# IN THE COURT OF APPEALS 12/17/96

# OF THE

# STATE OF MISSISSIPPI

## NO. 94-CC-00967 COA

**JOHNNIE OATES, DECEASED**

**APPELLANT**

**v.**

**OTASCO, INC. #112 AND AMERICAN MOTORIST INSURANCE COMPANY**

**APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: PANOLA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

KEITH S. CARLTON

ATTORNEY FOR APPELLEES:

DAVID L. CALDER

NATURE OF THE CASE: WORKERS' COMPENSATION

TRIAL COURT DISPOSITION: WORKERS' COMPENSATION BENEFITS DENIED

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

The heirs of Johnnie Oates were denied death benefits by the Workers' Compensation Commission.

This denial was affirmed by the Panola County Circuit Court. The court found that Ms. Oates was not acting within the course and scope of her employment when she was killed in a car accident that occurred while she was driving home, but also while carrying in her vehicle a table for delivery to her father-in-law who lived next door. The heirs appeal the decision of the circuit court. Finding no error, we affirm.

## FACTS

Ms. Johnnie Oates was a commissioned salesperson for Otasco Store in Oxford. Ms. Oates' father-in-law, Marion Oates, visited the store and had expressed an interest in purchasing a television table there. He told Ms. Oates that if these tables went on sale, he would like to have one for himself. On May 24, 1986, Ms. Oates called Mr. Oates and alerted him that these tables were now on sale. Mr. Oates advised Ms. Oates that he would purchase one of the tables if she would deliver it to his house the next day. The two lived next door to each other. At the close of the business day on May 25, Ms. Oates and her son, Billy, who also worked for Otasco, loaded two tables into their car. Billy testified that one of the tables was for Ms. Oates and the other was to be delivered to Mr. Oates. While traveling towards her home, Ms. Oates was killed in an automobile accident.

Her heirs claim that her injuries and ultimate death arose during the course and scope of her employment in that she was delivering merchandise from Otasco to a customer, Mr. Oates. The Administrative Law Judge agreed, but that decision was reversed by the Workers' Compensation Commission. The Commission found that Ms. Oates was not acting within the course and scope of her employment. The trial court affirmed the decision of the Commission.

## DISCUSSION

The appellants allege three points of error. All address whether or not Ms. Oates was acting within the course and scope of her employment at the time of the fatal accident. We will therefore discuss these issues together.

*Did the accident happen during the course and scope of Ms. Oates' employment?*

"This court reviews the decision of the Workers' Compensation Commission within a limited scope, as it considers only whether there is substantial evidence to support the findings of the Workers' Compensation Commission. The findings of the Commission will be reversed by an appellate court only if the findings are clearly erroneous and contrary to the overwhelming weight of the evidence." *Hardin's Bakery v. Taylor*, 631 So. 2d 201, 204 (Miss. 1994) (quoting *Morris v. Landsdell's Frame Co.*, 547 So. 2d 782, 784 (Miss. 1989)).

The appellants contend that they satisfied their burden of making out a prima facie case that the accident occurred during the course and scope of employment. The relevant evidence as they see it is that she was a commissioned salesperson and would have received a commission or bonus from the sale of the table; that Otasco did not have a formal policy prohibiting or promoting deliveries; that the employees often made deliveries and had the discretion to make deliveries of particular items; and, that at the time of the accident Ms. Oates' had two tables in her car.

In determining whether an employee was acting within the scope of employment, the supreme court stated that the scope of employment extends to everything "incident to that ultimate purpose which constitutes [the employee's] job." *Sears, Roebuck & Co. v. Creekmore*, 199 Miss. 48,59, 23 So.2d 250, 252 (1945). "It must be more than that which is merely technical, or suppositional, or argumentative, -- it must amount to more than a scintilla." *S. & W. Const. Co. v. Bugge*, 194 Miss. 822, 829, 13 So. 2d 645, 646 (Miss. 1943). "It is of course basic that in order for an injury to be compensable under workmen's compensation acts it is necessary that the injury result from some risk to which the employment of the claimant exposes him." *Persons v. Stokes*, 222 Miss. 479, 485, 76 So. 2d 517, 519 (Miss. 1954).

Ms. Oates had left work on the night in question and was headed towards her home. Billy Oates, Ms. Oates' son, testified that they did not know whether Mr. Oates would be at his home next door. Because they would have to pass Mr. Oates' house before they got to theirs, whether or not the delivery would be made depended solely on whether Mr. Oates was then home. Furthermore, Billy testified that even if Mr. Oates were not home, Ms. Oates would probably have kept the table at her house until Mr. Oates could receive it. The evidence also revealed that there was no delivery charge paid by Mr. Oates to Otasco. There was no evidence presented that Ms. Oates deviated from her regular routine of leaving work and heading home.

This mix of motives -- the employee wanting to go home and also wanting to make a delivery -- invokes the "coming and going rule" and the "dual purpose rule." "As a general rule, hazards encountered by an employee going to or returning from his regular place of work, off the employer's premises, are not incident to employment, do not arise therefrom, and are not compensable." *Wilson v. Service Broadcasters, Inc.*, 483 So. 2d 1339, 1341 (Miss. 1986). A recognized exception, called the dual purpose rule, is advanced here. "If the work of the employee creates a necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own.. . . If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk." *E & M Motel Mngt., Inc. v. Knight*, 231 So. 2d 179, 182 (Miss. 1970) (citing Larson's Workmen's Compensation Law, Vol. 1, § 18.12, page 241.)

The evidence supports the Commission and the trial court's findings that Ms. Oates' journey would have occurred even in the absence of carrying out the delivery for her father-in-law. Although Ms. Oates may wanted to deliver the table to her father-in-law, that mission did not create the necessity for travel. Had there been no table to deliver, there still would have been the travel at that time along that route to Ms. Oates' home. Under the dual purpose rule, that means Ms. Oates was not then in the scope of her employ.

There is no doubting the tragedy of this accident. We are called upon to determine whether under our statutes Ms. Oates' employer bears a financial responsibility for the tragedy. The rules outlined by our supreme court compel us to hold that Otasco had no liability. We affirm.

**THE JUDGMENT OF THE PANOLA COUNTY CIRCUIT COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND PAYNE, JJ., CONCUR.**