STATE OF NEW HAMPSHIRE

SUPREME COURT

ELBA HAWES

v.

ASPLUNDH TREE EXPERT, LLC

Case No. 2021-0187

# BRIEF OF ASPLUNDH TREE EXPERT, LLC

APPELLEE

Respectfully submitted,

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## QUESTIONS PRESENTED

Whether the Compensation Appeals Board (CAB) issued an erroneous or unjust decision when it found that the "going and coming" rule barred the appellant's claim for Workers' Compensation benefits following a motor vehicle accident while traveling home after the appellee employer released the appellant early to go home and return later that same day due to an impending storm.

## STATUTES AND RULES INVOLVED IN THE CASE

RSA 281-A:2, XI

## STATEMENT OF THE CASE

On March 4, 2020, a First Report of Injury relative to the motor vehicle accident which is the subject of this case was filed with the New Hampshire Department of Labor. The Carrier denied the claim by Memorandum of Denial on March 9, 2020, citing no causal relationship to employment. The appellant filed a Request for Hearing, which the Department of Labor heard on September 14, 2020, issuing a decision dated October 5 2020, in favor of the Carrier. The appellant appealed that decision to the Compensation Appeals Board (CAB) in a timely manner. The CAB conducted a *de novo* Hearing on February 4, 2021. On February 22, 2021, the CAB Panel found in favor of the Carrier, following which the appellant filed a Motion for Rehearing. The CAB denied that motion on April

5, 2021. The appellant filed his Rule 10 Notice of Appeal with this Court, which the Court accepted by Order dated June 18, 2021.

## STATEMENT OF THE FACTS

The appellant, Mr. Hawes, worked for Asplundh Tree Services (Asplundh).[1] The appellant routinely worked from 7:00 AM until 4:00 PM, depending on the weather conditions.[2] The appellant reported to work at 7:00 AM on November 1, 2019, in his personal vehicle.[3] He traveled from his personal home to a sandpit in Conway, New Hampshire per his employer's instructions, where he then traveled to the job site in a company truck.[4]

Asplundh intended the appellant to work at the job site for the entire day at the beginning of that workday.[5] However, news of a storm later that evening caused Asplundh to change the appellant's work schedule.[6] Asplundh asked the appellant and his fellow workers to stop work at noon, punch out and go home to return to work at 8:00 PM that evening to begin cleanup following the expected storm.[7]

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[1] Decision, p. 2.
[2] Id.
[3] Id.at 2-3.
[4] Id.at 3.
[5] Id.
[6] Id.
[7] Id.

The appellant traveled back to the sandpit in a company vehicle and drove his personal vehicle home.[8] At approximately 12:19 PM, while on route to his home, an SUV crossed the center line and collided with the appellant's vehicle, following which a large tractor trailer truck struck the appellant's vehicle from behind.[9] The appellant suffered several injuries in the motor vehicle accident, the specific nature of which are not at issue.[10] The appellant was unable to return to work until February 9, 2020.[11]

A First Report of Injury specifying a November 1, 2019 date of injury was filed with the New Hampshire Department of Labor (DOL). On March 9, 2019, the insurance carrier for Asplundh filed a Memorandum of Denial, citing no causal relationship to the appellant's employment and, as such, denying compensability of the claim. The DOL held a Hearing on this matter on September 14, 2020 and issued a decision on October 5, 2020, wherein the insurer prevailed on the compensability issue.

The appellant filed his appeal to the New Hampshire Department of Labor Compensation Appeals Board (CAB). On January 4, 2020, the CAB held a *de novo* hearing on the merits, and on February 22, 2021, the CAB issued a decision

[8] Id.at 3.
[9] Id.
[10] Id.
[11] Id.

in favor of the insurer. The appellant motioned for a Rehearing/Reconsideration to the CAB, but the CAB denied this motion on April 5, 2021.

## SUMMARY OF ARGUMENT

The Court should uphold the CAB decision as it was neither unjust nor unreasonable to find that the appellant's voluntary return home in the middle of the day because of a future night shift arose out of and in the course of employment. The appellant does not meet the definition of a "traveling employee." His travel home from the sandpit in Conway, New Hampshire was no different from his usual commute from home to work and does not entitle him to portal-to-portal coverage. Further, the appellant's injuries do not arise out of or in the course of his employment, as he was on his regular commute when he was injured

The "mutual benefit" exception to the "going and coming" rule does not apply to the facts of this case.

Additionally, the appellant was not engaged in a "special errand" for the appellee employer which would make this claim compensable.

The appellant was not within the course and scope of his employment when the motor vehicle accident occurred and none of the exceptions to the "going and coming" rule apply.

## ARGUMENT

The Court will only overturn a decision from the CAB for errors of law, or if the order is unjust or unreasonable by a preponderance of the evidence. Appeal of Kelly, 167 N.H. 489, 491 (2015); Appeal of Hooker, 142 N.H. 40, 47 (1997). The Court reviews statutory interpretation by the CAB *de novo*. Hooker, 142 N.H. at 47. The Court will construe the Workers' Compensation law liberally to give the broadest reasonable effect to its remedial purpose and will resolve "all reasonable doubts in favor of the injured worker. Hooker, 142 N.H. at 47. However, "that maxim applies to the construction of the statute involved, not to the task of weighing evidence." Appeal of Gamas, 138 N.H. 487, 491 (1994) (see also Petition of Blackford, 138 N.H. 132, 135 (1993); Petition of Correia, 128 N.H. 717, 721-22 (1986). The findings and rulings of the [Compensation Appeals] board must be upheld unless they lack evidentiary support or are tainted by legal error. Appeal of Gamas, at 491.

### THE CAB DID NOT ERR BY HOLDING THAT THE APPELLANT'S INJURIES DID NOT ARISE OUT OF AND IN THE COURSE OF THE APPELLANT'S EMPLOYMENT.

The New Hampshire workers' compensation statute requires that an accidental injury, to be compensable, must arise out of and in the course of employment. RSA 281-A:2, XI. "This requirement imposes on the appellant an obligation to prove that the injury is related to the

employment in terms of time, space, and subject matter." Whittemore v. Sullivan Cty. Homemaker's Aid Serv., 129 N.H. 432, 434 (1987). Whether an appellant's injury arose "out of and in the course of employment is a two-prong analysis. Id. To show that the injury arose out of employment, the appellant must show the injury resulted from a risk created by the employment. Maheux v. Cove-Craft Co., 103 N.H. 71, 74 (1960). To show that the injury arose in the course of employment, the appellant must demonstrate that "(A) it occurred within the boundaries of time and space created by the terms of employment, and (B) it occurred in the performance of an activity related to employment, which may include a personal activity if reasonably expected and not forbidden, or an activity of mutual benefit to employer and employee." Appeal of Pelmac Indus. Inc., 2021 WL 4783944, p. 6 (Oct. 13, 2021) (citing Murphy v. Town of Atkinson, 128 N.H. 641, 645-46 (1986)). This Court has recognized that the ordinary perils of travel between home and work are not considered hazards of employment and, therefore, that injuries arising from such travel are non-compensable. See Donnelly v. Kearsarge Tel. Co., 121 N.H. 237, 240 (1981); Heinz, 117 at 218.

In most regards, the appellant's situation is extremely similar to that of the employee in Donnelly. There, the employee cable repairman was tasked with using a company-assigned vehicle, which the employee

picked up from the employer's office every morning after his usual commute, and would work from 8:00 A.M. to 5:00 P.M. driving to various work sites before returning to the office to drop off the company vehicle. Donnelly, 121 N.H. at 238. The employee was also frequently traveling outside of regular business hours as the company's only available technician. Id. at 238. While driving from his home to the employer's place of business to pick up the company vehicle and start his day, the employee was injured in a motor vehicle accident. Id. at 239. The Court noted that, unlike in Heinz, the appellant's journey was not "sufficiently related" to any special duty imposed by the employer merely because the employee was often on-call and focused on the lack of "work-connected character" of the journey. Id. at 241. The employee there had a definable point in time and space at which his employer usually required him report before beginning the day and from which he would check out. Id. at 241-42. Finally, the Court questioned whether the "journey itself was an important part of the service," and held that, as the trip on which the employee was injured was "nothing but the usual [trip the employee] always had to take, there is no real distinction from the going and coming of an ordinary employee." Id.

Here, the same principles governing the employee in Donnelly govern the situation applicable to the appellant. The appellant had a point

in time and space that he was usually required to report to, in this case the sandpit in Conway, New Hampshire, before moving onwards to a remote work site. He would arrive in his personal vehicle, like the employee in Donnelly, before boarding a company vehicle which would then travel to the work site. From the work site, he would then return in a company vehicle to the predetermined point at the end of his day, here again, the sandpit in Conway, New Hampshire, before driving his personal vehicle home. Thus, his commute to and from the location in Conway, New Hampshire is indistinguishable from the appellant's usual commute.

The Carrier does not dispute that this metric would be different if the facts were different. If the appellant was driving directly from his home to the remote work site, the appellant might reasonably be entitled to compensation benefits as his travel would be more than the usual commute and the hazards of the road would be of a work-related character. Certainly, if the appellant was injured on the drive from the employer's place of business to the remote work site, this injury would be compensable. However, the trip to his home from his employer's designated meeting place was indistinguishable from his usual commute and, therefore, falls under the "going and coming" doctrine barring compensability.

Here, the CAB Panel had ample factual basis on which to distinguish the appellant's travel home from that of an on-call employee. The CAB Panel, applying the "going and coming" rule, found that the appellant's injury occurring on the drive home indistinguishable from a regular commute. As the appellant's factual situation is indistinguishable from Donnelly, the Court should find that the "going and coming" rule applies, that the appellant's injuries do not arise "out of and in the course of" his employment, and that the CAB did not act erroneously, unreasonably, or unjustly in so finding.

**THE CAB DID NOT ERR BY FINDING THAT THE APPELLANT'S INJURIES DID NOT ARISE OUT OF HIS EMPLOYMENT, AS THE APPELLANT WAS NOT A "TRAVELING EMPLOYEE"**

This Court should find that the CAB Panel did not err by not finding the appellant entitled to benefits under the "traveling employee" exception to the "going and coming" rule. Notably, the CAB decision, issued on February 22, 2021, predated the decision of Appeal of Pelmac Indus., Inc., 2021 WL 4783944 (Oct. 13, 2021) on which the appellant heavily relies. As such, the Court should apply the case law that existed at the time of the CAB decision in determining whether the CAB Panel made an error of law, as the holding in Pelmac had not yet been made.

Before Pelmac, Appeal of Griffin 140 N.H. 650 (1996) addressed this distinction. See Griffin, 140 N.H. at 652. In Griffin, the Court held that an employee whose job required that he remain overnight, offered both daily meal allowances and motel accommodations, and allowed use of the company vehicle for these purposes was injured in the course of his employment. Griffin at 652. Following a meal and several drinks, the employees in Griffin engaged in a physical altercation, resulting in the claimant being struck in the head with a two-by-four piece of wood. Id.

The Court in Griffin, applying the test in Murphy, found a distinction for "traveling employees" whose "business requires that he be away from home." Id. (citing Murphy, 128 N.H. at 645-46.) Drawing from Heinz, the Court analogized that, as when special duties require an employee to take on special duties, the hazards from those special duties arise out of employment, so too do the hazards arising from travel as a 'traveling employee' arise out of employment. Griffin at 655 (citing Heinz, 117 N.H. at 214). "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct depart[ure] on a personal errand is shown." Griffin at 655. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. Id.

(citing 1A A. Larson, The Law of Workmen's Compensation § 25.00, at 5-275 (1995)).

The nature of an employee's job distinguishes a "traveling employee" from an employee on their usual commute, which is not a compensable part of employment, and from a singular "special duty." See generally Donnelly, 121 N.H. at 240; Heinz, 117 N.H. at 218. In Griffin, the Court found that "[b]ecause the petitioner was required by his employment to live away from home, the risk of injury to him during travel necessary to take his meals was created by his employment.," satisfying the first prong of the Murphy test. Griffin, at 655-56 (citing Murphy, 128 N.H. at 645-46).

The Court also addressed this distinction in Donnelly v. Kearsarge Telephone Co.. As noted, there the employee worked as a cable installer who reported to the office before traveling to the worksite and who was "on-call" approximately one week per month. Donnelly, 121 N.H. at 238-39. The appellant there was injured as he drove to the employer's place of business at the start of a usual workday. Id. at 239. The Court held that, despite his status as an on-call worker, he still had "an identifiable point in time and space" at which he was required to report before beginning and ending his workday. Id. at 241-42. Further, the employee's on-call status did not lend himself to such coverage, as he was injured in a trip without

distinction from the "going and coming of an ordinary employee." Donnelly at 242.

Here, the appellant's employment conditions are more analogous to those of the employee in Donnelly than in Griffin. The appellant commuted from his home to a predetermined location in Conway, New Hampshire, where he then boarded a work vehicle and traveled to a worksite, like the employee in Donnelly. The appellant usually worked regular business hours, at the end of which he would take the work vehicle back to a predetermined location and commute home in his personal vehicle. At no point was the appellant living away from his home, as was the employee in Griffin, and he was not working on-call in the interim.

The facts governing "traveling employees" as outlined by this Court in prior cases do not match the facts provided at the CAB Hearing. As such, the CAB was eminently able to make its own determination regarding the facts as they apply to the "traveling employee" exception to the "going and coming" rule. As such, there is no reasonable grounds on which to apply the "traveling employee" exception, and the Court should hold that the CAB Decision was neither unreasonable nor unjust.

**EVEN IF THE COURT APPLIES PELMAC, THE CAB'S HOLDING DOES NOT CONFLICT WITH THE COURT'S HOLDING, AS THE FACTS ARE DISTINGUISHABLE**

The CAB did not err by considering the appellant a regular employee for the purposes of the "going and coming" rule, even under the newer Pelmac holding, as the appellant's situation is factually distinguishable from the new interpretation of a "traveling employee" in Pelmac.

In Pelmac, the Court evaluated the application of the "going and coming" rule where the employee died from suicide subsequent to suffering serious injuries in a motor vehicle accident in the employer's vehicle while driving home from a remote work site. Appeal of Pelmac, 2021 WL 4783944 (Oct. 13, 2021) The employee in Pelmac, an alarm installer and technician, was deemed a "traveling employee" who usually traveled from his home to various work sites in a company vehicle, rarely visiting the employer's Manchester, New Hampshire office location. Id. at 2. The employee was driving home from a job site when he crashed, suffering significant injuries. Id. As a result of complications from treatment for his various injuries, and faced with the prospect of a poor recovery, the employee committed suicide two months after his injury. Id. at 3. The Court addressed both whether the employee's initial vehicle accident and subsequent suicide were compensable injuries. See Id.

On appeal, the Carrier argued that Donnelly foreclosed compensation under the "going and coming rule", arguing that the employee's commute was not a compensable activity and that there was no portal-to-portal coverage for employees. Pelmac, at 6. The Court, however, distinguished Donnelly, holding that the employee was a "traveling employee" under Griffin. Id. at 6-7. (Citing Murphy, 128 N.H. at 645-46; Griffin,140 N.H. at 655). Making this determination, the Court focused on the appellant's extensive travel directly between remote worksites and home, as well as the integral nature of this travel to the employer's operations. Pelmac, at 8. Further, the Court found relevant the appellant's travel not only on his usually scheduled days, but on days the appellant was "on-call." Id. This, reasoned the Court, placed the appellant into a position of a "traveling employee," and thus made all the perils of his injury directly part of his employment. Id.

As noted above, the appellant in this matter is not a "traveling employee" under the articulated exception of the "going and coming" rule, either before Pelmac or after the Court's expansion of the exception. As such, the CAB decision was neither erroneous nor was it unjust or unreasonable.

Unlike in Pelmac, the appellant did not drive from his home to the final worksite in a company vehicle, but would arrive at a predetermined point in his personal vehicle before continuing on in a work vehicle. He would then return in the company vehicle from the remote site, in this case Conway, New Hampshire,

and return home. His commute from the Conway, New Hampshire location to home was more akin to the regular commute from an office which similar employees make, which is the basis of the "going and coming" rule. Moreover, unlike the employee in Pelmac, the appellant was not on-call during the time before or following his workday.

Thus, this Court should find that the appellant's situation here is factually distinguishable from the employee in Pelmac and should hold that the appellant was not a "traveling employee" entitled to portal-to-portal coverage. As the CAB decision had the opportunity to find the appellant a "traveling employee" and elected not to under the body of law governing exceptions to the "going and coming" rule, the Court should find that the CAB decision did not rule erroneously, unjustly or unreasonably.

## THE CAB DID NOT ERR BY NOT FINDING A "MUTUAL BENEFIT" EXCEPTION TO THE "GOING AND COMING" RULE FOR THE APPELLANT

The CAB did not err or act either unreasonably or unjustly by determining that the appellant's commute home was not a "mutual benefit" exception to the "going and coming" rule. Not only was the lack of a "mutual benefit" the primary focus of the CAB decision, but the CAB Panel found, as a factual consideration, that the appellant's supervisors' directive to go home and rest was an unenforceable suggestion. As the CAB Panel had sufficient facts on which to find

that this activity did not constitute a mutual benefit, the Court should uphold its decision.

The Court has held that the "mutual benefit" exception to the "going and coming" rule may apply when the employee is injured conducting activities that "confer a 'mutual benefit on the employee and employer.'" Cook v. Wickson, 135 N.H. 150, 154 (1991). In Cook, the appellant was injured when, after punching out for the day, he encountered two co-workers, one of which was his immediate supervisor, who were stranded on the side of the road. Id. at 152. The appellant, who was driving a service vehicle, picked them up and drove home, leaving the service vehicle at his home and taking a personal vehicle with his co-workers to the gas station. Cook, at 152. On the way back to the stranded vehicle, he made a U-turn and collided with another vehicle. Id. at 152-53. The Court dispensed with the appellant's argument that he was engaged in activity of mutual benefit to the appellant and his employer, as his activity was 'too vague and attenuated a benefit' to justify the protection of a "mutual benefit" exception. Id. at 156. (Elaborating on the 'mutual benefit' exception to the 'going and coming rule). The Court further held that the appellant there was not returning to work, was not obligated to aid his co-workers, and that roadside assistance was not part of his job duties. Id.

As in Cook, the CAB Panel found that the 'mutual benefit' to the appellant and the employer was too attenuated and vague to constitute a compensable

relationship between the appellant's rest and employment. Like the appellant in Cook, the nature of the appellant's employment did not obligate him to return home. He could have as easily slept in his vehicle or engaged in any other activity until it was time to return that evening without consequence from his employer. The CAB decision elaborates on this, questioning the compensability of a suggestion by a supervisor to "rest at home in your own bed" would make the commute home compensable under this rule.

Taken to its logical end, extending compensability for something as attenuated as ensuring employees receive adequate rest implies employers and employees are mutually benefitted from any attenuated activity that maintains employee productivity and health. This attenuated benefit would plausibly extend to employees visiting a gym or attending routine doctor visits. Such activities may benefit the employer tangentially insofar as they maintain effective employees, but are otherwise unrelated to employment. Here, the mutual benefit would have been several hours of rest, which is otherwise indistinguishable from any other day but for the schedule deviation.

Further, the CAB made a discretionary finding of fact, which is *prima facie* reasonable, when it determined that the appellant's schedule subjected him to no more risk than that applicable to a regular commute. The appellant articulated no increased risk at the CAB as a matter of factual evidence, nor that there was more traffic at noon on a weekday than around 4:00 P.M. He

articulated no specific scenario that subjected him to any risk beyond that applicable to driving on roads for a regular commute. The CAB, therefore, had competent evidence on which to base its finding that the appellant's drive home was otherwise indistinguishable from his ordinary commute.

The appellant points to cases from Michigan and Massachusetts, arguing that this Court should apply the findings of those courts to the case before it. Initially, the Court need not look to other jurisdictions to make a ruling in this case when there is a significant body of case law within New Hampshire.

The appellant first argues that the Supreme Court of Michigan's decision in Bisdom v. Kerbrat, 251 Mich. 316, 232 N.W. 408 (1930) provides guidance to this Court. In Bisdom, the Michigan Supreme Court found that the employee, a landscaper, was entitled to Workers' Compensation coverage following a vehicle accident when the employee was returning home to change into presentable attire and return to work soliciting further business. Bisdom, 251 Mich. at 409. The court there focused on the employee's workday not yet being complete as of his trip home, in a company vehicle, at 4:30 P.M. Id. The employee's workday would usually end at 5:30 P.M. Id.

While this case bears facial similarities to the appellant's case before the Court, this case is also distinguishable. Initially, the employee's expected time to work was not yet complete at 4:30 P.M., and the employee had returned home to dress for a function separate and apart from his landscaping work. This is more in

line with the Court's holding in Heinz, where a teacher killed in a vehicle accident was entitled to coverage because his trip home to prepare for a later function was a special errand. See generally Heinz 117. N.H. 214. However, as noted later in this brief, the appellant here was not engaged in a special duty, but was merely dismissed early. The appellant was not required to return home and rest and could have spent that time in any location doing almost any activity without incurring consequences from the employer. The CAB decision noted, in their factual discretion, that the advice given was an unenforceable suggestion. Indeed, allowing such unenforceable advice would potentially expose employers to increased risk of liability for a supervisor suggesting to subordinates "tomorrow's job is a tough one. Make sure you get plenty of rest at home in your own bed tonight," despite the act of returning home to rest having only the barest of benefit to the employer.

Further, unlike the employee in Bisdom, the appellant's shift was essentially over at noon on the date of his injury. The employer had ended the workday early, albeit in anticipation of an overnight work shift. This situation, however, is indistinguishable from any other form of split-shift. The appellant's present work period had ended, and his time was his to do with as he pleased until such time as he was required to report in for his overnight shift.

The appellant cites to other out-of-state cases, such as Carbone's Case, 993 N.E. 2d 140 (Mass. App Ct. 2013) and McClure v. Gen Motors Corp., 408

Mich. 191 (1980) to find a common thread of mutual benefit exceptions to the going and coming rule on the basis that breaks for employees constitute a furthering of the employee's business interests. However, not only did the CAB directly reject this contention on the basis of the facts presented at the CAB Hearing, but this benefit also remains extremely attenuated and, taken to its logical end, would include tangential activities insofar as they maintain effective employees without regard for the employer's realized or intended benefit or for their actual authorization of such activities.

Based on the law and the facts provided, the CAB Panel was not erroneous as a matter of law when it found that the "mutual benefit" exception did not apply. As such, the CAB Panel did not err in its decision, nor issue an unreasonable or unjust determination.

## THE CAB DID NOT ERR BY NOT FINDING A "SPECIAL DUTY EXCEPTION TO THE "GOING AND COMING" RULE FOR THE APPELLANT

The CAB Panel did not act erroneously, unreasonably or unjustly when it found that no "special duty" exception to the "going and coming" rule existed when the appellant returned home to rest at the suggestion of his supervisor. The appellant's employment did not place him in any particular place or condition as of the time of the appellant's accident, and his travel bore no work-related character. As such, the Court should uphold the CAB Panel's decision.

This Court addressed the "special errand" exception in Henderson v Sherwood Motor Hotel, Inc., where the employee was employed as a cocktail waitress. Henderson v, Sherwood Motor Hotel, Inc., 105 N.H. 443, 444 (1964). She was called into her workplace to serve food and drinks beginning at 9 P.M, beyond her normal hours. Id. In the course of the party, she became intoxicated and left at 3:30 A.M., perishing in a motor vehicle accident on the way home. Henderson at 444. The Court there addressed exceptions to the 'going and coming' rule. Id. at 445. Specifically, the Court held that an injury is compensable where, as the result of special duties, the employee is subject to special travel risks beyond usual working hours. Id. at 445. The Court specifically considered whether the employee's "employment may be reasonable be said to have 'put [her] at the place where she was and in the condition she was in at the time of the accident." Id. at 446.

Similarly, in Heinz the Court explored where the "special duty" exception applies to travel home before returning to work. There, the employee was injured in a motor vehicle accident when traveling first from the school to a social gathering with colleagues, where the employee consumed several glasses of beer, and then home to change his clothes in anticipation of a school dance he was scheduled to chaperone. Heinz, 117 N.H. at 217. His purpose for the journey home was to change his clothes prior to returning to his school to chaperone a dance. Id. The Court held that, although "the ordinary perils of travel between

home and the place of employment are not properly considered as hazards of employment, the plaintiff's injuries were compensable because the journey home was "sufficiently related to the special duties imposed (by the employer) to be considered a 'hazard of employment.' Heinz at 220.

Specifically addressing scenarios where employees return to a resting place, the Court added that "(t)he conditions under which the employee leaves (or returns to) the resting place must have a principally work-connected character." Id. These conditions consisted of a spatial condition, requiring that "the resting place ... (be) within reasonable physical proximity of the place of employment," and a temporal condition, indicating "that at the time the employee leaves (or returns to) the resting place, the limits of time objectively indicate that the employee is expeditiously proceeding to (or from) his special duties." Heinz at 220.

Despite the appellant's argument that Henderson requires the Court find a special duty exception, the premise of the holding in Henderson is factually and conceptually distinguishable. While the appellant here traveled beyond his usual hours, no special risk existed during his commute home, and the appellant suffered no more than a generalized risk inherent to his regular commute. Unlike the employee in Henderson, the appellant faced no intoxication, exhaustion, or other condition exposing the appellant to a particular risk other than the generalized risk inherent in a commute, which did not arise out of his employment

generally or any special duties specifically. The circumstances putting the appellant and the employee in Henderson on the road are also different: The employee in Henderson was kept late as part of additional work, where here the appellant was permitted to leave early. As previously noted, the appellant was not required to rest or to return home: his time was his own.

Similarly, the appellant's situation is distinguishable from that of the employee in Heinz. Unlike in Heinz, the spatial and temporal conditions of the resting place to which the appellant returned were indistinguishable from his regular commute. He traveled from the employer's site in Conway, New Hampshire to home, the same drive he made at the end of every workday. Further, his employer did not expect him to return to work for eight hours, a temporal condition far too long for the Court to consider it "expeditious." Instead, it clearly indicates an end to one shift rather than a mere intermission before the next.

The appellant again points to cases from other jurisdictions to bolster his argument relative to the "special duties" exception of the "going and coming" rule. However, even more so than the "mutual benefit" exception, the Court here has ample New Hampshire cases on which to base its decision. The appellant cites Green v. Worker's Comp. Appeals Bd., 187 Cal.App.3d 1419, 1423 (Cal.Ct.App. 1986) and Sloane-Nissan v. Workers' Compensation Appeals Board (Zeyl), 820 A.2d 925 (Pa. Commw. Ct. 2003), arguing that similar jurisdictions

extend "special duties" exceptions to situations where the employee returned home to prepare for a later event. However, both descriptions provided indicate scenarios where the appellant was expeditiously proceeding home to change attire on the way to a later event. See Green, 187 Cal.App.3d at 1424-25; Sloane-Nissan, 820 A.2d at 927. These are both factually distinguishable from an eight-hour period of rest, even factoring in the appellant's longer commute time for the current case. The examples cited are more in line with Heinz, where the temporal space of the deviation was short and involved a clear intent to proceed expeditiously to the next event, not to remain home for several hours. Even ignoring the ample New Hampshire authorities available to the Court, these cases are inapplicable to the current matter based on their facts.

Based on the law and the facts provided, the CAB Panel was not erroneous as a matter of law when it found that the "special duties" exception did not apply. As such, the CAB Panel did not err in their decision, nor issue an unreasonable or unjust determination.

## CONCLUSION

The Court should uphold the CAB decision and find that the appellant is not entitled to workers' compensation benefits relative to his November 1, 2019 injuries. The appellant was not within the course and scope of employment when the motor vehicle accident occurred and none of the exceptions to the "going and coming" rule apply.

## STATEMENT REGARDING ORAL ARUGMENT

The Appellee requests 15 minutes of oral argument and designates Craig A. Russo, Esq. as the attorney to be heard.

## STATEMENT OF COMPLIANCE – WORD LIMITATION

I hereby certify that this brief is incompliance with the 9,500-word limitation under Supreme Court Rule 16 (11). This brief contains 6,091 words.

Respectfully submitted,
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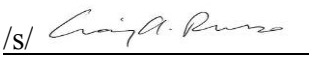
Dated: December 14, 2021

**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2021, a copy of the forgoing is being timely provided through the electronic filing system's electronic service to Benjamin T. King, Esq. and the NH Attorney General.

/s/ 

Craig A. Russo, Esq.