UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1036

September Term, 2016

RINA CALVO

.

v.

MONTGOMERY COUNTY, MARYLAND

Wright,
Nazarian,
Arthur,

JJ.

Opinion by Wright, J.

Filed: June 21, 2017

This appeal arises out of a worker's compensation action. Appellant, Rina Calvo, is employed as a bus driver by appellee, Montgomery County, Maryland ("the County"). Calvo brought a workers' compensation claim for injuries sustained in a car accident on May 16, 2015, while Calvo was on her way to an employee customer service training that took place on a time and day different from her normal work hours, and at a location different than her normal worksite.

The County contested Calvo's claim, and a hearing was held by the Workers' Compensation Commission ("the Commission") on October 30, 2015. On November 6, 2015, the Commission ruled that Calvo's accident arose out of and in the scope of her employment and was, therefore, compensable.

On December 1, 2015, the County appealed the Commission's award to the circuit court and requested a jury trial. The County then filed a motion for summary judgment, and Calvo filed an opposition. A hearing on the County's motion was held on June 23, 2016. The circuit court ruled that as a matter of law, Calvo's injuries did not arise out of and in the course of her employment, and the court granted the County's motion for summary judgment. Calvo timely appealed.

QUESTIONS PRESENTED

We have combined and reworded Calvo's questions for clarity, as follows:[1]

[1]In her brief, Calvo asks:

> 1) Where the decision of the Workers' Compensation Commission is presumed to be *prima facie* correct, was it error for the Circuit Court to enter summary judgment against a Claimant where the Claimant had prevailed before the Commission and the appellate courts have held that

Did the circuit court err in granting the County's motion for summary judgment?

For the following reasons, we find no error in the circuit court's grant of summary judgment.

FACTS

All bus drivers employed by the County are required to a take an annual customer service training.[2] Calvo was notified on May 6, 2015, that she would be required to take the training on Saturday, May 16, 2015, from 8:00 A.M. to 4:30 P.M., at the Gaithersburg Depot.

whether an injury arose "out of and in the course of employment" constitutes a question of fact?

2) Did the Circuit Court err in holding, as a matter of law, that the "special mission" exception to the "going and coming" rule does not apply where Ms. Calvo's [sic] was on her way to a different task (customer service training), at a different work site, at the behest of her Employer and in the furtherance of her Employer's business, on a day she was [sic] normally did not have to work?

3) Given that the case law holds that a claim is compensable when it occurs in a place the employee would not have been "but for" her employment and/or while engaged in an activity incident to her employment, and that here Ms. Calvo was involved in an accident while she was traveling on behalf of her employer to an event that was to the benefit of her employer, did the Circuit Court err in granting summary judgment?

[2] All of the facts have been derived from testimony before the Commission, and documents presented at the October 30, 2015, hearing. The County did not present any contesting witnesses or affidavits at the hearing before the Commission or in support of its motion before the circuit court.

Calvo did not normally work on Saturdays nor did she usually report to work at the Gaithersburg Depot location. She was not required to wear her bus-driver uniform to the customer service training. Calvo was not provided with transportation to the training; she used her personal vehicle and did not receive mileage reimbursement from the County for her travel to the training. She was not paid during the time that she was driving to the training, but she was to be paid her regular rate of pay to begin upon her arrival at the training.

On her way to the training, Calvo was rear-ended by another vehicle while waiting at a traffic light. She was unable to attend the training on May 16, 2015, and attended another training on October 17, 2015.

Calvo had been employed by the County as a bus driver for nineteen years at the time of her accident.

DISCUSSION

"Workers' compensation cases . . . occupy a special niche in Maryland civil law." *Baltimore Cty. v. Kelly*, 391 Md. 64, 67 (2006). Therefore, before we turn to the merits, we first revisit the procedural considerations of workers' compensation appeals and the relevant case law.

The Maryland Workers Compensation Act (the "Act") provides benefits to employees who suffer an accidental injury that "arises out of and in the course of employment." Md. Code (1993, 2008), Labor & Employment Article ("L&E") § 9-101(b)(1).

The "course of employment" test directs our attention to the time, place, and circumstances of the accident. *Montgomery Cty. v. Wade*, 345 Md. 1, 11 (1997) (citations omitted). "In determining whether an injury occurred 'in the course of employment,' we consider the time, place, and circumstances of the accident in relation to the employment." *Livering v. Richardson's Rest.*, 374 Md. 566, 576-77 (2003) (quoting *Wade*, 345 Md. at 11).

"'Arises out of' refers to the causal connection between the employment and the injury." *Id.* at 574. However, the phrase "arises out of" does not require that the injury be directly caused by the performance of an employment-related task, but rather requires, "more broadly, that the injury be incidental to the employment, such that it was by reason of the employment that the employee was exposed to the risk resulting in the injury." *Id.* at 574-75 (quoting *Mulready v. Univ. Research Corp.*, 360 Md. 51, 57 (2000)).

The facts and circumstances of each individual case determine whether an injury arises out of and in the course of employment. *Id.* at 574 (citing *Knoche v. Cox*, 282 Md. 447, 454 (1978)).

The Act is "remedial, social legislation designed to protect workers and their families from various hardships that result from employment-related injuries." *Id.* at 574 (citation omitted). Therefore, the Act is to be construed liberally in favor of injured employees in order to effectuate its "benevolent purposes." *Id.* (quoting *Bethlehem-Sparrows Point Shipyard, Inc. v. Hempfield*, 206 Md. 589, 594 (1955)).

"Ordinarily, an employee that suffers an injury going to or returning from their place of work is not considered to be acting in the course of their employment." *Garrity*

v. Injured Workers' Ins. Fund, 203 Md. App. 285, 293 (2005) (citations omitted). However, there are a several exceptions to this "going and coming" rule barring recovery. *Bd. of Cty. Comm'rs for Frederick Cty. v. Vache*, 349 Md. 526, 532 (1998).

An employee seeking compensation for a work-related injury first files a claim with the Commission. *See* L&E § 9-709. The "Commission is an administrative agency and was created specifically to develop an expertise in its field. The Commission forms part of a comprehensive scheme of liability set up by the Workmen's Compensation Act, which largely abrogates the common law." *Newell v. Richards*, 323 Md. 717, 732 (1991) (citations omitted).

"A party dissatisfied by the action of the Commission may seek review in a circuit court by either proceeding on the record made before the Commission (much like a judicial review of the final action of most state administrative agencies) or receive a new evidentiary hearing and decision before a jury (much like an original civil complaint brought in a circuit court)." *Kelly*, 391 Md. at 67-68; *S.B. Thomas, Inc.*, 114 Md. App. 357, 364-66 (1997) (extensively detailing the two pathways for an appeal of a determination by the Commission); L&E § 9-745.[3] On appeal, the Commission's

[3] L&E provides the following procedure for circuit court proceedings for appeals of decisions from the Commission:

> (a) *In general.*—The proceedings in an appeal shall:
>
> (1) be informal and summary; and
>
> (2) provide each party a full opportunity to be heard.

decision is entitled to a presumption of correctness, *i.e. prima facie correct*, that must be overcome. *Kelly*, 391 Md. at 68. However, the presumption of correctness "is only pertinent when the issue on appeal to the circuit court is one of fact and not of law." *Simmons v. Comfort Suite Hotels*, 185 Md. App. 203, 211 (2009) (citations omitted).

(b) *Presumption and burden of proof.*—In each court proceeding under this title:

(1) the decision of the Commission is presumed to be prima facie correct; and

(2) the party challenging the decision has the burden of proof.

(c) *Determination by court.*—The court shall determine whether the Commission:

(1) justly considered all of the facts about the accidental personal injury, occupational disease, or compensable hernia;

(2) exceeded the powers granted to it under this title; or

(3) misconstrued the law and facts applicable in the case decided.

(d) *Request for jury trial.*—On a motion of any party filed with the clerk of the court in accordance with the practice in civil cases, the court shall submit to a jury any question of fact involved in the case.

(e) *Disposition.*—

(1) If the court determines that the Commission acted within its powers and correctly construed the law and facts, the court shall confirm the decision of the Commission.

(2) If the court determines that the Commission did not act within its powers or did not correctly construe the law and facts, the court shall reverse or modify the decision or remand the case to the Commission for further proceedings.

Essentially, although courts accord deference to an administrative agency's interpretation of the statute it administers, we may always determine whether the agency made an error of law. *Long v. Injured Workers' Ins. Fund*, 448 Md. 253, 264 (2016).

On appeal from a decision by the circuit court, where the sole issue presented is one of law, the appellate court reviews the decision *de novo*, without deference to the decisions of either the Commission or the circuit court. *Prince George's Cty. v. Proctor*, 228 Md. App. 579, 587 (2016); *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14, (2004).

In this case, after requesting a jury trial, the County filed a motion for summary judgment and asserted that there was no dispute of fact. On appeal before this Court, the County continues to assert that there is no issue of material fact. Therefore, as no issue of fact need be determined by a jury, the County is not seeking review by a jury, but rather seeking review by the court "on the record made before the Commission," *Kelly*, 391 Md. at 67, via the "routine appeal process." *Id.* at 74 (citation omitted). To put it another way, the County essentially first appealed requesting a full *de novo* trial, but *via* a motion for summary judgment first utilized the "routine appeal" process and requested a review of the record before the commission for a determination of legal error.

Under Md. Rule 2-501(a), a "party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." However, "even where the underlying facts are undisputed, if those facts are susceptible of more than one permissible inference, the choice between those inferences should not be made

as a matter of law, but should be submitted to the trier of fact." *Fenwick Motor Co., Inc. v. Fenwick*, 258 Md. 134, 138 (1970) (citations omitted).

Appellate courts review grants of summary judgment *de novo*. *Kelly*, 391 Md. at 73 (citations omitted). The proper standard of review is whether the trial court's decision was legally correct. *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 476 (2004).

As the Court of Appeals did in *Kelly*, we now consider whether a review before a circuit court was amenable to disposition on a motion for summary judgment. The circuit court correctly determined that summary judgment was appropriate because there was no dispute of material fact. The circuit court then turned to the strictly legal question of whether Calvo's injury was barred by the going and coming rule or whether it arose out of and in the scope of her employment because she was on a special mission or errand. *See Mayor and City Council of Baltimore v. Jakelski*, 45 Md. App. 7, 8 (1980) (where the Commission stated that a case with undisputed facts gave rise to "(s)tricly a legal question" of whether the going and coming rule barred recovery for an accidental injury which occurred during transit to a work-related duty).

In order to review the legal correctness of the court's grant of summary judgment, we look to the case law regarding exceptions to the bar against recovery for injuries sustained while traveling to a work-related duty.

As stated previously, injuries suffered while a person is traveling to or from work are usually not compensable. *Barnes v. Children's Hosp.*, 109 Md. App. 543, 555 (1996) (citations omitted). "The rule is based on the notion that the Act does not protect

employees against the common perils of life, and the dangers of ordinary commuting dangers that are common to all people." *Id.* (internal citations omitted).

However, although the rule prohibits recovery generally, there are a number of exceptions. The Court of Appeals has enumerated them as follows:

> [1.] [W]here the employer furnishes the employee free transportation to and from work, the employee is deemed to be on duty, and an injury sustained by the employee during such transportation arises out of and in the course of employment. [2.] Compensation may also be properly awarded where the employee is injured while traveling along or across a public road between two portions of the employer's premises. [3.] The "proximity" exception allows compensation for an injury sustained off-premises, but while the employee is exposed to a peculiar or abnormal degree to a danger which is annexed as a risk incident to the employment. [4.] Injuries incurred while the employee travels to or from work in performing a special mission or errand for the employer are likewise compensable.

Vache, 349 Md. at 532 (quoting *Alitalia Linee Aeree Italiane v. Tornillo*, 329 Md. 40, 44 (1993) (internal citations omitted). Additionally, the *dual purpose doctrine* provides that an "injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey." *Stoskin v. Bd. of Educ. of Montgomery Cty.*, 11 Md. App. 355, 358 (1971) (citation omitted).

Here, the County avers that the going and coming rule applies to Calvo's injury and bars recovery because the annual customer service training was so routine so as not to be considered a special errand or mission, and because Calvo was merely going to another worksite on another day of the week. Calvo responds, reaffirming the position argued before the Commission, that the going and coming rule does not preclude

recovery for her injury because the training was sufficiently unusual to constitute a special mission or errand.

The "special mission or errand" exception is one of the enumerated exceptions to the going and coming rule. In *Barnes,* we reiterated the definition of the rule as follows:

> When an employee, having identifiable time and space limits on his employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or 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.

109 Md. App. at 556-57 (quoting *Fairchild Space Co. v. Baroffio,* 77 Md. App. 494, 501 (1989)).

In *Barnes,* the appellant was an employee at Children's Hospital. *Id.* at 550. She was shopping with her family on a Saturday, a day she did not normally work, but was called to work to perform a task usually performed by a subordinate. *Id.* She planned to take her family home before proceeding to work and realized she needed gas to make the drive to work. *Id.* When she stopped for gas, she slipped in a puddle of oil, and was injured. *Id.* The Commission determined that her injury did not arise out of and in the course of her employment, and the circuit court affirmed. *Id.* We examined when a "mission is sufficiently 'special' to be brought within the ambit of the rule." *Id.* at 557.

We stated that in order to assess if a mission is sufficiently special so as to be considered an exception to the going and coming rule, the court must focus on the

characteristics of the journey rather than the work to be performed,[4] and must first "consider the relative regularity or unusualness of the particular journey." *Id.* (citation and quotation marks omitted). "If the journey at issue is 'relatively regular,' in the context of the employee's normal duties, then the case begins with a strong presumption that the trip is not special and instead falls within the normal going and coming rule." *Id.* (citation and quotation marks omitted). Second, the court must consider "the relative onerousness of the journey compared with the service to be performed at the end of the journey." *Id.* at 558 (citations omitted). Onerousness depends not only on the length of travel, but also on the circumstances under which it is made, including the time of day, and on whether it is a regular workday. *Id.* Third, the suddenness or whether the call was made with an "element of urgency" is also a relevant factor, although this factor is not dispositive. *Id.* at 558-59.

We ruled that Barnes's journey was sufficiently special, despite the hospital's assertions that it was not special because the duty for which she was called in was part of her normal supervisory duties since the work was the duty of a subordinate, and that the

[4] Relatedly, the law in Maryland also provides that "certain company-sponsored social events are sufficiently work related to be incidents of employment, so that injuries which occur during such events are compensable" under the special mission exception. *Coats and Clark's Sales Corp. v. Stewart*, 39 Md. App. 10, 14 (1978) (citing *Sica v. Retail Credit Co.*, 245 Md. 606, 618-19 (1967); *Selected Risks Ins. Co. v. Willis*, 266 Md. 674, 677-78 (1972)). Further, in *Stewart*, we held that a worker's "self-contained trip to a grocery store, to obtain food for a baby sitter needed to enable him to attend a company-sponsored social event is a special errand or mission" because the social event was sufficiently work related, and the "task would not have been undertaken except for the obligation of employment[.]" *Id.* at 17.

work was routine because the report at issue was generated monthly. *Id.* at 559. We held that Barnes's travel to the hospital on a Saturday was unusual because it was sudden, and because it was not her normal workday, and because the hospital did not show the frequency under which weekend trips to the hospital were made. *Id.* at 560.

In contrast, when an employee is traveling to a work related function in a way that is only *slightly* unusual, the travel will not be sufficiently special to allow recovery for an accidental injury. [5] In *Jakelski*, 45 Md. App. at 11-14, we concluded that a police officer's injury on his way to testify at traffic court was not compensable because the travel was not sufficiently special. There, we focused on the regular nature of the travel, and the fact that the officer made monthly trips, which made them a "regularly repetitive" part of his job duties. *Id*. at 11. The trip and the testimony were, therefore, a regular course of monthly conduct. *Id.* at 12. Similarly, in *Baroffio*, 77 Md. App. at 501-03, we held that an employee's travel to her regular work site only one-half-hour before her regularly scheduled employment was insufficiently special so as to permit recovery for an injury that occurred while she was traveling to work.

Turning to the case at bar, the question is one of law which depends on the particular facts of the case. *Reisinger-Siehler Co. v. Perry*, 165 Md. 191, 198 (1933) (where the Court of Appeals first recognized the special mission exception and stated that

[5] The Court of Appeals addressed a related question in *Roberts v. Montgomery Cty.*, 436 Md. 591 (2014), and concluded that where an employee was traveling from a work-related activity to another site where he was to engage in a work-related act, the going and coming rule did not apply, but the positional-risk test held sway, and therefore, the Court did not need to get to the question of the applicability of the going and coming rule or its exceptions. *Id.* at 607.

"the question, therefore, whether a case is an exception to the [going and coming] rule, depends upon its own particular facts"); *Jakelski*, 45 Md. App. at 8. The facts of Calvo's injury are undisputed.[6]

It is undisputed that the travel to the training was sufficiently work-related, and that Calvo would not have been traveling the route, except for the obligation of employment, so as to fulfill the "arises out of" requirement. However, Calvo was traveling from her home to a work-related function. Therefore, the going and coming rule would control and require that she was not "acting in the course of her employment" which would render the injury non-compensable, unless an exception to the rule applies.

The County avers that the training was so routine so as to constitute Calvo's employment, thereby invoking the going and coming rule, and prohibiting recovery from her auto accident that occurred *en* route. Calvo responds that the journey to the training was sufficiently different so as to constitute a special mission, and that her injury is therefore compensable under the special mission exception.

The County first states that the special errand exception has primarily been used in Maryland by "on-call" employees. Although correct, the doctrine has never been limited to only those such employees, and we decline to summarily narrow it to only on-call

[6] Calvo avers that summary judgment was inappropriate because reasonable minds could disagree on whether the facts *infer* compensability. However, she does agree that the facts of the case were undisputed by the County before both the Commission and the circuit court, and she does not assert that there are any new or disputed facts that should have been entered into evidence before a jury. Calvo is mistaken that the question here is within the scope of an "inference" from fact, rather than being a question of law based on the specific facts of the case.

employees now. *E.g.*, *Stewart*, 39 Md. App. at 11. Similarly, with respect to lack of emergency,[7] the "element of urgency may supply the necessary factor converting a trip into a special mission," but no law states that "the absence of an emergency automatically means that the claimant is not on a special mission." *Barnes*, 109 Md. App at 561.

However, the record before the Commission reflects that Calvo was not on a special mission, and her claim is therefore barred by the going and coming rule. Unlike *Barnes*, we cannot agree that "the trip was sufficiently onerous" so as to be a special mission. 109 Md. App. at 560.

Although the training did require Calvo to work in a different location from her usual location, and on a day on which she did not expect to work, those are the only facts that support Calvo's position, and we find them to be inadequate to rise to the level of a special mission.

In our evaluation, we consider the "relatively regularity or unusualness," as well as the onerousness and the urgency, of the journey. *Barnes*, 109 Md. App. at 557-59. Calvo traveled to the training annually. Although annually is certainly less often than Jakelski's monthly travel to court, it is still semi-regularly, and Calvo's annual attendance was an established part of her obligation to her employer and was not sufficiently unusual. Further, the journey was not onerous compared to the work to be done at the location.

[7] Calvo had ten days notice to attend the training. The County asserts in its brief that Calvo could have rescheduled the training if the appointed day and time were inconvenient, but the record is silent on this matter. Calvo's testimony before the Commission was that she believed she could be suspended if she did not attend the scheduled training.

Rather, she spent the full day in training after a fairly typical commute to the worksite. Although the commute was not her usual route, no evidence was presented to demonstrate that anything about the commute itself was onerous other than that it was to a worksite other than Calvo's typical worksite. Finally, Calvo had adequate notice to eliminate any element of urgency which may have allowed her travel to rise to the level of that in *Barnes*.

Calvo attempts to persuade that the training was a special mission because she did not wear her bus driver uniform or drive a bus on the day of the training, and that driving a bus, not customer service, was Calvo's normal work. However, this position incorrectly focuses on the work itself, rather than the nature of the journey. *Barnes,* 109 Md. App. at 562-63 ("Numerous cases . . . have awarded compensation on the basis of the special nature of the journey at issue rather than the special nature of the task performed at the workplace. This analysis is consistent with the purpose and conceptual underpinnings of the special mission rule. Appellee [is] thus incorrect in [her] exclusive focus on the *task*[.]") (Emphasis in original).

Rather, when focusing on the journey itself, these facts sufficiently distinguish Calvo's circumstances from those of *Barnes,* and instead to make her case more similar to *Jakelski*. Although the Act is to be construed liberally, to hold that Calvo's injury is compensable would allow the special mission exception to swallow the goings and comings rule, and would compensate all travel injuries that occurred when an employee merely worked on another day and in a different location.

We find no error in the circuit court's legal determination that the goings and comings rule barred recovery for the traffic accident that occurred during her travel to work.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.