

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002239-WC

WILLIAM MEREDITH

APPELLANT

v.

PETITION FOR REVIEW  
OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
NO. WC-96-71604

JEFFERSON COUNTY PROPERTY  
VALUATION ADMINISTRATOR;<sup>1</sup> SPECIAL  
FUND; SHEILA C. LOWTHER,  
ADMINISTRATIVE LAW JUDGE; and  
WORKERS' COMPENSATION BOARD  
APPELLEES

### OPINION

### AFFIRMING

\* \* \* \* \*

BEFORE: BUCKINGHAM, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: William Meredith petitions for review of a decision of the Workers' Compensation Board that affirmed an Administrative Law Judge's opinion and order dismissing his claim for income and medical benefits because his injury occurred outside of the course of his employment. The issue to be resolved in this appeal is whether Meredith's injury while in a restaurant getting

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<sup>1</sup> The parties incorrectly identify this appellee in their briefs as "Jefferson County Property Evaluation Administration" and "Jefferson County Property Evaluation Administrator."

coffee meets any of the exceptions to the going and coming rule and is therefore compensable.

The facts of this case are not in dispute. Meredith worked as a field representative for the Jefferson County Property Valuation Administrator, and frequently met with attorneys, executors and administrators at banks to inventory safe deposit boxes. On October 28, 1996, Meredith reported to the PVA office to pick up his list of appointments for the day and then proceeded to the location of his first appointment. He arrived at a bank on Wilson Avenue early for his 9:00 or 9:30 a.m. appointment, but the bank had not yet opened. Meredith then drove to a McDonald's restaurant five or ten minutes away to drink coffee and wait for the bank to open. As he was walking from the counter to a table with his tray, Meredith slipped and fell, injuring himself. It is this accident which was the subject of his workers' compensation claim for income and medical benefits.

Following the entry of an arbitrator's Benefit Review Determination, Meredith requested a de novo hearing before an Administrative Law Judge. The parties submitted proof and a hearing was held before ALJ Lowther on February 2, 1998, after which the parties filed briefs. On March 31, 1998, the ALJ issued an opinion and order dismissing Meredith's claim, stating that she had "carefully considered the circumstances surrounding Mr. Meredith's injury." She then went on to relate her findings as follows:

When he arrived at the bank on Wilson Avenue on October 28, 1996, it had not yet opened. The person or persons

he was to meet there had not yet arrived. Rather than waiting outside the bank or in his car, Mr. Meredith made a decision to go to a McDonald's restaurant to have coffee. At the hearing he testified that this restaurant was five to ten minutes away from the bank. It was of course at this restaurant that he slipped and fell, sustaining a very serious injury. Had Mr. Meredith been injured on his way to or from the bank on Wilson Avenue, his injury would clearly have been compensable. However, it is the finding of the Administrative Law Judge that the Plaintiff's trip to the McDonald's restaurant was an identifiable deviation from the business purpose of his trip, and constituted a personal errand.

The ALJ then dismissed Meredith's claim for income and medical benefits as the injury occurred outside the course of his employment. The Workers' Compensation Board affirmed the ALJ's opinion and order in a two-to-one decision rendered August 7, 1998.

Meredith urges this Court to find that his injuries were compensable as arising out of and in the course of his employment. He argues that his employment was a contributing factor to his injury, that the injury occurred while he was on a trip on behalf of his employer, and that he had been in a place of danger because of his employment (the positional risk doctrine). Meredith also argues that the coffee break did not constitute a substantial deviation from his employment and was within the personal comfort doctrine. The Jefferson County PVA argues to the contrary that the evidence before the ALJ does not compel a different result and that

Meredith is attempting to have this Court impermissibly substitute its judgment for that of the ALJ.

In workers' compensation actions, this Court's role is to correct the Board only when it has misconstrued the law or erroneously assessed the evidence so flagrantly as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). The workers' compensation claimant has the burden of proof, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in claimant's favor. See Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979); Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence, which an unsuccessful claimant must establish to win on appeal, is that which is so overwhelming that no reasonable person could reach the same conclusion as the finder of fact. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). If substantive evidence of record supports the ALJ's decision, it must be upheld. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). The ALJ, as the finder of fact, has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. See Paramount Foods, Inc., v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

In the version of the Kentucky Workers' Compensation Act in effect at the time of Meredith's injury, an injury was defined as "any work-related change in the human organism, arising out of and in the course of employment." Ky. Rev. Stat. (KRS) 342.0011. The general rule that injuries that occur while commuting to and from work are not in the course of employment has had several exceptions

carved from it. Ratliff v. Epling, Ky., 401 S.W.2d 43 (1966), defined the operating premises exception, in which an injury occurring on the operating premises of the employer is deemed to be work-related. Hayes v. Gibson Hart Co., Ky. 789 S.W.2d 775 (1990), defined the positional risk doctrine. For this exception, coverage extends to the location where the work assignment places the employee even though the injury-producing mechanism is not work-related. The special errand exception, in which the employee is providing a benefit for the employer, is illustrated in Farris v. Huston Barger Masonry Co., Ky., 780 S.W.2d 611 (1989).

In the present appeal, we must determine whether Meredith's trip to McDonald's while waiting for the bank to open took him outside of the coverage of workers' compensation law. The ALJ found that this trip constituted a substantial deviation from his business trip and was thus a personal errand. Professor Larson defines a deviation as follows:

An identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, Vol. 1, § 19.00 (Desk ed. 1998). In § 19.62, Larson states that employees with no fixed routes or destinations who go on a personal errand "may be held to resume employment immediately upon completion of a personal visit and upon starting back in the general direction of their business obligations." The ALJ noted,

and we agree, that had Meredith been en route to or from the bank, the result in the case would have been different.

Larson also defines the personal comfort doctrine exception as follows:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred .

. . .

Larson, supra, § 21.00. This doctrine is closely tied to the deviation rule as that rule relates to the extent of the deviation. Insubstantial deviations would be compensable under the personal comfort doctrine, while the greater the deviation is, the less likely is it that it will be compensable. The ALJ found that because Meredith traveled five to ten minutes away to have his coffee, his deviation from the work trip was substantial and outside of the personal comfort doctrine.

Meredith produced some evidence that his trip for coffee may not have taken him completely outside of the business purpose of his trip. He did not have a fixed work-site, he had to travel from site to site, and he was paid for all breaks and lunches. However, the ALJ grounded her decision on substantive evidence in the record regarding the nature of the deviation. Based upon the ALJ's findings of fact as to the circumstances surrounding the injury and the application of those facts to the law, the ALJ found

that Meredith was on a personal errand at the time of the accident.

This Court may not substitute its judgment for that of the finder of fact, in this case the ALJ. Paramount Foods, Inc. v. Burkhardt, Ky., 698 S.W.2d 418 (1985). In Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 643 (1994), this Court addressed this point in detail:

"The position of the circuit court in administrative matters is one of review, not of reinterpretation." The appellate (circuit) court is not free to consider new or additional evidence, or substitute its judgement as to the credibility of the witnesses and/or the weight of evidence concerning questions of fact. Thus, if administrative findings of fact are based upon substantial evidence, then those findings are binding upon the appellate court. The only question remaining for the appellate court to address is "whether or not the agency applied the correct rule of law to the facts so found." If the ruling of the administrative agency is based on an incorrect view of the law, the reviewing court may substitute its judgment for that of the agency.

[Citations omitted.] See also Commonwealth, Dept. of Education v. Commonwealth, Ky. App., 798 S.W.2d 464 (1990). The ALJ might well have viewed the evidence favorably to Meredith's case and found that he was in the course of his employment at McDonald's restaurant. However, she did not choose to rely on that evidence, and it is not for this Court to re-weigh the evidence when the

evidence the ALJ relied upon was substantive. Because the ALJ correctly applied applicable law to the facts in this case, the Board correctly affirmed her decision.

The opinion of the Workers' Compensation Board affirming the opinion and order of the Administrative Law Judge is affirmed.

BUCKINGHAM, Judge, CONCURS.

JOHNSON, Judge, DISSENTS BY SEPARATE OPINION.

JOHNSON, Judge, DISSENTING. I respectfully dissent and adopt the dissenting opinion of Board Member Greathouse as my own:

I respectfully dissent. The majority has framed the issue with a large stroke from a broad rush. The claimant, as a field representative of the PVA office, whose job primarily required him to travel around to various banks meeting with executors and attorneys to conduct inventories of safe deposit boxes, was performing a vital service of the PVA office at the time he was injured. To frame the issue as to whether his departure to McDonald's for a cup of coffee was an abandonment of his job simply flies in the face of common sense as to what Meredith is required to do each day in service to his employer. The majority implies that had the McDonald's been located next door to the bank so that Meredith could have a "plain" view of the bank's front door, then perhaps the personal comfort doctrine would have applied to make his injury compensable. The majority concluded that Meredith's drive to a McDonald's five or so minutes away is the decisive factor. This



seems to be a distinction without a difference. I would reverse and remand for consideration as to the extent and duration of disability.

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