RENDERED: JUNE 8, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000679-WC

PROFESSIONAL FINANCIAL SERVICES — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-13-92143

SERENA GORDON;
HON. ROLAND CASE, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, D. LAMBERT, AND JOHNSON, JUDGES.

LAMBERT, D., JUDGE: Professional Financial Services (PFS) appeals from the March 31, 2017 opinion of the Workers' Compensation Board (the Board). The Board upheld the decision of Hon. R. Roland Case, Administrative Law Judge (ALJ), to award Serena Gordon disability and medical benefits. After review, we affirm.

I. BACKGROUND

Serena Gordon left work one night in February 2013. Upon arriving at her parked car, she realized she had left her employer-issued tablet in her office. Serena walked back into her work building and retrieved the tablet. As she returned to her car, with the tablet, she fell and injured her leg.

PFS initially accepted that the injury was compensable, but later denied Serena's workplace injury claim once it determined her injury did not occur on its business premises. The matter was heard before the ALJ.

The ALJ agreed with PFS in that Serena's injury did not happen on the business premises. The ALJ also found that PFS neither owned the parking lot where the injury occurred nor directed Serena where to park. Nevertheless, the ALJ ultimately ruled the injury was compensable because Serena returned to her car with the tablet and intended to continue her work once she got home.

On appeal to the Board, PFS argued that the ALJ failed to adequately support his ultimate decision. PFS noted that the ALJ only included one case citation in his opinion, *Phil Hollenbach Co. v. Hollenbach*, 181 Ky. 262, 204 S.W. 152 (1918), and further claimed the ALJ failed to sufficiently explain how the injury was work-related, especially considering Kentucky's traditional rule that injuries sustained when workers are coming and going from work are not compensable. The Board rejected these arguments, however, and concluded that the ALJ provided enough analysis to justify the benefits award under *Receveur*

Const. Company/Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1997). This appeal followed.

II. STANDARD OF REVIEW

For appellate purposes, an opinion from the Board will only be reversed if it misconstrued the applicable law or committed a flagrant error in evaluating the evidence. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We will defer to decisions supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984).

III. DISCUSSION

On appeal, PFS contends the Board misconstrued controlling law in upholding the ALJ's decision. PFS instead urges this Court to hold that Kentucky does not recognize an exception to the traditional coming-and-going rule when the injured worker's travel serves the employer's business interest. In the alternative, PFS challenges the Board's opinion as a usurpation of the ALJ's fact-finding role. PFS asserts it was the ALJ's responsibility, rather than the Board's, to cite whether it was applying an exception to the coming-and-going rule and make appropriate findings. PFS consequently asks this Court to remand the matter to the ALJ for additional consideration. For the following reasons, we agree with the Board.

There is a distinction in Kentucky workers' compensation law when a worker sustains an injury when traveling to or from the place where he regularly works. Travel is work-related if it is for the convenience of the employer and not

work-related if it is for the convenience of the employee. *Receveur Const. Company*, 958 S.W.2d at 20.

Here, despite PFS's argument to the contrary, the ALJ applied controlling Kentucky law to the facts of the case and properly concluded Serena sustained a work-related injury. As the sole arbiter of witness credibility, *see Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997), the ALJ accepted Serena's testimony that she frequently worked from home using the tablet, a device she also noted could only be utilized for business purposes, and made the following finding based on that substantial evidence: "[Serena's] act of retrieving the tablet to take same home for use was for the benefit of the employer and not for personal benefit." Accordingly, the ALJ did not err in awarding Serena benefits for her workplace fall. The Board's opinion is affirmed.

COMBS, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE: In this case, Serena Gordon was injured in a parking lot outside her office building when she tripped over a curb. The ALJ determined that even though Serena had left her employer's work place and was not on property owned by her employer, she should still be compensated for her injury. The ALJ based his decision on the fact that she was returning to her car after getting a business issued iPad she had previously forgotten at the office. In its opinion, the Board, by a 2-1 vote, determined that Serena was entitled to compensation based

upon the "service to the employer" exception. Our Court affirms the Board's opinion. I respectfully disagree.

The Board based its decision on an analysis of whether Serena was providing a service to her employer when she returned to the office building to retrieve the tablet. The Board found that her injury occurred while she was going from her place of work to her car, and thus it occurred "during the course and scope of her employment with the defendant-employer."

Serena had been issued the tablet by her employer so that she would be able to work at home. The Board determined that once Serena left the workplace the second time, she was still covered under workers' compensation. The majority opinion concurs.

The facts of this case are not in dispute. Serena had reached her car when she realized that she had forgotten the tablet and returned to her place of work to retrieve it. The Board's order determined that Serena was providing a service to her employer by returning to the office building to retrieve the tablet. Where I disagree with the Board and the Court's majority opinion is their determination that once Serena left the building the second time, her journey from her place of employment to the parking lot occurred "during the course and scope of her employment with the defendant-employer." I believe this is an expansion of the workers' compensation law and contrary to current Kentucky law. *Warrior Coal Co., LLC v. Stroud*, 151 S.W.3d 29, 31 (Ky. 2004).

Had Serena put the iPad in her briefcase when she left her office the first time and then fallen in the parking lot, she would not have been entitled to workers' compensation because as the Board found, the coming-and-going rule would apply. *Warrior Coal, id*. The Board also found that the parking lot where the injury occurred does not fall into the "operating premises" exception, *i.e.*, her employer did not control the premises where she was injured. *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966).

While I may agree with the Board and this Court's majority that her return to her office the second time was in furtherance of her employer's business, I believe they err in their determination that her return, second trip, from her employer's place of business to her car is also covered. Once Serena had retrieved her iPad, the errand which benefitted her employer was complete. I believe that the Board and this Court incorrectly applied the law.

Once Serena left her work place on the second trip to her car, she should not be covered based upon the coming-and-going rule. *Fortney v. Airtran Airways, Inc*., 319 S.W.3d 325, 329 (Ky. 2010), states that "[i]f the journey is part of the service for which the worker is employed or otherwise benefits the employer" it is an exception to the coming and going rule. The Board found that her return to retrieve the IPad was the errand she performed for the benefit of her employer. Therefore, once Serena obtained the IPad, her errand for her employer had ended. When she left the premises the second time, she fell within the coming and going rule and should not be entitled to benefits.

Thus, I disagree with the majority opinion of this Court and the Board's decision, and file this dissent.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE, SERENA GORDON:
Ian Matthew Godfrey Lexington, Kentucky	Paula Gay Richardson Owingsville, Kentucky