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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001223-WC

AIRTRAN AIRWAYS, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-00328

SARAH FORTNEY, ADMINISTRATOR OF THE ESTATE OF CLARENCE FORTNEY, DECEASED AND GUARDIAN OF CALVIN FORTNEY, A MINOR; THE WORKERS' COMPENSATION BOARD, AND HON. JOHN W. THACKER, ADMINISTRATIVE LAW JUDGE APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, LAMBERT AND WINE, JUDGES.

CLAYTON, JUDGE: Appellee Sarah Fortney is the widow of Clarence Fortney. Calvin Fortney, also an appellee, is their son. Mr. Fortney died in an airplane

accident on August 27, 2006. Mrs. Fortney filed a workers' compensation claim on March 2, 2007, requesting benefits as a result of her husband's death. The Administrative Law Judge ("ALJ") found that Mrs. Fortney was not entitled to benefits under the claim as Mr. Fortney had been on his way to work at the time of the accident. Mrs. Fortney then appealed the ALJ's decision to the Workers' Compensation Board (the "Board") which reversed the decision and allowed Mrs. Fortney benefits. AirTran now appeals that decision. We reverse the Board's award of benefits.

BACKGROUND INFORMATION

Mr. Fortney was a passenger on Comair flight 5191 which was en route from Lexington, Kentucky, to Atlanta, Georgia, when it crashed immediately after take-off. AirTran, Mr. Fortney's employer, contended that his death was not within the course and scope of his employment because at the time of his death he was travelling to his workplace in Atlanta, Georgia.

At the time of the accident, the Fortneys were residing in Lexington. Prior to that, the Fortneys had lived in Louisville. Since AirTran did not fly into nor out of Kentucky, Mr. Fortney would take a flight to Atlanta to begin his work day. His flight to Atlanta was on another carrier and Mr. Fortney was not paid for his time while flying to Atlanta.

Mr. Fortney was able to fly to Atlanta for free as the result of a reciprocal cockpit jumpseat travel agreement AirTran had with Comair. This agreement provided as follows:

> COMAIR, INC. and AirTran Airways agree to a reciprocal interchange of cockpit jumpseats for Flight Crews and Flight Operations Management of the two companies subject to the following conditions:
>
> Jumpseat travel is a discretionary courtesy, subject to all applicable FAR's, company regulations and permission of the captain. Travel is on a "Space Available" basis.
>
> Each person using this privilege must observe strict professional conduct, decorum, and wear the carrying airline's appropriate dress for the first class interline travel or full uniform. . . .

Mrs. Fortney argued that benefits should be awarded under the "employer conveyance" doctrine. AirTran, however, asserted that under the "benefit to the employer" doctrine, it should prevail as it was Mr. Fortney who benefited from its agreement with Comair regarding transportation to and from his workplace, not AirTran. There was testimony before the ALJ that in the regular course of business within the airline industry, it was customary for airlines to have reciprocal jumpseat agreements with one another.

The ALJ entered an Opinion and Order dismissing Mrs. Fortney's claim.

The ALJ concluded that:

> 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 hazards ordinarily encountered in such journeys are not incident to the employer's business. However, exceptions exist to the

general rule when 1) the going and coming is for the benefit of or service to the employer; 2) the premises/conveyance is under the control or operation of the employer; or 3) the positional risk exception . . . . (internal citations omitted).

When Mr. Fortney applied for employment with AirTran, he answered yes to the question "Are you willing to relocate?" and no to the question "Are there any restrictions to where he where (sic) he would relocate?" Free travel was listed as an employee benefit in an ad to induce employment with AirTran. Use of the free or reduced fare flight benefit allowed Mr. Fortney to spend more time in Kentucky near his family and for his family to spend more time with relatives. Mr. Fortney had the option of moving to Atlanta or diving (sic) to Atlanta in addition to using the free or reduced fare flights. Mr. Fortney performed no work for AirTran on the flights commuting to work. . . . The Administrative Law Judge finds that the providing of free or reduced fare flights on other airlines through the Reciprocal Jumpseat Travel Agreement and Reduce Fare Travel Agreement was a benefit AirTran provided to its employees to allow them to live where they chose. The providing of this benefit to the employees was a burden on AirTran, as the company was required to be familiar with and follow the tax law of numerous states when employees chose to live in other states and make use of the free or reduced fare flights to commute to work. As the commuting flight used by Mr. Fortney was a benefit or service to him and not the defendant/employer, the benefit/service to the employer exception to the going and coming rule does not apply to the injury to Mr. Fortney.

#1. On June 4, 2008, the Board reversed the decision of the ALJ finding that:

The Board held that Mrs. Fortney had a compensable claim based upon:

1. Mr. Fortney's presence on the Comair flight being either caused by or a requirement of his employment with AirTran;

2. AirTran also benefited from the transportation, thus entitling Mr. Fortney to the "benefit to the employer" exception; and

3. The "employer conveyance doctrine" was applicable since AirTran can also be said to have "controlled" the conveyance.

STANDARD OF REVIEW

As a reviewing Court, we must decide, in light of the record, whether the evidence is "so overwhelming, . . . as to have compelled a finding in his favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). When this Court reviews a decision of the Board, our function "is to correct the Board only where [we] perceive[] 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v.*

Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). With this standard in mind, we will examine the merits of this appeal.

LEGAL ANALYSIS

AirTran begins its argument by contending that the Board improperly considered arguments made by Mrs. Fortney on appeal that were not raised before the ALJ. Specifically, AirTran asserts that failing to advance an argument in one's final brief to the ALJ on contested issues amounts to a waiver of that argument.

Appellees argue that the "going and coming rule" had been argued at the ALJ level. Specifically, they cite to the notice of contested issues which was covered under the Kentucky Workers' Compensation Act. Specifically, they raised the issue of whether the travelling question was considered "work related" as defined in *Receveur Const. Company/Realm, Inc. v. Rogers,* 958 S.W.2d 18 (Ky. 1997), and whether Mr. Fortney was considered to be in the service of his employer in Kentucky at the time of his death, therefore subjecting the defendant to the mandatory provisions of the Act.

The Board found that ". . . by listing 'compensability/going and coming' as a contested issue at the benefit review conference, any issue regarding exceptions to the 'going and coming' rule was also preserved." Board Opinion at p. 26, n.2. We agree with the Board's decision. Mrs. Fortney's arguments regarding the "going and coming" rule have been preserved for appellate review and were properly before the Board.

Having determined that the issue was properly before the Board, we proceed to the finding of the Board on the issue of 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." *Receveur,* 958 S.W.2d at 20.

The Board found that:

> In this case, the decedent's presence on the Comair flight used to transport him to his employer's base of operations in Atlanta was caused by the requirements of his employment and was implicit in the understanding Airtran had with him when he was hired . . . without the availability of the reciprocal jumpseat agreement for pilots to travel from out of state to the Atlanta airport, it would not be financially practical for Airtran pilots to fly commercially. It is clear the harm which occurred was based on the causal connection to the decedent's work and was the reason for his presence on the plane when it crashed. To this extent, the incident is compensable. (citation omitted).

Board Opinion at p. 28-29.

The Board continued:

> Moreover, it can be said that the decedent's use of the Comair jumpseat per the reciprocal . . . agreement . . . also provided a service to Airtran and benefited Airtran. . . . .
>
> [A]lthough Airtran did not directly provide the Comair airplane used by the decedent to commute to Atlanta, it did indirectly do so via the reciprocal jumpseat agreement it maintained with Comair which provided the opportunity for Comair pilots to fly on Airtran's aircraft

> at Airtran's expense. Moreover, travel was necessitated by and in furtherance of the business interests of Airtran and was an essential element required to supply the requisite number of pilots to fly in to and out of its hub in Atlanta. Moreover, flying to and from Atlanta for work was part of the decedent's job responsibilities as it was incident to Airtran's enterprise.
>
> Finally, the decedent's death occurred within the course and scope of his employment based upon the application of the employer conveyance exception to the "going and coming" rule. Larson's Workers' Compensation Law, Vol. I, Chapter 15, Employer's Conveyance, Sect. 15.01 provides if a trip to and from work is made in a . . . vehicle under control of the employer, an injury during that trip is incurred in the course of employment. Larson points out the reason for the rule depends upon the extension of risks under the employer's control. . . .

The Board found that through the reciprocal jumpseat agreement, AirTran provided air transportation for its employees and that such agreements were common practice within the airline industry. It also found that through internal regulations, AirTran exerted control over the method of transportation by requiring its pilots to behave and dress in a certain manner. This, the Board held, benefited AirTran and qualified under the employer conveyance exception to the "going and coming" rule and brought the decedent's accident under the course and scope of his employment. We disagree.

AirTran did not exhibit control over the method of transportation. While the pilots were asked to wear appropriate attire, this was not sufficient to put the method of transportation within the control of the employer for purposes of the "going and coming" rule.

AirTran also contends that the Board improperly substituted its own factual finding for the ALJ's, that the transportation in question was for the benefit of the employee. AirTran contends that the question of who benefited from the transportation to the hub is an issue of fact. There is no question, however, regarding the facts. The question is whether the facts indicate that Mr. Fortney's travel for AirTran benefited AirTran and thus fell under an exception to the "going and coming" rule. The Board could not overturn the decision of the ALJ unless it found his decision was clearly erroneous.

AirTran also contends that the Board erred in applying *Black v. Tichenor,* 396 S.W.2d 794 (Ky. 1965), and *Olsten-Kimberly Quality Care v. Parr,* 965 S.W.2d 155 (Ky. 1998). In *Olsten*, the Supreme Court of Kentucky found that a home health nurse was covered even though she was returning home from visiting a patient. The Board found that *Black* applied in this case as Mr. Fortney's job required him to fly to many areas of the country. In *Black*, the Court found that:

> It is quite a different thing to go to and from a work site away from the regular place of employment, than it is to go to and from one's home to one's usual place of employment; it is the latter which generally comes within the so called going and coming rule absolving employers from workers' compensation liability. The former comes within the principal stated in Larson, Workers' Compensation Law, Volume I, Sect. 25.00: "Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip except when a distinct departure on a personal errand is shown. . . .

Mr. Fortney was going to his workplace when the accident occurred. It would have been no different had he had been driving. Thus, the "going and coming" rule applies.

Finally, AirTran argues that the Board exceeded its powers by adopting a new legal theory which has not been recognized in Kentucky. Mrs. Fortney counters this argument with Kentucky Revised Statutes (KRS) 446.080 which provides that the workers' compensation statute must be construed liberally in order to enforce the purposes for which they were created. The "going and coming" rule has been adopted by the Commonwealth and implicit within the adoption of that theory are doctrines which interpret and define the rule. The "employer conveyance" doctrine does exactly that. Having found this, however, we find the facts in this instance do not fall within the "employer conveyance" doctrine. Mr. Fortney benefitted from the reciprocal agreement as he was allowed to live wherever he chose. AirTran, however, could have required him to move to Atlanta. Clearly, the agreement benefitted Mr. Fortney, not AirTran.

For the foregoing reasons, we will reverse the decision of the Workers' Compensation Board.

ALL CONCUR.

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