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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002154-WC

SHUMATE, FLAHERTY AND EUBANKS, P.S.C. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 99-WC-73177

GLADYS FUGATE;
HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Shumate, Flaherty and Eubanks, P.S.C. (hereinafter "Appellant"), appeals the opinion of the Workers' Compensation Board (hereinafter "the Board") reversing the opinion and dismissal of the Administrative Law Judge (hereinafter "ALJ"). Appellant contends that the Board erred in applying an improper standard of review to the findings of fact and incorrectly applied applicable case law to the new findings of fact. We disagree, and hence, affirm.

Gladys Fugate (hereinafter “Fugate”) worked for appellant’s law firm as a paralegal. She performed various duties for Appellant, including interviewing clients, answering telephones, performing title searches, working on workers’ compensation cases, social security cases and domestic relations cases. On the day of her injury, July 20, 1999, she parked her vehicle in the parking lot in which Appellant leased five parking spaces. The parking lot was not paved. As she exited her car and was walking towards the law office, she stepped on a rock and fell. As a result of her fall, she fractured the radial head of her right arm, as well as suffering some superficial injuries to her face. She has undergone two surgeries, physical therapy and marcaine injections to help alleviate her pain, and has since returned to work as a paralegal with Appellant. However, due to the injury, she cannot perform all the duties she undertook prior to the fall.

Before the ALJ contested issues were appropriate factors under KRS 342.730, failure to preserve an affirmative defense, extent and duration, scope of employment and reasonableness/necessity of medical expenses. The ALJ found that the injury had not occurred within the scope of employment in that Fugate failed in her burden of proof to qualify as an exception to the “coming and going” rule or that the parking lot

could be considered as being part of Appellant's "operating premises."

On Appeal, the Board disagreed with the ALJ on the issue of whether the parking lot was part of Appellant's "operating premises." Specifically on this issue, the Board, with Board Member Stanley writing the unanimous opinion, stated:

> There is little dispute over the details of the parking lot itself. It is agreed that Shumate[1] did not in fact own the parking lot, but rather, leased five spaces in the lot from its owner, Denny Insurance Agency, a business located next door to the law firm. Shumate paid $15.00 per month per parking space and this was the only parking provided by Shumate to its employees. It is agreed that the parking lot was composed of gravel and in a poor state of repair. Eubanks estimated that the parking lot would accommodate ten to twelve vehicles and Fugate estimated the number at between twenty and thirty. Eubanks denied any obligations on the part of Shumate with respect to maintenance or upkeep of the lot. The ALJ found that these facts did not evidence influence or control on the part of Shumate over the parking lot so as to consider it as a part of its "operating premises" and impose liability for Fugate's fall therein. As a matter of law, we disagree and therefore reverse and remand on this issue.
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> It is well established in Kentucky law that workers' compensation legislation was not intended to protect workers against the risks of the street. Olsten-Kimberly Quality Care v. Parr, [Ky., 965 S.W.2d 155 (1998)]. The general rule is that injuries

[1] In the Board's opinion, it identifies Appellant's law firm as Shumate and refers to the testimony given by the Firm's president and managing partner Michael F. Eubanks as Eubanks.

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 the hazards ordinarily encountered in such journeys are not incident to the employer's business. Kaycee Coal Co. v. Short, Ky., 450 S.W.2d 262 (1970). Nevertheless, our courts have also expressly held, "We are not willing, however, to accept the boundary line of the employer's property as the proper point at which to differentiate between liability or nonliability." K-Mart Discount Stores v. Schroeder, Ky., 623 S.W.2d 900 (1981). Consequently, Kentucky law recognizes several exceptions to the "going and coming" rule. Olsten-Kimberly Quality Care v. Parr, supra, at 157.

One such exception central to this claim is commonly referred to as the "operating premises rule." Ratliff v. Epling, Ky., 401 S.W.2d 43 (1966). Under this rule, if an employer provides or maintains a parking lot or other premises for the convenience of its employees, and an employee while on said premises sustains an injury, the injury as a matter of law is work-related and the employer is responsible for payment of workers' compensation benefits. K-Mart Discount Stores v. Schroeder, Ky., 623 S.W.2d at 902. However, our courts have also ruled that the "operating premises" rule must be applied on a case-by-case basis. Id. at 902. In other words, in determining whether an injury was work-related, no single factor should be given conclusive weight, and the decision must be based upon the quantum of aggregate facts rather than existence or nonexistence of any particular factor. Hayes v. Gibson Hart Co., Ky., 789 S.W.2d 775 (1990). Nevertheless, before the exception can be found to be controlling and liability fixed, two factors must be established. First, the employer must "control" the area in

question. Secondly, the work-related injury must have been sustained on the area. Id. at 902.

In the case sub judice, it is undisputed that Fugate's injury occurred in the parking lot leased by Shumate for the convenience of its employees and customers, and that the state of disrepair of the gravel lot did not necessarily constitute a dynamic with regard to her injury. The issue, therefore, centers on whether there was sufficient "control" by the employer over the area of Fugate's accident. To answer that question we must first determine what constitutes "control" as a matter of law for this and other similarly situated cases to be considered work-related. As designated by the ALJ and the parties, two cases by the Kentucky Supreme Court provide us with guidance in answering this question. These are Pierson v. Lexington Public Library, [Ky., 987 S.W.2d 316 (1999)], a 1999 decision, and K-Mart Discount Stores v. Schroeder, supra, a decision issued in 1981.

In Pierson, supra, the claimant parked her vehicle upon returning from lunch in a multi-storied parking structure adjacent to the Lexington Public Library where she was employed. The library leased one hundred forty-four parking spaces from the owners of the structure in order to provide free parking for the convenience of its employees and patrons. Although we do not know specifically how many total parking spaces were available generally in the parking garage, the court in Pierson informs us that library workers were requested to park on the seventh floor of the structure, "although particular spaces were not reserved for their use." Id. at 317. While riding down in a parking garage elevator, the elevator dropped as the claimant was exiting and causing her to injure her left knee and elbow. Although the accident did not occur within the boundaries of the

library itself, the injury was held to be work-related and therefore compensable under the "operating premises" exception to the "going and coming" rule. In so ruling, the supreme court stated that, of particular concern in making a determination of whether an injury occurs within the employer's operating premises "is the extent to which the employer could control the risks associated with the area where the injury occurred." Id. at 318. Though the library had no ownership, maintenance obligation or direct control over the parking garage in which the claimant fell, its lease of one hundred forty-four parking spaces was found to be sufficient to make it a "major customer" with "some degree of influence over the owner." Id. at 318. The fact that the library provided parking in the garage as a benefit to the claimant was also a primary factor that weighed heavily in favor of compensability.

By contrast, in K-Mart Discount Stores v. Schroeder, supra, the claimant worked as a sales person for K-Mart. The store where she was employed was located in a shopping center among "a cluster of about 20 other stores." Id. at 901. The parking lot for the shopping center was large enough to accommodate at least nine hundred seventy-five automobiles. K-Mart, however, was provided and designated a specific area in the north end of the parking lot in which its employees were requested to park their cars. On June 13, 1977, the claimant, on her way to work, could not find any space in the designated area to park so she parked her car in the area commonly used by persons shopping in the center and at a point about forty or fifty feet from the front door of the K-Mart store. The claimant then started walking toward the store where she stepped in a hole, a distance of about twenty feet from a driveway. She fell to the ground, breaking her ankle. The driveway between the parking lot and the store building was

for two-way vehicular traffic and ran the complete distance from the entrance to the parking lot off a local highway to the extreme south building occupied by another merchant. Consequently, the supreme court in reversing the court of appeals held that the claimant's injury was not work-related in that she fell in an area of the parking lot that was under the sole control of the owner of the shopping center and not under the control of K-Mart. However, we note with great interest that the court in making this ruling, took great pains to distinguish K-Mart from the facts in Smith v. Klarer Company, Ky., 405 S.W.2d 736 (1966), wherein the claimant had been injured on the sidewalk in front of the employer's place of business. Although the sidewalk was used by the general public, located approximately two hundred forty feet away from the employees' entrance and outside the employer's property, because Klarer's employees had to use the sidewalk to gain access to the place of their work, the sidewalk was held to be under sufficient "control" of the employer for a fall upon it a risk peculiar to the employment. Id. at 738.

After weighing the above authority, we believe the evidence in this appeal compels a finding in Fugate's favor that her injury was work-related. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). We interpret these decisions as denoting "control" for purposes of this and other similarly situated cases, to be a measure of whether the parking lot where the injury occurs, is either owned, established or sponsored by the employer for the benefit of its employees, and whether the employee's presence at the location is reasonably incidental to her employment at the time of the accident according to the facts of the individual case.

As in Pierson, supra, Fugate parked in an adjacent parking lot partially leased by Shumate for the convenience of its employees and its clientele, and as was recommended by Shumate. As part of this arrangement, Shumate leased from the parking lot's owner between 17% to 33% of the parking spaces available, although as in Pierson, particular parking spaces were not designated for the employer's use. Though Shumate had no ownership, maintenance obligation or direct control over the parking lot in which Fugate fell, its lease made it a major customer of the parking lot presumably with some degree of influence over the owner; i.e. giving it a right to complain, had it so desired, regarding the lot's condition. Moreover, as in Smith, supra, Shumate should have been reasonably aware of the parking lot's condition, and that Fugate and its other employees after leaving their vehicles would pass through a portion of the gravel lot when gaining access to its business premises. What is more, Fugate probably would not have been where the accident occurred, but for her employment. See Hayes v. Gibson Hart Co., supra. Unlike in K-Mart, supra, Fugate was injured in an area recommended for parking by her employer and not in another parking area, such as a public street or a different parking location personally selected by the injured worker for her own expediency. The fact that Shumate had no direct control in this instance over the parking lot's maintenance was erroneously stressed by the ALJ and is of no import, or is the fact that Shumate later made arrangements with a different parking provider after the fact of Fugate's accident. We therefore conclude as a matter of law, that the "control" Shumate had over the gravel parking lot then under lease was all that was required to compel a ruling in Fugate's favor with regard to this single question. As a result, we reverse the ALJ's determination that Fugate's accident of July 20, 1999, on the basis of

> the "going and coming" rule was not work-related, and remand this action with instructions that a decision be rendered on the remaining merits of Fugate's claim. (Footnote in original Board opinion omitted).

Having thoroughly reviewed the facts of this case and the cases relied upon by the ALJ and the Board, we find no error in the Board's reliance upon Pierson, supra. The ALJ held the K-Mart case was controlling. In K-Mart, a 1981 case, our Supreme Court stated:

> In Smith v. Klarer Company, Ky., 405 S.W.2d 736 (1966), and in Harlan Appalachian Regional Hospital v. Taylor, Ky., 424 S.W.2d 580 (1968), this court fixed liability on the basis of control of the area being in the employer. No so in the instant case, as Schroeder fell in an area of the parking lot that was under the control of the owner of the shopping center and not under the control of K-Mart.
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> We have been asked to further expand on the "operating premises" rule. The "operating premises" rule is an outgrowth of liberal construction given to the Workers' Compensation Law (KRS 342.004) and the "going and coming" rule, which itself is an extension of the industrial hazard theory.
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> ....
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> In Harlan Appalachian Regional Hospital v. Taylor, supra, we were again confronted with the question of what constitutes "operating premises." This court held that a parking lot owned, operated, and maintained by an employer for the use of its employees qualifies as part of the operating premises so as to permit an employee to recover workers' compensation benefits for

an injury she received when she fell in the parking lot while on her way to work. Harlan Appalachian Regional Hospital is distinguishable from the subject case in that Schroeder did not receive her injury in a parking area either owned, maintained, or controlled by her employer. She fell and received her injury in the area of the parking lot used by the public generally and separated from the working area of her employer by a two-way vehicular driveway over which her employer had no control.

The "operating premises" rule must be applied on a case by case basis. In other words, what we are holding is clearly and simply that if an employer provides or maintains a parking lot or other premises for the convenience of its employees, and an employee, while on said premises, sustains a work-connected injury, then the employer is responsible to the employee for workers' compensation benefits. Two factors must be present to fix liability on the employer. First of all, the employer must control the area, and second, a work-related injury must have been sustained on the area. What we are saying is that "operating premises" constitute a part of the work area, and an employee, under those conditions, receiving a work-related injury is in a "work connected activity."

The outcome of the subject action may have been altogether different had Schroeder been an employee of the shopping center. That, however, is not the case, and we are not constrained to further construe the workers' compensation law so liberally as to lose all sense of proportions, which we would be doing if we permitted an award to be made to Schroeder under the proven facts. The proven facts clearly and unequivocally show that Schroeder's injury did not happen on K-Mart's operating premises. Consequently, there is no liability for her injury on K-Mart.

K-Mart, 623 S.W.2d at 901, 902, 903.

However, in Pierson, supra, our Supreme Court re-examined the "operating premises" rule and held:

> Workers' Compensation legislation was not intended to protect workers against the risks of the street. Larson, Larson's Workers' Compensation Law, § 15.11. As a general rule, injuries which occur while an employee is on the way to or from the work-site are not compensable. This principle is commonly known as the "going and coming" rule. Harlan Collieries v. Shell, Ky., 239 S.W.2d 923 (1951). However, an employer is responsible for work-related injuries that occur on its entire "operating premises" and not just at the injured worker's worksite. Ratliff v. Epling, Ky., 401 S.W.2d 43 (1966). Whether a particular area comes within an employer's operating premises depends on the facts and circumstances of the case. Hayes v. Gibson Hart Co.; K-Mart Discount Stores v. Schroeder; Harlan Appalachian Regional Hospital v. Taylor; Ky., 424 S.W.2d 580 (1968); Smith v. Klarer, Ky., 405 S.W.2d 736 (1966). Of particular concern in making that determination is the extent to which the employer could control the risks associated with the area where the injury occurred.
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> The facts presented by this case are not controlled by Hayes v. Gibson Hart Co.. More accurately, they fall somewhere between those present in K-Mart Discount Stores v. Schroeder and in Harlan Appalachian Regional Hospital v. Taylor. The Library did not own, operate, or maintain the parking structure, and it was used by the general public as well as the Library. However, the evidence also indicates that the Library leased approximately 144 spaces in the structure, certainly making it a major customer with some degree of influence over

> the owner. Furthermore, the Library influenced claimant's decision over where to park by providing her with free parking in that particular garage as part of its employee benefit package. If claimant had chosen to park elsewhere in downtown Lexington, she would have been required to pay the cost of parking herself. Under those circumstances, we are persuaded that there were sufficient indicia of employer control to support the ALJ's conclusion that the Library should be responsible for the effects of an injury to an employee which occurred in the garage. (Emphasis added).

Pierson, 987 S.W.2d at 318.

Pierson is the case law controlling the case before us. The ALJ erred in failing to apply the appropriate law to the factual situation presented and as such, the Board was correct in reversing and remanding the case on the "operating premises" issue. The Board affirmed all other issues raised by the Appellant and we find no error in the Board's well-reasoned opinion on those issues.

For the foregoing reasons, the opinion of the Board affirming in part and reversing in part and remanding is affirmed.

ALL CONCUR.

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