4-12

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

CAROLYN C. GILBERT,

Petitioner,

v.

PUBLIX SUPER MARKETS, INC.
and CARE ADMIN. SERVICES, INC.,

Respondents.

CASE NO: 94,998

DCA NO: 97-1573

CLAIM NO: 264-13-5905

D/A: 1/26/95

PETITIONER'S AMENDED INITIAL BRIEF ON JURISDICTION

THOMAS A. VAUGHAN, ESQ.
20 N. Orange Ave., #1307
Orlando, FL 32801
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 on 12/28/98, Motion for Rehearing denied on 1/28/99.

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioner, CAROLINE C, GILBERT, shall be referred to herein as "claimant"

The Respondents, PUBLIX SUPER MARKETS, INC. and CARE ADMIN. SERVICES, INC., 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 3/24/97, the Opinion filed by the First District Court of Appeal on 12/28/98, and the Order Denying Motion for Rehearing filed by the First DCA on 1/28/99.

STATEMENT CERTIFYING SIZE AND STYLE OF FONT

The font used in this brief is 12 Point Courier New.

STATEMENT OF THE CASE

On 10/23/95 (V10-1815) and 1/23/96 (V10-1826), CAROLINE C. GILBERT, filed a Petition for Benefits ("PFB") seeking various indemnity (temporary disability) and medical benefits (including 24 a day attendant care) for injuries sustained in an accident on 1/26/95. On 2/22/96 (V1-1), 2/23/96 (V2-286), 5/15/96 (V3-437), 6/3/96 (V3-463), 6/20/96 (V3-475), 8/2/96 (V3-485), 11/22/96 (V3-562) and 2/27/97 (V3-579), various hearings on the aforesaid PFBs were held before the Honorable JCC Joseph E. Willis, wherein claimant sought, inter alia, determination of the compensability of the accident and injuries (Vl-6-7, V4-616, V12-2214-2215).

The E/C defended the claim on the grounds that, inter alia: (1) claimant was not in the course and scope of employment at the time of her auto accident; (2) claimant was on her way to work and not on a special errand at the time of the accident; (3) auto accident not causally related to employment; (4) claimant was precluded from recovering under the workers' comp law due to the going and coming rule; (5) claimant was not on a special errand for the employer (Vl-9, V4-616, V12-2215).

On 3/21/97, the JCC entered his Final Order denying compensability (Al-16) and found as follows:

> "The claimant has failed to prove by competent and substantial evidence she suffered a compensable accident on January 26, 1995. I specifically find that claimant was

hit by a drunk driver while driving directly to work on her customary route to work, at her regularly scheduled time on January 26, 1995." (A-8).

The JCC also found:

"I am of the opinion that this case falls directly within the specific exclusion of compensability under the going and coming rule . ." (A-13).

On 4/9/97, claimant filed a Motion to Amend and/or Vacate and/or Rehearing, arguing that her injury was compensable under the dual purpose doctrine (V12-2234-2236). That motion was denied. Thereafter, claimant appealed the JCC's decision to the First DCA. On 12/28/98, the First DCA, in a written Opinion, affirmed the JCC's Order (A-17-18) holding as follows:

"Although claimant had completed preparation of a newsletter for Publix at home before embarking on her journey to work and the newsletter was present in her car at the time of the accident, these facts are not sufficient to compel compensability of her injuries. Competent substantial evidence in the record supports the finding that claimant prepared the newsletter at her home for her own convenience" (A-18).

The First DCA also stated in its 12/28/98 Opinion:

"Similarly, although preparation of the newsletter was an employment duty, it was not necessary that the newsletter be brought to work the morning of January 26,1995. The purpose of claimant's commute early that morning was to carry out her responsibilities related to opening the store at 4:00 a.m. Her delivery of the newsletter was merely an incidental part of the trip. She would not have made the drive if the personal mode of (going to work) was removed." (A-18).

Thereafter, on 1/11/99, claimant timely filed a Motion for Rehearing before the First DCA. On 1/28/99, the First DCA

denied the Motion for Rehearing (A-19). Thereafter, claimant filed her Notice to Invoke Discretionary Jurisdiction before this Honorable Court.

STATEMENT OF THE FACTS

The operative facts relevant to this Petition are as follows: Claimant is 34 years old (Vl-54) and, with the exception of 2 or 3 years, has worked for Publix ever since she was 16 years old (V1-54).

On the date of her accident, 1/26/95, claimant was working as a second assistant manager for Publix Store #427 (V2-214). All of the managers for Publix testified that there are times when they would have to take work home because they did not have time to do it at the store (V2-218, 249, 252, 277, V7-1416-1418).

Claimant worked 5 days a week, but the days would vary (V2-349). One of her job responsibilities was to open the store at 4:00 a.m. (V2-229-230, V9-1630-1631).

Store #427 had a newsletter which informed store associates of various programs, new associates, promotions and things of that nature (V2-353). It also listed procedures that were to be followed by associates (V2-353). The newsletter was claimant's responsibility (V2-218-219, 262, 353) each week (V2-353-354). The newsletter had to be brought into the store each Thursday morning before 8:00 a.m. so that it could be delivered with the

paychecks (V2-220, 262-263, 354, V8-1434). Claimant generally prepared the newsletter at home on Wednesday nights and brought it to the store on Thursday mornings (V2-219, 264, 355). Claimant took the newsletter home to type because there was no typewriter in the store (V2-264, 345-346). This was done with the consent of claimant's immediate supervisor and the store managers (V2-265, 355, V8-1418).

Claimant's normal schedule on Thursdays was to come in at 10:00 a.m. (V8-1425). However, she would generally bring the newsletter in between 6:30 and 7:00 a.m. before she was scheduled to work (V2-263, V8-1419, 1447). The unrefuted testimony established that she would bring the newsletter in on Thursday mornings, even on Thursdays that she was not scheduled to work (V2-356, V8-1435). There was no specific time that she had to bring the newsletter in, as long as it was brought in in time to be delivered with the paychecks at 8:00 a.m. (V2-267).

In the evening before and the early morning of 1/26/95, claimant completed the newsletter at home (V1-189). She was scheduled to open the store at 4:00 a.m. on 1/26/95 and left for work at about 3:00 or 3:30 a.m. (Vl-135). While driving to work, at approximately 3:45 a.m., a drunk driver ran into her vehicle (V4-641). Among the contents in claimant's car was the newsletter dated 1/26/95 (V1-169-170, 172, V8-1496-1497).

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

POINT ON APPEAL

I

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN NIKKO GOLD COAST CRUISES v. GULLIFORD, 448 So.2d 1002 (Fla. 1984) and COOK v. HIGHWAY CASUALTY CO., 82 So.2d 679 (Fla. 1955).

SUMMARY OF ARGUMENT

This Honorable Court has discretionary jurisdiction to review a decision of a DCA that expressly and directly conflicts with a decision of another DCA or of the Supreme Court on the same question of law, Article V, Sec.3(b)(3), Fla.Const., Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.. In the case at bar, the decision of the First DCA is in express and direct conflict with the decisions of this Honorable Court in Nikko Gold Coast Cruises v. Gulliford, 448 So.2d 1002 (Fla. 1984) and Cook v. Highway Casualty Co., 82 So.2d 679 (Fla. 1955).

ARGUMENT

I

WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS HONORABLE COURT IN NIKKO GOLD COAST CRUISES v. GULLIFORD, 448 So.2d 1002 (Fla. 1984) and COOK v. HIGHWAY CASUALTY CO., 82 So.2d 679 (Fla. 1955).

Article V, Sec.3(b)(3), Fla.Const. provides:

> (b)JURISDICTION - THE SUPREME COURT: . . (3) may review any decision of a District Court of Appeal . . that expressly and directly conflicts with a decision of another District

Court of Appeal or of the Supreme Court in the same question of law." See also Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

To invoke the discretionary jurisdiction of this Honorable court under Article V, Sec.3(b)(3), Fla.Const., and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., antagonistic principles of law must have been announced in a case by the lower court based on practically the same facts. The conflict must be obviously and patently reflected in the decisions relied on, and must result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof, Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961). For purposes of determining conflict jurisdiction, this Court is limited to facts which appear on the face of the opinion, Hardy v. State, 534 So.2d 706 (Fla. 1988).

The purpose of conflict jurisdiction is to give this Court jurisdiction on any case decided by one of the DCAs wherein such decision might conflict on the same point of law, with a prior decision of another DCA, or a decision of this Court, so that there might be uniformity in the case law in Florida, Board of Commissioners of State Institutions v. Tallahassee Bank & Trust co., 116 So.2d 762 (Fla. 1959). The concern of this Court in cases based on conflict jurisdiction is the precedential effect of those decisions which are incorrect and in conflict with decisions reflecting the correct rule of law, Wainwright v.

Taylor, **476** So.2d 669 (Fla. 1985). However, in order to have a conflict which causes confusion of lack of uniformity among the Florida courts, the conflict must be express and direct, i.e., it must appear within the four corners of the majority decision, Dept. of HRS v. National Adoption Counseling, 498 So.2d 888 (Fla. 1986). Inherent or so-called "implied" conflicts may no longer serve as a basis for this Court's jurisdiction, HRS v. National Adoption Counseling, supra. However, conflict jurisdiction does exist where a case gives rise to a fair implication that conflicts exist, Hardy v. State, supra.

In the case at bar, the decision of the First DCA expressly and directly conflicts with the cases of Nikko v. Gulliford, supra, and Cook, supra. 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 & Coming Rule" in workers' compensation cases. It also 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 v. Gulliford, supra, Cook, supra. Further, the courts do not weigh the relative importance of the personal motive versus the business motive, Gulliford, supra, Cook, supra, Spartan Food Systems v. Hopkins, 525 So.2d 987 (Fla. 1st DCA 1988). In Gulliford, this Court, courting with approval from its prior decision in Cook, stated:

> "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 of Marks Dependants v. Gray, . . 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 workmen's compensation." Gulliford, supra at 1004-1005.

This Court went on to state:

> "We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible, that the trip would have been made though the private errand had been cancelled." Gulliford, supra.

The decision by this Court in Gulliford and Cook clearly hold that a trip comes within the dual purpose doctrine if, regardless of the personal motive of the trip, the business purpose of the trip would have required it to be taken anyway.

In this case, every witness who testified stated that claimant had to bring the newsletter to work every Thursday morning before 8:00 a.m., even if she was not scheduled to work on that day (Nathan Hicks, Second Asst. Mgr.(V2-220-221); Michael Seithel, Store Asst. Mgr. (V2-262-263, V8-1419, 1447); David Curry, Store Mgr. (V2-354, **356**)). The above facts establish that claimant still would have made the drive tc deliver the newsletter on the morning of the accident even if she were not required to work on that day and this brings claimant's trip within the dual purpose doctrine.

As noted by the Hon. Judge Benton in his dissenting opinion in Swartz v. McDonalds Corp., 23 FLW D2521 (Fla. 1st DCA 1998):

> "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." Swartz, supra (Dissenting Opinion of Hon. Judge Benton at p.D2524, 1 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, Sec.18.13 at 4-368269 (1997) .

Therefore, since this claimant was required to prepare the newsletter, since she regularly prepared the newsletter at home, with the consent of management, since she was required to bring

the newsletter in to work on Thursday mornings before 8:00 a.m., and did bring the newsletter in to work before 8:00 a.m. on Thursdays, even when she was not working, then, delivery of the newsletter on Thursday, 1/26/95, the date of her accident, was a concurrent purpose or cause of her trip to work on that morning and therefore, the accident of 1/26/95 is compensable under the dual purpose doctrine.

It is therefore respectfully submitted that the First DCA's finding that claimant's delivery of the newsletter was merely an incidental part of the trip and the accident does not therefore fall within the dual purpose doctrine is in conflict with this Court's controlling precedents as set forth in Gulliford, supra, and Cook, supra.

CONCLUSION

It is respectfully requested that this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction, accept jurisdiction of the appeal, and direct the parties to file a Brief on the Merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail on this 16th day of March, 1999 to: Thomas A. Vaughan, Esq., 20 N. Orange Ave., #1307, Orlando, FL 32801, Arthur J. England, Jr., Esq. Brenda K. Supple, Esq., 1221 Brickell Ave., Miami, FL 33131, and to Michael Wall Jones, Esq., 1069 W. Morse Blvd., Winter Park, FL 32789.

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
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
DISTRICT "H"

CLAIM NO: 264 13 5905 D/A: 1/26/95

EMPLOYEE: Caroline C. Gilbert
2527 Princess Way
Kissimmee FL 34746

REPRESENTED BY: Thomas A. Vaughan, Esq.
20 N. Orange Ave., #1307
Orlando FL 32801

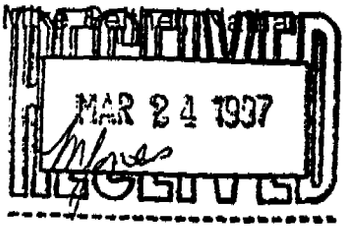
EMPLOYER: Publix Super Markets, Inc.
PO Box 407
Lakeland FL 33802

CARRIER : Care Admin. Services, Inc.
3710 Corporex Park Drive #280
Tampa FL 33619

REPRESENTED BY: Michael Wall Jones, Esq.
1069 W. Morse Blvd.
Winter Park FL 32789

COMPENSATION **ORDER DENYING COMPENSABILITY**

After due notice to the parties, a hearing was held in Orlando, Orange County, Florida on February 22 and February 23, 1996; a rehearing was held August 2, 1996; and a final argument hearing was held February 27, 1997. In addition, a series of status conferences were held prior to February 27, 1997. The claimant, Caroline Gilbert, was represented by Thomas A. Vaughan, Esquire, and Scott P. Williams, Esquire. Providing live testimony in the claimant's behalf were: Charles Eugene Moore, the claimant's father; Donna Moore, the claimant's mother; Ron Moore, the claimant's uncle; Brandon Matthew Gilbert, the claimant's son;



A-1

Hicks, David Currey, and Lyn Esko, a rehabilitation specialist. The employer, Publix Super Markets, Inc. and the workers' compensation servicing agent, Care Admin. Services, Inc., were represented by Michael Wall Jones, Esquire, and Robert C. Hand, Esquire. Appearing live on behalf of the employer/servicing agent were Terri Brown, Scott Brubaker, and Kelly Wagoner. It should be noted the undersigned's opportunity to observe the candor and demeanor of the eleven (11) live witnesses was a significant factor and consideration in the decisions reached herein.

Prior to the hearing, the parties had entered into the following stipulations:

1) The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2) That venue properly lies in Orange County, Florida;

3) That the claimant is permanently and totally disabled as a matter of law;

4) That on or about January 12, 1995, Caroline Gilbert, accompanied by her mother, visited Dr. Winston Bedford and received a dental examination; that on the date of the initial examination an appointment for dental surgery was scheduled by Ms. Gilbert and was to take place January 27, 1995;

5) That the January 27, 1995 dental appointment was not canceled by Ms. Gilbert and that the records of Dr. Bedford shall be received into evidence by the Judge of Compensation Claims.

The following were stipulated and/or received into evidence:

1) As Court Exhibit #1, the PreTrial Stipulation and PreTrial Compliance Questionnaire;

2) As Claimant's Exhibit #1, the Hearing Information Sheet;

A-2

3) As Claimant's Exhibit #2, Claimant's Memorandum of Law;

4) As Claimant's Exhibit #3, the deposition transcript of Roberta Shaffbower taken February 8, 1996;

5) As Claimant's Exhibit #4, the deposition transcript of Matthew Imfeld, M.D. Taken February 13, 1996;

6) As Claimant's Exhibit #5, a video tape of the claimant and her family taken by members of the family;

7) As Claimant's Exhibit #6, the deposition transcript of Paul Ziajka, M.D. taken on January 11, 1996;

8) As Claimant's Exhibit #7, the deposition transcript of German Montoya, M.D. taken December 15, 1995;

9) As Claimant's Exhibit #8, the deposition transcript of Michael Seithel taken February 7, 1996;

10) As Claimant's Exhibit #9, the Blue Cross/Blue Shield records of Caroline Gilbert, including a December 15, 1995 letter;

11) As Claimant's Exhibit #10, the letter awarding social security benefits to Caroline Gilbert;

12) As Claimant's Exhibit #11, Circuit Court documents appointing Donna Moore as guardian of Caroline Gilbert;

13) As Claimant's Exhibit #12, a picture of the claimant's desk;

14) As Claimant's Exhibit #13, the Curriculum Vitae of Lyn Esko;

15) As Claimant's Exhibit #14, the composite report of Lyn Esko;

A-3

16) As Claimant's Exhibit #15, a copy of the Life Care Plan prepared by Lyn Es ko;

17) As Claimant's Exhibit #16, the Publix 427 newsletter dated January 26, 1995;

18) As Claimant's Exhibit #17, a book entitled Food Store Sanitation ;

19) As Claimant's Exhibit #18, a spiral notebook;

20) As Employer/Carrier Exhibit #1, the medical records of Winston G. Bedford, D.M.D. and the February 19, 1996 letter to Thomas A. Vaughan, Esquire from the law office of Pyle, Jones & Hurley, P.A. listing four stipulations regarding the records of Dr. Bedford;

21) As Employer/Carrier Exhibit #2, the Hearing Information Sheet dated February 21, 1996;

22) As Employer/Carrier Exhibit #3, the deposition transcript of Brandon Gilbert taken February 16, 1996;

23) As Employer/Carrier Exhibit #4, the deposition transcript of Ronald G. Moore taken February 16, 1996;

24) As Employer/Carrier Exhibit #5, the deposition transcript of Gene Moore taken January 19, 1996;

25) As Employer/Carrier Exhibit#6, the deposition transcript of Kelly Wagoner taken February 13, 1996;

26) As Employer/Carrier Exhibit #7, the deposition transcript of Nathan Hicks taken January 19, 1996;

A-4

27) As Employer/Carrier Exhibit #8, the deposition transcript of Scott Brubaker taken February 13, 1996;

28) As Employer/Carrier Exhibit #9, the Memorandum of Law dated February 22, 1996;

29) As Employer/Carrier Exhibit #10, the Publix Super Markets, Inc. Employee handbook;

30) As Employer/Carrier Exhibit #11, the weekly time card for all departments for Caroline Gilbert for schedule date 1/21/95 - week end date: 1/27/95;

31) As Employer/Carrier Exhibit #12, the payroll records of Michael Seithel for the week of January 21, 1995;

32) As Employer/Carrier Exhibit #13, a listing of actual hours worked by Caroline Gilbert during the week of January 21, 1995;

33) As Employer/Carrier Exhibit #14, a letter from Mike Seithel to Roberta Shaffbower dated August 25, 1995;

34) As Employer/Carrier Exhibit #15, a January, 1995 calendar;

35) As Employer/Carrier Exhibit #16, the schedule of Nathan Hicks for the week of January 21, 1995;

36) As Employer/Carrier Exhibit #17, a composite of the Q.I.P. Status Report sheet including the Maintain Associate Information sheet, the Update Project Information sheet, the Query One sheet and the Status Report sheet;

37) As Joint Exhibit #1, the deposition transcript of Corporal John J. Gregory taken February 5, 1996;

38) As Joint Exhibit #2, a composite of medical records,

A-5

The following were stipulated and/or received into evidence at the August 2, 1996 hearing:

1) As Claimant's Exhibit "A", the deposition of Bobbie Shaffbower taken July 1, 1996;

2) As Claimant's Exhibit "B", the deposition of Rebecca Ardley taken July 17, 1996;

3) As Claimant's Exhibit "C", the deposition of Joseph Abal taken July 23, 1996;

4) As Claimant's Exhibit "D", a photograph composite from Dr. Abal;

5) As Claimant's Exhibit "E", claimant's second Memorandum of Law and attached chart;

6) As Employer/Carrier's Exhibit "A", deposition of Sargent Jennings taken July 23, 1996;

7) As Employer/Carrier's Exhibit "B", deposition of Janet Deberardinis taken July 27, 1996;

8) As Employer/Carrier's Exhibit "C", the deposition of Donna Moore taken July 1, 1996; and

9) As Employer/Carrier's Exhibit "D", the Hearing Information Sheet and Employer/Carrier's second Memorandum of Law.

As stipulated by the parties, the issues to be determined by the Court are:

1) The compensability of the completely controverted claim;

2) The claimant's entitlement to twenty-four (24) hour per day attendant care to be provided by the claimant's father and mother for twelve (12) hours per day at the

A-6

statutory rate and by an outside provider for the remaining twelve (12) hours of the day; said services from January 26, 1995 through the present and continuing;

3) The claimant's entitlement to physical and mental therapy and rehabilitation, to enable the claimant to become more self sufficient with daily living activities;

4) Entitlement to costs, interest, penalties and attorney's fees.

The employer/servicing agent defended the claim on the following grounds:

1) The claimant was not in the course and scope of her employment at the time of her automobile accident;

2) The claimant was on her way to work and not on a special errand at the time of the automobile accident;

3) The claimant's employment is not a major contributing cause to the claimant's injury;

4) The claimant's automobile accident is not causally related to employment;

5) The claimant was precluded from recovery under workers' compensation due to the going and coming rule;

6) The claimant was not on a special errand for employer;

7) There is no entitlement to costs, interest, penalties or attorney's fees.

In making my findings of fact and conclusions of law in this claim, I carefully considered and weighed all of the evidence presented to me, I have had the opportunity to observe the candor and demeanor of eleven (11) live witnesses and as

A-7

a result, have resolved all conflicts in testimony and evidence. Based upon the foregoing, the evidence and the applicable law, I make the following determinations:

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

2) The stipulations of the parties are accepted by me and adopted herein and they are incorporated by reference as if set out at length.

3) The claimant has failed to prove by competent and substantial evidence she suffered a compensable accident on January 26, 1995. I specifically find the claimant was hit by a drunk driver while driving directly to work on her customary route to work, at her regularly scheduled time on January 26, 1995.

It is uncontroverted the claimant had a dental appointment with Dr. Winston Bedford scheduled to take place January 27, 1995. I specifically accept the testimony of Nathan Hicks and David Currey that Caroline Gilbert requested hor schedule be changed so that she could attend the scheduled dental appointment. Nathan Hicks was originally scheduled to open Publix store #427 at 4:00 a.m. on January 26, 1995. Many witnesses, including the claimant's mother and father, testified it was not unusual for the claimant to open the store at 4:00 a.m. Although members of the claimant's family testified to the contrary, I specifically reject the inconsistent testimony of the claimant's family and accept the testimony of Nathan Hicks, David Currey, Mike Seithel and Terri Brown. This Court's ability to observe the candor and demeanor of those individuals presenting live testimony was crucial to my teaching a decision regarding the non-compensability of this claim. I have accepted as more consistent with the factual circumstances outlined, the testimony of the witnesses for the

A-8

employer/carrier, as well as Mr. Hicks, Mr. Seithel, and Mr. Currey. The testimony of the witnesses for the employer/carrier and Mr. Hicks, Mr. Seithel and Mr. Currey is more logical than the inconsistent testimony of the claimant's family. Terri Brown, a witness called by the employer/carrier, candidly admitted she did not wish to testify in this matter. According to Donna Moore, the claimant's mother and court appointed guardian, Terri Brown is a friend of the family. Ms. Brown specifically stated she had a prior conversation with the claimant several days prior to the accident wherein the claimant told Ms. Brown the claimant was going to open store 427 at 4:00 a.m. on January 26, 1995. In fact, Ms. Brown had planned with the claimant to meet for lunch on January 26, 1995 due to the fact both Ms. Gilbert and Ms. Brown were opening their respective stores at 4:00 a.m. I have considered the testimony of other witnesses present at trial and by way of deposition. I have thoroughly reviewed the witnesses' testimony so as not to overlook any conflicts or inconsistencies. Nonetheless, I specifically reject any inferences to the contrary, in view of the unequivocal and -consistent testimony of Mr. Hicks, Mr. Seithel, Mr. Currey, and Ms. Brown. Further, there is uncontroverted testimony that only four (4) people could open the store, including David Currey, Nathan Hicks, Michael Seithel, and the claimant. Mr. Hicks, Mr. Seithel and Mr. Currey all testified they were not scheduled to open the store on January 26, 1995. Based upon this uncontroverted testimony, it is clear the claimant was scheduled to open the store at 4:00 a.m. on January 26, 1995 as part of her customary work schedule.

The claimant's mother and father both testified that the normal route from the claimant's home to Publix was the one taken by the claimant on January 26, 1995. In

A-9

addition, neither the testimony of Corporal John Gregory, nor any other evidence presented was sufficient to raise the issue of a special hazard. Claimant attempted to persuade this Court that the stretch of road driven was a special hazard. I am mindful of Tovota of Pensicola v. Maines, 558 So.2d 1072 (Fla. 1 st DCA 1990) and the requirements to meet the special hazard doctrine. Having received the testimony and evidence at trial, I specifically reject the insinuation of a special hazard.

I have accepted the position of the claimant that she was not prohibited from working on the newsletter at home and on the basis of live testimony I am of the opinion the claimant completed her work on the newsletter before she left for work and before this accident occurred, Based upon the live testimony received at trial, I believe the newsletter was in the claimant's possession, along with other work and non-work related items, at the time of the accident, The completion of the newsletter took place before she left for work and before the accident occurred. The claimant was not paid for travel time and was on her way directly to work at her regularly scheduled time and on her normal route when the claimant's vehicle was struck by the vehicle of a drunk driver. Therefore, as supported by live testimony, there was nothing unusual about the claimant's travel to work on January 26, 1995. I specifically find, based upon the accumulated evidence before me that the claimant was not on a "special errand" for the employer, and was merely traveling to the store in order to open the store at 4:00 a.m.

Section 440.092(2), Florida Statutes 1994 directly precludes compensability in instances where a claimant is injured while "going to" or "coming from" work unless the claimant is engaged in a "special errand" or mission for the employer. El Viejo Arco

Iris, Inc. v. Ildefonso Luaces, 395 So.2d 225 (Fla, 1st DCA 1981), involved a situation in which a claimant was in an automobile accident while on his way to work after first picking up some materials at a plumbing store to be used at the job site per the direct request of the employer. The Court reiterated that injuries sustained while going to and coming from a place of work are not considered to have arisen out of and in the course of employment, further clarifying that if "the particular journey is a regular or frequent one, there is a strong presumption that the going and coming rule applies." Id at 226. In El Vieio the Court determined the claimant was injured on a regular and frequent journey after having completed the burden of picking up the plumbing supplies. The claimant was outside the course and scope of his employment on his way home at the time of the accident.

In the matter before this Court, the claimant was heading directly to work and based on the facts, had not deviated in any way from her normal, regular, frequent course and certainly was not traveling due to any special request made by the employer. The claimant was responsible for a newsletter and had prepared and completed the newsletter at home before she left for work and before the accident occurred. The preparation of the newsletter is inconsistent with a special errand as recognized by the Court, the burden of completing the document was clearly satisfied before she left for work and before the accident occurred and the claimant's drive directly to employment as required by her work schedule the next day generated no special errand which needed to be performed.

The case of New Dade Apparel, Inc. v. Louis De Lorenzo, 512 So.2d 1016, 1018 (Fla. 1st DCA 1987), codifies that "in determining whether the special errand rule

A-11

applies, the Courts have found the irregularity and suddenness of the employer's request are essential elements." I specifically find, based upon live testimony presented before me that there was no irregular or sudden requests made by the employer to support any of the essential elements established in New Dade.' The claimant had elected to prepare the newsletter and had done so on a regular basis in the past. This newsletter could be prepared at home although the employer recommended it be completed on the employer's premises, The physical reality of the newsletter in the claimant's car on the day of the accident has been fully considered in reaching my determination. I accept the employer's witnesses' testimony that the presence of the newsletter was circumstantial only and the inference initiated by witnesses for the claimant that the claimant was transporting the newsletter purposely for delivery to the store at 4:00 a.m. is specifically rejected as inconsistent with logic and reason pursuant to my acceptance of live testimony at trial. The employer simply did not request any irregular or sudden changes in the claimant's activity or schedule on the date the claimant was driving to work and was involved in the automobile accident. In fact, as previously stated, the change in schedule was made at the request of and to accommodate the claimant and was consistent with normal work schedule. Although it was established the claimant had work and non-work related items in her car such as books, keys and the newsletter, on the basis of live testimony of the employer, as a finder of fact I find such items did not convert the claimant's scheduled drive to work at 4:00 a.m. into a special errand. I have considered the testimony of other witnesses that might infer the claimant was on a special errand for the employer and specifically reject any inference to the contrary in

A-12

view of the overwhelming live testimony of Mr. Hicks, Mr. Seithel, Mr. Currey and Ms. Brown.

I am of the opinion that this case falls directly within the specific exclusion of compensability under the going and coming rule as supported by competent and substantial evidence and therefore find any other basis for compensability which may have been argued to be academic because of my ruling regarding the application of the factual circumstances accepted by this Court and the application of the going and coming rule.

Although I have found this claim, based upon competent and substantial evidence, not to be compensable, I must address additional issues raised by the parties.

I find the employer/carrier's position there should be a reduction in benefits based upon the failure of the employee to wear a seat belt is unsupported by facts and law. The employer/carrier was unable to carry its burden of proving a causal relationship between the knowing refusal to wear the seat belt and the injuries sustained by the claimant. The employer/carrier attempt to rely upon the testimony of a police officer (Trooper Jennings) to carry its burden. The deposition of Trooper Jennings clearly established he lacked the qualifications and training necessary to be accepted as an expert in accident reconstruction and/or causation of injuries and their relationship to use or non-use of seat belt restraints. Conversely, the deposition testimony of Dr. Joseph Abal clearly established his expertise in the area of accident reconstruction. Dr. Abal's education and training rendered him extremely qualified to make the requisite opinions on this issue. Dr. Abal clearly set forth the reasons that

A-13

the claimant's failure to use a seat belt did not cause her specific injuries. These reasons were based upon a personal visit to the accident scene, review of photographs of the accident site and vehicle involved, review of the medical records and testimony, review of the accident report, and specific inspection and measurements of the vehicles involved. Dr. Abal's credibility (aside from his excellent qualifications) was enhanced by the fact he was initially hired by a personal injury (third party) attorney for the purpose of trying to establish the grade of the highway on which the claimant was traveling was defective and lead to her injuries. Dr. Abal, after thoroughly inspecting the road and the automobiles involved, concluded the road was not a causative factor in the accident. During the routine information gathered in process with respect to that issue, Dr. Abal was also able to offer the conclusion on the insignificance of the claimant's failure to use a seat belt, He concluded the claimant would have sustained her injuries regardless of whether she had worn her seat belt and I find accordingly. However, this is academic because of my ruling the case is not otherwise compensable.

Concerning the employer/carrier's assertion that Florida Statute 440.02(32) (1994) prohibits recovery, I agree with the claimant and find the statutory language is not so narrow as to prohibit recovery in this instance. I agree with, and adopt, the reasoning set forth in the claimant's initial Memorandum of Law to support this finding in conjunction with the laws set forth in Vigliotti v. Kmart, 21 FLW 654 (Fla. 1st DCA 1996). However, this is academic because of my ruling that the case is not otherwise compensable.

A-14

One of the issues raised at the August 2, 1996 hearing was the claimant's entitlement to a finding of compensability based upon the First District Court of Appeal finding in Waffle House v. Hutchinson, 673 So.2d 883 (Fla. 1st DCA 1996). My first inclination, based upon the above, was to find in favor of the claimant, however, in North River Insurance Company, c/o Crum & Forster and M.F. Hinote & Son v. Wuelling the Court stated in part:

> "In doing so, we recede from our decision in Waffle House v. Hutchinson, 673 So.2d 883 (Fla. 1St DCA 1996), to the extent it holds that section 440.192(8) precludes the carrier from contesting compensability when it fails to file a notice of denial within 14 days after receipt of a petition for benefits."

Therefore, based upon the First District Court of Appeal's finding in North River v. Wuelling, the claimant's contention the claim is compensable based upon the employer/carrier's failure to file a notice of denial within 14 days after the receipt of a petition for benefits is denied.

Based on all of the above, the evidence presented and the opportunity to observe the candor and demeanor of the eleven (11) live witnesses, it is the finding of the undersigned Judge of Compensation Claims the claimant did not suffer a compensable accident/injury while driving directly to work on January 26, 1995. The claimant's sole purpose for traveling to work at approximately 4:00 a.m. on the morning of January 26, 1995 has been determined by the trier of fact to be for the sole purpose of opening the store as scheduled.

Wherefore, it is Ordered:

1) The claimant's claim regarding the compensability of this matter is denied.

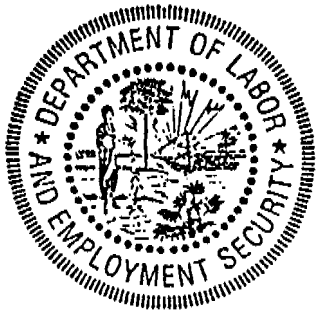
A-15

2) Based upon the above finding, all other claims for indemnity and medical are denied.

3) The claimant's claim for costs, penalties, interest and attorney's fees is denied.

DONE and ORDERED in Orlando, Orange County, Florida.

SEAL



JUDGE OF COMPENSATION CLAIMS

THIS IS TO CERTIFY that a copy of the foregoing has been furnished by regular mail this 21 day of March, 1997 to the parties at their last known address listed above.

JUDICIAL ASSISTANT

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CAROLINE GILBERT,

Appellant,

v.

PUBLIX SUPERMARKETS and CARE ADMINISTRATORS SERVICES,

Appellees.
_____/

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

CASE NO.: 97-1573

Opinion filed December 28, 1998.

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

Thomas A. Vaughan of Vaughan, Donohoe & Williams, Orlando; Bill McCabe of Shepherd, McCabe & Cooley, Longwood, for Appellant.

Arthur J. England, Jr. and Brenda K. Supple of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, for Appellees.

PER CURIAM.

Caroline Gilbert, the claimant and a former assistant manager for the employer-appellee, Publix Supermarkets, appeals an order of the Judge of Compensation Claims denying compensability for the injuries she sustained in an automobile accident which occurred at approximately 3:45 a.m. on January 26, 1995, en route from her home to her place of employment at

A-17

Publix. We affirm on all issues, but write briefly to address the compensability question.'

Although claimant had completed preparation of a newsletter for Publix at home before embarking on her journey to work, and the newsletter was present in her car at the time of the accident, these facts are not sufficient to compel compensability of her injuries. Competent, substantial evidence in the record supports the finding that claimant prepared the newsletter at home for her own convenience. This fact was not sufficient to constitute her home a second job site. Thus, it cannot be said that she was injured while traveling between two employment premises and was thereby excepted from the going and coming rule. See Santa Rosa Junior College v. Workers' Compensation Appeals Bd., 40 Cal. 3d 345, 708 P.2d 673 (Cal. 1985). Similarly, although preparation of the newsletter was an employment duty, it was not necessary that the newsletter be brought to work the morning of January 26, 1995. The purpose of claimant's commute early that morning was to carry out her responsibilities relating to opening the store at 4:00 a.m. Her delivery of the newsletter was merely an incidental part of the trip. She would not have made the drive if the personal motive (going to work) was removed. Swartz v, McDonald's Corooration, 23 Fla. L. Weekly D2521 (Fla. 1st DCA, November 12, 1998).

AFFIRMED.

BENTON, VAN NORTWICK AND PADOVANO, JJ., CONCUR.

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (850)488-6151

January 28, 1999

CASE NO: 97-01573

L.T. CASE NO. 264-13-5905

Caroline Gilbert v. Publix and Care Admin Services Inc.

Appellant(s), Appellee(s).

BY ORDER OF THE COURT:

Motion for rehearing, filed January 11, 1999, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: Jeanita McFarland
Deputy Clerk

Copies:

Thomas A. Vaughan
Bill McCabe
Arthur J. England, Jr.
Brenda K. Supple
Jerold Tobet
Michael Wall Jones
Joe N. Unger

RECEIVED
FEB 01 1999
WILLIAM J. McCABE

A-19