STATE OF NEW HAMPSHIRE
SUPREME COURT

Elba Hawes

v.

Asplundh Tree Expert, LLC

Case No. 2021-0187

REPLY BRIEF OF ELBA HAWES
APPELLANT

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SUMMARY OF ARGUMENT

Donnelly v. Kearsarge Telephone Co., 121 N.H. 237 (1981) is inapposite because, unlike the plaintiff in Donnelly, Mr. Hawes did not suffer his injuries while traveling to work for his usual shift at the usual time.

The Court should reverse the Compensation Appeals Board (CAB), finding Mr. Hawes' injuries compensable, because he suffered the injuries while within the scope of his employment. Appeal of Pelmac Indus., 2021 WL 4783944 at *4 (N.H. Oct. 13, 2021).

Mr. Hawes' injuries arose out of his employment because his employer subjected him to greater travel over the roads than he would have experienced working his usual 7:00 a.m. to 4:00 p.m. shift, by interrupting his usual workday and directing him to travel home at noon so that he could return later that day to work through the night. The employer's sudden placement of an intermission in Mr. Hawes' workday created a circumstance where he had to travel between home and work three (3) times in one (1) calendar day rather than twice.

Mr. Hawes' injuries likewise arose in the course of his employment. The injuries occurred within the boundaries of time and space created by Mr. Hawes' employment, given that the injuries occurred during travel directed by the employer during a mere intermission in the workday, not at the workday's end.

Furthermore, the travel during which the injuries occurred was "reasonably to be expected" and "not forbidden" by the employer, given that the employer directed the travel. In addition, the primary purpose of the travel was to benefit the employer, giving the employer the benefit of

Mr. Hawes being able to work through the night on storm cleanup activities. The CAB's holding that Mr. Hawes somehow cannot recover workers' compensation benefits because he was injured carrying out the employer's "unenforceable suggestion" has no basis in law and is contrary to the well-settled principle that personal activities are compensable if they are "reasonably to be expected" and "not forbidden" OR if the activities confer a mutual benefit on the employee and the employer.

In addition to Pelmac, both Cook v. Wickson Trucking Co., 135 N.H. 150 (1991) and Heinz v. Concord Union Sch. Dist., 117 N.H. 214 (1977) support the compensability of Mr. Hawes' injuries, given that he suffered the injuries during an unusual trip home, made for the primary purpose of benefiting the employer, in the midst of an interrupted workday.

The Court should reverse the CAB, holding that Mr. Hawes' November 1, 2019, injuries constitute compensable work-related injuries withing the meaning of RSA 281-A.

ARGUMENT

Donnelly Does Not Control This Case Because Mr. Hawes Was Not Injured While Traveling To Work From Home At His Usual Time.

The appellee erroneously relies heavily on Donnelly v. Kearsarge Telephone Co., 121 N.H. 237 (1981), ignoring this Court's recent admonition that New Hampshire case law has "develop(ed)" since Donnelly such that "the operative question [now] 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 'zone [i.e., the scope,] of his employment.'" Appeal

of Pelmac Indus., 2021 WL 4783944 at *4 (N.H. Oct. 13, 2021) (quotations omitted).[1]

The question of Donnelly's viability aside, Donnelly is materially distinguishable from the case at bar because Donnelly applied the "going and coming rule" to a circumstance in which the employee was injured during "a normal trip by the employee to his employer's place of business to begin a usual day of work." Donnelly, 121 N.H. at 242-43. The employee's "usual work week consisted of the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday," and he was injured "[p]rior to 8:00 a.m. on Monday, August 20, 1976, [as he] was riding his motorcycle to his employer's place of business to begin a usual work day, on the same road and at approximately the same time as usual." Id. at 238, 239.

Mr. Hawes' case involves a materially different circumstance, in which he suffered injuries while he drove home at the employer's instruction in the midst of an interrupted workday (as opposed to a usual workday), at a different time than he usually drove home as opposed to "the same time as usual," so that he could prepare to return to work later the same day to work through the night. Therefore, to the extent Donnelly

[1] The appellee suggests without citation to authority that Pelmac should not apply. The appellee is wrong, under general civil litigation principles. "Generally a supreme court decision applies retroactively to cases pending at the time the decision is announced." People v. Goebel, 672 N.E.2d 837, 843 (Ill.App.Ct. 1996). "A decision will be applied retroactively unless the court expressly declares that its decision is a clear break with the past, such as when it explicitly overturns past precedent, disapproves a previously approved practice, or overturns a well-established body of lower court authority." Id. Because Pelmac is not "a clear break with the past," the Court should apply it to Mr. Hawes' case.

remains good law, it provides no guidance for the outcome that should obtain in Mr. Hawes' case.

Contrary To The Cab's Findings, Mr. Hawes' Injuries Arose Out Of His Employment Because The Employer's Alteration Of His Schedule Subjected Him To Travel Risks Greater Than He Otherwise Would Have Experienced.

The CAB and the carrier both miss the mark by rejecting compensability on the grounds that "[n]o evidence was proffered that there was actually more traffic minutes after noon on a weekday than minutes after 4:00 p.m." Addendum to Plaintiff's Brief (Addendum) at p. 037. The carrier's directive that Mr. Hawes travel home at noon so he could return at 8:00 p.m. exposed Mr. Hawes to increased travel risks arising out of his employment, regardless of similarities or differences between the traffic conditions at noon and 4:00 p.m. This is so because Mr. Hawes had to spend more time on the road than he otherwise would spend on November 1, 2019, because of the employer's sudden interruption of his work schedule. Mr. Hawes only traveled between work and home twice on days when he worked his usual shift. The employer's directive to stop work in the middle of the workday, go home and return to work later the same day increased by 50 percent the amount of time he had to spend on the roads that day, subjecting him to increased travel risks arising out of his employment.

The Cab Committed Legal Error By Holding Mr. Hawes' Injuries Not Compensable Because He Suffered Them While Carrying Out His Employer's "Unenforceable Suggestion," Ignoring That Personal Activities Are Compensable If "Reasonably To Be Expected" And "Not Forbidden" Or If Such Activities Benefit The Employer.

The carrier further argues, insupportably, that the CAB somehow was entitled to reject compensability on the grounds that Mr. Hawes suffered his injury while carrying out "an unenforceable suggestion by a supervisor who wanted his men alert in the middle of the night." Brief at p. 036 (emphasis supplied). This CAB ruling defies well-settled New Hampshire law 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 employer.'" Cook v. Wickson Trucking Co., 135 N.H. 150, 154 (1991) (citations omitted) (emphasis supplied).

Whether the employer directive to travel home and rest was an "unenforceable suggestion" carries no legal significance. Under the Cook test that the CAB erroneously failed to follow, the CAB should have found Hr. Hawes' injuries compensable because Mr. Hawes' travel home during the intermission in the interrupted workday was "reasonably to be expected" and "not forbidden," given that the employer uncontestedly instructed Mr. Hawes and his fellow employees to go home and rest so that they could return to work later that day and work through the night. The CAB erred by failing to find Mr. Hawes' injuries compensable on this basis alone—that Mr. Hawes suffered injury while engaged in a personal activity

that the employer had ordered and that therefore was "reasonably to be expected" and "not forbidden."

The CAB further erred by failing to find Mr. Hawes' injuries compensable given that he suffered the injuries while engaged in travel that conferred a mutual benefit on the employee and employer—as the CAB found in its factual findings—regardless of whether Mr. Hawes was acting on "an unenforceable suggestion" by the employer at the time. The CAB specifically made the factual finding that the employer acted for its own benefit where it instructed Mr. Hawes to travel home during the employer-ordered intermission to Mr. Hawes' workday, finding that, "The [employer] 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 [employer's] benefit**, so workers such as Mr. Hawes were available to perform storm cleanup activities through the night."[2] Emphasis supplied.

Given the CAB's factual finding that Mr. Hawes' homeward journey in the midst of the workday benefited the employer, the CAB acted unjustly, unreasonably and unlawfully by failing to find Mr. Hawes' injuries compensable under the "mutual benefit" rule.

The CAB's reliance (and the carrier's reliance) on Cook is misplaced to find the "mutual benefit" doctrine somehow inapplicable. In Cook, the Court held that the "mutual benefit" rule did not apply to a situation where the employee suffered injuries when the employee—after his work was done for the day—escorted fellow employees whose work

[2] Addendum to Plaintiff's Brief (Addendum) at p. 26 at Request for Finding of Fact #9; Addendum at p. 37 (granting Request for Finding of Fact #9).

was also done for the day to a gas station when he found the fellow employees walking along the road because they had run out of gas while traveling home for the day. Cook, 135 N.H. at 152. In holding that the employee's conduct constituted "too vague and attenuated a benefit" to the employer to constitute an activity of mutual benefit to the employer and the employee, the Cook court noted that **"[a]ll three employees were finished with work for the day and returning home"** and **'[n]one of them was scheduled to return to work that night.'"** Id. at 156-57 (emphasis supplied. The Cook court contrasted the situation presented in Cook with Heinz v. Concord Union Sch. Dist., 117 N.H. 214 (1977), in which the Court held compensable injuries suffered by a schoolteacher while he traveled home to change his clothes so that he could return to chaperone a school dance. Cook, 135 N.H. at 157.

Cook thus supports compensability, contrary to the CAB's ruling and the arguments of the carrier, because Mr. Hawes' homeward journey in the midst of the workday conferred a concrete benefit upon the employer, not a vague and attenuated one. Unlike the employees in Cook, Mr. Hawes was not finished with work for the day. Unlike the employees in Cook, Mr. Hawes was scheduled to return to work that night. The employer reaped a concrete benefit from sending Mr. Hawes home at noon on November 1, 2019—the anticipated availability of an employee who could work through the night on storm cleanup activities.

Mr. Hawes' situation is thus comparable not to the facts of Cook, but to the facts of Heinz, where the Court held compensable injuries sustained by a teacher while he traveled home to change clothes so he could return to work to chaperone a school dance. Heinz, 117 N.H. at 217, 220-21. The

Heinz court relied on the "special duty" rule to find compensability, but Cook indicates that Heinz could just as properly have been decided based on the "mutual benefit" doctrine. Because the teacher in Heinz engaged in an activity that benefited his employer when he traveled home to change his clothes so he could chaperone a dance that evening, injuries that the teacher suffered in such travel merited a finding of compensability. Similarly, because Mr. Hawes' homeward journey in the midst of an interrupted workday benefited his employer—as the CAB found in a factual finding—Mr. Hawes' injuries are compensable under the mutual benefit doctrine, warranting reversal of the CAB.

Contrary To The Cab's Intimations, Reversing Its Decision Does Not Upend Current Law But Rather Comports With It.

Finally, reversing the CAB does not lead to the parade of horribles imagined by the CAB and the carrier, namely that a claim under the "mutual benefit" doctrine would somehow arise "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.'" Addendum at p. 037. Holding Mr. Hawes' injuries compensable will have no effect on the non-compensability of injuries such as those envisioned by the CAB that an employee may suffer while traveling home after the end of the employee's usual shift. This is not that case.

Contrary to the CAB's finding, Mr. Hawes did not travel home on November 1, 2019, at noon because he was somehow "done for the day's work." Id. Mr. Hawes only traveled home at this unusual time so he could return to work hours later the same day to work through the night. The travel was within the boundaries of time and space created by the

employment, given that the travel occurred at the employer's direction during a mere intermission in the workday, not at the workday's end. Further, the travel primarily benefited the employer. The mutual benefit doctrine is tailored for this purpose, to render compensable injuries that a person like Mr. Hawes suffers while undertaking what is generally considered a personal activity (traveling home) but does so for the benefit of his employer. The Court should apply the "mutual benefit" doctrine to reverse the CAB and find Mr. Hawes' November 1, 2019, 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 OF COMPLIANCE - WORD LIMITATION

I hereby certify that this brief is in compliance with the 3,000 word limitation as set forth in Supreme Court Rule 16 (11). This brief contains 2,543 words.

Respectfully submitted,
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Date: January 4, 2022

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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.

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