LLOYD W. ESCHEN, Employee v. CITY OF BOYD, SELF-INSURED, admin'd by BERKLEY ADM'RS, Employer/Appellant, and MN DEP'T OF LABOR and INDUS/VRU and MONTEVIDEO CLINIC, P.A., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 8, 1998

No. *[redacted to remove social security number]*

HEADNOTES

EMPLOYMENT RELATIONSHIP - SUBSTANTIAL EVIDENCE. Substantial evidence, including the claimant's testimony, which the compensation judge found credible, supports the determination that the claimant was employed by the City of Boyd on January 3, 1993 for the purpose of assisting with the annual inventory of city property at both the municipal liquor store and the recreation hall.

ARISING OUT OF & IN THE COURSE OF - GOING TO AND FROM WORK. Substantial evidence supports the compensation judge's finding that the employee's claim was not barred by the coming and going rule where the employee was walking one block from the municipal liquor store to the city recreation hall, at the request and instruction of the city clerk, to complete the annual inventory of city property at the recreation hall.

Affirmed as modified.

Determined by Hefte, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal from the compensation judge's determination that Lloyd Eschen was a covered employee of the City of Boyd for the purpose of conducting an annual audit of the municipal liquor store and the city recreation hall on January 3, 1993. They further appeal from the compensation judge's finding that Mr. Eschen's claim for worker's compensation benefits was not barred by the coming and going rule. We affirm.

BACKGROUND

On January 3, 1993, the claimant, Lloyd Eschen, was injured when he slipped and fell on an icy sidewalk while walking one block from the Boyd Municipal Liquor Store to the city recreation hall. Mr. Eschen claimed that he was employed by the City of Boyd, in various capacities, to assist with the city's annual year-end inventory and audit, and that his injury occurred

in the course and scope of his employment. The employer and insurer denied liability, asserting that Mr. Eschen was involved in the annual inventory in his capacity as a Boyd city council member, and that he was excluded from coverage under Minn. Stat. § 176.011, subd. 9(6).[1] They also argued, in the alternative, that even if Mr. Eschen was found to be an employee, he was traveling to his job as recreation hall manager when the injury occurred, and was not covered under the coming and going rule.

Following an initial hearing on December 5, 1996, the compensation judge found that Mr. Eschen was appointed to a city office or position as recreation hall manager, and was not a covered employee, pursuant to Minn. Stat. § 176.011, subd. 9(6). The judge further concluded that but for the provisions of Minn. Stat. § 176.011, subd. 9(6), Mr. Eschen would have been entitled to benefits since, at the time of the injury, he was engaged in the business expected of the Manager of the Recreation Hall (namely, walking with the Public Auditor to the Recreational Hall). (12/20/96 Findings & Order, findings 5, 6, 7.) This court vacated the previous findings and remanded for reconsideration, agreeing with the claimant that the issue of whether Mr. Eschen was a covered employee in his appointed position as recreation hall manager had not been raised or argued by the parties below. This court also concluded that the findings of the compensation judge's were not sufficient for a determination of whether the coming and going rule excluded coverage on the facts peculiar to the case, and remanded for additional findings on that issue as well.

A hearing on remand was held on October 7, 1997. In a findings and order issued October 24, 1997, the compensation judge found that Mr. Eschen was a covered employee on January 3, 1993, while participating in the city inventory and audit at both the municipal liquor store and recreation hall, that his claim was not barred by the coming and going rule, and that Mr. Eschen's injury arose out of and in the course of his employment with the City of Boyd. The employer and insurer appeal.

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[1] Minn. Stat. § 176.011, subd. 9(6) provides, in pertinent part:

> An officer of a political subdivision elected or appointed for a regular term of office . . . shall be included [as an employee] only after the governing body of the political subdivision has adopted an ordinance or resolution to that effect.

The parties stipulated that Mr. Eschen was a member of the Boyd City Council on the date of injury, and that the City of Boyd had not elected to extend worker's compensation coverage to members of the city council. (10/24/97 Findings & Order, stipulated agreements 3, 4.)

STANDARD OF REVIEW

In reviewing cases on appeal, this court must determine whether the compensation judge's findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Factfindings may not be disturbed, even though this court might disagree with them, unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

DECISION

Employee/Exclusion From Coverage

The employer and insurer contend that the compensation judge's finding that the claimant was an employee of the City of Boyd is clearly erroneous, and that the evidence requires a finding that Mr. Eschen was acting in his capacity as a city council member at the time of the injury. We are not persuaded.

The sole testimony, at both hearings in this matter, was that of the claimant. Mr. Eschen testified that taking the liquor store or recreation hall inventory was not part of the official responsibilities or obligations of a city council member. He explained that city council members had previously helped with the liquor store inventory out of a sense of civic obligation, but stated that anyone could have done the job. Mr. Eschen further testified that he expected to be paid a flat fee of $15.00 to $20.00 for his work at the liquor store that day, as he had in the past.[2]

There is no dispute that the claimant was employed to manage the recreation hall for the city. Mr. Eschen testified that he was asked to assist with the inventory at the recreation hall because he was familiar with the equipment and concessions operation, and that he would

[2] In finding 2, the compensation judge found that Mr. Eschen was employed at a flat rate of between $15.00 and $18.00 an hour for the time spent on the annual audit of the liquor store and the recreation hall. In his memorandum, the judge stated that the employee had testified that he was to be paid a flat fee of $15.00 or $18.00 for the liquor store audit or the equivalent of $5.25 per hour. The employee, in fact, testified that he expected to be paid a flat fee of $15.00 to $20.00 for the liquor store inventory, and was normally paid $5.25 to $5.50 per hour as recreation hall manager. The judge's findings are modified to reflect the employee's actual testimony.

have been paid for his time doing the inventory had he made it to the hall. He further testified that he was normally paid $5.25 or $5.50 an hour from a separate fund for his work as recreation hall manager, but was not sure what he would have been paid that day as he had not previously participated in the recreation hall inventory. The compensation judge accepted the employee's testimony and found that Mr. Eschen was an employee of the City of Boyd on January 3, 1993, for the purpose of assisting with the annual inventory of the municipal liquor store and the city recreation hall.[3]

The employer and insurer argue, however, that Mr. Eschen was not credible, asserting that his testimony at the October 7, 1997 hearing was self-serving and inconsistent with his testimony at the hearing on December 5, 1996. The assessment of a witness's credibility is the function of the trier of fact. This court must give due weight to the compensation judge's opportunity to observe the witness, and may not ordinarily substitute a different credibility assessment. Toltzmann v. McCombs-Knutson Assocs., 447 N.W.2d 196, 198, 42 W.C.D. 421, 424-25 (Minn. 1989); Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). The employee's testimony at both hearings, although susceptible to differing interpretations, could be viewed as presenting a substantially consistent whole. We note further, as did the compensation judge, that there is simply no testimony to the contrary. Karen Schmitt, the city clerk, did not testify, nor did other city council members or persons knowledgeable about city operations or finances. We believe, upon careful review of the testimony as a whole, that the compensation judge's reliance on Mr. Eschen's testimony was not unreasonable, and affirm accordingly.

Coming From and Going to Work

The employer and insurer argue, in the alternative, that even if this court affirms the determination that Mr. Eschen was employed by the city for the purpose of assisting in the recreation hall inventory, coverage is, nevertheless, excluded under the coming and going rule. To be compensable, an injury must occur within the time and space boundaries of the employment. That is, while the employee is engaged in, on or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service. Minn. Stat. § 176.011, subd. 16. See. e.g., Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). Whether an injury arose out of and in the course of employment is generally a question of fact for the compensation judge. Franze v. National Delivery Serv., 49 W.C.D. 148, 155 (W.C.C.A. 1993), *summarily aff'd* (Minn., Aug. 25, 1993).

As a general rule, an injury sustained while coming from or going to the employer's premises is not compensable under the Workers' Compensation Act. See, e.g., Swanson v. Fairway Foods, 439 N.W.2d 722, 41 W.C.D. 1010 (Minn. 1989). The employer and insurer contend that Mr. Eschen had completed his work at the liquor store and was traveling on a public

[3] An employee is any person who performs services for another for hire. Minn. Stat. § 176.011, subd. 9.

sidewalk to separate employment in his capacity as recreation hall manager at the time of the injury, and that coverage is, therefore, precluded under the coming and going rule.

The compensation judge's decision appears to be based on his conclusion that Mr. Eschen was employed by the City of Boyd on January 3, 1993, to assist with the annual inventory of city property, including the liquor store and the recreation hall. The judge accepted the employee's testimony, not disputed by the employer and insurer, that he was going from the liquor store to the recreation hall, with one of the auditors, at the specific instruction or request of Karen Schmitt, the city clerk, to help take the city inventory at the recreation hall.

The claimant argues that the coming and going rule is not applicable in this case because: (1) he was performing work duties at the time of the injury, (2) he was traveling between two job sites for the employer, or (3) he was on a special errand or mission for the employer. The central issue in all of these exceptions is whether the employee was performing activities incidental to his employment at the time of the injury. We conclude that the compensation judge could have found that Mr. Eschen was in the course of employment at the time of the injury under any one of these theories on the facts in this case.

The rule excluding off-premises injuries while coming from or going to work generally does not apply if the making of the journey is a substantial part of the services required of the employee. Here, an agent of the city specifically directed the claimant to go from the liquor store to the recreation hall to complete the inventory, the claimant was accompanied by the auditor, and the injury occurred at a location where the claimant would not likely have been, at that particular time, but for the city clerk's instructions. Thus, given the conclusion, which we have affirmed, that Mr. Eschen was employed by the city for the purpose of taking inventory at both the liquor store and the recreation hall, it would not have been unreasonable for the compensation judge to conclude that Mr. Eschen was performing services incidental to his employment, at the direction of the employer, at the time of the injury, and was, therefore, covered under the act.

Another exception is made to the coming and going rule for an employee who is traveling between two work sites in the course of his employment with the employer. See, e.g., Kahn v. State, University of Minn., 289 N.W.2d 737, 742, 32 W.C.D. 351, 360 (Minn. 1980); Rondeau v. Metropolitan Council, No. *[redacted to remove social security number]* (W.C.C.A. June 22, 1998). In this case, Mr. Eschen had completed his portion of the inventory at the municipal liquor store and was requested by the city clerk to travel to the recreation hall, one block away, to complete the inventory there. Under such circumstances, the judge could have found the employee was traveling from one work site to another at the time of the injury, and was, therefore, covered at the time of the injury.

Finally, the claimant argued that he was on a special errand or mission for the employer at the time of the injury.[4] We believe the compensation judge could also have found

[4] To be compensable under the special errand exception, there must be an express or implied request that the service be performed after the employee's usual working hours, the trip

the employee's injury covered under this exception, as the injury occurred outside the claimant's usual working hours as recreation hall manager, the annual inventory was outside the claimant's normal recreation hall manager duties, and the trip was undertaken at the request of the employer's agent solely for the purpose of completing the inventory at the recreation hall.

We, therefore, affirm the compensation judge's determination that the claimant was employed by the City of Boyd on January 3, 1993, for the purpose of assisting with the annual inventory, and that he was injured in the course and scope of that employment. We note, however, that the compensation judge erroneously limited the award of temporary total disability benefits from January 3, 1993 to March 30, 19**93**. The parties agree that they stipulated, at both hearings, that maximum medical improvement (MMI) had been reached prior to December 18, 1995, and that an MMI report had been duly served on Mr. Eschen on December 28, 1995. Consequently, the correct date, that is, 90 days after the attainment of MMI, is March 30, 19**96**. We modify the compensation judge's order accordingly.

involved must be an integral part of the service performed, and the task requested must not be one which was regular and recurring during the employee's normal employment. See Youngberg v. Donlin Co., 264 Minn. 421, 119 N.W.2d 746, 22 W.C.D. 378 (1963).