STATE OF NEW HAMPSHIRE
SUPREME COURT

Elba Hawes

v.

Asplundh Tree Expert, LLC

Case No. 2021-0187

BRIEF OF ELBA HAWES
APPELLANT

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Oral argument by:
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases

Statutes

QUESTIONS PRESENTED

Whether the Compensation Appeals Board (CAB) acted unjustly, unreasonably or erroneously as a matter of law where the CAB found that the "going and coming" rule barred the appellant's claim for workers' compensation benefits, where the appellant suffered injuries in a motor vehicle accident while traveling home in the middle of a workday because the appellee employer assigned the appellant an interrupted and irregular work schedule, requiring the appellant to work in the morning then travel home at midday to rest, so the appellant could return to work later the same day to work through the night. Transcript at pp. 19-27.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS INVOLVED IN THE CASE

RSA 281-A:2, XI and XIII

RSA 281-A:48

STATEMENT OF THE CASE

Mr. Hawes timely submitted to the New Hampshire Department of Labor (NHDOL) a First Report of Injury specifying a November 1, 2019, injury date. The carrier issued a memo of denial on March 9, 2020, citing no causal relationship to employment. Mr. Hawes appealed the denial of his workers' compensation claim to the NHDOL. NHDOL held a hearing on September 14, 2020, and issued a Decision of the Hearing Officer dated October 5, 2020.

Mr. Hawes timely appealed the Decision of the Hearing Officer to the CAB, submitting Requests for Finding of Fact and Rulings of Law in advance of the hearing.

The CAB held a *de novo* hearing on February 4, 2021, and issued a decision dated February 22, 2021. Mr. Hawes timely moved for rehearing. The CAB denied rehearing on April 5, 2021.

Mr. Hawes timely filed a Rule 10 Notice of Appeal with this Court, which accepted the Appeal by Order dated June 18, 2021.

STATEMENT OF THE FACTS

The appellee Asplundh Tree Expert, LLC (Asplundh) employed the appellant Mr. Hawes as a groundsman on or about November 1, 2019.[1] Mr. Hawes' regular work schedule for Asplundh required him to work from 7:00 a.m. till 4:00 p.m.[2] Mr. Hawes reported to work for his usual shift the morning of November 1, 2019.[3] That morning, he drove in his personal vehicle to a sandpit in Conway, New Hampshire, as Asplundh had instructed him to do.[4] He parked his personal vehicle there and met his

[1] Addendum at p. 25 at Request for Finding of Fact #1; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #1).
[2] Addendum at p. 25 at Request for Finding of Fact #2; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #2); Transcript at p. 9.
[3] Addendum at p. 25 at Request for Finding of Fact #3; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #3).
[4] Addendum at p. 25 at Request for Finding of Fact #3; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #3).

fellow workers, whereupon they traveled in company trucks to a nearby job site.[5]

Asplundh planned for Mr. Hawes and his fellow workers to work at the job site the entire day, when they traveled to the job site the morning of November 1, 2019.[6] News of an impending storm caused Asplundh to change the work schedules of Mr. Hawes and his fellow workers during the morning of November 1, 2019, however.[7] During the morning of November 1, 2019, Asplundh issued a directive to Mr. Hawes and his fellow workers that they should stop work at noon and then travel home to rest for the afternoon so they could return to work at 8:00 p.m. on November 1, 2019, to work on storm cleanup activities.[8] As Mr. Hawes testified:

> Q. Did your employer tell you what to do when you went home on November 1, 2019, at noon?
>
> A. Yeah, they had told us to go home and rest.[9]

As the CAB correctly found, Asplundh directed Mr. Hawes to go home at noon so he could return at 8:00 p.m. to work "through the night" on storm cleanup activities. "The respondent [Asplundh] required Mr. Hawes to deviate from his regular work schedule on November 1, 2019,

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[5] Addendum at p. 25 at Request for Finding of Fact #4; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #4).
[6] Addendum at p. 25 at Request for Finding of Fact #5; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #5).
[7] Addendum at p. 26 at Request for Finding of Fact #6; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #6).
[8] Addendum at p. 26 at Request for Finding of Fact #6; Addendum at p. 37 (indicating "Agreed" for Request for Finding of Fact #6).
[9] Transcript at p. 10.

sending Mr. Hawes home in the middle of the day and ordering him to return to work that night, for [Asplundh's] benefit, so workers such as Mr. Hawes were available to perform storm cleanup activities **through the night**."[10] Emphasis supplied. Mr. Hawes "figured [he] would be working through the night," as he testified.[11]

After Asplundh interrupted Mr. Hawes' workday at noon on November 1, 2019, Mr. Hawes traveled back to the sandpit with his fellow workers in the company trucks, at which point he proceeded to travel in his personal vehicle towards his home in Groveton, New Hampshire, to prepare to return to work that night.[12] Mr. Hawes' driving time from the Conway sandpit to his Groveton home was "[a]round an hour and a half."[13] Mr. Hawes would not have traveled home in the middle of the workday—for lunch or any other reason—if Asplundh had not directed him to go home, because his home was located ninety (90) minutes from the job site.[14] If Mr. Hawes had made it home, he would have had roughly 4.5 hours rest time at home. He would have arrived home likely a little before 2:00 p.m., and then he would have had to depart home for the job site no later than 6:30 p.m., given the 90-minute travel time between the job site and his home.

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[10] Addendum at p. 26 at Request for Finding of Fact #9; Addendum at p. 37 (granting Request for Finding of Fact #9).
[11] Transcript at p. 10.
[12] Addendum at p. 27 at Request for Finding of Fact #10; Addendum at p. 37 (granting Request for Finding of Fact #10); Transcript at p. 4 (Mr. Hawes testified that he resided in Groveton, on November 1, 2019).
[13] Transcript at p. 6.
[14] Transcript at p. 9.

But Mr. Hawes did not arrive home on November 1, 2019. An SUV crossed the center line and collided with Mr. Hawes' vehicle, and then a tractor trailer struck Mr. Hawes' vehicle from behind, during Mr. Hawes' trip home.[15] The motor vehicle accident occurred at approximately 12:19 p.m. on November 1, 2019, as Mr. Hawes drove home in the middle of his customary workday so that he could rest in anticipation of returning to work at 8:00 p.m.[16]

Mr. Hawes suffered several injuries in the motor vehicle accident, including a right 5th metacarpal fracture, a left distal radius fracture, a right bimalleolar ankle fracture, and a left knee effusion.[17] Mr. Hawes was disabled from work due to his accident-related injuries beginning November 1, 2019, and continuing through February 9, 2020.[18]

SUMMARY OF ARGUMENT

The Court should reverse the CAB, holding that Mr. Hawes suffered compensable work-related injuries in a traffic accident occurring while Mr. Hawes—at the employer's direction—embarked on a 90-minute trip home from a remote job site in the middle of a workday, so he could prepare to return to work later that day to work through the night. Mr. Hawes' injuries arose out of and in the course of his employment, rendering them

[15] Addendum at p. 27 at Request for Finding of Fact #11; Addendum at p. 37 (granting Request for Finding of Fact #11).
[16] Addendum at p. 27 at Request for Finding of Fact #12; Addendum at p. 37 (granting Request for Finding of Fact #12).
[17] Addendum at p. 27 at Request for Finding of Fact #13; Addendum at p. 37 (granting Request for Finding of Fact #13).
[18] Addendum at p. 27 at Request for Finding of Fact #14; Addendum at p. 37 (granting Request for Finding of Fact #14).

compensable. Mr. Hawes' injuries arose out of his employment both because he was a traveling employee working at remote job sites and because the employer directed his travel, such that the employment created the risk of Mr. Hawes' injuries. Mr. Hawes' injuries arose in the course of his employment because: (1) injuries suffered during an intermission in the workday when an employee travels home from a remote job site at an employer's direction occur within the boundaries of time and space created by the terms of employment involving travel to remote job sites; (2) travel home in the midst of a workday that the employer directs is related to the employment; and (3) an employee's travel home during an intermission in the workday is of mutual benefit to the employer and the employee, where the employer directs the employee to undertake the travel so that the employee can prepare to work an interrupted and irregular schedule, such as the night shift following the partial day shift present in this case.

The Court should also reverse the CAB on the separate grounds that Mr. Hawes' trip home in the midst of the workday at the employer's direction, in order to give Mr. Hawes an opportunity to rest so that he could prepare to work through the night, constituted a special duty or errand.

ARGUMENT

Standard of Review

The Court will disturb a CAB decision for errors of law or if the Court finds the CAB's decision to be unjust or reasonable by a clear preponderance of the evidence. Appeal of Kelly, 167 N.H. 489, 491 (2015). The Court reviews statutory interpretation by the CAB *de novo*. Id. The Court "construe(s) the Workers' Compensation Law liberally to

give the broadest reasonable effect to its remedial purpose," resolving "all reasonable doubts in favor of the injured worker." Id.

The CAB Erred By Holding That The "Going And Coming" Rule Bars Mr. Hawes From Receiving Workers' Compensation Benefits, As Demonstrated By The Court's Recent Holding In *Appeal Of Pelmac Industries*

This Court's recent holding in Appeal of Pelmac Indus., Inc., 2021 WL 4783944 (Oct. 13, 2021) supports that Mr. Hawes suffered a compensable work-related injury and that the CAB erred by holding otherwise. In Pelmac, the employee suffered injuries in a motor vehicle accident while traveling from his Manchester, New Hampshire, home to a Berlin, New Hampshire, job site in connection with his job duties as an alarm installer and technician for his employer. Id. at *1. The carrier in Pelmac argued that the "going and coming" rule foreclosed the employee's right to workers' compensation benefits, just as the CAB found in Mr. Hawes' case. Id. at *4.

This Court rejected the contention that the "going and coming" rule barred the employee from recovering benefits, however, holding that "the operative question is not what the employee is about to do, or has just been doing, but whether or not at the time of injury he is within the…scope of his employment." Id. (emphasis supplied). As the Court further explained, "[d]emonstrating that peripheral or ancillary activities [fall] within the scope of employment require(s) [an employee] to prove…(1) that the injury arose out of employment by demonstrating that it resulted from a risk created by the employment; and (2) that the injury arose in the course of

employment by demonstrating 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." Id. at **4-5.

The Pelmac Court applied this test to hold that the employee's travel from his home to his work site fell within the scope of his employment, rendering his injuries compensable. Applying the test to the facts of the instant case yields a similar result—that Mr. Hawes' travel from his work site to his home at the direction of his employer in the middle of his workday fell within the scope of employment, making compensable the injuries that Mr. Hawes suffered during such travel.

Mr. Hawes' Employment Created The Risk Of His Injuries Such That His Injuries Arose Out Of His Employment, Given That His Employment Involved Travel To Remote Work Sites And Given That His Employer Directed The Travel Through Which He Suffered His Injuries.

Mr. Hawes' injury resulted from a risk created by his employment, satisfying the first prong of the Pelmac test. The evidence supports that Mr. Hawes, like the employee in Pelmac, was a traveling employee, given that Mr. Hawes also "travel(ed) to different locations to perform [his] duties, as differentiated from employees who commute daily from home to a certain workplace." Id. at *5. The employee in Pelmac suffered his injury while traveling from his home to a remote job site 2.5 hours from his home. Similarly, Asplundh had assigned Mr. Hawes to a job site in Conway, on

the date of his motor vehicle accident—a job site 1.5 hours from Mr. Hawes' home—evidencing Mr. Hawes' status as a traveling employee.

Mr. Hawes' injuries during his travel arose from a risk created by his employment, given his "traveling employee" status, pursuant to Pelmac. "A traveling employee…'is generally considered to be within the scope of his employment throughout his sojourn' [because] 'the job's requirement of travel **and the employer's authority and control in assigning its employees to different work sites...increase the normal risk**,' such that the employee's travel cannot fairly be excluded from a classification of work-related risks." Id. (quotations omitted) (emphasis supplied). Just as was true of the employee in Pelmac, Mr. Hawes' job responsibilities as a groundsman for Asplundh did not involve traveling to and from an office each day but instead "involved traveling long distances, working on site, and returning to [Groveton]." Id. at *6. Therefore,"[t]he risk of injury to [Mr. Hawes] during travel necessary to perform his duties as [a groundsman] at assigned, remote work sites was created by his employment." Id. (quotations omitted). The fact that Asplundh directed Mr. Hawes to travel home in the middle of the workday and then return later—subjecting Mr. Hawes to three (3) additional hours of exposure to the perils of the roads—places beyond dispute that Mr. Hawes' employment created the risk of his injury, and renders unreasonable and unjust the CAB's conclusion to the contrary.

Mr. Hawes' Injuries Arose In The Course Of His Employment

Mr. Hawes' injuries arose in the course of his employment for the same reasons as did the injuries of the employee in Pelmac. Mr. Hawes'

"travel to and from [Conway] was necessitated by, and integral to, the nature of [Mr. Hawes'] employment with [Asplundh] such that his [November 1, 2019] injury occurred within the boundaries of time and space created by the terms of his employment" as a groundsman who traveled to work at remote ground sites. Id. at *7.

Furthermore, Mr. Hawes's injuries arose in the course of his employment because his travel home in the middle of the workday constituted an activity "reasonably expected and not forbidden by the employer." Id. at *5. Indeed, the employer itself directed the travel.

Mr. Hawes' injuries also arose in the course of his employment because his travel home in the middle of the workday—in anticipation of returning to the job site later the same day to work through the night—was at a minimum an activity of mutual benefit to the employer and the employee. Asplundh directed Mr. Hawes to go home in the middle of his workday primarily for Asplundh's benefit. Giving Mr. Hawes a few hours rest at home was designed to enable him to work an interrupted and irregular schedule under which he would return to work at 8:00 p.m. the same day and work through the night—after having already worked from 7:00 a.m. to noon. Having Mr. Hawes work through the night benefited Asplundh because the company needed employees working at night to deal with the impacts of an anticipated storm.

Other jurisdictions, applying the principles that led this Court to reject rigid application of the "going and coming" rule in Pelmac, have held injuries to be compensable under the exact circumstances present in this case—where an employer authorizes an employee to travel home in the

middle of a workday so the employee can prepare to return to work later the same day.

In Bisdom v. Kerbrat, 232 N.W. 408 (Mich. 1930), the court held that an employee suffered a compensable work injury when the employee suffered a fatal motor vehicle accident while traveling home, where the employer had instructed the employee to leave work an hour early to travel home to eat dinner and change his clothes, so that the employee could attend a business meeting for the employer that night. As the Bisdom court explained: "When Bisdom left at 4:30 p.m., **his day's work was not finished**. He was not going home for the night, but only to eat his dinner and change his attire, so as to make a more presentable appearance while continuing his day's work. Bisdom, while on his way home, met with an automobile accident which resulted in his death. He was acting within the course of his employment **and in accordance with the directions of his employer** at the time he suddenly met with his death through the hazards incurred on the public highway. The injuries arose out of the employment." Id. at 409 (emphasis supplied).

In all material respects, Mr. Hawes' case is indistinguishable from Bisdom, warranting reversal of the CAB. Mr. Hawes' work for the day was not finished, nor was he going home for the night, when he suffered the motor vehicle accident severely injuring him. Like the employee in Bisdom, Mr. Hawes was traveling home in accordance with his employer's directions to prepare to continue his day's work later.

In circumstances such as those present in the instant case and in Bisdom, all the factors of the Pelmac test are satisfied, calling for reversal of the CAB and a holding that Mr. Hawes' injuries are compensable. First, the

injuries arise out of the employment because the employer creates the risk of the travel-related injury by directing the employee to undertake greater travel than the employee otherwise would, directing the employee to travel home in the middle of the workday and then travel back to the job site.

Moreover, the injuries arise in the course of employment. Injuries suffered by an employee on a journey home that an employer directs—during a mere *intermission* in the workday rather than a coda to it—occur within the boundaries of time and space created by the terms of the employment, particularly "where the job requires extensive travel." Appeal of Griffin, 140 N.H. 650, 656 (1995) (quotations omitted). Such injuries also arise out of the employment because they occur during an activity that the employer authorizes—and therefore reasonably expects—and also occur during an activity that mutually benefits the employer and the employee, affording the employees the rest they need to work an interrupted and irregular schedule, such as a night shift following a partial day shift, in order to meet the employer's business needs. *Accord* Carbone's Case, 993 N.E.2d 1240 (Mass. App. Ct. 2013) (holding that "an employee's injuries from a risk of the street are compensable, rather than barred by the going and coming rule, when the employee's authorized activity at the time of the injury benefited the employer," and further noting that "the common thread throughout the categories of exceptions to the going and coming rule is the employer's authorization of an activity that furthers its business interest thereby exposing an employee to a street risk."); McClure v. Gen. Motors Corp., 289 N.W.2d 631, 633 (Mich. 1980) ("when on a given day an employee, in obedience to the employer's direction to deviate from 'the regular normal working schedule' and to enter upon an interrupted and

irregular schedule, including a mandatory period of 'swing run' inactivity, is injured, his injuries are suffered 'out of and in the course of the employment.'").

The Court Should Reverse The Cab Because Mr. Hawes' Injuries Are Compensable Under The Special Duty Exception To The "Going And Coming" Rule.

The Court should hold that the CAB erred by proclaiming that the act of going home somehow cannot fall within the "special duty or errand" exception to the "going and coming" rule. The CAB's declaration that going home somehow cannot constitute a special duty or errand directly conflicts with this Court's holding in Henderson v. Sherwood Motor Hotel, 105 N.H. 443, 446 (1964) (finding "special duty" exception applicable, and injury compensable, where "the decedent's employment may reasonably be said to have 'put the [employee] at the place where she was and in the condition she was at the time of the accident'" suffered by the employee as she drove home) (quotations omitted).

Other jurisdictions have correctly invoked the "special errand" exception (also dubbed the "special mission" exception) to find injuries compensable suffered under the circumstances present here. California courts have "awarded compensation under the special mission exception" in circumstances analogous to those presented by Mr. Hawes' case. Green v. Workers' Comp. Appeals Bd., 187 Cal.App.3d 1419, 1423 (Cal.Ct.App. 1986). The Green court held that an employee who suffered injuries in a motor vehicle accident while traveling from his workplace to his home suffered a compensable work-related injury because his injury fell within

the special mission exception to the going and coming rule, where the employee was traveling home to change his clothes in order to attend a trade show that night. Id. at 1424-25 (emphasis supplied) ("Since [the employee] wore work clothing on the employer's premises and the employer required he wear a coat to the trade show, it was necessary for [the employee] to return home to change his clothing for the show. The employer, furthermore, told [the employee] he would pick [the employee] up at his home to drive him to the trade show. **Thus, [the employee's] trip was undertaken at the employer's request and was for the benefit of the employer. Under these circumstances [the employee's] trip home in preparation for the evening trade show was a special mission**.").

Similarly, in Sloane-Nissan v. Workers' Compensation Appeals Board (Zeyl), 820 A.2d 925 (Pa. Commw. Ct. 2003), the Pennsylvania Court held that the claimant suffered a compensable work-related injury when his employer ordered him to travel home during the workday to change his attire and the claimant suffered a horrific traffic accident as he returned to the office from his home. "[S]ince claimant was to return to the workplace upon changing [his attire], the…finding that claimant was on a special mission for employer is supported by the evidence of record," the court held. Id. at 927. The record evidence that Mr. Hawes was to return to work later in the day in order to work through the night when he suffered his accident on November 1, 2019, supports a similar holding here that Mr. Hawes was on a special errand for the appellee, rendering his injuries compensable.

CONCLUSION

The Court should reverse the CAB, holding that Mr. Hawes proved his entitlement to workers' compensation benefits relative to his November 1, 2019, injuries.

STATEMENT REGARDING ORAL ARGUMENT

The appellant requests 15 minutes oral argument and designates Benjamin T. King, Esq., as the attorney to be heard.

STATEMENT OF COMPLIANCE - WORD LIMITATION

I hereby certify that this brief is in compliance with the 9,500 word limitation as set forth in Supreme Court Rule 16 (11). This brief contains 4,076 words.

CERTIFICATE OF ATTACHMENT OF APPEALED DECISION

I hereby certify that the appealed decision is in writing and appended to the Brief.

Respectfully submitted,
Elba Hawes
By his attorneys,
Douglas, Leonard & Garvey, P.C.

Date: November 12, 2021 By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being timely provided through the electronic filing system's electronic service to Craig A. Russo, Esq. and the Attorney General.

/s/ Benjamin T. King
Benjamin T. King

ADDENDUM TABLE OF CONTENTS

PAGE

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October 05, 2020

Benjamin King, Esq.
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RECEIVED
OCT 07 2020

Re: ELBA HAWES v. ASPLUNDH TREATING EXPERT, LLC
DOI: November 1, 2019
Case: #89558

Dear Attorney King:

Enclosed please find a copy of my decision rendered in the above-captioned case.

Should either party disagree with this decision, it may be appealed to the Workers' Compensation Appeals Board by filing a written notice of appeal addressed to the Director of Workers' Compensation, New Hampshire Department of Labor, 95 Pleasant Street, Concord, New Hampshire 03301, within 30 days from the date of this decision.

A recording of the hearing will be available for 60 days after the date of this decision. A digital recording copied to a standard CD-ROM of this hearing is available through the Department of Labor for a prepaid fee of $20.00. Please submit your payment with your written request.

Very truly yours,

Tahra White
Hearing Officer

TW/sw

Encl.

cc: Craig Russo, Esq.
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cc: client

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE

ELBA HAWES
v.
ASPLUNDH TREATING EXPERT, LLC

CASE # 89558

DECISION OF THE HEARING OFFICER

APPEARANCES: Attorney Benjamin King on behalf of the claimant, Elba Hawes.
Attorney Craig Russo on behalf of the carrier, Sedgwick CMS.

NATURE OF DISPUTE: RSA 281-A:2 XI, XIII - Causal Relationship of Injury to Employment.
RSA 281-A:48 - Review of Eligibility for Compensation.

DATE OF INJURY: November 1, 2019

DATE OF HEARING: September 14, 2020

BACKGROUND AND STATEMENT OF THE ISSUES

A First Report of Injury provides an injury date of November 1, 2019. The injuries are described as bilateral ankles, right hand, and left wrist injuries. The carrier issued a memo of denial on March 9, 2019 citing no causal relationship to employment. The claimant requested this hearing for review.

The hearing request was received by the Department of Labor on August 7, 2020. A formal hearing was held via WebEx on September 14, 2020. The claimant was the sole witness for the hearing.

FINDINGS OF FACT

Elba Hawes, 20, had an address of 20 Eames Street, Groveton, NH 03582 at the time of the hearing. The claimant was employed by Asplundh Tree as a groundsman. His duties in that regard involved setting up trucks, setting out cones, chipping brush and some traffic control. He described the job to be very physically demanding/heavy-duty.

The claimant testified that he arrived at work on November 1, 2019 for his scheduled 7:00 AM to 4:00 PM shift. He arrived at a sandpit outside of Conway where

the crew met, parked their personal vehicles, and got their work trucks. The claimant testified that on the morning of November 1, 2019, he arrived, set out cones, supervised a foreman in a bucket, and was chipping brush. At some point that morning, he learned that the schedule for the day changed. A phone call had been received from the general foreman advising the crew to work until noon, then go home, and return to the sandpit at 8 PM. The claimant testified there was an impending storm so he needed to come back to do storm cleanup.

The claimant testified that he worked his usual job until noon on November 1, 2019. He left in the Asplundh truck and went back to the sandpit where he retrieved his personal vehicle. He left the sandpit in his personal vehicle and headed northbound to go home. The vehicle in front of him swerved to the right. An SUV crossed the line and hit the claimant head on. The claimant then was hit a second time by a tractor-trailer in the tail end of his vehicle. The claimant testified that he had cuts and bruises on his face from the airbag as well as a lung contusion and he had to be extricated from his vehicle. He was then transported to Memorial Hospital.

At the hospital, x-rays showed a distal tibial fibula fracture. He was transferred to Maine Medical in Portland, Maine. The records from Maine Medical show diagnoses of right 5th metacarpal fracture, left distal radius fracture, right bimalleolar ankle fracture, and left knee effusion. He was scheduled for open reduction internal fixation of the right ankle. The claimant testified that his left wrist was casted and he did not require surgery for that wrist. He did undergo two procedures at Maine Medical; the first on November 3rd was for the right hand fracture, and the second on November 4th was to repair the right ankle. The claimant was in a rehabilitation hospital and then completed a course of physical therapy before returning to work full-time, full duty on February 10, 2020.

On cross-examination, the claimant reiterated that he arrived at the sandpit at 7:00 AM. He explained this was the property that the company was granted permission to park the trucks on and to leave their personal vehicles at. He agreed that he traveled from his home to the sandpit location and then was sent home early to rest so that he could return in the evening. The plan would have been to return to the sandpit again that evening. He clocked at a noontime, went to the sandpit, and proceeded in his own vehicle to go home.

DISCUSSION AND CONCLUSIONS

The claimant has the burden of showing that his injuries arose out of and in the course of his employment.

The carrier agreed that there is no question that there was a motor vehicle accident. The question is whether the accident arose out of and in the course of the claimant's employment. The carrier argued that this is a classic going and coming rule case and that these types of cases are very factually specific. The carrier argued that in Cook v. Wixon, 135 NH 150, the court laid out various rules and exceptions and articulated that traveling to and from work is generally not compensable. In this case, the claimant punched out at noon, got his own personal vehicle, and was driving home.

The carrier argued that these facts do not lend themselves to any of the exceptions identified to the going and coming rule. The carrier conceded that one exception that could be argued would be that the employee was on a special duty or errand for the employer; however, the carrier argued that this is not the case here. The carrier argued the claimant wasn't performing any special duty, he was simply going from the job site to his home. While he may have been required to return to work later that evening, he was not in the performance of a special errand for the employer while he was headed home. The carrier argued that the claimant has not met his burden of showing that the injuries sustained arose out of and in the course of his employment.

The claimant argued that in Henderson v. Sherwood Motor Hotel, 105 NH 443, the Supreme Court essentially "swallowed the going and coming rule." The claimant argued that he was doing a special errand for the employer at the time of the injury. The employer sent them home early to rest so that he be able to return and work through the night. In Henderson, an employee was called into work, punched out and was intoxicated from an event, and was fatally injured on the drive home. The Court said the special errand rule applied and the question was whether the employment put the claimant in the place he or she was at the time of the injury. In the present case, the claimant argued that but for being sent home early to rest, he would not have been in the place he was at the time of the injury. The claimant further argued that he took no detour and was heading straight home at the time of the accident. The claimant argued that his injuries arose out of and in the course of his employment.

There is no question that the claimant sustained substantial injuries as a result of a motor vehicle accident on November 1, 2019. Based on the evidence presented, the claimant cannot meet his burden of showing that he was in the course of his employment or that the injuries sustained arose out of his employment. He had clocked out of work much earlier than anticipated, was in his personal vehicle, and was traveling home when he was involved in a motor vehicle accident. While the evidence supports that the claimant was anticipating returning to work at 8:00 PM, the evidence does not support that the claimant was performing a special errand for the employer at the time of the accident.

DECISION

Based on the evidence presented, it is determined that the claimant failed to show by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment on November 1, 2019. The claimant's request for benefits shall, respectfully, remain denied.

October 05, 2020
Date of Decision

Tahra White, Hearing Officer

TW/sw

NEW HAMPSHIRE DEPARTMENT OF LABOR
WORKERS' COMPENSATION APPEALS BOARD

Elba Hawes

v.

Asplundh Tree Expert, LLC

Docket No. 2021-L-0111

APPELLANT'S REQUESTS FOR FINDINGS OF FACT AND RULINGS OF LAW

NOW COMES the appellant Elba Hawes, by and through his attorneys Douglas, Leonard & Garvey, P.C., and respectfully submits the within Requests for Findings of Fact and Rulings of Law, stating as follows:

Requests for Findings of Fact

1. The respondent Asplundh Tree employed the claimant Mr. Hawes as a groundsman on or about November 1, 2019.

2. Mr. Hawes' regular work schedule for Asplundh required him to work from 7:00 a.m. till 4:00 p.m.

3. Mr. Hawes reported to work for his usual shift the morning of November 1, 2019. That morning, he drove in his personal vehicle to a sandpit in Conway, New Hampshire, where he parked his personal vehicle and met his fellow workers, as the respondent had directed him to do.

4. Mr. Hawes then traveled with his fellow workers in company trucks to a nearby job site.

5. When Mr. Hawes and his fellow workers traveled to the job site the morning of November 1, 2019, the respondent planned for them to work at the job site throughout the work day.

6. News of an impending storm caused the respondent to change the work schedules of Mr. Hawes and his fellow workers during the morning of November 1, 2019. A supervisor with the respondent, Ray Whitney, telephoned the foreman at the job site, Scott Litvin, the morning of November 1, 2019, to direct that the workers stop working at noon and punch out, then go home to rest for the afternoon so they could return to the Conway, New Hampshire, sandpit at 8:00 p.m. to resume work on storm cleanup activities.

7. On November 1, 2019, the respondent thus directed Mr. Hawes to deviate from his normal regular working schedule of 7:00 a.m.-4:00 p.m. and to enter upon an interrupted and irregular schedule.

8. The respondent subjected Mr. Hawes to increased street risks on November 1, 2019, by assigning him an interrupted and irregular work schedule that day, requiring him to go home to rest in the middle of the customary workday, then return to work that night. Ordinarily, Mr. Hawes' travel going to work and coming from work would have consisted only of: a.) his morning trip from home to arrive at work at 7:00 a.m.; and b.) his afternoon trip departing work at 4:00 p.m. to return home. Mr. Hawes faced increased street risks on November 1, 2019, however, because the respondent compelled him to make an additional trip home in the middle of the work day.

9. The respondent required Mr. Hawes to deviate from his regular work schedule on November 1, 2019, sending Mr. Hawes home in the middle of the day and ordering him to return to work that night, for the respondent's benefit, so workers such as Mr. Hawes were available to perform storm cleanup activities through the night.

10. Following the suspension of work at noon on November 1, 2019, Mr. Hawes punched out, traveled back to the sandpit with his fellow workers, and then traveled home in his personal vehicle to prepare to return to work later that night.

11. During Mr. Hawes' trip home, Mr. Hawes was involved in a motor vehicle accident in which an SUV crossed the center line and collided with Mr. Hawes' vehicle head on, whereupon a tractor trailer rear-ended Mr. Hawes' vehicle.

12. This motor vehicle accident occurred at approximately 12:19 p.m., as Mr. Hawes drove home in the middle of his customary work day at the direction of the respondent so that he could rest in anticipation of returning to work at 8:00 p.m. *See* Medical Records at Tab 10 at 342 (noting that the accident occurred at 12:19 p.m. on 11/1/19).

13. Mr. Hawes suffered several injuries in the motor vehicle accident, including a right 5th metacarpal fracture, a left distal radius fracture, a right bimalleolar ankle fracture, and a left knee effusion. Medical Records at Tab 8 at 291.

14. Due to Mr. Hawes' accident-related injuries, Mr. Hawes was disabled from work beginning November 1, 2019, and continuing through February 9, 2020.

Requests for Rulings of Law

1. Notwithstanding that "the ordinary perils of travel between home and work are not considered hazards of employment," "an employee may recover for injuries sustained while traveling to or from his place of employment if he is on a 'special duty or errand' for the employer." Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1991) (quotations and citations omitted).

2. The fact that Mr. Hawes had punched out—when he traveled home in the noon hour on November 1, 2019, in order to prepare to return to work later that day—is not conclusive of whether his travel home was "a part of [his] employment." Henderson v. Sherwood Motor

Hotel, 105 N.H. 443, 445 (1964). "In complying with [his] employer's request [to go home in the middle of his usual work day so he could return to work later to work through the night], [he] cannot be said to have left [his] employment." Id.

3. Mr. Hawes was on a "special errand" for the respondent when he traveled home at the respondent's direction in the noon hour on November 1, 2019, in preparation for returning to work later the same day at the unusual hour of 8:00 p.m. in order to work through the night. Mr. Hawes' midday trip home constitutes a special errand for several reasons, including: a.) Mr. Hawes undertook the trip at the employer's request and for the respondent's benefit so that he could prepare to work through the night for the respondent; b.) Mr. Hawes was not traveling home because his day's work was finished but rather because the respondent ordered him to go home so he could prepare to continue the day's work at 8:00 p.m.; and c.) the respondent's directive that Mr. Hawes deviate from his normal working schedule, and work an interrupted and irregular schedule, increased the miles Mr. Hawes had to travel on November 1, 2019, thereby subjecting him to increased travel risks and placing him in the position in which another motorist's SUV crossed the center line and collided with his vehicle, and a tractor-trailer rear-ended him, causing him severe injuries.

4. Case law from New Hampshire and other jurisdictions supports that Mr. Hawes was on a special errand for the respondent when he traveled home in the middle of his customary work day on November 1, 2019, to prepare to return to work that night. The special errand exception applies because the respondent placed Mr. Hawes in the position that led to his traffic accident, where the respondent subjected Mr. Hawes to increased street risks by forcing him to travel home in the middle of the workday, in order to further the respondent's business interest to enable Mr. Hawes to work through the night on storm cleanup activities. *See* Henderson, 105 N.H.

at 446 (quotations omitted) (finding "special duty" exception applicable, and injury compensable, where 'the decedent's employment may reasonably be said to have 'put the [employee] at the place where she was and in the condition she was at the time of the accident'"); Carbone's Case, 993 N.E.2d 1240 (Mass. App. Ct. 2013) (holding that "an employee's injuries from a risk of the street are compensable, rather than barred by the going and coming rule, when the employee's authorized activity at the time of the injury benefited the employer," and further noting that "the common thread throughout the categories of exceptions to the going and coming rule is the employer's authorization of an activity that furthers its business interest thereby exposing an employee to a street risk."); McClure v. Gen. Motors Corp., 289 N.W.2d 631, 633 (Mich. 1980) ("when on a given day an employee, in obedience to the employer's direction to deviate from 'the regular normal working schedule' and to enter upon an interrupted and irregular schedule, including a mandatory period of 'swing run' inactivity, is injured, his injuries are suffered 'out of and in the course of the employment.'").

5. The compensability of Mr. Hawes' injuries is supported by a closely analogous case in which the Michigan Supreme Court held that an employee suffered a compensable work injury when the employee suffered a fatal motor vehicle accident while traveling home, where the employer had instructed the employee to leave work an hour early to travel home to eat dinner and change his clothes, so that the employee could attend a business meeting for the employer that night. Bisdom v. Kerbrat, 232 N.W. 408 (Mich. 1930). As the Bisdom court explained:

> When Bisdom left at 4:30 p.m., **his day's work was not finished**. He was not going home for the night, but only to eat his dinner and change his attire, so as to make a more presentable appearance while continuing his day's work. Bisdom, while on his way home, met with an automobile accident which resulted in his death. He was acting within the course of his employment **and in accordance with the directions of his employer** at the time he suddenly met with his death through the hazards incurred on the public highway. The injuries arose out of the employment.

Id. at 409 (emphasis supplied). In all material respects, Mr. Hawes' case is on all fours with Bisdom. Mr. Hawes' work for the day was not finished, nor was he going home for the night, when he suffered the motor vehicle accident severely injuring him. Like the employee in Bisdom, Mr. Hawes was traveling home in accordance with his employer's directions to prepare to continue his day's work later. Mr. Hawes' injuries suffered in the November 1, 2019, motor vehicle accident are therefore compensable.

6. California courts have also "awarded compensation under the special mission exception" in circumstances analogous to those presented by Mr. Hawes' case, further supporting the compensability of Mr. Hawes' accident-related injuries. Green v. Workers' Comp. Appeals Bd., 187 Cal.App.3d 1419, 1423 (Cal.Ct.App. 1986). The Green court held that an employee who suffered injuries in a motor vehicle accident while traveling from his workplace to his home suffered a compensable work-related injury because his injury fell within the special mission exception to the going and coming rule, where the employee was traveling home to change his clothes in order to attend a trade show that night. Id. at 1424-25 (emphasis supplied) ("Since [the employee] wore work clothing on the employer's premises and the employer required he wear a coat to the trade show, it was necessary for [the employee] to return home to change his clothing for the show. The employer, furthermore, told [the employee] he would pick [the employee] up at his home to drive him to the trade show. **Thus, [the employee's] trip was undertaken at the employer's request and was for the benefit of the employer. Under these circumstances [the employee's] trip home in preparation for the evening trade show was a special mission**.").

7. Similarly, in Sloane-Nissan v. Workers' Compensation Appeals Board (Zeyl), 820 A.2d 925 (Pa. Commw. Ct. 2003), the Pennsylvania Court held that the claimant suffered a compensable work-related injury when his employer ordered him to travel home during the

workday to change his attire and the claimant suffered a horrific traffic accident as he returned to the office from his home. "[S]ince claimant was to return to the workplace upon changing [his attire], the…finding that claimant was on a special mission for employer is supported by the evidence of record," the court held. Id. at 927. The record evidence that Mr. Hawes was to return to work later in the day in order to work through the night supports a similar finding here that Mr. Hawes was on a special errand for the respondent when he suffered his accident.

8. In addition, a New York court held that an employee suffered a compensable work-related injury when the employee tripped entering her home as she complied with a directive from her employer to travel home to eat dinner and then return to the workplace to complete a stock inventory. Ross v. Sunrise Food Exchange, 75 N.Y.S.2d 897 (N.Y.App. Div. 1948). The Ross court held that "the injuries sustained by claimant were accidental and arose out of and in the course of her employment [because] the claimant was under the compulsion of the employer." A finding of compensability is appropriate for similar reasons here. Mr. Hawes was under the compulsion of the respondent when he traveled home in the middle of his customary work day on November 1, 2019. He was not going home for the day but was only going home to prepare to continue his work later in the day.

9. Because Mr. Hawes was on a special errand for the respondent when he suffered his November 1, 2019, injuries, his injuries are deemed to be compensable within the meaning of RSA 281-A. Mr. Hawes is awarded temporary total disability benefits for the period beginning November 2, 2019, and continuing through February 9, 2020.

Respectfully submitted,

ELBA HAWES
By his attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

Dated: February 3, 2021

By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically served to all counsel of record on this date.

/s/ Benjamin T. King
Benjamin T. King

State of New Hampshire

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February 22, 2021

Benjamin King, Esq.
Douglas, Leonard & Garvey PC
14 South St, Suite 5
Concord NH 03301

Re: Elba Hawes V Asplundh Tree Expert LLC
Docket # 2021-L-0111

Dear Attorney King:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - ***Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.***

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of $20.00.

Respectfully submitted,

Richard A. Mitchell, Esq., Panel Chair
Compensation Appeals Board

Cc: Craig Russo, Esq.

State of New Hampshire

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February 22, 2021

DECISION OF THE WORKERS' COMPENSATION APPEAL BOARD

ELBA HAWES

V.

ASPLUNDH TREE EXPERT, INC.

DOCKET # 2021-L-0111

APPEARANCES: Benjamin King, Esquire, appeared for Elba Hawes
Elba Hawes, Esquire, appeared for Sedgwick CMS

WITNESS: Elba Hawes

ISSUES: RSA 281-A: 2, XI, XIII – Causal Relationship of Injury to Employment
RSA 281-A: 23 - Medical, Hospital and Remedial Care
RSA 281-A: 48 – Review of Eligibility for Compensation

DATE OF INJURY: November 1, 2019

HEARING: A *de novo* hearing of appeal of a decision dated October 5, 2020 was held at the New Hampshire Department of Labor, Concord, New Hampshire on February 4, 2021.

PANEL: The panel was composed of Dennis Adams, Robert Norton and Richard A. Mitchell, Esquire, chairperson.

BACKGROUND AND FINDINGS

The facts in this matter are not in dispute.

On November 1, 2019, the claimant, Elba Hawes, was working as a ground man for Asplundh Tree Expert, Inc. On that morning, he traveled from his home in Groveton to report to work at a sandpit in Conway. It was there that the crews met and were

disbursed to their jobs after punching in at 7:00 a.m. He left his truck there and went in a company vehicle to that day's jobsite, which was about 10-15 minutes away.

During the morning, a supervisor told the crews to stop working at noon, go home and report back at 8:00 p.m. There was a storm coming. Based on his experience, Mr. Hawes expected he would work all that night up 16 hours. The supervisor advised the workers to go home and rest up for the night of work.

Soon after leaving the sandpit in his truck, the claimant was severely injured in a motor vehicle accident that was not his fault.

The claimant "punched in" when he arrived at seven and punched out at noon. Mr. Hawes testified that this sort of abbreviated shift before a night call due to a storm was not uncommon. It has happened eight to ten times during the year he has been employed by Asplundh.

The issue is whether the accident and resulting injuries arose from his employment or were excluded by the "coming and going" rule. It is the claimant's burden to prove by a preponderance of the evidence that his accident and injuries arose from his employment.

Both sides rely on Cook v Wickson Trucking., Inc., 135 NH 150 (1991), which generally outlines the exceptions to the coming and going rule. In that case, an employee who was on his way home in a company truck and saw co-workers stranded on the side of the road who had run out of gas. He picked them up and drove then to his home where he got a gas can and his personal vehicle. On the way back to the stranded vehicle he was in an accident. The court found that the incident constituted the "ordinary perils of travel between home and work [and] are considered hazards of employment". Therefore the injuries arising from such travel are non-compensable.

Wickson reiterated the rule that for an accident to be compensable, it must arise out of and in the course of employment. NHRSA 281-A:2 -XI. The claimant must prove that the injury arose out of employment by demonstrating that it resulted from a risk of employment; and 2) that the injury arose in the course of employment by demonstrating 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 reasonable expected and not forbidden; or, if the activity was of mutual benefit to employer and employee. Wickson, 154.

Claimant contends that Mr. Hawes' supervisor's remonstration to go home and rest was an order that put the claimant into traffic and at greater risk for a motor vehicle accident and that going home to rest was for the benefit of the employer.

First, the advice to go home and rest was just that, advice. The employer could not enforce an order to Mr. Hawes to go home and rest. He was free to go shopping, jogging, out dining or whatever he wanted to do for the eight hours off. It was merely an unenforceable suggestion by a supervisor who wanted his men alert in the middle of the night.

Secondly, "go home" to rest was also a suggestion. Mr. Hawes could have gone anywhere or even stayed in his truck at the sandpit rather than driving over an hour each way to home and back.

The claimant was free to go anywhere and any place and do whatever he wished after punching out and ending his workday on November 1.

Wickson delineates the two exceptions to the coming and going rule. The first is when there is a "special employment errand" when a person in authority "directs an employee to run some private errand or some work outside his normal duties for the private benefit of the employer or supervisor". Wickson at 155.

Going home does not constitute a special private employment errand. Mr. Hawes was not running a private errand or doing some work outside his normal duties. He was driving home as he normally would when the workday was done and he had punched out.

The second exception is when activities of a personal nature may be a natural incident of employment. Although the expression of this exception is broad, the Supreme Court in Wickson noted that in cases where this exception was used was when the injured employees were engaged in activities on the employer's premises utilizing the employer's equipment and with the employer's knowledge. Wickson at 156.

The majority of the Supreme Court in Wickson rejected the dissent's argument that the employee's actions provided a "mutual benefit" to the employer and employee. Although the majority rejected this argument at least in part because it was based upon the fact that one of the stranded co-employees was the injured Good Samaritan's

supervisor, the Court did not adopt or incorporate a pure "mutual benefit" exception to the going and coming rule. In the light most favorable to the claimant, the "mutual benefit" would have been to rest for the eight hours. But again, this was unenforceable advice.

"The [claimant] was not required by nature of his employment, to render assistance" in Wickson, 157. So also, Mr. Hawes was not required *by nature of his employment* to go home and rest for the next day's early shift.

In this case, the advice to go home and rest was too attenuated and vague to be a mutual benefit. To carry the claimant's argument forward, would there be a claim if, at the end of a normal length day the supervisor admonished his crew: "Tomorrow's job is a tough one. Make sure you get plenty of rest at home in your own bed tonight"? Or, if because the work was done early, he was free to leave the jobsite at rush hour rather than when there was less traffic?

The only "increased risk" that the claimant argued was that by "requiring him to go home to rest in the middle of the customary workday" the employer subjected Mr. Hawes "to increased street risks" (Requests #8). No evidence was proffered that there actually was more traffic minutes after noon on a weekday than minutes after 4:00 p.m.

The claimant was done for the day's work on November 1 at noon, had punched out and would punch back in that night. His accident was too attenuated from his employment to be an exception to the coming and going rule.

DECISION

The majority of the panel finds that the claimant failed to carry his burden of proof that his accident on the way home from work arose from his employment.

Findings on Claimants Requests for Findings of Fact and Rulings of Law:

1-6 Agreed

7. Granted in part, denied in part. This was not the claimant's regular schedule, but the changing of the schedule due to weather was not uncommon.

8. Denied

9-14 Granted

Rulings: Denied

Richard A. Mitchell, Esq., Panel Chair
Compensation Appeals Board

STATE OF NEW HAMPSHIRE
WORKERS COMPENSATION APPEALS BOARD

Elba Hawes

v.

Asplundh Tree Expert, LLC

MOTION FOR REHEARING

NOW COMES the claimant Elba Hawes, by and through his attorneys Douglas, Leonard & Garvey, P.C., and respectfully moves for rehearing, stating as follows:

1. The Compensation Appeals Board (CAB) should grant rehearing because its decision is unjust, unreasonable and erroneous as a matter of law. The CAB's decision is based on unreasonable and erroneous factual findings, including findings that Mr. Hawes suffered injuries when his workday was "done" and that he was returning home to "rest for the next day's early shift." In fact, Mr. Hawes' workday was not done when he suffered his injury: he was traveling home to rest in order to return to work later the same day. The CAB made further unreasonable and erroneous factual findings where the CAB held that Asplundh somehow did not expose Mr. Hawes to increased street risks on November 1, 2019, notwithstanding that Asplundh's alteration of his schedule that day unquestionably required him to travel the roads to a significantly greater extent than he otherwise would have done. The CAB also made legal errors, erroneously holding that the New Hampshire Supreme Court has not recognized a "mutual benefit" exception to the "coming and going" rule notwithstanding that the Supreme Court has repeatedly done so. The CAB's factual and legal errors contributed to its erroneous decision denying Mr. Hawes's workers' compensation benefits, warranting rehearing.

2. The CAB made unreasonable and erroneous findings of material fact, finding that Mr. Hawes suffered his injuries when he "was driving home as he normally would when the workday was done and he had punched out." Decision at p. 3. Contrary to the CAB's finding, Mr. Hawes' workday was not "done," under the uncontested facts. The employer originally scheduled Mr. Hawes to work 7:00 a.m. to 4:00 p.m. on November 1, 2019, but after Mr. Hawes had already begun his workday, Asplundh changed his schedule, requiring him to suspend his workday at noon and return to resume it at 8:00 p.m. Requests for Findings of Fact 2 and 6. Mr. Hawes would have worked an additional four (4) hours on November 1, 2019—from 8:00 p.m. until midnight---after the CAB unreasonably found his workday to be "done," but for his motor vehicle accident. Mr. Hawes' workday was not "done" and noon. His workday was only interrupted, for the benefit of Asplundh.

3. The CAB made a further erroneous and unreasonable factual finding where the CAB found that "Mr. Hawes was not required *by the nature of his employment* to go home and rest for the next day's early shift." Decision at p. 4 (italics in original) (underlining added). Again, Asplundh did not instruct Mr. Hawes to return to work early the next day—November 2, 2019. On the contrary, Asplundh demanded that Mr. Hawes return to work later the same day. The CAB further acted unreasonably by finding that the nature of Mr. Hawes' employment somehow did not require him to go home and rest before returning later in the day. Asplundh had Mr. Hawes perform heavy physical labor the morning of November 1, 2019, then required him to return at 8:00 p.m. that night to resume performing heavy physical labor throughout the night. The CAB therefore should have found that the nature of Mr. Hawes' employment required him to go home and rest in the interval between his two (2) shifts on November 1, 2019 (7:00 a.m.—noon, followed by 8:00 p.m.—midnight), as his employer directed him to do.

4. In addition, the CAB acted unreasonably, and committed error, by failing to find that Asplundh's directive to Mr. Hawes on November 1, 2019, subjected him to "increased street risks." Decision at p. 4. As Mr. Hawes testified, he would only have traveled the 3-hour round-trip between his home in Groveton, New Hampshire, and the job site once in a normal workday when he was scheduled to work from 7:00 a.m. until 4:00 p.m. Asplundh's directive that Mr. Hawes return home to rest at noon so he could return to work at 8:00 p.m. that night subjected Mr. Hawes to an additional 90 minutes on the road that day, however. Indisputably, Asplundh's directive required Mr. Hawes to travel the roads on November 1, 2019, to a significantly greater extent than he otherwise would have traveled them that day, thereby subjecting him to increased street risks. The more a person must travel the roads, the greater the street risks the person faces. Moreover, it is beyond dispute that Mr. Hawes would not have suffered his injuries if Asplundh had not interrupted his normal schedule, instructing him to go home to rest at noon so he could return to work at 8:00 p.m. Mr. Hawes would have been working at the job site at the time of the accident, not traveling the roads, if Asplundh had not altered his schedule.

5. The CAB committed patent error where it found that the New Hampshire Supreme Court has not adopted "a pure 'mutual benefit' exception to the 'coming and going' rule. " Decision at p. 4. In fact, the Supreme Court has repeatedly recognized such an exception. N.E. Telephone Co. v. Ames, 124 N.H. 661, 664 (1984) ("we hold that the activity of the defendant was of mutual benefit to herself and to the plaintiff, and thus arose in the course of employment."). Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1992) (emphasis supplied) ("personal activities are compensable if they are 'reasonably to be expected and 'not forbidden,' or if they confer a 'mutual benefit on the employee and the employer.").

6. Asplundh unquestionably acted for its own benefit where it instructed employees such as Mr. Hawes "go home and rest" so they could return to work later the same day to work through the night for Asplundh.

7. Because Mr. Hawes suffered injury in the course of performing an activity of mutual benefit to Asplundh and himself, and because the New Hampshire Supreme Court has held that "personal activities are compensable…if they confer a 'mutual benefit on the employee and the employer," the CAB erred by failing to find Mr. Hawes' injuries compensable.

8. The CAB committed additional error where it failed to apply the "special errand" exception" notwithstanding that working through the night constituted a special duty for Mr. Hawes and traveling home in the middle of the day to prepare to return to work that night subjected Mr. Hawes to special travel risks. Henderson v. Sherwood Motor Hotel, 105 N.H. 443, 445 (1964).

9. The CAB committed further error where it reasoned that an employee somehow does not suffer a work-related injury where the employee suffers injury carrying out the employer's "unenforceable suggestion," in this case traveling home to rest so the employee could return to work later the same day. Decision at p. 3. No principle exists in New Hampshire workers' compensation law that employees can only recover workers' compensation benefits for injuries suffered while performing acts their employers force them to do. The CAB's erroneous reasoning flies in the face of the New Hampshire Supreme Court's pronouncement that "personal activities are compensable if they are 'reasonably to be expected and 'not forbidden,' or if they confer a 'mutual benefit on the employee and the employer." Cook, 135 N.H. at 154. The CAB's reasoning likewise ignores the principle that RSA 281-A should be construed liberally "to give the broadest reasonable effect to its remedial purpose" and further ignores the principle that all doubts

should be resolved in favor of the injured worker "when construing the statute." Appeal of Cote, 139 N.H. 575, 578 (1995).

10. Not only do the New Hampshire Supreme Court's Henderson and Cook decisions support the compensability of Mr. Hawes' injuries, but so do the decisions of other courts applying the "special errand" exception to the "coming and going" rule to find compensability in circumstances where an employee suffers injury while traveling between work and home before the workday is done at the employer's request or for the employer's benefit. Carbone's Case, 993 N.E.2d 1240 (Mass. App. Ct. 2013) (holding that "an employee's injuries from a risk of the street are compensable, rather than barred by the going and coming rule, when the employee's authorized activity at the time of the injury benefited the employer," and further noting that "the common thread throughout the categories of exceptions to the going and coming rule is the employer's authorization of an activity that furthers its business interest thereby exposing an employee to a street risk."); Slone-Nissan v. Workers' Compensation Appeals Board (Zeyl), 820 A.2d 925, 927 (Pa. Commw. Ct. 2003) (employee's injuries traveling home to change his clothes were compensable because "claimant was to return to the workplace" after changing his attire); Green v. Workers' Comp. Appeals Bd., 187 Cal.App.3d 1419, 1424-25 (Cal.Ct.App. 1986) (holding compensable under the special mission exception to the "coming and going" rule injuries that employee suffered while traveling home to change his clothes in order to attend a trade show for the employer that night because the employee's "trip was undertaken at the employer's request and was for the benefit of the employer."); McClure v. Gen. Motors Corp., 289 N.W.2d 631, 633 (Mich. 1980) ("when on a given day an employee, in obedience to the employer's direction to deviate from 'the regular normal working schedule' and to enter upon an interrupted and irregular

schedule, including a mandatory period of 'swing run' inactivity, is injured, his injuries are suffered 'out of and in the course of the employment.'").

11. For the foregoing reasons, the CAB should grant rehearing, find Mr. Hawes' November 1, 2019, injuries compensable, and award him temporary total disability benefits for the period beginning November 2, 2019, and continuing through February 9, 2020.

Respectfully submitted,

ELBA HAWES
By his attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

Dated: March 24, 2021

By: /s/ Benjamin T. King

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically served to all counsel of record on this date.

/s/ Benjamin T. King
Benjamin T. King

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March 31, 2021

New Hampshire Department of Labor
Workers' Compensation Division
State Office Park South
95 Pleasant Street
Concord, NH 03301
Attn: Richard Mitchell, Chair, CAB Panel

RE: EMPLOYEE: Elba Hawes
EMPLOYER: Asplundh Tree Expert LLC
D.O.I.: 11/1/19
CASE NO.: 2021-L-0111

CARRIER'S OPPOSITION TO THE CLAIMANT'S MOTION FOR RECONSIDERATION/REHEARING

Please accept this correspondence as the Carrier's Opposition to the Claimant's Motion for Rehearing of the recent CAB Hearing Decision (Decision) relative to the above-captioned matter.

The CAB Hearing in this matter was held on February 4, 2021, from which the claimant has since filed his Motion for Rehearing. The Carrier respectfully opposes the claimant's Motion for Rehearing on the grounds that the CAB Panel was not in error concerning the

"interpretation or application of the applicable state statue or administrative rule" and that the Decision was not "contrary to controlling law." See Lab 206.04 (b) (2)-(3).

Specifically, the CAB Panel should reject the argument contained in § 2 of the Motion, as it involves an erroneous reading of the Decision. The claimant argues that the CAB found, erroneously and unreasonably, that the claimant was injured after the end of his workday. This is not what the Decision states. The Decision states that "Mr. Hawes was not running a private errand or doing some work outside his normal duties. He was driving home as he normally would when the workday was done, and he had punched out." (Decision at p. 4.) This statement is allegorical, describing the claimant's status immediately pre-injury as analogous to the claimant's routine commute. The Decision does not claim that the claimant's workday was done. Thus, the CAB Panel should reject this argument.

The CAB Panel should reject the argument in § 3 of the Motion that CAB Panel erroneously found that the claimant was directed to return for the next day's shift and not the later shift on the same day. Even taken literally, the statement is not so erroneous as to require reversal. The Decision does state that the claimant was "not required by the nature of his employment to go home and rest for the next day's early shift." (Decision p. 4) (underlining added). However, this error is not dispositive of the Decision's overall point relative to the nature of the claimant's employment, as it is merely a colloquial phrasing. Per the claimant's own testimony, the claimant, "based on his own experience. . . expected he would work all that night up 16 hours." (Decision p. 2.) In the most technical sense, the claimant expected to return to work that same day, at 8:00 P.M, and not the next day. However, the claimant anticipated working through the night, possibly as much as 16 hours. Given that only four of those hours would be that day and most of the remaining 12 hours were through the next morning, the CAB

did not fatally err by referencing the shift singularly as "the next day's early shift." The only reasonable interpretation of this statement is a colloquial reference to distinguish the later shift from the work the claimant had already accomplished that day. Thus, the CAB Panel should reject this argument.

The CAB Panel should also reject the argument that Asplundh required the claimant to return home and rest as a requirement of employment per § 3 of the Motion, as this is not a reasonable interpretation of Asplundh's suggestion. The claimant argues that Asplundh's suggestion to return home and rest was a directive, as the claimant would need to perform heavy labor. However, there is nothing to suggest that such a directive would be remotely enforceable or specific enough to constitute an extension of employment duties. There was nothing preventing the claimant from engaging in any activity other than resting during that period, and there was no evidence suggesting that the employer would penalize the claimant for such an action. Indeed, the Decision noted that, carrying this argument forward, a supervisor admonishing his crew: "tomorrow's job is a tough one. Make sure you get plenty of rest at home in your own bed tonight," would subject an employee to a compensable employment directive, regardless of whether it is a part of employment. Thus, the CAB Panel should reject this argument.

The CAB Panel should reject the argument that the claimant was subjected to "increased street risk" per § 4 of the Motion, as the Decision reasonably found that there was no such risk articulated at the CAB Hearing. The claimant argues that, as the claimant was scheduled to return home and then report to work, he was subject to 90 more minutes of driving he otherwise would not have undergone. Specifically, the claimant argues that "the more a person must travel the roads, the greater the street risks the person faces." However, the claimant did not provide,

either in the CAB Hearing or in his Motion, any further justification to indicate what increased risks existed beyond mere time on the road. In fact, the claimant does not address whether traveling on a weekday at noon is generally a safer commute than 4 P.M on that same weekday by avoiding rush hour. This bare claim is not enough to suggest that the CAB Panel erred, and the CAB Panel should reject this argument.

The CAB Panel should reject the argument that the CAB Panel held that New Hampshire did not adopt a "pure 'mutual benefit' exception to the 'coming and going' rule" per § 5 of the Motion, as the argument is based on a faulty reading of the Decision. The Decision addressed the question of the 'mutual benefit' exception at the bottom of page 3 through the top of page 4. The Decision addresses that the Court in Cook v. Wickson Trucking Inc., 135 N.H. 150 (1991) did not adopt or incorporate a pure 'mutual benefit' exception. In relevant part, the Decision stated:

> "Although the majority rejected this argument at least in part because it was based upon the fact that one of the stranded co-employees was the injured Good Samaritan's supervisor, the Court did not adopt or incorporate a pure "mutual benefit" exception to the coming and going rule." Decision, p. 3-4.

The context clearly addresses the holding of the court in Cook v. Wickson Trucking Inc. and not the 'mutual benefit' exception in New Hampshire jurisprudence more broadly. Thus, the CAB Panel should reject this argument.

The CAB Panel should further reject the factual arguments made in § 6 and 7 of the Motion, as suggesting employees go home and rest does not constitute a 'mutual benefit' under the 'coming and going rule exception. In Cook v. Wickson Trucking Co., the Court held that personal activities are compensable if they. . . confer a 'mutual benefit on the employee and employer.' Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1992). In Cook, the claimant was

injured when, after punching out for the day, he encountered two co-workers, one of which was his immediate supervisor, who had run out of gas. Cook, 135 N.H. at 152. The claimant, 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 coworkers, to the gas station. Id. 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 claimant's argument that he was engaged in activity of mutual benefit to the claimant and his employer, as his activity was 'too vague and attenuated a benefit' to justify the protection of a mutual benefit exemption. Id. at 156. (elaborating on the 'mutual benefit' exception to the 'coming and going rule). The Court further held that the claimant there was not returning to work, was not obligated to aid his coworkers, and that roadside assistance was not part of his job duties.

As in Cook, the asserted 'mutual benefit' to the claimant and the employer in this case are too attenuated and vague to constitute a compensable relationship between the claimant's rest and employment. Admittedly, this case and Cook have superficial similarities: both cases involve workers injured while driving after hours. However, 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 exercising routinely or attending doctor visits, which benefit the employer only insofar as they maintain effective employees but otherwise are unrelated to a specific employment provision. Here, the 'mutual benefit' would have been eight hours of rest, which is otherwise indistinguishable from any other day but for the schedule deviation. To the extent that there

exists a factual mutual benefit in such a vague statement, it is too attenuated to justify enforcement. Thus, the CAB Panel should reject this argument.

The CAB Panel should reject the arguments made in § 8 of the Motion, as the facts in this matter are distinguishable from those in Henderson v. Sherwood Motor Hotel, 105 N.H. 443 (1964) and do not constitute a "special errand" or duty. The claimant argues that the claimant's commute home early to rest in anticipation of work that night constituted a special duty which subjected the claimant to special travel risks. Notwithstanding the previously discussed travel risks, for which the claimant provided no particular examples or evidence, the claimant fails to show that this is a "special errand" as contemplated by the applicable case law.

The Supreme Court addressed "special errand" in Henderson, where the claimant was employed as a cocktail waitress. Henderson, 105 N.H. at 444. 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 her party, she became intoxicated and left at 3:30 A.M., perishing in a motor vehicle accident on the way home. Id. 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 claimant is subject to special travel risks beyond usual working hours. Henderson, at 445. The Court specifically considered whether the claimant'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.

This case, however, is distinguishable. While the claimant traveled beyond his usual hours, no special risk existed during his commute home. The claimant here did not suffer more than a generalized risk inherent in travel to and from work as part of his regular commute. Unlike the claimant in Henderson, there was no intoxication, exhaustion, or other condition

exposing the claimant to a particular risk. The claimant faced only the generalized risk inherent in a commute, which did not arise out of his employment generally or any special duties specifically. Further, while the claimant in Henderson engaged in unusual professional circumstances, the claimant here testified that he was expected to work overnight between eight to ten times in the last year. A nearly monthly occurrence is hardly a special duty. Thus, the CAB Panel should reject this argument.

The CAB Panel should reject the arguments made in § 9 of the Motion, as the CAB Panel did not err by finding that the claimant suffered no work-related injury when carrying out a mere suggestion. As previously articulated above, Asplundh did not make a binding directive to the claimant to return home and rest. The claimant could have gone anywhere and done essentially anything rather than rest between noon and 8 P.M. that day without reprisal. Nor was the claimant engaged in an act 'reasonably expected and not forbidden'. While there is no principal in New Hampshire law exclusively requiring Workers' Compensation coverage for employer-mandated acts, the Decision did not rely upon that finding as the claimant suggests. Even under the CAB Panel's ambit to interpret RSA 281-A liberally, this argument does not follow. Thus, the CAB Panel should reject this argument.

Finally, the CAB Panel should reject those arguments made in § 10, as those cases cited within are not binding on New Hampshire Department of Labor proceedings as a collection of cases from other states. While there may theoretically be some persuasive value in such cases, there is nonetheless sufficient binding precedent from New Hampshire on which the CAB Panel can maintain their decision.

For the forgoing reasons, the CAB should deny the claimant's Motion for Rehearing, as the claimant has failed to show any mistake of law or fact in the CAB Decision.

Respectfully submitted,

Craig A. Russo, Esq.
Attorney for Carrier

CAR/dl

State of New Hampshire

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April 5, 2021

ELBA HAWES

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ASPLUNDH TREE EXPERT, LLC

DOCKET# 2021-L-0111

DECSION ON MOTION FOR RECONSIDERATION/REHEARING

The Motion for Rehearing is denied. All of the issues raised in the motion were considered at the hearing. No new issues were raised in the motion.

Richard Mitchell, Esq., Panel Chair
Compensation Appeals Board

Cc: Benjamin King, Esq.
Craig Russo, Esq.

R.S.A. 281-A:2, XI

"Injury" or "personal injury" as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out of and in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. "Injury" or "personal injury" shall not include diseases or death resulting from stress without physical manifestation, except that, if an employee meets the definition of an "emergency response/public safety worker" under RSA 281-A:2, V-c, the terms "injury" or "personal injury" shall also include acute stress disorder and post-traumatic stress disorder. "Injury" or "personal injury" shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer. No compensation shall be allowed to an employee for injury proximately caused by the employee's willful intention to injure himself or injure another. Conditions of the aging process, including but not limited to heart and cardiovascular conditions, shall be compensable only if contributed to or aggravated or accelerated by the injury. Notwithstanding any law to the contrary, "injury" or "personal injury" shall not mean accidental injury, disease, or death resulting from participation in athletic/recreational activities, on or off premises, unless the employee reasonably expected, based on the employer's instruction or policy, that such participation was a condition of employment or was required for promotion, increased compensation, or continued employment.

R.S.A. 281-A:2, XIII

"Occupational disease" means an injury arising out of and in the course of the employee's employment and due to causes and conditions characteristic of and peculiar to the particular trade, occupation or employment. It shall not include other diseases or death therefrom unless they are the direct result of an accidental injury arising out of or in the course of employment, nor shall it include either a disease which existed at commencement of the employment or a disease to which the last injurious exposure to its hazards occurred prior to August 31, 1947.

R.S.A. 281-A:48

I. Any party at interest with regard to an injury occurring after July 1, 1965, may petition the commissioner to review a denial or an award of compensation made pursuant to RSA 281-A:40 by filing a petition with the commissioner not later than the fourth anniversary of the date of such denial or the last payment of compensation under such award or pursuant to RSA 281-A:40, as the case may be, upon the ground of a change in conditions, mistake as to the nature or extent of the injury or disability, fraud, undue influence, or coercion. This section shall not apply to requests for extensions of medical and hospital benefits, or other remedial care, which shall be governed solely by those sections of this chapter relating thereto. This section shall not apply to lump sum agreements, except upon the grounds of fraud, undue influence, or coercion.

I-a. Any party at interest with regard to an injury occurring after January 1, 2016, where medical treatment for that injury is purposefully and intentionally postponed for medical reasons beyond the fourth anniversary of the date of denial or the last payment of compensation, may petition the commissioner to review such denial or award of compensation made pursuant to RSA 281-A:40 by filing a petition with the commissioner no later than 180 days after the date of the postponed treatment. A written acknowledgment by the employee and notification to the workers' compensation carrier shall be included in the worker's medical record including the medical reason for postponing the medical procedure. Any award or denial of indemnity payments made under this paragraph shall not extend the time frame under paragraph I.

II. Upon the filing of a petition and after notice to all interested parties and hearing, the commissioner shall enter an order, stating the reasons therefor, either:

(a) Granting or denying an original award of compensation if none has previously been paid; or

(b) Ending, diminishing, or increasing the compensation previously paid or fixed by award, subject to the maximum or minimum provided in this chapter.

III. If a petitioner files for reducing or for ending compensation, the petitioner shall submit along with the petition medical evidence that the injured employee is physically able to perform his or her regular work or is able to engage in gainful employment. On the basis of such medical evidence, the commissioner may authorize suspension of further payments pending a hearing on the petition; otherwise, compensation shall continue on the basis of the existing award pending the hearing and any further order by the commissioner. All procedure on a petition under this section shall be the same as provided in this chapter for original hearings.

IV. A review under this section shall not affect an award with respect to money already paid.

V. Any party at interest who is dissatisfied with the decision of the commissioner under this section may appeal to the compensation appeals board, established under RSA 281-A:42-a, in the same manner as provided in RSA 281-A:43.