

# RISK/ALERT

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## CASE LAW UPDATE

### *Coming and Going Rule Forms Basis for Denial of Two Claims*

Earlier this month, two different panels of the Court of Appeals applied the "coming and going rule" to affirm Industrial Commission denials of claims involving employees injured while traveling to and from work.

In the first, a case successfully defended by TCD&G, Joseph Dunn was employed by Marconi Communications as a lead man. His responsibilities consisted of supervising the installation of telephone equipment by teams of workers and maintaining the stock of materials necessary to do so. He traveled frequently as part of his job and was provided a van for that purpose by Marconi, which also supplied a company credit card to purchase gasoline.

Dunn was paid for the time he spent traveling between job sites. During weekends or between jobs, he drove the company van to his home and would then drive it to the next job site. His pager was turned on at all times, allowing him to be contacted regarding the location of future jobs.

At the time of his injury, Dunn was assigned to a project site in Richmond. His crew was using a hydraulic crimper to tighten cables as they were installed. Only one crimper was in use, the work was running behind schedule, and Dunn had an additional manual crimper owned by Marconi at his home in Maysville, a four hour drive from Richmond. He later testified that he decided to retrieve it so as to complete the project more quickly.

According to Dunn, it was his custom to call company headquarters every week to inform the

payroll clerk where to deliver his paycheck. He claimed that when he drove home for the crimper accompanied by his fiancé, he checked to see if his paycheck had arrived. On his trip back to Richmond, he was injured when his van ran off the highway and flipped over.

The deputy commissioner and Full Commission both denied Dunn's claim, finding his explanation regarding the trip to his home to pick up the crimper was not credible and concluding that his injury did not fall within any of the exceptions to the coming and going rule.

On December 16, the Court of Appeals affirmed that decision in *Dunn v. Marconi Communications, Inc.* In doing so, it found evidentiary support for the Commission's determination that claimant's testimony about the purpose of his trip to Maysville was not believable. That, in turn, eliminated any basis for the recognized exceptions to the coming and going rule. The "traveling salesman" exception did not apply because, at the time he was injured, claimant was "on a distinct departure on a personal errand." Likewise, the "contractual duty" exception, which is applicable to injuries while traveling in employer-provided transportation, did not apply because claimant had abandoned his employment-related purpose for using the company van. At the same time, the "special errand" exception did not apply because he was on a personal, not business-related, errand at the time he was hurt.

A similar result was reached in *Stanley v. Burns International Security Services*, a case involving the death of Patricia Stanley, a site captain and security guard at Brick Landing, a residential community near the coast which had been closed temporarily as a result of Hurricane Floyd.

A few days after she returned to work following the hurricane, Stanley was killed in a motor vehicle accident heading home from work. Her dependents contended that her accident was compensable because she had been "pressured" to return to work following the hurricane. However, the Commission and Court of Appeals both rejected that argument, finding no evidence to support application of the "special errand" exception to the coming and going rule.

**Risk Handling Hint:** Risk managers are reminded that while injuries going to and coming from work are normally non-compensable, the numerous exceptions discussed in the *Dunn* and *Stanley* decisions must be taken into consideration and the relevant facts analyzed on a case-by-case basis.

*Claim for PTSD Allegedly Resulting from Failed Employment Exam Denied*

Thomas Clark, a firefighter with the City of Asheville, had an extensive history of psychological treatment resulting from problems related to his two tours of duty in Vietnam. In May 1999, he filed an occupational disease claim alleging he had developed post-traumatic stress disorder (PTSD) after failing a driving test and being told he could no longer drive the City's fire trucks.

A firefighter since 1973, Clark had been driving fire trucks for approximately twenty years before he retired in December 1998. When he first started driving them, there was no specific, designated, position of fire truck driver. Rather, it was a duty shared by all of the City's firefighters. However, in the spring of 1998, the City decided to make the position a separate promotional one. Those wishing to hold it were required to pass a hands-on test to qualify. Sixty-two firefighters took the test, forty-one passed and twenty-one did not. Nine of those who failed, including Clark, were already assigned drivers. They were barred from driving on a regular basis, but permitted to work as relief drivers.

Failing the driver's test and being told he would no longer be a regular driver caused Clark to

become extremely angry. He viewed the situation as a demotion and immediately sought psychological treatment. He also filed a claim for workers' compensation benefits, claiming the contraction of an occupational disease.

The Commission determined that Clark's PTSD resulted from his service during the Vietnam War and that his condition, when combined with his personality type, led to extreme anger and potential violence when dealing with the normal stresses of life, such as marital, family and relationship problems. It also found that failing an employment test and receiving a perceived demotion are not uncommon circumstances in the workplace. Concluding that his employment had not placed him at an increased risk of experiencing stress, the Commission found that Clark's condition was not "characteristic of and peculiar to" his employment as a firefighter and denied his claim.

On December 16, in *Clark v. City of Asheville*, the Court of Appeals affirmed that ruling, while acknowledging at the same time that the position of firefighter is inherently dangerous and exposes those performing it to traumatic events not usually witnessed by the general public. In explanation for its decision, the Court noted that in this case, claimant had failed to establish that those inherently dangerous activities significantly contributed to his psychological condition.

**Risk Handling Hint:** Risk managers should be careful to recognize the distinctions between *Clark* and the earlier holdings in *Smith-Price v. Charter Pines* (*Risk/Alert*, September 2003) and *Woody v. Thomasville Upholstery* (*Risk/Alert*, May 2002). Together, these three decisions establish that it is not enough for a claimant to simply allege his job was stressful. Rather, to prove a compensable occupational disease, he must show that the stressors associated with his work not only placed him at an increased risk of developing a psychological condition, but actually were a significant contributing factor in its development. That is, there must be both an increased risk and causal link between the stressors inherent in claimant's job and the problems he actually experienced.