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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001512-MR

ANDREW CALDWELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CI-04628

RICHARD HUBBLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: VANMETER, ACTING CHIEF JUDGE; ACREE AND WINE, JUDGES.

WINE, JUDGE: Andrew Caldwell appeals from an order of the Fayette Circuit Court granting summary judgment in favor of the appellee, Richard Hubble. Upon review, we affirm the Fayette Circuit Court.

At the time of the accident giving rise to the injury in this case, both Caldwell and Hubble were employed by Kentucky Logistics in Lexington, Kentucky. Kentucky Logistics is located on Briar Hill Road in Lexington in a facility consisting of several buildings, a warehouse, and a gym. Kentucky Logistics is a company that supplies clothing to the U.S. military. Caldwell worked as a "materials handler" for Kentucky Logistics. Hubble worked as a "quality control handler." Both men worked the third shift, which ran from 11:30 p.m. to 7:30 a.m.

On September 7, 2007, Hubble and Caldwell were working during the third shift. Kentucky Logistics permitted third shift employees to leave the warehouse between the hours of 4:00 and 5:00 a.m. to work out at a gym approximately a quarter of a mile from the warehouse and located within the Briar Hill facility. Employees remained on the clock and were paid for the period of time that they were in the gym. Although participation in the exercise program was voluntary, employees were encouraged to participate and received monetary compensation for their participation.

On the morning of September 7, 2007, Caldwell walked to the gym along with a few co-workers. Hubble also went to the gym, but drove his personal vehicle instead of walking. The employees exercised at the gym and then proceeded to head back to work shortly before 5:00 a.m. Upon returning from the

gym, Hubble drove his car too closely to a group of employees who were walking back to the warehouse and his front tire rolled over Caldwell's foot, crushing it.[1]

Caldwell's injury necessitated a surgery that required the placement of pins into his foot and toes. Caldwell received workers' compensation benefits for 80% of his lost wages during the time he was off from work. Caldwell was also a member of the Air National Guard at the time of the accident and was honorably discharged thereafter because he was unable to meet the physical requirements of service due to his injury.

Caldwell sued Hubble in negligence for the injuries he sustained. Hubble's answer raised the defenses of the exclusive remedy provision of the Kentucky Workers' Compensation Act and the fellow servant rule. Upon the completion of discovery, Hubble moved for summary judgment on the basis of the fellow servant rule and the exclusive remedy provision. The trial court granted the motion. Thereafter, Caldwell filed a motion to reconsider, which the trial court denied. Caldwell now appeals.

On review, we ask whether the trial court was correct in finding that there were no genuine issues as to any material fact and that Hubble was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). We review the summary judgment *de novo* as it involves a question of law. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

[1] The accident occurred within the Briar Hill Campus on a private roadway which connects Kentucky Logistics and the gym. The roadway was also used by the other companies on the campus.

The Kentucky Workers' Compensation Act ("the Act") insulates employers from liability for unintentional death or injury to any of its employees occurring during the course of their employment. Kentucky Revised Statute ("KRS") 342.690. Such protection is offered so long as the employer has secured payment of compensation, i.e., has procured a policy of workers' compensation insurance, and extends to the employer's officers, directors and employees. KRS 342.690(1). Further, KRS 342.690(1) states as follows:

> If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee. . . . The ***exemption from liability*** given an employer by this section ***shall also extend*** to such employer's carrier and ***to all employees***, officer or directors of such employer or carrier. . . [unless] . . . caused by the willful and unprovoked physical aggression of such employee. . . .

(Emphasis added). Thus, the exclusive remedy provision clearly exempts Hubble from liability, so long as it is found that Hubble's actions causing Caldwell injury were covered under the Act.[2] An injury is covered under the Act if the injury is determined to have occurred while the employee was engaged in an activity "arising out of and in the course of employment." KRS 342.001.

The question, then, is whether the employees of Kentucky Logistics were engaging in an activity "arising out of and in the course of employment" when traveling to and from the on-site gymnasium during their paid break. In *Jackson v. Hutchinson*, 453 S.W.2d 269 (Ky. 1970), the former Court of Appeals

[2] Clearly, the Administrative Law Judge felt that Caldwell's injury came under the Act, as Caldwell was awarded compensation for his injury.

adopted the workers' compensation standard for determining whether fellow-employee immunity applies in a particular situation. The *Jackson* Court stated,

> A test of fellow-employee immunity is whether each of the employees involved would have been entitled to workmen's compensation benefits for any disabling injury suffered in the accident.

Id. at 270.[3] This test was reaffirmed by *Kearns v. Brown*, 627 S.W.2d 589, 590 (Ky. App. 1982). However, in *Kearns*, the Court made clear that while the regular workers' compensation standard is the applicable test, it does not apply where an employee's actions can be considered "horseplay," or are so far removed from what might ordinarily be anticipated by an employer as to effectively remove the employee's actions from the course of employment. *Id*. at 591.

In order to determine whether Hubble and Caldwell would have both been entitled to workmen's compensation benefits for any injuries arising out of the incident, then, we must first ask whether Hubble and Caldwell were acting within the course of their employment when the accident occurred.[4] As this Court has previously stated, it is often difficult "to determine when an employee's recreational activities fall within the course of his employment." *Jackson v. Cowden Mfg. Co.*, 578 S.W.2d 259, 261-62 (Ky. App. 1978).

In *Jackson v. Cowden*, we set forth a three-pronged test to use in determining whether recreational or social activities may be considered to be

[3] Professor Larson defends this approach as superior to the approach used in some other jurisdictions of applying a separate test for fellow-employee immunity. Larson notes that "there are troubles and complications enough administering one course of employment test under the Act, without adding a second." *Larson's Workers' Compensation Law*, §111.03(3) (2009).

[4] The parties do not dispute that Kentucky Logistics had purchased and obtained workers' compensation insurance, thus, we need not address this issue.

within the course of a person's employment. *Id*. The Supreme Court modified this test in 2005 by adding a fourth "prong." *Smart v. Georgetown Community Hosp.*, 170 S.W.3d 370 (Ky. 2005). The test provides as follows:

> [A]n injury that occurs during recreational activity may be viewed as being work-related if:
>
> (1) It occurs on the premises, during a lunch or recreational period, as a regular incident of the employment; or
>
> (2) The employer brings the activity within the orbit of the employment by expressly or impliedly requiring participation or by making the activity part of the service of the employee; or
>
> (3)The employer derives substantial direct benefit from the activity beyond the intangible benefit of an improvement in employee health and morale that is common to all kinds of recreation and social life; or
>
> (4) The employer exerts sufficient control over the activity to bring it within the orbit of the employment.

Id. at 372. As evident from the disjunctive language used, satisfaction of any one of the above four prongs may be sufficient to render an injury work-related. In *Jackson v. Cowden*, we stated that "the first inquiry must be whether the injury occurred on the employer's premises and during working hours." 578 S.W.2d at 262. Indeed, the presence of one or both of these factors "will frequently be a sufficient basis for finding that the recreational activity was work-related." *Id*.

We find that Hubble and Caldwell's actions were clearly within the scope of employment and that Caldwell was entitled to benefits for the injuries suffered. In this case, Caldwell and Hubble were both "on the clock" at the time

the injury occurred as Kentucky Logistics paid employees for the time they spent at the gym. In addition, the accident occurred on Kentucky Logistics' premises.[5] Moreover, although Kentucky Logistics did not require participation in the exercise program, participation was strongly encouraged and employees even received monetary compensation. Further, Kentucky Logistics derived a benefit through its employees' participation as it promoted the health and fitness of its employees. Thus, we find that Hubble is exempted from liability under the exclusive remedy provision of the Act. *See, e.g., Haines v. BellSouth Telecommunications, Inc*., 133 S.W.3d 497 (Ky. App. 2004); *Miller v. Scott*, 339 S.W.2d 941 (Ky. 1960). The Kentucky Workers' Compensation Board clearly reached the same result, as benefits were extended to Caldwell. Moreover, as Caldwell did not "opt out" from coverage under KRS 342.650(6) and KRS 342.395, but instead received benefits under the Act, he is bound by the exclusive remedy provision of KRS 342.690(1).

As we have determined that Hubble and Caldwell's actions were within the course of their employment, our next question is whether Hubble's actions should be exempt from the Act's protection, either because (1) his actions constituted "willful and unprovoked physical aggression" under KRS 342.690 or (2) because his actions can be considered "horseplay" or were otherwise so removed from what an employer would ordinarily anticipate as to remove his actions from the course of employment. *Kearns*, 627 S.W.2d at 591. Here, we

[5] Caldwell admitted in his responses to the *Plaintiff's Requests to Admit* that he was on Kentucky Logistics' premises at the time of the incident. TR 33.

find that the record contains no evidence that Hubble's actions were willful and unprovoked. Further, Hubble was not engaged in horseplay, nor was his behavior removed from what Kentucky Logistics would normally expect. The record makes clear that employees often chose to drive their vehicles to and from the on-site gym, and that perhaps more chose to drive than to walk. Hubble was merely driving his vehicle from the gym to the warehouse, which many employees chose to do, and was traveling the same path the employees typically travelled to do so. He testified that he slowed the vehicle to 5 to 10 miles per hour when passing Caldwell and the walkers. Unintentional acts and acts of ordinary negligence are clearly within the purview of the exclusive remedy doctrine.

Finally, we will not consider the applicability of the fellow servant doctrine today as the Act was clearly applicable and Hubble was exempted from liability under the exclusive remedy provision. KRS 342.690(1). We do observe, however, that the now all-but-obsolete "fellow servant doctrine" functioned in the common law to protect the master, rather than the servant. *Ruble v. Stone*, 430 S.W.2d 140 (Ky. 1968); *Hazelwood v. Beauchamp*, 766 S.W.2d 439, 440 (Ky. App. 1989). Although it is questionable whether the doctrine even survives today, it is clear that the doctrine would not act to exempt Hubble from liability, as he is a fellow servant rather than a master.

In conclusion, as we find that summary judgment was appropriate under the Act, we affirm the Fayette Circuit Court.

ALL CONCUR.

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