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Supreme Court of Kentucky

2023-SC-0525-WC

W.G. YATES & SONS CONSTRUCTION CO. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
NO. 2023-CA-0695
WORKERS' COMPENSATION BOARD NO. WC-22-00320

HONORABLE GREG HARVEY, ADMINISTRATIVE LAW JUDGE; JOSEPH LEE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION OF THE COURT BY JUSTICE THOMPSON

REVERSING

Joseph Lee, a Louisiana resident, sought workers' compensation benefits for injuries he sustained in a motorcycle accident which occurred during non-working hours while he was employed at a construction project in Maysville, Kentucky. The Administrative Law Judge (ALJ) determined that Lee's injuries did not occur within the course and scope of his employment and the Workers' Compensation Board (Board) affirmed. By a 2-1 vote, the Court of Appeals reversed the Board and remanded the case.[1] On appeal to this Court, we find

[1] *Lee v. W.G. Yates & Sons Construction Co.*, 2023-CA-0695-WC, 2023 WL 7095038 (Ky. App. Oct. 27, 2023) (unpublished).

that Lee's injuries are not compensable and, for the reasons set forth below, we now reverse the judgment of the Court of Appeals and affirm the Board's determination.

I. FACTUAL AND PROCEDURAL HISTORY

Lee was a legal resident of Louisiana when he began discussions with W.G. Yates & Sons Construction (Yates) regarding work at a construction site in Maysville, Kentucky. Yates is based in Mississippi but accepts work nationally. Yates was contracted to upgrade the ash system at the Eastern Kentucky Cooperative Plant in Maysville. This project would take approximately a year to complete. The project manager, to whom Lee would report, was located in Jacksonville, Florida. In turn, that project manager's supervisor worked out of an office in Birmingham, Alabama. Yates only maintained a temporary office on the site of the Maysville project.

Lee had worked for other construction companies across the country and was hired by Yates in January 2020, as a general foreman for the Maysville project. During his interview process, Lee spoke by telephone from his Louisiana residence with a Yates employee who was already working in Kentucky, but Lee stated at the final hearing before the ALJ that he was not hired by Yates until after he had arrived at the job site in Maysville after already traveling to Kentucky.

In order to accept the job and fulfill his job duties in Kentucky, Lee temporarily moved to a campground in Aberdeen, Ohio "a few miles" from the job site where he lived in a travel trailer which he had towed to Ohio with his

own pickup truck. Lee also brought along his motorcycle. Lee was not compensated by Yates for this move. Lee stayed in the Ohio campground for the entirety of his employment but continued to maintain his Louisiana residence and driver's license. Lee's choice of the campground as his temporary residence was not dictated by, or paid for by, Yates. While Lee was not paid or reimbursed for travel or housing expenses while working on the Maysville project, he was paid a flat $100.00 daily *per diem* by Yates during his employment.

Lee's work in Maysville did not require him to leave the project site during work hours. He worked the night shift from 7:00 p.m. to 7:00 a.m. and was paid an hourly rate.

Almost eight months into his job, on September 19, 2020, Lee clocked out from work in the early morning hours and drove to his trailer. At approximately 4:30 p.m., Lee left his trailer and rode his motorcycle to meet a friend for dinner prior to his next shift. On his way to the restaurant and while still in Ohio, a vehicle entered Lee's lane of traffic and struck him. The accident resulted in Lee suffering a frozen left elbow and the loss of his left leg below the knee.

Lee filed a claim for worker's compensation benefits. Yates contested Lee's claims arguing that his injuries were governed by the "coming-and-going" rule, which provides that injuries sustained while an employee is coming or going from his or her place of employment do not "arise out of" or "in the course of" employment and, as such, were not work-related. Lee argued that

the "traveling-employee" exception to the going and coming rule applied, entitling him to benefits for work-related injuries.

Lee's claim was bifurcated by agreement of the parties to first determine the threshold issue of whether his injuries occurred within the course of his employment with Yates. After a hearing, on November 3, 2022, the ALJ entered an opinion and order denying Lee's claim, determining that travel was not an integral part of Lee's job and Lee had relocated for the Maysville project and was only, at best, commuting to work at the time of the accident. Lee's petition for reconsideration argued that he was a traveling employee and had not relocated for the Maysville project citing his permanent residence in Louisiana, his Louisiana driver's license, his temporary living arrangement at a campground in a travel trailer, the *per diem* he received from Yates, and his lack of intention to reside or remain near Maysville following the completion of the project.

In an order following Lee's motion for reconsideration entered on December 6, 2022, the ALJ's conclusion that Lee's injuries were not compensable was not changed, but additional findings were made noting that while Lee's employment agreement with Yates did not specifically require that he relocate to Aberdeen, Ohio, once Lee was there, the only travel required of him by his job was commuting to and from a "static" job site in Maysville. Specifically, the ALJ found:

> [O]nce Lee arrived in Maysville, Kentucky and set up his temporary residence in Aberdeen, Ohio, travel was not an integral part of this job as all of his actual work was performed at the job site in Maysville, Kentucky. Nothing about the job or Yates' business

> required travel other than arriving at the static job site where work was to be performed each day.

Lee appealed the ALJ's determination to the Board which unanimously affirmed that Lee's injuries did not occur within the course and scope of his employment, ruling *per diem* payments alone do not mandate finding Lee to have been a "traveling employee" at the time of an injury, and affirming that the ALJ's decision was supported by substantial evidence.

By a 2-1 vote, the Court of Appeals reversed the Board citing to *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 (Ky. 2012), reasoning that the only way in which Lee could accomplish the work for which Yates had hired him, was for him to temporarily live close to the job site and away from his permanent residence in Louisiana which made his claim fall within the "traveling employee" exception to our "going and coming rule" at the time of his injuries. In reaching its conclusion, the Court of Appeals' majority stated:

> Generally, "injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." (*Black v. Tichenor*, 396 S.W.2d 794, 797 (Ky. 1965)) (citations omitted). Lee's injury arose out of the necessity of eating dinner at a restaurant while away from his home in Louisiana. His presence in Kentucky was entirely for the benefit of Yates, who was responsible for Lee's presence there, was "abundantly aware" that Lee was in Kentucky solely for work-related purposes and acquiesced to such by providing him with a per diem. *See Dee Whitaker Concrete v. Ellison*, 641 S.W.3d 142, 148 (Ky. 2022). Consequently, Lee's injury was within the course and scope of his employment.

Lee, 2023 WL 7095038 at *5

The Court of Appeals' determination would effectively mean that all out-of-state job applicants who choose to accept employment in Kentucky at a single, fixed location, which necessitates them effectively relocating to Kentucky, would be covered by workers' compensation twenty-four hours a day, seven days a week, *if* they decide to keep a separate "legal residence" elsewhere.

In the opinion's dissent, certain faults in the majority's reasoning were succinctly stated,

> It must be first determined that work-related travel is for the convenience of the employer, such as a traveling nurse assistant for a home health care provider. *Olsten-Kimberly Quality Care v. Parr*, 965 S.W.2d 155, 158 (Ky. 1998). *See also Brown v. Owsley*, 564 S.W.2d 843 (Ky. App. 1978). Based upon our precedent, I cannot agree that Lee was a traveling employee or was providing a service to the employer.
>
> The majority herein found that Lee was in Maysville "at the behest of his employer and therefore in his employer's service." However, a reading of the cases clearly shows distinguishing facts that do not exist in this instance. Lee's motorcycle ride to a restaurant with a friend was nowhere close in time to his work shift; it was not part of the service for which he was employed; and it was not of any benefit to the employer.

Id. at *7.

II. STANDARD OF REVIEW

"Our standard of review in workers' compensation claims differs depending on whether we are reviewing questions of law or questions of fact." *Ford Motor Co. v. Jobe,* 544 S.W.3d 628, 631 (Ky. 2018). With respect to an

ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts, our standard of review is *de novo. Id.* Regarding factual findings, "[t]he ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence." *Id.* Judicial review of a Board's decision is governed by KRS 342.290, which states,

> The decision of the board shall be subject to review by the Court of Appeals pursuant to Section 111 of the Kentucky Constitution and rules adopted by the Supreme Court. The scope of review by the Court of Appeals shall include all matters subject to review by the board and also errors of law arising before the board and made reviewable by the rules of the Supreme Court for review of decisions of an administrative agency.

The threshold question in determining the applicability of workers' compensation to a claim is whether the injury at issue was work-related. *Milby v. Wright*, 952 S.W.2d 202, 205 (Ky. 1997). Historically, this Court has treated the determination whether an injury is work-related as "a question of fact which is the sole province of the Administrative Law Judge in the workers' compensation system." *Id.* The question of "whether an employee is performing a service to the employer is a question of fact for the ALJ." *Howard D. Sturgill & Sons v. Fairchild*, 647 S.W.2d 796, 798 (Ky. 1983).

However, the interpretation and scope of any exceptions to the going and coming rule, which are at the forefront of our inquiry here, are questions of law this Court reviews *de novo. Ford Motor Co.*, 544 S.W.3d at 631.

In this case, the ALJ's determination that Lee's injuries were not covered under workers' compensation is a mixed question of law and fact. The ALJ's

findings regarding the nature and specifics of Lee's employment and the circumstances of his injuries were based on specific testimony and are not challenged by the parties. The ALJ's determination that Lee's movements from his trailer by motorcycle to a dinner destination fell outside the course and scope of his employment is a legal conclusion. As such, we review this application of the law *de novo*, granting no deference to the ALJ's legal determinations.

III. ANALYSIS

The going and coming rule is well-established in Kentucky with a long precedential history and, as a general rule, we have stated:

> injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to rise out of and in the course of the employment as the hazards ordinarily encountered in such journeys are not incident to the employer's business.

Receveur Construction Co. v. Rogers, 958 S.W.2d 18, 20 (Ky. 1997).

This rule is subject to several exceptions, two of which are relevant to this case: the traveling employee exception and the service to the employer exception. Yates argues that the Court of Appeals erred as a matter of law when it reversed the ALJ's determinations by misapplying controlling precedent regarding these exceptions.

A. The Traveling Employee Exception Does Not Apply.

The traveling employee exception was explained in *Gaines Gentry*, 366 S.W.3d at 462-63:

> Kentucky applies the traveling employee doctrine in instances where a worker's employment requires travel. Grounded in the positional risk doctrine, the traveling employee doctrine considers an injury that occurs while the employee is in travel status to be work-related unless the worker was engaged in a significant departure from the purpose of the trip.

In *Gaines Gentry,* the employer instructed the employee to travel to yearling sales and return to his duties at the employer's Lexington farm when a sale ended. *Id.* The employee was injured traveling back to Lexington from a sale. *Id.* at 462. Upholding his entitlement to workers' compensation benefits, we reasoned,

> [t]he accident in which he was injured occurred during the "necessary and inevitable" act of completing the journey he undertook for Gaines Gentry. In other words, travel necessitated by the claimant's employer placed him in what turned out to be a place of danger and he was injured as a consequence.

Id. at 463.

With Lee's claim here, the Court of Appeals determined that our reasoning in *Gaines Gentry* necessitated a finding that Lee was a traveling employee and stated,

> [t]he significant controlling factor was not where he [Lee] temporarily resided but that, in order to accomplish the job for which he was hired, he was required to temporarily lodge somewhere other than his permanent residence. It is absurd that an employer would expect his employee, a resident of Louisiana, to travel daily to the job site in Maysville, Kentucky.

Lee, 2023 WL 7095038 at *3. Such a reading of *Gaines Gentry* is actually a significant and unwarranted expansion of the traveling employee exception.

Lee was not, in fact, hired by Yates while residing in Louisiana and then ordered by Yates to travel to Kentucky for his job. On the contrary, he was

offered a position in Kentucky should he wish to relocate to within commuting distance but was not an actual employee of Yates until he arrived at the work site, completed paperwork and orientation, and accepted the job in Maysville. At the time of Lee entering his employment agreement with Yates, neither party had any expectation of work-related travel given all of Lee's work was to be performed at one fixed site.

Under the Court of Appeals' reasoning, Lee would be an "employee" for purposes of worker's compensation benefits at all times, day and night, for the full year he was expecting to work in Maysville only because he chose to maintain a residence in Louisiana, while: (a) local Kentucky residents who worked the same job; (b) employees residing in southern Ohio who made the daily commute to Kentucky; or (c) any other employee who, unlike Yates, chose to formally change their residency to Kentucky, or in this case Ohio, would not. Neither our statutes nor our precedents envision such unequal treatment of employees. It would be inappropriate to allow employees to be able to self-opt into further workers' compensation protections when they choose to maintain an out-of-state permanent address.

The Court of Appeals' emphasis on Lee needing to relocate/travel to Kentucky in order to take the job, loses focus on the primary issue here which should have been the purpose or necessity of his travel *at the time of the accident*. The motorcycle ride in Ohio which resulted in Lee's injuries did not occur while he was in "travel status" as an employee. The ALJ correctly determined that there was no benefit or service to Yates when Lee attempted to

go to a restaurant outside of his working hours because his travel was not an integral part of Lee's job, in no way benefited Yates, and was not being done at the direction of Yates.

Based on the evidence presented, Lee was not a "traveling employee" at the time of the accident in a legal sense. While the job opportunity in Maysville required Lee, if he wished to accept the job, to temporarily or permanently "move" or "relocate" to a place within commuting distance of the job site, his actual work in Maysville was, as determined by the ALJ, "static." All the services Lee was providing for Yates occurred at one location and this work did not require him to travel away from the Maysville job site premises. The fact that Lee was paid a *per diem* for the duration of the project does not change these facts and, by itself, is but one factor to consider when determining Lee's status as an "employee" at law at the time of his injuries.

A key factor is what the parties' understanding was about any travel requirements of the job when Lee was hired. We discussed this in *Olsten-Kimberly Quality Care v. Parr*, 965 S.W.2d 155 (1998), where we stated:

> Even more appropriate to the case at bar is the idea that "[w]hen travel is a requirement of employment and is implicit in the understanding between the employee and the employer *at the time the employment contract was entered into*, then injuries which occur going to or coming from a work place will generally be held to be work-related and compensable. . . ."

Id. at 157 (emphasis added). Lee travelled to Maysville, Kentucky to accept a position with Yates in Maysville; there was no requirement that he travel once he was in Maysville. *Olsten-Kimberly Quality Care* is still good law and was

most recently quoted in *Dee Whitaker Concrete v. Ellison*, 641 S.W.3d 142 (Ky. 2022).

Therefore, Lee's motorcycle trip from his temporary abode to a restaurant to eat dinner, was not in furtherance of his employer's business interests. By contrast, in *Black v. Tichenor*, 396 S.W.2d 794, 797 (Ky. 1965), the injured employee was on his way from Louisville, where his employer was located, to a site in Middlesboro to conduct an audit. Our predecessor Court held that "[a]lthough traffic perils are ones to which all travelers are exposed, the particular exposure of Tichenor in the case at bar was caused by the requirements of his employment and was implicit in the understanding his employer had with him at the time he was hired." *Id.* However, in the matter at hand, Lee was "off the clock," was not traveling between job sites or offices at the behest of his employer, and his attempted journey to a restaurant during his personal time was in no way otherwise "caused by the requirements of his employment," or as we stated in *Dee Whitaker Concrete v. Ellison*, 641 S.W.3d 142, 146 (Ky. 2022), "necessitated by the furtherance of the employer's business interests."

B. The Service to the Employer Exception Does Not Apply.

The ALJ, Board and Court of Appeals also each addressed the service to the employer exception to the going and coming rule, with the Court of Appeals determining that "Lee's overall travel to the Maysville site was in furtherance of the business interest of the employer, Lee's injury falls squarely in the 'service

to the employer' exception to the 'going and coming' rule." *Lee*, 2023 WL 7095038 at *5.

In *Fortney v. Airtran Airways*, 319 S.W.3d 325, 329 (Ky. 2010), we explained the service to the employer exception to the going and coming rule as, "[t]he rule excluding injuries that occur off the employer's premises, during travel between work and home, does not apply if the journey is part of the service for which the worker is employed or otherwise benefits the employer."

While Lee's initial "travel" to Maysville to accept a position there did benefit Yates in the sense that Yates acquired the services of an obviously competent and hard-working employee, his movements at the time of his injuries were not in any way a "service to the employer" in a legal sense.

Lee's motorcycle ride to a restaurant to meet a friend was not close in time to his work shift, was not part of the service for which he was employed and was of no benefit to his employer. As further recognized by the ALJ, Lee was not "on call" or required to be available between his work shifts and he was not driving a company vehicle. Therefore, Lee was not a covered employee acting in the course and scope of his employment at the time he was injured, and was not entitled to workers' compensation benefits.

IV. CONCLUSION

KRS 342.0011(1) clearly establishes a compensable "injury" as one "arising out of and in the course of employment[.]" The phrase "arising out of" employment relates "to the cause or source of the accident" while the phrase "in the course of employment" refers to the time, place, and circumstances of

the accident. *Masonic Widows & Orphans Home v. Lewis*, 330 S.W.2d 103, 104 (Ky. 1959). Injuries "arising out of" employment are traceable "to the nature of the employee's work or to the risks to which the employer's business exposes the employee." *Stasel v. Ame. Radiator & Standard Sanitary Corp.*, 278 S.W.2d 721, 723 (Ky. 1955). Neither the going and coming rule nor its exceptions change these standards.

Our prior decisions in *Gaines Gentry* and *Tichenor*, *supra*, are not affected by this opinion. Both of those opinions stand for the proposition that when employees must travel in order to perform work, as directed by their employer, at remote locations, *then* they are covered by workers' compensation for injuries they receive while they are traveling. Their travel was "work related" because their travel had to occur in order for the employees to perform their as-directed job duties.

Lee's situation is very different situation from when a Kentucky employee with a regular local workstation is directed by his employer to perform work at a remote location which necessitates the travel which results in the employee's injury. When Lee was injured he was not traveling either to or from a "remote" site at the behest of his employer. He was also not traveling between work sites.

Lee's employment with Yates was at one fixed job site in Kentucky. He was hired in Maysville, Kentucky for a job in Maysville, Kentucky. His job duties to Yates were not in any way the cause of him being on a motorcycle in Ohio. Rather, Lee's wholly personal choices about where to reside while

working at the Maysville project and where and when to dine while off work that day were the reasons for his presence on the roadway at the time of his injuries. Lee's actions that afternoon were completely autonomous of any direction by his employer and Yates had no authority over Lee at that time which could have changed or affected the occurrence of the accident. Therefore, Lee was not a "traveling employee" at the time of the accident nor was his travel that afternoon in "service to the employer."

Given these facts, we reverse the Court of Appeals decision and affirm the Workers' Compensation Board's dismissal of Lee's claim.

All sitting. All concur.

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