Justice James H. Coleman, Jr., Inn of Court

New Jersey Worker's Compensation

2022-2023 Session - Pupilage Meeting

Analyzing Liens in Worker's Compensation

Hypothetical Fact Pattern

Ruth Gader was employed as a landscape architect by Coleman Industries, Inc for the time period of May 2003 to the present. She was paid an annual salary of $85,000. Gader was provided health insurance through her employment with Coleman.

Coleman is an industry leader known for an exceptional executive staff, and vibrant local vicinages. Coleman is a national corporation with approximately 7,000 employees across the Country. Coleman provided both commercial and residential customers with a broad array of landscaping related services including, lawn maintenance, landscape architecture consultation, planting, construction and tree health maintenance. Gader works as a specialist in shade tree planting, design and health.

In New Jersey, Coleman Industries operated out of a single location located in Freehold, New Jersey. This location had one building which contained a few offices and a warehouse where the company maintained its various tools, equipment and materials. Ms. Gader had an office at the location, but rarely used it as most of her work was conducted remotely through company provided iPads. As part of her job, Gader was provided with a company assigned vehicle which she drove from her home to the customer's location. The vehicle was a Mercedes-Benz Sprinter van, which the company had modified to hold the various chemicals, tools and equipment Gader used on a daily basis. Gader also owned a personal vehicle which she insured personally. Gader selected her health insurance to act as the primary insurance for any motor vehicle accident-related injuries.

As part of her work, Gader routinely treated various plant diseases. This included routine treatment for Anthracnose, a collective term for several common

fungal diseases which affect shade trees. Anthracnose is treated with fungicides containing chlorothalonil e.g., Daconil), copper sprays containing copper diammonia diacetate (e.g., Liquicop), propiconazole (e.g., Banner Maxx II), and the systemic fungicide thiophanate-methyl (e.g., Cleary's 3336).

Coleman Industries kept a supply of these various fungicides at their Freehold location. Gader would travel from her home in her company assigned vehicle to the residential and commercial properties, where she would perform her assigned duties such as design, planting, and landscape maintenance. Her duties included routine application of fungicides to shade trees. Coleman directed Gader and other employees not to carry large quantities of the fungicides or other supplies in their company assigned vehicles because they did not want the chemicals exposed for long periods to summer heat or winter cold, and wanted to limit the risk of products being stolen.

Whether Gader would go directly to the remote work site or to Coleman's shop to restock supplies would depend on the services to be performed and the supplies available in her assigned vehicle at the time. Coleman preferred its employees to pick up supplies in the morning for that workday and instructed them not to keep the materials in the assigned vehicles overnight.

On July 16, 2020, Gader was scheduled to go to 3 customer locations to treat Anthracnose with various fungicides. Pursuant to the employer's policy, she first had to drive to the warehouse to pick up the necessary fungicides. At 6:05 a.m., Gader was on her way to Coleman's warehouse to obtain the supplies needed to perform the jobs she was assigned to that day. On her way to the warehouse Gader was involved in a serious motor vehicle accident in which she suffered a displaced femur fracture, and complaints to her cervical spine. Gader was transported to a hospital and underwent surgical repair of the displaced femur fracture on the following date. Gader promptly reported the accident to Coleman who in turn notified their worker's compensation insurance carrier.

The worker's compensation carrier immediately issued a denial of the claim indicating Gader was not eligible for worker's compensation benefits as she was travelling to the employer's warehouse and was not in the course and scope of her employment.

Gader retained the firm of Brump & Tiden, LLC, who promptly filed a Worker's Compensation Claim petition with the Division, and pursued a third-party negligence claim against the operator of the other vehicle. An answer was filed on behalf of Coleman by their carrier's staff counsel denying the claim.

Gader underwent significant treatment, which primarily focused on the femur fracture immediately following the accident. She required a 15-day in-patient hospital stay for an infection following the surgery, and was then transferred to a sub-acute facility for 3 weeks for continued wound care and therapy. She was placed out of work by the surgeon for 6 months, and she obtained physical therapy for her leg following her release from the sub-acute facility. Up to that point, all of Gader's medical bills were submitted to her primary health insurance carrier, and were paid at the rates requested by the facilities. A total of $240,000.00 was paid by the private health carrier. Gader's attorneys were aware that those bills were paid by her health insurance.

Also, during that time period Gader was unable to work per the surgeon's restrictions, and she applied for State Temporary Disability. Brump & Tiden filed a notice of contested worker's compensation claim with the State TDB office. Gader obtained disability benefits through the State of New Jersey in the amount of $6,000.

Upon release from the sub-acute facility Gader wanted to seek treatment for her neck injury, which had gone untreated during the 6 weeks since the accident. Brump & Tiden, requested treatment with the Respondent's attorney and worker's compensation carrier. The request for treatment was denied pursuant to Respondent's position that Gader was not eligible for benefits as she was commuting to her place of employment. Brump & Tiden then scheduled Gader to be evaluated by an expert for purposes of providing an opinion as to any need for treatment, and causal relationship to the accident in question. The expert was a board-certified orthopedic spine surgeon who was actively practicing in that field. The report recommended 1) continued treatment for the femur fracture, 2) MRI imaging of the cervical spine, physical therapy and consultation with an orthopedic spine surgeon. Brump & Tiden filed a motion for temporary and/or medical benefits upon receipt of the report. No reference was made in the motion for any of the medical bills for the prior treatment related to Gader's femur. Coleman

opposed the motion, disputing compensability. The Court recommended a physician to conduct a need for treatment exam. That doctor causally related her neck injury and agreed an MRI and follow up were appropriate.

An evidentiary hearing took place on September 15, 2020, at which time the Petitioner and a representative from the company testified. The Judge of Compensation (JWC) heard oral argument and issued an oral decision and order determining that the injuries Gader suffered in the accident were compensable under the Act because Gader was acting within the course and scope of her employment at the time of the accident. The Court issued an Order for treatment, and ruled as follows regarding the issue of compensability:

The Worker's Compensation Act provides:

Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer; provided, however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.

[N.J.S.A. 34:15-36.]

"The Workers' Compensation Act 'is humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense.'" *Lapsley*, 249 N.J. at 435 (quoting *Livingstone v. Abraham & Straus, Inc.*, 111 N.J. 89, 94-95, 543 A.2d 45 (1988)). "Therefore, 'provisions of the Act have always been construed and applied in light of [its] broad remedial objective.'" *Ibid.* (quoting *Livingstone*, 111 N.J. at 95); *see also Sager v. O.A. Peterson Const., Co.*, 182 N.J. 156, 169 (2004) (stating that courts "must remain mindful" that the Act "must be liberally construed 'in order

that its beneficent purposes may be accomplished'" (quoting *Torres v. Trenton Times Newspaper*, 64 N.J. 458, 461, 317 A.2d 361 (1974))).

It is undisputed that Gader was operating an authorized business vehicle on business authorized by Coleman in accordance with Coleman's directive that employees only carry a limited quantity of supplies in their assigned vehicles. Gader was instructed by Coleman to restock supplies in the morning. She was on her way to Coleman's warehouse to do exactly that when the accident occurred.

Coleman acknowledges that Gader was an off-premises employee. Coleman's policy required Gader to restock fungicides and supplies. These facts are materially different from cases where an employee is merely commuting to work or engaging in personal activities unrelated to work.

The Court distinguished an earlier decision by the App. Div. *Chisolm-Cohen v. Cnty. of Ocean, Dep't of Emergency Servs.*, 231 N.J. Super. 348, 352, 555 A.2d 713 (App. Div. 1989). There, at the time of the motor vehicle accident, the employee was driving a county-owned car on her way home to change her clothes after normal hours ended and before a nighttime training session started. The Court found that unlike in this case, at the time of the accident, the employee in *Chisolm-Cohen* was not performing a work-related task or operating the vehicle "on business authorized by the employer." *Id.* at 352 (quoting N.J.S.A. 34:15-36).

Gader was engaging in services within the course and scope of her employment at the time of the accident and performing duties that were expressly authorized and directed by her employer, thereby falling within the authorized operation of a business vehicle exception. Therefore, her injuries were compensable under the Act.

Counsel fees on the motion were reserved.

Question 1: Do you agree with the Court's determination and why?

The Court granted Petitioner's motion, and Petitioner was referred to a qualified Orthopedic spine surgeon. She obtained an MRI showing a one level herniation at C5-6. She underwent conservative treatment including physical therapy for her neck, and 3 epidural injections. Due to ongoing radicular

complaints including weakness in her right upper extremity, she underwent a one level discectomy and fusion.

Brump & Tiden eventually settled the third-party negligence claim against the other driver for the driver's policy combined policy limits of $1,500,000. Brump & Tiden expended $48,000 dollars in costs solely on the third-party claim. These costs involved retrieval of medical records, filing of the complaint, private investigator costs, accident reconstruction experts, medical experts, and medical illustrations of the injuries at issue.

After initially subtracting their costs of $48,000. Brump & Tiden was paid a counsel fee pursuant to court rule of 33.33% on the first $750,000 in recovery ($250,000.00), and 30% on the remaining $702,000 ($210,600.00). The total counsel fee paid on the third-party claim was $210,600. Brump & Tiden obtained a letter with the gross worker's compensation lien at the time of settlement indicating the total worker's comp lien was 120,000 at the time of the settlement. A check was issued to the worker's compensation carrier in the amount of $79,250, which was cashed by the carrier. No itemized lien or release of lien was provided. Ruth Gader received a check for $912,150.00 prior to any settlement discussions taking place in worker's compensation.

After extensive treatment, the parties obtained permanency evaluations in the worker's compensation matter. The parties began their negotiations. At the start of their negotiations, no correspondence had been sent or received regarding the $240,000 in medical bills which had been paid by Gader's primary health insurance.

Question 1: What obligation, if any does Brump & Tiden have to investigate the $240,000 in medical bills paid by the private health insurance carrier? If they had an obligation, when did it start?

Question 2: What obligation, if any does Respondent have to investigate the $240,000 in medical bills, they were aware were paid by the private health insurance carrier?

Assume for purposes of this hypothetical that Brump & Tiden learn after their third-party settlement, and before their negotiations in the comp claim, that Gader's health insurance policy was set up through ERISA.

Question 4: How do Brump & Tiden determine if reimbursement is required to the health insurance plan?

Assume for purposes of the hypothetical that Brump & Tiden have determined the primary health care for Gader was a qualified self-funded plan under the ERISA statute, and is eligible for subrogation.

Question 5: What should the Petitioner's or Respondent's attorney do to resolve the subrogation issue?

Assume for the next section of the hypothetical that the parties have agreed the worker's compensation carrier will negotiate the reimbursement with the ERISA plan.

Petitioner has been able to return to work for Coleman, but missed approximately one year of work related to her injuries and treatment. She has significant scarring on the thigh in the area of her surgery. She has a plate and 6 screws in the femur, and is developing nerve pain which has not yet travelled into her hip, but extends down the leg. She notices color changes on her thigh, and experiences severe pain in her quadricep muscle near the incision site. This pain is not predictable, but is impacted by fluctuations in temperature. There were no other diagnoses issued by the surgeon or pain management doctors, and she is only taking over the counter medication as needed. She was discharged by neurology, pain management and orthopedic doctors at MMI, and Petitioner agrees there is no additional treatment that would help her at this time. She has returned to work, but in a light duty capacity only which means she is no longer able to actually work on the trees themselves, and is limited to design and supervisory roles. Her salary has not been affected.

Petitioner obtained a permanency exam which indicated she had a partial disability of 75% to the leg, and 65% to the cervical spine causally related to the accident.

Respondent obtained a permanency exam which indicated she had a 7.5% disability to the leg, and a 5% disability to the cervical spine causally related to the accident.

An itemized breakdown of the alleged worker's compensation benefits paid to date was provided at the time of the worker's compensation settlement negotiations. The total gross worker's compensation lien was $415,040.00

The itemization reflected:

Medical: $365,900, broken down as follows:

1) Medical expenses: $360,000 (inclusive of the ERISA reimbursement post third party settlement)
2) Administrative costs of scheduling appointments: $4,000
3) Respondents' permanency evaluation: $1,200
4) Medical record retrieval: $700

Temporary Disability: $49,140

The parties proceed to settlement, and following a conference with the Judge have agreed upon a settlement in the amount of 52.5% Partial Total Disability apportioned approximately 31% of Partial Total related to petitioner's cervical spine and 42.5% of the leg. The total award is calculated by OSCAR to be $218,295.00 paid for 315 weeks at $693.00 per week. The petitioner's last date of temporary disability was July 16, 2021, and the settlement was approved on July 16, 2022. Petitioner's counsel costs for the worker's compensation claim were $1200, ($600 for the NFT exam and $600 for Perm). The Court apportioned $600 to be paid by Petitioner, and $600 paid by Respondent. The Court awarded a counsel fee of 20% of the settlement, $43,659, apportioned $17,464 paid by Petitioner and $26,195 paid by Respondent.

Question 6: Calculate the gross worker's compensation lien, and the net reimbursable lien prior to the worker's compensation settlement.

Question 7: Calculate how much the Petitioner will be paid from the partial total award.

Question 8: How many payments will the Petitioner receive for this award? When will Petitioner's right to reopen her claim expire.

Question 8: Calculate the remaining third-party lien credits.

Question 9: Assume the third-party case settled after the time of the partial total award, but before any additional benefits were paid. Calculate the payment Petitioner would receive from her partial total award. How much would the third-party lien be at the time of the third-party case?

Question 10: Do you agree with the amount of the counsel fee that was awarded to Brump & Tiden on the partial total award?

date

(Name of Plan Administrator – should be set forth in SPD)

Plan Administrator for _____ Medical Plan

Street address

City, State, Zip Code

CERTIFIED MAIL: Return Receipt Requested

Dear Mr./Ms.,

My name is _____. Pursuant to my right as a participant and beneficiary of _____ Plan, I respectfully request copies of the following materials:

Copies of the Summary Plan Description (SPD) and a complete copy of the Plan Documents relating to my health insurance coverage for the years ____, _____, ____, and ____. (year preceding date of injury through current year); and

Administrative Services Contract between _____ (Employer/Plan) and _____ (Plan Insurer(s)/Claims Administrator) for the years ____, ____, _____, and ____. (year preceding date of injury through current year); and

Copies of all contracts including, but not limited to: Insurance contracts, Stop Loss Contracts, Health Insurance Contracts, Insurance Intermediary Services Contracts, and Administrative Services Contracts related to _____ Medical Plan serving (insert name of state or region encompassing client) participants for the years ____, ____, _____, and ____. (year preceding date of injury through current year); and

Amendments to the Plan Documents for _____ Medical Plan(including, but not limited to the Summary Plan Description) for the years ____, ____, _____, and ____. (year preceding date of injury through current year); and

Copies of the SMM (Summary of Material Modifications) statements for the years ____, ____, _____, and ____. (year preceding date of injury through current year); and

Copies of form 5500, including all attached schedules, filed with the U.S. Department of Labor for the years ____, ____, _____, and ____. (year preceding date of injury through current year).

Please forward these materials to my attorney, Mr./Mrs. _____, (street address), (city), (state), (zip code).

Thank you.

_____ (signature)

(Name of Participant/Beneficiary – Printed)

Plan Participant

Plan Beneficiary

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3660-20

HENRY KEIM,

Petitioner-Appellant,

v.

ABOVE ALL TERMITE & PEST CONTROL,

Respondent-Respondent.

Argued October 4, 2022 – Decided October 12, 2022

Before Judges Geiger, Susswein, and Berdote Byrne.

On appeal from the New Jersey Department of Labor and Workforce Development, Division of Workers' Compensation, Claim Petition No. 2020-26474.

April M. Gilmore argued the cause for appellant (The Epstein Law Firm, PA, attorneys; April M. Gilmore, of counsel and on the briefs; Jeffrey B. Richter, on the briefs).

Anne Hammill-Pasqua argued the cause for respondent (Capehart & Scatchard, PA, attorneys; Anne Hammill-Pasqua, of counsel and on the brief).

PER CURIAM

Petitioner Henry Keim appeals from a Workers' Compensation Division order dismissing his claim petition for medical benefits with prejudice, based on a finding that the injuries suffered by Keim caused by a motor vehicle accident were not compensable under the Workers' Compensation Act, N.J.S.A. 34:15-1 to -147 (the Act), because Keim was not acting within the course and scope of his employment at the time of the accident when he was driving his employer's vehicle from his home to the shop of his employer, respondent Above All Termite & Pest Control (Above All), to restock the chemicals he used at work sites. We reverse and remand for further proceedings.

We take the following facts, which are largely undisputed, from the record, which included a two-day evidentiary hearing. Keim and Michael Zummo, the owner of Above All, testified at the hearing.

Keim was a salaried employee of Above All, working as a pesticide applicator. He traveled from his home in a company assigned vehicle to residential and commercial properties, where he applied pesticides and performed other pest control techniques. He and other company employees drove home in their company assigned vehicles at the end of each workday.

The pesticide application services Keim performed for Above All were performed off-premises. Zummo made the work assignments, which Keim received in advance via a company assigned iPad.

The pesticides that Keim applied and the traps he placed at worksites were obtained from Above All's shop in Forked River. Zummo directed employees not to carry large quantities of pesticides and supplies in their company assigned vehicles because he did not want the chemicals exposed for long periods to summer heat or winter cold, and wanted to limit the risk of products being stolen. Whether Keim would go directly to the remote work site or to Above All's shop to restock supplies would depend on the services to be performed and the supplies available in his assigned vehicle at the time. Keim testified that Zummo preferred employees pick up supplies in the morning for that workday and supplies not remain in the assigned vehicles overnight.

On July 16, 2020, at 6:05 a.m., Keim was on his way to Above All's shop to replenish the supplies needed to perform the jobs he was assigned to that day.[1] Keim was involved in a serious motor vehicle accident, hitting his head on the inside of the vehicle and losing consciousness and claims he injured his left

[1] Petitioner testified that he was going to Above All's shop to replenish his supplies at Zummo's direction.

flank and ribs. Keim declined transport to a hospital and was seen by a nurse practitioner later that same day. Keim promptly reported the accident.

About two months later, Keim experienced balance issues and promptly reported the symptoms to Above All, which advised Keim to seek medical assistance. A CT scan revealed bilateral subdural hematomas that required immediate surgery on October 1, 2020. Keim continued to follow up with the surgeon through January 2021.

On October 21, 2020, Keim filed a workers' compensation employee claim petition. Above All filed an answer asserting a general denial of the allegations in the petition. Above All then filed a motion to dismiss the claim petition that contended Keim's injuries did not arise out of and in the course of employment.

While the dismissal motion was pending, Keim filed a motion for temporary and/or medical benefits, seeking authorization for unspecified post-surgical medical treatment and temporary disability benefits commencing September 29, 2020. Above All opposed the motion, disputing compensability.

The evidentiary hearing took place in March and May 2021. On July 13, 2021, the Judge of Compensation (JWC) heard oral argument and issued an oral decision and order dismissing Keim's petition with prejudice, determining that the injuries Keim suffered in the accident were not compensable under the Act

because Keim was not acting within the course and scope of his employment at the time of the accident.

The JWC relied on Chisolm-Cohen v. Cnty. of Ocean, Dep't of Emergency Servs., 231 N.J. Super. 348, 352 (App. Div. 1989) and three unpublished opinions,[2] and concluded that Keim's injuries were not compensable under N.J.S.A. 34:15-36, "when he's simply driving to his office," because when doing so "he's not in the course and scope of his employment . . . ." The JWC reasoned:

> He went home because his job was over the night before. He was on his way to work. He had not yet come under the control [of] his employer. Yes, he had to go and pick up his stuff, but I find that to be irrelevant since he was on his way to his place of employment.

This appeal followed. Keim argues:

> THE WORKERS' COMPENSATION COURT ERRED IN ITS FINDING THAT APPELLANT WAS NOT IN THE COURSE OF HIS EMPLOYMENT AS DEFINED BY N.J.S.A. 34:15-36.
>
> A. Keim Was In The Direct Performance Of The Duties Required Of Him By His Employer At The Time Of The July 16, 2020 Accident, Thereby Entitling Him To Benefits Under The Workers' Compensation Statute.
>
> 1. Keim Was Engaged In The Direct Performance Of Duties Assigned And

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[2] Unpublished opinions have no precedential value, are not binding upon any court, and shall not be cited by any court. R. 1:36-3.

Directed By Respondent At The Time Of The Accident.

2. Respondent's Physical Location Was Not Keim's "Place Of Employment."

3. Keim's Activities At The Time Of The Accident Were Not Personal In Nature, And He Was Not Commuting To His Office.

B. The Workers' Compensation Judge Misapplied Case Law Interpreting N.J.S.A. 34:15-36 And Its Exceptions To The Facts Presented.

"Courts generally give 'substantial deference' to administrative determinations." Lapsley v. Twp. of Sparta, 249 N.J. 427, 434 (2022) (quoting Earl v. Johnson & Johnson, 158 N.J. 155, 161 (1999)).

> [I]n the workers' compensation context, the scope of appellate review is limited to a determination of "'whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge their credibility."
>
> [Ibid. (quoting Earl, 158 N.J. at 161).]

"Deference must be accorded [to] the factual findings and legal determinations made by the Judge of Compensation unless they are 'manifestly unsupported by or inconsistent with competent relevant and reasonably credible evidence as to

offend the interests of justice.'" Ibid. (quoting Lindquist v. City of Jersey City Fire Dep't, 175 N.J. 244, 262 (2003)). "However, we are not 'bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue.'" Id. at 434-35 (quoting Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). "Instead, we review an agency's interpretation of a statute de novo." Id. at 435 (citing Russo v. Bd. of Trs., PFRS, 206 N.J. 14, 27 (2011)).

Keim argues that he was performing duties required by Zummo, Above All's owner. He further contends that he was not commuting to work. Instead, Keim maintains he was engaged in an activity specifically directed by his employer—driving an assigned vehicle to Above All's shop to retrieve the chemicals necessary to fulfill his work that day.

The Act provides benefits to an employee resulting from an "accident arising out of and in the course of employment . . . without regard to the negligence of the employer." N.J.S.A. 34:15-7. The Act further provides:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer; provided, however, when the employee is required by the employer to be away from the employer's place of employment, the employee shall be deemed to be in the course of employment when the employee is engaged in the direct performance of duties

> assigned or directed by the employer; but the employment of employee paid travel time by an employer for time spent traveling to and from a job site or of any employee who utilizes an employer authorized vehicle shall commence and terminate with the time spent traveling to and from a job site or the authorized operation of a vehicle on business authorized by the employer.
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> [N.J.S.A. 34:15-36.]

"The Workers' Compensation Act 'is humane social legislation designed to place the cost of work-connected injury on the employer who may readily provide for it as an operating expense.'" Lapsley, 249 N.J. at 435 (quoting Livingstone v. Abraham & Straus, Inc., 111 N.J. 89, 94-95 (1988)). "Therefore, 'provisions of the Act have always been construed and applied in light of [its] broad remedial objective.'" Ibid. (quoting Livingstone, 111 N.J. at 95); see also Sager v. O.A. Peterson Const., Co., 182 N.J. 156, 169 (2004) (stating that courts "must remain mindful" that the Act "must be liberally construed 'in order that its beneficent purposes may be accomplished'" (quoting Torres v. Trenton Times Newspaper, 64 N.J. 458, 461 (1974))).

Prior to 1979, the Act had "broad statutory language defining compensable accidents as those arising out of and in the course of the employment." Hersh v. Cnty. of Morris, 217 N.J. 236, 243 (2014) (quoting Watson v. Nassau Inn, 74 N.J. 155, 158 (1977)). However, workers'

compensation jurisprudence at the time recognized the "going and coming rule," which excluded workers' compensation benefits for accidental injuries that occurred during routine travel to or from the employee's place of work. Ibid. (quoting Watson, 74 N.J. at 158). The going and coming rule was subject to numerous exceptions that allowed awards of workers' compensation benefits, to the point where our Supreme Court concluded that the general going and coming rule had a rather limited applicability, extending only to routine daily trips to or from an employee's fixed place of business during hours at the beginning or end of the day. Id. at 243-44 (citing Briggs v. Am. Biltrite, 74 N.J. 185, 190 (1977)).

In response, the Legislature amended the Act to restrict the definition of "employment." Id. at 244 (citing N.J.S.A. 34:15-36). "[S]pecifically, a section was added 'to establish [] relief from the far-reaching effect of the "going and coming rule" decisions by defining and limiting the scope of employment.'" Ibid. (citing Joint Statement of the Senate and Assembly Lab., Indus. & Pros. Comm. to S. 802 and A. 840 at 2 (November 13, 1979)).

"With the 1979 amendments, the 'going and coming rule' was replaced with the premises rule." Ibid. (quoting Kristiansen v. Morgan, 153 N.J. 298, 316 (1998)). The premises rule states that an injury to an employee "arises out of and in the course of employment if the injury takes place on the employer's

premises." Ibid. (quoting Kristiansen, 153 N.J. at 316). N.J.S.A. 34:15-36 nevertheless provides two exceptions to the premises rule that allow benefits to an employee where the injury did not occur on the premises of the employer: (1) the special mission exception, and (2) the authorized operation of a business vehicle exception. Id. at 244 n.1.

The "special-mission" exception "allows compensation when the employee is required to be away from the conventional place of employment for business purposes, and travel was an indispensable part of the performance of the employee's job duties." Jumpp v. City of Ventnor, 351 N.J. Super. 44, 48-49 (App. Div. 2002), aff'd, 177 N.J. 470 (2003) (citing Zelasko v. Refrigerated Food Express, 128 N.J. 329, 336-37 (1992)). The authorized operation of a business vehicle exception requires authorized operation of a business vehicle "on business authorized by the employer." Chisholm-Cohen, 231 N.J. Super. at 352. Here, the facts fall within the latter exception.

Furthermore, "when an employer directs or requires an employee to undertake an activity, 'that compulsion, standing alone, brings an activity that is otherwise unrelated to work within the scope of employment.'" Sager, 182 N.J. at 163 (quoting Lozano v. Frank DeLuca Constr., 178 N.J. 513, 532 (2004)).

"Because off-premises employees may not report to a single 'premises,' the statute provides that they are to be compensated only for accidents occurring in the direct performance of their duties." Jumpp v. City of Ventnor, 177 N.J. 470, 483 (2003). "Employees who are where they are supposed to be, doing what they are supposed to be doing, are within the course of employment whether on- or off-premises, except when they are commuting." Ibid.

Here, Keim's injuries are compensable under the authorized operation of a vehicle exception. It is undisputed that he was operating an authorized business vehicle on business authorized by Above All in accordance with Zummo's directive that employees only carry a limited quantity of supplies in their assigned vehicles. Keim was instructed by Zummo to restock supplies in the morning. He was on his way to Above All's shop to do exactly that when the accident occurred.

Above All acknowledges that Keim was an off-premises employee. Keim was told not to keep more than one container of a specific work product in his work assigned vehicle. Above All's policy required Keim and other pesticide applicators to go to Above All's shop to restock pesticides and supplies. These facts are materially different from cases where an employee is merely commuting to work or engaging in personal activities unrelated to work.

The JWC's reliance on Chisolm-Cohen is misplaced. The facts in Chisolm-Cohen are clearly distinguishable. There, at the time of the motor vehicle accident, the employee was driving a county-owned car on her way home to change her clothes after normal hours ended and before a nighttime training session started. 231 N.J. Super. at 350. Unlike in this case, at the time of the accident, the employee in Chisolm-Cohen was not performing a work-related task or operating the vehicle "on business authorized by the employer." Id. at 352 (quoting N.J.S.A. 34:15-36).

Keim was engaging in services within the course and scope of his employment at the time of the accident and performing duties that were expressly authorized and directed by his employer, thereby falling within the authorized operation of a business vehicle exception. Therefore, his injuries were compensable under the Act.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.
CLERK OF THE APPELLATE DIVISION