

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 15, 2011

CLAIM NO. 200910385

US BANK HOME MORTGAGE

PETITIONER

VS.

APPEAL FROM HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE

ANDREA SCHRECKER  
and HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** US Bank Home Mortgage ("US Bank") seeks review of the opinion and award rendered June 20, 2011, by Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ"), determining Andrea Schrecker ("Schrecker") sustained a work-related injury due to an accident occurring December 31, 2007 resulting in an award of

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. US Bank also appeals from the order denying its petition for reconsideration issued July 22, 2011.

On appeal, US Bank argues the CALJ erred in determining Schrecker was acting in the course and scope of her employment at the time of her injury. We affirm.

Since the CALJ's award of periods of TTD benefits, PPD benefits and medical treatment are not in dispute, we will limit our review of the facts to those pertinent to the sole issue raised by US Bank on appeal.

Schrecker testified by deposition on April 27, 2010, and at the hearing held April 19, 2011. The underlying facts of the claim are not in dispute. Schrecker was employed by US Bank as a payment processor. Her workday began at 7:00 a.m. and ended at 4:00 p.m. Schrecker generally went to lunch for a period of one hour beginning at approximately 11:00 a.m. during which time she was not paid. US Bank employed a procedure requiring employees to use a telephone to enter a code clocking out for lunch and clocking into work at the end of the period. Schrecker was also provided two additional break periods, one at approximately 9:00 a.m., for twenty minutes, and one at approximately 1:30 p.m., for twenty minutes. Schrecker

was paid during both of those break periods. However, she was still required to utilize the same telephone procedure, but with a different code.

On December 31, 2007, Schrecker began her workday at 7:00 a.m. She did not take a lunch break that day due to necessity of completing end-of-the-year work, and her co-worker being absent. At approximately 1:30 p.m., she took her afternoon break, and followed the telephone procedure for her paid break rather than the unpaid lunch break. Schrecker testified she intended to go across the street to Taco Bell to get something to eat and bring it back to her desk. Specifically, Schrecker testified, "I was just going across the street. It's like an everyday event. People just go across the street, you know, just on their afternoon breaks." Schrecker testified US Bank had no written policy restricting employees from leaving the premises during breaks. She also testified she was never advised she could not leave the premises during breaks.

As she was crossing the street, Schrecker was struck by a car and temporarily lost consciousness. She was able to return to work and completed her shift. She did not seek medical treatment for residuals from the accident until January 9, 2008 when she was directed to Convenient Care Work Health by US Bank's workers'

compensation insurer. After the accident, Schrecker attempted to transfer to a less intense job, but she was denied permission to do so. She eventually obtained employment elsewhere and was terminated from US Bank.

Jennifer Lee Roberts ("Roberts"), supervisor of the payment research department at US Bank since 2004, testified by deposition on May 27, 2010. Roberts testified Schrecker was not on the bank's premises at the time of the accident. Schrecker was attempting to cross Frederica Street, a four lane road with a median in the middle, when she was struck by a car. According to Roberts, Schrecker was not performing an errand for anyone at US Bank at the time of the accident. Roberts testified there was no preset time for employees to go to lunch. Roberts also testified US Bank has no lunchroom available for employees to use. However, Roberts noted a break room with vending machines is available.

Jane Fulkerson ("Fulkerson"), manager or assistant vice-president of processing and payment research for US Bank since 1998, testified by deposition on May 27, 2010. Fulkerson testified Schrecker was not performing an errand for her at the time of the accident. She testified Schrecker returned to work after the accident. Fulkerson further testified Schrecker continued to work until June

2008 when she was terminated for failure to call in for approval of her vacation. Fulkerson testified Schrecker was a satisfactory employee during her entire tenure with US Bank. Fulkerson acknowledged Schrecker was entitled to two breaks per day, one in the morning and one in the afternoon, in addition to her lunch break.

Linda Mitchell ("Mitchell"), human resources generalist with US Bank for over 26 years, testified by deposition on May 27, 2010. Mitchell testified Schrecker worked on December 31, 2007, and was not on the premises at the time of the accident. According to Mitchell, "Federica St. is a four-lane highway that we have going through town and there's a large median in the middle. It's a pretty busy highway." Mitchell testified US Bank employees have no regulated lunch hour, and despite a lunchroom provided on premises, employees are not mandated to stay there. She testified Schrecker was not terminated for inability to perform the physical and mental requirements of her job. Rather, Mitchell stressed she was terminated because of failure to contact US Bank regarding her absence.

In the opinion and award rendered June 20, 2011, the CALJ found as follows:

Plaintiff relies on a much more recent Supreme Court decision, one decided May 18, 2000. An employee of

the Jefferson County property valuation administrator slipped and fell in a fast food restaurant while waiting for a bank to open in order to perform his work related activities. Plaintiff was "on the clock", had traveled from his office to the bank which he found to be not then open and, while awaiting the opening hour, went to a McDonald's restaurant for a cup of coffee. While in the McDonald's, he slipped, fell and suffered a serious back injury. In ruling the incident work-related, the Supreme Court stated as follows:

In other words, the nature of his work included periods of enforced hiatus. There was no evidence that claimant's employer restricted his activities during such periods or that he was prohibited from taking a coffee break if there was time to spare between appointments. Finally, the type of activity in which he was engaged when he was injured was not so unreasonable that it must be viewed as a departure from his duties. Under those circumstances, we are persuaded that claimant's injuries should be viewed as arising out of and in the course of his employment and, therefore, to be compensable. Meredith v. Jefferson County Property Valuation Administrator, 19 S.W.3d 106, 110 (Ky., 2000).

The Meredith case is "still good law" and has, over the last 11 years, not been amended by any subsequent Supreme Court decisions. Based on the ruling in the Meredith decision, which is much more recent and much more similar factually than Baskin, supra, I am convinced that Plaintiff's incident of December 31, 2007, which is the subject

of this litigation, resulted in injury occurring in the course and scope of her employment with Defendant Employer.

. . .

#### FINDINGS AND CONCLUSIONS

. . .

2. On December 31, 2007 Plaintiff suffered injuries during the course and scope of her employment with Defendant Employer when she was struck by a motor vehicle. I further find that those injuries were permanent injuries, as defined by the Kentucky Worker's Compensation Act, and included a "closed head injury"/traumatic brain injury. In making these findings and conclusions, I have relied on Plaintiff's testimony, the medical records from Convenient Care, the reports of the diagnostic procedures performed on her brain, sternum and left knee, the records of Drs. Briones and Hurley, and the opinions of Drs. Gray, Naas and Chapman when those facts are applied to legal principles announced by the Kentucky Supreme Court [in] Meredith v. Jefferson County Property Valuation Administrator, 19 S.W.3d 106, 110 (Ky., 2000). Thus the issues of the occurrence of a work-related injury, causation/work relatedness of Plaintiff's injuries and the compensability of the treatment Plaintiff has received for a closed head injury are resolved in favor of Plaintiff.

Since the only issue on appeal is whether Schrecker's injury occurred in the course and scope of her employment, US Bank has waived any argument it may have

regarding the CALJ's award of TTD benefits, PPD benefits and medical benefits.

We cannot say the CALJ erred as a matter of law in his determination Schrecker was in the course and scope of her employment. However, we affirm for reasons other than those relied upon by the CALJ. This matter appears to be a case of first impression in Kentucky. We do not believe Meredith, supra, asserted by Schrecker and relied upon by the CALJ, is applicable to the case *sub judice*. US Bank correctly points out, unlike Meredith a traveling employee, Schrecker worked at a fixed location. US Bank has cited to Baskin v. Community Towel Service, 466 S.W.2d 456 (Ky. 1971) in support of its position Schrecker was not in the course and scope of her employment. However, this reliance is also misplaced. Baskin who worked at a fixed location, was on an unpaid lunch break at the time of the injury. No Kentucky case specifically addresses accidents occurring off-premises during a paid break.

In his treatise, Larson's Workers' Compensation Law, (2011), §13.05[1], [4], Professor Larson, states:

§13.05 Going and Coming: Lunch or Rest Periods

[1] Premises Rule as Applicable to Lunch-Time Travel

. . . .

The basic rule, then, is that the journey to and from meals, on the premises of the employer, is in the course of employment. Conversely, an employee with a fixed time and place of work who has left the premises for lunch is outside of the course of employment if he or she falls, is struck by an automobile crossing the street, or is otherwise injured.

. . .

Similarly, just as an employee who is paid during the going and coming trip is deemed to be in the course of employment for that reason, so a claimant who was paid during the time taken out for lunch or coffee may be given the benefit of the same conclusion. Again, the conditions of special strain attending the employment may make it a reasonable part of the employment to go down the street for a cup of coffee, as was held in the case of a night man who had been on duty continuously for 12 hours and who, as he was permitted to do, had gone off the premises to a nearby restaurant for coffee.

. . .

#### [4] Break Periods and Coffee Breaks off the Premises

The going and coming rule has so far been treated as substantially identical whether the trip involves the lunch period or the beginning and end of the work day. This can be justified because normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee's freedom of movement so complete that the obligations and

controls of employment can justifiably be said to be in suspension during this interval.

Now that the coffee break or rest break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear that one cannot announce an all-purpose "coffee break rule," since there are too many variables that could affect the result. The duration might be five minutes, seven minutes, 10 minutes, or even 20 minutes by which time it is not far from that of a half-hour lunch period. Other variables may involve the question whether the interval is a right fixed by the employment contract, whether it is a paid interval, whether there are restrictions on where the employee can go during the break, and whether the employee's activity during this period constituted a substantial personal deviation.

The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment. The New York Appellate Division expressly undertook to draw this kind of line between the lunch period and the brief coffee break period, in affirming an award to an employee for injuries sustained in returning to work after getting coffee at the "nearest place" across the street:

The employment of an inside worker given express permission of the employer to take a short "coffee break" may be quite as uninterrupted as the employment of a salesman who, as in [Matter of Bollard (278 N.Y. 463, 17 N.E.2d 130)], was crossing the street to his place of employment after getting his supper. The basic theory of decisions denying compensation [for] mealtime injuries is that the employer then exerts no authority over the employee [Matter of Johnson v. Smith (263 N.Y. 10, 188 N.E. 140 (1933))]. There is some logical distinction in control and closeness to employment, we think, between the circumstances under which an employee ventures forth on his own for lunch and those under which he takes a short break, under close control, for rest or coffee.

Here it could be found that authority of the employer continued during this approved coffee break, short in duration, and short in distance from the claimant's desk, and that the employment itself was "not interrupted" at the time of accident.

. . .

If the employees during the coffee break are expected to go to a particular off-premises place, the element of continued control is adequately supplied. In Sweet v. Kolosky, 259 Minn. 253, 106 N.W.2d 908 (1960) the claimant fell on a public sidewalk between the place of employment and the drugstore where all employees were permitted, by their employment agreement, to go for a coffee break because of lack of facilities on the premises. Compensation was awarded.

The various added facts which would give rise to an exception to the premises rule in regular going and coming cases have the same effect when shorter rest or coffee intervals are involved. For example, if the hazard resulting in injury is one flowing from employment conditions or one necessarily encountered in going to and from the premises, the injury should be held compensable even if it takes place off the premises during a rest period.

. . . .

The fact that the coffee break or rest period is a paid one, or for any other reason might be presumptively within the course of employment, does not of course mean that anything that happens during that span of time is compensable. If the employee uses the interval, not for its basic purpose of rest and refreshment, but for personal errands, such as cashing a check at a bank, or doing some shopping for Christmas, or getting a tuberculin shot checked, the employee leaves the scope of employment if the deviation is such as to be called substantial. On the other hand, a swim during a coffee break has been held not to interrupt the course of employment, in part because the refreshing effects of the swim would benefit the employer as well as the employee by enhancing the employee's efficiency. But merely standing and staring at an air compressor, whether or restful pastime or not, were found to fall outside the scope of employment.

Likewise Couch's treatise on insurance, 9A Couch on Ins. (3<sup>rd</sup> ed. Updated 2011) states the following:

§ 135:44. Generally; "Personal Comfort"  
Doctrine

An exception to the general rule precluding workers' compensation for acts performed by employees solely for their own benefit has been carved out for acts of personal convenience or comfort. This exception, sometimes referred to as the "personal comfort" or "personal convenience" doctrine was developed to cover the situation where an employee is injured while taking a brief pause from his or her labors to minister to the various necessities of life. Although technically the employee is performing no services for his or her employer in the sense that his or her actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form of better work from a happy and rested worker, and on the theory that such a minor deviation does not take the employee out of his or her employment.

In order to recover for an injury occurring while the employee is attending to personal needs, it is necessary that the employee's acts be of a character normally expected of an employee under the conditions of his or her work. Acts which are considered to fit the character of normally expected activity include: satisfaction of thirst, hunger, or other physical demands, or protection from weather conditions

. . .

§ 135:45. Breaks

Injuries occurring to an employee during an intermission or break for

rest or refreshment generally arise in the course of the employment, and are compensable. However, even if the employer would tolerate the departure, the period may be outside the course of the employment, if the time consumed by the rest is greater than is ordinarily allowed for rest periods, or if the purpose of the departure is not the expectable convenience or comfort for which such periods are provided. Whether an employee, by resting during working hours, departs from, abandons, or breaks his or her employment so as to deprive himself or herself of the right to compensation for an injury sustained while so resting generally depends upon whether such resting, in view of all the circumstances, is reasonably incident to the employment.

Finally, 82 Am. Jur. 2d *Workers' Compensation* § 259, addresses this same issue as follows:

The general rule precluding workers' compensation for acts performed by employees solely for their own benefit does not apply to acts of personal convenience or comfort. The personal comfort doctrine - also sometimes referred to as the personal convenience exception - was developed to cover situations in which an employee is injured while taking a brief pause from his or her labors to minister to the various necessities of life. Compensation for such injuries is justified on the rationale that the employer does receive indirect benefits in the form of better work from a happy and rested worker, and that such a minor deviation does not take the employee out of his or her employment. Under this doctrine, to the extent that such actions are not in conflict with

specific instructions, and are acts that may normally be expected under the conditions of the employee's work, acts of personal convenience and comfort are incidental to employment duties and in the course of employment. Thus, acts that are reasonably necessary to the health and comfort of an employee while at work, such as the satisfaction of thirst, hunger, or other physical demands, or protection from excessive cold, are incidental to the employment, and injuries sustained in the performance of such an act are generally compensable as arising out of and in the course of the employment.

However, even if a personal activity of an employee is involved, a causal connection must still be shown; the requirement that the accidental injury arise out of the employment is not eliminated in the application of the personal comfort doctrine. The activity must be reasonably foreseeable and incidental to the employment to entitle the employee to claim compensation; and if the employee voluntarily and in an unexpected manner exposes himself or herself to a risk outside any reasonable exercise of his or her duties, the resulting injury will not be considered to have occurred during the course of employment.

Whether a personal comfort activity is in fact in the course of employment is resolved by a time, place, and circumstances analysis; the injuries for which compensation is sought must have occurred within the time and space limitations of the person's employment.

#### § 262. Work breaks

Injuries occurring to an employee during an intermission or break from

work for rest or refreshment generally arise in the course of the employment and are compensable. The general proposition that an employee who abandons his or her work, with or without permission, for the purpose of attending to personal business is not acting within the course and scope of employment does not apply to permitted rest periods during which the employee is attending to his or her bodily comforts or convenience or is engaged in recreation. However, even if the employer would tolerate the departure, the period may be outside the course of the employment if the time consumed by the rest is greater than is ordinarily allowed for rest periods, or if the purpose of the departure is not the expectable convenience or comfort for which such periods are provided.

Whether an employee, by resting during working hours, departs from, abandons, or breaks his or her employment so as to lose the right to compensation for an injury sustained while so resting generally depends upon whether such resting, in view of all the circumstances, is reasonably incident to the employment.

Roberts, Fulkerson and Mitchell confirmed Schrecker's testimony the accident occurred off the premises. They also confirmed lunch breaks were unpaid periods. None were asked, however, and none volunteered Schrecker was in fact injured during her paid afternoon break. Likewise, no one contradicted Schrecker's testimony it was a common condoned practice to cross the street

during the afternoon break to bring back food to eat at the employee's desk. Furthermore, Schrecker's testimony she did not take her lunch break on the date of the accident because she was busy preparing end-of-the-year reports and her co-worker was absent is uncontradicted. Foregoing the regular lunch break, we believe, was a benefit to the employer in that it allowed Schrecker to accomplish her required tasks.

Based upon the fact Schrecker's deviation from employment or rest break was relatively minor and further bolstered by the fact it was apparently a condoned practice to cross the street to get something to eat during the afternoon break, we do not believe the CALJ erred in finding Schrecker's injury to be compensable.

Accordingly, the opinion and award rendered June 20, 2011, by Hon. J. Landon Overfield, Chief Administrative Law Judge, as well as the order ruling on the petition for reconsideration entered July 22, 2011, are hereby **AFFIRMED**.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON SHERRI P BROWN  
300 EAST MAIN ST, STE 400  
LEXINGTON, KY 40507

**COUNSEL FOR RESPONDENT:**

HON THOMAS M RHOADS  
9 EAST CENTER ST  
MADISONVILLE, KY 42431

**CHIEF ADMINISTRATIVE LAW JUDGE:**

HON J LANDON OVERFIELD  
110 NORTH WATER ST  
HENDERSON, KY 42420