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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001736-WC

ROBERT SHAWN PADGETT — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-01392

BOWLIN GROUP, LLC;
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MAZE, STUMBO, AND VANMETER, JUDGES.

MAZE, JUDGE: Robert Shawn Padgett petitions for review of a September 13, 2012 opinion by the Workers' Compensation Board ("Board"). The Board affirmed a June 22, 2012 opinion and order of the Administrative Law Judge ("ALJ") dismissing Padgett's claim for benefits against Bowlin Group, LLC

("Bowlin") after finding the September 23, 2011 accident did not occur in the course and scope of his employment. In this petition for review, Padgett argues that the ALJ misapplied the exception to the "going and coming rule." Padgett maintains that his use of a company-owned motor vehicle was of some benefit to Bowlin, and therefore his injury in an accident while traveling to work falls within the exception. In the alternative, Padgett argues that Bowlin provided the company-owned motor vehicle as an inducement to his continued employment, which likewise created an exception to the going and coming rule. We agree with Padgett that his use of the vehicle fell within the exception to the going and coming rule. Hence, we reverse and remand for further proceedings on the merits of Padgett's claim.

In February 2011, Bowlin hired Padgett as an installation supervisor for the Northern Kentucky area at its office in Walton. Bowlin provided cable installation services on a contract basis for Insight Communications. Padgett's job required him to organize the workload for between thirteen and eighteen installers, to deliver money and paperwork to Insight, to deliver equipment to installers in the field, and to follow up on jobs performed by the installers. Since Padgett had no reliable transportation of his own, Bowlin provided him with a company-owned vehicle, as well as a fuel card to pay for gasoline.

In late July, Bowlin advised Padgett and the installers who he supervised that the Walton office would be closed, and anyone desiring to do so could transfer to the Lexington office. Padgett opted to transfer to Lexington

beginning in early August 2011. At the Lexington office, Padgett processed paperwork and made deliveries to Insight, which was located 4/10 of a mile from the Bowlin offices. He no longer had supervisory responsibilities and he did not deliver any equipment or materials to the field.

At the time of Padgett's transfer to Lexington, Padgett's supervisor expressed concerns about the mileage being placed on the vehicle. From that point on, Padgett was advised that personal use of the company-owned vehicle was not allowed and he was required to keep records regarding the use of the vehicle. However, Bowlin allowed him to continue using the fuel card to buy gas for the truck. Padgett also continued to use the truck to commute to and from the Lexington office. Although not required to do so, Padgett began tracking the hours he worked.

On September 23, 2011, Padgett was commuting from his home in Walton to Bowlin's Lexington office. He testified that it was raining, and he was running late for work. In a single-vehicle accident, the truck hydroplaned and crashed into a guardrail. Padgett lost consciousness and awakened to find himself trapped in the vehicle. An emergency team removed him from the vehicle, and he was transported to the University of Kentucky Medical Center for treatment. He sustained multiple severe injuries in this accident.

On October 23, 2011, Padgett filed a claim for workers' compensation benefits arising from this accident. After conducting some discovery, the ALJ bifurcated the claim to address the issue of whether Padgett sustained his injury in

the course of his employment as an exception to the "going and coming rule." After reviewing the undisputed facts and the applicable law, the ALJ concluded that the exception did not apply and dismissed Padgett's claim.

On appeal, the Board affirmed. Although the Board recognized that there are several exceptions to the going and coming rule, the Board concluded that none of them applied to Padgett's claim. The Board found substantial evidence to support the ALJ's determination that, after the transfer to Lexington, Padgett's use of a company-owned vehicle was primarily for his benefit, not Bowlin's. Furthermore, the Board found insufficient evidence to support Padgett's claim that his use of the company-owned vehicle was an inducement for his continued employment after the transfer to Lexington.

In this petition for review, Padgett argues that the ALJ and the Board misapplied these exceptions to the going and coming rule. As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Since Padgett, the party with the burden of proof before the ALJ, was unsuccessful, the issue on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

On the other hand, this Court reviews questions of law on a *de novo* basis and without deference to the interpretation given by the agency. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 266 (Ky. App. 1990). This Court may substitute its judgment on mixed questions of law and fact where the agency's

decision was based on an incorrect view of the law. *Id.* The function of this Court's review of the Board is to correct the Board only where the Court perceives 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 Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

As the ALJ and the Board recognized, the threshold issue in this case concerns the application of the "going and coming" rule and the exceptions to that rule. Under the general rule, injuries sustained by employees when going to or returning from the regular place of work are not deemed to have arisen out of and in the course of their employment. *Turner Day & Woolworth Handle Co. v. Pennington*, 250 Ky. 433, 63 S.W.2d 490, 492 (1933). The rationale supporting the rule is that such injuries are caused by perils encountered by the public at large and not incident to the employer's business. *Receveur Constr. Co./ Realm, Inc. v. Rogers*, 958 S.W.2d 18, 20 (Ky. 1997).

However, Kentucky courts have recognized that, where the use of the conveyance serves to benefit the employer's interests rather than merely serve the employee's convenience, then an injury sustained in the course of going to and coming from work will be deemed work-related and therefore compensable. *Id.* *See also Port v. Kern*, 187 S.W.3d 329 (Ky. App. 2006). Factors considered under the exception include not only an employer service or benefit but also whether the injured worker is paid for travel time, such as 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. *Fortney v. Airtran Airways, Inc.*, 319 S.W.3d 325, 329 (Ky. 2010).

Before he was transferred to Lexington, Padgett directly supervised installers in the field. He used the truck as part of those duties, and also to make deliveries to field installers and to Insight offices. But after the transfer to Lexington, Padgett no longer had those supervisory duties and did not make any equipment deliveries to installers in the field. While he continued to use the truck to make deliveries to Insight offices, Bowlin did not require him to use the truck for these duties, and in fact, had other vehicles available for this purpose.

Based on this evidence, the ALJ and the Board concluded that Padgett's continued use of the company-owned truck was primarily for his convenience and not for Bowlin's benefit. Padgett argues that the ALJ interpreted the exception too narrowly. He notes that in *Rogers*, the Kentucky Supreme Court held that the exception applies "where there is evidence that the use of the company owned vehicle is of *some benefit* to the employer…." *Rogers*, 958 S.W.2d at 19 (emphasis added). Thus, he contends that his continued use of the truck in Lexington need not be "primarily" for Bowlin's benefit, as long as it continued to provide "some benefit."

Padgett points out that, in addition to his regular duties in Lexington, he used the truck for company business on several occasions on his way to and

from Lexington. (Bowlin disputes this, however). He concedes that Bowlin did not require him to use the company-owned truck after the transfer to Lexington. However, Padgett emphasizes that his supervisor told him that the truck was only for work and not for personal use. Furthermore, Bowlin continued to provide him with a fuel card to pay for these work-related uses of the truck. Consequently, Padgett maintains that his continued use of the truck was more than merely a "perquisite" of his job, but was for Bowlin's benefit as well as his own.

We agree with the ALJ and the Board that the employer must receive more than *de minimus* benefit from employee's use of the conveyance in order to be subject to liability for injuries arising out of the use of that conveyance. But recently, in *Fortney*, the Kentucky Supreme Court held that the rule excluding injuries occurring while traveling to and from work does not apply if the travel is part of the service for which the worker is employed or otherwise benefits the employer. *Fortney*, 319 S.W.3d at 329. The fact that an employer uses transportation or transportation expense as an inducement to accept or continue employment is material to supporting compensability, particularly when the journey is sizeable and when the employer pays all or substantially all of the expense. *Id.*

The ALJ and parties themselves read this "inducement" language in *Fortney* as an exception to the going and coming rule which is separate from the "benefit to the employer" exception. However, the Court's analysis in *Fortney* places it squarely within the "service/benefit to the employer" exception. The

Court noted that, while provision of a conveyance benefits the worker who accepts it and places a financial burden on the employer, such an inducement also benefits the employer when its purpose is accomplished. "An employer is unlikely to provide such an inducement unless it views the resulting benefit as outweighing the burden." *Id.*

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* 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.

Accordingly, the September 13, 2012 order of the Workers' Compensation Board is reversed, and this matter is remanded for additional proceedings on the merits of Padgett's claim.

ALL CONCUR.

BRIEF AND ORAL ARGUMENTS FOR APPELLANT:

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