Exceptions Are the Rule

Understanding This Rule and its Exceptions in Determining Injury Compensability

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Generally speaking, injuries an employee incurs while going to or coming from work are not compensable under the Maryland Workers’ Compensation Act. This rule of law is known as the “Going and Coming Rule.” There are several reasons for this rule.

- First, going to or from work generally is considered to be the employee’s own responsibility.
- Second, the employer’s interests ordinarily are not advanced during these times.
- Third, the hazards encountered by an employee while commuting to work are typically common to all workers, no matter what their job, and thus such risks cannot be attributable to a person’s particular employment.
- Finally, workers’ compensation insurance does not insure workers against the common perils of life.

For all these reasons, the general rule is that injuries sustained by an employee while going to or coming from work are not considered to arise out of or in the course of the employment, and are therefore not covered under workers’ compensation.

Over the past 50 years; however, the courts have carved out several exceptions to this rule. As you will see, these exceptions have eroded the general rule to the point that the Going and Coming Rule is more the exception rather than the rule.

**FACTS:**
The employer provides parking for its employees on its property. An employee who has parked there for work is injured while walking to the employee entrance.

Is that injury compensable? The answer is yes. Once an employee has arrived on the employer’s property, presumably for the purposes of reporting to work, an injury will be deemed compensable, even if the employee has not yet begun to work.¹

Likewise, the employee will also be covered after completing the work shift and returning to the lot to drive off, up until the car has left the employer’s property. This exception has often been referred to by the courts as “The Premises Exception.”

**The Premises Exception**

I heard Joe was injured in the employee parking lot...
FACTS:
An employee who parks off site, in a lot next to the employer's premises, is injured when she slips on ice in the parking lot while walking from her car to work.

Compensable? You would think not since the Premises Exception does not apply. However, there is another exception that may apply – the Proximity Exception – that will require us to obtain more facts.

The Proximity Exception has two elements: there is a special hazard at the off-premises site where the injury occurs, and there is a close association of the access route to the premises.²

In the scenario above, if the parking lot is controlled by the employer or the employer directs its employees to park there, the employee's injury, although incurred off site and not during work hours, will be found compensable.

Here is another illustration: An employee is released early from work, punches out and begins walking to a parking lot maintained by the employer for the use of its employees. The employee, while walking along the tracks of a railroad line that is a shortcut to the parking lot, is struck by a train. The shortcut is customarily taken by employees going between the lot and the premises. The employer knows of the shortcut, or acquiesces in employees' use of the shortcut. Because the railroad line presents a special hazard and the shortcut is associated with access between parking and work, the two elements of the proximity exception are met and the claim for injuries is compensable.³

One scenario in which both the Proximity and Premises Exceptions were rejected involved an employee who had decided to scale a fence surrounding a parking lot, where he customarily parked, rather than walk or take a shuttle to the main entrance. He was injured in the course of climbing the fence. The appellate court did not view the fence as a special hazard. Instead, the court reached the conclusion that the employee unnecessarily exposed himself to risks that were of his own making, and were neither known of, nor approved of, by his employer.⁴

What if the off-site parking is not owned or controlled by the employer, and parking there is not sanctioned in any way by the employer? Given these facts, an employee who is injured while en route to or from such a location is subject to a peril that is common to the public at large and not contemplated by the employment arrangement. Therefore, an injury occurring at that location would not fall within the Proximity Exception and would not be compensable.⁵

The Employer-Provided Transportation Exception

FACTS:
An employer arranged with a bus company to transport its employees to and from work. Employees could use their own transportation, but if they chose to use the bus service, they were charged a daily fee. An employee riding the bus is injured when the bus hits a curb.

Compensable? Yes. When an employer agrees to provide transportation for its employees to travel to and from work, that travel is part of the employment, and the employer bears the responsibility for the risks encountered in connection with that transportation.⁶

We offer a shuttle bus for employees from downtown to the manufacturing plant...
A related exception is the Free Transportation Exception. Where an employee, as part of his contract of employment, is furnished free transportation to and from work, and an injury occurs during the period of transportation, the injury is deemed to have arisen out of and in the course of the employment and is compensable. The free transportation exception applies whether the employee is provided with the transportation or is reimbursed for expenses incidental to the work-related travel.

Thus, if the employer provides a company-owned or -controlled vehicle, travel in that free transportation will be deemed part of the employment. In a decision from the Maryland Court of Appeals nearly 50 years ago, an employee who was on call 24 hours a day, who was given the use of a company truck with no restrictions, and who was involved in an accident while driving home from the local tavern on a Sunday evening, was found to have sustained an accidental injury arising in and out of the employment. The court found that the accidental injury arose out of and in the course of employment given that the arrangement between the employer and its employee for free use of the truck at all times was for the employer’s convenience. The fact that the employee had stopped at a bar on the way home was immaterial.

If the employer reimburses the employee for the entire cost of traveling to and from work, such as paying for a monthly public transit pass, an obligation is created that effectively brings travel by such conveyance within the scope of employment.

However, if contractually provided travel expenses bear no relationship to actual expenses, this exception may not apply.

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1 Saylor v. Black and Decker, 258 Md. 605 (1970)
2 Wiley v. Manufacturing Co. v. Wilson, 280 Md. 200 (1977)
3 Wiley supra
5 Board of County Commissioners v. Vaché, 349 Md. 526 (1998)
7 Lee v. BSI, supra
**FACTS:**
An employee is injured while driving to the worksite on a scheduled day off. Is this injury compensable?

While this would appear to fall within the Going and Coming Rule, another exception – the special errand exception – could apply. We will need to obtain more facts.

Employees who find themselves traveling as a result of being "on-call" may come within this exception to the Going and Coming Rule. A frequent scenario is when an employer requests that its employee come in to the workplace outside of normal work hours, such as a custodian summoned by his employer to respond to a police call that lights are on in a building at night. An injury that occurs while en route to or from the workplace for this purpose is viewed as a special errand or mission that would not have been undertaken except for the obligation of employment. In this case, the element of urgency may transform the trip from a regular commute into a special errand.

What if an employee is called in to work earlier than usual and is involved in an accident en route? The Maryland Court of Special Appeals did not apply the special errand exception in this scenario, reasoning that the employee, who was a salaried Contracts Administrator, and occasionally performed some tasks outside of regular work hours, was not subject to a special inconvenience or sense of urgency by virtue of the fact that she had to report to work one half hour early.

**FACTS:**
An employee is injured while driving home from work when books she has brought with her from work to review fall inside her car causing her to lose control.

Is this compensable? Perhaps. The question here is whether the employee was required as a part of her employment to take the books with her. If she was, there could be both a business and personal purpose to the commute, and thus the injury may be compensable.

An employee who is injured during the course of a trip to or from work that serves both a business and personal purpose is within the course of employment if the trip involves the performance of a service for the employer that would have caused the trip to be taken even if it had not coincided with the personal journey. For instance, the employer asks the employee to deliver an envelope filled with business documents to a particular location while en route home from work. An accident occurring at any point during the journey, even after completion of the requested task, may be compensable provided that there is no substantial deviation from the intended route.

**FACTS:**
An employee is involved in a motor vehicle accident while on duty, being paid, traveling between his employer-encouraged physical training session and the firehouse where he worked.

Is this compensable? Yes. The positional risk test is essentially a “but for” test. An injury arises out of the employment if it would not have occurred but for the fact that conditions and obligations of the employment placed the employee in the position where he was injured. The employee was determined to be traveling from one site where he was engaged in employer-encouraged activities, to another site, where he was engaged in a work-related task, to which his employer acquiesced.

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**Can you drop this envelope off to our accountant on your way home tonight?**

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**Need more information? Chesapeake Employers can help.**
As you can see, there are numerous exceptions to the Going and Coming Rule, and whether an injury occurring off site is compensable will depend in large part on the particular facts of the case. Timely and thorough investigation of the facts will enable your Chesapeake legal and claims professionals to determine whether any of the exceptions may apply. We stand ready to assist you in evaluating these scenarios as your questions arise.
Although there are currently no specific OSHA standards for accident investigation, Chesapeake Employers has developed these tips based on best practices in this area. As a rule, all accidents and incidents should be investigated, regardless of their severity.

Ultimately, you are trying to determine the facts about the accident – who, what, when, where, why and how. Follow these eight steps to ensure a thorough accident investigation:

1. **Respond to the emergency** –
   - First, see that any injured person receives medical attention, if needed.
   - Second, secure the area; use barricades or caution tape to keep people from changing the scene in any way.
   - Follow your company procedures to shut down the involved equipment or area until it is safe.

2. **Collect evidence and record data** –
   - Begin gathering information to determine what happened.
   - Inspect and record any physical characteristics or conditions of the accident site.
   - Preserve any physical evidence, such as potentially defective equipment.
   - Take photos to help preserve the scene.

3. **Conduct interviews and identify potential witnesses** –
   - Find out whether any employees saw or heard anything that may explain the incident.
   - Talk to individuals separately. Interviews should be done as soon after the accident as possible while the facts are still fresh in people’s minds.
   - Obtaining signed statements as soon as possible following an accident, incident, or near miss ensures that you have an accurate account of how the event occurred.

4. **Prepare the investigation reports** –
   Fill out the appropriate Chesapeake Employers’ accident investigation form(s), giving an accurate accounting of all the facts. These forms are available in English and Spanish at www.ceiwc.com.

5. **Review the data** – Review all accident investigation documentation as soon as possible with the following in mind:
   - Are all the facts consistent with each other?
   - Has all the documentation been completed thoroughly?
   - What could have contributed to the accident?
   - What could have failed or did not occur that could have caused the incident?
   - Has a previous action been taken to correct this problem? If so, what was it? Why did it fail this time?

6. **Root cause analysis** – The supervisor or accident investigator should take care when describing the cause of the accident or incident to make sure it is described both accurately and clearly. He or she should identify all possible causes, preventions and controls. Causal factors may include:
   - equipment,
   - the environment, or
   - people.

7. **Implement corrective actions** –
   Determine how the information gathered in your accident investigation can be used to implement corrective measures to prevent accidents and injuries from occurring in the future. Follow your organization’s protocol for making any necessary changes. Corrective actions can include:
   - Eliminating the hazard (most effective);
   - Engineering solutions;
   - Administrative changes;
   - Training;
   - Personal protective equipment;
   - Labeling/warning signs (least effective).

8. **Follow up** –
   - Check back regularly with those who experienced the accident or incident to ensure the appropriate remedies have been put in place and are working as intended.
   - Be sure to update your organization’s safety policy with any changes that resulted from recommendations made as a result of your investigation.
REMEMBER to Complete the Accident Investigation Forms When You Have a Workplace Injury

After your injured worker has received medical treatment and you have reported the injury to Chesapeake, the next important step is to conduct the accident investigation using the three Accident Investigation Forms. The forms are included in your Employers’ Handbook and can be downloaded from the Chesapeake Employers’ website. These forms are also available in Spanish.

Accident investigation forms/statements should be filled out by the:
- injured employee
- supervisor
- and any witness(es) to the accident

Train your supervisors to conduct the preliminary investigation as soon as possible. Care must be taken to assure the investigation is fact finding, not fault finding. The injured worker’s memory of the details around the accident may change over time. Obtaining signed statements as soon as possible following an accident ensures that you, the employer, have an accurate account of how the injury occurred. The completed forms also help to spot possible third-party liability as well as possible fraudulent claims.

Investigation Forms Q&A

Q. After I have these forms completed, what do I do with them?
Please mail or fax the completed and signed forms to your claims adjuster and keep a copy for your files. These completed forms can provide valuable information in a claims investigation of an injury and for developing the defense in the event of a workers’ comp hearing.

Q. What if my employee refuses to fill out or sign an Employee’s Report of Injury?
Of course, you cannot make an employee fill out the document. You can, however, stress the importance of getting his or her account of the accident to set the record straight and to help prevent the accident from happening again. Also, still obtain the supervisor’s report as well as any witness statements.

Q. What if my employee has retained an attorney? Can I still ask the injured employee to fill out an Employee’s Report of Injury?
Yes. You, the employer, as part of your company’s accident management plan, can still ask the employee to fill out the report form.

Visit www.ceiwc.com - publications section to download forms
The “Going & Coming from Work” Rule:

**Premises Exception Safety Tips**

- Make sure the employer-owned or provided parking and walking areas are well lit and in good repair.
- Be sure employee parking lot(s) are well controlled in terms of vehicle exposures. Be sure that traffic direction, pedestrian crosswalks, blind spots and other warnings are clearly marked. First-time vehicular visitors are especially in need of this warning information.
- Remove snow and ice as soon as possible from walking and parking surfaces. Have a snow removal plan for your workplace.
- Escort with a witness all terminated employees to their vehicles and off the employer’s premises. You don’t want a terminated employee having an unwitnessed trip or fall on your premises and possibly filing an injury claim.
- Know where your employees are parking, especially if you provide offsite parking areas owned or maintained by your company.
- Are there any special hazards the employees may encounter while walking to your place of business from the employer-owned parking areas? Railroad tracks, steep inclines or unpaved pathways, staircases, construction debris, alleys, etc. As an employer, are you controlling these special hazards effectively?
- If you have employees taking unsafe walking shortcuts, issue regular reminders to all employees of the proper route/path to use while walking to your premises.

**Employer-Provided Transportation Exception Safety Tip**

- If an employer provides a company-owned or leased vehicle to an employee, special safeguards need to be followed, regardless of the number of business miles driven. Driving records should be pulled on a regular basis and written acceptable driver record criteria (based on points and accidents) should be developed, documented and enforced. These rules also apply to those employees who use their own personal vehicles for regular “business” use, whether or not they are reimbursed for mileage.

**Special Errand Exception Safety Tip**

- Be careful in requesting “urgent” and/or special errands of your employees. The element of urgency may change the trip from a regular commute into a special errand. Even asking employees to pick up lunch for others on the way back from their lunch break could be construed as “in the course of employment.”
- Be cautious in asking disgruntled, poor performing or new employees to be on-call or to run urgent errands after hours. Their lack of focus and potentially negative attitude in running the errand may lead to an accident.
Recent Success Cases at the Maryland Workers' Compensation Commission

Chesapeake Employers’ legal and claims professionals work in tandem to successfully litigate numerous hearing cases in front of the Maryland Workers’ Compensation Commission. Our thorough case preparation, investigation and defense help to keep premium costs fair by limiting unnecessary and excessive awards or claim payments. Here are a few summaries of recent hearing cases in which the Commission ruled in our favor.

Successfully Defended

Knee Deep in Confusion
Chesapeake Employers had this case before the Commission on the issue of causal relationship to the left knee. Our argument was that there was no mechanism of injury in any record. The claimant testified that there was a “pop” in the back of his knee when a sofa was lifted. But there was no knee trauma [recorded] at that time. The claimant testified that there was always knee pain and was unsure why it never made its way into reports. The Commission was initially not persuaded by the defense argument but, with no causal relationship shown by the claimant, Chesapeake’s closing argument on the burden of proof swayed the court's opinion in favor of the policyholder.

Middle Trigger Finger Case
In this case, the claimant alleged to have suffered an occupational disease of the left middle finger (also known as the trigger finger). There was a prior left middle finger case in which the claimant had already received a permanency award and that claim had been settled. The current occupational disease was brought as a new claim. Multiple witnesses were brought by the defense. Defense counsel was able to show that the claimant’s work had not decreased and her treatment was consistent from the prior claim. Compensation was disallowed based on no disablement.

Falling Short of the Standard
Our claims and legal professionals worked together to defend this contested claim on the issue of occupational disease. The claimant alleged to have developed carpal tunnel syndrome due to employment. At the hearing, there was a submission of the medical reports with the legal argument. Chesapeake was able to successfully argue that the claimant had failed to produce any report that met the standard to a reasonable degree. The Commission agreed.

Poking Holes in the Story
This claim of injury to the neck and back was successfully defended at the Commission. The claimant alleged that injuries to the neck and back were experienced while lifting a patient at an assisted living facility and later while stopping a patient from falling. The success of this defense rested on the cross-examination of the claimant. The defense counsel effectively poked multiple holes in the claimant's story. There were inconsistencies, conflicting statements and evidence that this was a retaliatory claim.

Shaking Things Up at the Soda Machine
The legal team, with the help of claims adjusters, tried this case before the Commission on the issue of accidental injury. The defense counsel brought the claimant's supervisor as a witness. The claimant testified that on a specific date in 2014, an injury happened to the left hand by falling into a soda machine while at work. Cross-examination showed that the claimant’s First Report of Injury described a fall involving steps and revealed nothing about a soda machine. Our witness helped provide evidence that there was nothing during that time that would have caused the claimant to fall into the soda machine.
Q. My injured employee received a permanency award and remains off work. What does Chesapeake Employers do to follow up and check on the worker’s condition?

A. Chesapeake Employers doesn’t just send out checks and forget about the claimants. Our Special Investigations Unit will schedule visits also known as “Alive and Well Checks.”

Alive and Well Checks serve multiple purposes. They allow Chesapeake to have face-to-face meetings with claimants to let them know that their treatment remains a priority for Chesapeake and to make sure that they are receiving the appropriate benefits. We also ask them if they are interested in setting up direct deposit to receive their payments. The checks/visits also serve to let the claims adjuster know if anything has changed in the claimant’s situation that would impact the claim, such as a return to work or a change in activity level. On average per year, Chesapeake conducts hundreds of “Alive and Well Checks” on claimants living in Maryland as well as out-of-state.

Q. I have been president of a distribution warehouse for more than 25 years. Recently, I’ve experienced an increase in workplace accidents. I wrote a basic overview of company safety rules and regulations and I posted my commitment about safety on the bulletin board. I also mounted safety posters throughout the warehouse. Now it seems these tools are no longer effective in controlling accidents. What else can I do?

A. No one can argue against the importance of maintaining a strong managerial commitment to promoting safety in the workplace. Posting safety posters and making employees abide by safety rules are fine. However these mechanisms may become stale after a while.

What is needed are more supervisory and employee “buy in” tactics. For instance, having regularly scheduled safety meetings and asking staff for its feedback on the effectiveness of the company’s safety policies can provide great insight into what is “wrong” and “right” with the program. This allows employees to have a greater sense of ownership in developing innovative and practical safety solutions. Employee involvement tends to bolster compliance with safety rules and elevate overall morale.

Thus, it is this “buy-in” that is a major component of a successful safety program that enables employees to become “engaged” with management in fulfilling the common objectives of providing a safe and healthy workplace.
Free Safety Training Materials & Posters
Visit Chesapeake Employers’ Safety University & the Publications page at www.ceiwc.com to download safety training & tip sheets or order safety publications and posters.

Don’t Let Gravity Get You Down!
This is a Drug-Free Workplace!
We Conduct Drug Testing

SAFETY TIP
Preventing Hot Tar & Asphalt Burns

SAFETY TIP
Evite resbalones, tropezones y caídas

Fall Prevention Safety Training 1
Fall into Safety

FALL PREVENTION SAFETY TRAINING 1
FALL INTO SAFETY

SAFETY TRAINING

Some items available in Spanish
Safety training flipbooks & brochures

Safety training tip sheets

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NEW Safety Flicks Streaming Video Titles Announced

New video titles by WUMBUS include:

- Blink! A Practical Approach to Workplace Stretching
- A Better Way to Lift
- The Safe Operation and Use of Ladders
- Backing Accident Prevention for the Sanitation Driver
- Understanding and Safely Using Fall Protection
- Hazard Communication Safety

Visit www.wumbus.com to preview the new video titles. Chesapeake Employers’ policyholders with an eServices account can visit the Chesapeake Safety Flicks webpage to stream videos or request a DVD. Most safety training videos produced by WUMBUS are 10-15 minutes in length. Additionally, Safety Flicks training videos now include an interactive Question & Answer quiz feature.

IMPORTANT!

OSHA Updates Recordkeeping Rule

OSHA has updated its recordkeeping rule, expanding the list of severe injuries and illnesses that employers must report to OSHA. As of January 1, 2015, all employers under OSHA or MOSH jurisdiction must report:

- ALL work-related fatalities within 8 hours.
- ALL work-related inpatient hospitalizations within 24 hours.
- ALL work-related amputations or losses of an eye within 24 hours.

Maryland employers can report to OSHA at:

- Maryland MOSH statewide: 1-888-257-6674
- OSHA National Reporting Hotline: 1-800-321-6742
- OSHA will be developing web-based reporting in the future.

OSHA has also updated the list of industries exempt from record keeping requirements. Visit www.osha.gov/recordkeeping2014 for more information.