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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000078-MR

DAVISON CROCKER; AND BENITA
DANIEL, ADMINISTRATRIX OF THE
ESTATE OF DALE CHERRY — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 12-CI-00133

JAMES E. COLEMAN; AND
PROGRESSIVE CASUALTY
INSURANCE COMPANY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: We are asked in this appeal to determine whether the Warren Circuit Court properly entered summary judgment in favor of the appellees upon concluding that the Workers' Compensation benefits afford the exclusive

remedy for injuries the appellants sustained in a motor vehicle accident. We affirm the well-reasoned order in its entirety.

James Coleman, Davison Crocker, and Dale Cherry were employed by A&G Tree Service, Inc., at all times relevant to this appeal, and it appears from the record they all resided in Warren County, Kentucky. The employer has described itself as "a firm dedicated to professional maintenance of utility right of way." (Trial record, p. 108). The business is located in Leitchfield, Kentucky.

On August 18, 2011, the three were assigned to work on a job site in Tennessee, and they traveled there together in a company-owned vehicle driven by Coleman. They completed their duties and left the site in the same vehicle, again driven by Coleman. Before they reached their destination, they were involved in a motor vehicle accident which injured Crocker and killed Cherry.

A&G Tree Service's employee handbook provides that an employee's paid work begins when he arrives at the job site; employees are not compensated for travel. The handbook permits employees to use company-owned vehicles, when they are available, for work-related travel "for the convenience of employees[,]" and to travel "between home and work sites at the beginning and end of the day[.]" They are permitted to carpool to job sites. The handbook also contemplates that work will be performed at job sites in different locations depending on the contracts the employer is able to secure.

Crocker received Workers' Compensation benefits for his injuries, and Cherry's estate received Workers' Compensation death benefits.

Crocker then sought tort damages from Coleman in the Warren Circuit Court. Cherry's estate was granted leave to intervene against Coleman, as well, and also named Cherry's underinsured motorist (UIM) carrier, Progressive Casualty Insurance Company, as a defendant. The plaintiffs claimed Coleman's negligent driving had caused their injuries.

After limited discovery commenced, Coleman and Progressive filed motions for summary judgment. They argued that Workers' Compensation benefits were the exclusive remedy for the plaintiffs' injuries and, accordingly, they were not permitted to seek damages in tort or to recover UIM benefits.

The circuit court agreed, and this appeal followed.

The appellants believe the "going-and-coming" rule applies to make their injuries non-work related and therefore susceptible to recovery in tort. They argue, furthermore, that because their injuries were inflicted by a person other than the employer, they may recover both Workers' Compensation benefits and tort damages.

I. Summary judgment standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR[1] 56.03. "Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense

[1] Kentucky Rule of Civil Procedure.

that we owe no deference to the conclusions of the trial court." *Pinkston v. Audubon Area Cmty. Servs., Inc*., 210 S.W.3d 188, 189 (Ky. App. 2006) (citation omitted).[2]

II. Whether the injuries were work-related

As a general matter, injuries incurred by employees which arise out of the course and scope of their employment are compensable by Workers' Compensation benefits to the exclusion of other remedies. KRS[3] 342.0011(1); KRS 342.690(1). In other words, the injury must be work-related to be covered by KRS Chapter 342.

Another general rule, "a principle known as the going[-]and[-]coming rule, [provides that] injuries that occur during travel to and from work generally are not compensable." *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29, 31 (Ky. 2004) (citation and quotation omitted). But travel to and from work can become work-related, and therefore compensable, when it is for the benefit of the employer. *Olsten-Kimberly Quality Care v. Parr,* 965 S.W.2d 155, 157 (Ky. 1998).

More specifically, the "benefit to the employer" exception to the going-and-coming rule applies as follows:

> When travel is a requirement of employment and is implicit in the understanding between the employee and

[2] The appellants have asserted that summary judgment was inappropriate because there are genuine issues of material fact, but the substance of their arguments addresses only the legal conclusions. Furthermore, because the parties agree almost entirely as to the factual bases of the plaintiffs' claims, we perceive that the matters raised on appeal are solely challenges to the circuit court's application of law to the undisputed facts.

[3] Kentucky Revised Statutes.

> 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.

Id. Stated differently, when an employee's travel "was necessitated by, and in furtherance of, the business interests of the employer, and was an essential element required for completion of the essence of claimant's assignments[,]" it is compensable. *Id.* at 158.

In this case, the travel undertaken by Crocker and Cherry was undoubtedly for the benefit of the employer. A&G Tree Service maintains utility easements at a variety of locations away from the employer's office. This requires field workers – the ground persons, bucket operators, and crew leaders – to be present wherever the customer's easement lies. The employer's service cannot be rendered unless its employees are present at a job site, and that necessarily requires that they travel to the job site. It is of no consequence that employees were responsible for finding their own transportation, that they were not paid for their travel time, or that the collision occurred away from the employer's premises. *See Olsten-Kimberly*, 965 S.W.2d at 158.

The appellants point to a provision of the employee handbook which they believe is dispositive evidence that their travel in company cars was for their convenience alone and not for their employer's benefit. The handbook states that when employees are permitted to use company vehicles for travel to and from a job site, the vehicles are "provided for the convenience of employees." (Trial record,

p. 117). But the fact that providing a company vehicle may have been convenient for the employees does not prevent the primary benefit of their travel from accruing to the employer. *Receveur Const. Company/Realm, Inc. v. Rogers,* 958 S.W.2d 18, 21 (Ky. 1997). That passage in the handbook does not alter our analysis.

The circuit court correctly determined that the appellants' travel was work-related and therefore not compensable in tort.

III. Whether the remedy is exclusive

The appellants next argue that they are permitted to receive both Workers' Compensation benefits and tort damages because the injury was caused by some person other than the employer, namely Coleman.

When a third party is legally liable for an employee's injuries, "the injured employee may either claim compensation or proceed at law by civil action against the other person to recover damages, or proceed both against the employer for compensation and the other person to recover damages, but he shall not recover against both." KRS 342.700(1). If the injured employee receives Workers' Compensation benefits, the employer may recover the amount of the benefits from the third-party tortfeasor. *Id.*

None of this bears on the matter at hand. An injured worker's fellow employees are exempt from tort liability to the same extent as the employer: "The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employees, officers[,] or directors of such

employer or carrier . . . ." KRS 342.690. The only exception to a co-worker's exemption from liability arises when "the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee[.]" *Id.*

The appellants have asserted only that Coleman's driving was negligent, not that it amounted to "willful and unprovoked physical aggression …." The circuit court correctly determined that remedies in tort are not available on this basis.

IV. Whether Cherry's estate may recover from his UIM carrier

The circuit court also determined that Cherry's estate could not receive UIM benefits from Progressive because the insurance policy promised only to "pay for damages that an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury[.]" (Trial record, p. 252). Since the estate was not legally entitled to recover any damages from Coleman, reasoned the court, there were no UIM benefits to recover from Progressive. We agree.

A contract must be enforced strictly according to its terms. *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006). The terms of the agreement between Cherry and Progressive did not permit recovery of UIM benefits because Cherry's estate was not entitled to recover any damages from Coleman.

V. Conclusion

The December 21, 2012, summary judgment of the Warren Circuit Court in favor of James Coleman and Progressive Casualty Insurance Company is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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Samuel S. Porter
Bowling Green, Kentucky

BRIEF FOR APPELLEE, JAMES E. COLEMAN:

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BRIEF FOR APPELLEE, PROGRESSIVE CASUALTY INSURANCE COMPANY:

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