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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-000877-WC

WARRIOR COAL COMPANY, LLC — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-01-72186

BILLIE STROUD;
HON. ROGER D. RIGGS, ALJ;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

BARBER, JUDGE: We are asked to decide whether the Workers' Compensation Board erred, as a matter of law, in affirming the ALJ's application of the "operating premises" exception to the "going and coming" rule. Finding no error, we affirm. The essential facts are not in dispute. We review the matter as a question of law.[1] The Appellee, Billie Stroud, was an employee of the Appellant, Warrior Coal, L.L.C. On March 29, 2001,

[1] *Brown By and Through Brown v. Young Women's Christian Ass'n*, Ky. App., 729 S.W.2d 190 (1987).

Stroud, an electrician, was driving to work in his personal vehicle. The ALJ found:

> He turned from the public highway onto a private haul road which was on property leased by the defendant-employer and maintained by the defendant-employer. He was to report to work at 11:00 p.m. In order to access the grounds leased by the defendant-employer he left the public road and drove past a gate through a roadway where there is a sign stating "Warrior Coal, LLC, Cardinal Mine. Along the haul road is another sign which states "Private Road – Do Not Enter." Mr. Stroud fell asleep while driving along the haul road and failed to negotiate a curve resulting in his pickup truck striking several trees and crashing in a ravine. He said the point of the accident was about 200 yards from the mine.
>
> . . .
>
> Brian Kelly, an engineer with Warrior Coal Company, . . . said that Warrior . . . has a permit for 2,432 surface acres in Hopkins County on which the Cardinal Mine is located. According to the permit Warrior . . . has the surface rights to the entirety of the property. . . .
>
> Mr. Kelly testified that the haul road on which Mr. Stroud had his accident is a gravel road which leads from the public road to the bath house. He said the road is 8 to 10 feet in width, is made of gravel, and is maintained by Warrior. . . . He testified that the length of the haul road is approximately 1.5 miles . . . and that the accident occurred over one-half mile from the parking lot where the bath house, warehouse and shop are located. He testified that the haul road is not actually used for hauling coal, but is simply an access road to the parking area.

The ALJ explained that:

> On the questions of the "going and coming rule" and whether the plaintiff was on the "operating premises" the Administrative Law Judge makes the following observations: The coal company made it clear by fences and signs that once a vehicle leaves the public highway it is on private/coal company property. This is . . . a gravel road built and maintained by the employer. . . . These issues are fact specific, and under the facts in question, the evidence supports the conclusion that Mr. Stroud's accident was work-related.

Warrior appealed to the Board asserting, *inter alia,* that the ALJ erred, as a matter or law, in finding Stroud's claim compensable. Warrior maintained that Stroud failed to establish he was on the operating premises at the time of the accident; moreover, that Stroud's falling asleep caused the accident and took him outside the course of his employment.

On March 26, 2003, the Board rendered a unanimous Opinion affirming the ALJ's decision, insofar as it pertains to application of the "operating premises" exception to the "going and coming rule." The Board's opinion provides a detailed summary of Kentucky law on the subject. Among the cases cited by the Board is *Pierson v. Lexington Public Library.*[2] *Pierson* expanded operating premises to a parking structure *neither owned nor maintained by the employer.* There, the employee was injured when the elevator she was exiting dropped. At the time, the

[2] Ky., 987 S.W.2d 316 (1999).

employee was on her way back to work after lunch. The Supreme Court held that:

> [T]he evidence . . . indicates that the Library [the employer] leased approximately 144 spaces in the [parking] 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.[3]

Here, the Board determined that "but for Stroud's employment with Warrior, he would not have been on the roadway, and could not legally have been there." Further, that Warrior clearly exercised more control over the roadway on which Stroud was traveling than did the employers in many other cases in which liability was imposed, including *Pierson.* We agree.

The Board also rejected Warrior's argument that Stroud's falling asleep changed the result, citing *Ratliff v. Epling.*[4] There, the Court held that:

> Our final question is whether the Board was justified in finding that the activity of the employee at the time of his death was such a 'deviation' from the course of his employment that he was beyond the pale of coverage. It may be

[3] *Id.*, at 318.
[4] Ky. 401 S.W.2d 43 (1966).

> stated generally that the deviation should be substantial, or to put it another way, 'minor interludes are immaterial'. Larson's Workmen's Compensation Law, Vol. 1, section 19.63 (page 294.99).
> The authority just cited lists the following insubstantial deviations **which do not absolve** the employer of liability: 'running across the street in the course of a delivery trip to buy a little food; getting cigarettes during a trip to or from work in the employer's conveyance; stopping at one's home to get a raincoat and leave some meat; crossing the road during a delivery trip to have a glass of beer at 2:00 in the afternoon; picking up two young ladies and taking them home while driving a car to test its brakes; buying a toy during spare time to take home to a child; and even picking cherries from a customer's cherry tree.'[5] (Emphasis added)

In the case *sub judice,* the deviation was Stroud's dozing off. Considering that the accident happened late at night – Stroud was on his way to report for third shift at 11:00 p.m. - we cannot say that the deviation was so substantial as to absolve Warrior from liability. Accordingly, we concur with the sound reasoning of the Board, and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
Henderson, Kentucky

BRIEF FOR APPELLEE:

Jerry P. Rhoads
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[5] *Id*., at 45-56.