

Lommen, Abdo, Cole,  
King & Stageberg, P.A.

STATE OF MINNESOTA

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WORKERS' COMPENSATION COURT OF APPEALS WORKERS' COMPENSATION COURT OF APPEALS

No. WC11-5266

Brenda J. Schwalbe,

Cross-Appellant,

Bosch Law Firm, Ltd.  
Gerald W. Bosch  
150 South Fifth Street, Suite 1490  
Minneapolis, Minnesota 55402

v.

American Red Cross and Cambridge Integrated  
Services/Sedgwick CMS,

Appellants,

Lommen, Abdo, Cole, King &  
Stageberg, P.A.,  
Kay Nord Hunt  
Richard L. Plagens  
200 IDS Center  
80 South Eighth Street  
Minneapolis, Minnesota 55402

and

Twin Cities Orthopedics, P.A., HealthPartners,  
St. Paul Radiology, Regions Hospital, Metropolitan Anesthesia,  
Fairview Health Services, Umeng David Thao, M.D.,  
Twin Cities Bakery Drivers' H & W Fund, and  
Allstate Insurance Company,

Intervenors.

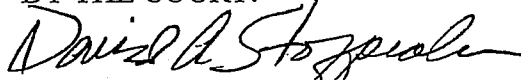
The employer and insurer's appeal, filed March 30, 2011, and the employee's cross-appeal, filed April 1, 2011, from the Findings and Order of Compensation Judge Jennifer Patterson, served and filed March 3, 2011, came on for hearing on Monday, August 8, 2011, pursuant to due notice, before David A. Stofferahn, Patricia J. Milun, and Thomas L. Johnson, Judges of the Workers' Compensation Court of Appeals.

Based on all of the pleadings in the case, the transcript of evidence taken before the compensation judge, the exhibits admitted into evidence, and briefs and arguments of counsel, the court is of the opinion that the Findings and Order of the compensation judge are in accord with the evidence and law in the case.

NOW, THEREFORE, this court AFFIRMS the Findings and Order of Compensation Judge Jennifer Patterson, served and filed March 3, 2011.

This court further ORDERS that the employer and insurer pay \$1,250.00 to the employee's attorney as and for attorney fees on appeal.

BY THE COURT:



Handwritten signature of David A. Stofferahn in cursive script.

DAVID A. STOFFERAHN, Judge

## OPINION

DAVID A. STOFFERAHN, Judge

The employer and insurer appeal from the compensation judge's determination that the employee was in the course and scope of her employment when she was injured in a motor vehicle accident on April 7, 2009. The employee has cross-appealed the compensation judge's "finding" that alternate theories of recovery "would have failed." We affirm.

## BACKGROUND

On April 7, 2009, Brenda Schwalbe was employed by American Red Cross [ARC] as a collections team supervisor. She began working for ARC in 2001 as a phlebotomist, drawing blood from donors at a blood drive.<sup>1</sup> The employee received a number of promotions and, in July 2008, became a collections team supervisor. The employee worked out of the ARC office in downtown St. Paul which was the ARC office for the north central region. The north central region covered all of Minnesota, parts of South Dakota, Iowa, and Wisconsin. Blood mobiles conducted by the St. Paul office might be located at any location in this region.

As a collections team supervisor, the employee's basic responsibility was to manage a blood mobile. This was a salaried position and, while the employee was asked to maintain a forty-hour work week, she did not keep track of her hours. Approximately three days a week, the employee would be involved in managing a blood mobile. The other days she would be at the ARC office in St. Paul, taking care of other duties, primarily staff supervision. There were twelve other supervisors at the St. Paul office and the employee shared undesignated work space with a desk, mailbox, and computer access. The employee was provided a laptop computer, cellular phone, and credit card by ARC and was allowed to work at home if she

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<sup>1</sup> An explanation of the nomenclature used here is appropriate. The terms "blood drive" and "blood mobile" are generally interchangeable. Blood drive usually refers to the site or sponsor while blood mobile generally refers to the ARC operation.

desired. On days when the employee was supervising a blood mobile, she arrived at the blood drive before it began and supervised the set up of equipment and supplies. She would assign staff and oversee the blood drive, including making sure that donors moved through the site without delay and that there were appropriate breaks for the staff. At the end of a blood mobile, the employee supervised the re-loading of the truck, examined the collected blood to make sure it was properly packed, reviewed paperwork for the drive, and provided staff hours to the ARC office. Blood drives typically ran for five or six hours, often in the afternoon or early evening. Approximately eight staff members typically worked with the employee on a blood mobile. Staff members might be local ARC employees or work out of the St. Paul office.

Because the truck or bus used to provide supplies for a blood drive accommodated only the driver, it was ARC policy to provide a van for staff members to travel to the blood drive, although employees were also allowed to take their personal vehicles to the blood drive site. The employee testified she typically took her own car to a blood mobile. The van that was made available by ARC had to be picked up in St. Paul and since the employee lived in Lino Lakes, she generally found it more convenient to take her own car. Also, the employee said she often found the van was dirty or needed gas. The employee was also a smoker at that time and used her vehicle to take a smoking break. Finally, the employee testified that she often transported extra supplies that might be needed for a blood drive, especially if the blood drive was in a smaller town where supplies were not available. A representative of the employer testified at the hearing that this was contrary to ARC policy.

Blood drives were also conducted throughout the north central region. For blood drives more than 65 miles from the St. Paul, ARC followed a number of practices for staff members working at those events. ARC scheduled and paid for hotel rooms for staff, although employees were able to refuse the hotel and travel home after the blood mobile was completed. Employees were also provided with a per diem of \$19.00 to cover meals and were also paid \$10.00, an amount generally referred to as "pillow pay." The employee, as a salaried employee was not paid for her travel time but noted the time she spent traveling on her reports. Hourly workers were paid for their travel time. If the employee used her own car instead of the ARC van to travel to a blood drive, she was not paid mileage or vehicle expense.

On April 6, 2009, the employee worked at a blood mobile in Rice Lake, Wisconsin, about 86 miles from St. Paul. The employee took her own vehicle to the blood mobile. The blood drive took place from 11:00 A.M. to 4:00 P.M. and the employee finished her work there at about 5:00 P.M. The employee then drove to Eau Claire, about 57 miles from Rice Lake for a blood mobile scheduled in Eau Claire the next day. ARC had made hotel reservations for her in Eau Claire; the blood mobile was scheduled to take place between noon and 5:00 P.M. Eau Claire is 109 miles from St. Paul.

The employee testified that she left the blood drive site in Eau Claire at about 5:30 P.M. She stopped at a dollar store briefly, stopped at a gas station for coffee, and then

started the drive back to St. Paul on Interstate 94. The employee testified that she was intending to stop at the ARC office in St. Paul to drop off timesheets for some staff. An employer representative testified that there was no need for delivery of paper timesheets at that time. Just as she drove into Minnesota, the employee was involved in a motor vehicle accident when a vehicle going the other way crossed the median and struck the left side of her car.

The employee received serious injuries in the collision, including a traumatic brain injury, trachea laceration, chest wall trauma with multiple fractures, multiple fractures of her left arm with an ulnar nerve injury, left kidney laceration, and a pelvic fracture. The parties stipulated at the hearing that the employee was entitled to temporary total disability benefits from April 7, 2009, to the date of hearing and continuing.

The employee's claim petition was heard by Compensation Judge Jennifer Patterson on December 17, 2010, and January 6, 2011. The issue at the hearing was whether the employee's personal injury of April 7, 2009, arose out of, and in the course and scope of her employment. In her Findings and Order of March 3, 2011, the compensation judge determined that the employee was a "traveling employee" at the time of her injury and that the employee's injuries were compensable. The employer and insurer appeal. The employee cross-appealed.

## DECISION

A personal injury is covered by the Minnesota Workers' Compensation Act if it is an injury "arising out of and in the course of employment" but the statute "does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of the injury." Minn. Stat. § 176.011, subd. 16.

For many, if not most employees, the "premises" of the employer where the employee's services are required is readily apparent. These employees have fixed hours and work at a fixed location, whether that location is an office, farm, plant, or some other facility. In commuting to or from the employer's premises, an employee is "traveling to or from his home for his own personal convenience and not in the performance of services for his employer." Funk v. A.F. Scheppmann & Son Constr. Co., 294 Minn. 483, 199 N.W.2d 791, 792, 26 W.C.D. 332, 333 (1972). Accordingly, as a general rule, injuries suffered by an employee while commuting to and from work are not compensable. Swanson v. Fairway Foods, 439 N.W.2d 722, 41 W.C.D. 1010 (Minn. 1989).

There are exceptions to the general rule which arise when the employee's work does not involve a fixed locale or fixed hours. An employee "whose work entails travel away from the employer's premises is, in those circumstances, under continuous compensation coverage from the time he leaves home until he returns." Voight v. Rettinger Transp., Inc., 306 N.W.2d 133, 136, 33 W.C.D. 625, 631 (Minn. 1981). In Voight, the employee was a school bus

driver who ordinarily drove a set route during fixed hours. He was injured while on a charter bus assignment that required travel of over 200 miles and an overnight stay. The court held that his injuries, sustained while he was in the parking lot of a bar where he had gone with other drivers, were compensable. As a traveling employee, the employee carried the employer's premises with him on the trip and he was covered by workers' compensation on a portal to portal basis.

A similar result was reached in Lundgaard v. State, Dep't of Public Safety, 306 Minn. 421, 237 N.W.2d 617, 619, 28 W.C.D. 237, 239 (1975). The employee was hired to give instruction in emergency care procedures for the Bureau of Criminal Apprehension. On the trip in question, the employee was giving a lecture in Bemidji. The employee took her own vehicle for the trip but the employer paid her time, her vehicle expense and her lodging. The employee was injured in a motor vehicle accident on her way home to Minneapolis. The court stated, "the facts before us lead to the conclusion that the use of the automobile was for the particular benefit of the employer and that the employee was not within the generally excluded category of persons who regularly commute to work for their own reasons."

The employer and insurer argue, however, that the employee was commuting home from the employer's premises when she was injured and that, as a result, her injuries are not covered by workers' compensation. It is the employer and insurer's contention that it was only at the blood drive site in Eau Claire where the employee's services were required and performed. We are not convinced.

For authority, the employer and insurer cite to Cavilla v. Northern States Power Co., 213 Minn. 313, 6 N.W.2d 812, 12 W.C.D. 429 (1942). The employee in that case had been sent on temporary assignment to a job site in Tracy, Minnesota where it was expected that he would be working for several weeks. The employee stayed in a motel there and was injured in a motor vehicle accident when he was on his way home to visit his family in Minneapolis for a weekend. The court stated that the employee was not a traveling employee because his services were performed during fixed hours at a fixed site and travel was not a part of the employee's service. Similarly, in Bonfig v. Megarry Bros., Inc., 294 Minn. 180, 199 N.W.2d 796, 26 W.C.D. 321 (1972), the employee, a resident of Freeport, Minnesota, was working at a highway construction project near Grand Marais. He was injured while driving back from the job site to the motel where he was staying. The court focused primarily on the question of whether the employee's use of the employer's vehicle provided coverage but the court also noted that the employee was using the vehicle for his own convenience and not as part of his service for the employer.

The employer and insurer also cite to this court's decision in Schmaltz v. Albert Kastner & Sons, 42 W.C.D. 539 (W.C.C.A. 1989). The employee in Schmaltz was a carpenter who reported directly to various job sites in the Twin Cities area and did not report to any office of the employer. The court rejected the employee's argument that he was a traveling employee, noting that the employee was not required to stay overnight at the job site and the job sites were

the actual premises where the services were performed. Finally, in Matetich v. Ulland Bros., 48 W.C.D. 350 (W.C.C.A. 1993), the court denied the employee's claim for injuries arising out of a fire at a hotel where he was staying because the job site was too far from home for a daily commute. The court found the case to be governed by the decisions in Cavilla and Bonfig and noted the employee was not provided with any per diem or reimbursement for hotel expenses.

We find the facts in those cases to be significantly different than those in the present case. In the cases cited by the employer and insurer, while the job sites were far enough from the employee's home that a daily commute was impracticable, the work at the job sites would last for weeks or months. In Cavilla, Bonfig, and Matetich, the employees had essentially changed their residences so they commute to the job site on a daily basis. The court in Lundgaard distinguished its holding in that case from the holding in Bonfig by noting, "The employee in Bonfig, on the other hand, was regularly employed at a construction site in Grand Marais and resided in Freeport, Minnesota." (emphasis in the original) 237 N.W.2d at 619, 28 W.C.D. at 239. In these cases, the employers supervised work at these sites and the employee had little or no connection with any other premises of the employer.

The facts here are closer to those considered by this court in Doyle v. Kraft Foods, Inc., slip op. (W.C.C.A. Feb. 19, 1989). Mr. Doyle, a sales representative in the Twin Cities, was required to attend a three-day regional sales conference at resort in Brainerd and was injured while attending the conference. The employer argued that the employee was not in the course of his employment while he was at the conference. The court rejected that argument and stated, "the employee was clearly a traveling employee because he was away from his home overnight to attend a business meeting."

In considering whether injuries sustained during travel are compensable, Larson states, "the rule excluding off-premises injuries during the journey to and from work does not apply if the making of that journey. . . . is in itself a substantial part of the service for which the worker is employed." Larson's Workers' Compensation Law, Ch. 14 (2011). We consider whether the evidence in this case supports a conclusion that the trip to Rice Lake and Eau Claire was in itself a substantial part of the service for which Ms. Schwalbe was employed.

The employee did not work fixed hours at a fixed location; she could work at home, could work at the ARC regional office, and spent 30% of her time at various times at blood mobiles throughout the north central region. The employee, in contrast with construction workers in Cavilla, Bonfig, Matetich or Schmaltz, did not work at a particular job site for days or weeks at a time. A blood mobile would typically last for five or six hours and the record shows that from January 1, 2009, to April 6, 2009, the employee worked at 31 different blood drive locations. The trip at issue involved travel to Rice Lake, Wisconsin and Eau Claire. The total mileage was in excess of 250 miles. The employer provided overnight lodging and paid "pillow pay" as well as per diem for expenses. It was the employer's decision to have employees travel out of the St. Paul office to conduct blood drivers in a multi-state area. While it was theoretically

possible for the employee to refuse the lodging arranged by the employer, the fact remains that the employee did not do so in this case and was away from her home overnight in furtherance of the employer's business. The employee's overnight trip and travel on April 6 and 7, 2009, was "in itself a substantial part of the service for which the worker is employed."

The evidence amply supports the determination that on April 7, 2009, the employee's travel to Rice Lake and Eau Claire and back again was in the course and scope of Brenda Schwalbe's employment for ARC. The compensation judge was correct in finding that the employee's injuries were covered by workers' compensation and her decision is affirmed.<sup>2</sup>

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<sup>2</sup> The employee cross-appealed the compensation judge's "finding" that alternate theories advanced by the employee would not support a recovery. Our decision in this matter renders moot the issues raised by the employee on cross-appeal.