RENDERED: APRIL 8, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001726-WC

ADMINISTRATIVE OFFICE OF THE COURTS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-95469

KATHY BLEVINS;
HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KRAMER, AND NICKELL, JUDGES.

COMBS, JUDGE: The Administrative Office of the Courts (AOC) appeals an opinion and award of workers' compensation benefits in favor of its former employee, Kathy Blevins. After our review, we affirm.

Kathy Blevins was employed by AOC as a deputy clerk at the Knox County Courthouse in Barbourville, Kentucky. The courthouse and two parking lots behind it (a smaller lot with six spaces and a larger lot with twelve) are surrounded by a two-lane, oval-shaped roadway known as "Court Square." Several buildings form a rectangular perimeter around Court Square; these buildings, some of which are vacant at times, house an office of the Knox County Sheriff, a number of small businesses and some apartments. There are about fifty additional parking spaces adjacent to these buildings beyond the "Court Square" oval. For sake of reference, we will refer to the lot with six spaces as the "AOC lot," the lot with twelve spaces as "lot H," and the fifty additional parking spaces as "Court Square parking." The AOC lot, lot H, and the Court Square parking are not the only places to park in this area. There are several lots outside the Court Square perimeter, including about twelve parking spaces beside the sheriff's office -- the "sheriff's lot."

Blevins was on her way to work shortly before 8 a.m. on January 25, 2013. There had been an ice storm earlier that morning. She parked her car in a space located in the sheriff's lot near the perimeter of Court Square. She needed to walk a distance of about 150 feet to reach her workplace. Her journey involved taking a few steps across the sheriff's lot, turning right, walking along a portion of the sidewalk along the perimeter of Court Square in front of the sheriff's office, crossing Court Square, and entering a keycard-operated security door located behind the courthouse in the area of the AOC lot. During her walk, Blevins

slipped and fell on a patch of black ice on the sidewalk in front of the sheriff's office and injured her right leg. She filed a timely workers' compensation claim. An ALJ ultimately awarded her income and medical benefits. Following an administrative appeal, the Board affirmed. AOC filed this appeal.

Workers' compensation law is not "an accident insurance program against the hazards of traffic with the premiums paid by one's employer." *Baskin v. Community Towel Service*, 466 S.W.2d 456, 458 (Ky. 1971). Under the "coming-and-going" rule, injuries that occur during travel to and from work generally are not considered work-related and compensable. *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29, 31 (Ky. 2004). One exception to this rule provides that an employer *is* responsible if its worker is injured while (1) on the employer's "operating premises" and (2) not substantially deviating from the normal activities of coming or going. *See Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966).

On appeal, AOC challenges the ALJ's finding that Blevins's injuries were work-related. As it has contended throughout the proceedings below, AOC again argues that the "coming-and-going" rule barred Blevins's claim. AOC also argues that the "operating premises exception" to this rule does not apply under the circumstances of this case. The issue on appeal is whether the place where Blevins was injured (the sidewalk in front of the sheriff's office) should be deemed a part of AOC's "operating premises."

Whether a particular area comes within an employer's operating premises depends on the facts and circumstances of each particular case. Several

of our worker's compensation cases have addressed the application of the "operating premises" exception in circumstances involving workers who have been injured travelling between their workplace and the site where they parked.

In *Smith v. Klarer*, 405 S.W.2d 736 (Ky. 1966), the claimant was attempting to access her employer's meat packing plant when she was injured on the sidewalk outside it. The former Court of Appeals held that the location of the claimant's injury qualified as the employer's operating premises "because the employees, more than other segments of the public, necessarily had to use the sidewalk or part of it to personally gain access to the place of their work, and the sidewalk was in the control of the employer…." *Id.* at 738.

In *Harlan Appalachian Regional Hospital v. Taylor*, 424 S.W.2d 580 (Ky. 1968), the claimant fell in the parking lot of the Harlan Appalachian Regional Hospital as she was leaving her car and preparing to go to work in the hospital building. Because the hospital had furnished the lot for the use of its employees, the Court determined that the lot constituted part of the hospital's operating premises qualifying as an exception to the coming-and-going rule.

In *K–Mart Discount Stores v. Schroeder*, 623 S.W.2d 900 (Ky. 1981), K-Mart provided and designated a specific area for its employees to park; *i.e.*, in the north end of the parking lot of the shopping center that K-Mart shared with about 20 other stores. Because she was unable to find a parking space there, Schroeder parked in an area used by shoppers approximately 40 or 50 feet from the front door of the K-Mart store. While she was walking toward the store, Schroeder

stepped in a hole in the parking lot and broke her left ankle. *Id*. at 901. Finding that her injury did not warrant workers' compensation benefits under the "operating premises" rule, the Kentucky Supreme Court held in relevant part:

> Schroeder did not receive her injury in a parking area either owned, maintained, or controlled by her employer. She fell and received her injury in the area of the parking lot used by the public generally and separated from the working area of her employer by a two-way vehicular driveway over which her employer had no control.
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> The "operating premises" rule must be applied on a case by case basis. In other words, what we are holding is clearly and simply that if an employer provides or maintains a parking lot or other premises for the convenience of its employees, and an employee, while on said premises, sustains a work-connected injury, then the employer is responsible to the employee for workers' compensation benefits. Two factors must be present to fix liability on the employer. First of all, the employer must control the area, and second, a work-related injury must have been sustained on the area. What we are saying is that "operating premises" constitute a part of the work area, and an employee, under those conditions,
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> receiving a work-related injury is in a "work connected activity."

Id. at 902.

In *Hayes v. Gibson Hart Co.*, 789 S.W.2d 775 (Ky.1990), the Gibson Hart Company was performing work at the T.V.A. facility in Owensboro, Kentucky. Hayes, one of Gibson Hart's employees, tripped on a piece of concrete and fell on a sidewalk within the T.V.A. facility while walking from his car to his work station. The Court recognized that physical control of the area where the

accident occurred and responsibility for the condition of the sidewalk remained with the T.V.A. Nonetheless, the Court held that his claim was compensable because Hayes would not and could not have been on the T.V.A. property **but for his** employment with Gibson Hart. Thus, ownership or control of the site of the injury did not outweigh the "but for" factor of his employment and its relationship to his injury.

In *Pierson v. Lexington Public Library*, 987 S.W.2d 316 (Ky. 1999), Pierson worked at the main branch of the Lexington Public Library. The library leased parking spaces from the owner of an adjacent parking garage, and library employees were required to park on the seventh floor of the garage. Pierson was injured while returning to work from lunch when the garage elevator dropped as she was exiting. The library contested Pierson's claim, arguing that any risk related to the elevator was common to the street, that it had no control over the elevator, and that Pierson was in the process of coming and going. *Id*. at 317–18.

Noting that workers' compensation legislation was not intended to protect workers against the general risks of the street, the Court nonetheless stated that employers are liable for work-related injuries that occur on their entire "operating premises." *Id*. at 318. In making that determination, the Court emphasized the extent to which the employer should control the risks associated with the area where the injury occurred. The Court found that the library -- as a major customer of the garage -- had some influence over the owner. Furthermore, by providing free parking to Pierson, the library clearly **influenced** her decision to

park there. Thus, there were sufficient indicia of employer control to support the conclusion that the library bore liability. The Court nonetheless concluded that the library had liability for Pierson's injury.

In *Jackson Purchase Medical Associates v. Crossett*, 412 S.W.3d 170 (Ky. 2013), the Kentucky Supreme Court reemphasized that benefits are properly awarded pursuant to the "operating premises" exception when an employee suffers injuries *while walking a reasonable path from* a parking area designated for employee parking toward her place of employment. There, as in *Pierson*, the designated parking area was not maintained or controlled by the employer. But it had been leased by the employer, and the lease required the employer's workers to park "only in spaces designated" and prohibited employees from parking "in spaces reserved for public parking." *Id*. at 173, n. 1.

Last and most recently, *Hanik v. Christopher & Banks, Inc.*, 434 S.W.3d 20 (Ky. 2014), involved a claimant who, like Blevins, suffered injuries after she slipped and fell on ice between the place where she worked (a retail clothing store) and the lot where she parked (a lot located directly behind the store). Although the evidence was disputed, some evidence existed to support the ALJ's determinations that the employer: had no control over the parking lot where the claimant fell; had not instructed the claimant to park in that particular location; and that any directions regarding where to park came from the company that owned the mall where her employer's clothing store was located — and not from her employer. The ALJ — and ultimately the Kentucky Supreme Court — applied

the law to these findings and held, therefore, that the "operating premises" exception did not apply. It so held despite the general consensus of all testifying witnesses that the back lot where the claimant had parked was primarily used by employees of shops at the mall. *Id*. at 26. The *Hanik* court further declined to extend the "positional risk" doctrine to parking lot cases, thereby rejecting the notion that the necessity of parking "somewhere" in order to get to work — in and of itself — renders an employer liable for injuries suffered by claimants traversing the distance between their place of employment and their parking place.

In the case before us, Blevins did not park in a lot that was owned, leased, maintained, or controlled by AOC; she parked in a public lot next to a public building. She did not injure herself on a sidewalk owned, maintained, or controlled by AOC; it was a public sidewalk used by the public in general. Furthermore, she did not park in a place where her employer required her to park.

However, the ALJ reasoned that AOC was liable for Blevins's injuries because AOC had told her where *not* to park. In relevant part, the ALJ held:

> In the present case, there was parking assigned to the employees of the Administrative Office of the Court, but Blevins' supervisor had directed that she and other employees **not park in** that lot. Clearly had she been able to park in the lot assigned to the employees of AOC she would have been within the operating premises of the defendant-employer. Instead, she and other employees were directed not to park in that designated parking area nor on the street which left her with the only reasonable alternative being to park in the closest place, which was where she parked in a lot owned and maintained by the city of Barbourville and Knox County. It was when she *stepped from that lot onto the sidewalk that the injury*

> *which is the subject of this claim occurred.* **Because of the restraints placed on where she could park** Blevins parked in the closest place she could to the secured entrance to be used the [sic] AOC employees. [Emphases added.]

Blevins had been specifically forbidden or discouraged from parking on the AOC premises, but the sheriff's lot was inside an area that was authorized by her employer. The ALJ concluded Blevins was entitled to benefits under the "operating premises" exception because "not only was the parking lot a part of the expanded 'operating premises' of the employer, but [Blevins] was performing a service to the employer by parking where **she was directed to free up AOC parking spaces** located directly on courthouse property for judges and other court personnel." (Emphasis added.) Opinion of the ALJ, October 16, 2015, p. 13.

Numerous cases have addressed the nuances of the issue before us. *Hayes, supra,* emphasized that *but for* the fact of his employment, Hayes would not have suffered injury while walking across the TVA parking lot – premises not owned or controlled by his employer. Hayes recovered workers' compensation benefits.

Although *K-Mart, supra,* reaches a contrary result, *Pierson, supra,* expanded the concept of "operating premises" beyond an area that the employer owned or controlled to encompass the location where it encouraged Pierson to park.

In *Hanik, supra,* the employer was silent on the issue of where the employee should or should not have parked – neither directing, providing, nor forbidding a parking place.

After a review of the many cases discussing this issue, we are persuaded that the ALJ and the Board correctly found that Blevins was entitled to recover for her injury. The ALJ focused on the directive of AOC in telling Blevins and other employees where *not* to park. Nonetheless, Blevins had to attain access to the building where she worked (*i.e.,* the "operating premises"). She had no alternative as to parking because of the restraints placed on her by AOC itself. Significantly, AOC impeded her access to parking on its own premises for the sake of its own operating convenience of providing access to other court personnel (*e.g.,* judges). AOC effectively expanded the parameters of its own "operating premises." Thus, AOC should be estopped from attempting to avoid its liability for Blevins's injury.

As noted in *K-Mart, supra,* this is indeed an issue to be decided on a "case by case" basis. *Id.* at 902. That is precisely what the ALJ did – and he did so correctly. We cannot say that the Board erred at all – much less flagrantly – in assessing the evidence in this case. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

We affirm the decision of the Workers' Compensation Board.

NICKELL, JUDGE, CONCURS.

KRAMER, JUDGE, DISSENTS BY SEPARATE OPINION.

KRAMER, JUDGE, DISSENTING: To be sure, Blevins's unchallenged testimony was that her supervisor told her she could park *anywhere except* the six parking spaces located in the AOC lot while court was in session (typically in the morning) and *except* the Court Square parking located in front of occupied buildings unless nothing else was available. Blevins testified she understood, therefore, that her parking option was *anywhere else*, which included: (1) lot H; (2) Court Square parking located in front of vacant buildings; (3) the sheriff's lot; (4) the AOC lot when court was not in session; and (4) in her words, "other available parking." She further testified that, like her supervisor, she typically parked in the sheriff's lot.

Boiled down, the ALJ reasoned that because the sheriff's lot was outside the area Blevins had been forbidden or discouraged from parking, the sheriff's lot was inside an area that "was authorized by, and of benefit to her employer." The ALJ concluded Blevins was entitled to benefits under the "operating premises" exception because "not only was the parking lot a part of the expanded 'operating premises' of the employer, but [Blevins] was performing a service to the employer by parking where she was directed to free up AOC parking spaces located directly on courthouse property for judges and other court personnel." Accordingly, the ALJ's logic stands for the following proposition: When an employer forbids its employees from using a limited number of parking spaces, the employer effectively converts every other conveniently located parking space into its "operating premises."

I believe the ALJ erred by misunderstanding the word "premises," which contemplates a specific, identifiable place. *See* MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY 980 (11th ed. 2005) (defining "premises" as "a tract of land with the buildings thereon"). This is the constant thread in each of the cases discussed above where a claimant was held to have sustained injuries on an employer's operating premises. In *Klarer*, the claimant was injured on a sidewalk located on his employer's property. In *Harlan* and *Jackson*, the claimants were injured in parking lots furnished by their employers. In *Hayes*, the claimant was injured on property he would not have been able to access, but for his employment. In *Pierson*, the claimant was injured in transit between the employer's facility and the place the employer had designated for employee parking.

By contrast, the claimant in *Schroeder* was unable to find a place to park in the area furnished by her employer.[1] In *Hanik*, it was determined the employer did not designate or furnish any parking for its employees. In both cases, the claimants' injuries — sustained in parking lots located just outside of the employers' respective businesses — were deemed non-compensable. That the claimants needed to park somewhere, or that they may have chosen the most convenient places to park, was not sufficient to convert the places they parked into their respective employers' "operating premises."

[1] In light of *Pierson*, it is doubtful *Schroeder* could now be interpreted to mean that the claimant's injuries would have been non-compensable if the claimant in that matter had parked in the area of the lot her employer leased.

In my view, "operating premises" must, at minimum, be a place defined by an employer, not by an employee's convenience or need to park somewhere. "Somewhere else," "whatever else is convenient," or "other available parking" are not places where an employer can "authorize" parking, and they are not places capable of rationally falling within the confines and factors of the "operating premises" rule, because they are not "places" at all; they are nebulous concepts. I believe the ALJ erred by determining that the sheriff's lot where Blevins parked and the sidewalk in front of the sheriff's office where Blevins fell qualified as AOC's operating premises. AOC did not own, control, maintain, or require Blevins to park in the area where Blevins parked her car and ultimately fell. Therefore, I would reverse.

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