# *IMPORTANT NOTICE*

## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: JANUARY 19, 2006
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL DATE 2-9-06 ELIA Grant, DC.

2005-SC-0403-WC

CRANDELL L. SLONE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-2347-WC
WORKERS' COMPENSATION BOARD NO. 00-81563

KENTUCKY STATE POLICE; HON. RICHARD M. JOINER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

In a decision that was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, an Administrative Law Judge (ALJ) determined that the claimant did not sustain a compensable injury because the motor vehicle accident in which he was involved did not arise out of and in the course of his employment. Appealing, the claimant asserts that his injury is work-related under the "traveling employee" exception to the "going and coming" rule or the positional risk theory. Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965). We affirm.

The claimant worked as a state trooper from 1967 until his retirement in 1991. In 1992, he returned to the department as a civilian, testing driver's license applicants. He resided in Shelbyville. His official workstation was at Bowman Field in Louisville, but he occasionally helped out in other counties when they were short-staffed. During the year

immediately preceding the accident in which he was injured, the claimant reported to the employer's Taylorsville office on Tuesdays to perform testing. When doing so, he drove his personal vehicle and went there directly from his home. He was not reimbursed for mileage between his home and Bowman Field but was reimbursed for mileage between his home and Taylorsville. When working in Taylorsville, he took a one-hour lunch break. He testified that he drove 15-18 miles to his home for lunch because no restaurant in Taylorsville suited him. He was not reimbursed for driving home for lunch.

On Tuesday, May 23, 2000, the claimant was involved in a head-on collision when returning to Taylorsville from his home after lunch. Addressing the question of work-relatedness, the ALJ noted that during the year immediately preceding the accident, the claimant's regular assignment was to report to Bowman Field on four days each week and to report to the Spencer County Courthouse in Taylorsville on Tuesday. Based on the mileage reimbursement he received under the regulations, the ALJ inferred that his official workstation was in Louisville. The ALJ also acknowledged that when work involves travel away from the employer's premises, the worker is considered to be within the course of the employment during the entire trip unless a distinct departure on a personal errand is shown; therefore, injuries that result from the necessity of sleeping in hotels or eating in restaurants while in travel status are usually compensable. Nonetheless, the ALJ determined that the travel at the time of the claimant's accident was unrelated to his employment. He was not traveling to or from a restaurant. He had been to his home and was returning to work at his regularly-assigned place of work on Tuesdays; therefore, he was not a traveling employee. On that basis, the ALJ concluded that the accident did not arise out of and in the course of the employment.

The Board noted that the payment of mileage was but one factor for the ALJ to consider and determined that substantial evidence supported the finding that the claimant was an employee with more than one work station at the time of his accident. Rejecting the claimant's "positional risk" argument (that he would not have been involved in the accident had he not been working in Taylorsville), the Board noted that such an exception to the "going and coming" rule would swallow it. Finding no error, the Court of Appeals affirmed.

The claimant continues to assert that the accident occurred while he was traveling for the employer's benefit, that he was entitled to a one-hour lunch break during which he was not required to stay on the employer's premises, and that he did not depart on a personal errand that would interrupt his status as a traveling employee; therefore, he is entitled to coverage. Black v. Tichenor, supra. He emphasizes that his official workstation was in Louisville and that he was reimbursed for mileage when he worked in Taylorsville or other worksites away from Bowman Field. He complains that the decisions below would deny coverage to any employee who travels to a site away from his regular place of employment on a regular basis, due solely to the regularity of the travel. In a "positional risk" argument, he asserts that but for the work he performed in Taylorsville, he would not have been in what turned out to be a place of danger. Therefore, the accident was due to his work and its effects were compensable. See Kaycee Coal Company v. Short, 450 S.W.2d 262 (Ky. 1970). We disagree.

The burden was on the claimant to prove every element of his claim, including work-relatedness. Although he asserted that he was entitled to coverage under the traveling employee exception to the going and coming rule, the ALJ concluded as a matter of law that the accident "did not arise out of and occur in the course of his

employment with the Kentucky state police." Having failed to convince the ALJ that the accident was work-related, the claimant's burden on appeal was to show that the evidence in his favor was so overwhelming that it compelled a favorable finding as a matter of law. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Contrary to the claimant's assertion, his work was not akin to that of a traveling salesman who makes regular calls on a number of customers. For the year preceding his accident, he worked Mondays and Wednesdays through Fridays at his employer's Bowman Field office and Tuesdays at its Taylorsville office, which was in an adjacent county. Although his employer paid mileage for the trip between his home and Taylorsville at the beginning and end of the day, it did not pay mileage for his trips home for lunch. Under the circumstances, the evidence in the claimant's favor would have permitted but was not so overwhelming as to compel a conclusion that he was a traveling employee for the purposes of Chapter 342 when he worked at the Taylorsville office. Special Fund v. Francis, supra.

Even if the ALJ had viewed the claimant as being in travel status when he worked at the employer's Taylorsville office, we are convinced that the evidence would not have entitled him to coverage. Nor would it have entitled him to coverage under the positional risk theory. Corken v. Corken Steel Products, Inc., 385 S.W.2d 949 (Ky. 1964). As the ALJ correctly noted, when work involves travel away from the employer's premises, a worker is considered to be within the course of the employment during the entire trip unless the individual is performing a personal errand that constitutes a distinct departure from the work-related purpose of the trip. Kaycee Coal Company v. Short, supra; Turner Day & Woolworth Handle Company v. Pennington, 250 Ky. 433, 63 S.W.2d 490 (1933); Standard Oil Company (Kentucky) v. Witt, 283 Ky. 327, 141 S.W.2d 271 (1940). For that

reason, injuries arising from the necessity of sleeping in hotels or eating in restaurants while on travel status are usually found to be compensable. Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 25.01, et seq. (2005). Reasonable incidental travel in the vicinity of the worksite in order to obtain a meal is not considered to be a personal departure, but what is reasonable depends upon the circumstances. Id.

This is not a case where work-related travel caused the claimant to be away from home for an extended period of time. He was working in Taylorsville for one 8-hour day. Furthermore, his reason for driving 15-18 miles to his home for lunch was that no restaurant in Taylorsville suited him. Under the circumstances, it would not have been reasonable to conclude that his work was the reason he made a 15-18-mile trip home for lunch. Nor would it have been reasonable to conclude that his work was the reason for his presence at what turned out to be a place of danger.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cooper, Johnstone, Roach, and Wintersheimer, JJ., concur. Graves, J., dissents by separate opinion in which Scott, J., joins.

COUNSEL FOR APPELLANT:

Christopher P. Evensen
Tamara Cotton & Associates
429 West Muhammad Ali Blvd.
1102 Republic Building
Louisville, KY 40202

COUNSEL FOR APPELLEE:

K. Lance Lucas
Sutton, Hicks, Lucas, Grayson & Braden, PLC
130 Dudley Road, Suite 250
Edgewood, KY 41017

RENDERED: JANUARY 19, 2006
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

2005-SC-0403-WC

CRANDELL L. SLONE — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2004-CA-2347-WC
WORKERS' COMPENSATION BOARD NO. 00-81563

KENTUCKY STATE POLICE; HON. RICHARD M. JOINER, ANDMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

**DISSENTING OPINION BY JUSTICE GRAVES**

Appellant is entitled to relief if he can show that "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Because the majority has unreasonably disregarded the precedent established by Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965), I must respectfully dissent.

Although the Board's decision may appear overtly reasonable in the eyes of the majority, it is still erroneous if it overlooks controlling statutes or precedent (regardless of how unreasonable the statutes or precedent may appear to be). In Black v. Tichenor, supra, our predecessor Court held that "employees whose work entails travel away from the employer's premises are . . . within the course of their employment continuously

during the trip, except when a distinct departure on a personal errand is shown." Id. at 797. The Black Court went on to cite Corken v. Corken Steel Products, Inc., 385 S.W.2d 949 (Ky. 1964) for the proposition:

> We accept the view that causal connection is sufficient if the exposure results from the employment. Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed.

Id. In Corken, the Court approved an award of compensation where a traveling salesman was killed on a public street by a demented stranger during a lunch break that he took in between sales calls. Id.

The majority acknowledges that Appellant's work required his traveling away from his regular employer's premises and that obtaining a meal during such travel is generally not considered a personal errand or departure. See Larson's Workers' Comensation Law, § 25.01, et seq. (2005). Rather, the majority finds that because Appellant traveled 15-18 miles to obtain that meal, his actions were unreasonable and thus, they could not be considered work-related.

The majority's argument is misplaced. First, there is no dispute that Appellant's purpose was to obtain the meal (and thus, no party contends that the meal was just a pretext for some other personal agenda). Therefore, no matter how unreasonable (or perhaps unusual) traveling 15-18 miles for lunch may seem to us,[1] it does not undermine the underlying premise that obtaining a meal during one's lunch break while they are traveling away from the employer's premises is not a personal errand or departure. Moreover, the fact that Appellant was able to travel back to his home during

[1] Traveling what appears to be a long distance for lunch to city dwellers is not necessarily perceived likewise for folks who inhabit rural or sparsely-populated areas. In those areas, obtaining a meal or other daily necessities is not as simple as driving down the street to a local strip mall or shopping mecca.

his trip fails to distinguish this case. The purpose underlying the traveling employee exception is to compensate employees whose work obligations caused them to be located at what turns out to be a place of danger. See Black v. Tichenor, supra; Corken, supra. That is exactly what happened here; Appellant testified that he drove home for lunch because he was unfamiliar with any suitable lunch providers in any area more proximate. It is improbable that Appellant would have encountered this work-related positional risk were it not for his obligation to travel to and from the off-premises work site. See Olston-Kimberly Quality Care v. Parr, 965 S.W.2d 155, 158 (Ky. 1998) (traveling nurse who was injured in an automobile accident on her way ***home*** from visiting a patient was entitled to compensation under the traveling employee exception since travel to and from the patients' homes was a service being offered by the employer to its clients).

In addition, fault on the part of the injured worker is irrelevant when determining whether one is entitled to benefits under the Workers' Compensation Act. See, e.g., Adkins v. R & S Body Co., 58 S.W.3d 428, 430 (Ky. 2001). Thus, the reasonableness of Appellant's decision to travel 15-18 miles to obtain lunch should play no part in determining whether traveling to and from lunch during an extended period of time away from Appellant's regular work site should be compensated as work-related[2]. See Black v. Tichenor, supra, at 796 ("It is true that Tichenor could have driven his own car, could have traveled by public transportation, and could have started early Monday morning instead of riding Sunday night with his fellow employee, Black, but we do not consider the freedom of choosing his mode of transportation or the method in which his salary

[2] This is particularly true in this highly mobile society characterized by the personal autonomy of operating private motor vehicles.

was computed as controlling factors in determining whether he was within the protection of the Workmen's Compensation Act when his injuries occurred.")

The bottom line is Appellant's work required him to be away from his regular employer's premises for a period of time long enough for him to be entitled to a lunch break. Pursuant to our established caselaw, traveling to obtain a lunch during that break does not disrupt his status as a traveling employee. Since this Court has not seen fit to overrule established caselaw, I must respectfully dissent as Appellant's actions clearly fell within the purview of the Act.

Scott, J., joins this dissenting opinion.