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FOR PUBLICATION

Appeal No. 2000-026

IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ANTONIO A. SANTOS, on behalf of
SUSANA A. SANTOS (Deceased – Claimant)
Claimant / Appellant,

v.

PUBLIC SCHOOL SYSTEM,
Employer / Appellee,

and

WORKERS' COMPENSATION COMMISSION,
Carrier / Appellee.

OPINION AND ORDER

Cite as: *Santos v. Public School System*, 2002 MP 012

Civil Action No. 94-0680
Hearing held June 7, 2001
Decided May 29, 2002

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO and JOHN A. MANGLONA, Associate Justices.

MANGLONA, Associate Justice:

¶1 Appellant Antonio A. Santos ("Antonio") appeals a Decision and Order of the Superior Court denying claims for workers' compensation benefits for the death of his wife, Susana A. Santos ("Susana" or "decedent"). We have jurisdiction pursuant to Article IV § 3 of the Constitution of the Commonwealth of the Northern Mariana Islands ("CNMI") and 1 CMC § 3102 (a). We reverse and remand with instructions.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The following issues are presented for our review:

I. Whether Antonio was barred from raising the issue of whether the decedent's death while traveling on behalf of her employer was compensable because of the "twenty-four hour rule,"[1] and, if not,

II. Whether the decedent's death while traveling on behalf of her employer was compensable because of the "twenty-four hour rule."

¶3 *Camacho v. Northern Marianas Retirement Fund*, 1 N.M.I. 364, 366 (1990) sets forth the proper standard of review for judicial review of agency action.[2] Our review of

[1] The "twenty-four hour rule," found in WCCRR § 3.102, provides, in pertinent parts:

> Any employee who travels within or without the Commonwealth on behalf of his/her employer shall be entitled to compensation as provided by law in the same manner as an employee who is injured on the job in the Commonwealth. The employee's coverage while on travel status is 24 hours each day ....

[2] In *Camacho*, we stated:

> We review the actions of NMI administrative agencies according to the dictates of the Commonwealth Administrative Procedure Act ("APA"), 1 CMC §§ 9101 et seq. The standards for judicial review of agency action are set forth in 1 CMC § 9112(f). Since we review agency action on the identical basis as the trial court, we are not required to accord any particular deference to the trial court's conclusions. Our review of the trial court's review of agency action is de novo.

the superior court's review of the agency action is de novo.[3] While we give "no special deference to the court's conclusion that the [agency's] was based upon substantial evidence, we are to affirm if we conclude that the court did not err in finding substantial evidence supporting the [agency's] decision, and if the [agency] did not misapply the law." *In re Hafadai Beach Hotel Extension*, 4 N.M.I. 37, 41 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Susana was an employee of the Public School System ("PSS") and worked under the Chamorro Bilingual Program as an Administrative Assistant. She had no medical history with respect to her health. Susana went to Tinian under an official travel authorization on February 9, 1992, to assist and participate in a series of scheduled workshops. On the night of February 11, 1992, Susana and her colleagues went to a nightclub after being hosted for dinner at a friend's house.[4] After one dance, she collapsed and lost consciousness. In the early morning of February 12, 1992, Susana was pronounced dead due to cardiac arrest.

¶5 On December 2,1992, Antonio submitted a claim to the Workers' Compensation Commission (hereinafter "WCC") for workers' compensation death benefits. An informal conference was held, and Administrative Hearing Officer Edward H. Manglona recommended that WCC pay the benefits. At this informal hearing, Antonio raised the issue of whether "employees on travel status are covered on a 24 hour basis[.]" ER 14. A formal hearing[5] was held on October 6, 1993; this hearing resulted in a decision in

[3] We reject Appellant's (Antonio's) assertion that we should apply a "clearly erroneous" standard of review. The Appellees' brief did not include the applicable standards of review.
[4] Appellant's *Excerpts of Record* at 23 and 89.
[5] The formal hearing was held before the same administrative hearing officer.

favor of WCC. At each of these hearings, the parties attempted to stipulate that the "twenty-four hour rule," Rule 3.102 of the WCC Rules and Regulations, did not apply.[6]

¶6 Antonio appealed the denial of benefits to the full WCC. The issue of the applicability of WCCRR § 3.102 was not raised in this appeal. The Commission denied the request for death benefits because Antonio had failed to establish a causal connection between Susana's death and the performance of her duties as a PSS employee.

¶7 Antonio then sought judicial review in the Superior Court. He moved for summary judgment, claiming that WCCRR § 3.102 applied and that he was entitled to the death benefits regardless of the activity at the time of Susana's death, as she was on Tinian at the request of PSS. The trial court denied Antonio's motion, ruling that Antonio was barred from raising the issue of WCCRR § 3.102 for the first time on appeal. Antonio timely filed his appeal with this Court.

I. Whether Antonio was barred from raising the issue of whether Susana's death while traveling on behalf of her employer was compensable because of the "twenty- four hour rule."

¶8 Antonio argues that issue of twenty-four hour coverage was raised below and that, but for a "comedy of errors," is properly before us at this time. As far as we can decipher from his briefs, Antonio argues that his counsel[7] was under the impression that the parties had stipulated that WCCRR § 3.102 was applicable to his claim, while the WCC "proceeded with the implied belief that [Santos] must prove that the decedent was covered by the 24-hour rule when [WCC] argued that the decedent's injury was not in the

[6] The record before us is inadequate in that, although it is the dispositive issue in this case, inexplicably, the actual agreement between the parties was not provided to us. In his decision, the administrative hearing officer wrote: "The issue stipulated between the parties was the matter of 24 hour coverage. The 24-hour rule found in the WCC Rules and Regulations was repealed because it was held to be unenforceable. *See Rebecca G. Constante v. McCart and CIGNA*, WCC Case SPN-91-269 (October 26, 1992)." We interpret this to be the stipulation.

[7] Juan T. Lizama, now a Superior Court judge, was the original attorney for Appellant.

course of her employment." Appellant's brief at 6-7. This disagreement, therefore, proves that "[c]learly, the 24-hr rule was far from being a non-issue." Id. at 7.

¶9 WCC argues that the issue of WCCRR § 3.102's alleged applicability to Antonio's claim was not raised until Antonio sought review in the Superior Court. We agree with WCC that the issue of WCCRR § 3.102 was not raised until the January 1998 summary judgment motion in the Superior Court. No honest reading of the record presented to us allows for the construction urged by Antonio.[8]

¶10 The appellate court's consideration of issues not raised below has been adduced in a number of cases. *See Camacho v. Northern Marianas Retirement Fund*, 1 N.M.I. 364, 372 (1990) (citing *CNMI v. Micronesian Insurance Underwriters, Inc.*, 3 CR 731, 738 (D.N.M.I. App. Div. 1989) and *Brown v. Civil Service Commission*, 818 F.2d 706 (9th Cir. 1987)); *Commonwealth v. Kaipat*, 1996 MP 20. An appellate court will generally not discuss an issue not raised below. *Limon v. Camacho*, 1996 MP 18 ¶9. Three exceptions to this general rule exist. First, we will consider an argument raised for the first time on appeal when a new theory or issue has arisen because of a change in the law while the appeal is pending. *Id.* That is not the case here. There has been no change to WCCRR § 3.102 since March, 1992.[9]

¶11 Next, we will consider an argument raised for the first time on appeal when the issue is purely one of law that does not rely on any factual record. *Id.*. Such is not the case here. The applicability of WCCRR § 3.102 to this case hinges on a factual record:

[8] Especially troublesome is the statement: "Whether there was a stipulation or not, one thing is clear: if they stipulated, the stipulation would have been whether the 24-hour rule coverage was, or was not, a disputed issue." Appellant's Brief at 6. There is absolutely no doubt that the parties entered into a stipulation.

[9] Prior to March, 1992, WCCRR § 3.102 was numbered WCCRR § 3.103; the regulation remained unchanged.

factual determinations such as: Susana (1) was an employee of an employer in the Commonwealth; (2) was traveling on behalf of her employer; and (3) was injured or died must be made. Although the requisite facts were either found by the court or admitted by the parties,[10] we will not consider the issue unless it does not rely on any factual record. *See id.*

¶12 Finally, we will review an issue not raised below when plain error was committed and an injustice might result unless we consider the issue. *Id.* We have had occasion to review issues not raised below due to the plain error exception. *See Ada v. Sablan*, 1 N.M.I. 415, 426-27 n.12 (1990) ("[The plain error exception is] applicable in this case."); *Commonwealth v. Kaipat*, 1996 MP 20 ¶9

¶13 In the present case, there is no question that plain error occurred. This error involves the stipulation. A bedrock tenet of American jurisprudence is "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60, 1 Cranch 137 (1803). Consequently, it is very well established that courts in the 9th Circuit are not bound by stipulations as to questions of law. *Swift & Co. v. Hocking Valley Railway Co.*, 243 U.S. 281, 289, 37 S.Ct. 287, 289, 61 L.Ed. 722 (1917) ("We treat the stipulation, therefore, as a nullity."); *Avila v. I.N.S.*, 731 F.2d 616, 620 (9 Cir. 1984) ("A stipulation of law is not binding on an appellate court."); *Smith Engineering Co. v. Rice,* 102 F.2d 492, 499 (9th Cir.1938), *cert. denied,* 307 U.S. 637, 59 S.Ct. 1034, 83 L.Ed. 1519 (1939) ("We see no reason why we

[10] "The decedent was an employee of the Public School System." Appellant's *Excerpts of Record* at 24. "The decedent was on an official travel required by her employer based on documentary evidence." *Id.* "The decedent had no medical history with respect to her health." Id. at 25. "On the night of 11 February 1992, *while on Tinian on behalf of PSS* . . . Decedent fell ill and later collapsed." Appellee's Brief at 2 (emphasis added).

should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties.").

¶14 Our review of the record convinces us that the administrative hearing officer felt bound to accept the stipulation of counsel. An exchange that occurred near the end of the formal hearing is revealing:

> MR. MANGLONA: So all these are now admitted into the record. *I would also like to say that everything that is in the file* other than that independent medical opinion *will be admitted as part of the record of this hearing.* Patrick, do you have any closing statements before we close the hearing?
> MR. TENORIO: Is the 24-hour status going to be an issue on the decision? Will that affect this case?
> MR. LIZAMA: I think that is not an issue.
> MR. TENORIO: So, Mr. Hearing Officer, that will not be brought into the decision when you decide on this case?
> MR. MANGLONA: *I will look at all available resources* to come up with a fair and impartial decision. Now do you have a closing statement?

E.R. 114 (emphasis added). The hearing officer did not apply WCCRR § 3.102; it is apparent, then, that he felt that WCCRR § 3.102 was not available to him because of the stipulation.[11]

¶15 While it is clear that plain error occurred, we must also determine that "an injustice might result unless we consider the issue." *Limon*, 1996 MP 18 ¶9. We are mindful of Appellee's position that "Any misunderstanding regarding the stipulation concerning the 24 hour rule rested solely with Appellant." Appellee's Brief at 6. We disagree. As will be seen, both parties were in error in regards to the stipulation.[12]

[11] The hearing officer explicitly cited the stipulation wherein the parties agreed that the "twenty-four hour rule" in WCCRR § 3.102 was "repealed because it was held to be unenforceable." Appellant's *Excerpts of Record* at 26.

[12] One party may waive an issue, but it takes two to stipulate.

¶16 Any assertion that "the 24 hour rule" in WCCRR § 3.102 "was repealed because it was held to be unenforceable" is a misstatement of the applicable law.[13]

¶17 In *Constante*, the claimant, a non-resident worker, was injured in an automobile accident while on her way to a Laundromat in Garapan prior to heading to work. *Rebecca G. Constante v. McCart and CIGNA*, WCC Case SPN-91-269 at 4 (October 26, 1992). Constante sought compensation for her injuries, "apparently relying on Rule 3.101."[14] *Id.* WCCRR § 3.102[15] was not implicated in *Constante*. In fact, the hearing officer went so far as to say, "The exception applies to employees who are required to travel in the performance of a job in order to advance the employers' interest. Not being a 'traveling employee', the claimant cannot and should not be subjected to the special rules accorded to that category of employees." *Id.* at 7.

¶18 Any doubt as to whether the 24-hour rule found in WCCRR § 3.103 was repealed disappears when one considers that WCCRR § 3.101 was repealed in its entirety on January 16, 1992, *id.* at 2, and WCCRR § 3.103 was, in its entirety, renumbered WCCRR § 3.102 in March, 1992. It remains an enforceable part of the WCC Rules and Regulations today. *See* WCC Rules and Regs., 14 Com. Reg. 9078 (Mar. 15, 1992). Therefore, because the parties to the stipulation and the hearing officer were operating

[13] Again, because of the inadequate record before us, we cannot be sure of the exact stipulation of the parties. It is possible that the hearing officer was laboring under a misconception as to what the applicable law was. We note that Administrative Hearing Officer Manglona was also the hearing officer in *Constante*. *See Rebecca G. Constante v. McCart and CIGNA*, WCC Case SPN-91-269 (October 26, 1992). If such were the case, our analysis would not change. It would be manifestly unjust to uphold a judgment when the tribunal proceeded under a mistaken understanding of the law of this magnitude.

[14] Rule 3.101 provided: "Non-resident worker employees shall be covered on a 24 hour basis whenever employed outside their country of origin, except as provided in 4 CMC 9303(d), or as deemed unreasonable by the Administrator."

[15] The former WCCRR § 3.103.

under an incorrect understanding of the relevant law, plain error was committed and an injustice might result unless we consider the issue.

II. Whether Susana's death while traveling on behalf of her employer was compensable because of the "twenty-four hour rule."

A. WCCRR § 3.102 does not create an irrebuttable presumption that any injury sustained by an employee while on travel status is automatically compensable under the Commonwealth's workers' compensation system.

¶19 Antonio argues that WCCRR § 3.102 conclusively presumes that an injury sustained by an employee while on travel status arises out of and in the course of her employment. Therefore, it is not necessary for the claimant to prove that her injury arose out of and in the course of her employment.[16] Consequently, Antonio is entitled to workers' compensation death benefits because Susana died while traveling on behalf of PSS.

¶20 WCC argues that WCCRR § 3.102 does not conclusively presume that an injury sustained by an employee while on travel status arises out of and in the course of her employment.[17] WCC next argues that the construction urged by Antonio runs afoul of the intent of workers' compensation system, stating: "Worker's compensation is not designed to contemplate coverage or benefits for situations in which an employee is pursuing, or engaged in, activities not related to employment."[18] Finally, WCC argues that the construction advanced by Antonio would place WCCRR § 3.102 outside the scope of statutorily permissible coverage delineated in 4 CMC § 9303(a).[19]

[16] For these propositions, Antonio cites WCCRR § 3.102 and 4 CMC § 9303(a).
[17] For these propositions, WCC cites WCCRR § 3.102 and 4 CMC § 9303(a).
[18] WCC cites *Malacarne v. City of Yonkers Parking Authority*, 391 N.Y.S. 2d 402, 406 (1976) for this assertion.
[19] 4 CMC § 9303(a) reads: "Compensation shall be payable under this chapter in case of disability or death of an employee, but only if the disability or death results from an injury or illness arising out of and in the course of employment."

¶21 We agree with WCC that WCCRR § 3.102 does not create an irrebuttable presumption that any injury sustained by a traveling employee is automatically compensable under the Commonwealth's workers' compensation statutes.

¶22 At first blush, a plain reading of the rule would lead a reasonable person to believe that WCCRR creates the conclusive presumption urged by Antonio. This is due to the phrase "on the job." It must be noted that the phrase "on the job" is neither defined in the Workers' Compensation Rules and Regulations; nor is it defined in the Commonwealth Code,[20] nor have we considered the issue. When construing statutes, we use the plain meaning of words. *Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995). Our understanding of the plain meaning of "on the job" translates to "at work, while working." Thus, one could read WCCRR § 3.102 as authorizing payment to a traveling employee in the same manner as an employee who is injured at work, while working; certainly a compensable claim.

¶23 The construction advanced by WCC would tend to render the phrase "on the job" superfluous. An employee who had to prove that his injury was job related would be treated "in the same manner as an employee who was injured in the Commonwealth" and not "in the same manner as an employee who was injured on the job in the Commonwealth." Courts generally do not disregard words or phrases when construing

[20] The phrase occurs once in the Commonwealth Code at 1 CMC § 8117, which reads in pertinent part:

> Pursuant to the Administrative Procedure Act (1 CMC § 9101 et seq.) and 1 CMC § 8116(a), the Civil Service Commission shall prepare reasonable rules and regulations to carry out the provisions of this act. The rules and regulations shall:
>
> (a) Regulate appointments, promotions, removals, and other personnel matters;
>
> (b) Contain uniform provisions covering the method and manner of conducting examinations; **on the job** training programs; a uniform performance evaluation system, including the manner in which ratings are to be used in promotions; salary increases, suspensions and separations; and position classification

1 CMC § 8117 (emphasis added). Our understanding of "on the job training" is training one receives at a job, while performing the job.

statutes or administrative regulations. *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301,304 (9th Cir. 1995)("We may not interpret a statute so as to render some of its language superfluous; at any rate, we may not do so lightly."). Thus, it appears that WCCRR § 3.102 would tend to create a presumption that any injury sustained by an employee on travel status would be compensable.

¶24 However, WCC correctly asserts that WCCRR § 3.102 may not be construed without deference to the workers' compensation statutes. 4 CMC § 9351 is the statutory grant of authority to the WCC.[21] The WCC may make any rule needed to administer the workers' compensation system unless the legislature has specifically provided otherwise.

¶25 The rule presumes that any injury sustained by an employee on travel status is compensable. 4 CMC § 9303(a) dictates that compensation is only available to employees suffering disability or death "if the disability or death results from an injury or illness arising out of and in the course of employment." That portion of WCCRR § 3.102 that purports to authorize payment of injuries, which do not arise out of and in the course of employment, is *ultra vires* and null.

B. Did Susana's death arise out of and in the course of her employment?

¶26 To be compensable, Susana's injury must have arisen from and in the course of her employment. Generally, an accident will arise out of employment "when there is a 'causal relationship' between the injury and the employment." *Bucznski v. Industrial Commission of Utah*, 934 P.2d 1169 (Utah.Ct. App. 1997) (citing *Commercial Carriers v. Industrial Comm'n*, 888 P.2d 707, 712 (Utah.Ct.App. 1994)). This does not, however,

[21] 4 CMC § 9351 states, in pertinent part: "(a) Except as otherwise specifically provided the Workers' Compensation Commission shall administer the provisions of this chapter, and for such purpose the commission may:
(1) Make rules and regulations in conformance with this chapter."

mean that the injury must be "'caused by' the employment; rather, the employment 'is thought of more as a *condition* out of which the event arises that as the force producing the event in affirmative fashion.'" *Buczynski*, 934 Pl2d at 1172)citing *Commercial Carriers*, 888 P.2d at 712 (quoting 1 Arthur Larson, *The Law of Workmen's Compensation* § 6.60, at 3-9 (1994)) (emphasis in quoted treatise).

¶27 The phrase "in the course of" generally refers to "the time and place of the injury." *Western Airlines v. Workers' Compensation Appeals Board*, 202 Cal.Rptr. 111 (1982). Notwithstanding these seemingly simple definitions, there can be no doubt that the question of whether an injury "arises from and in the course of employment" is an issue about which reasonable people can, and usually do, differ.

> The few and seemingly simple words "arising out of and in the course of the employment" have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute.

Herbert v. Foxx & Co., Ltd., [1916] 1 App. Cas. 405, 419 (appeal taken from Yorkshire).

¶28 The majority of jurisdictions relax the normally stringent requirements of whether an injury arises out of and in the course of employment when an employee travels on the behest of her employer:

> The traveling employee is generally considered to be within the scope of his employment throughout his sojourn:
> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdiction[s] to be within the course of their employment continuously during the trip, except when a distinct depart[ure] on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.

Appeal of Griffin (New Hampshire Compensation Appeals Board), 671 A.2d 541, 544

(N.H. 1996) (quoting 1A A. Larson, *The Law of Workmen's Compensation* § 25.00, at 5-275 (1995) (footnote omitted).

¶29 Applying the "traveling employee rule"[22] to the facts of this case, we do not hesitate to determine that Susana's death arose out of and in the course of her employment. 4 CMC §9329 is a statutory presumption that a claim comes within the purview of the workers' compensation statutes.[23] This is a clear expression of the legislature's intention to provide coverage in "close cases." In this case, however, the presumption is unnecessary.

¶30 A review of case law guides our decision in this case. In *Capizzi v. Southern District Reporters*, 61 N.Y.2d 50 (1984), the claimant was a typist for a court reporting firm in New York City. She went on a business trip to Toronto, Ontario, to transcribe notes of the minutes of depositions being held there. Capizzi slipped and fell as she entered the hotel bathtub to take a shower in preparation for her return trip. The Appellate Division denied Capizzi's claim, holding that injuries sustained by an out-of-town employee due to a slip and fall while showering in a motel room are ordinarily non-compensable because they are attributable solely to the personal acts of the employee unless the claimant's employment first causes him or her to become physically dirty and

[22] The valid portion of WCCRR § 3.102 is, in our opinion, nothing more than a codification of the "traveling employee rule." We agree with the WCC and the majority of jurisdictions that have considered the issue that the "traveling employee rule" provides the proper analysis for determining the compensability of injury or death of traveling employees. Consequently, to clarify the law in the CNMI regarding traveling employees, we now adopt the majority rule and hold that a traveling employee is generally considered to be in the course of her employment continuously during the duration of the entire trip, except when there is a distinct departure on a personal errand. Therefore, the injury or death of a traveling employee occurring while reasonably engaged in a reasonable recreational or social activity arises out of and in the course of that employee's employment.

[23] 4 CMC § 9329 reads, in pertinent part: In any proceedings for the enforcement of a claim for compensation under this chapter, it shall be presumed, in the absence of substantial evidence to the contrary:

(a) That the claim comes within the provisions of this chapter."

then requires a neat appearance.

¶31 The Supreme Court reversed, holding that if an employee "is directed, *as part of his duties,* to remain in a *particular* place or locality…for a specified length of time…the rule applied is simply that the employee is not expected to wait immobile, but may indulge in any *reasonable* activity at that place, and if he does so the risk inherent in such activity is an incident of his employment" *Id.* at 53.

¶32 In *Savin Corporation v. McBride*, 894 P.2d 1261 (Ct.App.Ore 1995), the claimant worked as an engineer throughout central Oregon. She was dispatched to specific job sites from the Portland office. She normally worked from 8:00 a.m. to 4:30 p.m., Monday through Friday. She was considered "clocked out" following the last call of the day. On the date of her injury, she completed an assignment in LaPine at about 3:30 p.m. She was directed to a final call, but subsequently was informed that the work order had been canceled and that she was released for the day.

> Rather than return directly to her home in Bend, however, claimant decided to stop at a nearby bank… a diversion of three to five blocks from the route on which she would return [home]. The bank business took some five minutes. Claimant then returned to her car and began driving [home]. As she drove through Redmond, she was hit by another car …and was injured. The accident took place a few blocks before she returned to the route that she would have used to return home if she had not gone to the bank.

Id. (quotation omitted).

¶33 After quoting from Larson a litany of situations where personal errands were held not to be purely personal departures,[24] the court held that notwithstanding Claimants'

[24] The quotation from Larson reads as follows:

> [C]ourts now generally recognize that human beings do not run on tracks like trolley cars, and therefore uphold awards in situations like the following: getting cigarettes during a trip to or from work in the employer's conveyance; running across the street in the course of a delivery trip to buy a little food; driving one's daughter to school, dropping one's wife off at church, leaving a message with one's sister about working late, picking up mail for vacationing friends, crossing the street during a beer break to retrieve one's

personal departure, her injuries arose out of and in the course of her employment as her errand was not a "distinct departure." *Id.* at 1264 n.2[25].

¶34 In *Blakeway v. LeFebure Corp.*, 393 So.2d 928 (La.Ct.App 1981), the claimant, employed in New Orleans, Louisiana, was sent to a two-week training seminar in Cedar Rapids, Iowa. The company provided him with a motel room in Cedar Rapids. Seminar classes began on Monday, July 9, 1979, and were conducted from 7:30 a.m. to 4 p.m., Monday through Friday, for the two-week period. On Sunday, July 15, 1979, the claimant was injured when he dove into the motel swimming pool between 5 and 6 a.m. Blakeway's claim was initially denied. *Id.* at 929. The appellate court reversed, holding that the injury arose out of[26] and in the course of[27] his employment.

¶35 In *Gray v. Eastern Airlines, Inc.*, 475 So.2d 1288 (Fla App. 1985), the claimant, a flight attendant, was injured during a two-day layover. The claimant broke his nose while playing in a "pick-up" basketball game at a YMCA near the hotel. Although the accident occurred "in the course of sports activity for personal health and recreation," the court still held that the accident arose out of and in the course of Gray's employment:

> A foreseeable, nonprohibited, off-premises refreshment break has not been considered to be a deviation removing a claimant from the course and scope of employment. Entitlement to compensation would therefore appear to be reasonably arguable for claimant in the present case if he had incurred his injury in a store or restaurant while purchasing necessary food
>
> lunch, stopping at one's home to get a raincoat and leave some meat; crossing the road during a delivery trip to have a glass of beer at 2:00 in the afternoon; or to get a newspaper; making a personal phone call; looking for a ring; picking up two young ladies and taking them home while driving a car to test its brakes; buying a toy during spare time to take home to a child; and even picking cherries from a customer's cherry tree." Larson, 1 *Workmen's Compensation Law* § 19.63 at 4-434 (footnotes omitted).

[25] The court stated: "Because we conclude that claimant's personal errand to the bank was not a distinct departure, we need not address employers second assignment of error."

[26] "One could hardly expect these employees to retire to their rooms and remain practically immobile on each day when the classes ended and for the week end." *Id.* at 930.

[27] "While plaintiff was not in a paid status after Friday afternoon he was still required to be in the motel at Cedar Rapids so as to be back at class at 7:30 a.m. on Monday. Thus, we conclude that the accident occurred during the course of his employment." *Id.* at 931.

> or drink. We conclude that for the claimant in this case, under the circumstances here in question including an enforced lay-over of more than minimal duration, exercise at a nearby facility should be regarded as necessary for the same reasons underlying extension of course of employment in the foregoing cases to other activities reasonably required for personal health and comfort.

Id. at 1289, 1290.

¶36 Of course, there have also been instances where an employee was injured while traveling on behalf of his employer that were held not to have arisen out of and in the course of employment. In *Buczynski v. Industrial Commission of Utah*, 934 P.2d 1169 (Ct. App Utah 1997), the claimant was employed as an assistant professor at Utah State University. As part of her employment, claimant was required to present a scholarly paper at a convention in Baltimore, Maryland. *Buczynski*, 934 P.2d at 1170. The court noted the details:

> In accordance with the general plan to attend the Baltimore convention, petitioner and her companion flew on March 24, 1992, from Salt Lake City to Dulles International Airport, near Washington, D.C. Instead of driving to the Baltimore area, however, petitioner and her companion drove in the opposite direction to McGaheysville, Virginia, located some 150 miles from the convention site. Upon arriving in McGaheysville, petitioner and her companion checked into a room at the Massanutten Hotel, which they had reserved some months earlier. One amenity offered by the hotel was a hot tub, which petitioner and her companion enjoyed on the evening of March 26. After relaxing in the hot tub, petitioner exited to change into her sweatpants. While walking in the direction of the changing room, petitioner stepped into a puddle of water, apparently caused by run-off from the adjacent swimming pool, and fell, injuring her right knee. Emergency personnel were summoned to transport petitioner to the emergency room, where she was diagnosed as having knee strain and a "possible quadriceps tear."

Id. at 1170-71.

¶37 The injury suffered by claimant was found to be not compensable not because the injury happened while exiting a hot tub;[28] the court determined that, because claimant

[28] The court did not reach that issue.

intended the entire two day trip to Virginia, 150 miles from the convention site, to be more personal than work-related, the injury did not arise out of or in the course of her employment.[29] *Id.* at 1176-77. In short, the trip seems more like a personal vacation.[30]

¶38 In *Marbury v. Industrial Commission*, 577 N.E.2d 672 (1989), the claimant was an administrator at Sinclair Community College in Ohio. She attended a conference for college administrators in Baltimore, Maryland.

> The conference meetings took place between 9:00 a.m. and 5:00 p.m....At 5:00 p.m. on one of the days in the middle of the conference, a bus tour of Washington, D.C. was available to the conference participants at an additional cost. Marbury went on the bus tour ... [T]he last stop on the tour, between 9:30 p.m. and 10:00 p.m., was at a souvenir shop in Washington, D.C. The participants were free to exit the bus and shop at the souvenir shop, but were not required to do so. At her deposition, Marbury testified that her purpose in entering the souvenir store was to purchase a T-shirt for her daughter, which she did. Upon her entry into the store, she slipped and fell on the store floor, sustaining injuries.

Id. at 672-73. Marbury filed a claim for workers' compensation benefits; that claim was denied.[31] *Id.* at 673.

¶39 The Ohio Court of Appeals upheld the trial court's determination that Marbury's injuries arose outside of the course of her employment. The court held:

> [I]t is not disputed that Marbury was within the course of her employment, at least for workers' compensation purposes, when she participated in the Baltimore conference. When the evidence is viewed in a light most favorable to Marbury, a reasonable mind might conclude that she was still within the course of her employment, for workers' compensation purposes,

[29] The court stated: "From this evidence, we can only conclude that the Commission properly determined that petitioner's side trip to McGaheysville constituted a distinct departure from the business of her employer."

[30] The court in *Buczynski* intimated that even a short personal vacation tacked on to the beginning or end of a business trip could be compensable if the extra days resulted in some savings on airfare to the employer.

[31] A district hearing officer initially allowed Marbury's claim. *Id.* The Dayton Regional Board of Review of the Industrial Commission reversed the district hearing officer's decision, holding that Marbury's injury did not occur in the course of her employment. Upon Marbury's administrative appeal, the Industrial Commission vacated the decision by the Dayton Regional Board of Review and reinstated the district hearing officer's decision allowing her claim. Sinclair appealed to the Montgomery County Common Pleas Court. That court granted Sinclair's motion for summary judgment, holding that the injuries for which Marbury sought compensation did not occur in the course of her employment. *Id.*

> when she participated in the bus tour of the Washington, D.C. area. However, reasonable minds can only come to the conclusion that when she left the bus and entered a souvenir shop in Washington for the purpose of purchasing a T-shirt for her daughter, she was on a purely personal mission of her own, having nothing to do with her employer's purposes, and was therefore outside the course of her employment.

Id. at 674.

¶40 We find the present case to be akin to *Capizzi*, *Savin Corp.*, *Blakeway* or *Gray* type of case than a *Bucyznski* or *Marbury* case. Unlike the claimant in *Buczynski*, Susana was not injured on a personal vacation that was merely tacked on to the beginning or end of a business trip. Susana was injured while on travel status. Unlike the claimant in *Marbury*, who left a tour to purchase something for her child, Susana was relaxing "at the Hideaway Nightclub where she and her colleagues enjoyed some soda pops." E.R. 23.

¶41 While one may argue that there is no distinction between shopping for a child and dancing in a nightclub in that neither activity seems to benefit the employer, there is a meaningful distinction in the context of workers' compensation law. "[T]he test as to whether specific activities are considered to be within the scope of employment or purely personal activities is the reasonableness of such activities. Such an employee may satisfy physical needs including relaxation." *Robards v. New York Div. Electric Products, Inc.,* 307 NYS 2d 599, 600-01 (1970) (citation omitted). While there has been no assertion that Susana danced as a form of exercise, we have no doubt that she was relaxing with her colleagues at the nightclub.

¶42 PSS had to contemplate that Susana and her colleagues would participate in some recreation while on Tinian for the scheduled workshops. It would be unreasonable and unjust to expect Susana to have locked herself in her hotel room and sit motionless every evening. It is reasonable to expect conference participants to socialize outside the

confines of the conference. Susana, in enjoying an evening by dancing with her colleagues was engaged in a reasonable activity. The activity is certainly not a "distinct departure" in the context of workers' compensation law. Finally, we can see no meaningful distinction[32] between a healthy claimant on travel status stepping onto the basketball court and leaving with a broken nose and the present situation where a woman on travel status with "no medical history with respect to her health" steps onto the dance floor and suffers a heart attack. Both injuries arise out of and in the course of the respective claimant's employment.

¶43 WCCRR § 3.102 should have been applied to this case. When the proper law is applied to the facts of this case, Antonio has established that coverage exists. All that remains is a determination of the proper amount of compensation owed to him.

CONCLUSION

For the foregoing reasons, we REVERSE and REMAND to the Workers' Compensation Commission for proceedings consistent with this opinion.

SO ORDERED THIS 29 DAY OF MAY, 2002.

MIGUEL S. DEMAPAN, CHIEF JUSTICE

ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

JOHN A. MANGLONA, ASSOCIATE JUSTICE

[32] There is, of course, a large distinction in the gravity of the injuries.