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Recent Developments: CALVO V. MONTGOMERY COUNTY: THE DECISION OF WHETHER A TRIP FALLS UNDER THE SPECIAL MISSION EXCEPTION TO THE GOING AND COMING RULE IS FOR THE JURY, NOT SUMMARY JUDGMENT

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RECENT DEVELOPMENT

CALVO V. MONTGOMERY COUNTY: THE DECISION OF WHETHER A TRIP FALLS UNDER THE SPECIAL MISSION EXCEPTION TO THE GOING AND COMING RULE IS FOR THE JURY, NOT SUMMARY JUDGMENT.

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The Court of Appeals of Maryland held the special mission exception to the going and coming rule may apply when an employee is tasked with attending a mandatory work training at a different location from their regular workplace. *Calvo v. Montgomery Cty*, 459 Md. 315, 343, 185 A.3d 146, 163 (2018). This conclusion is further bolstered when the employee comes in on their day off. *Calvo* at 339, 343, 185 A.3d at 161, 163. Since a reasonable jury could have rationally concluded the special mission exception applied, it was improper to grant summary judgment against the claimant. *Id.*

Ms. Rina Calvo ("Calvo") was employed by Montgomery County ("County") for over 20 years in the capacity as a bus driver, working Monday to Friday. Calvo received a letter informing her that she was scheduled to attend a mandatory work training, on a Saturday, and at a location she did not normally work. While traveling to the training, Calvo was rear-ended and sustained personal injuries as a result of the accident.

Calvo filed a claim with the Workers' Compensation Commission ("Commission"). After a hearing, the Commission found Calvo's injuries were compensable as they occurred in the course of her employment. The County sought judicial review of the Commission's award in the Circuit Court for Montgomery County, and subsequently moved for summary judgement. In support of their motion, the County argued the going and coming rule specifically precluded Calvo's claim. In opposition to that motion, Calvo argued, *inter alia,* the special mission exception to the going and coming rule applied, thus entitling her to workers' compensation benefits. The trial court ultimately granted the motion, finding as a matter of law the going and coming rule precluded recovery, and none of the exceptions to the rule applied. The Court of Special Appeals of Maryland affirmed, and Calvo filed a petition for a *writ of certiorari*, which the Court of Appeals of Maryland granted. The issue before the court was whether an injury arising out of and in the course of employment is a question of fact.

The Court began by examining the Workers Compensation Act, which provides compensation for a loss of earning capacity which results from accidental injuries arising out of and in the course of employment. *Calvo*, 459 Md. at 324, 185 A.3d at 151. In order to determine whether Calvo's injuries arose out of her employment, the court applied the positional-risk test set forth in *Livering v. Richardson's Restaurant*. *Id.* at 328, 189 A.3d at 154 (citing *Livering v. Richardson's Rest.*, 374 Md. 566, 823 A.3d 687 (2003)). The test provides that an injury arises out of the course of employment if it would not have happened but for the employment duties putting the employee in the situation causing the injuries. *Calvo*, 459 at 327-288, 185 A.3d at 153-54 (citing *Livering*, 374 Md. at 575, 823 A.3d at 692). The court found Calvo's injuries arose out of her employment as they would not have happened but for traveling to the employer's mandatory training. *Calvo*, 459 at 328, 189 A.3d 154.

Next, the court analyzed whether Calvo's injuries occurred in the course of her employment. *Calvo* at 329, 185 A.3d at 154. The court considered the circumstances leading up to the injury, particularly time and place, and whether Calvo was either directly or indirectly carrying out her employment duties. *Id*. at 328-29, 185 A.3d at 154. Generally, injuries which occur while the employee is going and coming to work are not compensable. *Id.* (citing *Roberts v. Montgomery Cty*, 436 Md. 591, 606, 84, A.3d. 87, 98 (2014)). However, if the special mission exception applies, an employee may be entitled to compensation that would ordinarily be precluded by the going and coming rule. *Calvo*, 459 Md. at 333, 185 A.3d at 157. A special mission is found when the employee is traveling in the course of their employment for a purpose which specifically benefits the employer's business. *Id*. at 333, 185 A.3d at 157 (citing *Barnes v. Children's Hosp.*, 109 Md. App. 543, 553-56, 675 A.2d 558, 564-565 (1996)). Additionally, the exception may apply when the trouble and time of making the trip, or special inconvenience of making it in the particular situation, is sufficiently substantial to be an integral part of the service itself. *Id.*

Next, the court used the factors set forth in *Barnes* v. *Children's Hosp.*, to determine whether the special mission exception was applicable to Calvo's trip. *Calvo* at 334-35, 185 A.3d at 158 (citing *Barnes,* at 555-56, 675 A.2d 558). Those factors are whether the trip was: not usually part of the employee's regular duties; onerous in comparison to the task performed; or performed with a sense of urgency or suddenly required. *Calvo* at 334, 185 A. 3d at 157-59 (citing *Barnes,* at 557-58, 675 A.2d at 564-565). Consulting Maryland precedent, as well as authorities from other jurisdictions, the court found that while

the going and coming rule applied, a reasonable jury could have rationally concluded the special mission exception applied. *Calvo*, at 342, 185 A.3d at 162.

In the 4-3 split decision, the Majority and Dissenting opinions focused on the application of the regularity of the journey. *Calvo* at 337, 185 A.3d at 159; *Id.* at 349, 185 A.3d at 348 (Greene, J., dissenting). The court noted that there is a strong presumption the special mission exception does not apply when the employee's duties regularly require trips. *Id.* at 335, 185 A.3d at 158. The court distinguished Calvo's trip from those which occur with more regularity and do not qualify as special missions, as in *Jakelski* where a police officer was injured on his way to his monthly court appearance to testify. *Calvo* at 336, 185 A.3d at 159 (citing *Mayor & City Council of Baltimore v. Jakelski*, 45 Md. App. 7, 410 A.2d 1116 (1980). Here, the court found that Calvo's annual customer service training was distinguishable from the monthly obligations in *Jakelski*, and therefore, a jury could have found that the special mission exception applied. *Calvo* at 337, 185 A.3d 159.

While there are multiple ways for a trip to qualify as a special mission, in Calvo's case the primary factor was being tasked to work on a day that she normally had off. *Calvo.* at 342-43, 185 A.3d 162. The court likened Calvo's trip to that in *Barnes*, where the employee was injured on her way to work on a day off. *Id.* at 340, 185 A.3d at 161. The court reaffirmed that a journey to the usual workplace on a day off is onerous enough for the exception to apply. *Id.* at 340, 185 A.3d at 341. When viewed in that light, a reasonable jury could find requiring Calvo to travel to a different location on her day off was unusual and irregular enough for the special mission exception to apply. *Id.* at 330, 185 A.3d at 161. Therefore, the circuit court erred in granting summary judgment because the undisputed facts could have allowed a jury to find the special mission exception applied. *Id.* at 344, 185 A.3d at 163.

The Dissent argued that none of the *Barnes* factors suggested the trip was sufficiently unusual to allow the special mission exception to apply. *Calvo* at 347, 185 A.3d at 165. Using the dictionary definition of the word "periodical," the Dissent found the annual work training was not isolated and was just as periodic as a monthly or weekly obligation. *Id.* at 348, 185 A.3d at 166. The dissent reasoned that just as the officer in *Jakelski* was expected to regularly appear in traffic court, Calvo could reasonably expect to attend an annual training. *Id.*

As a result of this holding, practitioners may expect to see the continued erosion of the going and coming rule through the use of the positional-risk test, and continued growth of the special mission

exception by a broadened interpretation of what constitutes regularity and onerousness. To those who wish to prevent the compensability of such accidents, this case presents an economic dilemma by seemingly requiring that training be held on-site during a work day. The answer will most likely be decided using the economy of scales. For large employers, such as the County, increased frequency of on-site trainings would cost substantially more than paying for infrequent accidents. For smaller employers, however, it would be prudent to only hold on-site trainings on regular work days. Despite the loss of productivity, the cost of such an augmentation would be considerably less than paying out workers' compensation claims, and the corresponding increase in premiums.