RENDERED: OCTOBER 13, 2017; 10:00 A.M.
TO BE PUBLISHED

# Commonwealth of Kentucky
# Court of Appeals

NO. 2016-CA-001367-WC

FIRST CLASS SERVICES, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 12-WC-60799

GURAL W. HENSLEY;
HONORABLE OTTO DANIEL
WOLFF, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, J. LAMBERT, AND STUMBO, JUDGES.

LAMBERT, J., JUDGE: First Class Services, Inc., has petitioned this Court for review of the August 19, 2016, decision of the Workers' Compensation Board (the Board) affirming in part, vacating in part, and remanding the December 11, 2015, Administrative Law Judge's (ALJ) Remand Opinion and Order and the February 16, 2016, Order on Petition for Reconsideration. In its appeal, First Class Services

contends that, as a matter of law, injured employee Gural W. Hensley was not entitled to the "service to the employer" and "traveling employee" exceptions to the "going and coming" rule. We disagree and affirm.

We begin by repeating the statement of facts and procedural history as set forth in the Board's opinion:

> [Hensley] sustained multiple injuries in an MVA [motor vehicle accident] on November 15, 2012, while employed by First Class as an over-the-road truck driver. Hensley kept his truck at home at all times except when he was driving, or when he took it to the terminal at Lewisport, Kentucky, for service. He called the dispatcher from his home to receive assignments, and left on his route from his home. When his route was finished, he returned home with the truck. He generally hauled plastic from Frankfort, Kentucky, to Ada, Oklahoma. Sometimes he brought a trailer home with him, and sometimes he did not.
>
> In discussing why he kept his truck at home, Hensley explained his home is located near the interstate, and the Lewisport facility was approximately one hour away and off of his route. He stated keeping a truck at home provided a benefit to First Class by reducing fuel cost, wear and tear on the vehicle, and maintenance costs. This testimony was corroborated by James Craig, Jeff Belcher, and Jackie Moon, all employees of First Class.
>
> The day before the MVA, Hensley became ill while returning to Kentucky from a delivery in northern Illinois. He told Randy Cutrell, Vice President of First Class, that he was not feeling well. Hensley took his truck to Derby City Tank Wash in Louisville, where he was to have the tank cleaned then proceed to Frankfort to pick up a load. On the day of the accident, it was determined Hensley should not complete his dispatch and another driver was sent to the tank wash to pick up Hensley's trailer to take it to Frankfort for a load to finish the dispatch. Hensley was on his way home from the

tank wash in his truck without the trailer, when his truck left the road and crashed into trees.

. . . .

On remand, the ALJ specifically determined Hensley kept his truck at home, and commenced and concluded his routes from home, which provided a benefit to the employer. The ALJ then considered the traveling employee exception, and noted the Board had rejected application of the personal comfort exception. He stated:

> The Board having said what it said, it would seem fruitless to now determine [Hensley], at the time of his MVA, was not on a distinct departure from his work route due to a personal matter; consequently, it is determined [Hensley] does not qualify for the "traveling employee" exception to the "going and coming" rule.

Both parties filed petitions for reconsideration. First Class argued Hensley was on a purely personal mission at the time of the accident. Hensley argued he was a traveling employee at the time of the accident, and that returning home, even due to illness, constituted a work activity.

. . . .

We find it necessary to reverse the ALJ's finding regarding the traveling employee exception. The holding in *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456 [462-63] (Ky. 2012), is directly on point concerning return trips by traveling employees. There, the Kentucky Supreme Court held as follows:

> Kentucky applies the traveling employee doctrine in instances where a worker's employment requires travel. Grounded in the position risk doctrine, the traveling employee doctrine considers an injury that

> occurs while employee is in travel status to be work-related unless the worker was engaged in a significant departure from the purpose of the trip. The ALJ did not err by concluding that the traveling employee and position doctrines permitted compensation in this case.
>
> The claimant's accident did not occur while he was working for Eaton or Paramount but while he was traveling from Saratoga back to Lexington. As found by the ALJ, the parties contemplated that he would work at the sales and return to his duties at the farm when the sales ended. The accident in which he was injured occurred during the "necessary and inevitable" act of completing the journey he undertook for Gaines Gentry. In other words, travel necessitated by the claimant's employer placed him in what turned out to be a place of danger and he was injured as a consequence.

Here it is uncontroverted Hensley's work placed him in the location he was in at the time he became ill. There is no indication Hensley engaged in any non-work-related activity with the truck while on the road. There is no indication he deviated from the route to his home. Most importantly, the ALJ specifically found Hensley was on his way home. As was the case in *Mandujano*, the return trip was a "necessary and inevitable" act of completing the journey undertaken for the employer. As we noted in our prior decision, a mere deviation from his usual employment due to an illness would not negate the fact Hensley was still working until he returned home. Because the ALJ determined Hensley kept his truck at his home, began and ended his routes at his home, and was merely in the process of returning from his route, as a matter of law Hensley must be viewed as a traveling employee at the time of the accident.

Accordingly, the December 11, 2015 Remand Opinion and Order and the February 16, 2016 Order on Petition

> for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby AFFIRMED IN PART, REVERSED IN PART and REMANDED for entry of an amended decision consistent with the views expressed herein.

Our standard of review in workers' compensation appeals is well-settled in the Commonwealth. "The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board 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).

Kentucky law establishes that "[t]he claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor." *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979) (citations omitted). "When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). However, "[i]f the board finds against a claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor." *Snawder*, 576 S.W.2d at 280 (citations omitted).

Because the decision favored Hensley, we must determine whether there was some evidence of substance to support the ALJ's findings.

> Although a court cannot substitute its evaluation of the weight and credibility of the evidence for that of the Workmen's Compensation Board, nevertheless, the findings of fact of the board when it decides in favor of the claimant must be supported by substantial evidence. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.

*Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). And it has long been the law in Kentucky that "[t]he ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993), citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

The sole issue before this Court is whether the Board properly ruled in Hensley's favor in its determination that Hensley was providing a service to First Class and was entitled to traveling employee status at the time of his accident.

> The courts have construed KRS [Kentucky Revised Statutes] 342.285 ["Appeal to Workers' Compensation Board"] to require a party who appeals a finding that favors the party with the burden of proof to show that no substantial evidence supported the finding, i.e., that the finding was unreasonable under the evidence. A party who fails to meet its burden of proof before the ALJ must show that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, i.e., no reasonable person could have failed to be persuaded by the favorable evidence. **Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal**.

*Mandujano*, *supra* at 461 (emphasis added; footnotes omitted).

First Class has failed to meet that burden of demonstrating "overwhelming favorable evidence" in support of its position that Hensley was not providing a service to it or that Hensley was not a traveling employee. Hensley had been employed at First Class since 1998, and Hensley had routinely driven the First Class rig (with or without a trailer or tanker) to and from his home ever since. As he and three other First Class employees testified, and as the Board stated in its Opinion, "keeping a truck at home provided a benefit to First Class by reducing fuel cost, wear and tear on the vehicle, and maintenance costs." Because Hensley's route began and ended at home, returning home early because of illness did not introduce a significant departure from that routine. *Id.* at 462.

The Board's finding was not "unreasonable under the evidence." *Id.* at 461. And its ruling comports with Kentucky case law regarding this issue. *See*, *e.g.*, *Olsten-Kimberly Quality Care v. Parr*, 965 S.W.2d 155 (Ky. 1998); *Receveur Construction Company/Realm, Inc. v. Rogers*, 958 S.W.2d 18 (Ky. 1997); *Fortney v. Airtran Airways, Inc.*, 319 S.W.3d 325 (Ky. 2010); *Port v. Kern*, 187 S.W.3d 329 (Ky. App. 2006); *Abbott Labs. v. Smith*, 205 S.W.3d 249 (Ky. App. 2006).

First Class cites the unpublished decision of *Cole v. Cardinal Country Stores, Inc.*, No. 2013-CA-000787-WC, 2013 WL 5522800 (Ky. App. Oct. 4, 2013), as supporting its position that the Board incorrectly ruled in Hensley's favor. There the Board ruled in the employer's favor because the claimant, after leaving work, had gone to the bank and then to another town before returning home. The Court of Appeals reasoned:

> [T]he evidence indicated that [Claimant] was on an entirely personal errand at the time of the accident—an errand that constituted a **distinct departure** from the normal course of his employer's business. The exception upon which [Claimant] relies does not apply under these circumstances since he was **not simply travelling between work and home at the time of his injuries**; his journey was not part of the service for which he was employed; and the journey did not benefit his employer. *See Abbott Laboratories v. Smith*, 205 S.W.3d 249 (Ky. App. 2006). [Claimant's] use of the vehicle for his purely personal errands dictated that the injuries he sustained did not fall within the course and scope of his employment.

*Cole* at *3 (emphases added). We hold that *Cole* is inapplicable to the present case because of Hensley's distinguishing facts: Hensley was merely returning home, albeit earlier in the day than usual, from work; there was no "distinct departure from the normal course of his employer's business." *Id.* Furthermore, we have the guidance of published decisions on this issue, thus need not rely on an unpublished decision, especially given the disparate circumstances. CR 76.28(4)(c).[1]

For the foregoing reasons, the opinion of the Workers' Compensation Board affirming in part, vacating in part, and remanding the decisions of the Administrative Law Judge is affirmed.

ALL CONCUR.

[1] The pertinent language of the Rule states: "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished 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**." (Emphasis ours.)

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