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NOT TO BE PUBLISHED OPINION

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RENDERED: MARCH 20, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000031-WC

SHELBY INDUSTRIES, LLC — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-000667-WC
WORKERS' COMPENSATION NO. 10-01351

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Shelby Industries, LLC, appeals a decision of the Court of Appeals which affirmed an award of death and survivors' benefits to the Appellees, the Estate of Brian Larsh, Sandra Larsh, Kieara Larsh, and Breann Larsh (collectively "Estate"). Shelby Industries' sole argument on appeal is that the Estate is not entitled to benefits because Larsh was killed by a lightning strike, or an Act of God, on company property while leaving his employment. Shelby Industries specifically argues that the Administrative Law Judge (hereinafter "ALJ"), Workers' Compensation Board, and the Court of Appeals misapplied the operating premises exception to the coming and going rule to

find Larsh's death compensable. For the below stated reasons, we affirm the Court of Appeals.

On June 10, 2009, Larsh asked his supervisor if he could leave work early to tend to some personal business. Larsh was given permission and at 11:29 a.m. he clocked out and exited the building to wait for his daughter to pick him up. Around this time a thunderstorm was approaching. At approximately 11:32 a.m., Wayne Allen, vice-president of Shelby Industries, heard a scream from the parking lot. When he went to investigate, Allen found Larsh lying face down on the ground outside the building near a large oak tree. He had been struck by lightning. CPR was performed on Larsh until emergency medical personnel arrived and took him to the hospital. Larsh died two days later from his injuries.

The Estate filed a claim for death and survivors' benefits. Shelby Industries denied the claim arguing that Larsh's injury and death were not work-related.

The ALJ found that benefits for Larsh's injury and death were not barred by the coming and going rule. The coming and going rule generally provides that injuries which occur while an employee is on the way to or from a worksite are not compensable. *Harlan Collieries v. Shell*, 239 S.W.2d 923 (Ky. 1951). However, the operating premises exception attaches liability to the employer if the employer controls the area, and a work-related injury occurs there. *K-Mart Discount Stores v. Schroeder*, 623 S.W.2d 900, 902 (Ky. 1981). The ALJ held that:

> [t]he unrebutted evidence in this case establishes that [Larsh] was fatally injured during the course of leaving the workplace on June 10, 2009, and that the injury occurred on the employer's operating premises. . . .
> It is clear that cases involving the operating premises exception to the going and coming rule are fact-specific and the application of the exception will turn on the particular facts presented. [*Schroeder*, 623 S.W.2d 902]. In the present case, it is undisputed that Larsh was injured while leaving his place of employment and that he had clocked out, inside the plant, no more than two to three minutes before the injury occurred. . . .
> The [ALJ] is not persuaded from the facts presented that Larsh's leaving the building and walking towards the area where he was to be picked up, even during a storm, was a substantial deviation from his trip home. . . .
> The [ALJ], therefore, finds that the decedent's fatal injury occurred on the employer's operating premises while he was in the course of normal coming and going activity, and that Larsh did not substantially deviate from that process.

The ALJ further found that the positional risk doctrine applied in this matter. The positional risk doctrine applies "when employment places a worker in what turns out to be a dangerous place" and therefore, any resulting injury is considered work-related even though the injury producing mechanism itself was not necessarily work related. *Jackson v. Cowden Mfg. Co.*, 578 S.W.2d 259 (Ky. App. 1978). The ALJ applied the positional risk doctrine based on a FEMA fact sheet, printed from their website by Shelby Industries, which stated that during a thunderstorm one should avoid anything which would be considered a "natural lightning rod such as a tall, isolated tree in an open area" and "anything metal." Thus, the ALJ reasoned that since Larsh had to pass by a tall tree which was in vicinity to a metal building to leave the premises, a zone was created which made the likelihood of a lightning strike greater.

A petition for reconsideration was denied but several errors in calculating the Estate's benefits were corrected. The Board affirmed.

The Court of Appeals also affirmed the ALJ's opinion and award. In affirming, the Court of Appeals agreed that Shelby Industries had no control over the lightning. However, the opinion reasoned that control over the instrumentality of the injury was not the determinative factor of whether the injured worker was entitled to benefits. The Court of Appeals cited three cases to illustrate this point:

> In *Hayes v. Gibson Hart [Co.]*, 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.
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> 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.
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> 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.
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> Finally, in [*Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29 (Ky. 2004)], 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.
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> 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 and coming and going activities. Therefore, we discern no error in the ALJ's finding that Larsh suffered a work-related injury.

The Court of Appeals further stated that the ALJ committed harmless error by applying the positional risk doctrine because "it generally applies to injuries that occur outside the employer's operating premises." This appeal followed.

Shelby Industries argues that the Court of Appeals erred by affirming the finding that Larsh's injury and subsequent death were work-related under the operating premises exception to the coming and going rule. We disagree, but affirm the decision of the Court of Appeals on slightly different grounds. *See McCloud v. Commonwealth*, 286 S.W.3d 780, 786 n. 19 (Ky. 2009).

In most lightning strike cases an increased risk test is applied to determine if the injury is work-related. 1 Larson's Workers' Compensation Law §5.01. (2007). Kentucky has applied a similar rule as explained in *Bales v. Covington*, 312 Ky. 551, 228 S.W.2d 446, 448 (Ky. 1950):

> [*Stout v. Elkhorn Coal Co.*, 289 Ky. 736, 160 S.W.2d 31 (Ky. 1942)] adopted the majority rule in such cases which is that recovery of compensation by workmen injured by lightning is permitted 'if the current of the stroke is aided or assisted in any manner to seek out and land upon the injured servant where he is directed to and is engaged in his work.' After referring to a number of annotations on the subject in American Law Reports, the opinion said:
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> > 'It is acknowledged – not only by the writer of the annotations, but by some of the courts themselves – that there exists conflict in the opinions of the various courts upon the question as to whether or not an injury produced by an act of God ever becomes compensable under the workmen's compensation acts in any state of circumstances. But it will also be found that the great majority of the courts have reached the conclusion that the servant is entitled to compensation for injuries produced by lightning in all cases where he 'was subjected to a danger from lightning greater than were the other people in the neighborhood; that is, Was the danger to which he was subjected one which was incident to the employment, or was it one to which other people, the public generally, in that neighborhood, were subjected?'

Following this rule, the Court in *Bales* granted workers' compensation benefits to the worker's estate who died as a result of a lightning strike because the

shed in which he was working was partially made of metal, was located on a high ridge, and was located next to a tall tree, all of which increased the likelihood lightning would strike him.

Thus, applying our historic standard, the question which must be asked in this matter, is whether due to his employment, Larsh was placed in an area of increased risk as he attempted to leave the building? The ALJ found that Larsh was placed in a zone of increased risk due to the presence of a metal building and a tall tree which made the likelihood of a lightning strike greater. His conclusion is supported by the FEMA fact sheet which is a part of the record. While Shelby Industries did not have control over the lightning, due to his employment, Larsh ended up in an area in which made the chance of being hit by lightning greater.

Yet even if Larsh was in an increased zone of risk, but was there because he substantially deviated from normal coming and going activities, the Estate would not be entitled to benefits. *See Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966) (holding that the family of an employee who went to gather loose coal for his personal use for approximately half an hour after clocking out was not entitled to death benefits when an embankment caved in on him on the employer's property). But in this matter, as held by the Court of Appeals, the coming and going rule does not prohibit the Estate from receiving benefits. It is uncontroverted that the injury occurred on Shelby Industries' property. There is no evidence that Larsh deviated from normal coming and going activities. Indeed, Larsh clocked out (after receiving permission) only three

minutes before he was struck by lightning, and went outside to wait for his daughter to pick him up. While Larsh could have remained inside to wait for his daughter, there is no evidence that his decision to go outside was a substantial deviation.

For the above stated reasons, the decision of the Court of Appeals is affirmed.

Minton, C.J.; Abramson, Cunningham, Noble, Scott, and Venters, JJ., sitting. All concur. Keller, J., not sitting.

COUNSEL FOR APPELLANT,
SHELBY INDUSTRIES, LLC:

James Gregory Allen
Katherine Michelle Banks

COUNSEL FOR APPELLEES,
ESTATE OF BRIAN LARSH, SANDRA LARSH,
KIEARA LARSH, AND BREANN LARSH:

Charles E. Jennings