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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002253-WC

US BANK HOME MORTGAGE — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-09-10385

ANDREA SCHRECKER;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; CLAYTON AND DIXON, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Workers' Compensation Board (the Board) affirming the decision of the Administrative Law Judge (ALJ) awarding Appellee Andrea Schrecker benefits. Based upon the following, we affirm the Board's decision.

BACKGROUND INFORMATION

Schrecker was an employee of Appellant, US Bank Home Mortgage (US Bank), on December 31, 2007. As an employee, Schrecker was entitled to a one-hour lunch break during her work day. The lunch hour was an unpaid break and she was required to clock out when she left, then clock in when she returned. Schrecker also received two twenty-minute breaks during her work day. They were paid breaks and, while she was also required to clock out/in for them, she used a different code.

On the date of her injury, Schrecker clocked out with the code for paid leave when she left at 1:30 pm. While crossing Highway 431 to go to a fast food restaurant, she was struck by a vehicle and sustained injuries. Schrecker filed a workers' compensation claim for her injuries. The ALJ concluded that Schrecker was acting within the course and scope of her employment at the time she was injured and awarded her benefits. US Bank appealed the ALJ's decision to the Board.

In determining that Schrecker was entitled to benefits, the ALJ relied on the holding set forth in *Meredith v. Jefferson County Prop. Valuation Adm'r*, 19 S.W.3d 106 (Ky. 2000). In affirming his decision, the Board found as follows:

> We cannot say the [Chief Administrative Law Judge] CALJ erred as a matter of law in his determination Schrecker was in the course and scope of her employment. However, we affirm for reasons other than those relied upon by the CALJ. This matter appears to be a case of first impression in Kentucky. We do not believe *Meredith, supra*, asserted by Schrecker and relied

> upon by the CALJ, is applicable to the case *sub judice*. US Bank correctly points out, unlike Meredith a traveling employee, Schrecker worked at a fixed location. US Bank has cited to *Baskin v. Community Towel Service*, 466 S.W.2d 456 (Ky. 1971), in support of its position Schrecker was not in the course and scope of her employment. However, this reliance is also misplaced. Baskin who worked at a fixed location, was on an unpaid lunch break at the time of the injury. No Kentucky case specifically addresses accidents occurring off-premises during a paid break.

Board Opinion entered November 11, 2011, at 8.

US Bank now appeals the Board's decision.

STANDARD OF REVIEW

As a reviewing court in workers' compensation cases, our function is to correct the Board when we believe it "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 examine the merits of the appeal.

DISCUSSION

US Bank contends that Kentucky should not abandon the "premises rule" in claims involving paid breaks. It relies on the case of *Baskin,* 466 S.W.2d 456, in support of its argument that Schrecker was on an unpaid lunch break at the time of her injury. In determining that Schrecker was on a paid rest break rather than an unpaid lunch break, the ALJ and the Board relied on the following factual evidence in addition to Schrecker's testimony:

> Jennifer Lee Roberts ("Roberts"), supervisor of the payment research department at US Bank since 2004, testified by deposition on May 27, 2010. . . . Roberts testified there was no preset time for employees to go to lunch. Roberts also testified US Bank has no lunchroom available for employees to use. However, Roberts noted a break room with vending machines is available.
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> Jane Fulkerson ("Fulkerson"), manager or assistant vice-president of processing and payment research for US Bank since 1998, testified by deposition on May 27, 2010. Fulkerson testified Schrecker was not performing an errand for her at the time of the accident. She testified Schrecker returned to work after the accident. Fulkerson further testified Schrecker continued to work until June 2008 when she was terminated for failure to call in for approval of her vacation. Fulkerson testified Schrecker was a satisfactory employee during her entire tenure with US Bank. Fulkerson acknowledged Schrecker was entitled to two breaks per day, one in the morning and one in the afternoon, in addition to her lunch break.
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> Linda Mitchell ("Mitchell"), human resources generalist with US Bank for over 26 years, testified by deposition on May 27, 2010. Mitchell testified Schrecker worked on December 31, 2007, and was not on the premises at the time of the accident. According to Mitchell,"Federica St. is a four-lane highway that we have going through town and there's a large median in

> the middle. It's a pretty busy highway." Mitchell testified US Bank employees have no regulated lunch hour, and despite a lunchroom provided on premises, employees are not mandated to stay there. She testified Schrecker was not terminated for inability to perform the physical and mental requirements of her job. Rather, Mitchell stressed she was terminated because of failure to contact US Bank regarding her absence.

Board Opinion entered November 11, 2011, at 4-5.

For its legal analysis, the Board relied on Larson's Workers' Compensation Law, *Going and Coming: Lunch or Rest Periods* (2011) § 13.05[1], [4] which provides:

> [1] Premises Rule as Applicable to Lunch-Time Travel
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> The basic rule . . . is that the journey to and from meals, on the premises of the employer, is in the course of employment. Conversely, an employee with a fixed time and place of work who has left the premises for lunch is outside of the course of employment if he or she falls, is struck by an automobile crossing the street, or is otherwise injured. . . .
>
> . . . .
>
> Similarly, just as an employee who is paid during the going and coming trip is deemed to be in the course of employment for that reason, so a claimant who was paid during the time taken out for lunch or coffee may be given the benefit of the same conclusion. Again, the conditions of special strain attending the employment may make it a reasonable part of the employment to go down the street for a cup of coffee, as was held in the case of a night man who has been on duty continuously for 12 hours and who, as he was permitted to do, had gone off the premises to a nearby restaurant for coffee.
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> . . . .

[4] Break Periods and Coffee Breaks off the Premises

The going and coming rule has so far been treated as substantially identical whether the trip involves the lunch period or the beginning and end of the work day. This can be justified because normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee's freedom of movement so complete that the obligations and controls of employment can justifiably be said to be in suspension during this interval.

Now that the coffee break or rest break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear that one cannot announce an all-purpose "coffee break rule," since there are too many variables that could affect the result. The duration might be five minutes, seven minutes, 10 minutes, or even 20 minutes by which time it is not far from that of a half-hour lunch period. Other variables may involve the question whether the interval is a right fixed by the employment contract, whether it is a paid interval, whether there are restrictions on where the employee can go during the break, and whether the employee's activity during this period constituted a substantial personal deviation.

The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment. The New York Appellate Division expressly undertook to draw this kind of line between the lunch period and the brief coffee break period, in affirming an award to an employee for injuries sustained in returning to work after getting coffee at the "nearest place" across the street[.]

. . . .

> The fact that the coffee break or rest period is a paid one, or for any other reason might be presumptively within the course of employment, does not of course mean that anything that happens during that span of time is compensable. If the employee uses the interval, not for its basic purpose of rest and refreshment, but for personal errands, such as cashing a check at a bank, or doing some shopping for Christmas, or getting a tuberculin shot checked, the employee leaves the scope of employment if the deviation is such as to be called substantial. On the other hand, a swim during a coffee break has been held not to interrupt the course of employment, in part because the refreshing effects of the swim would benefit the employer as well as the employee by enhancing the employee's efficiency.

Board opinion at 8-12.

US Bank, however, argues that *Baskin,* 466 S.W.2d 456*,* controls and that Schrecker was not entitled to benefits due to the "premises rule." In *Baskin*, a panel of our Court held:

> In this workmen's compensation case we are asked to review the current applicability of the "going and coming" rule to the claim of an employee who was employed on a fixed-time basis at a fixed place of work and who was injured while returning from lunch to the premises of his employer.

Id. at 456.

US Bank contends that the fact that their lunch was an unpaid break is not sufficient to distinguish it from the case at bar. The Board, however, found that *Baskin* was distinguishable and that "[n]o Kentucky case specifically addresses accidents occurring off-premises during a paid break."

Board opinion at 8.

We agree with the Board that no Kentucky case addresses this issue and, therefore, look to the interpretation of Kentucky law regarding this issue for guidance. As set forth in Larson, *supra,* the elements a court must look to in determining whether the employee is entitled to benefits if injured while off premises is the amount of control the employer retains over her, whether it is a paid break and whether the accident occurred as a result of the hazard being encountered in going to and from the workplace.

In this case, it was common practice for employees to cross the street to obtain food from the fast food restaurants on the other side of the road. The Board cited Couch's treatise on insurance, 9A *Couch on Ins.* (3rd ed. Updated 2011), in which the "personal comfort" doctrine was explained:

> § 135.44. Generally; "Personal Comfort" Doctrine.
>
> An exception to the general rule precluding workers' compensation for acts performed by employees solely for their own benefit has been carved out for acts of personal convenience or comfort. This exception, sometimes referred to as the "personal comfort" or "personal convenience" doctrine was developed to cover the situation where an employee is injured while taking a brief pause from his or her labors to minister to the various necessities of life. Although technically the employee is performing no services for his or her employer in the sense that his or her actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form of better work from a happy and rested worker, and on the theory that such a minor deviation does not take the employee out of his or her employment.

Couch makes an example of thirst and/or hunger as situations for which recovery of benefits is appropriate. Both Couch and Larson agree that if the employee is on an errand during the paid break for his or her own convenience, it is not compensable while leaving the premises for a "personal convenience" is. We agree with their logic.

In this case, the Board found that while the other employees confirmed Schrecker's testimony that the accident occurred off work premises and that lunch breaks were unpaid, none of them contradicted Schrecker's testimony that she was actually on her paid afternoon break when she was injured. Neither did they contradict Schrecker's assertion that it was common practice to cross the street for food during the paid breaks and that it was condoned by US Bank.

US Bank asserts that if she had required refreshment, Schrecker should have simply gone to the vending machine area that was located on premises. There was no requirement, however, that an employee take her unpaid breaks on premises. The facts are that Schrecker clocked out for a paid break. She crossed the street for a "refreshment" which is a condoned and common practice among US Bank employees. Given these facts, the Board did not err in finding that Schrecker was on a paid break at the time of her accident and was, therefore, within the course and scope of her employment entitling her to benefits for her injuries. Thus, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sherri P. Brown
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BRIEF FOR APPELLEE:

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