STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES

IN THE MATTER OF:

Tyler Carroll,
CLAIMANT

JCN: 2021022612

DOI: 5-4-21

and

WV Heating & Plumbing Co.,
EMPLOYER

DECISION OF ADMINISTRATIVE LAW JUDGE UPON REMAND

PARTIES:

Claimant, Tyler Carroll, by counsel, Cynthia Ranson
Employer, WV Heating & Cooling Co., by counsel, H. Dill Battle, III

ISSUE:

This claim is before the Office of Judges pursuant to the Workers' Compensation Board of Review Order dated April 19, 2022 remanding the claim to the Office of Judges to consider the affidavit of Leonard Ernie Bragg dated November 8, 2021 and the employer's closing argument dated November 10, 2021.

Mr. Carroll protested the Claim Administrator's Order dated June 9, 2021, rejecting his application for benefits.

DECISION:

It is ORDERED that the Claim Administrator's Order dated June 9, 2021, rejecting Mr. Carroll's application for benefits, is REVERSED with directions to rule his claim compensable and to approve his claim for his conditions of above the knee amputation of his left leg, right leg tib-fib fracture, right and left arm fractures, skull fracture, as well as any other injury related medical condition demonstrated by the medical record.

RECORD CONSIDERED:

See attached record considered.

FINDINGS OF FACT:

1. The Claim Administrator issued an Order dated June 9, 2021, rejecting Mr. Carroll's application for benefits. The Claim Administrator stated that the disability complained of by Mr. Carroll was not due to an injury or disease received in the course of and resulting from employment. The Claim Administrator also stated that the decision was based primarily on the investigation and documentation submitted indicating the incident did not occur as a result of Mr. Carroll's employment. Mr. Carroll protested the Order.

2. A State of West Virginia Uniform Traffic Crash Report dated May 4, 2021, completed by C.E. Westfall stated in the Narrative portion of the report: "On April 4th 2021 this officer responded to an accident on I-79 at about the 69 mile marker. Upon arrival this officer observed a truck in the middle of the south bound lane and a vehicle in the meadean [sic]. This officer received two [sick] eye witness [sic] statements. The eye witnesses [sic] stated that the white truck driven by Driver 1 was traveling north bound lost controle [sic] and crosses the meadean [sic] and coming to rest in the middle of the south bound lane. Tyler Carroll was a by stander [sic] traveling south and observed the white truck wreck and stopped to try and help Driver One while trying to help Driver One Tyler was struck by Driver 2 an seriously injured. This officer obtained a statement from Driver 2. She stated that she was traveling south bound and she noted that she was going up hill and was in the passing lane do [sic] to a semi truck she was trying to pass, she stated that as she cleared the front of the semi truck she saw the accident but was to close to stop and hit the by stander [sic] and the white truck."

3. Mr. Carroll completed an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) dated May 4, 2021, stating he injured his right arm, left arm, that his left leg was broken and partially amputated, facial fractures, and a broken and shattered right ankle and heel while at work on May 4, 2021. Mr. Carroll stated he was involved in a motor vehicle accident coming home from work in a company vehicle.

The physician's portion of the form was completed by CAMC staff. It was indicated the Mr. Carroll had sustained an occupational injury. The injured body parts were listed as right arm, left arm, right leg and left leg. Diagnoses codes S82.292A, S82.291A, and S02.92XD.[1]

4. Mr. Carroll was treated in the emergency department at CAMC General Division as a priority 1 trauma patient on May 4, 2021. Glenn Allen Ridenour, M.D., was consulted at the request of Dr. Rennie of Trauma Services for Mr. Carroll's bilateral open tibia fractures and right open humerus fractures. Mr. Carroll was intubated and sedated. Dr. Ridenour reviewed radiographs which demonstrated a comminuted distal 3rd right humeral shaft fracture. Radiographs of the left forearm demonstrated comminuted midshaft on the

[1] ICD-10-CM lists Diagnosis Codes S82.292A, S82.291A, and S02.92XD, as other fracture of shaft of left tibia, initial encounter for closed fracture, unspecified fracture of facial bones, other fracture of shaft of right tibia, initial encounter for closed fracture, and subsequent encounter for fracture with routine healing, respectively.

fracture. The radius appeared to be intact. Radiographs of the bilateral femurs were negative for fracture dislocation. Radiographs of the bilateral tib-fibs demonstrated a left comminuted distal third tibia fracture which was 100% displaced. There was associated fibular fracture at that level as well. Radiographs of the right tib-fib demonstrated a midshaft tibia fracture which was displaced. Radiographs of the left foot demonstrated a fracture of the third, 4th, and 5th metatarsals as well as questionable fracture of the talus. Dr. Ridenour also reviewed a CT angiogram.

5. On May 11, 2021, Mr. Carroll underwent surgical procedures to include: 1. removal of external fixator under anesthesia right tibia; 2. intramedullary nailing right tibial shaft fracture; 3. open reduction of internal fixation right ankle syndesmosis; 4. open reduction internal fixation on right lateral malleolus fracture; 5. removal of external fixator under anesthesia left tibia; 6. left below-knee amputation; and 7. application of wound VAC left BKA stump. The pre-operative diagnoses were: 1. right open tib-fib fracture status post I and D and external fixation; 2. right distal fibular fracture; 3. left grade 3b open tibia fracture status post I and D, external fixation and fasciotomy; 4. left proximal tib-fib dislocation; and 5. necrotic muscle left lower leg anterior and lateral compartment. The post-operative diagnoses were: 1. right open tib-fib fracture status post I and D and external fixation; 2. right distal fibular fracture; 3. left grade 3b open tibia fracture status post I and D, external fixation and fasciotomy; 4. left proximal tib-fib dislocation.

6. The surgical report of May 14, 2021, states that Mr. Carroll underwent a left above-the-knee amputation that day as there was not enough tissues to salvage the leg below the knee level.

7. Mary Beth Johnson, president of West Virginia Heating & Plumbing testified at a deposition held on November 2, 2021. Ms. Johnson's testimony is discussed further herein.

8. In the Affidavits of September 30, 2021 and October 1, 2021, Mr. Bragg and Mr. Carroll stated the following: At about 9:05 p.m., around mile marker 69 near the Sutton exit, Mr. Carroll and Mr. Bragg observed the driver of a white pick-up truck heading northbound on I-79 lose control of his vehicle, cross the median and "barrel" roll into the southbound lanes of I-79. Mr. Carroll took evasive action and was able to avoid a collision with the out-of-control truck. Mr. Carroll steered the van to the right shoulder of the southbound lanes. Mr. Carroll and Mr. Bragg both observed the disabling damage to the pick-up truck and that the driver appeared unconscious. After checking his rear-view mirror and determining that there was no oncoming traffic, Mr. Carroll turned on the emergency flashers on the van. Then both Mr. Carroll and Mr. Bragg exited the van to render aid. Mr. Carroll rushed to the driver's door of the white truck. Mr. Bragg went to the back of the van with his cell phone flashlight engaged in an attempt to stop any oncoming southbound traffic. As he approached the white pick-up truck, Mr. Carroll could see the driver through the windshield; the driver's head was slumped forward, and he appeared to be unconscious. He tried to communicate with the driver but there was no response. Mr. Carroll attempted to open the door, but it was jammed closed, and he was unable to do so.

9. Mr. Carroll's closing argument dated November 9, 2021, was reviewed and considered in rendering this opinion.

10. The employer's closing argument dated November 10, 2021, was reviewed and considered in rendering this opinion.

11. The transcript of the expedited hearing held on November 10, 2021, was reviewed, considered and is discussed herein. It is noted that the contents of the parties' written closing arguments were largely discussed in oral argument at this hearing.

12. By Order dated April 19, 2022 the Workers' Compensation Board of Review remanded the claim to the Office of Judges to consider the second affidavit of Leonard Ernie Bragg dated November 8, 2021 and the employer's closing argument dated November 10, 2021.

13. All evidence listed on the attached Record to be Considered, although not specifically referenced, was reviewed and considered in rendering this Decision.

DISCUSSION:

This case is before the Office of Judges based on a protest to the Order regarding the compensability of the claim. W. Va. Code § 23-4-1 provides for benefits to employees who receive an injury in the course of and as a result of their covered employment. Three elements must coexist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E. 2d 698 (1970); *Jordan v. State Workmen's Compensation Commissioner*, 156 W.Va. 159, 191 S.E. 2d 497 (1972.)

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing.

Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

At all times relevant herein the employer, West Virginia Heating and Plumbing Co., hereinafter WVHP, was a member of the Kanawha Plumbing-Heating-Cooling Contractors Association. The employer is bound by an agreement between the Kanawha Plumbing-Heating-Cooling Contractors Association and Plumbers and Pipefitters Local Union #625, the latter of which has jurisdiction over 14 counties in West Virginia.[2] The claimant, Tyler J. Carroll, was employed by WVHP and, at the time of the accident which forms the basis of this claim, was a 23-year-old, 3rd year union apprentice.

At some point prior to the subject accident of May 4, 2021, Mr. Carroll, along with Leonard Ernie Bragg, a union journeyman, was assigned by Mary Beth Johnson, president and owner of WVHP, to work on a federal project at the Joseph F. Weis, United States Courthouse located in Pittsburgh, Pennsylvania. Ms. Johnson testified at her deposition taken on November 2, 2021, that WVHP was granted permission by a "Mr. Rhodes" of Local 625, to have his above union members work in another jurisdiction. (Depo. at 37). Ms. Johnson testified that during the two-day period of the Pittsburgh assignment, Mr. Bragg, as journeyman, would be in charge of apprentice, Mr. Carroll. (Depo. at 133, 134).

On May 3, 2021, Mr. Carroll and Mr. Bragg departed Charleston, WV for Pittsburgh PA, a trip of approximately 230 miles requiring about 3 hours and 29 minutes of driving. They drove in a WVHP van and transported company tools and materials in the van for the Pittsburgh project. (Johnson depo. at 43). It is noted that the union agreement did not permit for the transporting of WVHP tools and materials to the job site in the private vehicles of its union employees and required a company owned or leased vehicle. (Johnson depo. at 40, 41). It is further noted that on occasion Ms. Carroll would take a company van to his home and from time to time would leave from his home to drive to a particular worksite. (Johnson depo. at 45). WVHP paid for overnight accommodations in Pittsburgh for Mr. Carroll and Mr. Bragg. (Johnson depo. at 59, 60). WVHP also paid for the purchase of fuel and meals for the Pittsburgh trip. (Johnson depo. at 63, 64; see also Affidavit of "Ernie" Bragg).

Mr. Carroll and Mr. Bragg performed work at the Federal Courthouse in Pittsburgh when they arrived on May 3, 2021, and then again on May 4, 2021, after their overnight stay. They finished their job on May 4, 2021. (Johnson depo. at 60). The tools and materials transported by Mr. Carroll and Mr. Bragg in the WVHP van were necessary to complete the job in Pittsburgh. (Johnson depo. at 47).

At about 5:30 p.m. on May 4, 2021, Mr. Carroll and Mr. Bragg completed their work in Pittsburgh and gathered the WVHP tools and remaining materials and placed them in the company van. At about 6:30 p.m. they left Pittsburgh and headed South on I-79 towards

[2] The covered counties are Boone, Clay, Fayette, Greenbrier, Kanawha, Mercer, Monroe, Nicholas, Pocahontas, Putnam, Raleigh, Roane, Summers and Webster.

Charleston. They stopped in Morgantown to eat and fill the van with gas. They continued on I-79 South. Mr. Carroll was driving.

At about 9:05 p.m., around mile marker 69 near the Sutton exit, Mr. Carroll and Mr. Bragg observed the driver of a white pick-up truck heading northbound on I-79 lose control of his vehicle, cross the median and "barrel" roll into the southbound lanes of I-79. Photographs show that the white pick-up truck came to rest mostly in the southbound passing lane, but a significant portion of the truck was also in the right lane of I-79 South. Mr. Carroll took evasive action and was able to avoid a collision with the out-of-control truck.[3] Mr. Carroll steered the van to the right shoulder of the southbound lanes. Mr. Carroll and Mr. Bragg both observed the disabling damage to the pick-up truck and that the driver appeared unconscious. (See Affidavit of Tyler J. Carroll; Affidavit of Leonard Ernie Bragg). After checking his rear-view mirror and determining that there was no oncoming traffic, Mr. Carroll turned on the emergency flashers on the van. Then both Mr. Carroll and Mr. Bragg exited the van to render aid. Mr. Carroll rushed to the driver's door of the white truck. Mr. Bragg went to the back of the van with his cell phone flashlight engaged in an attempt to stop any oncoming southbound traffic. (See Affidavits of Mr. Carroll and Mr. Bragg). As he approached the white pick-up truck, Mr. Carroll could see the driver through the windshield; the driver's head was slumped forward, and he appeared to be unconscious. He tried to communicate with the driver but there was no response. Mr. Carroll attempted to open the door, but it was jammed closed, and he was unable to do so. (Affidavit of Mr. Carroll).

In the meantime, a tractor trailer approached the crash scene which due to Mr. Bragg's warning was able to slow and stop without crashing into the disabled truck. Seconds later a second truck slowed behind the first. Then a small black vehicle, identified in the crash report as an uninsured 2013 Chevrolet Cruze, traveling at a high rate of speed, passed the truck and the tractor trailer and struck the disabled white pick-up truck near the driver side door and gas tank area where Tyler Carroll had been working to free the driver. (Affidavit of Mr. Bragg; see also Crash Report). After hearing the impact, Mr. Bragg looked at where Mr. Carroll had been standing but he was gone. Mr. Bragg observed the white pick-up truck "spinning and sliding further south on the interstate". (Affidavit of Mr. Bragg). Mr. Carroll stated that the last memory he had after being unable to open the truck door

[3] The employer contests that Mr. Carroll took such an evasive action as such was not referenced in the Uniform Traffic Crash Report. However, the affidavit of both Mr. Carroll and the initial affidavit of Mr. Bragg, as well as the photograph showing the truck partly in both lanes, supports the need for such evasive action. Also, Mr. Carroll testified that the white truck almost hit the van and that he was "happy to evade it". (HT at 36). Moreover, Officer C.E. Westfall of the Braxton County Sheriff's Department did not have the benefit of interviewing Mr. Carroll in completing his crash report. In a second affidavit sworn on November 10, 2021 Mr. Bragg changed his previous affidavit and did not state that there was evasive action. Instead, he stated that while driving they saw the pick-up truck wreck and after the wreck Tyler pulled the van off the interstate and onto the shoulder. Thus, Mr. Bragg's statements indicate that while driving at interstate speeds at 9:30 at night they were close enough to see a truck, likely also traveling at interstate speeds, in the opposite direction, lose control, roll across the median and come to a rest in the middle of the southbound lanes in which they were traveling, and still have time to slow down enough to pull the van off the interstate. In this regard, it is found that Mr. Bragg's initial statement as to the taking of evasive action is likely more accurate. Furthermore, Ms. Johnson testified that it was her understanding "that they swerved at some point" before they pulled off the side of the road. (HT at 16). Accordingly, it is concluded that the preponderance of the evidence establishes the taking of evasive action by Mr. Carroll.

was the light of Mr. Bragg's flashlight and the sound of a tractor trailer gearing down. (Affidavit of Mr. Carroll). Mr. Bragg, along with another person who had stopped at the crash scene to provide assistance, referenced as "Nurse", found Mr. Carroll in the median. The Nurse began to render aid to Mr. Carroll while Mr. Bragg called for emergency responders. (Affidavit of Mr. Bragg). Mr. Carroll was later transported from the scene by AirEvac helicopter to the Charleston Area Medical Center.

The medical record demonstrates that as a result of this accident Mr. Carroll underwent a below the knee amputation of his left leg on May 11, 2021. However, as there was insufficient tissue to salvage the leg at the below the knee level, an above the knee amputation was performed on May 14, 2021. Mr. Carroll sustained multiple fractures involving all four extremities, as well as a fracture of his skull.

The employer argues that Mr. Carroll's application for benefits was properly rejected because his injuries were not sustained in the course of employment. (HT at 44). The employer reasons that Mr. Carroll was "not on the employer's clock at the time of his injury" as he did not receive overtime or travel pay. (HT at 42, 43). The employer further reasons that coming from work on a public highway is not considered to be within the course of employment and that risk of being involved in a motor vehicle accident on I-79 was not imposed by the employer. (HT at 44).

It is found that the employer's above arguments are not persuasive. Mr. Carroll's claim is not precluded by the "going and coming rule" or by the employer's arguable position that Mr. Carroll was not paid overtime or travel expenses. In Syllabus Pt. 2 of DeConstantin v. Public Service Commission, 83 S.E. 88 (W.Va. 1914), the West Virginia Supreme Court of Appeals held: "An injury incurred by a workman, in the course of his travel to his place of work and not on the premises of the employer, does not give right to the participation in such (Workmen's Compensation) fund, unless the place of injury was brought within the scope of employment by an express or implied requirement in the contract of employment, of its use by the servant in going to and returning from his work." Accord, Canoy v. State Compensation Comm'r, 170 S.E. 184 (W. Va. 1933).

However, the "going and coming rule" traditionally applies where the only evidence linking the employer to the accident was the fact that the employee was coming or going to work. Various nuances of the rule may serve to alter its application where additional evidence exists linking the employer to the accident. Courtless v. Joliffe, 507 S.E. 2d, 136, 141, (W.Va. 1998). Where additional evidence exists linking the employer to the accident such as when the use of the roadway is required in the performance of the employee's duties for the employer, when the employee is rendering an express or implied service to the employer, or when there is an incidental benefit to the employer that is not common to ordinary commuting trips, the application of the "going and coming" rule may be altered. Courtless, 507 S.E.2d at 141, 142. An employee is entitled to compensation for an injury sustained in going to or from his work, only where such injury occurs within the zone of his employment, and that zone must be determined by the circumstances of the particular case presented. Syllabus Point 1, Carper v. Workmen's Compensation Comm'r 1 S.E. 2d 165 (W. Va. 1939). Workmen's Compensation law generally recognizes that an employee is

entitled to compensation for an injury received while traveling on behalf of his employer's business. Syllabus Point 1, Calloway v. State Workmen's Compensation Comm'r, 268 S.E.2d 197 (W.Va. 2002); Brown v. City of Wheeling, 569 S.E2d 132 (W.Va. 1980).

It is noted that only one of the cases cited above concerns the use of a company vehicle at the time of the accident.[4] DeConstantin involved the death of a construction contractor working on the Baltimore & Ohio railroad. Mr. DeConstantin was killed by a train while walking on the main line of that railroad but not on the construction work in which he was engaged. There was no evidence showing just why he was there. Canoy and Carper also involved claims where the injured employee was walking.

In Courtless, Bobby Courtless was permanently disabled while riding his bicycle when he was struck by a vehicle driven by David Clyde Joliffe, an employee of the Princess Beverly Coal Company. Mr. Joliffe was in route to work at the time of the accident. Mr. Joliffe owned the vehicle, but Princess paid Mr. Joliffe $400 monthly, the amount of the monthly payment on the truck, as well as maintenance and repair costs, and provided free use of gasoline from Princess. Courtless filed a civil action against Mr. Joliffe and Princess, alleging that Princess was liable under the doctrine of respondent superior. Analyzing the case under the application of the "going and coming rule" the West Virginia Supreme Court of Appeals reversed the lower court's grant of summary judgment and remanded the case with directions to "develop a complete and exhaustive determination of that application, all facts surrounding Princess' connection to the truck involved in the accident and the purposes for the travel undertaken by Mr. Joliffe on the day of the accident...". Courtless, 507 S.E.2d at 142. The Court identified this issue as "an evolving area of law in this state." Courtless, 507 S.E. 2d at 143.

In Brown, Leah Brown was an employee of the City of Wheeling and was required to travel to the State Police Academy in Institute, West Virginia for a training session. Ms. Brown rode to Institute with a co-worker in the co-worker's personal vehicle. On the return trip from the training session the vehicle was involved in a one-car accident. Ms. Brown died as a result. Ms. Brown's surviving spouse, instead of filing a worker' compensation claim for dependent's benefits, filed a civil action against the City of Wheeling alleging that the driver was acting within the scope of his employment so as to bind the City of Wheeling to liability based on the employee/driver's negligence. At the same time the complaint alleged that Ms. Brown was not acting in the scope of her employment with the city. The circuit court ruled that Mrs. Brown was within the scope of employment at the time of her death and that the City of Wheeling was entitled to governmental immunity based on West Virginia Code § 29-12A-A. The Supreme Court of Appeals found that the co-worker did not deviate from their return trip home and that the City directly benefited from Ms. Brown's attendance at the training. The Court held:

> Based on the facts in the record of this case, Ms. Brown was clearly acting within the course of her employment when she died while returning from a mandatory training session. Her

[4] Calloway involved the use of a company vehicle. However, the issue in that case was whether a lengthy drinking spree at numerous taverns constituted a major deviation from the business trip.

> death occurred on a public highway which was brought within the scope of her employment by the City's requirement that she attend training at the State Police Academy. The appellant is therefore entitled to benefits under the Workers' Compensation Act, and the City is entitled to immunity as provided for in W.Va. Code 23-2-6 [1991] ...
> Brown, 569 S.E.2d at 203.

Professor Larson, in 2 Larson's Workers' Compensation Law §14.07, addresses the payment for expenses of travel rule as follows:

> However, in the majority of cases involving a deliberate and substantial payment for the expenses of travel, or the provision of an automobile under the employee's control, the journey is held to be in the course of employment. This result is usually correct, because when the subject of transportation is singled out for special consideration it is normally because the transportation involves a considerable distance, and therefore qualifies under the rule herein suggested: that employment should be deemed to include travel when the travel itself is a substantial part of the service performed.

In footnote 2 of that section Professor Larson further explains: "The essence of the employment connection in the present subsection is the furnishing by the employer of something of value as compensation to the employee for undertaking the trip. There is little difference in principle between furnishing an amount in cash equivalent to the value of the use of the employee's own car and furnishing the car itself." See, e. g. Doering, v. Labor & Indus, Review Comm'r, 187 Wis. 2d 472, 523 N.W.2d (Ct. App. 1994); Recevur Constr. Co. v. Rogers, 958 S.W. 2d 18 (KY. 1997); Port v. Kern, 187 S.W. 3d 329 (Ky. Ct. App. 2006).

Additionally, Professor Larson in §15.05 addresses the rule of employer conveyance and states:

> The theory behind this rule is in part related to that of the employer-conveyance cases; the obligations of the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise he or she would have the option of avoiding. But in addition, there is at work the factor of making the journey part of the job, since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purpose.

See, e.g. Doering v. Labor and Indus. Review Comm'n, 187 Wis. 2d 472, 523 N.W. 2d 142 (Ct App. 1994); Boyd's Roofing Co. v. Lewis, 1 Va. App 93, 335 S.E. 2d 281 (1985); Linda Gas v. Edmonds, 2014 Miss. App. Lexis 547 (September 30, 2014); Thayer v. Iowa, 653 N.W.2d 595 (Iowa 2002); Butt v. City Wide Rock Excavating Co., 204 Neb. 126, 281 N.W.2d 406 (1979); Southerland v. Christian, Inc. 629 P.2d 799 (Okla. Ct. App 1981); Pickrel v. Martin Beach Inc., 80 S.D. 376 (1963); But Cf. VanLeewoen v. Industrial Comm'n, 901 P.2d 281 (Utah Ct. App. 1995); Miano v. Schneider, 3 A.D. 2d 900, 162 N.Y.S. 544 (1957).

Based on consideration of the above authorities, it is concluded that Mr. Carroll experienced an isolated fortuitous occurrence in the course of his employment. The facts of this case demonstrate that Mr. Carroll's claim is not precluded by the "going and coming rule." It is evident that WVHP has determined that in order to facilitate its business as a HVAC and Plumbing contractor, it was necessary to provide its employees with transportation sufficient to transport the employees and needed tools and materials to the Pittsburgh job site and back to Charleston. In this regard the journey is part of the job.

In addition, the provision of this transportation provides significant incidental benefits to the employer that are not common to ordinary public commuting trips. The provision of the company van ensured that the employees arrived at the Pittsburgh site with any needed tools and materials. Other more common personal vehicles would not provide the employer with the benefit of this capability. Significantly, Ms. Johnson testified that WVHP received benefit from its employees transporting tools, materials and the employees themselves to Pittsburgh in the company van. WVHP derived further benefit from the employees, tools and materials being transported back to Charleston. (HT at 14, 15; depo. at 48). Accordingly, it is concluded that in light of the above significant incidental benefits to the employer, which are not common to ordinary commuting trips, the preponderance of the evidence demonstrates that Mr. Carroll was within the course of his employment at the time of the accident on May 4, 2021.

It is found that Mr. Carroll's claim was also within the course of his employment based on the "payment for expense of travel rule." Here, Mr. Carroll and Mr. Bragg were provided a vehicle by WVHP under their control. In addition, it is found that their employment required them to drive a considerable distance, as in this instance then traveled over 230 miles to get them from Charleston to the work site in Pittsburgh, PA. Therefore, Mr. Carroll's employment is deemed to include travel as travel itself is a substantial part of the services performed by Mr. Carroll. This finding is made not only on the basis of the distance of Mr. Carroll's travel but on the nature and function of the vehicle being transported by Mr. Carroll to the work site, as discussed previously herein.

The employer also argues the following:

> A worker who is not engaged in performing the particular duties of his employment is not in the course of his employment, even though he might be in the general sphere of it. When he

> engages in a deviation from his business purpose of travel, for workers' comp injuries that are suffered can be denied. (HT of 45).

The employer argues that Mr. Carroll voluntarily engaged in an activity that has no relation or connection with his employment and from which the employer gains no benefit. The employer indicated that acts which benefit third persons are ordinarily not compensable. (HT at 46).

In support of its position the employer cites Morton v. West Virginia Office of Insurance Commissioner and Seneca Health Services, Inc.,749 S.E.2d 612 (W.Va. 2013). Based on its reading of Morton, the employer stated that the Court did not find the facts of the case submittable to the Good Samaritan Doctrine but that in a footnote in Morton the Court found that West Virginia does not recognize the Good Samaritan Doctrine in regard to workers' compensation cases. (HT at 45). The employer further stated with respect to the footnote that the Court indicated that even in jurisdictions that apply the Good Samaritan Doctrine, the Courts frequently require the act to partially benefit the employer in order for an injury to be considered incidental to employment. (HT at 47). The employer noted that the Court discussed the North Carolina case of Robert v. Burlington Industries. The employer, in its closing argument also referenced the Georgia case of Old South Custom Landscaping, Inc. v. Mathis. (HT at 48).

Mr. Carroll argues that by operation of West Virginia Code §§ 17C4-1 and 17C-4-3, he, and Mr. Bragg, were required to stop at the scene of the crash, to remain at the scene of the crash until law enforcement arrived, to provide information required to investigating law enforcement officers, and most significantly, if physically able to do so, to render aid to any person injured in such crash by providing reasonable assistance including carrying or making the arrangements for carrying of such person to a physician, surgeon or hospital if it is apparent such treatment is necessary. Mr. Carroll argues that he does not forfeit or waive his employment or on the job status by remaining at the scene and rendering aid to a person seriously injured in the crash, consistent with the requirements of West Virginia law. (See Claimant's Closing Argument at 14, 15).

In Morton, the West Virginia Supreme Court of Appeals identified the operable facts as follows:

> Petitioner is employed by respondent Seneca Health Services, Inc. (hereinafter Seneca) as a secretary. On September 13, 2010, petitioner injured her right wrist and shoulder while assisting a Seneca contract employee lift a box of maternity clothes which had been left in the petitioner's office. The box of clothes had apparently been loaned by the contract employee to another employee who returned the clothes by leaving the box in the petitioner's office for the contract employee to pick up. The contract employee who did not work in the office with petitioner, asked petitioner for help in lifting and transporting the

> box to her vehicle. Petitioner agreed and, upon lifting the box, lost her balance and fell backwards, injuring her right wrist and shoulder.
> Morton, 749 S.E.2d at 614.

The Court found that there was no question that the claimant's injury occurred in the course of employment considering that the claimant was on Seneca's premises, during her regular work hours, ostensibly tending to her duties at the time the request for assistance in lifting the box was made. The Court clarified that: "The dispute herein concerns whether her injury was 'resulting from', that is causally related to her employment". Morton, 749 S.E.2d at 616.

The Court in Morton, while noting that this was a "marginal case in terms of compensability", could discern no particular benefit to Seneca in the claimant's admittedly kind, but purely gratuitous, gesture of assisting her co-worker with the box. In concluding, the Court agreed with the Board of Review that: "an injury which occurs while gratuitously assisting a co-employee with the task of a purely personal nature, involving no instrumentalities of employment and without the alleged involvement or benefit to the employer, does not result from employment." Morton, 749 S.E.2d at 619. In rendering its decision in Morton, the Court stated the following in Footnote 6:

> Although not argued by the parties, we note that we do not find this case amenable to analysis under the 'Good Samaritan doctrine' recognized by some courts and assessing compensability of injury sustained while rendering aid to others. In cases where this doctrine has been applied to find compensability, typically the aid rendered is of an emergent nature and the employees' 'conditions of employment' positioned him or her to undertake the rescue. See *Olde South Custom Landscaping, Inc. v. Mathis*, 229 Ga. App. 316, 494 S.E.2d 14 (Ga. Ct. App. 1997); see also *Rockhaulers, Inc. v. Davis*, 554. So.2d 654 (Fla. Dist. Ct. App. 1989). Even in jurisdictions applying this doctrine, courts frequently also require the act to 'at least partially benefit his employer in order for an injury to be considered incidental to or arising out of employment.' *Quiney v. Md. Cas. Co.*, 347 So.2d 921, 923 (La. Ct. App. 1977); *Roberts v. Burlington Ind., Inc.*, 321 N.C. 350, 364 S.E.2d 417, 421 (N.C. 1988). An injury to an employee while he is performing acts for the benefit of third persons does not arise out of the employment unless the acts benefit the employer to an appreciable extent').
> Morton, 749 S.E.2d at 618.

While the "Good Samaritan doctrine" may have some applicability in the instant case, it is found that this is more accurately considered under the "Rescue doctrine". Professor Larson elucidates upon the rescue doctrine in 3 Larson's Workers'

Compensation Law § 28.02. Professor Larson begins this section by stating: "The really controversial issue in the rescue field is the question whether injury incurred in the rescue of a stranger should be held compensable". Professor Larson notes that a long step toward coverage of such injuries was taken in the leading case of Waters v. Taylor Co., 218 N.Y. 248, 112 N.E. 729 (1916). In Waters, the deceased was employed by one contractor on a construction project, and about 20 feet from him the employee of another contractor was trapped by a cave-in while at work on the excavation for the same building. In attempting to rescue him the deceased was killed by a second cave-in. A compensation award against the decedent's own employer was upheld by the highest New York court, the Court of Appeals.

Given that Waters involved the rescue of someone other than a co-employee, Professor Larson noted that to do this the Court had to establish an entirely new theory as the duty of the employer to rescue his own employees did not apply. The new theory that replaced the old consisted of three ideas. First, "It was his employment which brought him where he was, and in a general sense caused him to be confronted with the condition and emergency which he sought to meet". Second,

> It must have been within the reasonable anticipation of his employer that his employees would do just as Waters did if the occasion arose, for it is quite inconceivable that any employer should expect or direct his employee to stand still while the life of a fellow-workman working a few feet away was imperiled by such an accident as occurred here.
> Waters, 112 N.E. at 727.

The third of the grounds relied upon by the Court in Waters was:

> Independent of any legal obligation which might require the master to attempt to rescue a servant from the dangers of an emergency, there is a moral duty resting on principles of humanity and those principles ought to apply to a contract of employment and broaden its scope so as to permit a servant to do as Waters did in attempting to rescue a fellow workmen although technically working for a different employer.
> Waters,112 N.E. at 727, 728.

Professor Larson wrote as follows with respect to the impact and applicability of Waters:

> A moment's reflection will show that a decision based on such broad principles cannot be arbitrarily limited to a fact situation involving employees working in the same building, or on the same over-all project. The distinction between such employees and other strangers with whom the rescuer is brought into contact by his duties is completely non-existent in law or in morality. Legally, the employee of another employer on the

> same project is a much a stranger as if he were a Chinese river-pirate. And as to moral grounds, is there any greater humane duty to rescue such a worker, merely because of the circumstances that he is working on the same project, than there would be to rescue another workman working five feet away but on another building, across a property-line, or, for that matter, any fellow-being in peril of death whose emergency is thrust upon the rescuer because his job brought him into contact with that sort of situation? The Waters case, then, since any attempt to restrict it to workers on the same project leads to complete absurdity, must be taken to establish a rule covering rescue of strangers when the occasion for rescue is presented to the rescuer because of the nature of his employment and when the employer must know that common principles of humanity will lead the employee so placed by his employment to attempt the rescue.

Professor Larson cited and discussed Putkammer v. Industrial Comm'n, 371 Ill. 497, 21 N.E.2d 575 (1939). In Putkammer, a truck driver stopped at the scene of a collision in which he was not involved and was killed while carrying an injured child away from the accident. In awarding compensation, the court approached the claim as one of possible deviation. The court concluded that the "deviation" to pick up the child was as much a natural incident of the job as truck driver as going across the street for a drink would be. The court observed that it would be paradoxical indeed if crossing the road to get a glass of beer could be held compensable while crossing the road to pick up an injured child could not. In analyzing this case Professor Larson noted that the court's reasoning "echoes that in the Waters opinion: the rescue was a natural incident to be expected in the course of employment of this kind". The Illinois court which decided Putkammer, supplemented its opinion in the later decision of Public Serv. Co. v. Industrial Comm'n, 395 Ill. 238, 69 N.E.2d 875 (1946), utilizing, in part, an analogy of the "old principle applying to deviation in marine voyages, where insurance was not voided if it was for the purpose of saving life or helping the injured and helpless. Perkins v. Augusta Insurance & Banking Company, 10 Gray 312, 71 Am. Dec. 654". Professor Larson concluded:

> The rule here stated- not as to what the law ought to be but as what it is, under the only possible interpretation of the Waters and Putkammer cases- does not go so far to say that every rescue of a stranger by an employee is covered; it refers to a rescue the necessity for making which is thrown in the claimant's path by the conditions of his employment.

Professor Larson noted that the Supreme Court of the United States extended the rescue doctrine to its "ultimate limit" by covering the rescue of complete strangers when the connection with employment is furnished, not by the nature of employment, but solely by the fact that the employment brought the employee to the place where he observed the occasion for the rescue attempt; the so-called "positional risk theory". In O'Leary v. Brown-

Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470 (1951), Mr. O'Leary was an employee of a government contractor operating on the island of Guam. The contractor maintained for its employees a recreation center near the shoreline, along which ran a channel so dangerous for swimmers that its use was forbidden. Mr. O'Leary had spent the afternoon at the center and was waiting for his employer's bus to take him from the area when he heard two men, standing on the reefs beyond the channel, signaling for help. Followed by nearly twenty others, Mr. O'Leary plunged into the channel to effect a rescue. In attempting to swim the channel to reach the two men, Mr. O'Leary was drowned. The Supreme Court, reversing a decision of the Ninth Circuit, ordered the award of compensation to be reinstated. The Supreme Court's reasons for this "pioneering holding" were very brief and in general terms. The Court stated: "The test of recovery is not a causal relation between the nature of employment of the injured person and the accident". O'Leary, 340 U.S. at 504, 506. Further, "Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer". O'Leary, 340 U.S. at 504, 507. The Court concluded:

> All that is required is that the 'obligations or conditions' of employment create the "' zone of special danger' out of which the injury arose... A reasonable rescue attempt, like pursuit in aid of an officer making an arrest, may be 'one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute.'
> O'Leary, 340 U.S. at 504, 507.

Professor Larson also discussed the case of Edwards v. Louisiana Forestry Commission, 49 So.2d 53 (La. 1950). Professor Larson noted that the same week the O'Leary v. Brown-Pacific-Maxon case was being argued before the U.S. Supreme Court, the Louisiana Court of Appeals denied an award in Edwards relying on the Ninth Circuit decision in Brown-Pacific-Maxon. In Edwards, a towerman in a forest observation tower saw a child being attacked by a dog near the foot of the tower. He hurried down the stairs and killed the dog but sustained and inguinal hernia in the process. The Louisiana court summed up available precedents stating: "... awards have been sustained in instances where some association between the act and the employment could be justified or where the service of the interest of the employer might be recognized". Edwards, 49 So.2d 53, 55. In a dissent La. Supreme Court Judge Kennon stated:

> It is my opinion that a workman, confronted by an emergency of the sort described, in which he is the only adult present to avert an impending danger to a fellow human being, particularly a child of tender years, has the right to take such action and to render such assistance as an ordinary prudent person would do under the same circumstances, and that such action does not constitute a 'turning aside' from his employer's business.
> Edwards, 49 So.2d at 53, 55.

Professor Larson notes that after the U.S. Supreme Court decision in O'Leary v. Brown-Pacific-Maxon was handed down, the Edwards case was reversed by the Supreme

Court of Louisiana. See Edwards v. Louisiana Forestry Comm'n, 60 So.2d 449 (La. 1952). Professor Larson stated:

> It is a reasonable conclusion, then, that the rule in Louisiana may be taken to be that expressed in the quotation from Judge Kennon's dissent. The Supreme Court of Louisiana thus takes its place alongside the Supreme Court of the United States in applying the full positional risk doctrine to rescue cases...

In addition to the United States Supreme Court and Louisiana, Professor Larson reports that the positional risk rescue doctrine has been accepted by New Jersey, Massachusetts, and Florida.[5] Professor Larson noted, on the other hand, that Minnesota had declined an opportunity to accept the provisional risk doctrine. In Weidenbach v. Miller, 55 N.W.2d 289 (Minn. 1952), the decedent, a truck driver, accompanied by his employer, was driving along a lake, the shore of which followed the highway. They observed a man floundering in the lake. The employer stated, in effect, that "there is a man in the lake. We had better stop". The deceased stopped the truck, leaped over a fence and went onto the frozen lake. While attempting the rescue, the ice gave way and he drowned. In denying benefits the court drew the distinction that the assistance being rendered was to a person in the lake and not on the highway; thus, it was not incidental to the truck driver's employment. The court stated: "Can it be said that assistance to any person observed to be in peril off the highway, regardless of the distance separating such person from the highway is incidental to the employment so long as such person is within the range of the employee's vision". Weidenbach, 55 N.W.2d at 289, 296.

Professor Larson criticized the distinction drawn by the Minnesota court as to whether a rescue opportunity occurs on a highway or is visible from the highway, as it has a "brittle arbitrary quality". Professor Larson concluded as follows:

> This kind of fact-categorical approach to compensation law cannot survive long when there is no real distinction in principle. There is only one valid operative principle at work here: the employment thrust the employee into contact with a situation in which it was natural and probable that he or she as a human being would make the rescue attempt. If it had not been for the conditions and obligations to the employment, this demand upon the employee's natural human reactions would never have been made of the employee and the employee would not have died. More than this compensation law should not require.

[5] See Reilley v Weber Eng'g Co., 258 A.2d 36 (NJ 1969); D'Angeli's Case, 343 N.E.2d 368 (Mass. 1976); D.L. Cullifer & Son, Inc. v. Martinez, 572 So.2d 1360 (Fla. 1990). In D'Angeli's Case the Supreme Judicial Court stated: "It is our present view that when a conscientious citizen is in the course of his employment and perceives an imminent danger to the public, as would appear to have been the case in this instance, his endeavor to alleviate the danger should be considered incidental to his employment." 343 N.E. 2d at 371.

It is found that the facts of this case place the consideration of Mr. Carroll's claim squarely under the "Rescue Doctrine". The facts show that Mr. Carroll and Mr. Bragg were confronted with a true emergency. Mr. Carroll had to take evasive action to avoid Mr. Batten's white pick-up truck which they observed crossing the median and "barrel rolling" onto southbound I-79 coming to rest with portions of the truck in both lanes. Mr. Carroll observed that Mr. Batten was unconscious. Mr. Carroll and Mr. Bragg were the only persons at the scene and were the only persons who could initiate the rescue of Mr. Batten and attempt to prevent further injury, death and other damage at the scene. Clearly, Mr. Carroll was in the midst of a true emergency.

It is further found that Mr. Carroll's claim is sustainable on the basis of the positional risk theory. Here, the requirements of Mr. Carroll's employment thrust him into contact with the emergency situation. As has been found herein, Mr. Carroll was in the course of his employment during his trip to Pittsburgh and back. For the benefit of the employer, he was required to return the company van, which contained personnel, tools and materials to Charleston. On May 4, 2021, Mr. Carroll's employment brought him to I-79 near the Sutton exit at 9:30 at night where Mr. Batten's truck rolled into the northbound lane. Mr. Carroll's employment brought him to the place where it was probable that he, not to mention, Mr. Bragg, would have a natural reaction as human beings to take actions to facilitate a rescue of Mr. Batten. As to the reasonableness of Mr. Carroll's actions, it is significant to note that Mr. Bragg was Mr. Carroll's superior and supervisor. (See Johnson depo. at 28; HT at 12). Mr. Carroll was an apprentice. Mr. Bragg's participation in the rescue attempt also speaks to the propriety of the natural humane response that it appears they shared. Furthermore, Mr. Carroll's actions were consistent with West Virginia law: W.Va. Code § 17C-4-1(a) provides:

> The driver of any vehicle involved in a crash resulting in the injury to a death of entering any person shall mediately stop the vehicle at the scene of the crash or as close to the scene as possible and return to and remain at the scene of the crash until he or she has complied with the requirement of § 17C-4-3 of this code...

West Virginia Code § 17E-4-3 (b) provides, in pertinent part:

> The driver of any vehicle involved in a crash resulting in injury to or death of any person, if physically able to do so, shall render to any person injured in such crash reasonable assistance including the carrying or the making arrangements for the carrying of such person to a physician, surgeon or hospital...

With these statutes in mind, the legislative intent of which is to facilitate the proper response of West Virginia citizenry and those traveling in West Virginia when involved in a crash, it would seem incongruent to remove those West Virginia workers who are traveling on our highways in the course of their employment and who are injured by taking actions consistent with the above statutes, from the protections of the Workers' Compensation Act.

In Rockhauler's v. Davis, 554 So.2d 654 (Fla. Dist. Ct. App. 1989), a case very similar to that of Mr. Carroll's, the decedent, Mr. Davis was a lease operator hauling under contract with Rockhauler's, Inc. While hauling a load for them, Mr. Davis was the first one on the scene of a head on collision between another truck and an automobile. As he walked to the car to check on the passengers he was struck and killed by another vehicle. Mr. Davis' dependents were awarded death benefits. The employer appealed, arguing that Mr. Davis' rescue activities did not benefit the employer, nor was his injury a reasonably foreseeable consequence of his employment. Adopting the positional risk doctrine from O'Leary the Court held that: 1) the decedent was the first to arrive on the scene of a "true emergency", 2) the nature of his employment brought him to the place where a rescue attempt was required by "ordinary standards of humanity" and 3) the action taken by the decedent was reasonable and expected behavior.

The West Virginia Supreme Court of Appeals cited Rockhauler's v. Davis, in Footnote 6 of Morton as a case under the Good Samaritan doctrine and noted that "where this doctrine has been applied to find compensability, typically the aid rendered is of an emergent nature and the employee's 'conditions of employment' positioned him or her to undertake the rescue". The Court further noted in Footnote 6 of Morton that even in jurisdictions applying the Good Samaritan doctrine, the courts frequently also require the act to 'at least partially benefit his employer in order for an injury to be considered incidental to or arising out of employment'. Citing, in part, Roberts v. Burlington Ind., Inc., 364 S.E.2d 417, 421 (N.C. 1988). In his treatise, Professor Larson distinguishes between Good Samaritan cases and "true emergency cases". See 3 Larson's Workers' Compensation Law § 27.02. It is an important distinction because, as the Supreme Court referenced in Footnote 6 of Morton, the courts in Good Samaritan cases frequently apply a "benefit to the employer" analysis. This is likely so because the "Good Samaritan" concept encompasses a panoply of situations involving rendering aid to others which may require a "benefit to the employer" analysis to determine the relationship between the act and the employment. The "true emergency cases" such as that in Rockhauler's v. Davis, which applied the positional risk rescue doctrine, are based on whether the employment places the employee into an emergency situation in which it was natural or probable that the employee, as a human being, would make a rescue attempt of another human being. Whether an employer benefits in relation to the humane act is not dispositive as to the relationship between the act and the employment.

For the above stated reasons, it is concluded that Mr. Carroll's claim is compensable under the positional risk theory of the Rescue Doctrine. It is further concluded that Mr. Carroll's claim would be compensable under a Good Samaritan analysis. Due to his employment, Mr. Carroll was required to travel by vehicle for approximately 460 miles over a course of about 8 hours. This put him at a risk to which the general public is not exposed. Part of the drive was at night which increased the risk, including the risk of encountering an intoxicated driver. In addition, Mr. Carroll's actions were of partial benefit to his employer. It is found that the employer benefited by Mr. Carroll taking action consistent with the requirements of West Virginia law. Clearly an employer benefits when an employee, in the course of his employment acts within the confines of the law and is not convicted or

imprisoned for violating the law in the course of his employment. Here, Mr. Carroll took action consistent with West Virginia Code § 17C-4-1 and § 17E-4-3. In this regard, Ms. Johnson testified that she would not have wanted Mr. Carroll to get out and help the motorist on I-79 on May 4, 2021. However, she also testified that she never gave Mr. Carroll any instruction on what to do in such a situation. (HT 11, 12). Nor did Mr. Bragg give any such instruction at the scene. Instead, in his second affidavit Mr. Bragg stated: "After Tyler parked the van, both Tyler and I got out of the van to see if we could help the driver of the wrecked pickup truck and stop traffic. We did not discuss what each of us was going to do." The evidentiary record does not demonstrate the existence of any company instruction or policy addressing such issues. Thus, Mr. Carroll's legally appropriate action in the situation that was thrust upon him by his employment provided the benefit of a shield to the company's lack of direction on this issue.

CONCLUSIONS OF LAW:

It is found that Mr. Carroll has established by preponderance of the evidence and as a matter of law, that the Claim Administrator erred in denying his application for benefits on the grounds that his disability was not due to an injury received in the course of and resulting from his employment.

Accordingly, it is ORDERED that the Claim Administrator's Order dated June 9, 2021, rejecting Mr. Carroll's application for benefits, is REVERSED with directions to rule his claim compensable and to approve his claim for his conditions of above the knee amputation of his left leg, right leg tib-fib fracture, right and left arm fractures, skull fracture, as well as any other injury related medical condition demonstrated by the medical record.

APPEAL RIGHTS:

Under the provisions of West Virginia Code § 23-5-12a, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or final action of the Board of Review. **The appeal shall be filed with the West Virginia Intermediate Court of Appeals (304-558-3258).**

Date: September 12, 2022

J. Marty Mazezka
Administrative Law Judge

cc: TYLER J CARROLL
CYNTHIA RANSON - COUNSEL FOR CLAIMANT
WV HEATING & PLUMBING CO
CHARITY K LAWRENCE - COUNSEL FOR EMPLOYER
BRICKSTREET MUTUAL INSURANCE CO