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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001818-WC

LEWIS BAKERIES, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS'COMPENSATION BOARD CLAIM NO. WC-01-01130

CARL SMITH; AND DWIGHT LOVAN, JONATHAN STANLEY AND JOHN A. GARDNER, AS BOARD MEMBERS OF THE DEPARTMENT OF WORKERS' CLAIMS, IN THEIR OFFICIAL CAPACITIES; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

PAISLEY, JUDGE: Lewis Bakeries, Inc. petitions for review of a decision of the Workers' Compensation Board affirming an order of an Administrative Law Judge (ALJ). The ALJ determined that the injuries Carl Smith sustained in an automobile accident occurred during the scope and course of Smith's employment, with the result that those injuries were compensable under the Kentucky Workers' Compensation Act. We affirm.

Smith was employed by Lewis as a relief route driver/trainee. As part of his training, Smith accompanied route driver Gary McCleod as McCleod performed his regular route duties each Monday, Tuesday, Thursday and Friday. Smith and McCleod initially met each day in the parking lot where bakery items were loaded into McCleod's bread truck. However, closer to the time of Smith's accident, McCleod began loading and driving the bread truck to his residence each evening, and the men began meeting at McCleod's residence each morning to begin the route.

On Tuesday, February 6, 2001, the men met at McCleod's residence and began their route duties, which included delivering "Bunny Bread" to businesses and "pulling up" the bread on the shelves. A "pull up" consisted of pulling the bread from the back to the front of the shelves and replenishing goods as needed. McCleod and Smith serviced Wal-Mart twice on February 6 before refueling the truck, making a work-related bank deposit, and returning to McCleod's residence. Smith subsequently drove to the residence of another Lewis employee in order to retrieve a company car to use when making a third "pull-up" at Wal-Mart later that night, as well as when making rounds the next day while McCleod was off work. Unfortunately, while driving the company car to his residence Smith collided with a deer, with the result that he swerved into a ditch, crashed into a large rock, and injured his back. Smith timely filed a claim for workers' compensation benefits.

There was some dispute below as to whether Wal-Mart's bread shelves were always serviced three times per day or only as needed, but McCleod's supervisor, William Cunningham, clearly testified that he ordered Wal-Mart to be serviced a third time on February 6. Although Smith testified that he was scheduled both to perform a third "pull up" at Wal-Mart on February 6 and to make the rounds the following day, McCleod and Cunningham asserted that Smith was never authorized to perform after-hours "pull ups" or to perform any job duties during McCleod's scheduled absences from work. Indeed, both men testified that Smith's job duties ceased the moment McCleod completed his route. Nevertheless, Cunningham admitted that occasionally, when necessary, he had asked relief drivers such as Smith to perform additional "pull ups" or deliveries. Moreover, although McCleod and Cunningham testified that employees were not permitted to drive company cars home because such conduct did not benefit the company, they admitted that employees nevertheless regularly took company vehicles home and that Lewis did not enforce the policy until after Smith's accident. Further, Cunningham admitted that he thought he was aware before the accident that Smith planned to take the company car home so that he could get an early start on the next day's route.

After reviewing the testimony, the ALJ concluded that Smith's injuries were work-related and awarded him benefits based upon a 13% functional impairment rating as assessed by his

treating physician. The board affirmed and this petition for review followed.

The court's role in reviewing board decisions was described in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), as follows:

> The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] 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.

As the finder of fact, the ALJ is vested with the sole authority to determine the "quality, character and substance of the evidence presented." Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ may choose to "believe part of the evidence and disbelieve other parts," even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). The board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2). Similarly, on appeal a finding of fact cannot be disturbed if there is substantial evidence to support it. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979). Moreover, "[s]ubstantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable

person." Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)). See also Blankenship v. Lloyd Blankenship Coal Co., Inc., Ky., 463 S.W.2d 62 (1970). Guided by these legal principles, we now turn to Lewis's assertions of error.

Lewis argues that the ALJ and the board erred by finding that Smith's operation of the company car provided a benefit to Lewis so as to except Smith's injuries from the "going and coming" rule. Lewis further argues that at the very least, Smith's actions involved a dinner break and therefore did not arise out of or in the course of employment. Believing that the ALJ's decision was supported by law and substantial evidence, we reject these arguments.

It is a well-established principle of Kentucky workers' compensation law that a claimant's injuries are not compensable if they are sustained while traveling between his or her home and place of business, unless the employee is performing a special service or benefit for the employer. See Howard D. Sturgill & Sons v. Fairchild, Ky., 647 S.W.2d 796, 797 (1983). Nevertheless, as with any rule, there are exceptions "which depend upon the nature and circumstances of the particular employment." Turner Day & Woolworth Handle Co. v. Pennington, Ky., 250 Ky. 433, 63 S.W.2d 490, 492 (1933). Under the "service to the employer" exception to the "going and coming" rule of

noncompensability, an employee's transitory activities are covered by workers' compensation if such activities provide some service to the employer. Olsten-Kimberly Quality Care v. Parr, Ky., 965 S.W.2d 155, 157 (1998); Receveur Construction Co. v. Rogers, Ky., 958 S.W.2d 18, 20 (1997). However, such work-related travel must be incurred for the employer's convenience rather than for the employee's convenience. Id.

Here, the record shows that much like the claimant in Olsten-Kimberly, Smith had no regular job site, he was required to travel extensively to perform the fundamental duties of his employment, and his travel was of direct benefit to the goals of his employer. Indeed, Smith's travel to and from various stores in Kentucky and Illinois to deliver bread and perform "pull ups" was part of the services offered by Lewis to its customers. The evidence which was adduced concerning Smith's operation of the company car on the day of the accident, including his stated intention of returning to Wal-Mart later in the evening to "pull up" the company's products, supports the ALJ's finding that Smith's travel was of substantial benefit to the employer's goal of selling "Bunny Bread."

Moreover, the facts herein are comparable to those set out in Receveur, wherein the Kentucky Supreme Court found that an exception to the "going and coming" rule existed where an employee's use of a company truck allowed the employee to begin his actual duties earlier and to remain productive later in the

day by avoiding a stop at the company's offices. As the Supreme Court declared in Receveur, the employer's purpose in providing a vehicle was to allow the employee to better perform the duties of his job. Similarly, by declining to enforce its alleged policies against taking company vehicles to private residences, Lewis in effect encouraged Smith to take the company car home so he could more quickly and efficiently conduct his Tuesday evening and Wednesday duties, which in turn provided a service to the employer and an exception to the "going and coming" rule.

Finally, we agree with the ALJ that this matter is not analogous to Applegate v. Hord, Ky., 373 S.W.2d 430 (1963), which involved an employee's use of his employer's truck for his own benefit during the weekend immediately prior to his accident and injury. As that conduct provided no benefit to his employer, it did not create an exception to the "going and coming" rule. Here, by contrast, the record is completely devoid of any evidence that Smith used the company car for any personal benefit beyond driving it to his residence. Even then, Lewis benefited from the fact that Smith intended to use the vehicle both to return to Wal-Mart to perform the Tuesday evening "pull up," and to get an early start on Wednesday's rounds. We therefore conclude that the ALJ and the board did not err by finding that compensation for Smith's injuries was not barred by the "going and coming" rule.

The decision of the board, upholding the ALJ's determination that Smith is entitled to workers' compensation benefits, is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Denis Ogburn
Louisville, Kentucky

BRIEF FOR APPELLEE CARL SMITH:

William F. McGee, Jr.
Smithland, Kentucky