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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000787-WC

HARRY COLE APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-00101

CARDINAL COUNTRY STORES, INC.;
HON. GRANT S. ROARK, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; COMBS AND TAYLOR, JUDGES.

COMBS, JUDGE: Harry Cole appeals from an opinion of the Workers' Compensation Board after an Administrative Law Judge (ALJ) dismissed his claim for benefits against Cardinal Country Stores, Inc. The ALJ found that the injuries

that Cole sustained in an automobile accident were not work-related and, therefore, that they were not compensable under the provisions of Kentucky's Workers' Compensation Act. We affirm.

In 2002, Cardinal Country Stores hired Cole as head of maintenance. Cole provided maintenance services to approximately ten Cardinal Country Store locations throughout several counties. He traveled to various store locations each day. A number of years after he began working for Cardinal Country Stores, he received a company vehicle as well as a fuel card to pay for gasoline. Cole stored his tools in the vehicle and used it to travel to the stores. He also used it for his commute to work and back home again to Pikeville each day. Cole was not compensated for his travel time to and from work each day. He was expressly permitted by his employer to drive the vehicle for personal errands; when he did so, Cole paid for the fuel. Cardinal Country Stores also provided a cell phone to Cole so that he could be reached concerning maintenance issues outside regular business hours.

On June 17, 2011, after Cole finished a mowing job at the Lowmansville store in Lawrence County at 3:30, he quit for the day. He then drove the company vehicle to his bank and then to Shelbiana on a personal errand. There is no dispute that Cole was on a purely personal mission unrelated to his employer's business when he left work. On his way back home from Shelbiana to Pikeville, he was injured in a motor vehicle accident.

Cole filed a claim for workers' compensation benefits. The ALJ bifurcated the claim to address the issue of whether Cole sustained his injuries in the course of his employment under an exception to the going-and-coming rule, a rule that normally precludes recovery. After reviewing the undisputed facts and the applicable law, the ALJ concluded that no exception to the rule applied and dismissed Cole's claim.

The Board affirmed the ALJ on appeal. It determined that substantial evidence supported the ALJ's determination that Cole's use of the company vehicle at the time of his accident was primarily for his benefit rather than that of his employer. It also determined that there was insufficient evidence to support Cole's claim that the provision of a vehicle for his use was an "inducement" for his continued employment. The Board concluded that Cole's use of the vehicle under the circumstances placed him squarely within the going-and-coming rule and prevented recovery under Kentucky's Workers' Compensation Act.

In his petition for review, Cole argues that the ALJ and the Board erred by concluding that he was not acting within the course and scope of his employment when he was injured in the motor vehicle accident. As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton,* 862 S.W.2d 308 (Ky. 1993). However, with respect to questions of law, our review is *de novo;* that is, we do not defer to the agency's interpretation of the Act's provisions. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263 (Ky. App. 1990). We may correct the Board only if we determine that

it has misconstrued controlling statutes or precedent or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hosp. v. Kelly,* 827 S.W.2d 685 (Ky. 1992).

On appeal, Cole contends that the Board misapplied the going-and-coming rule. Under this rule, injuries sustained by employees travelling to or returning from their regular places of work are deemed *not* to be work-related. Thus, they are generally not compensable under the Workers' Compensation Act:

> The general rule is that 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 arise out of and in the course of the employment as hazards ordinarily encountered in such journeys are not incident to the employer's business. . . . However, this general rule is subject to several exceptions. For example, transitory activities of employees are covered if they are providing some service to the employer, *i.e.,* service to the employer exception.

Receveur Constr. Company/Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1997) (citations omitted).

As noted in *Receveur, supra,* under special circumstances, an exception to the general rule can be applied under the "service to the employer" doctrine. *Port v. Kern*, 187 S.W.3d 329 (Ky. App. 2006). Under this exception, the coming-and-going rule does not apply if the employee's journey is part of the service for which the worker is employed or if it otherwise benefits the employer. *Fortney v. Airtran Airways, Inc.,* 319 S.W.3d 325 (Ky. 2010).

In *Receveur,* the claimant was killed while driving a company vehicle home from a remote job site. The court's decision in that case focused on the reason that Rogers was driving a company vehicle. The facts indicated that Rogers's use of the company vehicle enabled him to avoid a stop at the company office in Louisville before proceeding to a job site, thus saving time and allowing him to begin work earlier in the day. While Rogers's use of the company vehicle was a convenience to him, it was primarily provided for the benefit of the employer. Under these circumstances, the court concluded that Rogers had been performing a service to the employer at the time of his death and, consequently, that his death was work-related under the service-to-the-employer exception to the going-and-coming rule. The court emphasized that there was no specific allegation that Rogers had substantially deviated from the course and scope of his employment at the time of his injuries.

In this case, the evidence supported a finding that Cole was given the use of the vehicle for the company's benefit and not solely as a personal perquisite. The employer does not dispute this fact. Cole used the company vehicle to travel between job sites. The tools and equipment that he used were stored in the vehicle and were readily available for his use. Furthermore, the provision of the cell phone indicated that Cole was meant to be available to respond directly to any of the numerous stores outside regular business hours. The vehicle provided Cole with reliable transportation.

However, the evidence indicated that Cole was on an entirely personal errand at the time of the accident – an errand that constituted a distinct departure from the normal course of his employer's business. The exception upon which Cole relies does not apply under these circumstances since he was not simply travelling between work and home at the time of his injuries; his journey was not part of the service for which he was employed; and the journey did not benefit his employer. *See Abbott Laboratories v. Smith,* 205 S.W.3d 249 (Ky. App. 2006). Cole's use of the vehicle for his purely personal errands dictated that the injuries he sustained did not fall within the course and scope of his employment.

Consequently, the Board did not err by concluding that Cole's injuries were not compensable under the provisions of the Workers' Compensation Act.

We affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE CARDINAL COUNTRY STORES, INC.:

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