RENDERED: September 10, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000777-MR

PATTY JO NUNN — APPELLANT

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 98-CI-00214

FIRST HEALTHCARE CORPORATION
D/B/A LIBERTY CARE CENTER — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; TACKETT AND VANMETER, JUDGES.

TACKETT, JUDGE: Patty Jo Nunn appeals from an order of the Casey Circuit Court granting summary judgment to First Healthcare Corporation d/b/a Liberty Care Center pursuant to Kentucky Rules of Civil Procedure (CR) 56, and dismissing Nunn's personal injury tort complaint for injuries she suffered in an accident while picking up her paycheck based on the exclusivity provisions of the Workers' Compensation Act. After reviewing the law and the arguments of counsel, we affirm.

On the afternoon of October 3, 1998, Nunn slipped and fell on a paved walkway connecting the parking lot and the operational building of the Liberty Care Center injuring her wrist, back, and neck. At the time, Nunn was employed by First Healthcare, but she was not working on that day. She went to the premises solely to pick up her paycheck.

On December 2, 1998, Nunn filed a tort premises liability complaint against First Healthcare for damages consisting of past and future medical expenses, pain and suffering, lost wages, and future impairment of earning capacity associated with her accident. On March 23, 1999, First Healthcare filed an amended answer raising a defense based on Kentucky Revised Statute (KRS) 342.690, the exclusive remedy provision of the Workers' Compensation Act. Thereafter, the parties exchanged discovery interrogatories in which Nunn stated that she went from her home to the Liberty Care Center on her day off from work in order to pick up her paycheck and intended to return to her home. Nunn stated that she fell and injured herself on a paved walkway while walking to her automobile in the parking lot after receiving her paycheck and exiting the building.

On December 2, 2002, First Healthcare filed a motion for summary judgment pursuant to CR 56 arguing Kentucky case law established that an employee's act of picking up his paycheck

was a work-related activity that was exclusively covered under the Workers' Compensation Act, citing several cases including Barnette v. Hospital of Louisa, Inc., Ky. App., 64 S.W.3d 828 (2002). On December 11, 2002, following a hearing, the trial court entered an order granting First Healthcare summary judgment based on the authorities cited in the motion, especially Barnette. On December 20, 2002, Nunn filed a motion to reconsider, which the trial court summarily denied. This appeal followed.

Nunn argues the trial court erred by granting First Healthcare summary judgment and holding that her tort action was barred by the Workers' Compensation Act. She criticizes the decision in Barnette and contends that prior Kentucky case law requires that the employer benefit from the employee's act of picking up her paycheck in order for any injury incurred while performing that act to be compensable under the Workers' Compensation Act.

KRS 342.690 (1) generally provides for exclusive recovery under workers' compensation and immunity from civil tort actions to employers for work-related injuries to employees. See also Travelers Indemnity Co. v. Reker, Ky., 100 S.W.3d 756 (2003); Shamrock Coal Co., Inc. v. Maricle, Ky., 5 S.W.3d 130 (1999). In order to invoke the exclusive remedy limitations of the statute, however, the injury must be covered

by workers' compensation in that it arises out of and in the course of employment. See KRS 342.690(1) ("the liability of such employer under this chapter shall be exclusive and in place of all other liability"); KRS 342.0011(1) (defining "injury" as any work-related traumatic event arising out of and in the course of employment); Coomes v. Robertson Lumber Co., Ky., 427 S.W.2d 809 (1968). The two phrases "arising out of" and "in the course of" are conjunctive, so both must be established. See Masonic Widows and Orphans Home v. Lewis, Ky., 330 S.W.2d 103 (1959); Wilke v. University of Louisville, Ky., 327 S.W.2d 739 (1959). The "arising out of" requirement concerns the origin or causal relationship between the injury and the employment relationship; whereas, the "in the course of" requirement concerns the time, place, and circumstances of the incident resulting in the injury. See, e.g., Stapleton v. Fork Junction Coal Co., Ky., 247 S.W.2d 372 (1952); Harlan Collieries Co. v. Shell, Ky., 239 S.W.2d 923 (1951); Masonic Widows, supra. "Arises out of" refers to an injury caused by exposure to some risk connected with or incidental to the employment. See City of Prestonsburg v. Gray, Ky., 341 S.W.2d 257, 259-60 (1960); Stasel v. American Radiator & Standard Sanitary Corp., Ky. 278 S.W.2d 721, 723 (1955); Livering v. Richardson's Restaurant, 374 Md. 566, 575, 823 A.2d 687, 692 (2003). The "in the course of" element involves whether the injury arises within the time and

space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. See, e.g., Draper v. Railway Accessories Co., 300 Ky. 597, 189 S.W.2d 934 (1945). The general rule is as follows: "An injury is said to arise in the course of the employment when it takes place within the period of the employment, at a place where the employee reasonably should be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." 1 Arthur Larson and Lex K. Larson, Larson's Worker's Compensation Law § 12.00, at 12-1 (2004). See also Livering, 374 Md. at 577, 823 A.2d at 693.

For purposes of workers' compensation, the relationship of employee and employer is ordinarily suspended during the period the employee is off duty, so injuries occurring when the employment relationship are suspended are typically not within the course of employment. See, e.g., City of Louisville v. Brown, Ky. App., 707 S.W.2d 346 (1986); Masonic Widows, supra. Similarly, "injuries received by an employee while voluntarily engaged in some activity having no essential relation to, or connection with, the employment, and undertaken solely for the pleasure, convenience, or benefit of the employee or a third person, are ordinarily not compensable as arising out of or in the course of employment." Meade v. Ries, 642 N.W.2d 237, 246 (Iowa 2002); Whitehouse v. R.R. Dawson Bridge Co., Ky.

382 S.W.2d 77 (1964); 82 Am.Jur.2d Worker's Compensation §257, at 245 (2003). An injury sustained outside normal working hours may be compensable where the employer derives a benefit from the employee's activity, or where the activity is normally incident to the employment even though the employer does not derive a benefit, or where the activity was contemplated in the contract of employment. Osbun v. Worker's Compensation Appeal Bd., 93 Cal.App.3d 163, 168, 155 Cal.Rptr. 748, 751 (1979). The test for determining whether specific activities are within the scope of employment or are purely personal is whether the activities are both reasonable and sufficiently work related under the circumstances. Neacosia v. New York Power Authority, 85 N.Y.2d 471, 476, 649 N.E.2d 1188, 1191 (1995).

Whether an injury is work-related in that it arises out of and in the course of employment is essentially a mixed question of law and fact. See generally Jackson v. Cowden Manufacturing Co., Ky. App., 578 S.W.2d 259 (1978); City of Savannah v. Stevens, 261 Ga.App. 694, 697, 583 S.E.2d 553, 555 (2003). Where the facts are undisputed, however, the ultimate issue of whether an injury is work-related is a legal issue. See Jackson, 578 S.W.2d at 265; Turner Day & Woolworth Handle Co. v. Pennington, 250 Ky. 433, 63 S.W.2d 490, 492 (1933); Bennett v. Columbia Health Care, 80 S.W.3d 524, 528 (Mo. App. 2002).

In the current case, Nunn was injured when she went to the Liberty Care Center, which was a healthcare facility where she was employed, on her day off from work in order to personally pick up her paycheck. She came from her residence and intended to return to her residence after receiving her paycheck. Case law is split on the application of workers' compensation coverage in this type of situation. The cases generally recognize that an employment relationship includes the act of being paid for one's labor for an employer. Injuries received on an employer's premises in connection with collecting pay satisfy the "arising out of" requirement. The more common area of controversy involves the "in the course of" element because collecting pay is only incidental to the employment service. Nevertheless, the general rule is that "[t]he contract of employment is not fully terminated until the employee is paid, and accordingly an employee is in the course of employment while collecting her or his pay." 2 Larson & Larson, Larson's Worker's Compensation Law §26.03 [1], at 26-10. See also Seventh St. Road Tobacco Warehouse v., Stillwell, Ky., 550 S.W.2d 469, 470 (1976). Several courts have held that injuries incurred while collecting wages at an employee's place of employment on a day the employee was not working may arise out of and in the course of employment. See, e.g., Crane Co. v. Industrial Commission, 306 Ill. 56, 137 N.E. 437, 438-39 (1922);

Singleton v. Younger Bros. Inc., 247 So.2d 273, 275 (La. App. 1971); Dunlap v. Clinton Valley Center, 169 Mich.App. 354, 425 N.W. 553, 554 (1988); Martinez v. Stoller, 96 N.M. 571, 632 P.2d 1209, 1210 (1981); St. Anthony Hospital v. James, 889 P.2d 1279, 1281 (Okla. App. 1994); Hoffman v. Worker's Compensation Appeal Board, 559 Pa. 655, 741 A.2d 1286, 1288 (1999); Griffin v. Acme Coal Co., 161 Pa.Super. 28, 54 A.2d 69, 70 (1947); Texas General Indemnity Co. v. Luce, 491 S.W.2d 767, 768 (Tex. Civ. App. 1973). But see McCoy v. Texas Employers Ins. Ass'n, 791 S.W.2d 347 (Tex. Civ. App. 1990)(employee injured picking up paycheck a few hours prior to going on duty not covered by workers' compensation). Many of these cases involved situations where the employee either was required to pick up his paycheck at the employer's place of business or it was a customary practice to do so.

In Barnette v. Hospital of Louisa, Inc., supra, this Court affirmed summary judgment in favor of an employer in a premises liability tort action holding that the act of an employee picking up her paycheck is a work-related[1] activity that is covered by the Workers' Compensation Act as a matter of law. The trial court relied especially on Barnette in deciding to grant summary judgment to First Healthcare. Nunn criticizes

[1] We note that the term "work-related" has been construed to be synonymous with the term "arising out of and in the course of employment". See Seventh St. Road Tobacco Warehouse, 550 S.W.2d at 470.

Barnette as oversimplifying the prior Kentucky case precedent cited in its opinion. She contends that her incident should not be considered work-related if her trip to pick up her paycheck was made entirely for her own personal convenience without benefit to her employer. See, e.g., Secor v. Labor & Industry Review Commission, 232 Wis.2d 519, 606 N.W.2d 175 (1999)(no workers' compensation coverage for trip to pick up paycheck for personal convenience where it was not required by employer or by established custom for all employees.) Nunn further maintains that the factual evidence on whether her act of retrieving her paycheck benefited her employer or was solely for her own personal convenience was so undeveloped as to preclude summary judgment.

While the cases relied on in Barnette may have involved some significant factual differences, the court in that opinion appears to have set out a bright-line rule that "an employee's actions of picking up a paycheck at her employer's place of business constitutes a work-related activity covered by the Workers' Compensation Act." 64 S.W.3d at 831. In holding that a workers' compensation claim was an employee's exclusive remedy, the Barnette court specifically rejected the same arguments raised by Nunn. For instance, Barnette had argued that she was injured when she went to her place of work for the "sole purpose" of picking up her paycheck and "that since she

was on her employer's premises at the time of the accident for her own purposes and not for the benefit of or as required by the hospital, her injuries were not work-related." 64 S.W.3d at 829.

We disagree with Nunn's suggestion that workers' compensation coverage requires a benefit outside of the normal incidents of the employment relationship. For example, in rejecting a claim that an employee's personal decision to pick up her paycheck at her employer's location rather than receive it through other available methods, i.e., mail or direct deposit, the court stated in Hoffman v. Worker's Compensation Appeal Board, 559 Pa. 655, 660, 741 A.2d 1286, 1288 (1999), "we find that, regardless of other available options, an employee's presence at the workplace to obtain a paycheck pursuant to an employer-approved practice bears a sufficient relationship to a necessary affair of the employer (payment of due wages) to fall within the course of employment as defined in [the Worker's Compensation Act]. . . ." Nunn has not presented any evidence that her action of picking up her paycheck at her place of employment was not a normal option available to her approved by First Healthcare. See also Brooks v. Wal-Mart Stores, Inc., 783 S.W.2d 509 (Mo. App. 1990) (affirming dismissal of tort action as barred by exclusive workers' compensation remedy for injuries sustained on employer's premises picking up paycheck); Glory v.

Zuppardo's Economical Supermarket, Inc., 532 So.2d 933 (La. App. 1988)(same).

Nunn's reliance on the case of Howard D. Sturgill & Sons v. Fairchild, Ky., 647 S.W.2d 796 (1983), is misplaced. In Fairchild, the employee was injured in an automobile accident while driving home after picking up his paycheck at the home of his employer. Fairchild involved the going and coming principle, which deals with injuries occurring while traveling off the employer's premises. The court in Fairchild stated that injuries sustained by an employee traveling between his home and the place of employment while not performing some special service or providing some benefit to his employer are not considered incurred in the course of his employment. The going and coming rule states that injuries sustained by workers going to and returning from places where they perform duties connected with their employment do not arise out of and in the course of employment because the hazards ordinarily encountered in such journeys are not incident to the employer's business. See Olsten-Kimberly Quality Care v. Parr, Ky., 965 S.W.2d 155, 157 (1998); Receveur Construction Co. v. Rogers, Ky., 958 S.W.2d 18, 20 (1997). The statement in Fairchild referring to special services and benefit to the employer are merely two recognized exceptions to the going and coming rule. See Olsten, supra; Phillips v. A & H. Construction Co., 134 S.W.3d 145 (Tenn.

2004). There are numerous other exceptions to the going and coming rule including the "operating premises" rule. See Pierson v. Lexington Public Library; Ky., 987 S.W.2d 316 (1999); Ratliff v. Epling, Ky., 401 S.W.2d 43 (1966); 82 Am.Jur.2d Worker's Compensation § 272. One of the rationales behind the going and coming rule is that the employment relationship between the employer and employee does not begin until the employee enters the employer's premises. See Louisville & Jefferson County Air Bd v. Riddle, 301 Ky. 100, 190 S.W.2d 1009, (1946); Ragland v. Harris, 152 N.C. App. 132, 566 S.E.2d 827 (2002); Beaver v. Mill Resort and Casino, 180 Or.App. 324, 328, 43 P.3d 460, 462 (2002). Thus, the going and coming rule does not apply to conduct after an employee has arrived at and enters the employer's premises. Under the operating premises rule, any injuries incurred by an employee on property controlled by the employer or that exposes employees to additional or special risks because of the employment arise out of and in the course of the employment. See Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775 (1990); Pierson, supra; 82 Am.Jur.2d Worker's Compensation § 285 (discussing special hazard or proximity rule exception to going and coming rule).

In the current case, Nunn fell and injured herself on a walkway connecting the main building of the Liberty Care Center after retrieving her paycheck. She was still on property

controlled by First Healthcare, so the going and coming rule does not apply. See, e.g., Hoffman, 559 Pa. at 660 n.4, 741 A.2d at 1288 n.4 (noting "significant difference" between situation where employee injured on employer's premises retrieving paycheck and employee injured off premises after taking possession of paycheck). Although it was her day off, so it was a non-work period, Nunn was on the premises for a purpose incidental to and in connection with her employment, i.e., payment of wages. Nunn's argument that workers' compensation coverage does not exist absent a benefit to the employer erroneously attempts to create a requirement for coverage by erroneously extrapolating a single exception from the going and coming rule that does not even apply. While benefit to the employer is a factor in determining whether an employee's conduct resulting in an injury is purely voluntary and not subject to compensation, it is only one factor that is not alone determinative. As did the court in Barnette, we reject the argument that there must be a showing that the employer derives a benefit from an employee's picking up her paycheck at the employer's place of business in order to qualify for workers' compensation coverage.

For the foregoing reasons, we affirm the order of the Casey Circuit Court.

ALL CONCUR.

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