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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001811-WC

MAIMOUNA BARRY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-01293

US AIRWAYS GROUP, INC.; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This matter is before the Court as an appeal by the employee, Maimouna Barry (Barry), from a split decision of the Workers' Compensation Board (Board), upholding the Administrative Law Judge's (ALJ) dismissal of the claim, which stated that Barry's injury was not compensable because it was barred by the application of the "going and coming" rule, which

maintains that injuries sustained by workers when they are going to or returning from the place where they generally perform their employment are not deemed to be a part of their employment. The issue presented in this appeal is whether Barry's motor vehicle accident arose out of and occurred during the course and scope of her employment with the appellant/employer, U.S. Airways Group, Inc. (U.S. Airways) and requires application of the travel exception to the "going and coming rule."

FACTUAL AND PROCEDURAL BACKGROUND

Barry was hired on October 17, 2005, to work as a customer service representative for U.S. Airways at the Louisville International Airport. Her job tasks primarily consisted of working at the ticket counter and gate areas, issuing tickets, checking baggage, and assigning seats. In addition, Barry's job also required infrequent attendance at out-of-state training programs. Currently, Barry remains on the employee roster and is classified as being on medical leave following shoulder surgery in July 2007. Barry may remain in this classification for three years per the union contract with the Communications Workers of America.

The injuries that are the subject of this action occurred on December 2, 2006. After attending a required three-day computer training program in Charlotte, North Carolina, Barry returned via air to the Louisville International Airport. Obviously, because she is an employee of U.S. Airway, the airport is Barry's normal place of employment. On this day, however, she flew into the

airport after attending a required training elsewhere. After checking the schedule and picking up her luggage, Barry got into a car to leave the airport. While traveling home on Interstate 264 (the Watterson Expressway) eastbound, she was involved in a motor vehicle accident. Barry encountered a line of traffic that had come to a standstill. Looking in her rearview mirror, she saw a pickup truck heading toward the rear of the car at a high rate of speed. The driver was using his cell phone and not paying attention. The truck slammed into the rear of Barry's car although she was able to avoid hitting any other vehicles. She had her seatbelt fastened but her airbag did not deploy.

Unfortunately, the accident caused serious injuries to Barry including a torn rotator cuff and two ruptured cervical discs. To date she has undergone shoulder surgery and is facing the prospect of cervical disc fusion surgery. Barry is claiming benefits for chronic neck, left shoulder, and low back pain. Barry gave notice of a claim for workers' compensation benefits but U.S. Airways denied the claim whereupon Barry filed a formal application for resolution of the claim.

The parties agreed to bifurcate the proceedings in order to first ascertain whether Barry's injuries occurred during the course and scope of her employment. The remainder of the claim is held in abeyance pending this determination. The ALJ ruled in favor of U.S. Airways, found that this incident did not fall within an exception to the "going and coming" rule, and dismissed the claim. Barry appealed that order to the Board, which upheld the ALJ's decision in a split decision. This appeal results from that decision.

ANALYSIS

Under Kentucky statutory law, in order to be compensable, an injury must be found to be work-related. Kentucky Revised Statutes (KRS) 342.0011(1). If an injury occurs while the employee is on the employer's premises and performing customary duties, the resolution of work-related employment is often easily accomplished. However, when the injury occurs off the work premises and not while performing the employee's normal and ordinary work duties, the issue is often subject to dispute between the parties.

Usually, injuries are not compensable when incurred during travel to and from employees' workplace in which they regularly perform their job duties. This general premise is known as the "going and coming" rule. *Harlan Collieries Co. v. Shell,* 239 S.W.2d 923 (Ky. 1951). The rule was concisely stated in *Receveur Const. Company/Realm, Inc. v. Rogers*, 958 S.W.2d 18, 20 (Ky. 1997):

> 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.

The general rule, however, has several exceptions, and the injuries may be compensable if the employee is engaged in some service arising out of the employment. For instance, traveling activities of employees are covered by the "service to the employer" exception if such activities provide some service to the employer. *Id*. *See also Olsten-Kimberly Quality Care v. Parr*, 965 S.W.2d 155,

157 (Ky. 1998); *Standard Gravure Corp. v. Grabhorn*, 702 S.W.2d 49 (Ky. App. 1985); *Spurgeon v. Blue Diamond Coal Co.*, 469 S.W.2d 550, 553 (Ky. 1971).

The "service to employer" exception is further explicated by William S. Haynes, *Kentucky Jurisprudence, Workers' Compensation,* § 10-3 (revised 1990):

> [w]hen travel is a requirement of employment and is implicit in the understanding between the employee and the employer at the time the employment contract was entered into, then injuries which occur going to or coming from a work place will generally be held to be work-related and compensable, except when a distinct departure or deviation on a personal errand is shown.

Olsten-Kimberly, 965 S.W.2d at 157*; see also Black v. Tichenor*, 396 S.W.2d 794 (Ky. 1965), and *Handy v. Kentucky State Highway Dept.*, 335 S.W.2d 560 (Ky. 1960).

Therefore, for an injury to be compensable, the employee must have been performing some service to the employer during the travel. *Louisville & Jefferson County Air Bd. v. Riddle*, 301 Ky. 100, 190 S.W.2d 1009 (Ky. 1945). Thus, in order to prevail, the employee must prove that she was performing some work or service for the employer or was on a special mission or errand as opposed to just traveling to and from her regular place of employment.

The situation herein meets that criterion. Barry knew when she was hired that she would be required to attend training for the airlines and that such training might require her to travel outside Louisville. Further, she was aware that these training sessions were mandatory. On December 2, 2006, Barry returned

from a mandatory training session sponsored by her employer in Charlotte, North Carolina. U.S. Airways paid for Barry's airfare, hotel, and a per diem for meals during the trip. Additionally, she was compensated for time on the airplane and at the classroom training. The car trip was the final step necessary to complete the travel required for the training, and as such, it was an integral step in her attendance at the training. To summarize, the attendance at the training was mandatory for Barry and beneficial for U.S. Airways. Even though her normal place of work is at the airport, the character of this particular day of work was based on travel and met an exception to the "going and coming" rule.

Where the facts are undisputed, the ultimate issue of whether an injury is work-related is a legal issue. *See Jackson v. Cowden Mfg. Co.*, 578 S.W.2d 259 (Ky. App. 1978); *Turner Day & Woolworth Handle Co. v. Pennington*, 250 Ky. 433, 63 S.W.2d 490, 492 (1933). As such, we do not agree with the legal opinion of the majority of the Workers' Compensation Board. The Board cites *Spurgeon* and *Husman Snack Foods Co. v. Dillon*, 591 S.W.2d 701 (Ky. App. 1979) and opines:

> Thus, we believe the proper resolution of the issue now before us turns on Barry's fixed work site at the Louisville International Airport. It is our opinion that for the traveling employee exception to be applicable from the time the employee leaves home to the time she returns, the travel involved must be to a site that does not necessitate passing through the employee's regular fixed work site both at the outset and the conclusion of the trip.

Yet, our understanding of these two cases does not comport with the Board's reasoning.

In *Spurgeon*, the Court considered an injury which occurred off premises after regular working hours. Similar to our case, Spurgeon was injured in a car accident returning from a meeting to his home. Spurgeon was a mine foreman who worked for the Blue Diamond Coal Company. The company was a member of a coal operators association which sponsored a mining institute. In this case, as opposed to Barry's mandatory attendance requirement, the employer encouraged but did not require its management employees to attend the institute meetings.

The Court held that the primary issue was whether the employee was injured while performing a service to the employer. *Spurgeon*, 469 S.W.2d at 552-554. Citing Larson, *Workmen's Compensation Law*, Sections 27.31(a) and 27.31(c), the Court held that an employee's attendance at training programs, conventions and institutes may be regarded as within the course of employment. The decision never states that, if Spurgeon had gone to the office after attending the meeting but before going home, the case would have been outside the exception to the "going and coming" rule. Indeed, the Court seems to suggest that, if Blue Diamond had compelled Spurgeon to attend the institute meetings as a part of his employment, the injury would have definitely been compensable because his employer had exposed Spurgeon to the risk of injury while attending the mining institute.

Again, in *Husman*, the employee, Dillon, was fatally injured in an automobile accident while returning home after making a delivery for Husman Snack Foods (Husman). The major issue in the case involved whether Husman was obligated to compensate Dillon's dependents under the Workers' Compensation Act, because the company maintained that he was an independent contractor rather than an employee. Our Court, after determining that Dillon was an employee, addressed the issue concerning whether his death was the result of a work-related accident. Pertinent to our case is the following statement:

> The "going and coming rule" does not apply because the travel itself involved a mission for Husman distinct from commuting back and forth to a fixed place of employment.

Husman, 591 S.W.2d at 704. Contrary to the Board's interpretation of the language in this case and *Spurgeon*, we believe these cases demonstrate that when an employee's activities require travel outside the employee's usual place of employment, the employee is on a special mission for the employer. Any injuries incurred while on this special mission are an exception to the "going and coming rule" and compensable. We do not believe that because employees work for a transportation industry so that their business travel takes them through their regular, fixed work site they should be disqualified from access to the travel exception of the "going and coming rule."

Therefore, we hold that because Barry was required to attend the training in Charlotte, North Carolina, as a condition to her employment and for the

benefit of U.S. Airways, her travel on that day falls under the traveling employee exception to the "going and coming rule." Hence, the injuries she received in the traffic accident occurred during the course and scope of her employment. Even though the trip necessitated that she fly into the airport where she worked, this fact does not change the character of the activities and is irrelevant. Indeed, if she worked for any other employer, besides one stationed at an airport, the mandatory nature of the business trip would certainly fall under the travel exception to the "going and coming rule," and the accident would be considered work-related.

The decisions of the ALJ and the Board are reversed, and the case is remanded for consideration on the remaining issues.

ALL CONCUR.

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