

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001262-WC

BLUEGRASS.ORG

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-75981

LISA HIGGINS;
HON. CHRISTINA HAJJAR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND K. THOMPSON,
JUDGES.

COMBS, JUDGE: This is a Workers' Compensation case in which Bluegrass.org,
the employer, appeals from an opinion of the Workers' Board (Board) which
reversed a decision of the Administrative Law Judge (ALJ) dismissing. The Board
held that the going-and-coming rule does not apply as a matter of law and directed

the ALJ on remand to determine whether the claimant's accident was attributable to an unexplained or idiopathic fall or a work-related incident. After our review, we affirm.

The going-and-coming rule is a rule of non-compensability. In general, it applies to injuries sustained while the employee is travelling to and from a fixed place of employment. *Husman Snack Foods Co. v. Dillon*, 591 S.W.2d 701 (Ky. App. 1979).

[I]njuries sustained . . . going to or returning from the place where [workers] 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.

Receveur Const. Co./Realm, Inc. v. Rogers, 958 S.W.2d 18, 20 (Ky. 1997).

However, there are exceptions to the rule. "For example, transitory activities of employees are covered if they are providing some service to the employer, *i.e.*, service to the employer exception." *Id.* Another exception is the operating premises. "To the extent that an employee is covered on the 'operating premises' while going to or leaving his work, he remains in the course of his employment only for a reasonable time necessary to accomplish the 'going' or 'coming' process." *Ratliff v. Epling*, 401 S.W.2d 43, 46 (Ky. 1966). With that discussion in mind, we turn to the case before us.

On August 24, 2017, the Appellee, Lisa Higgins (Higgins), filed a Form 101/Application for Resolution of Claim against her employer, the Appellant, Bluegrass.org (Bluegrass), alleging a June 7, 2017, injury to her left ankle and right knee. The Board's opinion provides a concise summary of the relevant facts:

Higgins began working for Bluegrass on June 22, 2015, as a SMI[serious mental illness] case manager working with adult clients. Higgins assisted clients by locating various resources to allow them to become more self-sufficient. Her job tasks varied day-to-day, and included relocating clients and accompanying them to various appointments. Higgins was working with 15 to 20 clients at the time of her injury. Higgins testified she spent 60-70% of her work time in the field and the remainder working from home, which her supervisor, Rebecca Seabaugh, approved. Higgins estimated she reported to the main office no more than once a week, typically for meetings. Higgins explained she does not have a specific office at the main office location, but she has access to a group office containing three desks and storage for files. Higgins testified as follows about working from home at the deposition:

Q: How often do you work from home? Or did you work from home for Bluegrass?

A: As- - as much as needed. I was considered a mobile case manager. And I had asked - - I had requested several times, is it okay if I work from home today. And I was told by [Seabaugh], "you don't have to ask me You don't need to ask me every time you need to work from home."

Q: When did - - when did she say that to you; do you recall?

A: Several times after I had worked with her - - or started working with her. In 2016, she took over for Julie Johnson. . . . And she was just letting me know that I did not have to ask her, but I always let them know. I had an Outlook calendar that I had to update and let them know where I was, any appointments I had and where I was at the time.

Higgins' position required her to drive to numerous locations, and she was reimbursed for mileage. Bluegrass also issued Higgins a work phone, and paid for the phone services. Bluegrass supplied Higgins a laptop computer and a hotspot. Higgins had an office set up in her house. Higgins agreed Bluegrass neither inspected her home nor managed or controlled how her home office was set up. The tools provided by Bluegrass, mainly the laptop computer and hotspot, enabled Higgins to work from anywhere, whether it was at home, in her car or in the public library. Higgins used a computer program called ADP to enter her time, to clock in and out, and to request time off.

Higgins testified by deposition that she had been working with clients in the field on the morning of June 7, 2017. She had to pick up a form for one of her clients at a dental office later in the day and decided to go home for a quick lunch. Higgins clocked out and then clocked back in after lunch on the ADP program. She did some computer work and then spoke to her client about the form that she was going to pick up. Higgins was sitting in a recliner with her work laptop on her lap. As they were finishing the conversation, Higgins got up, took a couple of steps, and fell. “[W]e were ending the call at that time.” Higgins still

had the phone in her hand when she fell. Her whole purpose of getting up was to get her purse and keys to go pick up the form, which was very important to the client. After she fell, Higgins's husband drove her to pick up the form from the dental office. "I was still on the clock, because I was going to pick up this letter for my client"

At her hearing, Higgins testified that she had gone home for lunch, had lunch, and clocked back in. At the time of the injury, the call was ending and she was going to get her purse; she took two steps, her ankle rolled, and then she fell on her knee.

On March 8, 2018, the ALJ rendered an opinion and order dismissing, in relevant part as follows:

The facts of this case must be analyzed under several distinct, but related issues: whether Plaintiff was considered to be on the operating premises of the employer, and whether Plaintiff was performing a service to the employer under the going and coming rule. The perils encountered during travel to and from work are no different from those encountered by the general public and are neither occupational nor industrial hazards. Therefore, under a principle known as the "going and coming rule," injuries that occur during travel to and from work generally are not compensable. *Harlan Collieries v. Shell*, 239 S.W.2d 923 (Ky. 1951). An exception to the rule permits compensation if an injury occurs on the employer's "operating premises." *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966), or was performed in the service to the employer. . . .

The ALJ concluded that: “Plaintiff did not sustain an injury in the course and scope of her employment, as the injury did not occur on the operating premises of the employer and the service to the employer exception of the going and coming rule does not apply.”

Higgins filed a petition for reconsideration asserting, *inter alia*, that the going-and-coming rule did not apply. By order rendered on April 2, 2018, the ALJ denied the petition. Higgins appealed to the Board, which reversed and remanded by opinion rendered on July 20, 2018, as follows in relevant part:

Higgins was neither engaged in a transitory activity at the time of her accident, nor was walking outside to enter her home anticipating to perform additional work activities. Rather, Higgins had clocked into the ADP program and began working for Bluegrass inside her home, which had been approved by her supervisor. Higgins was engaged in or ending a work activity, i.e., talking to a client on the phone, and had yet to leave the job premises when her accident occurred. Therefore, we find the going and coming rule does not apply as a matter of law in this instance, and reverse the ALJ’s finding.

On remand, we direct the ALJ to determine whether the accident occurred due to an unexplained or idiopathic fall or work-related incident. **We do not, however, direct any particular determination.** The issue of an idiopathic fall was preserved as an issue at the BRC. . . .

Where an employee sustains an injury at work due to a purely individual cause, i.e., such as an internal weakness, and the work does not contribute independently to the effects of the resulting harmful

change, the injury as a matter of law is idiopathic in nature and, therefore, not compensable. *Workman vs. Wesley Manor Methodist Home*, [462 S.W.2d 898 (Ky. 1971)]. By contrast, an unexplained fall is exactly what its designation purports - that which cannot be identified sufficiently with any thoroughness of detail. *Salyers vs. G. & P. Coal Co.*, 467 S.W.2d 115 (Ky. 1971) and *Coomes vs. Robertson Lumber Co.*, 427 S.W.2d 809 (Ky. 1968).

(Emphasis added). The Board explained that *Workman* acknowledges a rebuttable presumption that an unexplained fall which occurs during the course of employment is work related and that absent rebutting evidence, an ALJ cannot find against the claimant on the issue of whether the accident arose out of employment.

On August 3, 2018, Bluegrass filed a petition for review in this Court. “The function of further review of the [Board] in the Court of Appeals is to correct the Board only where [this] 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.” *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

We perceive no such error by the Board, and Bluegrass has not persuaded us otherwise. Higgins was not “in transit,” nor was she in the process of leaving her home when the injury occurred as Bluegrass contends in its brief. Rather, she was engaged in a work activity. The issue -- as the Board properly

determined -- is the nature of Higgins's fall. That question remains to be decided by the ALJ in accordance with the Board's direction upon remand.

We affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory L. Little
Louisville, Kentucky

BRIEF FOR APPELLEE:

Timothy J. Wilson
Lexington, Kentucky