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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 2, 2015
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2013-SC-000297-WC

DATE 4-23-2015 C Coleman DC

BOYLE MASONRY CONSTRUCTION — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001779-WC
WORKERS' COMPENSATION NO. 11-WC-00042

FELIPE MEDELLIN; HONORABLE DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Administrative Law Judge (ALJ) determined that the "service to the employer exception" to the "going and coming rule" applied to Felipe Medellin's (Medellin) claim, thus his injury occurred while he was within the course and scope of his employment at Boyle Masonry Construction (Boyle Masonry). The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Boyle Masonry appeals to this Court arguing that the ALJ's opinion creates a new rule of law that merely showing up for work establishes a service to the employer for purposes of the going and coming rule, and that such precedent would result in the exception becoming the rule. For the reasons stated below, we disagree and affirm.

I. BACKGROUND.

Medellin, who lived in Liberty, Kentucky, had worked for Boyle Masonry as a general laborer and forklift operator for 12 years. Dwight Boyle (Boyle), the owner and CEO of Boyle Masonry, operated the business out of his home in Nicholasville and the company performed work at job sites throughout central Kentucky. Because Boyle Masonry had no centralized location, employees reported directly to the appropriate job site each morning.

In June 2012, Boyle Masonry began a job in Lexington and assigned Medellin to work at that job site, which was approximately 70 miles from Medellin's home. Medellin lost his driver's license because of several DUI convictions, and, when Boyle learned that Medellin was driving without a license, he told Medellin that was "not acceptable." Therefore, Medellin began riding to and from the job site with Marcus Baxter (Baxter), the job superintendent. As superintendent, Baxter had the use of a company truck, and Boyle was aware that Medellin rode to and from the job site with Baxter in the company truck.

On September 7, 2010, Baxter and Medellin were headed home after leaving the job site. Baxter "blacked out" and the truck went off the road and struck a tree. As a result, Medellin suffered a fractured vertebra in his lower thoracic spine.

Medellin timely filed a claim for benefits, which Boyle Masonry contested, arguing that Medellin's claim was barred by the going and coming rule. The ALJ disagreed, finding that Medellin's claim fell within the service to the

employer exception to the going and coming rule. The Board and the Court of Appeals affirmed.

II. STANDARD OF REVIEW.

> When the party who bears the burden of proof is successful before the ALJ, the question on appeal is whether substantial evidence in the record supported the decision. Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. As fact finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence.

Transp. Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001), *as modified on denial of reh'g* (Mar. 21, 2002)(citations omitted). We will only reverse an ALJ's finding of fact if it "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Furthermore, this Court will "correct the Board only where the . . . Court perceives 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." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

III. ANALYSIS.

> 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 the 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 Const. Co. v. Rogers, 958 S.W.2d 18, 20 (Ky. 1997) (citation omitted).

As we further delineated in *Fortney v. Airtran Airways, Inc.*, 319 S.W.3d 325, 329 (Ky. 2010):

> The rule excluding injuries that occur off the employer's premises, during travel between work and home, does not apply if the journey is part of the service for which the worker is employed or otherwise benefits the employer. Factors considered under the exception include not only an employer service or benefit but also whether the injured worker is paid for travel time (*e.g.*, for performing work on the trip, traveling to a remote site, or traveling between job sites) and whether the worker is paid for the expense of travel. Although payment for travel time brings the trip within the course of the employment, the lack of payment does not exclude a trip from the course of employment.

(footnotes omitted). In other words, "work-related travel has come to mean travel which is for the convenience of the employer as opposed to travel for the convenience of the employee." *Olsten-Kimberly Quality Care V. Parr,* 965 S.W.2d 155, 157 (Ky. 1998).

Whether an employee is performing a service to the employer is a question of fact for the ALJ. *Howard D. Sturgill & Sons v. Fairchild*, 647 S.W.2d 796, 798 (Ky. 1983). Therefore, we only reverse the ALJ if his finding that Medellin was performing a service to Boyle Masonry was unsupported by evidence of substance and erroneous as a matter of law. *Ira A. Watson Dep't Store*, 34 S.W.3d at 52.

Boyle Masonry argues that Medellin was not performing any service for it by simply going home from work. Viewed in a vacuum, that is a correct statement of the law. However, as the ALJ noted, there were other factors involved. Boyle Masonry employed Medellin, and essentially all of its

employees, to perform work at remote non-permanent job sites, rather than hiring local workers. The ALJ was free to infer from that fact that Boyle Masonry benefited from its employees' travel because it did not have to hire and train new employees with each new job. Therefore, the ALJ was free to infer that Medellin's travel was not for his convenience but for Boyle Masonry's. This inference is further bolstered by the following facts: Boyle told Medellin that driving without a license was an unacceptable practice; Boyle was aware Medellin could not get to a job site more than 70 miles from home without a ride; Baxter, Medellin's supervisor, regularly drove Medellin to the job site in a truck furnished by Boyle Masonry; and Boyle knew of and condoned this practice.

Certainly, as Boyle Masonry argues, Boyle could have discharged Medellin when he learned that Medellin did not have a license. However, Boyle chose not to do so, which further supports the inference that Boyle Masonry benefitted from Medellin's travel.

The preceding factors, taken in isolation, may not have been dispositive; however, taken as a whole, they constitute evidence of substance sufficient to support the ALJ's conclusion that Medellin was providing a service to Boyle Masonry when he was injured. Therefore, we affirm.

IV. CONCLUSION.

Because the ALJ's opinion was supported by substantial evidence we affirm.

All sitting. Minton, C.J., Abramson and Keller, JJ., concur. Noble, J., concurs and further notes that when a contractor seeks jobs at various locations, sometimes far away from his home base, and keeps a group of employees that he sends to each new job site rather than hiring unknown workers at the site, it is clear that he relies on the skills and training of his known employees, and sending them to a remote site is a business decision, and therefore accrues to his benefit. Venters, J., dissents by separate opinion, which Barber and Cunningham, JJ. join.

VENTERS, J. DISSENTS: I respectfully dissent because the evidence does not support a finding that Medellin was "in the service of his employer" when he was injured. The ALJ's finding to the contrary was, therefore, clearly erroneous as a matter of law.

Medellin was injured going home; he was not working or otherwise contributing anything in the service of the employer. The fact that he rode with a co-worker in a company truck seems to influence the majority opinion, but that fact alters neither the purpose of the trip, nor its utility to the employer. Medellin was no more in "service to his employer" than he would be riding home in a taxi or bus, or hitch-hiking. Getting a lift from a co-worker was certainly not "for the convenience of the employer" as discussed in *Olsten-Kimberly*; the ride was purely for the convenience and accommodation of Medellin because he had no other way to get home from work in the evening.

We can always conceive of how any worker's ability to get home from work may have some indirect and intangible, but beneficial, impact upon an

employer. But these facts do not fall within the exception to the "going and coming" rule described in *Receveur Construction*, *Fortney*, and *Olsten-Kimberly*.

Barber and Cunningham, JJ., join.

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