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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001773-MR

RANDALL ISON — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 06-CI-00023

MARK PENNINGTON AND CAPITOL TUNNELING, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Randall Ison appeals from an order of the Lewis Circuit Court which granted summary judgment to Mark Pennington and Capitol Tunneling, Inc. Because Ison's common law claims in Kentucky against Pennington and Capitol were barred by his receipt of workers' compensation benefits in Ohio, we affirm.

Randall Ison and Mark Pennington were employees of Capitol Tunneling, Inc., an Ohio corporation. On June 30, 2003, Ison executed an agreement with Capitol

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

pursuant to Ohio Revised Code 4123.54 in which he elected the State of Ohio as the forum to pursue workers' compensation benefits in the event of a work-related injury, to the exclusion of all other remedies.

On October 3, 2003, Ison was a passenger in a vehicle owned by Capitol and operated by Pennington. The two men were traveling home from a project site in Greenwood, Indiana, when the vehicle became involved in a traffic accident in Lewis County, Kentucky. Ison sustained numerous injuries. He filed a claim for workers' compensation benefits with the Ohio Bureau of Workers' Compensation. His claim was found to be compensable by the Industrial Commission of Ohio and he received Ohio workers' compensation benefits. On February 16, 2006, Ison filed a personal injury suit against Pennington and Capitol (as well as several other defendants) in Lewis Circuit Court. Capitol and Pennington filed a motion for summary judgment, arguing that Ison's common law claim in Kentucky was barred by his receipt of the Ohio workers' compensation benefits, which were his exclusive remedy against his employer and co-worker. The circuit court granted the motion, and this appeal followed.

In reviewing a grant of summary judgment, our inquiry focuses on whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. Kentucky Rules of Civil Procedure (CR) 56.03. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the

respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

In its order granting the appellees' motion for summary judgment, the circuit court relied on *Buckman v. Republic Structural Painting Corp.*, 302 S.W.2d 855, 857 (Ky. 1957). We agree with the circuit court that *Buckman* is controlling in this case. Buckman, a Kentucky citizen employed by an Ohio corporation, had contracted to be bound by Ohio workers' compensation law in the event of a work-related injury. Buckman was injured in the course of his employment, and proceeded to file a common law claim in Kentucky after receiving workers' compensation benefits in Ohio. Kentucky's highest court held that his claim in Kentucky was barred, explaining its reasoning as follows:

> While Kentucky has an interest in the economic consequences and social effects of injuries occurring to persons within its borders, and may elect to provide remedies that need not yield to statutory remedies of other states, we find no evidence of a public policy of this state against recognition of a contract by an employe[e] to accept the compensation benefits of another state in lieu of his common law remedy.

Buckman, 302 S.W.2d at 857.

Ison attempts to distinguish the factual circumstances of his case from those of *Buckman* by pointing out his work site was in Indiana whereas in *Buckman*, the work site was in Kentucky. He argues that in *Buckman* this distinction was significant because the employer and employee selected a forum other than Kentucky with the knowledge that Kentucky would otherwise be the jurisdiction for workers' compensation claims

since any work-related injury would obviously happen in Kentucky, not in some third state. We fail to see how this affects the applicability of *Buckman* to Ison's situation.

Ison further attempts to cast doubt on the impact of *Buckman* by arguing that it has been overruled by statute. Although the *Buckman* opinion does contain citations to Kentucky workers' compensation statutes that have since been repealed, the opinion was decided on the basis of the common law of Kentucky, not in reliance on those statutes. As the *Buckman* court observed, "the employer and employee are not subject to the Kentucky compensation law and no obligation under that law is sought to be asserted against the employer." *Buckman* at 857. The repeal of the statutes has not undermined the validity of the holding in *Buckman*.

Next, Ison claims that he did not waive his right to Kentucky workers' compensation coverage by executing and filing the appropriate form with the Office of Workers' Claims. He contends that he could therefore hypothetically have a Kentucky workers' compensation claim, and that this possibility somehow invalidates his agreement to be bound by Ohio workers' compensation law. This argument would be relevant only if Ison were seeking workers' compensation benefits in Kentucky. Furthermore, although it is not an issue in this appeal, we fail to see how the failure to complete and file the waiver form invalidates his agreement with Capitol to be bound by Ohio workers' compensation law.

Ison also contends that his agreement with Capitol was invalid because it was not filed in accordance with Ohio workers' compensation laws. Specifically, he

claims that there was no showing that the agreement was timely filed within the period designated by statute. We fail to see the relevance of this argument to Ison's common law claims in Kentucky. Moreover, the argument is moot because the agreement clearly was honored in Ohio as evidenced by the fact that Ison was awarded workers' compensation benefits in that state.

Next, Ison argues that workers' compensation benefits are not his exclusive remedy under Ohio law, and that under the law of that state, he would be permitted to pursue a common law claim against his employer. This argument concerns the interpretation of Ohio workers' compensation statutes and Ohio common law and thus is not relevant to the present appeal. Whether or not Ison could pursue these claims in Ohio is irrelevant to the issue of whether he can pursue common law causes of action in Kentucky. Ison may pursue these claims in Ohio if he wishes, but they are barred in Kentucky, where *Buckman* is the controlling law.

Next he argues that his injuries would not have been compensable under Kentucky's workers' compensation statutes because the accident did not fall under the "going and coming rule." Under this rule, injuries sustained by workers when they are going to or returning from the place where they regularly perform duties connected with their employment, are generally not deemed to arise out of and in the course of employment for workers' compensation purposes. *See Receveur Construction Co. v. Rogers*, 958 S.W.2d 18 (Ky. 1997). Again, we fail to see the relevance of this argument. Under *Buckman*, Ison cannot contract to receive workers' compensation benefits from his

employer in another jurisdiction as his exclusive remedy, and receive such benefits, while pursuing a common law claim against the same employer in Kentucky. Kentucky worker's compensation law regarding the "going and coming rule" is simply not at issue here.

Ison also argues that the circuit court erred in granting summary judgment to Pennington, his co-worker. In Kentucky,

> one cannot maintain a common law negligence action against his fellow servant for injuries sustained in the course of or arising out of his employment. The only remedy for such an injury is under the Workmen's Compensation Act.

Black v. Tichenor, 396 S.W.2d 794, 795-96 (Ky. 1965).

This exemption from liability does not apply if the injury was a result of willful and unprovoked physical aggression. *See* KRS 342.690(1); *Russell v. Able*, 931 S.W.2d 460 (Ky.App. 1996).

Ison contends that there are genuine issues of material fact regarding whether Pennington was acting within the scope of his employment when the accident occurred, and that therefore Pennington may not qualify as a "fellow servant" who is immune from suit.

There is no evidence that Pennington, as Ison's co-worker and driver of the vehicle, was not acting within the scope of his employment when the accident occurred. Indeed, Ison argued successfully before the Ohio Industrial Commission that the accident had occurred within the scope of his employment. Furthermore, there is absolutely no evidence that the traffic accident was the result of an act of "willful and

unprovoked physical aggression" on Pennington's part, beyond an unsupported claim by Ison that Pennington may have been driving recklessly, and Pennington's own admission that he had purchased alcoholic beverages for the weekend prior to the accident.

Ison's final argument relies on the principle that an employer who claims immunity from suit under the exclusive remedy provision of the Kentucky workers' compensation statute bears the burden of proving that it secured payment of compensation. *See Gordon v. NKC Hospitals, Inc.,* 887 S.W.2d 360, 362 (Ky. 1994) ("To have protection of the [Workers' Compensation] Act, KRS 342.690 requires an employer to secure payment of compensation as a condition of benefiting from the exclusive liability provision. As the employer has this duty and the statute contemplates the possibility that it may not be fulfilled in which case there is a right to sue (KRS 342.690(2)), necessarily the employer must inform the court of its status as such and prove its compliance with the statute.") Ison contends that Capitol must prove that Kentucky workers' compensation benefits were secured in order to claim immunity from suit. But Capitol is not claiming immunity from suit under the provisions of Kentucky workers' compensation law; it is claiming immunity under our common law as set forth in *Buckman*. As we have already determined that Capitol is immune from suit, this argument is irrelevant.

For the foregoing reasons, the summary judgment granted to the appellees by the Lewis Circuit Court is hereby affirmed.

ALL CONCUR.

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