

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1997 MTWCC 72**

**WCC No. 9707-7788**

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**REGINA KUHRT**

**Petitioner**

**vs.**

**STATE COMPENSATION INSURANCE FUND**

**Respondent/Insurer for**

**FIRST FEDERAL SAVINGS AND LOAN**

**Employer.**

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**DECISION AND ORDER**

**Summary:** Savings and Loan teller parked on public street next to place of employment and fell when getting out of her pick-up. Parties disputed whether her accident occurred in the course and scope of employment and stipulated to the following: claimant received no travel pay to commute to work; parking was not available to claimant in any lot maintained by the employer; the employer "suggested" she park on the street.

**Held:** Consistent with *Heath v. Montana Mun. Ins. Auth.*, WCC No. 9702-7700, the accident was not in the course and scope of employment. Claimant was still traveling to work when she was injured. Under section 39-71-407, MCA (1995), for the travel to be compensable, either the employer must reimburse for travel costs or the travel must be required as part of the job duties. It is well settled in Montana that going to and from work, absent compensation for the travel, is not a part of the employee's job duties.

**Topics:**

**Constitutions, Statutes, Regulation and Rules: Montana Code Annotated: section 39-71-407, MCA (1995).** Slip and fall of savings and loan teller when getting out of her pick-up on a public street, before starting work, was not in the course and scope of employment. Parties stipulated that claimant received no travel pay to commute to work, that parking was not available to claimant in any lot maintained by the employer, and that employer "suggested" she park on the street. Claimant was still traveling to work when she was injured. Under section 39-71-407, MCA

(1995), for the travel to be compensable, either the employer must reimburse for travel costs or the travel must be required as part of the job duties. It is well settled in Montana that going to and from work, absent compensation for the travel, is not a part of the employee's job duties.

**Employment: Course and Scope: Coming and Going.** Slip and fall of savings and loan teller when getting out of her pick-up on a public street, before starting work, was not in the course and scope of employment. Parties stipulated that claimant received no travel pay to commute to work, that parking was not available to claimant in any lot maintained by the employer, and that employer "suggested" she park on the street. Claimant was still traveling to work when she was injured. Under section 39-71-407, MCA (1995), for the travel to be compensable, either the employer must reimburse for travel costs or the travel must be required as part of the job duties. It is well settled in Montana that going to and from work, absent compensation for the travel, is not a part of the employee's job duties.

This is a course and scope case involving a slip and fall as the claimant was exiting her vehicle on a public street next to her place of employment. The dispute is submitted to the Court on a Statement of Stipulated Facts and the briefs of the parties. With the filing of Petitioner's Reply Brief on November 10, 1997, the Court deemed the matter submitted and ready for decision.

Issue presented: The sole issue presented to the Court is whether the petitioner's slip and fall injury arose out of and in the course and scope of her employment.

#### Stipulated Facts

1. On January 9, 1997, Regina Kuhrt was employed as a teller with First Federal Savings and Loan in Hamilton, Montana.
2. Ms. Kuhrt worked a 40 hour week with various daily start and end times.
3. Ms. Kuhrt receives no travel pay to commute to or from her place of employment.
4. On the morning of January 9, 1997, Ms. Kuhrt traveled to work arriving shortly before 8:00 a.m. Snow had accumulated overnight on Baker Street, a public street next to First Federal Savings and Loan.
5. She parked her four-wheel drive pick up [sic] on Baker [S]treet, and proceeded to exit the pick up [sic] truck. Upon opening the door of the truck and placing her feet on the snow/ice covered roadway, Ms. Kuhrt slipped and injured her back.
6. Parking for employees of First Federal Savings and Loan is available as follows:
  - a. There is a parking lot owned by the employer with limited parking spaces. These parking spaces are allocated to employees on the basis of seniority and given Ms.

Kuhrt's short tenure with the employer she was not allocated a spot in this parking lot.

b. Another parking lot is located near the savings and loan building that is leased to another business. As part of the lease, there is limited access in this parking lot for employees of First Federal Savings and Loan. The spaces however, are not allocated to any specific employee and are available on a "first come" basis.

c. There is a customer parking lot immediately in front of the savings and loan and all employees are prohibited from parking in that lot.

d. When an employee first starts working with First Federal Savings and Loan the President advises them not to park in the customer parking lot or the parking lot reserved for senior employees. The President instead suggests they park on the public streets or in the leased parking lot that has limited spaces available. Ms. Kuhrt, however, was unaware of the suggestion that employees could park in the leased parking lot.

(Statement of Stipulated Facts at 1-2.)

#### Discussion

The decision in this case is controlled by this Court's September 25, 1997 decision in *Heath v. Montana Mun. Ins. Auth.*, WCC No. 9702-7700. In *Heath* I found that claimant was still traveling to work when she fell on a public sidewalk adjacent to the public street in front of her place of employment, thus she was not acting in the course and scope of her employment when injured. The factual scenario in this case is indistinguishable.

In *Heath* the claimant worked for the Lewistown Police Department as a dispatcher. Her job did not require her to drive to work and she was not paid to travel to or from work. She was told she could park in any of the parking lots or on the street, except on Watson Street immediately in front of the building in which she worked. The day she was injured, Heath parked her car in a lot adjacent to the city building and then walked down the sidewalk on Watson Street. As she approached the sidewalk leading to the police department, she slipped and fell.

In finding that Heath was not in the course and scope of her employment, I noted the long standing rule that employees are not covered under the Workers' Compensation Act while going to and from work. (*Heath* at 3-4.) Since the announcement of that rule, the Montana legislature has enacted statutes specifically addressing travel. The statute in effect at the time Regina Kuhrt was injured provides in relevant part:

*(3) An employee who suffers an injury or dies while traveling is not covered by this chapter unless:*

(a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) *the travel is required by the employer as part of the employee's job duties.*

§ 39-71-407, MCA (1995), (italics added). The claimant was not paid for travel to and from work, hence (3)(a) does not apply. Similarly, going to and from work, absent payment for the travel, is not a part of an employee's job duties. *Murray Hospital v. Angrove*, 92 Mont. 101, 109, 10 Pac. 577 (1932); *Griffin v. Industrial Accident Fund*, 111 Mont 110, 115, 106 Pac. 346 (1940); *Hagerman v. Galen State Hosp.*, 174 Mont. 249, 251, 570 P.2d 893, 894 (1977); *Gordon v. Smith Construction Co.*, 188 Mont. 166, 170, 612 P.2d 668, 670 (1980); *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16, 692 P.2d 417, 418 (1984); *Correa v. Rexroat Tile*, 217 Mont. 126, 128, 703 P.2d 160, 162 (1985); *Ogren v. Bitterroot Motors, Inc.*, 222 Mont. 515, 520, 723 P.2d 944, 947 (1986); *Buhl v. Warm Springs State Hosp.*, 236 Mont. 363, 364, 769 P.2d 1258, 1259 (1989); and *Hetland v. Magnum Petroleum*, 225 Mont. 389, 391, 733 P.2d 343, 345(1987).

Claimant, however, urges that because her employer suggested that she park her car on Baker Street, her parking on that street was of "special benefit" to her employer, thereby taking her injury out of the going and coming rule. The uncontested facts prepared and submitted by the parties in this case do not support her contention. While the stipulated facts state that the bank president "suggested" that the claimant park either in the leased parking lot or on the public streets, there is no evidence that she was required to park on Baker Street. The parking lot and street were offered as suggestions as to where she could park. Nothing in the way the stipulation is phrased "suggests" that claimant was required to park on Baker Street, or anywhere else for that matter.

In *Voorhies v. Park Cafe, Inc.*, 175 Mont. 232, 573 P.2d 202 (1978), the Supreme Court invoked the to and from work doctrine with respect to an injury in a public alley which occurred approximately two car lengths from the back door of the cafe where claimant worked. Claimant argued that her fall should be covered because she parked her car in the alley and said it was her understanding that she was supposed to park her car "in the rear or alley behind the cafe." *Id.* at 233, 573 P.2d 203. The Court rejected her argument, finding that there was no evidence of "any mandatory parking arrangement of any kind."

*Id.* at 234, 573 P.2d 204.

The claimant in the present case was not required to drive to work, was not assigned a parking place, and was not required to park in any particular place. At the time of her injury, she had parked and was exiting her pickup. She had not reached the premises of her

employer, thus she was still traveling to work and was not in the course and scope of her employment.

A copy of the *Heath* decision is attached.

JUDGMENT

1. Claimant was traveling to work when injured on January 9, 1997. She was not acting in the course and scope of her employment, and her injury is not covered under the Montana Workers' Compensation Act.

2. The petition is **dismissed with prejudice**.

3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

4. Any party to this dispute may have 20 days in which to request a rehearing from this Decision and Order.

DATED in Helena, Montana, this 30th day of December, 1997.

(SEAL)

\s\ Mike McCarter

JUDGE

c: Mr. Robert K. Ogg

Mr. Thomas E. Martello

Submitted: November 10, 1997

Attachment: *Heath* Order Granting Summary Judgment (9/25/97)

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**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**WCC No. 9702-7700**

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**ANGELA HEATH**

**Petitioner**

**vs.**

**MONTANA MUNICIPAL INSURANCE AUTHORITY**

**Respondent/Insurer for**

**CITY OF LEWISTOWN POLICE DEPARTMENT**

**Employer.**

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## ORDER GRANTING SUMMARY JUDGMENT

This is a course and scope case involving a slip and fall on a public sidewalk adjacent to the street on which claimant's workplace was located. The dispute is submitted to the Court on cross-motions for summary judgment. Respondent filed its motion on May 9, 1997. Petitioner filed her motion on May 28, 1997. On July 18, 1997, counsel orally argued the motions to the Court. With the filing of petitioner's deposition on July 22, 1997, the Court deemed the motions submitted and ready for decision.

Issue presented: The sole issue presented to the Court is whether the petitioner's slip and fall on the public sidewalk outside her place of employment occurred in the course and scope of her employment.

### Facts

The parties are not in total agreement as to the facts material to their motions. Nonetheless, after reviewing the factual record they have submitted, and accepting as true those facts which are set forth in their briefs without contradiction,<sup>(1)</sup> it is clear that the facts essential for resolution of the issue presented by the petition are undisputed and that summary judgment is appropriate. The undisputed, material facts essential for decision are set forth, in narrative form, in the following paragraphs. Since the record consists of a short deposition of claimant, and exhibits attached to the deposition, citations are omitted.

On April 2, 1996, the petitioner, Angela Heath (claimant), began working as a dispatcher for the Lewistown Police Department. The police department is located in the Lewistown City Building.

The city building fronts on Watson Street, which is a public street maintained by the City of Lewistown. Adjacent to and abutting the street is a public sidewalk, which will hereinafter be called the "Watson Street sidewalk."

On the side facing Watson Street, the city building has three separate entrances, one for the fire department, one for the police department, and the third for other city offices. Separate sidewalks link each of the three entrances to the Watson Street sidewalk. The sidewalks and entrances can be seen on the photographs which were attached to claimant's deposition as Exhibits 1 through 3. Those photographs are reproduced at the end of this decision. The sidewalks and entrances are also depicted in a diagram which is attached to claimant's deposition. A copy of that diagram is similarly attached at the end of this decision.

In addition to the front entrances, the police department has an additional entrance at the rear of the building. The police department's rear entrance is locked, but police department

employees are provided keys to that entrance. Claimant, however, had not yet received a key when she was injured.

There is a parking lot behind the city building and a second lot adjacent to and on the right side of the building when viewed from Watson Street. A "through way" or alley separates the adjacent lot from the building. There is also a third parking lot across Watson Street from the building.

The rear parking lot has several parking spaces reserved for police department employees. Otherwise, all spaces in the parking lots and on the street, with the exception of a fire lane directly across from the city building, are unreserved and open for parking not only by city employees but by the general public. The parking lot adjacent to the building serves the city building and a nearby community center.

Claimant was not required to drive to work and was not paid to do so. She was told she could park in any of the parking lots or on the street, except on Watson Street immediately in front of building.

On April 3, 1996, her second day of work, claimant left her home for work at approximately 7:30 a.m. She drove to work in her car, arriving at the city building at approximately 7:35 a.m. She parked in the lot adjacent to the building. After exiting her car, claimant walked across the through way and then down the Watson Street sidewalk. As she approached the sidewalk leading to the police department, she slipped and fell. At the time of her fall, she was still on the Watson Street sidewalk and had not entered the sidewalk leading to the police department. A diagram showing where she parked her car, the path she walked thereafter, and the place of her fall is attached to this decision.

At the time of her fall, petitioner's shift had not begun, she was not being paid, and she was performing no work-related duties.

On April 3<sup>rd</sup>, the City of Lewistown was insured by the Montana Municipal Insurance Authority (MMIA). Claimant submitted a claim to MMIA, which denied the claim on the ground that the injury did not occur in the course and scope of her employment.

#### Summary Judgment Standard

Court rule 24.5.329 governs motions for summary judgment. Subsection (2) sets forth the standard for granting summary judgment, providing:

(2) Subject to the other provisions of this rule, summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for production, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

This standard is the same standard provided by Rule 56(c), MONT. R. CIV. P.

### Discussion

It has long been the rule in Montana that employees are not covered under the Workers' Compensation Act while going to and from work. The rule was established in *Murray Hospital v. Angrove*, 92 Mont. 101, 109, 10 P.2d 577 (1932), and has been consistently reaffirmed in the 65 years since, see *Griffin v. Industrial Accident Fund*, 111 Mont 110, 115, 106 P.2d 346 (1940); *Hagerman v. Galen State Hosp.*, 174 Mont. 249, 251, 570 P.2d 893, 894 (1977); *Gordon v. Smith Construction Co.*, 188 Mont. 166, 170, 612 P.2d 668, 670 (1980); *Courser v. Darby School Dist. No. 1*, 214 Mont. 13, 16, 692 P.2d 417, 418 (1984); *Correa v. Rexroat Tile*, 217 Mont. 126, 128, 217 Mont. 160, 162 (1985); *Ogren v. Bitterroot Motors, Inc.*, 222 Mont 515, 520, 723 P.2d 944, 947 (1986); *Buhl v. Warm Springs State Hosp.*, 236 Mont. 363, 364, 769 P.2d 1258, 1259 (1987); and *Hetland v. Magnum Petroleum*, 225 Mont. 389, 391, 733 P.2d 343, 345 (1987). The fact that an employee is traveling to or from work does not automatically disqualify her from benefits, but the exceptions to the general rule of no coverage involve cases in which the employee is paid for her travel and/or the travel specially benefits the employer, *Hetland*, 225 Mont. at 391, 733 P.2d at 345; and see, e.g., *Guarscio and Courser* (cited above).

In 1987, the legislature enacted a statute specifically addressing travel. That statute, which was in effect at the time the claimant in this case injured herself, provides:

(1) Each insurer is liable for the payment of compensation, in the manner and to the extent provided in this section, to an employee of an employer that it insures who receives an injury arising out of and in the course of employment or, in the case of death from the injury, to the employee's beneficiaries, if any.

....

(3) *An employee who suffers an injury or dies while traveling is not covered by this chapter unless:*

(a) (i) the employer furnishes the transportation or the employee receives reimbursement from the employer for costs of travel, gas, oil, or lodging as a part of the employee's benefits or employment agreement; and

(ii) the travel is necessitated by and on behalf of the employer as an integral part or condition of the employment; or

(b) *the travel is required by the employer as part of the employee's job duties.*

§ 39-71-407, MCA (1995) (italics added). In *State Compensation Mut. Ins. Fund v. James*, 257 Mont. 348, 849 P.2d 187 (1993), the Supreme Court construed the statute as codifying existing law, both as to the exceptions adopted in prior Court decisions and the general rule

that coverage exists only where the travel is in the course and scope of employment. Noting that subsection 39-71-407(3)(a), MCA (1987), was inapplicable because the claimant in that case was not being paid for her travel, the Court went on to say:

Under subparagraph (b), the employee is not covered unless the travel is required as "part of" the employee's job duties. Prior to the enactment of the above statute, we held in *Massey v. Selensky* (1987), 225 Mont. 101, 731 P.2d 906, that the general rule was that travel to and from an employee's place of work was outside the *course and scope* of his employment. We here construe the phrase "as part of" from paragraph (b) of § 39-71-407(3), MCA, as equivalent to the phrase "in the course and scope of" employment from the previous common law.

*Id.* at 352, 849 P.2d at 190. In *Dale v. Trade Street, Inc.*, 258 Mont. 349, 357, 854 P.2d 828, 832-33 (1993) and in *Carrillo v. Liberty Northwest Ins.*, 278 Mont. 1, 8, 922 P.2d 1189, 1194 (1996), the Court reiterated its view that section 39-71-407(3), MCA (1987), merely codifies existing law governing going to and from work.

Thus, this Court must look not only to section 39-71-407(3), MCA (1995), in resolving this case, but also to historical precedents regarding travel to and from work.

Initially, claimant was not paid to travel to and from work; therefore, as in *James*, section 39-71-407(3)(a), MCA (1995), is inapplicable. Further, going to and from work does not in itself provide a special benefit to the employer, otherwise the general rule would be no rule at all. "If merely securing the employee's presence at work is in every case a 'special benefit,' the exception swallows up the rule." *Buhl*, 236 Mont. at 365, 769 P.2d at 1259 (quoting the Workers' Compensation Court decision below); and see *Ogren*, 222 Mont. at 521, 723 P.2d at 947 ("It is hard to imagine how traveling to one's regular work place on a regular workday can be for the special benefit of an employer.").

Under well established precedents, if claimant was still traveling to work when she fell, then there is no coverage for her injury. The more difficult question is whether claimant at the time of her fall should be considered as having arrived at work, and therefore no longer traveling. She strenuously urges that because her employer -- the City of Lewistown -- maintained the sidewalk on which she fell, she was on her employer's premises and the travel doctrine does not apply.

A similar contention was made in *Griffin* and rejected. The claimant in that case was a fireman for the City of Great Falls. He was returning home from work on a February day when, approximately five blocks from his home, he slipped and fell on an icy city sidewalk. He died from his injuries. Citing language from *Murray Hospital*, claimant's widow argued that the sidewalk was an "instrumentality" of his employer and that his injuries were therefore covered.

The language from *Murray Hospital* was as follows:

While there are certain exceptions to the general rule, based upon peculiar facts and circumstances, no court has held that a workman going to or from his place of employment in the ordinary manner is entitled to either compensation or hospitalization if injured en route **by an instrumentality not under the control of his employer**, either under the ordinary provisions for compensation or treatment after suffering injury from an industrial accident, and no such holding would be justified under our Act, as the injury could not arise out of or in the course of the employment, for the employment ceases ordinarily when the period of service is at an end and the workman leaves the plant for the night, and does not again begin until he reaches the plant on the next working shift or day.

92 Mont. at 109 (emphasis and underlining added). The claimant in *Griffin* focused on the bolded language. I have underlined additional language from the passage as it is relevant to determining when travel begins and ends.

In *Griffin* the Court summarily rejected the instrumentality argument, holding as follows:

The rule has been settled in this state that a workman is not entitled to compensation for injuries received while traveling to and from his place of work by an instrumentality not under the control of the employer, and when he is subjected only to the ordinary street hazards common to all pedestrians. Here it is true that the instrumentality causing the injury -- the sidewalk -- was an instrumentality under the control of the employer -- the city; in other words, the injury occurred on premises under the control of the employer. **But unless the instrumentality causing the injury, or the premises on which the injury occurred were used in connection with the actual place of work where the employer carried on the business in which the employee was engaged, there can be no recovery.** Conversely, if the employee is injured while carrying on the business of the employer for which he was [sic] employed, there is liability even though the injury occurred off the premises of the employer or by an instrumentality not under the control of the employer.

111 Mont. at 115-16 (citations omitted; emphasis added). The Court went on to apply the general rule governing going to and from work. It noted that the claimant was exposed to no greater hazards than the general public, *id.* at 110, and was simply traveling home from work, *id.* at 116-17. It denied coverage.

The claimant in the present case was not required to drive to work, was not assigned a parking place or provided with any special parking area, and was traversing a public sidewalk when injured. She had not reached the sidewalk leading into her workplace and was therefore **not** on a sidewalk used only by employees or persons conducting city business. "[T]he sidewalk was not used by the employer in carrying on his business in which the employee was employed and consequently the employee was injured only by an

ordinary street hazard common to all pedestrians." *McMillen v. Arthur G. McKee & Co.*, 166 Mont. 400, 404, 533 P.2d 1095, 1097 (1975) (citing *Griffin v. Industrial Accident Fund*, 111 Mont. 110, 106 P.2d 346 (1940)).

This case is therefore distinguishable from *Griffin* only in that the accident occurred closer to the workplace than the accident in *Griffin*. However, as another Supreme Court decision shows, the legal principal applicable to public sidewalks and other public ways does not fade or disappear as the worker gets closer to her place of employment. In *Voorhies v. Park Cafe, Inc.*, 175 Mont. 232, 573 P.2d 202 (1978), the Court invoked the to and from work doctrine with respect to an injury in a public alley two car lengths from the back door of the cafe where claimant worked. Claimant argued that her fall should be covered because she parked her car in the alley and said it was her understanding that she was supposed to park her car "in the rear or alley behind the cafe." The Court rejected her argument, finding that there was no evidence "of any mandatory parking arrangement of any kind." As to claimant's argument that she was exposed to a "special hazard" which would except her injury from the general rule of non-compensability, the Court remarked:

There is no legal support in the record to suggest that Montana has recognized the so-called "special hazard" doctrine. The fact there was ice in the alley would not present a special hazard for cafe employees. Any person traversing the alley would be subject to the same condition. . . .

*Id.* at 234, 573 P.2d at 203.

This case is distinguishable from *Nicholson v. Round Up Coal Mining Co.*, 79 Mont. 358, 257 P. 270 (1927) which claimant contends is the applicable precedent. In *Nicholson*, a coal miner died of shock caused by extreme temperature fluctuation as he exited the mine through a tunnel or "air course." A fan forced outside air through the tunnel. The air was 80-100 degrees colder than the air in the mine. *Id.* at 370. The Court agreed that the miner's death occurred in the course of his employment, finding that the miner was "placed in a position wherein he was . . . specially and peculiarly subject to a risk and danger not shared by members of the community generally . . . ." *Id.* at 379. The tunnel was part of the employer's premises, was used by the miners to enter and leave the mine, and was not open to the general public. That is not the situation in this case.

Montana Municipal Insurance Authority is entitled to summary judgment.

#### Summary Judgment

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. The facts material to the cross-motions for summary judgment are undisputed.

3. At the time of accident on April 3, 1996, the claimant was still traveling to work. She was not in the course and scope of her employment and she is not entitled to compensation under the Montana Workers' Compensation Act.

4. Accordingly, the petition in this matter is **dismissed with prejudice**.

5. Since petitioner has not prevailed in this action, she is not entitled to attorney fees and costs pursuant to section 39-71-611, MCA (1995).

6. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

7. Any party to this dispute may have 20 days in which to request a rehearing from this Order Granting Summary Judgment.

DATED in Helena, Montana, this 25th day of September, 1997.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Cameron Ferguson

Mr. Oliver H. Goe

Attachments

Submitted: July 22, 1997

1. The Court accepts as true those facts which **both** parties set out in their briefs. While this may exceed the usual rule requiring facts to be set forth in affidavits, depositions and other formal discovery, where the parties agree in their briefs to certain facts, such agreement shall be deemed a stipulation of facts.