RENDERED: DECEMBER 14, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000667-WC

SHELBY INDUSTRIES, LLC — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-10-01351

ESTATE OF BRIAN LARSH; SANDRA LARSH;
KIEARA LARSH; BREANN LARSH;
HON. ROBERT SWISHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KELLER, AND MAZE, JUDGES.

KELLER, JUDGE: An Administrative Law Judge (ALJ) awarded benefits to the Estate of Brian Larsh and to his widow, Sandra, and his daughters, Kieara, and Breann (collectively referred to as the Appellees). The Workers' Compensation

Board (the Board) affirmed the ALJ, and Shelby Industries, LLC (Shelby) now appeals from the Board's opinion. On appeal, Shelby argues that the ALJ erred: (1) in finding that the "coming and going rule"[1] did not bar the Appellees' claim; (2) in applying the presumption of work-relatedness contained in Kentucky Revised Statutes (KRS) 342.680; (3) in not finding that Shelby had rebutted that presumption; and (4) in finding that Brian Larsh's (Larsh) employment placed him at an increased risk of harm, thus bringing into play the "positional risk doctrine." Having reviewed the record and the arguments of the parties, we affirm.

FACTS

The underlying facts are not in dispute. On June 10, 2009, Larsh asked his supervisor if he could leave work early to tend to a personal matter. The supervisor gave his permission and, at 11:29 a.m., Larsh clocked out and went outside the Shelby building to wait for one his daughters, who was coming to pick him up. At or near that time, Wayne Allen (Allen), a Shelby vice-president, saw a storm approaching and a lightning strike. At approximately 11:32 a.m., Allen heard Larsh's daughter screaming. When he went to investigate, Allen found Larsh, who had been struck by lightning, lying face down on the ground outside the building near a large oak tree. Allen and others performed CPR until emergency medical services personnel arrived and transported Larsh to the hospital. Two days later, Larsh died from his injuries.

[1] We note that the case law variously refers to this rule as the "going and coming" and the "coming and going" rule. More recent cases use "coming and going"; therefore, unless required to do so by a specific citation, we use that phrase herein.

The Appellees timely filed a claim for death and survivors' benefits. Shelby denied the claim arguing, as they have throughout this litigation, that Larsh's injury and subsequent death were not work-related.

After summarizing the evidence, the ALJ first determined that the Appellees' claim was not barred by the coming and going rule because Larsh's claim fell within the operating premises exception to that rule. The ALJ then determined that the Appellees were entitled to the presumption of work-relatedness provided for in KRS 342.680 and that Shelby had not sufficiently rebutted that presumption.

The ALJ next addressed Shelby's argument that Larsh's death was the result of a non-compensable "act of God," and the Appellees' argument that Larsh was placed in a position of risk by his employment. The ALJ found that Larsh was "exposed to an increased risk of being struck by lightning as a result of his employment." In doing so, the ALJ specifically referred to a FEMA document that had been introduced into evidence by Shelby. That document states that "tall, isolated trees" and "anything metal" should be avoided during a thunderstorm. From this, the ALJ inferred that Larsh's

> path of egress from the work site to the point where he was to be picked up by his daughter put him directly in a zone of increased risk for injury by lightning strike given the presence of a very large metallic building and a very tall, isolated oak tree both of which were in the immediate area where plaintiff was injured.

The ALJ noted that there was no evidence that either the building or the tree had been struck by lightning; nonetheless, he found that the building and tree created "a zone in which the risk of being struck by lightning is increased." Thus, the ALJ concluded that Larsh's death was related to that risk and that an act of God would not relieve Shelby from its liability.

Shelby filed a petition for reconsideration arguing that: the ALJ failed to make sufficient findings that Larsh's death was work-related before addressing the coming and going rule; the ALJ erroneously found that Shelby had created a zone of increased risk of injury; and the ALJ erroneously found that Larsh took the "normal path" to be picked up by his daughter. The ALJ denied the petition, addressing each of the issues raised by Shelby in detail. Shelby appealed to the Board, which affirmed, finding that the ALJ's findings were reasonable in light of the evidence. It is from this opinion of the Board that Shelby now appeals.

STANDARD OF REVIEW

This Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision because the ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). However, when there are mixed questions of fact and law, we have greater latitude in

determining if the underlying decision is supported by probative evidence. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001).

ANALYSIS

The primary issue raised by Shelby is whether Larsh's injury was work-related. We hold that it was for the following reasons.

Pursuant to KRS 342.610(1) "[e]very employer . . . shall be liable for compensation for injury, or . . . death without regard to fault as a cause of the injury . . . or death." "'Injury' means any work-related traumatic event . . . arising out of and in the course of employment" and "'[d]eath' means death resulting from an injury." Therefore, to be entitled to benefits, the Appellees were required to establish that Larsh's injury and subsequent death arose out of and in the course of his employment.

Shelby argues that the Appellees failed to do this because, at the time of his injury, Larsh was leaving work and no longer providing any service to Shelby. Shelby is correct that, under the coming and going rule, injuries that occur during travel to and from work generally are not compensable. *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29, 31 (Ky. 2004). However, as with most, if not all, general rules, the coming and going rule has an exception, the operating premises exception. That exception "permits compensation if an injury occurs on the employers 'operating premises'" or in a place the employee "has access to . . . because of his employment." *Id.* However, geography is not the only issue that

must be considered. To be compensable, the injury must also occur while an employee is "engaged in the normal coming and going activity" and any "significant deviation from normal coming and going activity" may negate entitlement to compensation. *Id.*

The ALJ applied the operating premises exception to determine that Larsh's injury and subsequent death were work-related. Shelby specifically argues that the ALJ erroneously used this exception to the coming and going rule because Larsh: had clocked out; was leaving on a personal mission; was leaving the premises early, which was a deviation from the norm; and Shelby had no control over the risks associated with the lightning. We disagree for the following reasons.

First, as noted by the ALJ and the Board, virtually all employees who are leaving work have "clocked out." Furthermore, all employees who have clocked out, except those leaving the premises on employer-related missions, are on personal missions. Applying these criteria to the analysis would completely negate the operating premises exception to the coming and going rule. Therefore, whether Larsh was "clocked in" or was leaving work on a personal mission is irrelevant to the analysis.

Second, the deviation from normal coming and going activities is a deviation "from the process" of coming and going. *Portney v. Airtran Airways, Inc.*, 319 S.W.3d 325 (Ky. 2010). The former Court of Appeals first delineated the deviation from normal coming and going activities in *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966). In *Ratliff*, a coal miner (Ratliff) made arrangements to ride home

with a co-worker. After leaving the mine at the end of their shift, the two walked to the parking lot and discovered that the co-worker's car would not start. While the co-worker went to get help with starting his car, Ratliff began gathering loose pieces of coal for his personal use. Approximately one-half hour later, a "high wall" that Ratliff was standing near collapsed, killing him. *Id.* at 44.

The Court held that Ratliff's injury was not work-related. In doing so, the Court first determined that Ratliff was within the employer's operating premises. The Court then held that, when Ratliff left the car and began gathering coal, he deviated from the normal coming and going activity of leaving the work station, proceeding to the parking lot, and leaving the employer's property. Because of that deviation, Ratliff's claim was properly denied. *Id.* at 45-46.

In this case, Larsh, like Ratliff, left his work station and headed to the parking lot. However, unlike in Ratliff, there is no evidence that Larsh's path deviated from the norm or that he stopped to engage in anything but normal coming and going activity between the time he clocked out and the lightning strike. In fact, in the three minutes between the time he clocked out and the lightning strike, Larsh would have had little, if any, time to undertake any deviation from the norm. Furthermore, the fact that Larsh was leaving at 11:29 a.m. rather than 4:30 p.m. is not dispositive. Larsh requested permission to leave early, which Shelby granted, and there is no evidence that Larsh's leaving early was significantly outside of normal coming and going activities. Therefore, the ALJ's finding that

Larsh did not deviate from normal coming and going activities is supported by substantial evidence and cannot be disturbed on appeal.

Third, we agree that Shelby had no control over the lightning; however, as we interpret the operating premises exception to the coming and going rule, control over the instrumentality of the injury is not the determinative factor. The determinative factors are the geographic location where the injury occurred and whether the employee was in that location because of work. Three cases illustrate this concept.

In *Hayes v. Gibson Hart,* 789 S.W.2d 775 (Ky. 1990), Gibson Hart was performing work at the T.V.A. facility in Owensboro, Kentucky. Hayes, one of Gibson Hart's employees, tripped on a piece of concrete and fell on a sidewalk within the T.V.A. facility while walking from his car to his work station. The Court recognized that "physical control of the area [where the accident occurred] and responsibility for the condition of the sidewalk remained with the T.V.A." *Id.* at 778. However, the Court did not "consider this to be a controlling factor." *Id.* Rather, the Court held that the claim was compensable because Hayes would not and could not have been on the T.V.A. property but for his employment with Gibson Hart. *Id.* Thus, the location of the injury, not control over the instrumentality of injury, was the key factor.

In *Pierson v. Lexington Public Library*, 987 S.W.2d 316 (Ky. 1999), Pierson worked at the main branch of the library. The library leased parking spaces from the owner of an adjacent parking garage and employees were required

to park on the seventh floor of the garage. Pierson was injured while returning to work from lunch when the garage elevator dropped as she was exiting. The library contested Pierson's claim arguing that any risk related to the elevator was "common to the street," that it had no "control" over the elevator, and that Pierson was in the process of coming and going. *Id.* at 317-18.

The Court determined that the library had liability for Pierson's injury. In doing so, the Court noted that "[w]orkers' compensation legislation was not intended to protect workers against the risks of the street." *Id.* at 318. However, the Court stated that employers are liable for "work-related injuries that occur on [their] entire 'operating premises.'" *Id.* Furthermore, the Court stated that "[o]f particular concern in making that determination is the extent to which the employer should control the risks associated with the area where the injury occurred." *Id.* The Court found that the library, as a major customer of the garage, had some influence over the owner. Furthermore, the library's provision of free parking to Pierson influenced her decision to park there. Those factors were "sufficient indicia of employer control to support" the conclusion that the library had liability. We note that the court's emphasis was on control over the area where Pierson's injury occurred, not control over the elevator, which was the instrumentality of her injury.

Finally, in *Warrior Coal Company, LLC*, 151 S.W.3d 29, Stroud, who was driving to work on the private road used by employees to access their work site, was injured when he fell asleep and his car went off the road and hit a tree. The

Court affirmed the ALJ's finding that Stroud's injury was work-related. In doing so, the Court noted that "an injury is compensable if the worker is engaged in normal coming and going activity at the time it occurs and has access to the place where it occurs because of his employment." *Id.* at 31. The Court addressed causation, but only to note that Stroud was not engaged in activity that significantly deviated from normal coming and going activity. *Id.* However, we note that the Court did not address causation in terms of whether Warrior Coal Company had control over the instrumentality of Stroud's injury.

As noted above, we agree that Shelby had no control over the lightning, the instrumentality of Larsh's injury. Similarly, Gibson Hart, the Lexington Public Library, and Warrior Coal Company did not have control over the instrumentalities of their employees' injuries. We discern no difference between those employers' lack of control over the instrumentality of injury and Shelby's lack of control over lightning. The Court implicitly, if not explicitly, determined in the preceding cases that lack of control over the instrumentality of the injury was not dispositive. Similarly, Shelby's lack of control over lightning is not dispositive herein. The facts that are dispositive are: Larsh's injury occurred on Shelby's operating premises; and Larsh's activities did not significantly deviate from normal coming and going activities. Therefore, we discern no error in the ALJ's finding that Larsh suffered a work-related injury.

Finally, on the issue of the operating premises exception, we believe it is important to address what we perceive to be a thread of fault running through cases

involving that exception. That thread comes from the words and phrases that have been used to describe the exception, such as "control," "risk," "zone of risk," "exposed to the risk," etc. Those words and phrases carry the implication that an employer's liability arises from a failure to remove, remedy, or control a defective or risky condition on its premises. However, as we previously noted, workers' compensation is not a fault-based system.

An injury that is compensable under the operating premises exception is no different from any other injury. Shelby could not successfully argue, as it implicitly does here, that its liability in a "normal" injury claim is dependent on proof of its fault. Likewise, Shelby cannot successfully make that argument in an operating premises claim.

Because the preceding disposes of the issue before us, we need not address whether the ALJ erred with regard to application of KRS 342.680 and/or his application of the positional risk doctrine. However, we briefly do so.

KRS 342.680 provides that, when an employee has been killed or is otherwise unable to testify, and where there is unrebutted *prima facie* evidence of a work-related injury, there is a presumption that the injury and/or death were work-related. Because this claim can be decided based on application of the operating premises exception to the coming and going rule, it was not necessary for the ALJ to rely on the presumption created by KRS 342.680. However, his reliance thereon was not erroneous because application of the operating premises exception

provided the requisite *prima facie* evidence of a work-related injury. Furthermore, as fact-finder, the ALJ was free to find that Shelby did not rebut that presumption.

As to the positional risk doctrine, it generally applies to injuries that occur outside the employer's operating premises. Therefore, it has no application herein. However, because the ALJ's conclusion that Larsh's injury was work-related was supported by sufficient evidence of substance, and he correctly applied the operating premises exception, any mention of or reliance on the positional risk doctrine is harmless.

CONCLUSION

For the foregoing reasons, we affirm the Board.

ALL CONCUR.

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