

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000598-WC

CORHART REFRACTORIES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-02476

NORMAN HYBERGER;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

BARBER, JUDGE: Corhart Refractories petitions this Court for review of a decision of the Workers' Compensation Board (the Board) that reversed an Administrative Law Judge's dismissal of Norman Hyberger's claim for worker's compensation. Having reviewed the case in accordance with the standard announced in Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992), we have determined that the Board has not "overlooked or

misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Id. Thus, we affirm the decision of the Board, aptly authored by Honorable John A. Gardner, and adopt its reasoning as follows:

On September 10, 2004, Hon. John B. Coleman, Administrative Law Judge ("ALJ"), dismissed Norman E. Hyberger's ("Hyberger") claim for income and medical benefits. The ALJ concluded Hyberger's injury was unrelated to his work with Corhart Refractories ("Corhart"). Hyberger's appeal focuses on the "going and coming rule" and the "operating premises" exception to that rule.

The facts are uncontroverted. Corhart's property in Louisville, Kentucky is divided by 16th Street. Hyberger worked in the production plant on the west side of the street. Other offices belonging to Corhart and a company maintained parking lot are located on the east side of 16th Street. A concrete ramp leads directly to a painted crosswalk on 16th Street, which leads directly across to a gated entry to the employee parking lot.

On October 8, 2003, Hyberger, a long-time employee of Corhart, fell in the crosswalk injuring his ankle and knee. The evidence reveals Hyberger had clocked out that morning around 10:00 a.m. to play golf. He crossed 16th Street, but realized he had left his car keys in the locker room. The accident occurred on his return journey to the plant when he stepped in a hole within the boundaries of the crosswalk. There is no evidence that Corhart maintains the crosswalk or any portion of 16th Street.

The ALJ, after a thorough review of the evidence contained in the record, stated:

This claim involves a very interesting issue of work relatedness. The plaintiff argues the claim is compensable as being an exception to the 'going and coming' rule. The facts of the case are clear that the plaintiff had clocked out and left the plant to cross the public street to the company parking lot. It was then that he realized he had left his car keys and was returning across the public street when he stepped in a hole causing his injury. The plaintiff argues that the 'operating premises' rule applies to this facts scenario. However, the Administrative Law Judge notes that the case of Maddox v. Heaven Hill Distilleries, Ky., 329 S.W.2d 189 (1959) is directly on point. In that claim, the defendant's property was situated on the east side of the highway with a parking lot maintained on the west side of the highway maintained by the company. An eight-year employee was injured when he was struck by an automobile while crossing the road after he clocked out. The Court held that [t]he injury did not result from a risk connected with the employment because all persons using public highways are exposed to the same hazard, id. at 191. As the facts are directly on point to the facts of this claim, the plaintiff's claim for medical and income benefits must be dismissed as not being related to his work with the defendant-employer.

On appeal, Hyberger contends the ALJ committed reversible error by not awarding benefits. Hyberger, conceding that the crosswalk is a public crosswalk across a public street, argues there are sufficient indicia of employer control to warrant liability for his injury. Hyberger points to the fact that Corhart owns virtually the entire city block on both sides of 16th Street, and the crosswalk bisects the street at mid-block. Since the crosswalk leads from the parking lot to the entry of the factory, employees are required to walk on

public property to get to their work area. Hyberger cites K-Mart Discount Stores v. Schroder, 623 S.W.2d 900 (Ky. 1981) and Pierson v. Lexington Public Library, 987 S.W.2d 316 (Ky. 1999) for the proposition that the boundary line of the employer's property is not determinative of what constitutes the "operating premises." Hyberger contends that under the facts of this case, Corhart is liable for benefits.

It is well-settled Kentucky law that workers' compensation legislation was not intended to protect workers against risks of the street. Olsten-Kimberly Quality Care v. Parr, 965 S.W.2d 155 (Ky. 1998). The going and coming rule provides that injuries 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 that employment, as the hazards ordinarily encountered in such journeys are not incident to the employer's business. Receveur Const. Co./Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1977). Nevertheless, our courts have expressly held, "[w]e are not willing, however, to accept the *boundary line* of the employer's property as the proper point at which to differentiate between liability and non-liability." K-Mart Discount Stores v. Schroder, 623 S.W.2d at 902, citing Ratliff v. Epling, 401 S.W.2d 43 (Ky. 1966). Consequently, Kentucky law recognizes several exceptions to the going and coming rule.

Here, the ALJ specifically relied on Maddox v. Heaven Hill Distilleries, *supra*; however, our research reveals that "[a]ny possible applicability of the Maddox case is destroyed because later authority demonstrates that its basic premise is wrong." Kaycee Coal Company v. Short, 450 S.W.2d 262, 264 (Ky.App. (sic) 1970). The court stated:

In the Maddox case, compensation was denied to an employee who was injured while crossing a public street during a journey between his employer's plant and the same employer's parking lot. At the time of this decision, the employer's parking lot was not considered a part of the employment premises. U.S. Steel Co. v. Isbell, Ky., 275 S.W.2d 918 (1955); also see Bickel v. Ford Motor Co., Ky., 370 S.W.2d 193 (1963). In Harlan Appalachian Regional Hosp. v. Taylor, Ky., 424 S.W.2d 580 (1968), this view was changed and the cases (including the [Harlan Collieries Co. v. Shell, [239 S.W.2d 923 (Ky. 1951)] case) based thereon, were overruled to the extent of their inconsistency. In Taylor we held that a parking lot was part of the 'operating premises' of the employer. Hence, the accident in Maddox should now be considered compensable, if it presents the situation of injury to an employee en route over a public highway from one part of his employer's premises to another part of the same employer's premises. (Emphasis added.)

Kaycee Coal Co. v. Short, 450 S.W.2d at 264-5. See also Blue Diamond Coal Co. v. Creech, 411 S.W.2d 331 (Ky. 1967).

It is further noteworthy that the rule enunciated in Kaycee Coal Co. v. Short, albeit by dicta, occurred after Ratliff v. Epling, supra, (wherein our supreme court first adopted the "operating premises" exception to the going and coming rule.) Here, Hyberger was en route over a public street from one part of Corhart's premises to another part of Corhart's premises. His injuries must be deemed work-related.

For the reasons stated by the Board above, its decision reinstating Hyberger's claim is affirmed.

ALL CONCUR.

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