

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX AT KINGSHILL**

MARLENE HILL,

Petitioner,

vs.

**GOVERNMENT EMPLOYEES
RETIREMENT SYSTEM,**

Respondent.

CIVIL NO. 232/1995

ACTION FOR WRIT OF REVIEW

NOT FOR PUBLICATION

APPEARANCES:

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CABRET, Judge

MEMORANDUM OPINION

(September 17, 1999)

Petitioner, Marlene Hill, was employed by the Virgin Islands Department of Health. While driving to work one morning, Hill was injured in an automobile collision. After treatment, a physician concluded that Hill's injuries were permanently incapacitating. Based on this prognosis,

Hill applied to the Government Employees Retirement System ("GERS") for benefits under title 3, section 708 (a) of the Virgin Islands Code. GERS denied Hill's application. Following a series of appeals and remands to the GERS Board of Trustees ("Board"),¹ this Court granted Hill's Petition for a writ to review the decision of the Board, which affirmed GERS' denial of benefits. For reasons which follow, the Board's decision is affirmed.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The following facts are undisputed. On December 9, 1985, Hill was employed at a hospital by the Virgin Islands Department of Health as a clinical care coordinator. While driving to the hospital to work a scheduled shift that day, Hill was involved in an automobile collision. Hill was injured in the accident and hospitalized for seventeen days. Despite undergoing continuous medical care, Hill's condition did not improve, and she visited Dr. Sylvia Payne in Puerto Rico on December 5, 1986 and January 21, 1987. On January 30, 1987, Dr. Payne issued a report stating that Hill's injuries were permanently incapacitating. Immediately thereafter, Hill telephoned the GERS offices, informing representatives of Dr. Payne's prognosis.

Subsequently, in a letter to GERS dated June 24, 1987, Hill applied for a duty disability annuity pursuant to title 3, section 708(a) of the Virgin Islands Code.² GERS received the letter on June 30, 1987. After evaluating Hill's application, GERS denied the claim as untimely because section 708 (a) required that Hill file her application within six months after the date of the

¹ The procedural history of this case is presented in detail below.

² A duty disability annuity is defined by section 708 (b) as "75 percent of the member's rate of compensation at date of disability in an amount not to exceed \$65,000 per annum." V.I. Code Ann. tit. 3, § 708 (b) (1995).

accident.³ Hill appealed the decision to the Board which affirmed the denial of her application for duty-related disability.

Hill subsequently appealed the Board's decision to the District Court of the Virgin Islands which granted her Petition for a Writ of Review.⁴ See Hill v. Gov't Employees Retirement Sys., Civ. No. 90-258 (D.V.I. 1990). On appeal, Hill argued that the Board erred in denying her claim as untimely because the discovery rule tolled the six-month filing requirement until she learned that her injury was permanent. In an opinion issued on October 26, 1991, the District Court agreed that the discovery rule tolled the time limitation embodied in section 708 (a) until Hill "knew that she was permanently disabled by the injuries[.]" Id. slip op. at 8. In light of its holding, the District Court remanded the case to the Board for a determination:

1. As to when [Hill] first knew or reasonably should have known of the permanency of her injury and whether she filed within six (6) months thereof;
2. Whether the permanent disability was proximately caused by injuries sustained within the scope of her duties; and
3. Whether [GERS] had notice of the accident within thirty (30) days of the date thereof.

Id.

³ There is no time constraint for filing a non-duty disability application under title 3, section 710 of the Virgin Islands Code.

⁴ In 1991, the Legislature amended title 4, section 76 (a) of the Virgin Islands Code to transfer original jurisdiction over certain matters from the District Court of the Virgin Islands to the Territorial Court of the Virgin Islands. This amendment implicitly transferred jurisdiction to the Territorial Court to determine writs of review appealing local administrative determinations. See Moravian Sch. Advisory Bd. of St. Thomas V.I. v. Rawlins, 70 F.3d 270, 33 V.I. 280, (3d Cir. 1995). The 1990 appeal preceded this statutory amendment.

Pursuant to the District Court's order, the Board held a full evidentiary hearing on July 28, 1992. The evidence produced at the hearing showed that on December 30, 1985, Hill sued the other driver involved in the collision alleging that she suffered severe and debilitating injuries to her back and other parts of her body due to the other driver's negligence. Based on this evidence, the Board again affirmed GERS' denial of Hill's application for duty disability benefits. In its decision issued on October 15, 1992, the Board reasoned that Hill knew her injuries were permanent when she filed her civil action against the other driver on December 30, 1985, and that her application was thus untimely.

Hill appealed the Board's October 15, 1992 decision to the Territorial Court. The court granted a Writ of Review, and in an opinion issued on March 4, 1993, the court vacated the Board's decision.⁵ The court found that Hill first learned she was permanently disabled on January 30, 1987, when Dr. Payne issued her report stating that Hill's injuries were permanently incapacitating. Because Hill's June 24, 1987 application for benefits was filed within six months of this date, the court concluded the application was timely.

GERS appealed the Territorial Court's decision to the Appellate Division of the District Court of the Virgin Islands. Although the Appellate Division affirmed the Territorial Court's decision that Hill timely filed her application, it found that several issues still needed to be resolved to determine whether Hill is entitled to duty disability benefits. See Gov't Employees Retirement Sys. v. Hill, 866 F.Supp. 880, 31 V.I. 129 (D.V.I. 1994). Specifically, the Appellate Division found

⁵ Territorial Court Judge Raymond L. Finch, who is now the Chief Judge of the District Court of the Virgin Islands, rendered the decision. This is noteworthy because in addition to Judge Finch, two other Territorial Court judges, including this Court, have been assigned this case at various stages of the proceedings.

that the Board had failed to resolve the following issues: (1) whether Hill notified GERS of the accident within 30 days of the date of the accident; and (2) whether Hill's disability occurred within the scope of her duties. Accordingly, the Appellate Division remanded the case to the Territorial Court. Id.

Before the Territorial Court had an opportunity to address these issues,⁶ the Board held a hearing on January 24, 1995 to receive additional evidence necessary to render a decision on the remanded issues. On March 2, 1995, the Board issued a decision holding that Hill did not notify GERS within 30 days of the her accident and that the accident did not occur while she was acting within the scope of her duties. This Court subsequently granted Hill's instant Petition for a Writ of Review.

II. DISCUSSION

In her appeal, Hill asserts that the Board erred in concluding that her injuries did not occur within the scope of her employment and that she failed to notify GERS within 30 days of her accident as required by title 3, section 708(a) of the Virgin Islands Code. Section 708(a) provides:

Any member who becomes totally and permanently incapacitated for service as the proximate result of bodily injuries sustained or a hazard undergone while in the performance and within the scope of his duties, if such injuries or hazard were not the consequences of the wilful negligence of the member, shall receive a duty disability annuity; Provided, That application is made not more than six months after

⁶ On remand to the Territorial Court, the case was assigned to Judge Alphonso Andrews who, on July 14, 1997, issued an order remanding the case to the Board for a determination on the two remaining issues. Although the timing of the Board's hearing and Judge Andrews' remand order present a troubling procedural quagmire, little would be gained at this juncture by again remanding the case for another evidentiary hearing. In light of the circumstances that these proceedings have been pending for well over a decade, that Hill has pleaded with the Court to bring closure to the matter, and that this appeal will ultimately be decided on a question of law, judicial economy compels resolution without further delay.

the date of the accident if an accidental disability or six months after the occurrence of disablement if an occupational disease and proper proof is received from one or more physicians designated by the Board that such member is mentally or physically incapacitated; And provided, further, That notice of the accident shall have been filed in the office of the board within 30 days next following the date of the accident. . .

V.I. Code Ann. tit. 3, §708 (a) (1995) (emphasis added). Hill asserts that the phrase "while in the performance and within the scope of his duties," includes travel to and from home. The Court disagrees.

It is a well-established rule of statutory construction that in establishing the intent of the Legislature, "[w]ords and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language." V.I. Code Ann. tit. 1, § 42 (1995). The plain language at issue here expressly requires that the injury be sustained while the claimant is acting within the scope of her work duties. It does not state that travel to and from work is included within the ambit of such duties, and Hill has cited no evidence showing that driving to work is part of her job description.

Notwithstanding the plain language in section 708 (a), Hill contends that the Legislature intended to provide coverage for injuries sustained while commuting to and from work. In support of this contention, Hill relies on authority which authorizes workers' compensation benefits under the facts of this case. Hill's reliance on this authority is misplaced. Under the Workers' Compensation Act, an employee is entitled to compensation benefits for injuries "arising out of and in the course of his employment." V.I. Code Ann. tit. 24, § 252 (a) (1997). Section 252 specifically provides that "[i]njuries resulting from travel to and from home immediately before or after working hours . . . shall be considered as arising out of and in the course of employment." Id.

Although Hill correctly notes that section 252 (a) entitles her to workers' compensation benefits, it

is clear that section 708 utilizes a different coverage standard and, more importantly, does not include a provision including coverage for travel "to and from home." Id.

These distinctions are significant. Our Legislature added the "to and from home" provision to section 252 (a) in 1970 to specifically include, within the scope of workers' compensation coverage, injuries sustained while commuting to and from home. *See Diana Arts-Bermudez v. Comm'r of Labor*, 31 V.I. 51, 54 (Terr. Ct. 1995). Prior to the amendment, section 252 (a) did include the "to and from home" language and accordingly did not treat commuting as within the "course of employment." *See id.* This is because absent this additional language, the phrase "course of employment" is generally not interpreted as including travel to and from home. *See* 1 Arthur Larson, Larson's Workmen's Compensation Law, §15.00 (1993); *see also, e.g., Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286 (Alaska 1991); *Devine v. Advanced Power Control, Inc.*, 663 A.2d 1205 (Del.Super.Ct. 1995); *Ryan v. Boehm, Brown, Rigdon, Seacrest & Fisher*, 673 So.2d 494 (Fla.Dist.Ct.App. (1996); *Lee v. Indust. Comm'n*, 656 N.E.2d 1084 (Ill. 1995); *Morris v. Bd. of Educ.*, 663 A.2d 578 (Md. 1995); *Zelasko v. Refrigerated Food, Express*, 608 A.2d 231 (N.J. 1992); *Biddle v. Workmen's Compensation Appeals Bd.*, 652 A.2d 807 (Pa. 1995). It is thus clear that the only reason section 252 (a) provides coverage for injuries sustained while commuting, is because the Legislature specifically authorized such coverage in its 1970 amendment.

As stated above, unlike section 252(a), section 708(a) does not include language including travel "to and from home" as within the definition of the scope or course of employment. There is a maxim of statutory construction that addresses such circumstances: *expressio unius est exclusio alterius*. Though not a binding rule, this maxim means "the expression of one thing is the exclusion of another," Black's Law Dictionary 521 (5th ed. 1979). Application of the maxim here indicates

that the Legislature did not include the "to and from home" phrase in section 708 (a) because it did not intend to extend coverage of disability benefits for commuter injuries as it did with workers' compensation benefits. The Legislature was aware that this additional language was necessary to extend coverage to commuter injuries when it amended section 252(a), *see Diana Arts-Bermudez*, 31 V.I. at 54, and its failure to include similar language in section 708 (a) permits the inference that it did not intend to extend coverage for disability benefits from GERS.

This construction of section 708 (a) is also consistent with the Virgin Islands' interpretation of the phrase "scope of employment" as it is used in the laws of *respondeat superior*.⁷ As stated by the Third Circuit:

The general rule is that employees are not within the scope of their employment while traveling to and returning from work. [This] principle was recognized by the Territorial Court of the Virgin Islands in *McFarlane v. Jones Masonry*, 25 V.I. 43 (Terr.Ct. 1990). *See also Charles v. Mitchell*, 21 V.I. 478 (D.V.I. 1985). There may be some circumstances that take a case out of the general rule, for example, when there are express instructions by the employer or when the trip serves some specific purpose of the employer other than merely providing for the presence of the employee at the workplace.

Williams v. Rene, 72 F.3d 1096, 1100, 33 V.I. 297, 302 (3d Cir. 1995) (Emphasis added).

In light of this authority, the Court concludes that the phrase "while in the performance and within the scope of his duties," does not include travel to and from home. Our courts, and courts from other jurisdictions, have consistently interpreted similar language as not including travel to and from work. And, although our Workers' Compensation Act allows for recovery of benefits under

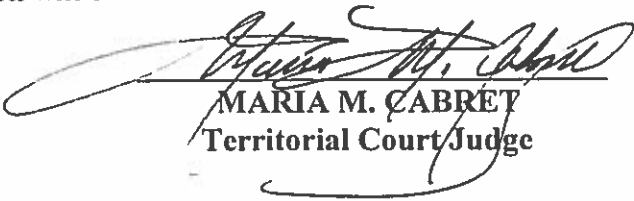
⁷ In his treatise on workmen's compensation law, Professor Larson suggests that the "course of employment" language used workers' compensation statutes originated from the law of *respondeat superior*. *See Larson supra* at § 14.

similar language, this is only because the Legislature amended title 24, section 252 (a) of the Virgin Islands Code to specifically include such coverage.

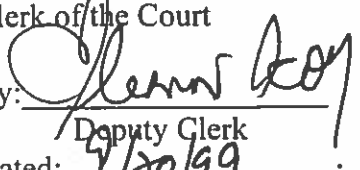
In this case, the undisputed evidence showed that Hill was injured in an automobile collision which occurred on a public highway while she was driving to work a scheduled shift at a local hospital. It is clear that under these circumstances her injuries, while permanently incapacitating, are not compensable under section 708 (a). Accordingly, Hill's application for disability benefits under this section was properly denied, and the Board's decision will be affirmed on this ground. In light of this conclusion, it is unnecessary to address the issues concerning the timeliness of Hill's notice to GERS.

III. CONCLUSION

For the reasons stated above, the Court concludes that Hill is not entitled to disability benefits under title 3, section 708 (a) of the Virgin Islands Code. The undisputed evidence shows that Hill was injured while driving to work, and section 708 (a) does not authorize recovery of benefits under these circumstances. The Board's decision will be affirmed.


MARIA M. CABRET
Territorial Court Judge

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

By: 
Deputy Clerk

Dated: 9/20/99