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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002051-MR

CHERYL DEEMS — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 10-CI-02093

MINUTE MEN, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON AND STUMBO,[1] JUDGES.

ACREE, JUDGE: Cheryl Deems asks this Court to reverse the Kenton Circuit Court's November 21, 2014 summary judgment dismissing her negligence claim against appellee Minute Men, Inc., d/b/a Minute Men Staffing Services as barred

[1] Judge Janet Stumbo concurred in this opinion prior to retiring from the Kentucky Court of Appeals effective December 31, 2017. Release of this opinion was delayed due to administrative handling.

by the exclusive remedy provision of Kentucky's Workers' Compensation scheme. We decline to disturb the circuit court's judgment, and affirm.

Deems was an employee of Minute Men, a temporary employment agency. On July 3, 2008, Deems reported to Minute Men's office in Cincinnati, Ohio, for her daily assignment.[2] Minute Men assigned Deems to a job at Verst Group Logistics located near the Cincinnati/Northern Kentucky International Airport. Deems elected to carpool to and from the location with her co-workers, Ronald Eubanks and Beverly Doane. While on their way back to Minute Men after their shift to pick up their daily paychecks, Eubanks, the car's driver, rear-ended another vehicle, causing Deems injury.

Deems filed a civil action against Minute Men, Eubanks, and Doane, claiming Doane negligently entrusted her car to Eubanks who then negligently caused the accident, and Minute Men, as Eubanks' employer or principal, was responsible for his actions. She also filed a workers' compensation action in Ohio against Minute Men. The workers' compensation claim was denied and subsequently upheld on appeal. *Deems v. Minute Men, Inc.*, No. 2016-Ohio-8259, 2016 WL 7494340, at *1 (Ohio App. December 21, 2016) (finding, under Ohio's "coming and going" rule, Deems was not within the course and scope of her employment when she suffered her injuries).[3]

[2] Minute Men provided labor to other companies, and would assign jobs to employees on a daily basis.

[3] Deems sought review of this decision with the Ohio Supreme Court, but review was denied. *Deems v. Minute Men Inc.*, 2017-Ohio-7843, 150 Ohio St. 3d 1443, 82 N.E.3d 1176 (Sept. 27, 2017).

In her civil complaint, Deems alleged that Eubanks carelessly and without due regard for the safety of others operated the vehicle in a negligent manner, causing it to crash and causing Deems injury. She further alleged that Minute Men was responsible for Eubanks' acts because Eubanks was an employee or agent of Minute Men and was acting in the course and scope of his employment or agency. Deems also asserted that Minute Men employed drivers to provide employees with safe transportation to job sites and it negligently trained and supervised those drivers, including Eubanks.

Deems and Minute Men filed competing motions for summary judgment. Deems' motion focused on whether Minute Men could be held liable for Eubanks' alleged negligent act under respondeat superior or an agency theory because it occurred within the scope of employment. Minute Men's motion, on the other hand, argued that, because of Deems' position that she was acting in the course and scope of employment at the time of the accident, under Kentucky's exclusive remedy provision found in KRS[4] 342.690(1), her civil claim was barred as a matter of law. In response to Minute Men's motion, Deems argued, forcefully and repeatedly, that "returning to Minute Men to pick up pay checks [was] a work-related activity" and it was "undisputed that [she and Eubanks] were returning to Minute Men's headquarters to pick up their paychecks" when the accident occurred. (R. 141, 145).

[4] Kentucky Revised Statutes.

The circuit court entered a partial summary judgment in Minute Men's favor on November 21, 2014. It noted that Deems "argues that under Kentucky law she and Eubanks were acting within the course of their employment at the time of the collision." Minute Men conceded this point. In light of this undisputed fact, the circuit court found the exemption from liability granted to an employer by the exclusive remedy provision of Kentucky's Workers' Compensation statute barred Deems' negligence claim against Minute Men. Deems appealed.[5]

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). We must "view the evidence in the light most favorable to the nonmoving party," and we will only sustain the circuit court's grant of summary judgment only "if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). Our review is *de novo*. *Id.*

Deems argues the circuit court erred in determining her employment status when the only issue to be determined was whether Eubanks was acting in the

[5] To avoid confusion, we pause to reiterate that, while designated a partial summary judgment, the judgment fully adjudicated Deems' claim against Minute Men, and included Kentucky Rule of Civil Procedure (CR) 54.02 recitations – (1) there was no just cause for delay, and (2) the decision was final. This converted an otherwise interlocutory order into a final and appealable judgment. *See* CR 54.02; *Watson v. Best Financial Services, Inc.*, 245 S.W.3d 722, 726 (Ky. 2008) ("If the trial court grants a final judgment upon one or more but less than all of the claims or parties, that decision remains interlocutory unless the trial court makes a separate determination that 'there is no just reason for delay.'").

course and scope his employment. She focuses her argument on the issue whether Eubanks was providing a benefit to Minute Men by driving fellow workers to and from jobsites. She fails to address the basis for the circuit court's summary judgment: the exclusive remedy provision set forth in KRS 342.690(1). Her failure to address this ruling makes our review difficult and limited.[6]

Under Kentucky law, if an employer provides workers' compensation coverage for its employees, then workers' compensation is the exclusive remedy for an employee who has suffered an injury that arose out of and in the course of employment. *Edwards v. Louisville Ladder*, 957 S.W.2d 290, 294 (Ky. App. 1997); KRS 342.690(1) (codifying the Act's exclusivity provision). There is no doubt that KRS 342.690(1) provides for exclusive liability under our Workers' Compensation Act. *Id.* Thus, covered employees are not permitted to seek damages in a civil suit when an injury is covered under the Act. *State Farm Mut. Auto. Ins. Co. v. Slusher*, 325 S.W.3d 318, 323 (Ky. 2010).

For an injury to be compensable under our workers' compensation scheme, it must "arise out of and in the course of employment[.]" *Warrior Coal Co., LLC v. Stroud,* 151 S.W.3d 29, 30 (Ky. 2004). "The perils encountered during travel to and from work are no different from those encountered by the general public and are neither occupational nor industrial hazards. Therefore, under a principle known as the 'going and coming rule,' injuries that occur during travel to and from work generally are not compensable." *Id.* at 31. This is so because, as a

[6] "[D]etermining, researching and making . . . arguments for [an appellant] is not the function or responsibility of this Court." *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012).

general rule, when an employee is injured while traveling to or from his place of employment the requisite causal connection between the injury and the employment is severed and does not exist. *See id.*

Kentucky courts have recognized, however, that "the act of an employee picking up a paycheck constitutes a work-related activity subject to workers' compensation coverage." *Barnette v. Hospital of Louisa, Inc.*, 64 S.W.3d 828, 830 (Ky. App. 2002); *Farris v. Huston Barger Masonry, Inc.*, 780 S.W.2d 611, 612 (Ky. 1989); *Seventh St. Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469, 471 (Ky. 1976) (holding that traveling to collect his pay is a work-related activity). This appears not to be so under Ohio law. *Deems v. Minute Men, Inc.*, No. 2016-Ohio-8259, 2016 WL 7494340, at *1 (Ohio App. December 21, 2016). We are not inclined to apply Ohio law to this case,[7] and so return to our own jurisprudence addressing this specific ruling by the circuit court.

Farris is most directly on point. Like Deems, the employees in *Farris* usually traveled to various jobsites in a carpool. 780 S.W.2d at 612. After work one day, Farris and other employees were involved in a traffic accident while carpooling from a job site to pick up their paychecks. Our Supreme Court affirmed the Workers' Compensation Board's legal conclusion that, because the employer had knowledge of, supported the practice of, and benefitted from its employees

[7] Nor has Deems suggested to this Court that the Ohio decision might be the basis of an offensive collateral estoppel argument, though she appears to have done so in the circuit court. (Appellee's brief, App'x 1, p. 1).

carpooling, and because traveling to pick up a paycheck provided a benefit to the employer, it qualified as a work-related activity. *Id.* at 613.

As in *Farris*, Deems and other employees were carpooling with the knowledge and support of Minute Men while on their way to pick up their paychecks when the accident occurred. Under Kentucky precedent, this constituted a work-related activity. *Farris*, 780 S.W.2d at 612; *Stillwell*, 550 S.W.2d at 471; *Barnette*, 64 S.W.3d at 830. We cannot dispute the circuit court's conclusion. Furthermore, "the Court of Appeals [previously has] held that KRS 342.690(1) precluded a civil action by an employee against his/her employer for an unintentional injury even if that injury is not compensable under the Workers' Compensation Act." *Kubajak v. Lexington-Fayette Urban County Government*, 2003-SC-0953-DG, 2005 WL 3500791, at *1 (Ky. Dec. 22, 2005).[8]

Deems here argues, incongruously, that "[d]uring the drive time [from the job site back to Minute Men to retrieve their paychecks,] employees were not on the clock nor were they providing a benefit to their employer." (Appellant's Brief at 3). She contends, now, that employees were not required to return to work to retrieve their paychecks. This directly conflicts with Deems' forceful and rather extensive argument before the circuit court that "Minute Men derived a benefit from having employees drive other employees to and from job sites," and that

[8] "[U]npublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." *Estate of Wittich By and Through Wittich v. Flick*, 519 S.W.3d 774, 779 (Ky. 2017) (quoting CR 76.28(4)(c)).

"[r]eturning to Minute Men to pick up paychecks was a work-related activity." She cited evidence that when the work day was finished, almost all the employees returned to Minute Men headquarters to pick up their paycheck; that it was common for employees to return to headquarters after work to pick up their paychecks; and that employees *were required* to travel to Minute Men's headquarters because they had to pick up their paychecks from that office. Minute Men, while initially disputing these facts, did an about face. Ultimately, Minute Men agreed that, because under Kentucky law Deems was engaged in the work-related activity of traveling to pick up her paycheck from Minute Men's headquarters, as required by Minute Men, she was acting within the course and scope of her employment at the time of the accident and her civil claim was barred by the exclusivity provision of the Act. The circuit court entered summary judgment based upon the facts neither party disputed. Deems cannot now be heard to complain.

For the foregoing reasons, we affirm the Kenton Circuit Court's November 21, 2014 partial summary judgment dismissing Deems' civil action against Minute Men as barred by the exclusivity provision of Kentucky's Workers' Compensation Act.

ALL CONCUR.

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