Alaska Workers' Compensation Appeals Commission

J. A. Spain & Sons, Inc. and American Interstate Insurance Company, Appellant, vs. James V. Stevens, Appellee.	Final Decision Decision No. 238 August 14, 2017 AWCAC Appeal No. 16-017 AWCB Decision No. 16-0098 AWCB Case No. 201518693

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 16-0098, issued at Anchorage, Alaska, on October 27, 2016, by southcentral panel members Ronald P. Ringel, Chair, and David Ellis, Member for Industry.

Appearances: Michael A. Budzinski, Russell Wagg Meshke & Budzinski, PC, for appellants, J. A. Spain & Sons, Inc. and American Interstate Insurance Company; Jonathan P. Hegna, Patterson & Hegna, LLC, for appellee, James V. Stevens.

Commission proceedings: Appeal filed November 28, 2016, with motion for stay; order granting motion for stay issued December 21, 2016; briefing completed April 20, 2017; oral argument held on May 30, 2017.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

James V. Stevens (Mr. Stevens) was employed by J. A. Spain & Sons, Inc. (Spain) as an equipment operator/truck driver. In the winter, Mr. Stevens operated a plow/gravel truck on an on-call basis, usually weather-related. On November 28, 2015, Mr. Stevens was injured in an automobile accident while driving from his home to his plow truck approximately 17 miles away. The Alaska Workers' Compensation Board (Board) heard the claim at a hearing on July 7, 2016. The Board issued its decision on October 27, 2016, finding Mr. Stevens had been injured in the course and scope of his employment, and ordering Spain to pay past and future benefits. Spain appealed and filed a Motion for Stay. The Alaska Workers' Compensation Appeals Commission (Commission) granted

the stay as to all benefits on December 21, 2016, in part because all parties agreed a stay would be appropriate under the facts of this case. Oral argument was heard on the merits of the appeal on May 30, 2017. The Commission now finds that Mr. Stevens was injured in the course and scope of his employment with Spain.

2. Factual background and proceedings.[1]

Mr. Stevens began working for Spain in July 2015 as an equipment operator/truck driver.[2] Spain had a contract with the Matanuska-Susitna Borough (Borough) to provide maintenance on Borough roads. The contract covered Borough roads connecting to the Parks Highway, extending from north of the City of Houston to near Talkeetna, but not including the Parks Highway itself.[3]

Spain maintained a shop on Hatcher Pass Road near Palmer and a smaller shop in Willow.[4] During the summer, Mr. Stevens worked as part of a crew that graded roads, cleared brush from the right of ways, cleared culverts, mowed the shoulders of the road, and otherwise kept the roads in good repair. Employees generally worked eight hours per day during the summer.[5] At end of the day during the summer, employees would generally park their equipment near where they were working, come back the next morning, and resume working.[6]

At the end of the summer work, employees prepared the equipment for winter work, by installing sanding beds and plows on trucks and preparing the road graders for snow plowing.[7] During the winter, Mr. Stevens operated a plow/gravel truck. Because

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[1] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[2] *Stevens v. J. A. Spain & Sons, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 16-0098 at 2, No. 1 (Oct. 27, 2016).

[3] *Id.*, No. 2.

[4] *Id.*, No. 3.

[5] *Id.*, No. 4.

[6] *Id.*, No. 5.

[7] *Id.*, No. 6.

the work was weather dependent, Mr. Stevens was on-call, 24 hours per day, seven days per week, and needed to be within one-half hour of his plow truck.[8]

Mr. Stevens had an assigned route during the winter, but because of variation in snowfall, equipment problems, or other factors, he was sometimes required to plow or gravel in other areas. On some occasions, Mr. Stevens helped with equipment maintenance at the Willow shop.[9]

Mr. Stevens owns property that fronts the Parks Highway about 17 miles from his home. Mr. Stevens parked his plow truck at this Parks Highway location, and Spain parked other equipment there as well. Spain did not pay Mr. Stevens for this use of his property.[10] During the winter, Mr. Stevens' pay began when he arrived at the plow truck. Some employees kept their assigned equipment at their homes and were not required to travel to begin work.[11] Employees went on the clock for pay when they reached their plow trucks, whether the trucks were at home or at the Parks Highway location.[12]

On November 28, 2015, Mr. Stevens was at home when he received a call from his supervisor asking that he get his plow truck and begin sanding.[13] Mr. Stevens was obligated to arrive at his plow truck within 30 minutes of the telephone call.[14] He left his home and began to drive to the plow truck via the Parks Highway, the only available route. There had been an ice storm, and the roads were extremely slick; Mr. Stevens stated they were the worst conditions he had seen that winter. As Mr. Stevens was driving, a four-wheel-drive pickup pulling a snowmachine trailer slid across the center line and hit him head on. Mr. Stevens was injured, and one of the occupants of the other

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8 *Stevens*, Bd. Dec. No. 16-0098 at 2, No. 7; James V. Stevens dep., July 6, 2016, at 46:9 – 47:14.

9 *Stevens*, Bd. Dec. No. 16-0098 at 2, No. 8; Stevens dep. at 48:11 – 50:20.

10 *Id.* at 2-3, No. 9.

11 *Id.* at 3, No. 10.

12 *Id.*

13 *Id.*, No. 11

14 *Id.* at 2, No. 7.

vehicle was killed.[15] Because Mr. Stevens had not yet reached the plow truck, he was not yet "on the clock."[16]

Mr. Stevens was recovering from this injury and had returned to work when he sustained a second and more serious injury.[17] He has received benefits related to the second injury, including medical treatment. The nature of the second injury is more severe than the first injury at issue here, and further medical treatment for the first injury has been delayed until Mr. Stevens recovers from the second injury.[18]

The Board held that Mr. Stevens was injured in the course and scope of his employment because his work was subject to his being on-call, because his on-call status directly benefited Spain, and because the increased risk of injury was due to the necessity of driving to the snowplow in hazardous weather conditions. The Board found Mr. Stevens' travel to be sufficiently work-related to bring Mr. Stevens into the course of his employment at the time of the injury. The Commission affirms the Board's decision.

3. Standard of review.

The issue before the Commission in this appeal is a legal one: was an injured worker, who is an on-call employee, acting within the course and scope of his employment at the time of his injury? According to AS 23.30.128(b), the Commission, in reviewing the Board's decision, exercises its independent judgment.

> (b) The commission may review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim or petition. The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission. The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record. In reviewing questions of law and procedure, the commission shall exercise its independent judgment.

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15 *Stevens*, Bd. Dec. No. 16-0098 at 3, No. 11.

16 *Id.*, No. 12.

17 *J. A. Spain & Sons, Inc. v. Stevens*, Alaska Workers' Comp. App. Comm'n Appeal No. 16-017, Order on Motion for Stay at 2-3 (Dec. 21, 2016).

18 *Id.*

Therefore, since the issue on appeal calls for interpretation of a statutory definition, the Commission does not defer to the Board's interpretation and exercises its independent judgment.

4. Discussion.

The question before the Commission is whether a worker who was in on-call status was injured within the course and scope of his employment, when after being called to work, he was injured on his way to pick up his plow truck. This is a legal question as the facts of this case are not in dispute. Therefore, the presumption of compensability was not applied.

AS 23.30.395. Definitions. In this chapter,

. . .

(2) "arising out of and in the course of employment" includes employer-required or supplied travel to and from a remote job site; activities performed at the direction or under the control of the employer; and employer-sanctioned activities at employer-provided facilities; but excludes recreational league activities sponsored by the employer, unless participation is required as a condition of employment, and activities of a personal nature away from employer-provided facilities . . . .

AS 23.30.120. Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

(2) sufficient notice of the claim has been given;

(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

(b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

(c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

In workers' compensation law, an accepted doctrine states that employees injured while traveling to and from work (the going and coming rule) are not compensable. However, as *Larson's Workers' Compensation Law* postulates, that doctrine is subject to many exceptions.[19] "Underlying some of these exceptions is the principle that course of employment should extend to any injury which occurred at a point where the employee was within range of dangers associated with the employment."[20] *Larson's* further states "[t]he rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey, or the special degree of inconvenience or urgency under which it is made, whether or not separately compensated for, is in itself a substantial part of the service for which the worker is employed."[21]

In *Sokolowski v. Best Western Golden Lion Hotel*, the Alaska Supreme Court (Court) adopted the "special hazard" exception to the "going and coming rule."[22] The Court quoted Professor Larson and noted "[t]his exception to the going and coming rule has been applied when the 'off-premises point at which the injury occurred lies on the only route, or at least on the normal route, which employees must traverse to reach the plant, and that therefore the special hazards of that route become the hazards of the employment.'"[23] The court added "[w]e believe that adoption of the special hazard exception to the going and coming rule will facilitate" the purpose of providing "injured workers with a simple and speedy remedy to compensate them for work related injuries."[24] The Court continued, "we hold that an injury to an employee caused by a

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[19] 1 A. Larson and L. Larson, *Larson's Workers' Compensation Law*, §13 at 13-1, Scope (2008).

[20] *Id.*

[21] *Id.* at §14 at 14-1, Scope (2008).

[22] *Sokolowski v. Best Western Golden Lion Hotel,* 813 P.2d. 286, 289-290 (Alaska 1991).

[23] *Id.*

[24] *Id.*

special hazard located on the employee's normal or usual route to work is compensable under the Act . . . ."[25]

The Court enunciated these elements to the special hazard exception:

> First, the injury must be casually related to the employment. Second, the hazard which caused the injury must be distinctive in nature or quantitatively greater than the risks common to the public . . . . We believe this test, in conjunction with the requirement that the employee be on a usual or normal route to work, strikes the proper balance between the going and coming rule and the special hazard exception.[26]

In *Johnson v. Fairbanks Clinic*, the Court stated travel "may be brought within the course of employment by the fact that the trouble and time making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself."[27] The Court was referring to another exception to the going and coming rule "the special errand rule" but the rationale is pertinent.

In *Seville v. Holland America Line Westours, Inc.,* the Court again looked at the special hazard rule and reiterated the three-part test. "[F]irst, there must be a causal relation between the employment and the injury; second, the hazard that causes the injury must be 'distinctive in nature or quantitatively greater than risks common to the public;' and, third, the employee must be on 'a usual or normal route to work.'[28] The Court again cited to Professor Larson's statement that "the underlying rationale of the special hazard exception is that a '[c]laimant has been subjected to a particular risk because of his employment."[29] The special hazard exception arises "when a court has

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[25] *Sokolowski*, 813 P.2d. 289-290.

[26] *Id.,* citing *General Ins. Co. of America,* 546 P.2d 1361, 1363 (California 1976).

[27] *Johnson v. Fairbanks Clinic,* 647 P.2d 592, 595 (Alaska 1982), citing 1 A. Larson, *The Law of Workmen's Compensation*, §16.10 at 4-123 (1978).

[28] *Seville v. Holland America Line Westours, Inc.,* 977 P.2d 103, 108 (Alaska 1999) (citation omitted).

[29] *Id.* at 109, citing 1 A. Larson, *Larson's Workmen's Compensation Law* §15.15 at 4-73 (1998).

satisfied itself that there is a distinct 'arising out of' or causal connection between the conditions under which claimant must approach and leave the premises and the occurrence of the injury, it may hold that the course of employment extends as far as those conditions extend."[30]

Other jurisdictions have reached similarly the conclusion that when a key component of the employment is a special hazard, an injury resulting from that special hazard is compensable. In 1926, the court in Pennsylvania awarded benefits to the family of an electrician who was killed walking to work late at night solely to make sure the pumps in the mine were operating.[31] The court said "the real labor is in going to and from, and while doing so the employee is engaged in the master's business . . . ."[32] The employee's travel was for the "master's business" and thus the death was compensable, even though this was a regular part of the employee's job and one which he did every night.

In *Paige v. City of Rahway, Water Dep't*, a court in New Jersey found that an employee's working on-call effectively limited the employee's options and thus awarded benefits to him for an injury arising after a late night assault at his home, after returning home from his shift.[33] "The rationale for the going and coming rule is the suspension of the employment relationship after the employee's departure from work at the end of the day."[34] Here the on-call nature of the employment did not suspend the employment relationship. The court further noted the benefit to the employer from the working arrangement. Likewise, a court in Colorado found an employee entitled to benefits when she was injured responding to her employer's insistence that she "get to work by any

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30 *Seville,* 977 P.2d 103, 108, quoting *supra* n. 29, at 4-72 to 4-73.

31 *Cymbor v. Binder Coal Co.,* 285 Pa. 440, 442 (1926).

32 *Id.*

33 *Paige v. City of Rahway, Water Dep't,* 74 N.J. 177, 376 A.2d 1226 (1977).

34 *Id.* at 1228.

means available to her."[35] The injury was sustained when she slipped and fell in the snow, walking to her car that she had previously gotten stuck while attempting to get to work. The court found the employee was responding to the employer's directive and thus exposed to an additional and unusual hazard.[36] The injury was in direct relationship to her employment and thus in the course and scope of that employment.

In Ohio, a court found an injury compensable when the employee was in an auto accident while responding to a summons to work where he had no fixed assignment nor fixed shift.[37] Mr. Durbin was traveling when paged and was rear-ended when he left the highway to respond to the page. The court held that his response to the page was essential to his employment duties and a substantial part of the service for which he was employed.[38] The court further noted that sixty years earlier "an employee who has no regular hours of employment but is on call and subject to recall by his employer at all hours" and who is injured responding to a call has "a sufficient causal connection between the injury and the employment to permit participation in the workers' compensation system."[39]

Thus, a variety of jurisdictions looking at various on-call employee situations have found travel responding to a call resulting in an injury to be compensable. Other jurisdictions have found to the contrary, but the above cases seem to be closer in context to the situation of Mr. Stevens.

Mr. Stevens' injury fits the elements of the special hazard exception test first detailed by the Court in *Sokolowski.* Mr. Stevens was on the road in direct response to a call from his boss to get to his plow truck and start sanding due to the icy road conditions.

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[35] *Walsh v. Industrial Commission,* 34 Colo. App. 371, 527 P.2d 1180, 1181 (1974).

[36] *Walsh,* 34 Colo. App. 371, 527 P.2d 1180, 1181.

[37] *Durbin v. Ohio Bur. of Workers' Comp.,* 112 Ohio App.3d 62, 677 N.E.2d 1234 (1996).

[38] *Id.* at 68.

[39] *Id.* at 67, citing *Indus. Comm'n. v. Murphy,* 50 Ohio App. 148, 1 O.O. 546, 197 N.E.2d 505 (1935).

Mr. Stevens had 30 minutes from the time of the call to get to his plow truck and he went on the clock (for pay) only when he reached the plow truck. The hazards he faced getting to the plow truck were greater than that faced by the general public because the general public had the option to stay off the icy roads, but Mr. Stevens did not. Driving on the icy road was necessitated by his employment. Furthermore, the road he drove to get to his plow truck was the only road and thereby was his usual and customary access to his work.

Spain contends that Mr. Stevens' normal job entailed his going out to work in inclement weather, therefore, bad weather should not be considered a special hazard of his employment. All Alaskans must contend with bad weather, and so, it should not be considered as an adverse consequence of Mr. Stevens' employment. However, this ignores the fact that the general public may always opt not to go out in bad weather, whereas Mr. Stevens, if he was to get paid, had no choice but to proceed to work in bad or hazardous weather conditions.

Mr. Stevens was taking the normal route to his plow truck when the accident occurred. This route was the only route available and the nature of Mr. Stevens' work in the winter, plowing and sanding snowy and/or icy roads, necessitated travel in extreme weather conditions. His travel increased the likelihood of an accident. In fact, on the day of injury the weather was the worst he had seen that year.[40]

Moreover, Mr. Stevens had to be at his plow truck within 30 minutes of being called by his boss.[41] Timely travel to his plow truck under extreme weather conditions is an inherent part of the service for which he was employed. Because of the nature of his work, Mr. Stevens was exposed to special hazards which other individuals could choose to avoid. The hazard that caused the accident was an integral part of Mr. Stevens' employment. Thus, his injury falls squarely within the special hazard exception to the going and coming rule as outlined by the Court in *Sokolowski*.

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[40] Hr'g Tr. at 16:6-11, Oct. 5, 2016.

[41] Hr'g Tr. at 13:23-25.

Moreover, the fact that Mr. Stevens was an on-call employee further subjected him to special conditions. Mr. Stevens was obligated to respond to a call from Spain within 30 minutes. Even if he was aware that the weather might necessitate his need to reach his plow truck timely, he still only had 30 minutes within which to reach his plow truck. Mr. Stevens was on-call to work in bad weather and the job required him to reach his plow truck within 30 minutes of the telephone call.

Additionally, Mr. Stevens had to drive to his plow truck whereas other employees parked their plow trucks at their homes. These employees were immediately on the clock as soon as they opened their door to get into their trucks. The on-call status of these employees was of direct and substantial benefit to Spain. Spain only had to pay its plow truck drivers when there was work to be done. This was an enormous cost-saving benefit.

Spain requested a bright line rule for when an on-call employee should be considered to be in employment status. The Commission, based on the facts of this case, consider Spain's employees to be in employment status when the telephone call is made requiring the employees to be at their trucks within 30 minutes. From the moment of the telephone call, the employees are under the direction of their employer.

5. Conclusion.

The Commission finds Mr. Stevens to have been in the course and scope of his employment at the time of the injury and, thus, the injury is compensable. The decision of the Board is AFFIRMED.

Date: *14 August 2017* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 238 issued in the matter of *J. A. Spain & Sons, Inc. and American Interstate Insurance Company vs. James V. Stevens,* AWCAC Appeal No. 16-017, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 14, 2017.

Date: *August 15, 2017*

Signed
K. Morrison, Appeals Commission Clerk