

# RISK ALERT

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## CASE LAW UPDATE

### *Nurse's Motor Vehicle Accident on Trip to Hospital Deemed Compensable*

As a home health care nurse for Caldwell Memorial Hospital, Joanne Munoz was assigned to provide care to one patient per day and required to travel to the patient's residence to do so. Her hourly wages began when she reached the patient's home, although part of her compensation package was an excess mileage allowance paid whenever the patient's residence was more than 60 miles round trip from where she lived.

On Monday, January 8, 2001, Munoz was assigned to care for a patient in Lenoir, North Carolina, a round trip of more than 60 miles. While on the way to her patient's home, Munoz decided to drop off her time slips at the hospital, which she was required to do by 5 p.m. each Monday. As she drove toward the hospital, which like the home of that day's patient was also in Lenoir, she was involved in a motor vehicle accident and suffered injuries to her head and back.

Munoz's claim for workers' compensation benefits was denied by the hospital under the theory that her accident, and the injuries she suffered as a result, had neither arisen out of nor in the course of her employment. But, the Commission disagreed and awarded benefits, concluding that the "traveling salesman" and "contractual duty" exceptions to the coming and going rule both applied, as Munoz was injured while on her way to care for a patient and the hospital was under a contractual duty to reimburse her travel expenses under its mileage reimbursement plan.

And, in response to the hospital's contention that neither of those exceptions to the coming and going rule applied because, at the time of the collision, Munoz was driving to the hospital, rather than her patient's residence, the Commission found that her intention to drop time slips off while on the way to care for her patient did not constitute a "distinct" or "total" departure on a personal errand.

Last month, in *Munoz v. Caldwell Memorial Hospital*, the Court of Appeals agreed with the Commission and affirmed its award of benefits. In doing so, it distinguished *Hunt v. Tender Loving Care Home Care Agency, Inc.*, a case it decided three years ago, in which the claim of a nurse's aide involved in an auto accident while traveling to a patient's residence was found non-compensable.

In *Hunt*, the home health nurse's aide had worked with the same patient for over two years and, therefore, had a fixed work location. By contrast, Joanne Munoz had both visited and cared for three separate patients at three different locations during the four days she had worked for Caldwell Memorial. Further, unlike the injured nurse's aide in *Hunt*, who did not travel far enough to qualify for reimbursement under her employer's travel expense policy, the opposite was true for Munoz. As such, the Court of Appeals agreed with the Commission's conclusion that the traveling salesman and contractual duty exceptions to the coming and going rule both applied to Munoz's claim, rendering it compensable.

The Court of Appeals also agreed with the Commission's conclusion that Munoz's decision to deviate from the most direct route of travel to her patient's house to drop off her time sheets did not render her accident and injuries non-compensable. Rather, the Court found that her deviation "does not rise to the level of a distinct departure" from the duties of her employment.

**Risk Handling Hint:** The essence of the coming and going rule is that injuries which occur while an employee is coming to or going from work are normally not compensable, unless they occur on property owned, controlled or maintained by the employer. The *Munoz* decision is a useful reminder to risk managers of both the application of, and the limits on, two of the more significant exceptions to this rule. Under the "traveling salesman" exception, certain workers required to travel who are injured while going to or returning home from work may be entitled to an award of benefits. Nevertheless, risk managers should carefully examine the facts in dispute before admitting compensability, as this exception does *not* apply where the employee has a fixed place to work, even if it is away from the employer's regular premises. Likewise, the "contractual duty" exception has no application if the employer provides transportation as a mere gratuity or convenience, and not as part of the injured worker's employment contract.

#### *Assault on Hospital Worker Found to Have Arisen Out of Her Employment*

Caroline D'Aquisto was employed as a cancer analyst for Mission St. Joseph's Hospital. On April 30, 2001, she arrived for work at approximately 6 a.m. About an hour later, she left her office to go to the morgue, located on the second floor, to confirm the cause of death of a patient who had recently died. While she waited in front of the main staff elevators, a man wearing green scrubs approached her. After they exchanged a few words, he assaulted her by grabbing and twisting her breasts, bringing her to her knees.

D'Aquisto broke away from her attacker and ran into a nearby stairwell,

but he pursued and physically assaulted her again. Ultimately, D'Aquisto broke free a second time, ran upstairs to the second floor, opened the door and fell into the arms of a co-worker, who observed a man come out of the stairwell behind her, trying to grab at her again.

About a month later, D'Aquisto was evaluated by a specialist in women's psychological issues, including sexual assault, and she was later diagnosed with post-traumatic stress disorder, severe acute stress reaction and depression. Eventually, after being taken out of work by her doctors, she filed a workers' compensation claim.

That claim was found compensable by the Commission, but the hospital appealed, contending that while the assault had occurred "in the course of" D'Aquisto's employment, it did not "arise out of" it. However, in *D'Aquisto v. Mission St. Joseph's Health System*, the Court of Appeals has now ruled that the Commission did not err in finding D'Aquisto to have been at an "increased risk" of being assaulted, as her job duties required her to walk to areas of the hospital where there were "few, if any, people in her vicinity."

The Court also noted that not only had claimant been assaulted inside the hospital while carrying business records, but her assailant was a man wearing scrubs who appeared to have legitimate business at the hospital. And, it cited several prior assault cases which had also been found compensable, including one in which the employee had been abducted by a co-worker from an employee parking lot while carrying work materials and another case in which a cocktail waitress was found to have been placed at an increased risk of being sexually assaulted because her employer had instructed her to give assistance to customers, even when she was off premises.

**Risk Handling Hint:** As is evident from the holding in *D'Aquisto*, assault cases can be problematic for risk managers and are at times very difficult to defend. Whether they are deemed compensable normally depends on the relationship and intent of the involved parties at the time of the assault. If its origin was

strictly personal and unrelated to the victim's work, any resulting injury is not covered by workers' compensation. To be compensable, the assault's proximate cause must have been a risk inherent in or incidental to the employment, and one to which the employee would not have been equally exposed apart from her work.

Essentially, the inquiry is whether the employment placed the worker at an "increased risk" of being assaulted. Thus, some of the more typical claims which have been found to involve an increased risk of injury include those in which the employee was required to make late night deposits of cash or where the employment made her a greater target for being assaulted for some other reason. On the other hand, assaults which take place randomly, with no reasonable connection to the victim's employment, are not compensable.

One of the more troubling aspects of the *D'Aquisto* decision is the Court's reliance on the Commission's finding that claimant's job duties took her to an area of the hospital where few others were around. If that alone were sufficient to find an increased risk of assault, without other evidence establishing that assaults were common inside the hospital, or at least in its neighborhood, many other employers can expect to face workers' compensation liability for assaults otherwise totally unrelated to the risks normally associated with their businesses.

Certainly, assaults in hospitals are unusual. The same is generally true for the typical factory or office building. But, as the work day passes into night, each tends to empty out and resemble the area around the main staff elevator in *D'Aquisto*, i.e., a place where "few, if any, people ... [are in the] vicinity." Risk managers should be cognizant of the possibility that the holding in *D'Aquisto* portends a rash of similar claims, although it is hoped that common sense will prevail and the Commission and our appellate courts will not lose sight of the fact that, to be compensable, a contributing proximate cause of any injury must be a risk inherent to the particular claimant's employment.