STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

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WEST VIRGINIA HEATING
AND PLUMBING CO.,

Petitioner,

v.

TYLER J. CARROLL,

Respondent.

Intermediate Court No.:
JCN: 2021022612
Claim No.: 2021011505
DOI: 05/04/2021
OOJ Order: 09/12/2022

BRIEF ON BEHALF OF PETITIONER WEST VIRGINIA HEATING AND PLUMBING CO.

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I. ASSIGNMENT OF ERROR

The Office of Judges' ("OOJ") September 12, 2022 decision (Exhibit A) was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record because the evidence shows Respondent's injury did not occur as a result of his employment.

II. STATEMENT OF THE CASE

Respondent Tyler J. Carroll ("Respondent" or "Claimant") is a 24-year-old HVAC technician for the Employer. According to the May 4, 2021 WC-1 application for benefits, Claimant was involved in an accident while traveling home from a work site in a company vehicle. (Exhibit B.) He sustained injuries to his right arm, left arm, right and left leg, and face. His left leg was amputated during hospitalization.

Employer's Evidence

According to the State of West Virginia Uniform Traffic Crash Report (Exhibit C):

> [t]he eye witnesses stated that the white truck driven buy (sic) driver 1 was travilling (sic) 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 bystander travlling (sic) south and observed the white truck wreck and

> stopped to try and help driver one wile (sic) trying to help driver one Tyler was struck buy (sic) driver 2 and seriously injured. This officer obtained a statement from driver 2. She stated that she was travlling (sic) 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 cleard (sic) the front of the semi truck she saw the accident but was to (sic) close to stop and hit the by stander and the white truck.

The report identifies Vehicle 1, the white truck ("the truck"), as a Chevrolet S-10 pickup truck driven by Charles Batton. Driver 2 is identified as Kristy Pechinko.

There is a statement from Ernie Bragg in the crash report that states "white S-10 crossed median N to S bound myself & buddy 'Tyler Carol' who was hit stopped to help. He was checking on S-10 driver I 'Ernie Bragg' was attempting to stop traffic black car S-bound was passing tractor trailer struck white S-10 & my buddy Tyler Carol[.]" (*Id.* at X.)

In an order dated June 9, 2021, the Claim Administrator denied the claim because the injury was not received in the course of and resulting from employment. (Exhibit D.)

Claimant's Evidence

Claimant submitted his paycheck stub for pay period April 29, 2021 to May 5, 2021. (Exhibit E.) He also submitted a September 7, 2021 WC-1 indicating he was driving his company van southbound on I-79 returning from a work site in Pittsburgh, Pennsylvania when a northbound vehicle crossed the center median, flipped, and rolled landing near his lane of travel. He claims he had to take evasive action to avoid being struck by the rolling vehicle. He stopped the company van, exited the vehicle, and attempted to render aid to the rolled vehicle's driver. He was then struck by another vehicle. Section II of this WC-1 is almost completely blank and contains no medical information completed by a healthcare provider. This WC-1 was not completed until 4 months after the incident and almost 3 months after the claim was rejected. (Exhibit F.)

Claimant submitted medical records indicating he was transported via Air Evac Lifeteam to CAMC General (Exhibit G), hospitalized on May 4, 2021 (Exhibit H), received medical treatment, and had both a below knee amputation and above knee amputation of the left leg on May 11, 2021 (Exhibit I) and May 14, 2021 (Exhibit J), respectively.

Claimant submitted a photograph of the Employer's Visa card, a photograph of a fuel receipt for a purchase in Morgantown, West Virginia on May 4, 2021 at 7:47 p.m. with the Employer's visa, and a Pittsburgh, Pennsylvania hotel room receipt showing he checked in on May 3, 2021 at 9:26 p.m. and checked out on May 3, 2021[1] at 7:29 a.m. (Exhibit K.)

Claimant submitted pages 28, 29 and 31 of an Agreement Between Plumbers and Pipefitters Local Union #625 and Kanawha Plumbing-Heating-Cooling Contractors Association ("the Agreement") regarding travel expenses, travel time, and use of employer vehicles. (Exhibit L.)

Claimant submitted the November 2, 2021 deposition transcript of Mary Beth Johnson, the Employer's president. (Exhibit M.) Ms. Johnson testified the Employer is a member of the Kanawha Plumbing-Heating-Cooling Contractors Association. She testified the Agreement covers rate of pay, hours, and working conditions for journeymen and apprentices. She also testified the only way for the employees to get back to Charleston from Pittsburgh was in the Employer's van. Tools and materials were needed for the job in Pittsburgh, and those would come back in the van.

Claimant submitted an Affidavit of Leonard Ernie Bragg. (Exhibit N.) He stated he traveled with Claimant from Charleston to Pittsburgh to work for the Employer at a

[1] This was most likely a clerical error as it should have read May 4, 2021.

courthouse on May 3, 2021. He stated the Employer paid for his and Claimant's meals, fuel, and travel expenses on May 3 and 4, 2021. He also stated he and Claimant completed work at the courthouse for the day on May 3 then went to a hotel for an overnight stay. The next day, May 4, 2021, Mr. Bragg and Claimant returned to the courthouse at approximately 7:00 a.m. to work for the Employer. They worked at the courthouse until approximately 5:30 p.m. then loaded the worked van with tools and remaining materials to go back to Charleston. While Claimant was driving and Mr. Bragg was a passenger in the van, Claimant took evasive steering and braking action to keep a truck from striking the van. Specifically, Claimant steered the van off I-79 onto the shoulder of the southbound lanes. After checking rear and side view mirrors of the van, Claimant turned on the van's emergency flashers and he and Mr. Bragg exited the vehicle to render aid. Mr. Bragg went to the back of the van with his cell phone flashlight engaged to alert and stop oncoming traffic. Mr. Bragg stated in Paragraphs 38 and 39 that the time spent traveling to and from Pittsburgh is "compensable work time" and that he and Claimant were on duty working for the Employer when the crash events began on May 4, 2021.

Claimant also submitted a personal Affidavit stating that, on May 3, 2021, he drove a work van to Pittsburgh and worked at a courthouse. (Exhibit O.) The Employer paid for his meals, fuel, and travel expenses including an overnight hotel stay. Claimant and Mr. Bragg completed work for the day at the courthouse on May 3 then went to the hotel for an overnight stay. On May 4, 2021, Claimant returned to the courthouse at approximately 7:00 a.m. and worked until approximately 5:30 p.m. After completing the job, Claimant and Mr. Bragg loaded the work van and departed the courthouse for

Charleston. While traveling on I-79 south at approximately 9:00 p.m., Claimant saw a northbound white truck begin to flip and roll across the median into the southbound lanes of I-79. Claimant states he took evasive steering and braking action to keep the white truck from striking the work van Claimant was driving. He steered the van off I-79 onto the shoulder. After checking the rear and side mirrors of the van, he activated the emergency flashers of the van and then he and Mr. Bragg immediately exited the van to render aid. While Claimant rushed to the driver's door of the white truck, Mr. Bragg went to the back of the Employer's van with his cell phone flashlight engaged to alert, and hopefully stop, any oncoming southbound traffic. Claimant stated the time spent traveling to and from Pittsburgh "is compensable work time." He also stated that when the crash events occurred, he was on work duty. Additionally, he stated he is paid for travel time to and from the job site when he is traveling outside his home-work community job site.

In addition to these documents, Claimant submitted a Mountain State Insurance Claim File. (Exhibit P.) In the file, a May 4, 2021 note states "(e)mployee was off work traveling home in a company vehicle on I-79. He saw a car wreck in front of him. He pulled the company vehicle off onto the shoulder of the road, got out to see if he could help. He was struck by another car." A May 5, 2021 note states "Encova call with employer/Mary Beth: I spoke to Mary Beth Johnson (ph: 304.756.3788) at 4:01 p.m. She verified the claimant was driving a company vehicle home after his shift had ended when the accident occurred."

Also in the Mountain State Insurance Claim File is a May 10, 2021 note that states:

> Encova call to insured: I spoke to Mary Johnson (ph: 304.756.3788) at 2:04 pm, I explained i didn't understand the accident occurred in the Sutton area, not (sic) did I know it occurred 4 hours after his shift ended. I asked where the claimant was working on 5/4/21 and she said in Pittsburg (sic). They

went to Pittsburg (sic) on 5/3/21, the job was expected to last for 2 days, but they finished early and were on their way home. They are not paid for their travel time to and from the job site, but the company pays for the hotel rooms for the employees when they are working out of town.[2] The claimant was driving a company vehicle and co-worker Ernie Bragg was travelling (sic) with him. They were driving southbound on I-79 around the Sutton exit. A vehicle driving northbound on I-79 was veering while driving, crossed the median and stopped in the southbound fast lane of the interstate. They thought the driver had fallen asleep. There was no traffic behind them, so they backed the company vehicle up and got out to check on the driver. Ernie was at the back of the vehicle with a flashlight so traffic would see them. A tractor trailer saw them and slowed down, but a vehicle behind the tractor trailer darted around the tractor trailer, traveling 70 mph, and struck the claimant.

The Mountain State Insurance Claim File also contains a May 10, 2021 note that states:

> Encova call to witness Ernie Bragg: I spoke to witness and claimant's co-worker, Ernie Bragg (ph: 304.288.4444) at 3:21 pm. . . Ernie is unsure what time they actually left Pittsburg (sic), but said he remembered looking at his watch at 5:30 pm and they were still upstairs and were gathering their tools. He said they took 1 or 2 loads of tools to the van on a dolly and had to organized (sic) everything before they left the job site. I asked if he happen (sic) to text his wife when they left and he reviewed his messages and said he texted his wife at 5:54 pm and told her it looked like they'd be heading home soon. He said it may have been 6:30 pm by the time they got everything loaded and actually left. . . When the accident occurred, they were travelling (sic) southbound on I-79. They had passed the Sutton exit and were headed towards the Beckley exit. They saw a truck traveling north, veering into the median and barrel roll into the southbound side of the interstate and it came to rest in the passing lane of the southbound side, facing south. The claimant pulled off the interstate onto the right shoulder. There was no traffic coming behind them, so they backed up until they could see the disabled truck out the front windshield. Ernie said Tyler jumped out of the van and Ernie went to the back of the van to locate a flashlight, but he did not have time to look for one, so he used the flashlight on his cell phone to alert traffic.

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[2] During the underlying litigation of this workers' compensation claim, the Employer and Mary Beth Johnson were under the mistaken belief that payment for travel time to and from Pittsburgh was not owed to Claimant. At the time of Ms. Johnson's interview with Encova, she held this mistaken belief. However, after litigation of the workers' compensation matter concluded before the Office of Judges, the Employer and Mary Beth Johnson learned that in accordance with the Fair Labor Standards Act, Claimant's travel time to and from Pittsburgh for the job discussed in this brief is compensable work time. As a result, the Employer no longer holds the mistaken belief that Claimant was not owed compensation for his travel time in this instance.

Employer's Rebuttal Evidence

The Employer submitted Claimant's time card and Mr. Bragg's time card for May 3, 2021 and May 4, 2021. (Exhibits Q and R.) The Employer also submitted the First Report of Injury, which indicates Claimant was on his way home, driving a company vehicle, when he pulled off the side of the interstate to help another vehicle that wrecked, and he was hit by a car. (Exhibit S.)

The Employer submitted a November 8, 2021 Affidavit of Ernie Bragg in which he affirmed he is plumber/pipefitter for the Employer and Claimant is his co-worker. (Exhibit T.) He stated that he and Claimant worked a 10-hour day in Pittsburgh on May 4, 2021. After they finished work, they headed south on I-79 toward home.[3]

Mr. Bragg further stated in his affidavit that after he and Claimant saw a pickup truck wreck on the Interstate, Claimant pulled the van off the Interstate onto the shoulder, backed up, and parked. After parking the van, both Claimant and Mr. Bragg exited the van to see if they could help the driver of the wrecked pickup truck and stop traffic.

The Employer submitted portions of Mary Beth Johnson's deposition transcript. (Exhibit M.) In her deposition, she testified that she did not ask Claimant to get out of the van and go over to the vehicle. Instead, she testified that Claimant and Mr. Bragg should have called 911 immediately after witnessing a vehicle roll across the median into the southbound lanes. She testified they should have made sure they were clear of anything that could happen on the interstate with traffic coming. Ms. Johnson testified that

[3] Mr. Bragg also indicated it was his understanding that he and Claimant were no longer on the clock when they were traveling home from Pittsburgh, and that he and Claimant are not paid for driving time to and from job sites. As indicated above in Footnote 2, the Employer now understands that Claimant's travel time to and from Pittsburgh is compensable work time under the FLSA. As a passenger traveling outside normal working hours following an overnight assignment, Mr. Bryant was not paid for his travel time because the FLSA does not consider such time compensable.

Claimant's actions in leaving the van to render aid to the river of the pickup truck had nothing to do with the Employer's business.

SUMMARY OF ARGUMENT

The evidence shows Claimant left the duties of his employment when he exited the company vehicle and crossed I-79 to render assistance to the truck driver. He was injured as a result of this deviation from his employment. Therefore, Claimant was not injured as a result of his employment and the claim was properly rejected.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Employer submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

A. Standard of Review

The Intermediate Appellate Court "shall reverse, vacate, or modify [an] order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are Law Judge's findings are: (1) [i]n violation of statutory provisions; (2) [i]n excess of the statutory authority or jurisdiction of the Board of Review; (3) [m]ade upon unlawful procedures; (4) [a]ffected by other error of law; (5) [c]learly wrong in view of the reliable, probative, and substantial evidence on the whole record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." W. Va. Code §23-5-12a(b).

B. The ALJ committed an error of law by finding this claim is not precluded by the "going and coming" rule.

Judge Mazezka found Claimant was within the course of his employment because the journey was part of Claimant's job and the provision of the company van provided benefits to the employer not common to ordinary commuting trips.

"Under normal circumstances, an employee's use of a public highway going to or coming from work is not considered to be in the course of employment. The reasoning underlying this rule is that the employee is being exposed to a risk identical to that of the general public; the risk is not imposed by the employer." *Brown v. City of Wheeling*, 212 W. Va. 121, 125-26, 569 S.E.2d 197, 201-02 (2002). "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). A worker 'not engaged in performing the particular duties for which he was employed, or in something incidental thereto, is not in the course of his employment, even though he may be in the general sphere of it[.]" *Emmel*, 150 W. Va. at 282, 145 S.E.2d at 32-33. "When an employee engages in a major deviation from the business purpose of travel, workers' compensation for injuries suffered while traveling can be denied." Syl. Pt. 3, *Calloway v. State Workmen's Comp. Comm'r.*, 165 W. Va. 432, 268 S.E.2d 132 (1980). *See also Williby v. W. Va. Office Ins. Comm'r.*, 224 W. Va. 358, 363-365, 686 S.E.2d 9, 14-16 (2009) (holding the claimant's injury did not occur in the course of or as a result of her employment when she was injured while traveling across the street to get lunch. The employee was on a break from employment, she was not conducting business for the employer, the employer did not control what she

could do on her break, and she was exposed to the same risk as every other member of the public walking on the street.)

Although Claimant argues he was injured while working for the Employer at the time of his injury, the preponderance of the evidence shows he was not within the zone of his employment. Claimant and Mr. Bragg had completed their job duties in Pittsburgh. Even though Claimant was going home from work at the time of the accident, Claimant deviated from his employment when he left his company vehicle and walked across the interstate to assist the truck driver where he was struck by another vehicle and injured. He was injured after he deviated from his path home. At the time of his injury, Claimant was not within the zone of his employment and he was not engaged in performing the particular duties for which he was employed, or in something incidental thereto. When Claimant left the company van to render aid, he broke from any employment-related duties and he was no longer acting in the course of his employment. Therefore, Judge Mazezka was clearly wrong in finding that this claim is not precluded under the "going and coming" rule.

B. The ALJ incorrectly analyzed this claim under the positional risk theory of the rescue doctrine and the Good Samaritan doctrine.

Judge Mazezka committed multiple errors of law by incorrectly analyzing this claim under the positional risk theory of the rescue doctrine and the Good Samaritan doctrine, which have not been recognized by West Virginia courts in workers' compensation jurisprudence. Citing outdated case law from other jurisdictions and a treatise, Judge Mazezka stated that Claimant was confronted with a true emergency - taking evasive action to avoid the truck, observing the driver whose vehicle crossed the median was unconscious, and being the only person at the scene who could initiate rescue and

attempt to prevent further injury. He found Claimant was thrust into contact with the emergency situation by his employment requirements of travel, and that his employment brought him to a place where it was probable that he would have a natural reaction to take action to rescue the truck driver. He also found that Claimant's actions partially benefitted the Employer because he acted consistently with the requirements of W. Va. Code §17C-4-1 and §17E-4-3, which, as will be explained below, do not apply to this case.

A claimant in a workers' compensation proceeding has the burden of proving his claim. *See e.g.*, Syl. pt. 2, *Clark v. State Workmen's Compensation Com'r*, 155 W. Va. 726, 187 S.E.2d 213, 214 (1972); Syl pt. 1, *Staubs v. S.W.C.C.,* 153 W. Va. 337, 168 S.E.2d 730 (1969). West Virginia Code § 23-4-1 provides benefits to employees who receive personal injuries in the course of and as a result of their covered employment. Three elements must coexist in compensation cases: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 798-799, 172 S.E.2d 698, 700 (1970). "In determining whether an injury resulted from claimant's employment, a causal connection between the injury and employment must be shown to have existed." Syl. Pt. 3, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965). Furthermore, "[w]hether an injury occurs . . . resulting from the employment so as to be compensable under the workmen's compensation act depends upon the particular facts in each case." *Id.* at Syl. Pt. 2.

West Virginia courts do not recognize the positional risk theory, rescue doctrine, or Good Samaritan doctrine in the context of workers' compensation cases, nor has the

West Virginia Legislature enacted such statutes in regard to workers' compensation claims. In fact, Judge Mazezka cited no West Virginia law in support of his analysis of this case under the positional risk theory, rescue doctrine, or Good Samaritan doctrine.

The most relevant West Virginia case for purposes of evaluation of this claim is a 2013 West Virginia case, *Morton v. W. Va. Office of Ins. Comm'r, et al.*, in which a secretary for Seneca Health Services, Inc. filed a workers' compensation claim for injuries sustained when she acquiesced to a coworker's request to help lift a box of maternity clothes which had been left in the secretary's office. 231 W. Va. 719, 721, 749 S.E.2d 612, 614 (2013). The Office of Judges "found that the employer derived no 'special benefit' from the removal of the box from the premises and that moving the box was 'a voluntary act on the part of the claimant to assist a coworker in a personal errand." *Id.* at 721-722, 614-615. The OOJ based its decision on *Williby* and found "there was no 'expressed or implied requirement that the [secretary] assist her coworkers" in personal convenience activities even though the secretary believed it was her duty as a support staff member to assist staff members in any tasks with which they needed or requested assistance. *Id.* The Workers' Compensation Board of Review affirmed the OOJ's decision and the secretary appealed to the West Virginia Supreme Court of Appeals. *Id.* at 722, 615.

On appeal, the employer argued the secretary's "job title and outlined duties in no way encompass assisting employees with lifting items, much less items of a wholly personal, non-work-related nature[.]" *Id.* The Court found no question that the injury occurred in the course of employment in terms of time, place, and circumstances[.]" *Id.* at 723, 616. She was on her employer's premises, during her regular work hours, tending

to her duties when the coworker requested her assistance in lifting the box. *Id.* However, the Court noted that "[i]njuries received by an employee while voluntarily engaged in some activity having no relation to, or connection with, the employment, and undertaken solely for the . . . benefit of the employee or a third person, are ordinarily not compensable[.]" 82 Am.Jur.2d Workers' Compensation § 257 (2003). *Id.* The Court also noted that the instrumentality of injury - the box of maternity clothes and the function of taking them to the [coworker's] car - had nothing whatsoever to do with [the employer's] business or workplace, aside from the fact that the box fortuitously happened to have been left there for the convenience of the [coworker]. *Id.* at 725, 618.

In Footnote 6, the Court stated that it did "not find this case amenable to analysis under the 'Good Samaritan doctrine' recognized by some courts in assessing compensability of injuries sustained while rendering aid to others." *Id.* at Fn. 6. The Court noted that "[i]n cases where [the Good Samaritan] doctrine has been applied by other courts to find compensability, the aid rendered is of an emergent nature and employee's 'conditions of employment' positioned him or her to undertake the rescue." (internal citation omitted) The Court further found that "[e]ven 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.'" *Id.* at FN 6 citing *Roberts v. Burlington Ind., Inc.*, 364 S.E.2d 417, 421 (N.C. 1988) which held that "[a]n 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."[4]

[4] In *Roberts*, a furniture designer employee returning home from a business trip was struck and killed by a car as he assisted an injured pedestrian on an I-85 entrance ramp. *See* 364 S.E.2d 417 at 418-419. The

The Court found "no particular benefit to [the employer] in [the secretary's] admittedly kind, but purely gratuitous, gesture of assisting her co-worker with the box." *Id.* at 725, 619. Thus, the Court found "an injury which occurs while gratuitously assisting a co-employee with a task of a purely personal nature, involving no instrumentalities of employment and without any alleged involvement of or benefit to the employer, does not 'result[] from' employment." *Id.* at 726, 619. The rejected claim was affirmed. *Id.*

The Supreme Court of Appeals of West Virginia also cited *Olde South Custom Landscaping, Inc. et al. v. Mathis*, 494 S.E.2d 14 (Ct. App. Ga. 1998) in Footnote 6 of *Morton* when discussing the Good Samaritan doctrine. In *Mathis*, the injured employee had stopped to assist stranded motorists he encountered while performing employment duties for his employer. *Id.* at 15. Specifically, the employee was a foreman and was required to travel to various locations for jobs then return to his employer's office. *Id.* at 16. On the day of his injury, the employee had completed his work and was returning to the employer's office in a company truck. *Id.* at 15-16. He saw an elderly couple stranded on Interstate 85, so he exited the interstate and returned to offer them assistance. *Id.* at 16. While assisting, the employee was injured. *Id.* Workers' compensation benefits were denied by an Administrative Law Judge who found the employee's "'injuries did not arise out of his employment, but out of a deviation from it.'" *Id.* The ALJ found the employer did not receive a benefit from the employee's deviation from employment. *Id.* at 16. The ALJ "refused to recognize a 'good samaritan' exception to the deviation rule,' holding that such had to be enacted by the legislature." *Id.*

Supreme Court of North Carolina found the employee's death did not arise out of his employment; there was no evidence that anyone involved in the accident other than the employee had any connection to the employer. *Id.* at 421. The employee's offer of aid was purely prompted by humanitarian concern for the injured pedestrian. *Id.* at 422.

On appeal, the Court of Appeals of Georgia held that the state's Workers' Compensation Act could not be "liberally construed so as to place the burden on employers to compensate for injuries resulting when an employee decides, due to a sense of decency, compassion or morality, to step away from his employment duties to assist someone in need." *Id.* at 17. The court found that although it agreed "with other jurisdictions that certain rescue attempts are mandated by ordinary standards of humanity and that the rescuer who is injured should not be punished for having made the attempt, whether employers are to bear the costs incurred when their employee makes the rescue attempt is a matter best left for our Legislature." *Id.* at 18. The court held that "'[a]bsent the Good Samaritan Rule, [the employee's] injuries are not compensable as they did not arise out of his employment and his actions were a deviation from his employment duties. *Id.* (internal citation omitted) The employee "temporarily abandoned his employment by exiting the intestate and turning around to help other motorists. This was an act of his own that was not connected to [the employer's] business of landscaping." *Id.* The court found there was no evidence that the employer benefitted by the employee's actions. *Id.* Thus, the court held the injuries were not compensable under the workers' compensation statute. *Id.*

In the claim at issue here, Claimant is a plumber/pipefitter/HVAC technician for the Employer. His customary job duties consist of performing HVAC service technician work, servicing boilers, repairing water leaks, etc. There is no evidence that Claimant is an EMT, nurse, physician, or any other type of medical provider.

Judge Mazezka erred in finding that Claimant's actions in rendering assistance to the truck driver partially benefitted the Employer. He found that Claimant's actions

provided the benefit of a shield to the Employer's lack of direction on what to do if he were to be in such a situation. However, Ms. Johnson testified that the Employer derived no special benefit from Claimant exiting and leaving his van to assist the wrecked vehicle. In fact, Ms. Johnson testified that she would not want her employees to put themselves in that type of danger. She testified the employees should have called 911 immediately after witnessing the truck roll across the median, and that Claimant's actions in leaving the van to render aid to the driver of the truck had nothing to do with the Employer's business. Claimant's actions were voluntary and his job title and duties as an HVAC tech/plumber in no way encompass exiting his vehicle to render aid to injured motorists on I-79. The Employer did not instruct Claimant to render assistance or aid to non-coworkers, wrecked vehicles, or other motorists on the interstate. The Employer never told Claimant to stop his work van and exit the van to try to rescue others in an emergency, nor should the Employer, a heating and plumbing company, bear the responsibility of teaching its employees to react to vehicular accidents on the interstate. This is completely unrelated to the Employer's business. Judge Mazezka's finding ignores the preponderance of evidence and West Virginia law. His finding is simply too broad and overstates the Good Samaritan doctrine that is discussed in the cases cited by the West Virginia Supreme Court of Appeals in *Morton*.

Claimant's injuries were sustained when he was voluntarily engaged in rendering aid to a motorist, an activity that has no relation to or connection with his employment, and which was undertaken solely for the benefit of the driver of the wrecked truck. The instrumentality of injury - a car hitting Claimant while he stood in the interstate rendering aid to a truck driver - had nothing whatsoever to do with the Employer's business or

workplace aside from the fact that Claimant was driving home from work in a company van when he saw an accident and swerved to avoid being involved.

Similar to *Morton*, this case is not amenable to the Good Samaritan doctrine and Judge Mazezka erred in finding the Good Samaritan doctrine applies because Claimant's actions of rendering aid to the truck driver did not benefit the Employer. There is no evidence that the truck driver had any connection to the Employer. Like the secretary in *Morton*, here Claimant's injury occurred while gratuitously attempting to render aid to another.[5] Claimant's actions involved no instrumentalities of employment - there is no evidence that he used his work tools or the work van to render aid to the truck driver. In fact, Claimant left the van along with its tools and materials on the side of I-79 to go help another motorist who was wholly unconnected to the Employer's business. These actions neither involved nor benefitted the Employer. Although Claimant undoubtedly attempted to rescue the truck driver out of a sense of human compassion, the Employer should not bear the costs incurred by Claimant's injury during his rescue attempt. Furthermore, whether or not such a cost should be imposed on employers in these situations is a matter to be determined by our Legislature.

Moreover, a positional risk theory should not apply here. West Virginia uses an increased risk analysis, not the positional risk theory. In the *Roberts* case mentioned by the West Virginia Supreme Court in *Morton*, *supra*, the North Carolina court used an "increased risk" analysis and stated that the employee's "employment did not increase the risk that he would be struck by a car while shielding an injured stranger with no relation to the employment. The risk was common to the neighborhood, not peculiar to the work."

[5] A difference between this claim and *Morton* is that Claimant rendered aid to a third-party motorist while the secretary in *Morton* rendered aid to a coworker.

Id. at 422-423. Thus, the Court ordered an order be entered denying workers' compensation benefits. *Id.* at 424. It held that "[t]o grant compensation here would effectively remove the 'arising out of the employment' requirement from the [Workers' Compensation] Act." *Id.*

Similarly, here Claimant's employment as an HVAC tech did not increase the risk that he would veer off I-79 to avoid a wrecking truck and be struck by a car while aiding the truck driver who has no relation to the employment. Contrary to Judge Mazezka's findings, this risk is common to anyone in the general public traveling on I-79. It is not peculiar to Claimant's work for the Employer. Claimant's injuries arose out of an altruistic deviation from his employment. When Claimant backed up his van, parked his van, and exited his van to render aid to the wrecked truck driver in the middle of I-79 at night, he temporarily abandoned his employment to render acts unconnected to his employment. There is no evidence that the Employer benefitted from Claimant's actions. Thus, the preponderance of the evidence shows that Claimant's injury did not result from his employment, and the claim was properly rejected by the Encova.

C. The ALJ incorrectly interpreted the requirements of W. Va. Code §17C-4-1 and §17E-4-3 and applied them to this claim.

Judge Mazezka was clearly wrong in finding that Claimant's actions partially benefitted the Employer because his actions were consistent with the requirements of W. Va. Code §17C-4-1 and §17E-4-3. This statute, known as Erin's Law, was enacted to prevent hit-and-run accidents; to prevent a crash perpetrator from fleeing the scene of an accident he caused. It requires individuals who are "involved in a crash" to stay at the scene, provide information, and render "reasonable assistance" to an injured person "if

physically able to do so." An exception applies if the individual leaves the scene to obtain emergency help for the injured person.

Judge Mazezka incorrectly interpreted and applied these statutory requirements to the situation in this claim, finding that Claimant had to take evasive action to avoid a collision with the truck, and that Claimant had to render assistance to the truck driver or risk criminal penalty under the statute. This is clearly wrong. The preponderance of the evidence shows Claimant was not involved in a crash or collision with the truck and the statutory requirements do not apply. The company van Claimant was driving did not collide with the truck. Additionally, there is no mention of evasive action by Claimant in the Traffic Crash Report, the May 4, 2021 WC-1, the Employer's First Report of Injury[6], the Mountain State claim file,[7] or the November 8, 2021 Affidavit of Ernie Bragg [8]. In fact, the Traffic Crash Report identifies Claimant as a bystander who "observed the white truck wreck and stopped to try and help [the] driver." Judge Mazezka ignored the preponderance of the evidence regarding this fact.

Even if Claimant had to swerve for fear of the truck coming into his lane, Claimant did not have to back up his van, park the van on the shoulder of I-79, exit the van, and walk across I-79 in the dark to render aid to the other vehicle that never even touched Claimant's work van. Whether Claimant swerved the van or took evasive action to avoid

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[6] (Claimant was on his way home, driving a company vehicle, when he pulled off the side of the interstate to help another vehicle that wrecked.)

[7](Claimant saw a car wreck in front of him and pulled the company vehicle off onto the shoulder of the road. Mr. Bragg reported to Encova that he and Claimant saw a truck traveling north veer into the median, barrel roll into the southbound side of the interstate, and come to rest in the passing lane of the southbound side, facing south. Mr. Bragg stated Claimant pulled off the interstate onto the right shoulder.)

[8] (After Mr. Bragg and Claimant saw a truck wreck on the interstate, Claimant pulled the van off the interstate onto the shoulder, backed up, and parked.)

being hit by the truck is irrelevant. What is relevant, however, is that the van Claimant was driving was not hit by the white truck and was therefore not "involved in a crash."

Moreover, even if Claimant had been "involved in a crash" with the truck, the statute does not require him to put himself in danger to render aid. It specifically states that aid should be rendered if the person is "physically able to do so." In fact, the statute specifically allows an exception for Claimant to leave the scene to get emergency help for the driver of the truck. Claimant could have stayed in his vehicle on the side of I-79 and called 911 instead of putting himself in danger. Thus, the statute does not apply to this claim and Judge Mazezka committed an error of law by incorrectly interpreting and applying it here. He discounted the preponderance of the evidence which clearly shows Claimant was not involved in a crash with the truck.

CONCLUSION

For all the foregoing reasons, the Employer respectfully requests this Court reverse the September 12, 2022 Office of Judges decision that reversed the June 9, 2021 rejection of the claim.

Respectfully submitted,

WEST VIRGINIA HEATING & PLUMBING CO.

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Heather N. Haynes, Encova

STATE OF WEST VIRGINIA
INTERMEDIATE COURT OF APPEALS

WEST VIRGINIA HEATING AND PLUMBING CO.,

Petitioner,

v.

TYER J. CARROLL,

Respondent.

Intermediate Court No.:
JCN: 2021022612
Claim No.: 2021011505
DOI: 05/04/2021
OOJ Order: 09/12/2022

CERTIFICATE OF SERVICE

I, Charity K. Lawrence, do hereby certify that the foregoing "**BRIEF ON BEHALF OF PETITIONER WEST VIRGINIA HEATING AND PLUMBING CO.**" has been served upon all parties via electronic filing on this 12th day of October, 2022 as follows:

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