THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

Jonathan Miller (decedent), Claimant,

Petitioner

v.

JCN No. 2020023628
SC No. 22-0103

Buckeye Community Hope Foundation, Employer,

Respondent.

BRIEF ON BEHALF OF RESPONDENT BUCKEYE COMMUNITY HOPE FOUNDATION

Lisa Warner Hunter *WV Bar ID # 7523*
WILLIAM J. FERREN & ASSOCIATES
Mailing Address:
PO Box 2903
HARTFORD, CT 06104-2903

Counsel for Respondent,
Buckeye Community Hope Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. NATURE OF THE PROCEEDING

This proceeding arises out of the claimant's appeal from the Board of Review's order dated January 5, 2022. The Board of Review reversed and vacated the Office of Judges' July 14, 2021 decision and reinstated the May 8, 20210 order denying death/dependent's benefits. The claimant/dependent, Jessica Miller, completed a West Virginia Workers' Compensation Application for Fatal Dependents' Benefits, which was undated. Ms. Miller is the wife of the decedent, Jonathan Miller, who died on March 30, 2020 in a single vehicle accident. The claim administrator issued an order dated May 8, 2020 denying the claim for dependent's benefits. The order indicated that the fatal accident did not occur in the course of and result from the decedent's employment as he had completed work at the job site and was traveling on the main road home. The claimant/dependent protested this order. The Office of Judges issued a decision dated July 14, 2021, which approved the claim for dependent's benefits. The employer filed an appeal from the July 14, 2021 decision to the Board of Review. The Board of Review issued an order dated January 5, 2022 reversing and vacating the Office of Judges' Decision. The claimant has filed an appeal from the January 5, 2022 order to this Honorable Court.

II. STATEMENT OF THE FACTS

The decedent, Jonathan Miller, died on March 30, 2020. At the time of the decedent's death, he was employed as a carpenter by Buckeye Community Hope Foundation.

The State of West Virginia Uniform Traffic Crash Report Indicates that the crash occurred on March 30, 2020 at 7:12 PM. The place of the accident was Spring Dale. The GPS coordinates were 37.91520 latitude and -80.82411 longitude. It was a single vehicle crash and there were no environmental contributing circumstances as the weather was clear and the roadway surface (asphalt) condition was dry. The first harmful event was shoulder and collision with a tree. The

accident did not occur in a school zone or a work zone. The specific details regarding the accident are as follows:

> VEHICLE ONE WAS TRAVELING SOUTH ON STATE ROUTE 20 AT A HIGH RATE OF SPEED. VEHICLE ONE WAS TRAVELING THROUGH A RIGHT HAND CURVE. VEHICLE ONE BEGAN TO PASS ANOTHER VEHICLE THAT WAS TRAVELING SOUTH ON STATE ROUTE 20. DURING THE COMMISSION OF THE PASS VEHICLE ONE TRAVELED OFF THE LEFT EDGE OF THE ROADWAY SURFACE. THE DRIVER OF VEHICLE ONE TURNED THE WHEEL TO THE RIGHT TO REENTER THE ROADWAY SURFACE. AS A RESULT THE REAR OF VEHICLE ONE BEGAN TO SLIDE AROUND TO THE LEFT PLACING VEHICLE ONE IN A YAWL. VEHICLE ONE YAWL SKID APPROXIMATELY THREE HUNDRED AND SIXTY FEET AND STRUCK A TREE IN THE REAR DRIVER DOOR. THE IMPACT CLIPPED THE TREE IN HALF AND FORCED THE REAR OF VEHICLE ONE TO SKID AROUND TO THE RIGHT. VEHICLE ONE THEN TRAVELED INTO A SECOND TREE WHERE IT CAME TO A REST. THE IMPACT CAUSED VEHICLE ONE TO CATCH FIRE.

(See, Police Report at pg. 2) The roadway description was two-way, not divided. The horizontal alignment was straight and vertical alignment was level. There was no underride or override. The vehicle maneuver was overtaking/passing. The crash avoidance maneuver was braking - skidmarks evident. The crash event was overturn/rollover. The sequence of events was ran off road left, tree (standing) and fire/explosion. The driver condition at the time of crash was apparently normal. The vehicle ran off the road. He operated vehicle in erratic, reckless, or careless manner. He overcorrected/oversteered. Alcohol was not suspected. Drug use was not suspected. The driver was not distracted. The citation was for reckless driving; driving to endanger; negligent driving. Speed related offenses were failure to maintain control of vehicle. The front airbag deployed. He was not trapped or ejected. Medical transport was "other." The time of death was 2023 and place of death was at the scene. A statement was taken from Jason Bowen DOB 4/30/84 at 1941 hours at the scene. He indicated they were traveling home from

work. He indicated that Jonathan passed him on the left. His truck got off on the side of the burm and truck lost control and slammed into a tree. Jason pulled off to the side and ran to the truck and it was on fire. He pulled Jonathan from the truck and to the other side of the road and called 911. He was traveling about 60 mph. When asked why Jonathan passed him in a no passing zone, he stated "he was just rolling on messing around i guess." He did not know how fast vehicle one was going, but indicated he was going a lot faster than him. He was asked if they were racing one another and he said no.

The West Virginia Department of Health and Human Resources Medical Examiner's Certificate of Death was certified on April 7, 2020. The surviving spouse was Jessica O'Dell Miller. The death occurred on a roadway on State Route 20 in Springdale, WV. The date of death was March 30, 2020. The immediate cause of death was blunt force injuries from a motor vehicle crash. The time of injury was 1920. The injury occurred from lost control of vehicle – struck tree. The medical examiner, Jimmy Sadler, signed the death certificate on March 30, 2020.

The claimant/dependent, Jessica Miller, completed a West Virginia Workers' Compensation Application for Fatal Dependents' Benefits. The signature is not dated. Jonathan Miller's home address is 1763 Hump Mt Rd Meadow Bridge, WV, 25976. His employer was Buckeye Community Hope Foundation. She indicated that "[i]mmediately upon departure from the construction project site, my husband began to travel home. He proceeded on the same route that he travels daily. He lost control of his truck and hit a tree, dying instantly." She provided the required documents regarding the decedent's prior divorce, their marriage certificate, children's birth certificates, and the above-referenced death certificate.

The claim administrator issued an order dated May 8, 2020 denying the claim for dependent's benefits. The order indicated that the fatal accident did not occur in the course of and

result from the decedent's employment as he had completed work at the job site and was traveling on the main road home. The claimant/dependent protested this order.

The dependent, Jessica Miller, filed a protest letter dated July 20, 2020 and included a statement from herself and the decedent's co-worker, Robert Bowen. Ms. Miller's statement indicated that the decedent was a superintendent/contractor for Buckeye Community Hope and worked full-time. On the day of his death, he had been working at the Sewell Landing project in Rainelle, WV. His job responsibilities included using his vehicle to transport tool [sic] to the job site daily. Buckeye Community Hope provided the decedent with a credit card to be used for his fuel for the commute to and from work. In the afternoons, the decedent would complete work time sheets from home. At the end of each week, he sent the total time for each employee to his supervisor from home. Additionally, he took work related calls in the evenings after arriving home and on weekends. The employer reimbursed him for his cell phone bill monthly. She signed this statement on July 22, 2020.

Mr. Bowen's one sentence statement was signed, but not dated. He states that he worked with the decedent as superintendents and they carry tools to and from work in addition to taking phone calls and doing paperwork at home.

The claimant filed the application for benefits referenced above. She also filed 20 pages of copies of text messages starting on October 4, 2019. The messages establish that the decedent submitted time cards for the employees to Kelly Seif (KS on the message) through text message. There are also messages to/from the decedent and Kelly regarding supplies that have been received and need to be picked up, an employee who was injured on the job one day, and other work-related issues. There are also work texts between the decedent and Francisco, Jeff, Bill Stidham, and Derrick. There is a message between the decedent, Bill, and one other that is not legible talking

about the upcoming Governor's announcement on March 17, 2020, and the possible effect on travel and work. That was the most recently dated text filed by the dependent.

The claimant also filed a Sprint printout of the call log listing an account number. The call log covers from January 25, 2020 through March 20, 2020. The documents include an account number, but no name for the account holder. It appears to be a printout for the call log for phone number 304-228-6646.

Mr. William Stidham completed an affidavit, which he signed on April 6, 2021. He indicated that he was employed by Buckeye Community Hope Foundation "Buckeye" as a construction manager who oversees all projects in West Virginia. Buckeye is a nonprofit corporation developing and facilitating affordable housing for low-income families in several states. He worked directly for Buckeye from August 13, 2019 through October 15, 2020. He indicated that Jonathan Miller worked for Buckeye as a working superintendent/carpenter. Mr. Miller was hired by Buckeye on September 9, 2019. Mr. Miller worked 40 hours per week plus overtime. On March 30, 2020, Mr. Miller worked at the Sewell Landing Apartments located at 364 Pennsylvania Avenue, Rainelle, WV 25962. Mr. Miller left the work site on March 30, 2020 in his Ram 2500 truck at between 7:00-7:10 p.m. He was traveling south on Route 20, which is a two-lane highway. He spoke with Mr. Bowen who was driving in front of Mr. Miller. He indicated that Mr. Miller was passing on the left when his left back tire went too far over the roadway and the back tire dropped off of the pavement. This caused Mr. Miller's vehicle to go out of control, strike a tree, and catch on fire. No other vehicles were involved. Mr. Bowen advised Mr. Stidham that he and Mr. Miller were on their way home following work. He and Amos Hicks were first on the scene and pulled Mr. Miller out of his vehicle. He explained that Mr. Miller was traveling on the main road that runs through Rainelle, West Virginia at the time of the accident. This road is

the regularly traveled road by the general public. Mr. Miller was not on a road that is required to travel for entering or exiting the work site at the time of the accident on March 30, 2020.

The employer introduced the google map printouts showing the directions from the work site at 364 Pennsylvania Avenue in Rainelle, WV, to the site of the accident at 2502 Sewell Creek Road, Rainelle, WV. This shows that the accident occurred on Rout 20 about 5.9 miles from the work site. The directions from the site of the accident to the decedent's home address are also included in the google maps printout. This shows that the decedent was still on Route 20 that leads to his residence, which was another 14.4 miles on Route 20.

The Office of Judges, Administrative Law Judge J. Marty Mazeska, issued a decision dated July 14, 2021 reversing the May 8, 2020 order denying the claim for dependent's/death benefits. Administrative Law Judge Marty Mazeska stated that there were several bases for approving the claim for fatal benefits based on the fact that the employer reimbursed the claimant for gas to drive his personal pickup truck to/from work and to transport tools to/from the worksites. Judge Mazeska refused the employer's argument that the death did not occur in the course of and result from the decedent's employment since he was simply driving home from work on the date and at the time of the MVA. Judge Mazeska determined that part of his responsibility as a superintendent was "to transport tools on a daily basis to and from the Buckeye work site." This was performed with his personal pickup truck for which the employer provided a credit card "to pay for fuel attendant to his going to and coming from the work site." He concludes that this makes the journey from home to the work site part of the job. He added that this provides significant incidental benefits to the employer since they do not have to purchase vehicles to accomplish these tasks, carry auto insurance on such vehicles, or pay expenses for vehicle maintenance. Based on the significant incidental benefits to the employer, he states that the decedent was within the scope of his employment at the time of the MVA. Judge Mazeska further states this is compensable under

the "payment for expense of travel rule" since the claimant drove a considerable distance, 29 miles, to get to and from work. He states the employment thus includes travel as a substantial part of the services performed by the decedent.

Judge Mazeska also states this dependent's claim is compensable under the "employer's conveyance rule" since the vehicle is a mandatory part of the work environment as he is compensated for making it available. Judge Mazeska considers this a major piece of equipment devoted to the employer's purpose, so the journey is part of the job. Judge Mazeska also states that the decedent performed substantial work for the employer after leaving the construction site since he worked on timesheets at home. He states that the text messages sent on several dates show that "most" of the timesheets were sent by the decedent to his supervisor on a Friday. "It is found likely that Mr. Miller was returning home to do clerical work for Buckeye on March 30, 2020." The employer filed an appeal from the July 14, 2021 decision to the Board of Review.

The Board of Review issued an order dated January 5, 2022 reversing and vacating the Office of Judges' July 14, 2021 Decision. The Board acknowledged the fact that the decedent died on March 30, 2020 in a single vehicle crash at 7:12 PM. The Board discussed the fact that the general rule is that traveling to and from work on a public highway is not considered in the scope of employment; however, there are exceptions to the rule. The place of the injury may be 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 and returning from work. The Board cites a case from 1998, Courtless v. Joliffe, 203 W.Va. 258, 263, 507 S.E.2d 136, 141, noting that various nuances of the rule may serve to alter its application where additional evidence exists linking the employer to the accident. The Board determined that the employer is not linked to the accident. The Board stated further that "Mr. Miller's work conditions do not qualify as exceptions to the 'going and coming rule.' Even if they do qualify as exceptions, Mr. Miller's actions while driving home from work on March 30, 2020, establish a

major deviation from any business purpose and an abandonment of his employment." The Board discussed the fact that the decedent was traveling on a two lane road and passed his co-worker at a high rate of speed. This was a no-passing zone. The traffic report cites the decedent's actions as erratic, reckless, or careless manner. The Board explained that the traffic report shows that Mr. Miller's actions while driving home on March 30, 2020 were a major deviation from the employer's business. The Board concluded that "[t]he deviation was so substantial that he is deemed to have abandoned any business purpose." The Board determined that his death did not occur in the course of and resulting from his employment. The claimant has filed an appeal from the January 5, 2022 order to this Honorable Court.

III. ISSUE

WHETHER THE BOARD OF REVIEW WAS CLEARLY WRONG TO REVERSE THE ADMINISTRATIVE LAW JUDGE'S DECISION DATED JULY 14, 2021 WHICH REVERSED THE CLAIMS ADMINISTRATOR'S ORDER DATED MAY 8, 2020 ORDER DENYING THE CLAIM FOR DEPENDENT'S BENEFITS WHERE THE DECEDENT WAS A WORKING SUPERINTENDENT/ CARPENTER FOR THE EMPLOYER; WHERE THE DECEDENT WAS CURRENTLY WORKING FOR THE EMPLOYER AT A JOB SITE IN RAINELLE, WV; AND WHERE THE DECEDENT WAS DRIVING ON THE MAIN ROAD THROUGH RAINELLE, WV, AT THE TIME OF THE SINGLE VEHICLE CRASH CAUSED BY HIS DRIVING OVER THE SPEED LIMIT, PASSING IN A NO PASSING ZONE, AND HITTING HIS TIRE ON THE CURB?

IV. ARGUMENT

The Board of Review was not clearly wrong to reverse and vacate the Office of Judges' July 14, 2021 decision and reinstate the May 8, 2020 order denying death/dependent's benefits because the Administrative Law Judge was clearly wrong to approve dependent's benefits since the decedent was driving recklessly on the main road through town after leaving work and was on his way home. Accordingly, the Board's order should not be disturbed on appeal.

In accordance with the foregoing statutory directives and case law, and in recognition of the fact that it is now claims administrators, and not the Workers' Compensation Commission, who make initial rulings with respect to workers' compensation claims, this Court now expressly holds that, when reviewing a decision of the West Virginia Workers' Compensation Board of Review ("the Board"), this Court will give deference to the Board's findings of fact and will review de novo its legal conclusions. The decision of the Board may be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong. Moran v. Rosciti Constr. Co., LLC, No. 17-0993, 2018 WL 2769077 (W. Va. June 4, 2018).

The Board of Review shall reverse a final order if the substantial rights of the petitioner have been prejudiced because the Administrative Law Judge's findings are (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or chara :terized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 23-5-12(b)(2005).

When the Office of Judges performs its duty as trier of fact and reviews the evidence of record in this claim, it is required to do so under the preponderance of the evidence standard set forth by statute. West Virginia Code § 23-4-1g, as amended by S. B. 2013 (2003) states:

> (a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on 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, mate ·iality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue 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. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.
>
> (b) Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

W. Va. Code § 23-4-1g (2003).

The Board properly reversed and vacated the Administrative Law Judge's decision since the Judge clearly erred in reversing the May 8, 2020 order denying the claim for dependent's benefits based on the fact that the decedent was driving home after completing work for the day, was traveling on the main road through Rainelle, WV, and was involved in a single vehicle accident that occurred when he attempted to pass in a no passing zone. The decision to accept this claim despite the fact that the decent was simply travelling home after work, was recklessly driving an excessive speed and passing in a no passing zone, and was not in the course of his employment was clearly wrong and severely prejudiced the employer.

W.Va. Code §23-4-10 provides that in case a personal injury, other than occupational pneumoconiosis or other occupational disease, suffered by an employee in the course of and resulting from his or her employment, causes death, and disability is continuous from the date of the injury until the date of death, or if death results from occupational pneumoconiosis or from any other occupational disease, the benefits shall be in the amounts and to the persons as follows:

> . . . (b) If there are dependents as defined in subdivision (d) of this section, the dependents shall be paid for as long as their dependency continues in the same amount that was paid or would have been paid the deceased employee for total disability had he or she lived. The

> order of preference of payment and length of dependence shall be as follows:
>
> (1) A dependent widow or widower until death or remarriage of the widow or widower, and any child or children dependent upon the decedent until each child reaches eighteen years of age or where the child after reaching eighteen years of age continues as a full-time student in an accredited high school, college, university, business or trade school, until the child reaches the age of twenty-five years, or if an invalid child, to continue as long as the child remains an invalid. All persons are jointly entitled to the amount of benefits payable as a result of employee's death;

"[T]he Commissioner shall disburse the workers' compensation fund to the employees. . . [who] have received personal injuries in the course of and resulting from their covered employment. . . ." W. Va. Code § 23-4-1 (1999).

Injuries arising from the ordinary use of streets and highways do not result from employment of the injured workman and are not compensable when they occur from causes to which all persons travelling the street are equally exposed, unless such use is required of the employer in the performance of his duties for the employer, was stated by our Supreme Court in Buckland v. State Compensation Comm'r. 175 S.E. 785, 115 W.Va. 323 (W.Va. 1934).

In general, "[u]nder 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, 569 S.E.2d 197, 201 (2002). 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 participation in such 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. Id.

This Court addressed a similar issue in Williby v. West Virginia Insurance Commissioner, 224 W.Va. 358, 686 S.E.2d 9 (2009). In Williby, an employee was injured when she fell in the middle

of the road on uneven pavement and injured her shoulder. 224 W.Va. at 360. The employee worked as a bank teller and had clocked out for a fifteen-minute break to grab some lunch during a late morning break on a day when the bank was understaffed. Id. The Court upheld the Board of Review's ruling that the employee had not established that she was on a "special errand" and she was not injured in the course of and resulting from her employment. The Court outlined that an exception to the "going and coming" rule, which states that injuries occurring while going to or coming from work, while not on the premises of the employer, are not compensable, is the "special errand" exception. Id. at 362-363. The "special errand" exception is as follows:

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

Id. at 363; Harris v. State Workmen's Comm'r, 158 W.Va. 66, 70-71, 208 S.E.2d 291, 293-94 (1974). In Williby, the employee stated that she fell because of uneven pavement on a public street, she was not conducting business for the bank at the time of the injury, and the bank did not have any control over what she could, or could not do, on her break.

This Court addressed the issue of a deviation from work in Calloway v. State Workmen's Compensation Comm'r, 268 S.E.2d 132, 165 W.Va. 432 (W.Va. 1980). At Syllabus 2, the Court explained where the employee deviates from the employer's business, he may be denied compensation if the injury occurs during the deviation, unless the deviation is so slight that the business purpose is not interrupted. Once the employee ceases the deviation and returns to the employer's business, a subsequent injury is ordinarily compensable.

The issue in the subject claim was the dependent's protest to the May 8, 2020 order denying the claim for dependent's benefits. The basis of the denial was that the fatal accident did not occur in the course of and result from the decedent's employment as he had completed work at the job site and was traveling home on the main road. The drive home after the end of the workday is not covered as this is coming and going from work and is excluded from workers' compensation. An exception to this rule is the "special errand exception" discussed by the Court in Williby.

The dependent completed an application for dependent's benefits based on the March 30, 2020 accident. On the application, she indicates that the decedent had left the job site for the day and was heading home on the same route that he drives every day. The accident occurred during his drive home. There is no allegation made or proven in this record showing that the decedent was performing a "special errand" on the date of accident of March 30, 2020.

In her protest letter, the dependent indicated that, on the day of his death, he had been working at the Sewell Landing project in Rainelle, WV. His job responsibilities ***generally*** included using his vehicle to transport tools to the job site daily. The employer provided the decedent with a credit card to be used for his fuel for the commute to and from work. In the afternoons, the decedent would complete work time sheets from home. At the end of each week, he sent the total time for each employee to his supervisor from home. Additionally, he took work related calls in the evenings after arriving home and on weekends. The employer reimbursed him for his cell phone bill monthly.

The dependent filed a statement from a coworker, Mr. Bowen. He states that he worked with the decedent as superintendents and they carry tools to and from work in addition to taking phone calls and doing paperwork at home. Mr. Bowen was also questioned by the state police at the time of the accident. He confirmed that he and the decedent were on their way home following completion of work that day. Mr. Bowen also advised the employer, Mr. Stidham, that he and the decedent were on their way home on the date of the accident after completing work for the day.

The issue before the Office of Judges was whether the decedent was in the course of his employment at the time of the accident and whether his employment caused his death. The evidence clearly establishes that, at the time of the motor vehicle accident, the decedent had completed work for the day and was driving home on the main road through Rainelle, WV. The decedent was exposed to the same hazards as anyone else driving on the main road. This travel home following work is excluded from workers' compensation under the coming and going rule.

The claimant's evidence indicates that the decedent sometimes performed work tasks outside of the regular work hours as a superintendent for the employer. This is not disputed by the employer. However, at the time of the accident around 7:00 PM on March 30, 2020, the decedent was simply driving home after work. The objective evidence establishes that the decedent was not within the zone of employment as he was not furthering the employer's business at the time of the accident. He was simply driving home and driving to and from work (coming and going), which is not in the course of a person's employment.

Administrative Law Judge J. Marty Mazeska reversed the denial of this claim despite the clear fact that the decedent was driving home after work on the main road with all others that travel the main road in the act of coming and going from work, which is not accepted as within the course of a person's employment. Judge Mazeska correctly noted that the decedent left the work site at around 7:00 p.m. At 7:12 p.m., he was in a single vehicle accident causing his death. He noted that the decedent was driving recklessly, passing in a no passing zone, and wrecked his vehicle.

Judge Mazeska acknowledges the case law establishing that traditionally a person is not in the course of employment while coming and going to work. An exception to the coming and going rule can be found if the place of injury is brought within the scope of employment by an express or implied requirement in the contract of employment. This is the special errand exception. The Administrative Law Judge cites to the case Carper v. Workmen's Compensation Comm'r,, which is a 1939 case that

states "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" and the Calloway v. State Workmen's Compensation Comm'r 2002 case stating "that an employee is entitled to compensation for an injury received while traveling on behalf of his employer's business."

The case law cited by the Administrative Law Judge explains that the facts of each case must be scrutinized to determine if the employee is rendering a service to the employer at the time of the accident/injury or when there is an incidental benefit to the employer that is not common to ordinary commuting trips. In our claim, the facts establish only that the decedent was driving himself home after completing his work for the day. The evidence does not establish that he was transporting tools or equipment home from the work site on March 30, 2020 nor that he was on his way going anywhere other than home. The fact that the decedent would have traveled home after work is not an incidental benefit to the employer that makes it any different than any normal commute home from work.

Judge Mazeska also discussed the Brown case from 1980. The facts of that case are distinguishable from this case since the employee in Brown was traveling as a passenger in a vehicle driven by a co-worker while they were returning from employment required training at the State Police Academy. This training session was clearly a different fact scenario than the subject employee/decedent who was driving on the same route that he drove every day to/from work on the main road through the city by himself. Our employee was traveling home from the work site whereas the Brown employee was returning to town following a mandatory training session. The "special errand" in the Brown case was traveling out-of-town for a work-related training session.

Judge Mazeska also cited the Courtless v. Jolliffe case from 1998. As he acknowledged, this case was on appeal to the West Virginia Supreme Court regarding a motion for summary judgment granted by the Circuit Court in a civil case where the plaintiff was attempting to hold the employer

liable for the employee's actions towards a third party while driving. Judge Mazeska cites to a few of the findings in Courtless regarding the traditional rule excluding coming and going from workers' compensation and determining whether there is a link between the employer and the accident.

Our Court in Courtless cited to a case, Standley v. Johnson, 276 So.2d 77 (Fl.App. 1973), addressing the "going and coming" rule within the context of a respondeat superior claim, wherein an employee had traveled to a drugstore to purchase medicine for his wife on his way to work. The employee, Johnson, also had some tools in his truck that he had carried home that weekend. Our Court cited the Standley holding as follows:

> It is the well recognized rule that an employee driving to or from work is not within the scope of employment so as to impose liability on the employer. **This is true even though the car driven by the employee is used in his work and partly maintained by the employer**, Foremost Dairies, Inc. of the South v. Godwin, 158 Fla. 245, 26 So.2d 773 (1946). However, in the case at bar, Johnson was doing more than merely driving to work. He adduced evidence that he had been instructed to keep the lawn mower filled with gas and was in fact transporting gas to the nursery as part of his job and for the benefit of his employer.

(*Id. at 78*, emphasis mine) Judge Mazeska either ignored or did not acknowledge this holding discussed by the Courtless Court indicating that the employee was not within the scope of employment even though he was driving the vehicle used in his work and partly maintained by the employer. The Court explained that in addressing whether the employee was acting within the scope of his employment at the time of the collision, it requires the reviewer "[t]o 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. Jolliffe ***on the day of the accident*** must be discovered."

The Courtless Court cited to the Harris v. State Workmen's Compensation Comm'r, 158 W.Va. 66 (1974) case from this Court noting that the general rule that injuries incurred through the ordinary use of streets and highways while going or coming to work are not considered within the

scope of employment unless the use is required by the employee in the performance of his duties for the employer. The Courtless Court noted that the exception was designated as the "special errand" exception to the going and coming rule and was held ***inapplicable*** in Harris due to the absence of any requirement that the employee return home to retrieve tools while in route between job sites.

Judge Mazeska also either simply ignored or failed to acknowledge the requirement to assess the exact purpose for the travel on the day of the accident. Judge Mazeska concludes that the accident occurred in the course of his employment because it was his responsibility to transport tools on a daily basis to and from the work site. However, this is not a fact established in the record. The dependent filed a written letter stating that her husband carried tools to the work site daily as part of his job; however, the only witness statement that is not from the claimant alone was from Mr. Bowen. In his one sentence statement, he states only that he worked with the decedent as superintendents and they carry tools to and from work in addition to taking phone calls and doing paperwork at home. This does not establish that the decedent was required to carry tools to and from the work site every day. It especially does not establish that he was carrying tools to and from the work site on the relevant date, which is March 30, 2020.

As discussed above, this Court has acknowledged the fact that an employee who drives his own vehicle as part of his employment and is reimbursed in any manner by the employer for this use is not considered to be in the course of his employment any more than any other person that is driving to and from work. This does not provide an exception to the coming and going rule. Judge Mazeska also goes beyond the facts of this case by assuming that because the employer is a nonprofit corporation developing and facilitating affordable housing "it was necessary to sufficiently compensate superintendents for the use of their personal vehicles in transporting needed tools, as well as the supervisors themselves, to the job site." He states that "[i]n this regard it is determined that the journey is part of the job." This is an extreme leap in logic that is not supported by any facts in the

record, and further, is not relevant to the issue of whether the decedent was engaged in a special errand that serves as an exception to the exclusion from workers' compensation by the coming and going rule.

Judge Mazeska does not discuss the most recent case from this jurisdiction that addresses the special errand exception to the coming and going rule. In Williby, this Court again addressed whether there was an exception to the coming and going rule that brought the claimant's travel within the zone of employment. The Court determined that the claimant was not within the zone of employment nor on a special errand while crossing the street to get lunch while on her break from the bank. In the subject claim, the decedent was not within the zone of employment as he was not travelling for a business purpose such as to an out-of-town training, but rather, was driving home after work. The fact that he was reimbursed for gas for his personal vehicle is not enough to bring the act of driving home on the ordinary street as done by everyone else within the zone of employment. Further, there is no evidence that the claimant was on a "special errand" since the facts of this claim establish that he was just driving home.

Every case discussed from our jurisdiction and even citations to cases from other jurisdictions are consistent in the requirement that the facts of the case on the date and at the time of the accident must be considered to determine whether there is an exception to the exclusion of the claim from workers' compensation by the coming and going rule. The Administrative Law Judge's decision to address generalizations about the decedent's six (6) month employment and the fact that he occasionally brought tools to/from the work site and picked up supplies during the day on occasion to establish an exception to the coming and going exclusion on the date and time of the accident was clearly wrong and severely prejudiced the employer.

Instead of following the case law established in our own jurisdiction, which clearly outlines the exclusion from workers' compensation when going and coming from work, the Administrative

Law Judge cites to Larson's on workers' compensation. A treatise on workers' compensation is helpful as guidance to determine a possible trend of other jurisdictions to determine the trend in your own jurisdiction; however, this is not applicable or relevant regarding an issue that has already been specifically addressed in your own jurisdiction. Again, our Courtless Court explained that the exact facts regarding the date of accident must be assessed to determine whether any exception to the exclusion from workers' compensation in a going and coming case is required. The Courtless Court cited a similar case in another jurisdiction denying compensability in a going and coming case even though the employee drove a vehicle that was in part maintained by the employer. In that case, no exception applied despite this financial benefit of transportation because the claimant's actions on the specific date of accident did not establish that his employer required him to return home to retrieve tools while en route between job sites. This case was a denial on compensability even though the claimant was a travelling employee driving between job sites because his employer did not direct him to stop at his house. This was considered a deviation that took the employee out of the course of employment.

In the subject case, the decedent had a fixed job site and was simply driving home after finishing work on the date of accident. The Board of Review also correctly determined that, even if driving home at the end of the work day on the main road is considered to be within the course of employment, the claimant's act of reckless driving that led to the single motor vehicle accident clearly was not in furtherance of his employment and would take him out of the scope of his employment. The Board stated that "Mr. Miller's actions while driving home from work on March 30, 2020, establish a major deviation from any business purposed and an abandonment of his employment." This leads to the same result that the decedent's death did not result from his employment.

This Court has discussed the deviation from work issue in the Calloway case. The Court explained that the claimant takes himself out of the course of employment with a deviation. If the

injury occurs during the deviation, compensation is denied. In the subject claim, the claimant deviated from his employment by his reckless driving, driving at an excessive speed and passing vehicles in a no passing zone when the accident occurred. The injury occurred during the claimant's deviation from work, and therefore, the claim is not compensable.

V. CONCLUSION

Based upon the foregoing, the employer submits that the Board of Review's order reversing and vacating the Office of Judges' July 14, 2021 decision and reinstating the May 8, 20210 order denying dependent's benefits was not in clear violation of a constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, nor was it based upon material findings of fact that are clearly wrong. Therefore, the employer respectfully requests that this Honorable Court refuse the claimant's Petition for Appeal from the Board of Review's January 5, 2022 order.

Thank you for your attention to this matter.

Respectfully submitted,
Buckeye Community Hope Foundation
By Counsel

Lisa W. Hunter

Lisa Warner Hunter *WV Bar ID # 7523*
WILLIAM J. FERREN & ASSOCIATES
Mailing Address:
PO Box 2903
HARTFORD, CT 06104-2903

CERTIFICATE OF SERVICE

I, Lisa Warner Hunter, attorney for the Respondent, Buckeye Community Hope Foundation, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Respondent, Buckeye Community Hope Foundation" was served upon the Petitioner by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 23rd day of February 2022 addressed as follows:

Jessica Miller
173 HUMP MOUNTAIN RD
MEADOW BRIDGE, West Virginia 25976

Lisa W. Hunter

Lisa Warner Hunter *WV Bar ID # 7523*