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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: JUNE 11, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000402-WC

BOWLIN GROUP, LLC — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001736-WC
WORKERS' COMPENSATION NO. 11-01392

ROBERT SHAWN PADGETT;
HONORABLE JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellant, Bowlin Group, LLC, appeals a Court of Appeals decision which reversed a Workers' Compensation Board ("Board") opinion that affirmed the dismissal of Appellee, Robert Padgett's, workers' compensation claim. Bowlin argues that the Court of Appeals improperly reweighed the evidence and reversed the Board's opinion on the grounds that Padgett's use of a company truck to commute to and from work fell within an exception to the going-and-coming rule. For the reasons set forth below, we reverse the Court of Appeals.

Bowlin provides construction and installation services for cable television and telephone companies. Padgett worked as an installation manager out of Bowlin's Walton, Kentucky office. Padgett was given a company truck and a

gas card to use because his job required traveling to multiple work sites away from the Walton office. Installation managers were normally given company trucks to use. He also did not have reliable transportation to travel to the various work sites. After a few months of working at Walton, Padgett was informed that Bowlin was closing that office. He was then given the option of either transferring to the Lexington, Kentucky office or being laid off. Padgett chose to transfer.

Since the Lexington office already had plenty of installation managers, Padgett was given an administrative clerical position. Other similarly situated employees were not given company trucks because the job did not require traveling between different work sites. Padgett, however, did not lose the use of the company truck. Twice daily Padgett would deliver certain documents and payments to an office approximately four tenths of a mile from the Bowlin office. He used the company truck to complete these trips even though other vehicles were available for him to use. Padgett also used his company truck to commute to and from his home in Northern Kentucky to the Lexington office, but was instructed to not use the truck for personal errands.

While driving to work one morning, Padgett hydroplaned on Interstate 75 and wrecked the company truck. As a result, he sustained several serious injuries. Padgett filed for workers' compensation.

The ALJ bifurcated Padgett's claim to first determine whether Padgett sustained his injury in the course of his employment as an exception to the "going and coming rule." The ALJ determined that the exception did not apply

and dismissed Padgett's claim. He reasoned that if the accident occurred when Padgett was working out of the Walton office and was traveling between remote work sites, the exception would have applied. However, the ALJ further stated that, "[w]hen he agreed to a transfer to Lexington with a different job, the continued use of the vehicle was not mentioned by [Bowlin or Padgett] in their discussions of the transfer to the new job. The use of the vehicle became a perquisite . . . when [Bowlin], without discussion, continued to allow [Padgett] the use of the vehicle and gas card in his employment in Lexington." No petition for reconsideration was filed and the matter was appealed to the Board.

The Board affirmed the ALJ. The Board agreed that none of the exceptions to the going and coming rule applied to Padgett's claim. Additionally, the Board believed substantial evidence supported the conclusion that Padgett's use of the company truck was for his own benefit and that the use of the vehicle was not an inducement for his continued employment. Padgett appealed to the Court of Appeals.

The Court of Appeals reversed and remanded the matter for further proceedings on the merits of Padgett's claim. The Court of Appeals wrote:

> As the ALJ correctly noted, the interpretation and scope of the 'service/benefit to the employer' exception is a question of law. The Court's reasoning in [*Fortney v. Airtran Airways, Inc.*, 319 S.W.3d 325 (Ky. 2010)] sets out a broader interpretation of this exception than the 'primary benefit' analysis followed by the ALJ and the Board. Rather than focusing on whether the provision of the conveyance was primarily for the benefit of the employer or whether the specific trip was for the benefit of the employer, the Court looked to the overall benefit which the employer received.

> In *Fortney*, the airline provided its pilots with free or reduced-fare air travel to its hub in Atlanta. This arrangement was a benefit to the pilot by allowing him to continue working for the airline without having to relocate to Atlanta. However, the airline also benefited from the arrangement because it served as an inducement to the pilot to continue working for the airline. As a result, the Court concluded that the pilot's travel from Lexington to Atlanta was work-related, and his death in a crash while engaged in that travel was compensable. *Id.*
>
> Similarly, Bowlin received a significant benefit by providing the truck to Padgett, both before and after his transfer to Lexington. Prior to the transfer, the truck served as an inducement for Padgett's employment by providing him with reliable transportation. For his part, Padgett used the truck extensively as part of his job duties.
>
> The balance of the benefit changed after the transfer to Lexington, but did not shift entirely to Padgett's favor. Indeed, after the transfer, Padgett's supervisor told him that personal use of the truck was not allowed and required him to keep records regarding the truck's use. Padgett could use other vehicles for necessary travel while in Lexington. But given Bowlin's restrictions on the truck's use and its continued provision of the fuel card, the parties clearly understood that Padgett would use the truck for this purpose. Moreover, Bowlin also accepted that Padgett's commute to and from Lexington was an acceptable work-related use of the truck. And in fact, Padgett's supervisor continued to allow him to use the fuel card for this purpose.
>
> Therefore, we conclude that the ALJ and the Board clearly erred in finding that Padgett's injury did not occur in the course and scope of his employment. Bowlin received sufficient benefit from its provision of the truck to place Padgett's travel in the truck within the exception to the going and coming rule. This benefit accrued to Bowlin regardless of whether Padgett actually used the truck for business purposes during his commute. Therefore, his travel between Walton and Lexington was within the scope of his employment, and Bowlin is liable for his injuries under the Workers' Compensation Act.

This appeal followed.

The Board's review in this matter was limited to determining whether the evidence is sufficient to support the ALJ's findings, or if the evidence compels a different result. *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

Further, the function of the Court of Appeals is to "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." *Id.* at 687-88. Finally, review by this Court "is to address new or novel questions of statutory construction, or to reconsider precedent when such appears necessary, or to review a question of constitutional magnitude." *Id.* As fact finder, the ALJ had sole authority to determine 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).

Bowlin argues that the Court of Appeals erred by reweighing the evidence and finding that Padgett's injury fell within an exception to the going and coming rule.

> 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). *Fortney*, 319 S.W.3d at 329, further elaborates:

> 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 employment, the lack of payment does not exclude a trip from the course of employment.

(Footnotes omitted). 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 the ALJ's finding that Padgett was not performing a service to Bowlin when his accident in the company truck occurred should only be reversed if it was unsupported by evidence of substance and erroneous as a matter of law. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Because the ALJ's findings are sufficiently supported by the record and are not erroneous as a matter of law, we reverse the Court of Appeals.

Rogers, 958 S.W.2d 18, cited to *Larson's Workers' Compensation Law* to note that other jurisdictions have held that a trip taken by an employee in a company vehicle will result in the trip being considered in the course of employment. But *Rogers* then stated, "[w]hile not prepared to totally adopt the reasoning in those cases, we do agree that where there is evidence that the use of the company owned vehicle is of *some benefit to the employer*, an exception to the going-and-coming rule is created." 958 S.W.2d at 19 (emphasis added). In *Fortney*, 319 S.W.3d at 330, the Court held that a paid or reduced-fare arrangement for transportation on an airplane provided by the employer was an inducement for an employee to work for that employer because it allowed

the individual to live where he wanted. Thus, Fortney's death while traveling using the paid airfare was held to be compensable.

In this matter, unlike *Fortney*, there is no evidence the company truck was an inducement for Padgett to transfer to the Lexington office. When Padgett worked as a supervisor at the Walton office, the ALJ found that Padgett did not have suitable transportation to travel among the various work sites and therefore the company truck allowed him to serve his role as supervisor. The ALJ correctly opined that if Padgett had an accident in the company truck at that time he would have been covered under our Workers' Compensation Act through an exception to the going and coming rule. However, upon being transferred to the Lexington office, the ALJ found that Padgett's use of the company truck became a perquisite, or a perk. The use of the company truck was not a condition that Padgett demanded before he accepted the transfer to the Lexington office. Instead Padgett was told that if he did not transfer, he would be laid off. Further, Padgett's new job in Lexington did not require the use of a company truck. While he undertook two short trips to a neighboring office each day, there were vehicles that Padgett could have used to complete that trip without being given a full-time company truck.

While one may view the facts in this matter and hold differently than the ALJ, that alone is insufficient to reverse his findings and conclusions. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). Thus, the Court of Appeals should not have reversed the Board, and the conclusion that the exception to the going and coming rule does not apply in this matter. *W. Baptist Hosp.*,

827 S.W.2d at 687-88. Padgett's accident and injuries are not covered under our Workers' Compensation Act.

For the above stated reasons, we reverse the decision of the Court of Appeals.

All sitting. All concur.

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