

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

JAMES BOWMAN,  
PLAINTIFF,

AUTO CLUB INSURANCE ASSOCIATION,  
INTERVENING PLAINTIFF

V

DOCKET #02-0455

R.L. COOLSAET CONSTRUCTION COMPANY AND  
LIBERTY MUTUAL FIRE INSURANCE COMPANY;  
SECOND INJURY FUND (PERMANENT AND  
TOTAL DISABILITY PROVISIONS),  
DEFENDANTS.

APPEAL FROM MAGISTRATE BRENNAN.

ROBERT J. LIPNIK FOR PLAINTIFF,  
JANE S. COLOMBO FOR INTERVENING PLAINTIFF,  
KIM C. ROCHAU AND DONNA J. NEIBAUER FOR DEFENDANTS R.L. COOLSAET  
CONSTRUCTION COMPANY AND LIBERTY MUTUAL FIRE INSURANCE COMPANY,  
GERALD M. MARCINKOSKI FOR DEFENDANT SECOND INJURY FUND (PERMANENT  
AND TOTAL DISABILITY PROVISIONS).

OPINION

GLASER, COMMISSIONER, DISSENTING

Plaintiff, James Bowman and Intervening Plaintiff, Auto Club Insurance Association (ACIA) appeal the decision of Magistrate Mary C. Brennan, mailed on October 22, 2002, denying plaintiff an open award on a finding that the disabling injury did not arise out of and in the course of employment. Defendant Second Injury Fund cross-appealed the portion of Magistrate Brennan's decision which found that the plaintiff was an employee of defendant R.L. Coolsaet Construction Company. I would affirm in part and reverse in part the magistrate's decision.

The parties do not dispute the fact that plaintiff is permanently and totally disabled as the result of a catastrophic injury from an automobile accident. The issues are whether the travel plaintiff was engaged in at the time of the accident, was an exception to the well established rule that injuries sustained while traveling to and from work are not compensable, and if so, was plaintiff an employee of defendant or an independent contractor.

Determinations of whether employee injuries arise in the course of employment are legal conclusions involving questions of law and, as such are subject to appellate review. *Forgach v Geo Koch & Sons Co*, 167 Mich App 50 (1988).

Because the issue to be resolved, although a legal issue, is fact intensive, I repeat portions of the magistrate's recitation of the facts that are pertinent to this discussion:

Plaintiff is 60 years-old, married, with no dependents save his wife, Rebecca. He has been a journeyman pipefitter since 1960 and a member of Local 190 since 1977. Throughout most of his career and during his membership in Local 190 he has worked on pipeline jobs that require him to travel throughout the state and at times throughout the country. Plaintiff, a resident of Big Rapids, estimated that since 1977 he has worked only eight weeks at jobs that were located within a commuting distance from his home. On all other jobs he maintains a temporary residence at a motel or his travel trailer at a location close to his job. Plaintiff testified that this is common practice in his trade.

Plaintiff drove and owned his own truck on the back of which he had mounted a welding machine. He also carried his torches, gauges, oxygen and acetylene tanks. He paid for his own insurance, repairs, truck maintenance and depreciated the truck on his tax return. It was standard practice in the industry for the pipefitters to negotiate a "rig rental" for the use of their trucks and welding machines with the individual employers. The terms of the rig rental would vary; at times the employer would provide the gas for the truck and supplies for the job, on other occasions the individual pipefitter would charge a higher hourly rate for the rental and supply his own gas and materials. While working for Coolsaet, defendant paid plaintiff \$7.50 per hour for the rental of his truck and welding machine and supplied his gas and materials. Plaintiff testified that he would not work on a job that did not pay a rig rental since he made additional income by renting his truck. Plaintiff's 2000 tax return includes a Schedule C, Profit or Loss From Business (Sole Proprietorship) based on the rental of his truck wherein he depreciated his truck and claimed a loss for the year. (Defendant's Ex #4) He stated that most contractors require pipefitters to have their own rigs.

Plaintiff explained that he would be contacted by his union and advised when a job was available. He would then contact the prospective employer and learn the specifics of the job. If he decided he wanted the job, he would go to the job cite and take a welding test. Once he passed the test, he was qualified to work on the job. Plaintiff was paid his hourly pay scale as determined by his union contract, and whatever he negotiated for his rig rental. At the end of the year, he received a W2 for his hourly wages and a 1099 for his rig rental fees. Under the terms of the union contract, plaintiff's regular work hours were 8:00 to 4:30. If he worked past noon and then was forced to stop the job due to weather, he was paid for a full eight hour day.

Plaintiff testified that he has worked for R.L. Coolsaet on several occasions before accepting the instant job in June 2000. The instant job was located in Dundee, Michigan, approximately 200 miles from his home. He was paid his union hourly wages and \$7.50 per hour for rig rental. As part of the rig rental agreement, defendant also provided plaintiff with a gas card and welding supplies. Because of the distance from

his home, he brought his travel trailer to a KOA campsite near Dundee and lived in his trailer during the week, driving his truck home to Big Rapids over the weekend. There were four other pipefitters on the same job, three of whom had the same living arrangements as plaintiff. Plaintiff testified that when he negotiated his rig rental he also requested that defendant reimburse him for his monthly camping fee, which was \$500. Defendant initially denied the request but when the pipefitters continued to seek reimbursement, defendant gave each of the four campers \$500 in July 2000. This was the only time during his employment that plaintiff was reimbursed for his campsite costs.

Defendant did not select the campground and did not require plaintiff or any of the employees to live in the campsite or even in the Dundee area. Plaintiff acknowledged that when he accepted the job he was aware that it did not include reimbursement for rent or meals.

Plaintiff testified that he reported for work on the morning of September 14, 2000 and worked until approximately 3:00 in the afternoon when a heavy rain caused the foreman to shut down the operation for the day. As he was driving his truck back to his trailer, plaintiff ran a stop sign at an intersection and struck another vehicle. He cannot recall any of the circumstances surrounding the accident. Plaintiff was taken by ambulance to St. Joseph Hospital where he underwent back surgery. He testified that he suffered a broken back at T11-12, a cracked skull and several broken ribs. Unfortunately, the accident rendered plaintiff paraplegic and to this day he has not been able to regain the use of his legs.

\* \* \*

Jeffrey Coolsaet is the president of defendant, R.L. Coolsaet Construction. The company builds underground pipelines in the United States east of the Mississippi River. He testified that the pipefitters are not required to bring their own rigs to a job but that it is standard practice for them to do so. He testified that many welders were "travelers" and agreed that it was customary for traveling welders to arrange for temporary residence near the job site. However, traveling welders do not typically ask for living expenses. Mr. Coolsaet denied that the employer benefited from the rig rental practice and stated that he would prefer that the employer own and control the rigs. However, he acknowledged that it was the practice of Local 190 that the pipefitters owned their own rigs and rented them to the employers.

The magistrate gives a brief history of the case law involving the "exceptions to the rule" that injuries sustained while going to or coming from work are not compensable. As a starting point I repeat and adopt that statement:

It is well established, and plaintiffs acknowledge, that as a general rule, injuries sustained while going to or coming from work are not compensable. However, it is equally well recognized that the general rule has been "riddled with exceptions". *Stark v L.E. Myers Co*, 58 Mich App 439, 443 (1975). In *Stark*, the court referred to the

evolution of a new rule wherein an injury was compensable if, “there is sufficient nexus between the employment and the injury so it may be said that the injury was a circumstance of the employment”. *Id* at 443, citing *Thomas v Certified Refrigeration, Inc*, 382 Mich 623 (1974). The court then articulated four factors to be considered when determining whether there was a sufficient causal nexus.

1. Whether the employer paid for or furnished employee transportation.
2. Whether the injury occurred during or between business hours.
3. Whether the employer derived a special benefit from the employee’s activities.
4. Whether the employment subjected the employee to excessive exposure to traffic risks. *Stark*, *supra* at 443. (citations omitted.)

In *Camburn v Northwest School District*, 459 Mich 471 (1999) the court delineated additional, specific circumstances where an injury occurring on the way to or from work could be compensable, including dual purpose missions, split-shift work schedules, and special missions.

Appellants make several arguments in support of their position that the magistrate erred in not finding sufficient causal nexus between the employment and the injury.

First appellants argue that the employer paid for or furnished plaintiff’s transportation. Defendant did enter into an agreement with plaintiff to rent plaintiff’s truck, tools and welding machine as a negotiated contract. This contract was separate from the contract for plaintiff’s services, as evidenced by the fact that plaintiff filed a 1099 form for income tax purposes specifically for that portion of his income and a W2 form for his hourly wages. Defendant also provided plaintiff with a gas card, which plaintiff testified he used not only for purchases related directly to the operation of the welding machine, but also for gas to travel back home on weekends. Appellants submit that these factors establish that the employer paid for or furnished employee transportation.

Appellees argue that the plaintiff owned the truck he was driving when the accident occurred and, therefore, it was not “provided” by the employer. They also argue that the gas card was intended primarily to cover the gas used by plaintiff to operate his truck and welding machine during the workday, and was not travel pay. They further argue that travel pay in and of itself cannot establish the necessary causal nexus between the employment and the injury, citing *Forgach, supra*.

Let me first restate that the *Forgach* court did not hold that travel pay, in and of itself, is never sufficient to establish the causal nexus between the employment and the injury. When read in its entirety that case was fact specific and held that the \$2.50 flat travel stipend was so indirectly connected with the actual travel expense incurred, it was added compensation for the job rather than travel pay, and hence in the absence of plaintiff’s ability to establish any of the remaining three factors, he had failed to establish a nexus between his injury and his employment. If, in fact, a showing of employer provided travel expenses can be made, that showing in and of itself can be sufficient to establish the causal nexus.

*Konopka v Jackson County Road Commission*, 270 Mich 174 (1935); *Chrysler v Blue Arrow Transportation*, 295 Mich 606 (1940); *Stark v L.E. Myers Co*, 58 Mich App 439 (1975); *Torres v Armond Cassil Co*, 115 Mich App 690 (1982). The finding of whether an employer was providing actual travel expenses must be determined on a case by case basis.<sup>1</sup>

The magistrate does have a duty to determine whether the employer had provided travel expenses sufficient to bring travel to and from the workplace into the realm of “within the course of employment”. In this case, the magistrate found that the employer did not. In so finding, she stated:

Plaintiff contends that when these factors are considered in the context of the facts in his claim, that he has established a sufficient causal nexus. Initially, and foremost, plaintiff points to the fact that defendant employer paid the rig rental and issued a gas card to pay for plaintiff’s gas. While it is true that the employer paid for both items, I am unable to find that the payments constitute employer furnished transportation as that factor has been interpreted in prior cases. In *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940) an employer-owned truck was made available to the employee/truck driver when coming to work. The court held that where the employment contract contemplates the transportation of the employee to his place of work, an accident arising out of the transportation is compensable. Likewise in *Lemanski v Frimberger Co*, 31 Mich App 285 (1971) the court upheld an award of compensation to an employee who was injured while driving to work because the contract of employment included payment for travel to and from the job site at a specified rate. However, in *Forgach v George Koch & Sons Co*, 167 Mich App 50 (1990) the court held that a daily travel allowance, paid to the employee under the terms of a union contract, that had no actual relationship to the distance traveled by the employee, was insufficient, in and of itself, to fall within the exception to the general rule precluding the payment of benefits for travel to or from work.

In the instant case, the employer did not pay for mileage and did not supply plaintiff with a truck. Rather, plaintiff provided his own truck, his own welding equipment, insured his truck, repaired his truck and depreciated his truck on his tax return. I find it particularly significant that plaintiff’s tax return includes a Schedule C, Profit or Loss From Business, that deals specifically with the use of his truck. Although defendant paid a rig rental, the agreement is limited to the time plaintiff works on the job. (See Plaintiff’s Ex #1). There is absolutely nothing in the agreement that suggests that defendant assumed any responsibility for the truck or had any control over the truck once it left the job site. As counsel for the Second Injury Fund observes, the rig rental agreement is a separate agreement, negotiated by the parties, independent of the employment contract that represents a contract between a lessor and lessee. Plaintiff was the owner of the truck and leased it to defendant via a separate contract that, according to plaintiff’s testimony, provided a direct benefit to plaintiff. When plaintiff was involved in his motor vehicle accident, he was the owner/operator of his truck, driving off the job site and on his way home from work.

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<sup>1</sup> See *Shields v Blue Cross/Blue Shield*, 2003 ACO #172 and *Hahn v Wayland Ford, Inc. Maxcis, Inc*, 2002 ACO #81, where this issue is discussed in great detail.

While defendant did provide plaintiff with a gas card, I find that the gas card was also part of the rig rental agreement, which, as I've indicated above, constituted a separate contract between the parties independent of the employment contract. Moreover, regardless of the rig rental agreement, I find plaintiff's use of the gas card is comparable to the travel allowance paid to plaintiff in *Forgach*, supra, and equally insufficient to establish a causal nexus between the injury and the employment. Here, as in *Forgach*, the gas card had no relationship to actual miles traveled, and was intended primarily to cover the gas used by plaintiff to operate his truck and welding machine during the work day. Thus, one cannot draw the inference, as was done in *Lemanski*, supra, that the use of a gas card reflected a "recognition" between the parties that travel was a necessary part of the job. Accordingly, I find that neither the rig rental agreement nor the use of the gas card fall within the exception of employer funded or furnished transportation.

I find that the magistrate's reliance on *Forgach*, supra, is misplaced as it pertains to the gas card. The plaintiff's un rebutted testimony was that he used the gas card for personal travel as well as on the work site. He specifically stated that the employer paid for gas, which he used when he traveled home on weekends. Although defendants argued that the employer did not approve that use of the gas card, they do not cite us to, nor can we find direct evidence of that fact. The employer's representative was present and testified at the hearing. He certainly could have answered that question, considering the plaintiff's earlier testimony that he did use the card for personal travel as well as work. I find that the evidence does not support the magistrate's finding that the use of the gas card had no relationship to actual miles traveled. I further find that the use of the gas card by plaintiff, and payment for that gas by the defendant, did represent reimbursement for actual miles traveled. Therefore, the inference can be drawn that the use of a gas card reflected a "recognition" between the parties that travel was a necessary part of the job.<sup>2</sup>

Clearly, the employer provided the truck which plaintiff was injured in, at least during "working time". (Plaintiff's exhibit #1). Where defendant has leased a truck, which his employee then drives, it is of absolutely no significance from where the defendant leased it. The pivotal question becomes whether the truck was still covered by the lease agreement at the time of the accident. Was that working time?

The plaintiff's testimony established that the truck rental was only for the time actually on the job and not, like the pay for the welders themselves, extended for the full eight-hour day.<sup>3</sup>

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<sup>2</sup> See *Lemanski v Frimberger Compensable*, 31 Mich App 285 (1971) where the court affirmed the Board's finding that an employment contract which included a rate of ten cents per mile for plaintiff to travel to and from the job site, a distance of 60 miles, was obviously intended to cover a special situation entailing more than a mere trip between home and shop and is recognition that this employment has placed demands outside the ordinary on plaintiff in order to fulfill the requirements of his job for that defendant.

<sup>3</sup> The actual pay records would tend to support the opposite position. Those records show that plaintiff was paid a rental fee for 36.50 hours, the same amount of hours that he was paid an hourly wage. However, he did not actually work all of the hours for which he was paid, because of the rainstorm, on September 14, 2000.

Since it was plaintiff's understanding that "working" time ended each day at the time the actual work ended, there was no expectation by the plaintiff that the employer intended to lease the truck for the full eight hours, which would have included the time at which plaintiff was injured. While the plaintiff was required to get the truck to the job site each day, that was part of his obligation as a lessor and not as a welder. Neither the employer nor the employee expected that the former would provide the vehicle itself for travel to and from the work site. Therefore, I find that the magistrate's finding that the plaintiff was driving his own vehicle at the time of the accident is supported by the requisite evidence.

The appellants next argue that the one time payment of a lot rent by the employer was either part of transportation expense or established defendant's awareness and acceptance that plaintiff was required to take on unusual travel burdens well known in the welding/pipefitting industry. The appellees respond that the \$500 paid to plaintiff was only paid in an effort to keep the welders from walking off the job. They further argue that such payment was in no way an acceptance or acknowledgement of plaintiff's need to have temporary housing, but rather was a gesture of good will by the employer. Defendant R.L.Coolsaet calls the argument advanced by plaintiff regarding the fact of this one time payment a "red herring".

The magistrate addressed those arguments, stating:

Plaintiffs also contend that when he was reimbursed for the trailer park rental his status was changed into that of a "traveling employee" and his claim should be analyzed under the "special mission" exception. I find no support in the record for such an analysis. According to plaintiff, defendant reimbursed the three welders on a single occasion after they had repeatedly complained about the low rig rental fee and the high cost of the campsite rental. This reimbursement occurred on a single occasion in July, not even the month of plaintiff's injury. The payment was made to mollify the welders at the campsite and was analogous to a bonus. It does not support the contention that plaintiff was a traveling employee or on a special mission for the employer. In fact, in this case, the plaintiff chose to take the job offered by defendant even though he was fully aware that it was not within driving distance from his home and knowing that it would require him to temporarily move to a location more convenient to the job site. It was plaintiff's decision to take the job that was offered and his decision to relocate to a convenient location near his work. Defendant never requested that plaintiff move to the trailer park, nor expressed any preference in plaintiff's living arrangements. The mere fact that defendant employer acceded to the requests of its workers and, on one occasion paid plaintiff \$500 to help offset his living costs does not render plaintiff a traveling employee.

The "traveling employee" doctrine was set forth for the first time by the Court of Appeals in a 1997 decision, *Eversman v Concrete Cutting*, 224 Mich App 221 (1997). That court described a theory, which had been relied on, but has not been codified, as was done in the cases involving "favored work".<sup>4</sup>

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<sup>4</sup> The legislature amended the WDCA to enact subsection 301(5) in 1981, codifying the judicially created "favored-work" doctrine. See *McJunkin v Cellasto Plastic Corp*, 461 Mich 590 (2000).

Traveling employees on a business trip are considered to be continuously within the scope of their employment during their trip, except when a distinct departure for a personal errand can be shown. 2 Larson, Workers' Compensation Law, §25.00, p 5-275. Thus, for traveling employees, the "arising out of and in the course of employment" tests are generally met by their being away from home for their employer's benefit and being at the place of injury because of their employment. See *Olinger Const Co v Mosbey*, 427 NE2d 910 (Ind App, 1981).

Like other employees who travel for days at a time, plaintiff had to eat and sleep. Injuries arising out of the necessity that traveling employees sleep in hotels or eat in restaurants away from home are usually held compensable. Larson, *supra*, p 5-275. Section 25.21(a) of the Larson treatise cites decisions from several jurisdictions that awarded benefits for a traveling employee, whether or not on call, who was injured in an activity arising out of the need for the employee to sleep or eat away from home. Specifically mentioned are cases where injuries were sustained in the process of getting meals or when a "traveling man . . . is struck by an automobile between his hotel and a restaurant." Larson, *supra*, pp 5-282 - 5-283.

On appeal, the Supreme Court neither adopted nor rejected the above quoted doctrine. Instead, that court found that the facts of the *Eversman* case were such that . . . "Regardless of whether Eversman was on a special mission or working as a traveling employee, his recovery is precluded under the plain language of MCL 418.301(3); MSA 17.237(301)(3)."

I do not find any evidence to support a finding that this plaintiff was exposed to any excessive traffic risks, as a result of his work with defendant. As in *Eversman*, there was nothing "special" about the mission this plaintiff was on for his employer, he was in Dundee to perform his regular employment. Instead, plaintiff was a "traveling employee" whose work entailed extended travel away from home. The magistrate correctly stated that the plaintiff knew that the job was not within driving distance from his home and that it would require him to temporarily move to a location more convenient to the job site. It was plaintiff's decision to take the job that was offered and his decision to relocate to a convenient location near his work. However, if those facts excluded an employee from the doctrine, no employee would ever be included. All employees are free to choose whether or not they want to take a job, which is located far from their home. Just like the employee who is asked to travel out of town to perform work for an employer may need to do so in order to keep his/her job, the plaintiff here needed to travel to a distant location in order to perform a job. This was the practice of the welder/pipefitter union, as well as the contractors who hired them. I agree that the payment for one month's lot rental is a red herring. Whether the employer actually pays for the temporary housing has never been a requirement.

I find that plaintiff's injury did arise out of and in the course of his employment on the basis that the employer was providing travel reimbursement sufficient to establish a nexus between his injury and his employment pursuant to *Forgach*. In addition, I find that plaintiff was a "traveling employee" and therefore, within the course of his employment for the duration of the job in Dundee, pursuant to *Eversman*.

Defendant Second Injury Fund cross-appealed, arguing that plaintiff was an independent contractor and not an employee. I quote defendant's reasoning as follows:

The courts have explained if a claimant meets any one of these three exclusions, then the claimant is not an "employee." *E.g., Amerisure Insurance Companies v Time Auto Transportation, Inc*, 196 Mich App 569; 492 NW2d 482 (1992). The economic reality factors are irrelevant, except insofar as they mirror the statute. *Hoste, supra*. And, the Court of Appeals and the Commission have often said reference to income tax forms are the predominating fact in determining whether the person maintains a separate business and/or holds himself out to render service to the public. *Blanzzy and Betancourt*, both *supra*.

Here, reference to plaintiff's income tax forms reveals that plaintiff maintained his own business, an "equipment rental" business (defendant's exhibit #4). Plaintiff files a "Profit or Loss From Business" Schedule C form with the Internal Revenue Service listing his business of "an equipment rental." He depreciates his rig, for example, as part of that business. *Id.* Significantly, plaintiff's business is *not* unrelated to plaintiff's injury in this case. Plaintiff was injured while driving the very rig that he uses in his "equipment rental" business.

Therefore, plaintiff is not an "employee" because he maintains a separate business and that business is directly related to the injury he alleges. Also, to some extent plaintiff holds himself out to rent equipment to the public, at least to the public (such as defendant-employer) who might rent rigs with their attached machinery.

Insofar as economic reality factors have continuing viability under some of the §161(1)(n) criteria listed above, plaintiff did own his own equipment, tools, and supplies. He owned his rig with the attached machine and he cared for them in terms of maintenance. He leased them to entities such as defendant-employer. Therefore, besides his income tax statements, plaintiff not only held himself out to the federal government as owning a business but actually did own and maintain his own machinery, tools, and rig, *i.e.*, very items at the core of the instant claim.

I reject defendant's argument because the business that plaintiff admittedly owned, which was renting his truck and rig, was separate and distinct from the service he performed for defendant R.L. Coolsaet Construction Company, as a welder. I affirm the magistrate's finding that plaintiff was an employee of R.L. Coolsaet Construction Company at the time of his catastrophic injury.

Martha M. Glaser

Commissioner

LESLIE, COMMISSIONER, CONTROLLING

We respectfully disagree with that portion of our colleague's opinion which holds plaintiff's injury arose out of and in the course of his employment. We do so because, in our view, the

magistrate's legal analysis is proper and her fact-finding is supported by competent, material and substantial evidence on the whole record.

To begin with, we agree with that portion of our colleague's opinion that affirms the magistrate's finding plaintiff was, under the circumstances of this case, providing his own transportation to and from the job site. However, we cannot agree the record is insufficient to sustain the magistrate's conclusion that plaintiff's use of the employer's credit card for gasoline was not reimbursement of travel expenses. In addition, we do not agree that so-called "traveling employee" doctrine is governing law in the state of Michigan. Moreover, even if it is, the facts before us are controlled by more specific Michigan decisions which do not permit recovery for injuries sustained in travel between a temporary residence and a temporary job site. As a result, we affirm the magistrate's finding plaintiff's injury did not arise out of and in the course of employment.

The Supreme Court having left the vitality of the "traveling employee" open in its *Eversman* decision,<sup>5</sup> we believe we are free to reexamine the question. Until the Court of Appeals' decision in *Eversman*,<sup>6</sup> no appellate court in this state ever accepted or applied what Professor Larson calls the "traveling employee" doctrine. Indeed, the *Eversman* court, writing in 1997, cited, along with Larson's treatise, a 1981 decision from the Indiana court of appeals, in support of a broad general principle:

Traveling employees on a business trip are considered to be continuously within the scope of their employment during their trip, except when a distinct departure for a personal errand can be shown. Thus, for traveling employees, the "arising out of and in the course of employment" tests are generally met by their being away from home for their employer's benefit and being at the place of injury because of their employment.

Under the facts of the case before us, this doctrine and the Court of Appeals' decision in *Eversman* is directly contrary to prior decisions of the Michigan Supreme Court and Court of Appeals. The fundamental error of the *Eversman* court is a failure to recognize under Michigan law we have long distinguished between employees who temporarily locate near their place of work and those who are on identifiable, special mission business trips.

In factual circumstances similar to the one before us,<sup>7</sup> the Supreme Court in *Graham v Somerville Construction*, 336 Mich 359 (1953) held that an employee returning from his job site at the end of the day to his temporary residence was not in the course of his employment. In doing so the

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<sup>5</sup> *Eversman v Concrete Cutting & Breaking*, 463 Mich 86, 93 (2000).

<sup>6</sup> *Eversman v Concrete Cutting & Breaking*, 224 Mich App 221 (1997).

<sup>7</sup> Mr. Graham, like Mr. Bowman, worked for a pipeline company. Mr. Graham was a job superintendent and in immediate charge of the work at the site performed by 35 to 40 workers. He had taken up temporary residence at a rooming house in proximity to the work. He was provided a pickup truck by the employer for use in performing his duties and the site of the pipeline construction. After leaving work on the day of his fatal accident, he had taken a co-worker back to his home in a different town. He had then eaten dinner and had spent some four hours socializing with the co-worker before returning to his temporary residence. He was killed during the return trip to his rooming house.

court applied the general rule that an employee who is returning home from work, not performing special services to the employer, is not in the course of his employment.<sup>8</sup> The court held:

At the time of his injury, Graham was not engaged in performing any specific duty arising out of his employment. While going from Nashville to his rooming place, his home for the time being, he was not, under the undisputed facts in the case within the course of his employment.

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So far as this record shows his day's work had been completed early in the evening, and he was at the time of the accident on his way to his home. That was his mission at the time of the accident.<sup>9</sup>

The Court of Appeals followed the *Graham* decision in *McLemore v Knee Co*, 4 Mich App 184 (1966). As here, Mr. McLemore temporarily relocated to be near his job site. He was fatally injured while traveling to his work site from his hotel room to begin his day's work. The court affirmed the finding he was not in the course of his employment while traveling from his hotel room in Muskegon to the job site.<sup>10</sup>

More recently, the Commission applied this general rule to unusual travel circumstances. In *Eads v Sperry Corp/Unisys*, 1998 ACO #677, the injured employee had been routinely transferred to out-of-state job assignments of indefinite duration. At the time of her injury, she was assigned to Randolph Air Force Base in San Antonio Texas to perform computer training of United States military personnel. She had a set work schedule from 7:30 A.M. to 4:30 P.M. She had leased an apartment for one year, and lived there with her two children and two dogs.

On the day of her injury, she left work at the usual time and engaged in a course of recreational consumption of alcoholic beverages at various establishments in the San Antonio area. She was driven home by a friend and sustained a serious injury when she fell while attempting to enter her apartment. The magistrate ruled that the employee was on a purely social junket at the time of her injury. On appeal, plaintiff argued she was in the course of employment under the "traveling employee" doctrine. She relied on non-Michigan cases invoking the doctrine. In affirming the magistrate's denial of benefits, we wrote:

In her appeal brief, much as she did below, plaintiff does not even argue that Ms. Bushey's after-work socializing and drinking had any business purpose. Instead, plaintiff proposes adoption of the rationale discussed in a series of non-Michigan cases she cites, illustrated by the following quotation from her brief on appeal:

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<sup>8</sup> *Graham* at 365-366.

<sup>9</sup> *Id.* at 368-369.

<sup>10</sup> *McLemore* at 187.

Quite plainly, this language is perfectly consistent with the holdings from foreign jurisdictions reprinted above, which recognize that the scope of employment for an individual who must remain away from home overnight as the result of the demands of his employer's business must necessarily include the satisfaction of physical needs, including relaxation. This principle is also consistent with the general rule noted above. Consequently, her presence at a bar and the consumption of intoxicants does not bar plaintiff's right to workers' compensation benefits.

The plaintiff also criticizes the magistrate for rejecting what she describes as convincing out of state authorities, in favor of the rationale described in the decision by the old Appeal Board in *Signorelli v GKN Automotive Components*, 1985 WCABO 252.

Unlike plaintiff, we find no serious flaw in the logic of either the magistrate in this case nor the Appeal Board in *Signorelli*, in their rejection of attempts to convince them to expand the scope of coverage for injuries to include many of an employee's activities while traveling. To begin with, we have found no Michigan precedent expressing such a rule, and we expressly reject its application in Michigan. Secondly, we note that in this case plaintiff was not traveling. She had in essence relocated in Texas, even if that move was not permanent. Hence, even if Michigan were to adopt the test she proposes, her injury would not fall within it.

Put another way, plaintiff was merely traveling home after leaving work on the day of her injury much like any Michigan resident does at the end of the work day. There is absolutely no proof that she was involved in any special mission for her employer. Indeed, the facts seem to indicate that she was merely socializing at the bar from after work until 2:00 a.m. the following morning, when she got a friend to drive her home. Under Michigan law, without special facts such as a special mission, an employee who has left work and is injured while traveling to his or her residence is not entitled to benefits. [Footnote omitted.]

On appeal to the Court of Appeals, the case was remanded for reconsideration in the light of *Eversman*. In again determining the magistrate was correct, that the employee's injury did not arise out of and in the course of her employment, we wrote:

We see no change necessitated by the *Eversman* opinion, and repeat our holding here and again affirm that portion of the magistrate's opinion which denied benefits to plaintiff as her injury did not arise out of and in the course of her employment.

We find this case is clearly distinguishable from *Eversman* in that plaintiff here was not a "traveling employee" but instead, was living on a semi-permanent basis in Texas. This plaintiff was not living in Michigan (as found by the magistrate) and merely

on a business trip of some extended duration as was plaintiff in *Eversman*. In *Eversman*, plaintiff was a Michigan resident, on a multi-day business trip roving among job sites in several states. In this case, plaintiff had no home in Michigan, but was living at semi-permanent lodging in Texas with her household.

It was just such factors which lead the Court in *Eversman* to differentiate between Mr. Eversman as a “traveling employee” as opposed to an employee on a “special mission.” Indeed, that Court stressed the need of a traveling employee to eat and sleep away from home, including the need to get meals and the like in restaurant type settings:

Like other employees who travel for days at a time, plaintiff had to eat and sleep. Injuries arising out of the necessity that traveling employees sleep in hotels or eat in restaurants away from home are usually held compensable. Larson, *supra*, p 5-275. Section 25.21(a) of the Larsen treatise cites decisions from several jurisdictions that awarded benefits for a traveling employee, whether or not on call, who was injured in an activity arising out of the need for the employee to sleep or eat away from home. Specifically mentioned are cases where injuries were sustained in the process of getting meals or when a “traveling man . . . is struck by an automobile between his hotel and a restaurant.” Larson, *supra*, pp 5-282---5-283.

It is noteworthy to again compare Mr. Eversman, who was traveling from motel to motel, eating his meals in restaurants and bars, to our plaintiff, who had a long-term-leased apartment, where she regularly ate and sleep in her household.

In *Todt & Meridian Ins Co v Quality Dining*, 2000 ACO #302 the employee was working for Quality Dining, a company that owned several restaurants in the state of Michigan. Plaintiff had worked at several different locations for short periods of time. Plaintiff was working at the Grand Rapids location when he was assigned to be the manager of a new restaurant opening in Pontiac. He finished his work in Grand Rapids on Sunday. He went home, slept for a few hours and then left for his new job assignment in Pontiac in the wee hours of Monday morning. He was scheduled to meet with the area director for the company on Monday morning at the restaurant in Pontiac. Plaintiff had arranged to rent an apartment in West Bloomfield area. It was undisputed plaintiff was to be reimbursed for mileage to Pontiac and for several snack items he bought on the way. Plaintiff was seriously injured in an automobile accident in Livingston County on his way to Pontiac. It was disputed whether he was going directly to the restaurant or to his apartment and then to the restaurant. The magistrate ruled plaintiff was not on a special mission for the employer, but, rather, that his trip was merely an extended trip to work. For the same reason, he distinguished *Eversman* noting: “*Eversman* presented an entirely different factual situation involving an employee who was on an extended business trip, not one who was going or coming to work.”

On appeal the Commission affirmed the magistrate’s decision. We wrote:

We begin with the observation that the question of whether an injury arises out of and in the course of employment is a mixed question of fact and law.<sup>8</sup> As a result, we review the magistrate's ultimate conclusion as a question of law.<sup>9</sup>

In reaching his ultimate conclusion that Todt's injury did not arise out of and in the course of employment, the magistrate made several findings of ordinary facts which we are bound to accept. First, he found that the employee was traveling to Pontiac from Grand Rapids in order to begin a new job assignment with his employer. He was not traveling on a special assignment from the Grand Rapids office to a distant location. Second, the magistrate also found that Todt was reimbursed for gasoline expenses and for several snack items he purchased while in route. Third, he found that the employer did not derive any direct, special benefit from the employee's activity at the time of injury. Fourth, he determined that the employer did not compel Todt to make the trip and that the employer's only interest was that he be at the appointed time and place in Pontiac ready to begin work. Fifth, he found that Todt was moving his place of living from Grand Rapids to Pontiac, had finished his work in Grand Rapids for the day, and was not required to be at his new job assignment until the following morning without any specific starting time being set.

Based on these facts we agree with the magistrate that Todt's trip was not a special mission. We recognize that this is not a typical trip to and from work. It was not, on the other hand, a special job assignment from the Grand Rapids office which required Todt to travel to Pontiac and then back to his home base. We have found no cases specifically considering whether travel as a part of moving to a new job assignment is in the course of employment.

There are three cases which lead us to the conclusion that the trip was not in the course of employment. In *Shane v Alexander*, 277 Mich 85 (1936) the employee worked two different jobs for two different employers. His trip from one job to the next was found not to be in the course of employment. In so holding the Supreme Court applied the general rule that an employee on the way to work is not in the course of employment.<sup>10</sup> In *Stover v Midwest Tank*, 87 Mich App 452 (1978) plaintiff's decedent was an executive officer of two corporations, one of which was located in Michigan and the other was located in Kentucky. He was being flown in a private airplane from a meeting in Kentucky to an urgent weekend meeting for the Michigan employer, Midwest Tank. The plane was leased by Midwest Tank and the pilot was paid by that company. The court found decedent's death in an airplane crash to arise out of and in the course of his Midwest employment because Midwest derived a special benefit from his travel and also because Midwest "played a substantial role" in furnishing decedent the transportation.<sup>11</sup> Finally, in *McLemore v Knee Co*, 4 Mich App 184 (1966) plaintiff was injured in an automobile accident while traveling between the job site and a motel where he was staying on temporary assignment. The court applied the general rule that injuries sustained while going to and from work are not compensable. As a result, plaintiff's injury did not arise out of and in the course of employment.

We recognize than none of these cases is identical with the case before us. Taken together, they stand for the proposition that an employee moving between jobs must demonstrate a special benefit to the employer at the time of injury over and above the mere fact of moving to change job assignments. The payment of substantial expenses of travel adds to the certainty of concluding that an employee is in the course of employment where there is also shown a special benefit to the employer.

In this case the magistrate was correct in his conclusion that there was no special benefit to the employer at the time of injury. Of course, it is a benefit to an employer to have an employee being reassigned to a new job in a different location show up for work, just as it is a benefit for an employee to show up at his or her regular job site. This is not, and has never been, however, the type of benefit to the employer which has been deemed a “special benefit”. In that regard, the magistrate’s characterization of this trip as traveling to and from work is correct. As we noted, the employee was not traveling to a distant job site from a home base to which he was required to return. Also, Todt was vacating his abode in Grand Rapids. This trip was for the purpose of moving his belongings to a location where he had arranged for an apartment to live as well as to show up for work later that day. Such a trip is not a special mission or special benefit to the employer bringing the trip and its hazards within the course of his employment.

With respect to payment for the trip, the uncontroverted testimony was that it was payment for moving expenses and not travel. Even so, the test to be applied by *Stover* as well as *Forgach* is whether the remuneration represents a substantial portion of the cost of travel. The magistrate found that the payments in this case were nominal. Mr. Todt was not reimbursed for the total cost of his travel. Moreover, in a case such as this the mere fact that the employer provides some payment for the cost of relocating does not make the actual trip within the course of employment where the trip itself is not a required or expected job duty.

The magistrate properly analyzed this case. Mr. Todt was not in the course of employment at the time of his injury. The magistrate’s denial of benefits is affirmed.

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<sup>8</sup> *Koschay v Barnett Pontiac*, 386 Mich 223 (1971); *Hawkins v State of Michigan*, 1997 ACO #708.

<sup>9</sup> *Fraleay v General Motors*, 199 Mich App 280 (1993); *Hawkins, supra*.

<sup>10</sup> *Shane* at 87.

<sup>11</sup> *Stover* at 459.

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All these decisions fit with the fundamental purpose of the Michigan worker’s compensation act that the consuming public pay for injuries related to work. In *Andrejwski v Wolverine Coal Co*, 182

Mich 298 (1914) the Michigan Supreme Court first articulated the policy underlying the new worker's compensation law. It said:

The construction of this section of the statute is for the first time before this court, and our statute, although similar in many respects to other statutes of like import in England and some of the United States, differs quite materially from all of them as to the rules provided for determining the amount of compensation to be paid those entitled thereto under it.

It will therefore be proper to give consideration at the outset to the conditions giving rise to the necessity for such legislation, and also the objects sought to be accomplished and the radical changes brought about by its enactment. Such legislation has undoubtedly been brought about by present industrial conditions which have for years continued to take increasing toll from the numbers of those employed, on account of the increased hazards connected with manufacturing, transportation, and kindred industries.

Heretofore if an employee has been injured or killed in any employment in which he was engaged, he, or those representing him or dependent upon him, could recover for such injury or death only when the same could be attributed to the negligence of the employer. Experience has shown that such conditions were unsatisfactory, and results arising from such litigation often worked great injustice to one or both parties. From these conditions has been evolved legislation of this character upon the theory that the industry which occasioned such injuries should, as a part of the cost of production, bear the burden by compensation for the same.<sup>11</sup>

More recently, discussing the question of horseplay at work the court wrote in *Crilly v Ballou*, 353 Mich 303 (1958):

It was the reaction of our people to these unrecompensed injuries that found expression in the workmen's compensation acts. A philosophy that is today no longer new demanded that the product pay its own way, that the human material consumed in its manufacture be purchased with the same coin as the coal and iron ore going into its production. "Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits."\* Let the bench and bar ponder well, as our course of decision in this area in the past decades is reviewed, that the words quoted are those of Mr. Justice Sutherland, the year spoken was not 1958 but a quarter century earlier, 1923, and the court was the supreme court of the United States. The theory of the acts was clear: The consuming public, not charity, public or private, must foot the bill for work-incurred injuries.

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<sup>11</sup> *Andrejwski* at 302-303.

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\* *Cudahy Packing Company of Nebraska v Parramore*, 263 US 418, 423 (44 S Ct 153, 68 L ed 366, 30 ALR 532), quoted in dissent of Black, J. in *Mack v Reo Motors, Inc*, 345 Mich 268, 272.<sup>12</sup>

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Injuries related to employment are a cost to be included in the ultimate cost of the product or service offered to the public. As a result, it is appropriate and necessary to limit recompense for injuries to those which are in the course of the employer's business and not related to the personal activity of the employee. This has been a distinction which has existed throughout the history of Michigan's compensation law.

In numerous decisions, however, as in *Crilly*, the court has ruled that incidental or reasonable activity during work or on the premises is in the course of employment, even though the employee is not actually performing service to the employer at the moment of injury. Such cases have as their driving force, a direct link with employment. With *Crilly* as the jumping off point, the Commission has explored the broad analytical framework in the field of arising out of and in the course of employment. In *Hawkins v State of Michigan, Department of Social Services*, 1997 ACO #708 we wrote:

We must, however, begin with the Supreme Court's pronouncement in *Crilly v Ballou*, 353 Mich 303 (1958), because the modern era in compensation law begins with that case. In rejecting a rigid approach to arising out of and in the course of employment questions, the Court noted that the fundamental purpose of compensation laws is to pass the cost of employment related injuries to the consuming public.<sup>1</sup>

Although it is impossible to boil the *Crilly* Court's decision down to a single, simple test to be applied in all cases, certain language of the Court describing course of employment comes close to a doctrinal statement:

Course of employment is not scope of employment. The former, as the cases so clearly reveal, is a way of life in a working environment. If the injury results from the work itself, or from the stresses, the tensions, the associations, of the working environments, human as well as material, it is compensable. Why? Because those are the ingredients of the product itself. It carries to the market with it, on its price tag stained and scarred, its human as well as its material costs. So says the statute. It does not become us to ignore its plain commands. *Crilly* at 326.

More recently, this Commission has applied additional language of *Crilly* to like effect. In *Ferguson v Thorn Apple Valley*, 1993 ACO #90 we quoted a different portion of *Crilly* as a guide to compensability:

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<sup>12</sup> *Crilly* at 307-308.

“Not the particular or peculiar character of the associations and conditions, but that the work creates and surrounds the employee with them is the basic thing.

Nor is it necessary, as these cases show, that the particular act or event which is the immediate cause of the injury itself to be part of any work done for the employer by the claimant or others. . . . Not that the act is in the line of duty, or forwards the work, or creates special risks, but that the work brings the employee within its peril, makes it, for purposes of compensation, ‘part of the work.’ (Citations omitted.)”

With this background, we turn to the cases decided since *Crilly*. Even though Michigan has a complex and often turbulent history of statutory interpretation in the field of arising out of and in the course of employment,<sup>2</sup> there has always been a strong current in the law allowing for compensation for incidental activity if it is reasonably related to work. Such cases include ministrations to one’s comfort before beginning work,<sup>3</sup> general hazards to which employees are exposed as a result of being in particular locations,<sup>4</sup> a tryout where the plaintiff is not yet an employee,<sup>5</sup> or picking up a paycheck on a day off work.<sup>6</sup>

In addition, for over 50 years, Michigan law has recognized that injuries may be work related even where the employee is not in the course of employment at the time of injury so long as the injury results from a hazard directly associated with employment, which has its origins in work related activity. In *Appleford v Kimmel*, 297 Mich 8 (1941) plaintiff, a theater manager, was assaulted on his way home from work. The perpetrators were patrons of the theater, who the manager had ejected from the theater on two prior occasions. Although plaintiff was not in the course of employment at the time of the assault, it was a compensable injury because the assault was a hazard which arose from his duties while he was in the course of his employment.<sup>7</sup>

Certainly, there are limits to compensability for incidental and tangentially related activity, and any analysis must fit with the underlying policy of the Worker’s Disability Compensation Act which makes the cost of work injuries a part of the cost of doing business such that the ultimate consumer, the purchaser or user of the goods and services, pays for the injury in the cost of the product consumed. Examples of types of injuries beyond the purview of the compensation act in Michigan include the disease of alcoholism,<sup>8</sup> purely personal activity during work related travel,<sup>9</sup> recreational or social activity,<sup>10</sup> loss of employment,<sup>11</sup> a deviation which dwarfs business activity,<sup>12</sup> off premises lunch time injuries,<sup>13</sup> activity with no specific benefit to the employer which the employer neither required or encouraged the employee to do<sup>14</sup> or where the activity is simply too far removed from work activity.<sup>15</sup> Indeed, an employee’s status may change with the passage of time and conduct inconsistent with work activity.<sup>16</sup>

Complicating precise analytical categorizing of cases is the more recent trend to avoid separate application of the “arising out of” and “course of employment” elements

found in the statute.<sup>17</sup> In recent cases the Court has referred to the requisite connection with employment required by the phrase “arising out of and in the course of employment” as “sufficient nexus with employment.” In addition, the Court has often resolved such questions by resort to the amorphous comment that the compensation act is to be construed in a humanitarian manner to the benefit of the employee. Whatever the value of such phrases, they are impressionistic conclusions and not analytical tools which assist lower tribunals with these issues.

Thus, we express our understanding of the current state of the law for issues relating to arising out of and in the course of employment. Determination of compensability depends on evaluation of four elements: 1) the nature of the hazard which led to injury, 2) the direct benefit to the employer from the employee’s work related activities at the time they were performed, 3) the activity of the employee at the time of the injury and 4) the location of the employee, either at the place where work is to be performed or away from it. Each element operates on a continuum which ranges from unrelated to employment to clearly work related. In addition, no single factor is necessarily determinative of compensability, but must be evaluated in conjunction with the others.

By way of illustration, we submit the following description of the manner such continuum operates to establish “sufficient nexus with employment” for purposes of meeting the requirements of the statute that an injury must arise out of and in the course of employment.

As far as the hazards of employment are concerned, a direct hazard from employment may lead to an injury arising out of employment where there is no benefit to the employer at the time of the injury as long as the injury resulted directly from plaintiff’s work connected activity as in *Appleford* and *Allison*. This is true even though the employee is not in the course of employment or on the premises at the time of injury. An injury from a neutral hazard<sup>18</sup> requires a higher level of benefit to the employer or employee activity directly connected with work at the time of injury, or in the alternative, the employee is at the place where work is to be performed during working hours. Where the hazard is personal, benefits are not payable unless the work contributes in some way to the ultimate harm done to the employee.<sup>19</sup>

As far as the benefit to the employer is concerned, the spectrum of values ranges from a direct benefit to the employer, to a generalized benefit, to no benefit, to behavior antithetical to the employer’s interests. Thus, where an employee is engaged in work activity or at the place where regular work is to be performed during work hours, there need be no particular benefit to the employer at the time of injury. Where the employee participates in activity which is neither required nor an inherent part of the usual employment activity, the employee has the burden of showing that the employer derived a specific or special benefit from the employee’s activity.<sup>20</sup> If the employee engages in conduct antithetical to the employer’s interests, the issue of compensability is measured under the deviation<sup>21</sup> or horseplay<sup>22</sup> models.

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<sup>1</sup> *Crilly* at 307-308.

<sup>2</sup> *Cf.*, *Daniel v Murray Corp*, 326 Mich 1 (1949) with *Freiborg v Chrysler Corp*, 350 Mich 104 (1957); *Baas v Society for Christian Instruction*, 371 Mich 622 (1963) with *Burchett v Delton-Kellog School*, 378 Mich 231 (1966). See also, Leslie, *The Role of the Employer's Premises in Michigan Worker's Compensation*, 9 Cooley L R 303 (1992).

<sup>3</sup> See, e.g., *Giebig v Ann Arbor Asphalt Co*, 238 Mich 560 (1927), where a majority of the court found the death of a road worker from an automobile accident to be compensable where he had crossed the road to gather wood to build a fire to keep himself and his co-workers warm as they waited for their work to begin.

<sup>4</sup> See, e.g., *Arnested v McNicholas*, 223 Mich 488 (1923), where the death of a logger, killed by a bullet fired by persons unknown while he was working to clear a road through the timber for his employer, arose out of and in the course of his employment, but, *cf.*, *Ryan v Port Huron*, 234 Mich 648 (1926) where an employee, bitten by a dog roaming in the area where plaintiff was working, was held not to have sustained an injury arising out of and in the course of employment.

<sup>5</sup> *Moore v Gundelfinger*, 56 Mich App 73 (1974).

<sup>6</sup> *Dunlap v Clinton Valley Center*, 169 Mich App 354 (1988).

<sup>7</sup> A more recent application of this principle is found in *Allison v Pepsi*, 183 Mich App 101 (1990) where the benefit to the employer occurred well before the activity which led to the employee's demise, but the two were directly connected.

<sup>8</sup> *Pierce v General Motors Corp*, 443 Mich 137 (1993).

<sup>9</sup> *Signorelli v GKN Automotive*, 1985 ACO #41, where the employee's death from asphyxiation in the apartment of a female co-worker after making love was found to be outside of the employment relationship.

<sup>10</sup> MCL 418.301(3).

<sup>11</sup> *Robinson v Chrysler Corp*, 139 Mich App 449 (1984).

<sup>12</sup> *Bush v Parmenter*, 413 Mich 444 (1982).

<sup>13</sup> *McClure v General Motors Corp (On Rehearing)*, 408 Mich 191 (1980).

<sup>14</sup> *Marcotte v Tamarack Fire*, 120 Mich App 671 (1982).

<sup>15</sup> *Thorpe, IBM Corp*, 1994 ACO #412, where an employee's second and fatal automobile trip was necessitated by an order to appear in court because of a traffic citation issued as a result of a car accident occurring during the first trip. The Commission found the second trip not work related because the connection between the work and injury was too attenuated under the authority of *Dean v Chrysler Corp*, 434 Mich 655 (1990).

<sup>16</sup> *Zarka v Burger King*, 206 Mich App 409 (1994), where an employee initially in the course of employment while picking up his paycheck, changed status to a customer as a result of buying and eating food in the retail portion of the restaurant. The resulting injury upon leaving the premises of the employer did not arise out of and in the course of employment.

<sup>17</sup> See, e.g., *Nemeth v Michigan Bldg Components*, 390 Mich 734 (1973) and more recently *Simkins v General Motors Corp*, 453 Mich 703, 712 n14 (1996), where the Court questioned whether Michigan law requires a separate test for each element for premises injuries.

<sup>18</sup> The typical neutral hazard is an act of nature such as a tornado or flood (*Whetro v Awkerman*, 383 Mich 235 (1970)), but may include stray bullets (*Arnested, supra*), low flying pheasants (*Levchuk v Krug Cement Co*, 246 Mich 589 (1929)) or falling tree branches (*LeVasseur v Allen Electric Co*, 338 Mich 121 (1953)).

<sup>19</sup> See, e.g., *Ledbetter v Michigan Carton*, 74 Mich App 330 (1977).

<sup>20</sup> See, e.g., *Marcotte v Tamarack Fire*, 120 Mich App 671 (1982).

<sup>21</sup> *Bush, supra*.

<sup>22</sup> *Petrie v General Motors Corp*, 187 Mich App 198 (1991).

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Given this framework of existing Michigan law and policy, we submit the “traveling employee” doctrine as described by the Court of Appeals in *Eversman* is too broad and amorphous to be of service in analyzing issues such as the one before us.

Nor are we convinced that the rationale of the “traveling employee” doctrine fits the facts of the case before us. The court of appeals in *Eversman* relied on a decision of the Indiana court of appeals decision in *Olinger Construction Co v Mosbey*, 427 NE2d 910 (1981). In adopting the “traveling employee” doctrine, the Indiana court in turn relied on the Georgia Supreme Court’s opinion in *Thornton v Hartford Accident & Indemnity Co*, 32 SE2d 816 (1945) as the doctrinal lynchpin of its result. The decision in *Thornton* was expressly grounded in the nature of the employee’s work as a “traveling salesman”. The Georgia courts had already adopted a special rule for traveling salesmen, holding that the scope of employment of a traveling salesman is broader than that of ordinary employees.<sup>13</sup> In *Thornton*, the court expanded the discussion on this point:

By the very nature of his work, a traveling salesman is not usually restricted to working on a schedule of hours. His employment is broader in scope than that of ordinary employees; his hours are more irregular, and usually longer, than those of general employees working in a fixed location; his conduct of his duties is of necessity left largely to his discretion; and his acts of ministrations to himself, such as eating a meal, because of the nature of his work, are not usually limited to a certain period, or periods, of time daily. Consequently, we think, in a case involving an injury to a traveling salesman while going to or from, or while eating, a meal, such a strict interpretation of the phrase, ‘arising out of and in the course of the employment,’ as is sometimes made in cases involving employees injured during a regular noon hour, or similar periods, is too limited. In the latter class of cases the injuries are received during a definite period set apart as belonging exclusively to the employees, during which they may go where they wish and do what they please, subject to no orders from their employers and freed

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<sup>13</sup> *Thornton* at 818, relying on *New Amsterdam Casualty Co v Sumrell*, 118 SE 786 (1923).

from all duty or responsibility with reference to their employment; and their employers do not usually pay the expenses of their meals.<sup>14</sup>

Thus, the doctrine as originally described is grounded in narrow and specific circumstances.

The *Eversman* Court also relied on *Epp v Midwestern Machinery Co*, 208 NW2d 87 (1973). This case is equally distinguishable from the case before us. In *Epp* the employee was an over the road truck driver. He was driving one of his employer's trucks from Minneapolis to various points east to culminate in a delivery in New Jersey. After picking up a shipment in Philadelphia, plaintiff was instructed to make another pick-up in Mechanicsburg, Pennsylvania. The court described the situation thereafter:

Employee arrived in Mechanicsburg on Friday, May 23, 1969, and was told upon arrival that he would be unable to take the machinery as the money required for its payment, although wired by the employer, had not yet reached the seller. Employee then telephoned his employer and was instructed to wait to see if the machinery could be released the following day. The record also indicates that employee was informed by employer that if such release could not be obtained on Saturday, May 24, 1969, he was to "wait over until Monday" or "stay there" until the load was released.

It is the employer's general policy during such layovers to pay for the expenses incurred. . . .

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The employee was unable to gain release of the machinery on Saturday and thus secured lodging for the weekend. Although the record is silent regarding the precise details surrounding the employee's death, it is clear that he was killed on May 25, 1969, at approximately 2:30 a.m. when he was struck by an automobile while crossing the highway, apparently on return to his motel.<sup>15</sup>

In granting benefits, the court made it clear the particular circumstances of the case were critical to the award of benefits. The court stated:

Relators primarily argue that the employee's accidental death did not arise out of a contemplated hazard or risk connected with his employment. The record is clear, however, that layovers, although frequent, were not usually as prolonged as the instant one, and that the employee admittedly was neither required nor expected to spend the entire duration of a layover in his motel room. The employer confirmed that its policy was to reimburse employee for all expenses of lodging, food, and drinks incurred while traveling on employer's behalf. From our reading of the record, however, we are

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<sup>14</sup> *Id.*

<sup>15</sup> *Epp* at 88.

convinced it was not established that the purchase of such food or refreshment was limited to purchases made at or near mealtime.

Where, as here, an employee is directed by his employer to remain at a certain locale on behalf of the employer for a specified time or until instructed otherwise, “the rule applied is simply that the employee is not expected to wait immobile, but may indulge in *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment.” *Robards v New York Division Electric Products, Inc.*, 33 A.D.2d 1067, 307 N.Y.S.2d 599, 600 (1970).<sup>1</sup> The commission surmised that employee “to pass some time—during a considerably long waiting period—crossed the road to the tavern and had some drinks until closing time.” *The record, therefore, is sufficient to support the conclusion that the employer contemplated, because of the work schedule of the employee, that he would be exposed to the hazards of being upon a highway at any hour of the day or night, either driving his truck or having to cross it for meals, refreshments, or to return to his motel room.* Accordingly, we cannot say that employee’s activity was unreasonable and that the risk to which he was exposed did not directly flow as a natural incident of his employment under the circumstances of this case.

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<sup>1</sup> In accord, see 1 Larson, *The Law of Workmen’s Compensation*, §25.21, where the following is found: “So when a traveling man slips in the street or is struck by an automobile between his hotel and a restaurant, the injury has been held compensable, even though the incident occurred on a Sunday evening, or involved an extended trip occasioned by employee’s wish to eat at a particular restaurant.”<sup>16</sup>

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The difference between *Thornton* and *Epp* and the case before us is patent. In *Epp* the employee’s job was traveling. He had no set hours, but by federal law was required to rest for eight hours between eight-hour shifts of driving. He had a weekend layover from his travels, with the express approval, and indeed, mandate of his employer. In addition, the employer paid for the employee’s lodging, food and drink while he was traveling. As the highlighted portion just quoted shows, the court found that the employee’s activity at the time of injury was due to a hazard directly related to the specific demands of the employee’s job duties, not a generalized concept of universal coverage for employees away from home. In *Thornton* the court specifically grounded the award in the peculiar nature of traveling sales work. The court noted the lack of identified hours of work as well as the unusual independence in action which attend such work. In addition, the decision in *Thornton* was limited to an employee going to or returning from eating a meal.

In the case before us, the employer did not pay for meals and lodging. The employee had set hours performed at a particular job site. After leaving the job, the employee’s time was his own. Although he was traveling to his temporary residence, his employment imposed no constraints on him until his required return to work the following day. As in an ordinary trip home from work, the

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<sup>16</sup> *Id.* at 89. Emphasis added.

employee was free to engage in any activity he chose at the time of injury. As a result, neither *Thornton* nor *Epp* can support an award under the facts of this case.

The magistrate correctly applied the general rule of Michigan worker's compensation law that injuries sustained while going to or from work are not in the course of employment, and, as a result, do not arise out of employment. She also carefully analyzed the facts of this case to determine whether the employee was within any of the exceptions to this rule as articulated in *Stark v Meyers Co*, 58 Mich App 439 (1975) and cases cited therein.

For all of these reasons, the magistrate decided this case within the proper legal framework and her conclusion on this point should be affirmed.

The magistrate was also correct in her analysis of the gasoline payment. This was a factual judgment regarding the significance of the employer's payment for gasoline for the personal use of the truck. This factual analysis was made in the context of deciding whether plaintiff in this case fell within the first exception described in *Stark*, "Whether the employer paid for or furnished employee transportation."<sup>17</sup> The magistrate wrote:

Plaintiff contends that when those factors are considered in the context of the facts in his claim, that he has established a sufficient causal nexus. Initially, and foremost, plaintiff points to the fact that defendant employer paid the rig rental and issued a gas card to pay for plaintiff's gas. While it is true that employer paid for both items, I am unable to find that the payments constitute employer furnished transportation as that factor has been interpreted in prior cases. In *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940) an employer-owned truck was made available to the employee/truck driver when coming to work. The court held that where the employment contract contemplates the transportation of the employee to his place of work, an accident arising out of the transportation is compensable. Likewise in *Lemanski v Frimberger Co*, 31 Mich App 285 (1971) the court upheld an award of compensation to an employee who was injured while driving to work because the contract of employment included payment for travel to and from the job site at a specified rate. However, in *Forgach v George Koch & Sons Co*, 167 Mich App 50 (1990) the court held that a daily travel allowance, paid to the employee under the terms of a union contract, that had no actual relationship to the distance traveled by the employee, was insufficient, in and of itself, to fall within the exception to the general rule precluding the payment of benefits for travel to or from work.

In the instant case, the employer did not pay for mileage and did not supply plaintiff with a truck. Rather, plaintiff provided his own truck, his own welding equipment, insured his truck, repaired his truck, and depreciated his truck on his tax return. I find it particularly significant that plaintiff's tax return includes a Schedule C, Profit or Loss from Business, that deals specifically with the use of his truck. Although defendant paid a rig rental, the agreement is limited to the time plaintiff works on the

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<sup>17</sup> *Stark* at 443.

job. (See Plaintiff's Exhibit 1) There is absolutely nothing in the agreement that suggests that defendant assumed any responsibility for the truck or had any control over the truck once it left the job site. As counsel for the Second Injury Fund observes, the rig rental agreement is a separate agreement, negotiated by the parties, independent of the employment contract that represents a contract between a lessor and lessee. Plaintiff was the owner of the truck and leased it to defendant via a separate contract that, according to plaintiff's testimony, provided a direct benefit to plaintiff. When plaintiff was involved in his motor vehicle accident, he was the owner/operator of his truck, driving off the job site and on his way home from work.

While defendant did provide plaintiff with a gas card, I find that the gas card was also part of the rig rental agreement, which, as I've indicated above, constituted a separate contract between the parties independent of the employment contract. Moreover, regardless of the rig rental agreement, I find plaintiff's use of the gas card is comparable to the travel allowance paid to plaintiff in *Forgach, supra*, and equally insufficient to establish a causal nexus between the injury and the employment. Here, as in *Forgach*, the gas card had no relationship to actual miles traveled, and was intended primarily to cover the gas used by plaintiff to operate his truck and welding machine during the work day. Thus, one cannot draw the inference, as was done in *Lemanski, supra*, that the use of a gas card reflected a "recognition" between the parties that travel was a necessary part of the job. Accordingly, I find that neither the rig rental agreement nor the use of the gas card fall within the exception of employer funded or furnished transportation.<sup>18</sup>

Our colleague would hold that there is no evidentiary support for the magistrate's conclusion "the gas card had no relationship to actual miles traveled..." In context, given her application and extensive discussion of *Forgach v Koch*, 167 Mich App 50 (1988), the magistrate's statement is correct. She found that the use of the gas card was directed toward work at the job site. Any personal use was merely incidental to the main purpose. This was a reasonable conclusion from the proofs presented.

It is important to bear in mind that the employee bears the burden of proof on establishing an exception to the general rule that commuting injuries are not compensable. The only proof offered on this point was that the employer gave the employee a credit card for fuel which could be used not only for strictly work purposes, but for all use of the employee's vehicle. It is a matter of common knowledge that the operation of motor vehicles involves much greater expense than the mere fueling of the car or truck. Licensing, registration, insurance, routine and special maintenance and depreciation are all expenses of operating a vehicle. In the absence of other proofs, the magistrate's conclusion gasoline expense alone did not represent payment of travel expenses is correct.

We find no error in the magistrate's factual analysis on this point and affirm the magistrate's finding that plaintiff's injury did not arise out of and in the course of his employment.

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<sup>18</sup> Magistrate's opinion at 5-6.

We affirm.

Commissioner Kent concurs.

Richard B. Leslie

James J. Kent

Commissioners

STATE OF MICHIGAN  
WORKER'S COMPENSATION APPELLATE COMMISSION

JAMES BOWMAN,  
PLAINTIFF,

AUTO CLUB INSURANCE ASSOCIATION,  
INTERVENING PLAINTIFF

V

DOCKET #02-0455

R.L. COOLSAET CONSTRUCTION COMPANY AND  
LIBERTY MUTUAL FIRE INSURANCE COMPANY;  
SECOND INJURY FUND (PERMANENT AND  
TOTAL DISABILITY PROVISIONS),  
DEFENDANTS.

This cause came before the Appellate Commission on intervening plaintiff's and plaintiff's appeal and defendant Second Injury Fund (Permanent and Total Disability Provisions) cross-appeal from Magistrate Mary C. Brennan's decision, mailed October 22, 2002, denying benefits. The Commission has considered the record and counsel's briefs, and believes that the magistrate's decision should be affirmed. Therefore,

IT IS ORDERED that the magistrate's decision is affirmed.

Richard B. Leslie

James J. Kent

Commissioners