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Workmen's Compensation

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WORKMEN'S COMPENSATION

Edens v. New Mexico Health & Social Serv. Dep't[1] posed the problem of determining when an employee's injuries "arise out of and are in the course of" employment so as to entitle him to recovery under the New Mexico Workmen's Compensation Act[2] (hereinafter referred to as the Act).

Betty Jean Edens was one of four Albuquerque employees of HSSD whom defendant HSSD required to attend a two-day conference in Santa Fe. To reduce its reimbursement costs, HSSD requested the employees to form a car pool. For the same reason, HSSD requested that they return to Albuquerque after each day's session rather than stay overnight in Santa Fe.

Mrs. Edens and three other HSSD employees agreed to meet at an Albuquerque parking lot from which they would proceed to Santa Fe in Mrs. Edens' car. After the first session, Mrs. Edens drove the other three employees to the Albuquerque parking lot from which the four proceeded home separately. En route home from the parking lot, Mrs. Edens was fatally injured in a collision with another vehicle.

Boyce D. Edens, widower of the deceased, brought suit in district court to recover workmen's compensation benefits pursuant to the Act. The plaintiff claimed that the death of Betty Jean Edens was an injury arising out of and in the course of her employment.[3] In particular, he sought to avoid the application of what is termed the "going and coming" rule: that an injury does not arise out of and in the course of employment if it is sustained while the employee is going to or coming from work.[4] The plaintiff relied on a widely recognized exception to this rule, referred to as the "special errand rule."[5] Under it, if an employer requests an employee to journey off

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1. 88 N.M. 366, 540 P.2d 846 (1975).
2. N.M. Stat. Ann. § § 59-10-1 to 37 (Repl. 1974, Supp. 1975).
3. Memorandum Trial Brief, p. 2, *Edens v. H.S.S.D.*, Dist. Ct.
4. N.M. Stat. Ann. § 59-10-12.12 (Repl. 1974, Supp. 1975):
   "injury . . . arising out of and in the course of employment" . . . shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving.
5. 1 A. Larson, The Law of Workmen's Compensation ¶ 16.10 (1972).

the employer's premises, the journey itself may become part of the service performed, thus within the course of employment.

After trial, the district court found that Mrs. Edens was not acting in the scope and course of her employment at the time of the accident.[6] Fact findings by the court suggest that this holding was grounded on the theory that she was within the going and coming rule once she left the Albuquerque parking lot. Hence her injury was not compensable.

The trial court found that Mrs. Edens was free to drive to her home or elsewhere once her fellow employees had left her car,[7] and that she had completed all of the duties of her employment for the day before the time of the accident.[8]

The New Mexico Court of Appeals affirmed. It viewed the evidence and the district court's findings of fact as showing that the accident occurred after decedent's work had ended. The court held that the day's employment began at the parking lot at the beginning of the day and terminated there on return from Santa Fe. The court considered the material factor to be the service to be performed for the employer. In so holding, the court rejected the plaintiff's contention that because Mrs. Edens was required to be on the highway after work incidental to her employment all driving to and from Santa Fe was done in the course of employment.

The New Mexico Supreme Court reversed.[9] As a preliminary matter, the Supreme Court addressed the question of whether the trial court determination that Mrs. Eden's injury did not arise out of her employment was a finding of fact or of law. The Court noted that the district court had regarded them as conclusions of fact and that thereafter the parties and the Court of Appeals had assumed that this was the case. This is important, since the rule that fact findings will not be overturned if supported by substantial evidence is applicable to workmen's compensation cases.[10] The rule that findings of law are freely reviewable likewise applies.[11] The Court stated that the determination of whether a finding was of fact or of law was itself a question of law and thus freely reviewable. It concluded that since the historical facts were undisputed, the question of whether the

6. *Edens v. New Mexico Health and Social Serv. Dep't*, 88 N.M. 366, 540 P.2d 846 (1975).

7. Dist. Ct. finding of fact #10.

8. Dist. Ct. finding of fact #13.

9. *Edens v. New Mexico Health and Social Serv. Dep't*, N.M. , 547 P.2d 65 (1976).

10. N.M. Stat. Ann. § 59-10-13.9 (Repl. 1974), states that the Rules of Civil Procedure apply to workmen's compensation cases except where the Act provides otherwise.

11. *Id.*

accident arose out of and in the course of employment was a question of law.

The Court found that HSSD had sent Mrs. Edens on a "special mission" as that term is used in *Wilson v. Rowan Drilling Co.*[12] The Court then considered whether the mission had been completed at the time of the accident. The Court again relied on *Wilson,* which in turn had quoted *Rafferty v. Dairymen's League Co-op Ass'n.*[13] Influenced by the "portal to portal" language of *Rafferty,*[14] the Court concluded that the logical starting point for the mission was ". . . the moment she left her home for Santa Fe. . . ."[15] Similarly, the Court found that each employee was within the scope of his employment ". . . until the moment he returned home at the end of the day. . . ."[16]

The Court rejected the defendant's contention that the starting and ending points of the mission were at the Albuquerque parking lot, holding that the agreement among the employees to meet there did not determine the scope of employment. Rather, the scope of employment is determined by the employer's directions. The Court thus held that the special errand rule[17] applied to the case and consequently that Mrs. Edens' injuries arose out of and in the course of her employment. Thus, *Edens* approves a broad special errand exception to the coming and going rule.[18] The significance of this is

12. 55 N.M. 81, 94, 227 P.2d 365, 373 (1950):
> . . . When an employee is sent by his employer on a special mission away from his regular work, . . . while on such mission, . . . the employee is acting within the course of his employment. . . . If an employee is accidentally injured while on such a mission, . . . the injury arises out of and in the course of his employment. . . .

13. 16 N.J. Misc. 363, 200 A. 493 (1938):
> . . . But if, while so off duty from his regular employment, he is called to do an errand or sent on a mission by the employer, the courts which have spoken on this subject hold it as a special service begun the moment the employee leaves his home, or the place where the call comes to him, and ended only with his return. . . .

14. *Id.*
15. N.M. , 547 P.2d at 68.
16. *Id.*
17. *Larson, supra,* note 5, 16.10 describes the rule:
> The special errand rule may be stated as follows: When an employee, having identifiably 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 the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

18. *Edens v. New Mexico Health and Social Serv. Dep't,* N.M. , 547 P.2d 65, at 68:

that the rule adopted confers "portal to portal" coverage on the employee[19] so that a worker determined to have undertaken a special errand is within the scope of his employment from the time he leaves his home until his return.[20]

Previous New Mexico decisions did not confer such broad coverage under the Act,[21] although the New Mexico courts had recognized exceptions to the going and coming rule.[22] The cases recognizing the exceptions sometimes used the terms "special mission" and "special errand" interchangeably,[23] as indeed was the case in *Edens*.[24] The distinction between the two terms is that the latter is an exception to

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". . . In considering the special errand rule, which is an exception to the 'going and coming rule,' . . ."

19. *See Larson, supra,* note 5, ¶ 16.10.

20. Note that the special errand rule as stated in Note 17, *supra,* applies to those cases where at least one terminus of the journey is the employee's home. This is because the going and coming rule pertains to such journeys, and the special errand rule is an exception to that rule.

21. The Supreme Court considered the special errand rule in *Ross v. Marberry & Co.*, 66 N.M. 404, 349 P.2d 123 (1960). The Court stated that the rule was an exception to the going and coming rule, but declined to apply the exception in *Ross.* The Court concluded that ". . . the mere fact that appellant, at the request of his employer, departed twenty-five minutes early for work and his usual destination, following his usual route, in order to accomplish a task which was one of his regular duties . . ." was insufficient to place the employee without the operation of the going and coming rule.

22. *McKinney v. Dorlac,* 48 N.M. 149, 146 P.2d 867 (1944); *Barrington v. John Drilling Co.*, 59 N.M. 172, 181 P.2d 166 (1947); *Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 227 P.2d 365 (1950); *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 370 P.2d 816 (1962). *Barrington, Rowan,* and *Brown* involved "going and coming" between home and work. Although the cases might have been analyzed as special errand cases, there were other factors present in each which may have brougt the journeys within the scope of employment independently of the special errand rule: additional compensation for providing transportation for other workers (*Barrington*); additional duty to see that a full crew was on the work site at the proper time (*Rowan*); employee charged with carrying a report home (*Brown*). *McKinney* seems a classic case where the special errand rule would apply: McKinney and his employer agreed that the former would travel from Albuquerque, the usual place of employment, to Roswell, for the purpose of preparing for a plastering job soon to start there. Mr. McKinney was to act as foreman on the job and was to leave on the day following the making of the agreement. He was paid in advance for the day of travel, for which he used his own car. McKinney was fatally injured en route to Roswell. The New Mexico Supreme Court did not discuss the facts in terms of the special errand rule, simply concluding that ". . . the main purpose in making the trip from Albuquerque, New Mexico, to Roswell, New Mexico, was in the furtherance of the business of the appellant Dorlac." Thus, the Court found that the employee was within the scope of his employment at the time of his injury.

23. *See e.g., Wilson v. Rowan Drilling Co.*, 55 N.M. 81, 94, 227 P.2d 365, 373 (1950): ". . . when an employee is sent by his employer on a special mission away from his regular work. . . ." But in *Rowan,* the employee was going to work at the time of his injury. Therefore, his trip was, in Larson's terms, a special errand.

24. *Edens v. New Mexico Health & Social Serv. Dep't,* N.M. , 547 P.2d 65, at 68: ". . . Edens was sent on a special mission to the meeting in Santa Fe . . ." and "we agree that the special errand rule is applicable to this case. . . ."

the going and coming rule, and comes into operation only in those cases where the employee is going from work to his home or vice-versa.[25] The term "special mission" is used to describe those situations in which the employer sends the employee off the premises on a mission. In these cases the going and coming rule would not apply since, of course, the employee is not on his way home from work while on the errand.[26] The question remains then as to whether, under New Mexico law, there is any distinction between the terms "special mission" and "special errand."

The Court in *Edens* made it clear that the directions of the employer determine the scope of the employment. Suppose the employees had been directed to form their car pool at the usual place of employment. Under *Edens* this would mean that the employment started when the employees left the employer's premises and not when they left their homes. Moreover, this is in accord with the definition of the special errand rule set out in the treatises.[27] The employees would be on a special mission from the time they left the place of employment until their return, but they would not be on a special errand from the moment they left their homes until their return there.[28] By contrast, the *Edens* court saw the distinction as a question of whether the employee was or was not performing the "special mission" at the time of the accident.

The better approach is to consider the journey as a whole to determine whether the circumstances warrant treating the trip itself as part of the service to be performed by the employer. The employer's instructions will then define the duration of the trip. If no employer instructions define the trip, the special errand rule confers portal-to-portal coverage. The alternative of attempting to choose a particular point in the journey at which to mark the beginning of the "mission," leads to the same difficulty rejected in *Edens*.

Schiller v. Southwest Air Rangers, Inc.[29] overruled three previous cases which had held that attorney fees cannot be awarded in workmen's compensation cases in which only medical and hospital

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25. *Larson, supra,* note 5, ¶ 16.10.

26. "Dual purpose" trips where, say, the employer asks the employee to run an errand on the way home from work are, of course, not taken into account here.

27. This assumes that the starting and ending times of the mission approximate those of a normal work day. If there is sufficient deviation from these norms, the special errand rule could come into operation (". . . the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, . . . is itself sufficiently substantial to be viewed as an integral part of the service itself." *Larson, supra,* note 17). *Cf. Ross v. Marberry & Co.,* 66 N.M. 404, 349 P.2d 123 (1960).

28. *Supra* note 17.

29. 87 N.M. 476, 535 P.2d 1327 (1975).

expenses are recovered.[30] The district court and the New Mexico Court of Appeals[31] had relied on *Wuenschel v. New Mexico Broadcasting Corp.*[32] and *Lasater v. Home Oil Co.*,[33] both of which the Supreme Court acknowledged as supporting the Court of Appeals holding. The Court held that *Wuenschel* and *Lasater* were erroneously based on *Rayburn v. Boys Super Market, Inc.*[34] and *Nasci v. Frank Paxton Lumber Co.*[35]

The Court noted that whether the term "compensation" includes medical expenses under the Act[36] was left open in the *Nasci* decision. However, the Court focused on language in *Nasci* tying the word "compensation" to medical payments.[37] The Court quoted *Rayburn* for a like connection between medical payments and compensation. *Rayburn* had applied N.M. Stat. Ann. § 59-10-23(D) (Repl. 1974)[38] to a situation in which the employer's liability was less than the settlement offer and thus concluded that attorney fees were not allowable.[39] The Court in *Schiller* observed that medical and surgical expenses were considered in determining whether the claimant in *Rayburn* collected compensation exceeding the settlement offer.[40] Based on the "implicit recognition" in *Nasci* and *Rayburn* that medical expenses are "compensation," together with the principle that the provisions of the Act are to be liberally construed in favor of the employee, the Court held that medical expenses are compensation for the purpose of allowing attorney fees under Section 59-10-23(D).

Security Ins. Co. of Hartford v. Chapman[41] considered the prob-

30. *Cromer v. J. W. Jones Constr. Co.*, 79 N.M. 179, 441 P.2d 219 (Ct. App. 1968); *Wuenschel v. New Mexico Broadcasting Corp.*, 84 N.M. 109, 500 P.2d 194 (Ct. App. 1972); *Lasater v. Home Oil Co.*, 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972).

31. 88 N.M. 27, 536 P.2d 728 (Ct. App. 1975).

32. 84 N.M. 109, 500 P.2d 194 (Ct. App. 1972).

33. 83 N.M. 567, 494 P.2d 980 (Ct. App. 1972).

34. 74 N.M. 712, 397 P.2d 953 (1964).

35. 69 N.M. 412, 367 P.2d 913 (1961).

36. N.M. Stat. Ann. § 59-10-23 (Repl. 1974) governs the awarding of attorney fees under the Act. Subsection D thereof, at issue in *Schiller*, states that where the employee has refused the employer's settlement offer of "compensation," and where subsequently he is awarded "compensation" in a greater amount in court proceedings, then reasonable attorney fees will be allowed.

37. ". . . the compensation to which he is entitled may be nothing more than medical and surgical payments . . . ," *Nasci v. Frank Paxton Lumber Co.* 69 N.M. 412, 415, 369 P.2d 913, 915 (1961).

38. *Supra* note 16.

39. *Id.*

40. The *Schiller* court quoted the following passage in support of this conclusion: ". . . the total amount of the employer's liability, including the medical and hospital expenses, was less than the $3200 offered in settlement. . . ."

41. 88 N.M. 292, 540 P.2d 222 (1975).

lem of when an employee may elect to sue a physician who aggravated the original work-related injury, rather than hold the employer liable under the Act for such injuries. Chapman sustained an injury during the course of his employment and was admitted to Presbyterian Hospital for medical treatment. Chapman, who was self employed, was both the employer and the employee. He notified his insurer, Security, of the accident, and Security discharged its obligation to pay Chapman's medical expenses and compensation pursuant to the Act.

Thereafter, Chapman and Security brought an action for negligence against Presbyterian Hospital, et al., alleging that the wrong type of blood was administered to Chapman when he was treated for his injury. Chapman sought damages for injuries and losses resulting from the mismatch of blood, and the insurance company sought reimbursement for medical expenses and compensation benefits allegedly paid as a result of the medical negligence which aggravated Chapman's injury.

Without notifying Security, Chapman settled his suit with the hospital, which agreed to indemnify Chapman against any subrogation claim which the insurer might bring against him. After the settlement Security amended its complaint to include a count against Chapman for reimbursement of that part of the settlement which the insurer attributed to damages paid by it to Chapman as a result of the mismatch of blood. The amended complaint also requested a declaratory judgment to determine the rights and obligations of the various parties. The trial court dismissed the complaint on the ground that it failed to state a claim upon which relief could be granted. The plaintiff insurer appealed.

At issue is the meaning of Sections 59-10-19.1(B)[42] and

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In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention and offers to furnish these services during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or, medicine than those so provided; Provided, however, that the employer furnishing such surgical, medical and hospital services and medicines shall be liable to the workman for injuries resulting from neglect, lack of skill, or care on the part of any person, partnership, corporation or association employed by the employer to care for the workman. In the event, however, that any employer becomes liable to the workman, it shall be optional with the workman injured in such a manner to accept the foregoing provisions and hold the employer liable for the injuries, or to reject these provisions and retain the right to sue the person, partnership, corporation or association employed by the employer who injures the workman through neglect, lack of skill or care. Election to accept or reject the provisions of this section shall be made by a notice in writing, signed and

59-10-25(C)[43] of the Act. Section 19.1(B) provides that when the employer furnishes hospital and medical facilities to the employee for treatment of a work-related injury, the employer is liable to the employee for injuries resulting from negligence on the part of the hospital or medical facility.[44] Any cause of action against the third party is assigned by the employee to the employer. Secondly, the employee may elect not to hold the employer liable for the subsequent injury and sue the third party directly.[45] The employee must make his election by written notice to the employer.[46]

The insurer, relying on the first clause of Section 59-10-19.1(B),[47] urged that the section applied only where the employer actually maintains hospital and medical facilities for its employees. The Supreme Court, in an opinion by Justice MacManus, rejected this view as too narrow a reading, holding that the section applied to the case at bar. The Court reasoned that the employee's admittance to the hospital, his notice of the accident to the insurer, and the fact that the employer was also the employee were sufficient to justify the conclusion that the employer made provision for hospital and medical facilities within the meaning of the section.

The insurer relied on Section 59-10-25(C) as a statutory basis for its asserted right of reimbursement from Chapman.[48] It claimed that a double recovery would result should Chapman be allowed to retain

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dated, given by the workman to his employer; and, if the workman elects to hold the employer liable for the injuries, the cause of action of the workman against the third party partnership, corporation or association shall be assigned to the employer, who may institute proceedings thereon in any court having jurisdiction, in the workman's name.

43. The right of any workman, or, in case of his death, of those entitled to receive payment or damages for injuries occasioned to him by the negligence or wrong of any person other than the employer or any other employee of the employer, including a management or supervisory employee, shall not be affected by the Workmen's Compensation Act, but he or they, as the case may be, shall not be allowed to receive payment or recover damages therefor and also claim compensation for the employer, and in such case the receipt of compensation from the employer shall operate as an assignment to the employer, his or its insurer, guarantor or surety, as the case may be of any cause of action, to the extent of payment by the employer to the workman for compensation, surgical, medical, osteopathic, chiropractic, and hospital services and medicine occasioned by the injury which the workman or his legal representative or others may have against any other party for the injuries or death.
44. *Supra* note 42.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Supra* note 43.

both the compensation benefits and the entire sum of the settlement.[49]

The Court agreed that an employee may not claim compensation for an injury for which he already has recovered judgment[50] from a third party tortfeasor or where he has settled his claim against the third party.[51] But Chapman argued that the injury resulting from the mismatch of blood was separate and distinct from the injury for which he was compensated and that this second injury was governed by Section 59-10-19.1(B), and not by Section 59-10-25(C). The Court's reasoning suggests that where the employee's work-related injury is aggravated by negligence perpetrated in the course of medical treatment the employee retains his common law cause of action against the negligent party until he gives written notice or accepts compensation clearly designated as compensation for the subsequent injury which shows that he wishes to hold the employer liable for the negligence rather than the tortfeasor.[52] It is only then that the employer or his insurer can participate in the recovery against the third party tortfeasor. The Court thus construed the provision as making no change in the common law, except that the employee, upon giving notice, may elect to shift the tort liability from the third party to the employer.

Since Chapman was both employer and employee, this notice requirement seems at first glance to lack meaning. Typically, however, both where the employer is also the employee and where he is not, it is the insurer who is the real beneficiary of notice. Thus, it would seem the better procedure to require that the employer-employee give the written notice to his insurer. The Court, however, suggested that the employer must assume that no election to hold him liable has been made, unless he has been so notified in writing, but that the employee may elect to sue the third party directly without giving written notice.[53] This one-sided interpretation seems

49. *Id.* ". . . [H]e . . . shall not be allowed to receive payment or recover damages therefor and also claim compensation from the employer. . . ."

50. *White v. New Mexico Highway Comm'n*, 42 N.M. 625, 83 P.2d 457 (1938).

51. *Royal Indem. Co. v. Southern Cal. Petrol. Corp.*, 67 N.M. 137, 353 P.2d 358 (1960).

52. N.M. Stat. Ann. § 59-10-19.1(B) (Repl. 1974):
"Election to accept or reject the provisions of this section shall be made by a notice in writing, signed and dated, given by the workman to his employer. . . ."

53. 88 N.M. 292, , 540 P.2d 222, 228 (1975):
"The New Mexico statute requires a written election by the employee before the employer is liable. . . . Only if the workman makes the election is the cause of action then assigned to the employer. . . ."
. . . The employee did not give the election in writing as required by the statute and did not file against the employer. . . . He instead *elected* to sue the physician, technicians and hospital. . . . [Emphasis supplied.]

unjustified either by the statutory language,[54] or the circumstances of self-employment.

The insurer also asserted an equitable right of subrogation, not decided by the Court, as it was not raised below. The Court suggested, however, that subrogation would not be allowed in such a case. Discussing the assignment of the cause of action to the employer, the Court remarked that such an assignment is different from subrogation to the extent of any amounts the employer may have paid. Instead, the "entire cause of action" is assigned to the employer.[55]

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54. N.M. Stat. Ann. § 59-10-19.1(B) (Repl. 1974):
"Election to *accept or reject* the provisions of this section shall be made by a notice in writing. . . ." [Emphasis supplied.]

55. 88 N.M. 292, , 540 P.2d 222, 227 (1975).