

RENDERED: FEBRUARY 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001724-WC

CITY OF FORT THOMAS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-65969

MATTHEW BOYERS; HONORABLE
JAMES L. KERR, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * * *

BEFORE: BARBER, DYCHE, AND TACKETT, JUDGES.

DYCHE, JUDGE: The facts of this case are uncomplicated and uncontested. Matthew Boyers, a firefighter employed by the City of Fort Thomas, received a fracture of his right arm while fighting a residential fire on September 13, 1999. The arm was surgically repaired, and he returned to work on November 11, 1999, without restrictions. He filed a Workers=Compensation claim, which was settled based upon a 6% permanent partial disability.

On November 12, 2000, he refractured the arm while playing football with children at his home. The arm was again surgically repaired. Boyers filed a motion to reopen his original claim, requesting temporary total benefits, and an increase in his occupational disability benefits. The Administrative Law Judge found the second injury to ~~be~~ responsible for the plaintiff's condition and awarded increased benefits, based upon a 10% occupational disability. The Workers= Compensation Board affirmed, and this appeal followed.

The City of Fort Thomas argues that the ALJ's finding that the second injury was work-related is not in conformity with Kentucky Workers= Compensation law. The city cites KRS 342.0011(1), which defines an ~~A~~injury as

any **work-related** traumatic event or series of traumatic events . . . **arising out of and in the course of** employment which is the proximate cause producing a harmful change in the human organism

(Emphasis added.) The city argues, ~~A~~Even if Boyers= re-fracture to his arm arose out of the original injury, he cannot meet the second requirement of the statute that the injury was in the ~~course~~ of employment. ~~o~~ The city buttresses its argument with Rogers v. Vermont American Corp., Ky. App., 936 S.W.2d 775 (1997), in which the claimant had worked for eighteen years, doing hard manual labor involving extensive use of his arms. He received a subsequent traumatic injury to his arm while

performing manual labor at home, and sought workers= compensation benefits for the injury. This court held that

an injury which occurs due to a non-work-related incident is not compensable due solely to the fact that the strenuous nature of the claimant's employment caused non-disabling wear and tear which was aroused into a disabling condition by the non-work-related incident.

936 S.W.2d at 777. The ALJ herein attempted, unconvincingly, to distinguish Rogers on the grounds that it was a cumulative injury case, and involved an Aactive condition prior to the event at home.@

The Board considered this issue, and adopted a test from Professor Larson's treatise on Workers= Compensation which we find unworkable and unnecessary under our statute. The Board acknowledged that the claimant in Rogers would be unsuccessful under the test it adopted from Larson, Abecause the injury did not occur within the course of employment.@ But the Board proceeded to ignore Rogers, without explanation, and hold that, under Larson's test, Boyers's claim has merit.

We disagree, and reverse the Board. Reading the statute and Rogers, Boyers's claim must fail. The second injury was **not** within the course of employment as required by the statute, Larson or no Larson.

The opinion of the Workers= Compensation Board is reversed.

ALL CONCUR.

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BRIEF FOR APPELLEE MATTHEW
BOYERS:

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