

OPINION ENTERED: SEPTEMBER 13, 2012

CLAIM NO. 201101392

ROBERT SHAWN PADGETT

PETITIONER

VS.

APPEAL FROM HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

BOWLIN GROUP, LLC
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Robert Shawn Padgett ("Padgett") seeks review of the opinion and order rendered June 22, 2012 by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), dismissing his claim for benefits against Bowlin Group, LLC ("Bowlin") finding the September 23, 2011 accident did not

occur in the course and scope of his employment. Neither party filed a petition for reconsideration.

The claim was bifurcated to determine whether the injury occurred in the course and scope of Padgett's employment with Bowlin as an exception to the going and coming rule. On appeal, Padgett argues the ALJ erroneously applied the improper legal standard, and should have properly determined whether the use of a company owned motor vehicle was of some benefit to the employer, and therefore an exception to the going and coming rule. Likewise, Padgett argues Bowlin provided the company owned motor vehicle as an inducement to his continued employment which likewise created an exception to the going and coming rule. We affirm.

It is undisputed Padgett sustained multiple injuries in a motor vehicle accident on September 23, 2011 as he was en route to work while driving a company owned vehicle. Padgett filed a Form 101 on October 25, 2011 alleging he was in the course and scope of his employment when he sustained his injuries. Padgett subsequently testified by deposition on December 20, 2011, and again on March 14, 2012. He also testified at the hearing held April 20, 2012.

Padgett worked for Bowlin for one week in September 2009 before accepting work elsewhere. In February 2011, he was re-hired by Jay Martin, vice president for Bowlin, as an installation supervisor in Walton, Kentucky. This job required Padgett to organize the workload for thirteen to eighteen installers, deliver money and paperwork to Insight, deliver equipment to installers in the field, and follow up on jobs performed by the installers. He was provided a company owned vehicle which he testified had no distinctive company markings, and a fuel card to assist in performing his duties.

In late July, Padgett and the installers who he supervised were advised the Walton office would be closed, and anyone desiring to do so could transfer to the Lexington office. Padgett opted to transfer to Lexington where he processed paperwork and made deliveries to Insight, which was located .4 miles from the Bowlin offices. He did not make any equipment deliveries to installers in the field after his transfer to Lexington. This transfer occurred in early August 2011. Padgett continued to use the company owned truck to commute from his residence, and to make deliveries to Insight. After his transfer to Lexington, Padgett was required to keep records regarding the use of

the company owned vehicle. Although not required to do so, he also began tracking the hours he worked.

On September 26, 2011, Bowlin was commuting from his home in Walton to Bowlin's Lexington office. He testified it was raining, and he was running late for work. In a single vehicle accident, the truck he was driving hydroplaned and crashed into a guardrail. He lost consciousness and awakened to find himself trapped in the vehicle. An emergency team removed him from the vehicle, and he was transported to the University of Kentucky Medical Center for treatment.

James Jay Martin, vice president for Bowlin, testified by deposition on March 1, 2012. He testified Bowlin provides construction and installation for cable television and telephone services. He hired Padgett as an installation manager in February 2011. Martin stated installation managers were provided a vehicle allowance for the execution of their duties. He stated Padgett did not have reliable transportation, and was provided a company owned vehicle and a fuel card. Martin stated the Walton office was closed in August 2011. After August 5, 2011, Padgett worked as a paperwork coordinator in Lexington, and he no longer delivered any equipment or materials to the field. Martin stated Padgett was not required to use the

company owned vehicle assigned to him to make deliveries to Insight. He noted several company owned vehicles were always present on the lot which Padgett could have utilized for that purpose.

Jason Clark, Bowlin's installation manager, testified by deposition on December 20, 2011, and at the hearing held April 20, 2012. He supervised Padgett from April 2011 until the date of the accident. Clark testified Padgett worked in an administrative capacity in the Lexington office subsequent to August 15, 2011, until the accident. He stated Padgett was not required to relinquish the company owned vehicle after he started working in Lexington. He testified numerous small trucks and vehicles were located at the Lexington office which could have been utilized by Padgett to make deliveries to Insight.

In an opinion and order rendered June 22, 2012, the ALJ dismissed Padgett's claim as not work-related since the accident occurred on his way to work, and no exception to the going and coming rule was applicable. In support of his conclusion, the ALJ made the following findings of fact:

Plaintiff was hired by Defendant/
Employer, which did installation work
for Insight Communication, in February
2011. He was hired by Jay Martin, a
friend and vice-president of Bowlin
Group, LLC, as an installation manager
for the Northern Kentucky area, with an

office at Walton. He was in charge of approximately 13 to 18 installers. Plaintiff did not have a suitable vehicle, and after Martin talked with the owner of the company, Mr. Bowlin, Defendant purchased a truck for Plaintiff to be used by Plaintiff in his duties of supervising the installation crew in the Walton area. He was also furnished a gas card and exercised personal use of the vehicle. There is no issue but that the truck was primarily for use for the benefit of Defendant while Plaintiff worked from the Walton office.

On July 27, 2011, Jay Martin met with Plaintiff and the installation crew and informed them that Defendant was terminating the Walton area office as to installations as of Friday, August 5, 2011. They were given the option of leaving the company or transferring to the Lexington office. About half the installers accepted the same positions in Lexington. However, since the Lexington office already had supervisors for the installation crews, Plaintiff was no longer needed in that capacity. He was assigned an administrative/clerical position in the Lexington office doing paper work. Jason Clark was his supervisor.

On his transfer to the Lexington office, he had to commute from his home in Walton to the Lexington office. There was no discussion by Mr. Martin and Plaintiff concerning the use of the truck that Plaintiff had used as Installation Manager in Walton, but Plaintiff continued to keep the truck, continued the use of his gas card, and used the truck in commuting to Lexington daily. There was no evidence that the use of the truck or gas card was an inducement or incentive for Plaintiff to

transfer to Lexington or to continue his employment. He was given the option of transferring or termination.

In doing his paper work in Lexington, he was required to make two visits daily to the Insight office, which was .4 mile from Bowlin's office to deliver money and paper work. He used the truck in making these trips, although Defendant generally had four or five extra vehicles parked at the office at any time that Plaintiff could have used.

. . .

Other than the use of the vehicle in two daily trips to Insight's office, there is some dispute as to the use of the vehicle in Walton in furtherance of Bowlin business. Plaintiff made two trips from his home in Walton to Bowlin's Walton office to meet with Bowlin personnel to compile paper work for a Department of Labor investigation.

Regarding the issues on appeal, the ALJ found as follows:

The issue in this claim is whether this [sic] the use of Defendant's vehicle furnished to Plaintiff was sufficient to invoke an exception to the "going and coming" rule, that is, that injuries sustained by employees when going to or returning from the regular place of work are not deemed to have arisen out of and in the course of their employment. *Turner Day and Woolworth Handle Company v. Pennington*, 250 Ky. 433, 437 (1933).

In making this determination, the parties have directed the ALJ to two cases that speak to the issue in this claim: *Receveur Construction Company/*

Realm, Inc. v. Rogers, 958 S.W.2d 18 (KY. 1997), and *Port v. Kern*, 187 S.W.3d 329 (Ky. App. 2006). Plaintiff has subsequently filed for the ALJ's consideration the case of *Fortney v. Airtran Airways, Inc.* 319 S.W.3d 328 (KY. 2010). The ALJ will discuss that case as the ALJ deems it applicable to the present claim. The court in that case did generally discuss exceptions to the "going and coming" rule and provided dicta as to the present state of the law pertaining to the claim *sub judice*. It specifically mentioned its case of *Rogers, id.*, but not the more recent case of *Kern, id.* By the failure to mention the later Court of Appeals case of *Kern*, the ALJ is going to consider that the Supreme Court did not consider that case as adding to the body of Kentucky jurisprudence on the issue. In the "background" discussion of that case, the court said:

The "going and coming" rule considers an injury incurred while commuting between a worker's home and workplace to be non-compensable absent exceptional circumstances. The rationale supporting the rule is that perils encountered by the general public and, thus, are neither occupational nor industrial hazards for which the employer is liable. (Emphasis supplied).

Then under "service/benefit to the employer exception" section of that opinion, the court said:

The rule excluding injuries that occur off the employer's premises, during travel between work and home, does not apply if the journey is part of the services for which the worker is employed or otherwise benefits the employer.

Factors considered under the exception include not only an employer service or benefit but also whether the injured worker is paid for travel time (e.g., for performing work on the trip, travelling to a remote site, or travelling between job sites) and whether the employee is paid for the expense of travel.

It is obvious that none of these exceptions apply as Plaintiff was injured in a commute from his home to his workplace. Then citing Rogers, id., the court said "the exception provided coverage where an employee's use of the vehicle to drive directly between home and the job site benefited the employer by avoiding a stop at the business office. (Emphasis supplied).

In reviewing *Rogers*, the ALJ notes that the court cited Larson for the proposition that most jurisdictions hold that the provision of an automobile under the employee's control by the employer will result in journeys taken in that vehicle being held to be in the course of employment. But the court went on to say:

While not prepared to totally adopt the reasoning in those cases, we do agree that where there is evidence that the use of the company owned vehicle is of some benefit to the employer, an exception to the going-and-coming rule is created. In our opinion, that is the effect of the Court's opinion in Turner Day, supra. (Emphasis supplied).

The court used some unfortunate language in stating "some benefit to the employer," but it went on to state

"although the use of such a conveyance was a convenience for Rogers, it was primarily of benefit to the employer," and "that was the effect of the Court's opinion in *Turner Day*." In *Turner Day* it is apparent that the employer was receiving more than *de minimis* benefit in the provision of a truck to the claimant. Not only was he carrying messages back and forth to the office in Bowling Green on weekends, but the truck was provided to him as an inducement to work away from home and have a source of transportation to and from his home in Bowling Green.

As the claimant in a workers' compensation proceeding, Padgett had the burden of proving each of the essential elements of his cause of action. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since Padgett was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. *Ira A.*

Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In the case *sub judice*, neither party filed a petition for reconsideration. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence

supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Concerning the issue on appeal, we believe the ALJ's determination is supported by the evidence. This case presents an interesting set of facts regarding the going and coming rule. The general rule is that injuries sustained by workers when they are going to or returning from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the course of the employment as hazards ordinarily encountered in such journeys are not incident to the employer's business. Kaycee Coal Co. v. Short, 450 S.W.2d 262 (Ky. 1970). In this particular case, the plaintiff argues that his accident falls within the service to employer exception to the going

and coming rule as set forth in Port v. Kern, 187 S.W.3d 329 (Ky. App. 2006) and Receveur Construction Co./Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1997).

As recognized by the ALJ in his opinion, the Kentucky Supreme Court in Rogers, supra, discussed the going and coming rule and its exceptions. In Rogers, supra, the employer's construction company was located in Louisville and the employee's residence was in Campbellsville. He worked at remote job sites around the region. Shortly before the fatal automobile accident, Rogers had been promoted to project superintendent and was issued a company vehicle. The truck was equipped with a CB radio allowing him to communicate with the employer during the day. The truck was to be used as a means of transportation both during the course of the work day and between Rogers' home and job site so he would not be required to first go to the central office in Louisville. Rogers was provided a credit card to cover the cost of gasoline for the vehicle. He was not paid for travel time between his home and work though he was paid for travel time between the central office and remote job sites. On the day of the accident, Rogers had been working that shift with a co-worker at a remote job site in Indiana. The two men returned together in the company truck to the central office in Louisville where they

unloaded a truckload of rubbish. The co-worker then went home in his own vehicle and Rogers left for home in the company truck. The accident occurred while in route to his home.

The Court acknowledged the general rule that travel to and from work is not deemed to arise out of and in the course of the employment as hazards ordinarily encountered in such journeys are not incident to the employer's business. However, the Court held the accident to be compensable under the service to the employer exception. Standard Gravure Corporation v. Grabhorn, 702 S.W. 2d 49 (Ky. App. 1985); Spurgeon v. Blue Diamond Coal Company, 469 S.W. 2d 550 (Ky. 1971); Ratliff v. Epling, 401 S.W. 2d 43 (Ky. 1966); Palmer v. Main, 209 Ky. 226, 272 S.W. 2d 736 (Ky. 1925)]. The Court in its reasoning did not focus on the particular trip during which the accident occurred, but rather the benefit the employer received generally from Rogers' use of the company vehicle. The court applied the "some benefit" test to the particular facts and in finding work-relatedness stated:

Therefore, based on our interpretation of the applicable case law as summarized above, as well as the facts presented in the case at bar, it appears that there was substantial evidence to support a conclusion that Rogers' use of the company truck was of

benefit to the company. The employer's purpose in providing such a vehicle to Rogers was to allow him to better perform the requirements and completion of his duties. Included within such objective was the premise that use of the company truck as transportation between Rogers' home and the job site would allow Rogers to begin his actual duties earlier, and to remain productive longer, by avoiding a stop at the company's business office in Louisville.

Thus, although the use of such a conveyance was a convenience for Rogers, it was primarily for the benefit of the employer. Hence, it was reasonable to conclude Rogers was performing a service to the employer at the time of his death, and which was therefore deemed work-related.

Similarly, in Kern, the claimant was supplied a company vehicle. Kern sustained injuries when involved in a motor vehicle accident while driving home from work in the company owned vehicle. Kern kept tools in the vehicle and was on call all times of the day and sometimes at night. The court discussed the holding in Rogers, *supra*. It found the evidence established Kern was given the use of the vehicle for the company's benefit and not as a requisite for himself. The Kentucky Court of Appeals found it significant that Kern stored his tools in the company vehicle and the company allowed him to travel directly to a job site instead of stopping at the place of work to pick up his tools.

More recently, in Fortney v. Airtran Airways, Inc., 319 S.W.3d 325 (Ky. 2010), the Kentucky Supreme Court held the rule excluding injuries occurring off the employer's premises, during travel between work and home, does not apply if the travel is part of the service for which the worker is employed, or otherwise benefits the employer.

The ALJ determined the exceptions to the going and coming rule outlined in these cases did not exist in the case *sub judice*.

Specifically, the ALJ found as follows:

In the claim *sub judice*, there is no question that Plaintiff's use of the truck in Northern Kentucky would have provided an exception to the "going and coming" rule had Plaintiff been similarly injured. When he agreed to a transfer to Lexington with a different job, the continued use of the vehicle was not mentioned by Mr. Martin or Plaintiff in their discussions of the transfer to the new job. The use of the vehicle became a perquisite on August 8, 2011, when Mr. Martin, without discussion, continued to allow Plaintiff the use of the vehicle and gas card in his employment in Lexington. The ALJ is convinced that the holding in Rogers that "although the use of such a conveyance was a convenience for Rogers, it was primarily of benefit to the employer." This holding seems to have been buttressed in Fortney when the court said: "...that employment should be deemed to include travel when the travel itself is a substantial part of the

service performed." To hold otherwise, the Court should just as well adopt what Larson has stated is the majority rule: "the provision of an automobile under the employee's control by the employer will result in journeys taken in that vehicle being held to be in the course of employment. See *Larson's, Workmen's Compensation Law, Desk Edition*, Section 16.31.

Substantial evidence supports the ALJ's determination that after the transfer to Lexington, the use of a company owned vehicle was for Padgett's benefit, not Bowlin's. Padgett acknowledged at the time of the accident he was commuting from his home to the Lexington office where he worked. He provided no evidence he was traveling for any purpose for Bowlin, other than to arrive at work.

Finally, Padgett argues the use of the company owned vehicle was an inducement for his employment. The ALJ specifically determined there was no evidence the use of the company owned vehicle or gas card was an inducement or incentive for Padgett to transfer to Lexington to continue his employment. Based upon the foregoing, we believe the ALJ's determination in dismissing this claim is supported by substantial evidence and a contrary result is not compelled.

Accordingly, the decision of Hon. Joseph W. Justice, Administrative Law Judge, dated June 22, 2012, is hereby **AFFIRMED**.

ALL CONCUR.

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