
>
> Q. You don't remember?
>
> A. No.
>
> Q. Okay. If there were B if there were individuals who had sent resumes and Ms. Swartz was bringing those paperwork to Orlando, as well, for the Orlando job fair, would that be an important role in making sure that you have some information about potential applicants there handy?

A. I'm going to have to ask you to say that one more time, I'm sorry.

Q. Okay. If an individual sent over resumes, background information, completed applications, things like that B

A. Uh huh (affirmatively).

Q. - and they were to meet you in Orlando to discuss future employment opportunities with McDonald's B

A. Uh huh (affirmatively).

Q. - is it appropriate to have those documents available and ready at the job fair?

A. Are you referring to the information that they would have mailed us to the regional office?

Q. Correct.

A. 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." (V1-157-158).

Thus, the portion quoted by the E/C in their AB has nothing to do with whether or not the job fair booth was required to be set up at the job fair on 3/4/96. It deals solely with the situation of where the HR consultant forgets to bring an application or resume from a prospect to the job fair.

The E/C argue that although the recruitment booth is certainly helpful and beneficial to the employer, it is not essential nor necessary in order to complete the business purpose of Claimant's journey (AB-22). This statement is completely contrary to the testimony of Ms. Jones that the job

fairs “typically require a set up of the booth” (V3-505), and that it is the responsibility of the employee who is going to be at the job fair to carry it (V3-504-505).

The E/C argue that the purpose of Claimant’s journey was not to delivery the equipment but to participate in the job fair (AB-22). There is an unsupported statement. The unrefuted testimony again from McDonald’s employee, Ms. Lenko, is that she needed Claimant’s assistance in order to get the booth to Orlando for the job fair on Monday (V1-156). 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 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. That’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 backseat and I put one in my car and Tess had one in her car.” (V1-144).
>
> Ms. Lenko further 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 Y 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 was it necessary in order to have it ready for the job fair**; is that right?

A. Yes, that started on Monday." (V1-156-157).

The E/C next argue that 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 (AB-22-23). This is completely contrary to the unrefuted testimony. Claimant was not merely carrying employment related paraphernalia, but was required to bring the recruitment booth to the job fair on 3/4/96. The booth would not fit in one car, and she therefore had to assist Ms. Lenko in bringing the booth to the job fair on 3/4/96. Ms. Lenko testified that we are "required" to bring materials to the job fair (V1-144), and Ms. Jones testified that the job fairs Atypically require" a set up of the booth (V3-505).

U.S. Fidelity & Guaranty Co. v. Rowe, 126 So.2d 737 (Fla. 1961), relied upon by the E/C in their AB (AB-23-24), is distinguishable from the case at bar. In Rowe, supra, a teacher

in a nursery school had collected $30 in nursery fees and was taking the money home, inasmuch as she had been instructed not to leave money at the school overnight. However, the $30 was not a necessary part of her job activities, i.e., the school would have gone on the next Monday, even if she had not returned to school, or had returned without the $30. Further, no one would have had to go to her home to get the $30 if it were not returned that Monday. To the contrary, Claimant herein was transporting the job fair booth because it was a necessary requirement of her job. The job fair could not have taken place without the booth. If Claimant had not transported the booth from Tampa to Orlando on 3/1/96, she or someone else would have had to transport the booth at some other time.

The E/C next give examples attempting to show that Claimant's position would lead to ridiculous results and would emasculate the going and coming rule (AB-24-25). The E/C give as an example a law associate bringing 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 (AB-24-25). If an associate takes a calculator, pencil, pad or pen home over the weekend to have it available for a mediation on a Monday morning, he does so because it is a convenience to him, not a necessity. To the contrary, Claimant herein was not taking the job fair booth from

Tampa to Orlando for her convenience, but rather because it had to be transported in order to be used at the job fair the following Monday. The fact that Claimant happens to live in Orlando is completely irrelevant. It was absolutely essential that the booth be transported from Tampa to Orlando in time to be used for the job fair on Monday. Had Claimant not done it, someone else would have had to do it.

It is therefore respectfully submitted that both the JCC and the First DCA have erred in failing to apply the dual purpose doctrine. Claimant's injury is compensable under the dual purpose doctrine, Spartan Foods v. Hopkins, 525 So.2d 987 (Fla. 1st DCA 1998), Nikko v. Gulliford, supra, Cook v. Highway Casualty Co., 82 So.2d 679 (Fla. 1955).

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.

Claimant adopts and realleges the arguments set forth under Point II of the IB (IB-37).

CONCLUSION

Claimant adopts and realleges the Conclusion as set forth in the IB (IB-38).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 21st day of June, 1999 to: Alfred 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.

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