

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002952-WC

CNB BANCSHARES, INC.

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-94764

MARY JOYCE SKEES (Deceased),
by STEPHEN M. SKEES (Spouse);
WORKERS' COMPENSATION BOARD;
and THOMAS A. NANNEY,
Administrative Law Judge

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOPF, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board), which affirmed a decision by an Administrative Law Judge (ALJ) that the death of the spouse of appellee Stephen M. Skees (appellee) was a compensable event. On appeal, appellant employer contends that both the ALJ and the board erred in reaching such a conclusion. We disagree. Hence, we affirm.

The material facts are undisputed. The deceased employee, Mary Joyce Skees (Skees), was employed by appellant as an assistant vice president. On December 3, 1996, she finished work, changed her clothes, and went to her van, which was parked in appellant's parking lot adjacent to its building. Just after she turned on the ignition, an unidentified man approached the vehicle and, apparently without provocation, shot and killed her. Appellee subsequently filed a claim for survivor's death benefits. The arbitrator dismissed the claim on the ground that Skees' death was not work related. An ALJ thereafter reversed the arbitrator's decision on the ground that the circumstances of Skees' death brought it within the "service to employer" exception to the going and coming rule, with the result that it was a compensable event. The board affirmed the ALJ's action, but instead found that Skees' death was compensable because it fell within the "operating premises" exception to the going and coming rule. This petition for review followed.

Appellant contends that both the ALJ and the board erred by finding that Skees' death was a compensable event. We disagree with its contention, but for different reasons than those relied upon by the ALJ and the board.

The parties do not dispute that the ALJ erred by finding that Skees' death fell within the "service to employer" exception to the going and coming rule. However, they disagree as to whether Skees' death fell within any other exception to the coming and going rule. Although the parties on appeal

specifically concentrate on the "operating premises" exception relied upon by the board, appellant also addresses on appeal the issue of whether this incident fell within the "positional risk" exception to the rule. As we conclude that the circumstances of Skees' death clearly met the requirements of the "positional risk" doctrine, it was a compensable event and the board's decision must be affirmed.

As succinctly noted in Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775, 777 (1990),

a long line of Kentucky cases have recognized the "positional risk" theory to extend coverage to employees where the work assignment places them where they were exposed to the injury for which compensation is sought even though the injury producing mechanism was not "work-related." Corken v. Corken Steel Products, Inc., Ky., 385 S.W.2d 949, 950 (1965); Baskin v. Community Towel Service, Ky., 466 S.W.2d 456 (1971); Tommy Thompson Produce Co. v. Coulter, Ky. App., 678 S.W.2d 794 (1984).

We fail to perceive any basis for the argument that Skees' work assignment did not place her in a position where she was exposed to danger from the unknown assailant. Indeed, in order to work for appellant, Skees was necessarily required to drive to her assigned bank location, park in its parking lot, and enter the building. Moreover, at the end of the day Skees was required to leave the building and to walk to her vehicle in the parking lot. Obviously, therefore, on the day in question Skees' work caused her to be in a position where she was exposed to a nonwork-related assault by an unidentified third person, and it

is clear that except for her presence in the parking lot, she would not have been killed. Hence, Skees' death clearly fell within the "positional risk" exception to the coming and going rule.

More important, we are of the opinion that the instant proceeding is so factually similar to Tommy Thompson Produce Co. v. Coulter, Ky. App., 678 S.W.2d 794 (1984), as to be governed by that decision. In Thompson, the employee accidentally shot the owner of a neighboring business, and then was shot and killed inside his own employer's operating premises by the first victim's son. Citing Corken v. Corken Steel Products, Inc., Ky., 385 S.W.2d 949 (1964), the court held that the deceased employee's death was a compensable event pursuant to the "positional risk" theory. In the instant proceeding, the only significant factual distinction is that Skees was killed in her employer's parking lot rather than within the bank itself. We find no basis for concluding, for purposes of the "positional risk" theory, that an employee's murder by a third-party stranger is noncompensable merely because it occurs on the employer's parking lot rather than within the adjacent building. We hold, therefore, that Skees' death was a compensable event, and that appellee is entitled to pursue a claim for survivor's benefits.

Given our conclusions thus far, it is unnecessary to address either the issue raised as to the "operating premises" exception to the coming and going rule, or the cases addressing that issue which are cited in the parties' briefs.

For the reasons stated, the board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR MARY JOYCE SKEES
(Deceased), by STEPHEN M.
SKEES (Spouse):

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