Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 8, 2016

CLAIM NO. 201360398

EAST & WESTBROOK CONSTRUCTION PETITIONER

VS. **APPEAL FROM HON. UDELL B. LEVY, ADMINISTRATIVE LAW JUDGE**

ROY CARROLL
and HON. UDELL B. LEVY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. East & Westbrook Construction ("East & Westbrook") appeals from the February 1, 2016, Opinion and Order and the March 18, 2016, Order on the Petition for Reconsideration of Hon. Udell B. Levy, Administrative Law Judge ("ALJ"). The ALJ determined Roy Carroll's ("Carroll") claim for workers' compensation benefits is not excluded by the going and coming rule and awarded income and medical

benefits. On appeal, East and Westbrook asserts the ALJ erroneously determined Carroll's claim was not excluded by the going and coming rule.

In the Form 101, Carroll alleged injuries to his "low back with leg pain" while in the scope and course of employment on October 23, 2013, in the following manner: "I was working and involved in a motor vehicle accident injuring my low back with leg pain."

The July 21, 2015, Benefit Review Conference ("BRC") Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; unpaid or contested medical expenses; exclusion for pre-existing disability/impairment; and TTD (Duration). Under "other" is the following: "Whether injury occurred within course and scope of employment. Extent of Statutory Subrogation credit."

In his February 3, 2015, deposition, Carroll described his job duties with East & Westbrook:

> A: Build concrete forms, poured concrete, finished concrete, at times built scaffolding, jack hammering. We did some metal prefab- prefab buildings, let's see, rake and grade level, operate certain equipment.
>
> Q: What kind of equipment?
>
> A: Excavators, back hoes, Bobcats, rough terrain forklifts.

Q: So these are all jobs that you would do personally?

A: Yes.

Q: Okay. And all of the sites are commercial sites?

A: Yes. Well, we did one residential in the time that I've been there, so...

Carroll testified regarding the location of East & Westbrook's job sites:

Q: Okay. Now, are all the job sites local in Louisville or Buckner or where are they?

A: They could be- I had gone to Nashville with them, Jett and Carrollton. It's all over Kentuckiana. I've been to Indiana for them.

Q: What's the furthest?

A: I think Nashville was our- my furthest for them.

Q: And in that instance, would you be -- would they like put you up in a hotel for the period of the job or would you trek back and forth?

A: In that instance, we'd go and be put up in a hotel.

Q: Okay. Do you know what the mileage radius would be for you all- what would be the requirement for you to drive to job sites back and forth? Do you understand my question?

A: Yes.

Q: Okay.

...

A: I know I've worked in Lexington at UK. I can't remember any more right now.

Q: That's okay. Were most of your job sites in the like Buckner, Louisville, La Grange area?

A: Yes.

Q: And at the time you were employed, you were living in La Grange; correct?

A: At the end of it, yes. Before then I was living in Louisville.

Carroll described his typical day on the job site:

Q: Okay. I do want to kind of fast-forward to October 23rd, 2013. Tell me on a typical day what - so not particularly - necessarily this day, but what was your shift like? When did it start? When did it end?

A: I'd meet Bryan [Kottak] at the bowling alley near our houses and get in the company truck. And we would drive up towards the job site in Jett. We'd talk about what we were going to do that day, who we were going to have do it, what our goal was for the end of the day. We'd get there around 7; 6:30, 7.

Q: A.M.?

A: Yes. Generally I'd unlock the Conexes and get the equipment turned on and ready. And then we'd talk to- have our morning meeting about what we were going to do. On that job we were

> working between 10- to 12-, 14-hour days. And we'd get in the truck, lock everything up and drive home.
>
> Q: So typically what time would you say your shift ended?
>
> A: A normal day would have been from seven to five out there. Me and Bryan normally stayed till 7:00 at night, because we were- had to wait for the last of the subcontractors to leave site before we could.
>
> ...
>
> Q: So you would drive your truck and he would drive his truck. You guys would meet at this bowling alley. And then from the bowling alley you would drive to the job site.
>
> A: Yes.
>
> Q: Will you tell me where the bowling alley is. What-
>
> A: It's on Beulah Church Road.
>
> Q: Okay. I'll find it. So you would leave your truck there?
>
> A: Yes.

Carroll explained why he was riding with his supervisor, Bryan Kottak ("Kottak") and provided a description of the motor vehicle accident ("MVA"):

> A: We were working on LG&E in Jett, Kentucky.
>
> Q: And what- what were you guys doing there?

A: Form- forming concrete pads and tying steel and pouring concrete.

Q: Were you building a new structure or-

A: We were building a- I think a railroad track system for I think it's a coal machine or something.

Q: Okay. And how long had you been on that job site prior to the motor-vehicle accident?

A: I think two or three months. I don't remember exactly though. It might have been just two.

Q: Okay. And was it a full-time-

A: Yes.

Q: -situation? With overtime you said; right?

A: Yes.

Q: Kottak, is that how you pronounce his last name?

A: Yes. K-o-t-t-a-c-k [sic].

Q: Okay. So he was your supervisor?

A: Yes.

Q: And what was his job title?

A: He was job site foreman or a superintendent. I don't know if he had gotten a promotion yet or not.

Q: What was your title?

A: I was a journeyman carpenter.

Q: Was Mr. Kottak your supervisor the entire time while you were on this job site?

A: Yes.

Q: Was he your supervisor prior to this assignment?

A: On different jobs, yes.

Q: Okay. And how far was your home from the job site location-

A: Let's see.

Q: -if you had to guesstimate?

A: Fifty-five minutes to an hour.

Q: The arrangement that you kind of talked about where you would meet Mr. Kottak at the bowling alley, was this something that you guys- how did that come about?

A: We- we generally did it at East & Westbrook. If a job was farther away and you can meet up with a foreman to ride in, they allowed you to do it so you could save your gas and time.

Q: Would you get reimbursed for mileage?

A: On some job we got paid mileage.

Q: Were you paid mileage on this job?

A: No, we were not.

Q: Okay. So Mr. Kottak would not be reimbursed for the travel or the mileage; right?

A: He- he had a company truck, so he has a gas card.

...

Q: Prior to this job assignment at LG& E, had you ridden in a- ridden in a company vehicle with him before?

A: Yes.

Q: On [sic] different job-

A: Yes.

Q: - assignments? And- let me think how I want to ask this question- so the arrangement that you made with Mr. Kottak, was it because of the proximity to your home and his home or just because of the distance to the job site?

A: We rode- we normally rode together because we were- we lived close to each other. Other guys- and other foreman would pick up other guys.

Q: Okay. So you- you lived in La Grange at the time. And did he also live in La Grange?

A: At that time I was living in Louisville.

...

Q: And Mr. Kottak was also living in Louisville?

A: Yes. He lived about five, ten miles from me.

Q: And who approached whom regarding the ride situation or the carpooling?

A: We had- the first time I'd ever worked with Bryan, I think we were working- what's that road? We were working somewhere, and we got paid

mileage for that job. And Jim Rice said, if you want, you can meet Bryan somewhere and you can ride with him.

Q: Who's Jim Rice?

A: He is our- I always call him a- what was it? He's- he's the one that assigns people to jobs. I think he's like a VP now or something. I don't- he got a promotion, I know, but I don't remember what it is.

Q: Okay. So he made the suggestion that you ride with Mr. Kottak on a different job?

A: Yes.

Q: Because you were being paid mileage?

A: Yes. We were- I don't remember where we were going, but yeah, we got paid.

Q: So that way, if I'm understanding your testimony correctly, if you didn't ride with Mr. Kottak, then they would have to pay you mileage; whereas if you did ride with Mr. Kottak, they would not have to pay you mileage.

A: Yes. We still got paid mileage even if we rode with them.

Q: I see. So what was the incentive for the company to have you ride with the foreman?

A: To make sure that all of us showed up on time.

Q: Okay. I see. Did you have any attendance issues prior to this incident?

A: Well, I mean, there was [sic] times I was late.

...

Q: So was there any- did you have any conversations with anyone at the company regarding riding with Mr. Kottak or sharing the trip or the commute with him or anything like that?

A: We just- when we knew we were- I was going to be on the job with him. I called him and I said, do you want to meet up to ride out there together. And he was like sure.

Q: Okay. Did you talk to anybody else about it, meaning anybody else at the company about it?

A: No. I mean, we- it's just a thing we always did, so...

Q: Okay. So no one...no one higher up asked you to do it or talked to you about it, about this particular job.

A: No.

Q: So you would drive your truck and he would drive his truck. You guys would meet at this bowling alley. And then from the bowling alley you would drive to the job site.

A: Yes.

...

Q: Okay. So on to the accident, it happened on October 23rd, 2013; right?

A: Yes.

Q: Tell me what- where you were coming from, where you were going.

A: We were coming from LG& E in Jett, Kentucky, and we were going to the bowling alley on Beulah Church.

Q: Okay. So this was at the end of your shift?

A: Yes.

Q: You were going home.

A: Yes.

Q: Okay. And tell me what happened.

A: We were driving and got- we had traffic, came to a stop, went a little bit farther, came to a stop, and someone rear-ended us.

...

Q: Okay. Before we get into that, in you- that trip from the job site and when this accident occurred, what time would you approximate you left the job site?

A: If it was at 5:30, we probably left at like 5:20.

Q: Did you stop anywhere?

A: No.

Q: And prior to this car accident when you had- when you drive- drove with- or rode, I guess, with Mr. Kottak, did you guys make any stops?

A: Sometimes we'd have to stop at the shop to get either material or tools.

Q: Did you ever stop to get food, get a beer?

> A: We wouldn't stop for a beer. I don't even know if Bryan drank. I don't know about on that job. I know we've stopped for food and stuff before on jobs, but I don't know if on that job we did.
>
> Q: Okay. You were riding as a passenger; right?
>
> A: Yes.

Carroll testified he carpooled with Kottak almost every day explaining:

> Q: My question was, when we were talking about the carpool arrangement that you had with Mr. Kottak, did you- for the time that you were on this job site of LG&E, you said about two or three months, did you carpool with him every day or just occasionally?
>
> A: Almost every day. If he had something he had to do in the morning or whatnot or in the afternoon, he'd let me know, and I'd drive my own vehicle.
>
> Q: Did you ever cancel on him?
>
> A: Maybe if I was running late, I'd tell him I'd drive.
>
> Q: Okay. So what percentage of the time would you say you would carpool together on this job?
>
> A: Probably 90% of the time.

Regarding his use of company vehicles, Carroll testified:

> Q: Did you ever drive the company vehicle at all?

A: Yes, I have.

Q: When did you- when, on what occasion?

A: On other jobs they'd send me out to go get materials or Dow at Corning, we had company trucks inside the site to drive around to do the jobs. That's-

Q: But typically as a journeyman, you wouldn't be given access to the company vehicles, correct?

A: Not all the time, no.

Q: Okay. So it was just only when they had a specific task for you to do?

A: Yes.

Q: And you would get instruction from whom to do this?

A: Whoever the supervising foreman was.

Q: Okay. So in these occasions when you would be riding with Mr. Kottak to and from the home to the job site, he would always be driving?

A: I do believe most of the time, yes.

Q: Do you drive sometimes?

A: I don't think with Bryan. I don't think so.

Q: Okay. Had you been in this--

A: With other foreman I had.

Q: So you have done this arrangement with other foremen.

A: Yes.

Q: Who were those?

A: Oh, well, Bennie Hernandez, Dave Schott. Let's see. What's his name? About every foreman we did it with, so...

Q: That's okay if you can't remember. Those were on different jobs; right?

A: Yeah. Each job we-- if it was a ways away, they'd tell us if you- if you want, you can meet up with a foreman and- at so-and-so location or so-and-so location to go to the jobs.

Q: Was- was this something that you got in writing? I mean, what- what do you mean when you said they told you?

A: They- they said if you- if you want to ride with a foreman to the jobs, they'll meet you up- or find- you call them and find out a place you wanted to meet.

Q: Who told you that?

A: Jim Rice or Paul Shovlin probably.

Q: Over the telephone, in e-mail, in person?

A: Probably on the phone, because that's where we'd find out where we were going, if we were going to the same site.

Q: Gotcha. And he was the one that put-- assigned you to a particular job you said; right?

A: Right.

Q: Is that right? So you would get your assignment via telephone right?

A: Yes. Most of the time.

Q: From- always from Jim Rice?

A: Sometimes Paul Shovlin would do it if Jim wasn't in town or...

Q: Okay. And that's when they would- you said that's when they would tell you, oh, you can ride with a foreman if you can find one?

A: If-- yes. They'd say, you're going to be on the site with so-and-so. If you-- if you guys wants [sic] to meet up, give him a call and ask him where you want to meet up.

Q: Okay. And during those telephone conversations, would they also let you know if you were going to get paid mileage or not?

A: We generally-- yeah, they'd tell us, depending on where the site is. If it was 50 miles away from the office, we got paid mileage.

Q: Okay. But-- so this job wasn't 50 miles away. It was less than that.

A: I do believe so, yes. I know we didn't get paid mileage, but some jobs we did.

During the July 21, 2014, hearing, Carroll explained why he was riding with Kottak:

Q: I'd like to talk about on October 23rd, 2013, when you were rear ended by a vehicle. You were the passenger, correct?

A: Yes.

Q: And Brian [sic] Kottak was driving?

A: Yes.

Q: And as I understand, you're [sic] arrangement with Brian [sic] was that type would meet somewhere and then ride with him to the job site?

A: Yes.

Q: That's correct.

A: Yes.

Q: Okay. And were you riding with him so that you could save gas money?

A: It was that and we could discuss the job. And he could sit, tell me who he wanted to go do this and that. So when he got there, he could deal with office stuff and I could go out there and kind of relay everything that we were supposed to do to the other guys that were showing up on site later.

Q: Okay. So on your way to work, you would talk about things that were going to happen that day; is that right?

A: Yes.

Q: But the accident happened on your way back from work; is that correct?

A: We talked about it on the way- what we've [sic] got finished, what our plans were for the next day, the next week, if we needed to check prints for dimensions.

Q: Okay. On October 23rd, 2013, do you specifically remember what you talked about on the way back?

A: At first, it was, 'Hey, look, we can actually get off before 7:30 tonight.'

Q: And I'm sure it was probably a good day?

A: Yeah. But, I mean, we were only 5 miles down the road. I mean, we hadn't even left the town that we were in. So I don't- I know he got it- got on his phone to call somebody about something.

...

A: -- but I--

Q: Do you remember if it was a work-related phone call?

A: More than likely, but -

Q: (Interrupting) And if you don't remember, there's no need to guess. Just curious--

A: (Interrupting) Yeah.

Q: -- if you knew.

A: I don't know.

Q: And so you road [sic] with Brian [sic] to work. Was that all the time or just sometimes?

A: Just sometimes. If he had a meeting at the office, I would take my car up there. If I was on a different job, either I'd drive or we'd meet with foreman to go to jobs. It just depended on the job.

Q: So you had the ability to drive yourself to the job if you needed to?

A: Yeah.

Regarding mileage reimbursement, he testified:

Q: Were you-all paid mileage for the travel time to Ghent, Kentucky?

A: No.

Q: Why is that?

A: It's within the 50-mile radius, I think.

ALJ: Okay.

A: Fifty (5), 60 miles, whatever it was.

Q: So it was within 50 miles of East and Westbrook Construction offices?

A: Yes, sir.

Q: All right. Anything over 50 miles, you got reimbursed mileage?

A: Yes, sir.

Q: But you would not be reimbursed for-- or you would not be paid any wages for your travel time?

A: No.

ALJ: Okay.

A: I got paid mileage.

Q: All right. So you go [sic] paid for the minute you arrived at the work site until you left the work site?

A: Yes, sir.

Kottak was deposed on February 9, 2015, and provided the following explanation of his driving arrangements with Carroll:

> Q: And we're going to get to the details of that, but I want to talk about the arrangements that you had with Mr. Carroll in terms of his transportation to and from the job site. Could you just talk about that generally?
>
> A: Well, Roy lived close by me and it was on my way, and I would meet him at a bowling alley on Beulah Church Road and pick him up and drive him, because we were working up in Carrollton- it's about an hour and a half drive- to save him gas money going back and forth.
>
> Q: Okay. How far did you live from the bowling alley?
>
> A: It was on my way.
>
> Q: Okay.
>
> A: So it makes- yeah.
>
> Q: You're not going out of your way to get him?
>
> A: No.
>
> Q: Okay. Did he drive his personal vehicle to the bowling alley--
>
> A: Yes.
>
> Q: --as far as you knew?
>
> A: Yeah.

Q: All right. Roy never drove the company vehicle to the job site from the bowling alley?

A: No.

Q: You did; correct?

A: Correct.

Q: All right. Do you still drive a company vehicle?

A: Yes.

Q: All right. Did-- did Roy ever have to- did he offer to pay you gas money or anything like that?

A: No.

Q: Okay. Was he reimbursed anything ever in terms of gas money?

A: No.

Q: Okay. Were you ever-- are you ever reimbursed anything for gas money?

A: No. I mean, the company pays for the gas.

Q: Okay. They do. How often in a five-day workweek would you drive Mr. Carroll to that job site?

A: Five days.

Q: Okay. So every day.

A: Every day, yes.

Q: Okay. Fair enough. And prior to October 23rd, 2013, how long had that arrangement been in place, roughly?

A: From the time we started the job in Jett, yeah.

Q: Several months or weeks?

A: I'm trying to think.

Q: Yeah, yeah.

A: I can't remember when the job started --

Q: Okay.

A: --but from the day the job started till-

Q: It wasn't just a few days--

A: Correct.

Q: --or something. All right. It had been- it had been going on for a while.

A: Yes.

Q: Okay. All right. Was Mr. Carroll paid when he got to the job site?

A: Yes.

Q: Tell me about how that works in terms of when he gets paid and when he stops getting paid.

A: Right. He would- like we would ride together. And a lot of times I'd have to be there earlier, but he would still ride with me. And I would start his time when everybody else started or when he was to start working.

Q: Okay.

A: And, I mean, if I'd stop by the shop, my time would start then. And then he would start when he-

Q: And a better way of asking that question probably would have been, he's not paid for the time he's riding in the vehicle with you.

A: Correct.

Q: Okay. If you don't take him to the job site, how does he get there?

A: Drives his [sic] self.

Q: He has to drive himself.

A: Yes.

Kottak provided a description of the accident:

Q: Okay. All right. Let's talk a little bit about the accident and what you remember. This was at the tail end of the day; correct?

A: Yes.

Q: All right. Tell me what happened.

A: We were leaving, just like we usually do, driving down 42, I believe is the road. Traffic, because everybody- every piece is- everybody's letting out through there. And we stopped and rear-ended. The next thing we know we got rear-ended.

...

Q: In terms of the day of the accident itself, there was [sic] no stoppages at the office or anything like that?

A: No.

Q: And no paperwork to drop off or any special circumstances that you remember that day?

> A: Like that morning or in the afternoon on the way to the job?
>
> Q: Either one.
>
> A: No. I mean, we did- we did end up stopping on the way back to get another truck.
>
> Q: Right. After the accident-
>
> A: The incident; right?
>
> . . .
>
> Q: We've talked about this job, this particular job. Were there other jobs in the past where you all would ride together?
>
> A: Yes.
>
> Q: Do you remember which jobs they were?
>
> A: You know, no, just anytime it was convenient for both of us. I mean, and other- other foreman would pick him up there too also. I mean, any time somebody was going to where was- yeah, gas was so high back then.

During his February 9, 2015, deposition, Jonathan James Westbrook, president of East & Westbrook, addressed the driving arrangements between Carroll and Kottak:

> Q: Fair enough. Okay. In terms of the arrangement between Mr. Carroll and Bryan-
>
> A: Uh-huh.

Q: --transportation wise to the job site, when did you become aware of that?

A: The specifics today.

Q: Okay.

A: I knew at the time that- of the accident, I was- you know, I'm made aware of any incident safety related by our safety director. And that's when I was told that they were riding together.

Q: Okay.

A: And that doesn't come as a shock to me, because we have employees that ride with our foreman and superintendents out of convenience every now and then because our employees live in different geographic locations and travel to job sites and that sort of thing.

Q: You mentioned the word convenience. For whose convenience would that have- that have been?

A: Well, for the employees, but not- not our foreman or superintendent. They're issued the truck-

Q: Okay.

A: - as part of their responsibilities. But if someone chooses to ride with them, it's for their convenience to save gas, carpool.

Q: Fair enough. Mr. Carroll was not paid until he hit the job site; is that correct?

A: That's correct. That's what our policy is.

> Q: All right. Jonathan, you were just talking about when basically work begins and ends.
>
> A: Uh-huh.
>
> Q: And that's kind of laid out here in the employee handbook. And I'm going to just give you a copy of this here.
>
> A: Okay.
>
> Q: That's something that's given to all your employees?
>
> A: Yes. All employees upon hiring. Also when our employees are interviewed and go through the orientation process, at both points they're told they're responsible for providing their own transportation-
>
> Q: Okay.
>
> A: --to the job sites.

In finding the injury occurred within the course and scope of Carroll's employment, the ALJ concluded as follows:

> The "Going and Coming" rule involves the question of whether or not, and under what conditions, an employee is covered by workmen's compensation when on his way to or from the place where he actually performs the duties connected with his employment. Generally, injuries that occur while an employee is going to or coming 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, and are therefore not

compensable, unless the employee is engaged in some service to the employer. Otherwise, the injury is merely incidental to the employment. *Howard D. Sturgill and Sons v. Fairchild*, 647 S.W.2d 796 (Ky. 1983); *Olsten-Kimberly Quality Care v. Parr*, 965 S.W.2d 156 (Ky. 1998) Stated another way, in the absence of the performance of some employment duties or work-connected activity, the employee is not covered if he is not on the employer's operating premises. *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966)

The Defendant argues that Mr. Carroll was not performing any service for their benefit when he was riding home from work on October 23, 2013. It is their [sic] position he was not performing the carpentry services for which he was employed; he was only paid wages beginning when he arrived at the job site and ending when he left; was neither paid for travel time nor reimbursed for travel expenses for this particular job; and was not engaged in work-related travel at the time of the accident. They further delineate this last factor by distinguishing travel which is for the convenience of the employer as opposed to travel which they argue in this case was for Plaintiff's convenience. *Olsten-Kimberly Quality Care v. Parr*, supra. Finally, they cite specific language by the Court of Appeals in *Brown v. Owsley*, 564 S.W.2d 843 (Ky. App. 1978) to support their position that the travel in the instant case was not for the benefit of East and Westbrook Construction:

> Therefore, we are compelled to hold in the present case that where the appellants

> traveled from home to a central meeting point each morning and then to a fixed place of employment, although it may change from day to day or week to week, and where they worked a fixed schedule from 8:00 a. m. until 4:30 p.m., that injuries or death incurred while in transit from home to work do not come within the purview of the Workmen's Compensation Act and it cannot be said that their injuries and death arose out of or in the course of their employment.

Brown v. Owsley is cited by the Supreme Court in *Olsten-Kimberly Quality Care v. Parr*, supra. In the latter case, however, the Court stated it was also essential to consider whether "travel is a requirement of employment and is implicit in the understanding between the employee and the employer at the time the employment contract was entered into." They held that, in those instances, "injuries which occur going to or coming from a work place will generally be held to be work-related and compensable, except when a distinct departure or deviation on a personal errand is shown." In *Fortney v. Airtran Airways, Inc.,* 319 S.W.3d 325 (Ky. 2010), the Court set out a similarly broader interpretation of "service/benefit to the employer" exception. Rather than focusing on whether the provision of the conveyance was primarily for the benefit of the employer or whether the specific trip was for the benefit of the employer, the Court looked to the overall benefit which the employer received:

> The rule excluding injuries that occur off the employer's premises, during travel between work and home, does not apply if the journey is part of the service for which the worker is employed or otherwise benefits the employer. Factors considered under the exception include not only an employer service or benefit but also whether the injured worker is paid for travel time (*e.g.,* for performing work on the trip, traveling to a remote site, or traveling between job sites) and whether the worker is paid for the expense of travel. Although payment for travel time brings the trip within the course of the employment, the lack of payment does not exclude a trip from the course of employment. In other words, "work-related travel has come to mean travel which is for the convenience of the employer as opposed to travel for the convenience of the employee." Citing *Olsten-Kimberly Quality Care v. Parr*

In this case, the very nature of Plaintiff's employment encompassed traveling to and from remote non-permanent job sites. Travel was necessitated by, and in furtherance of, the Defendant's business interests. It is inconceivable the Defendant would be able to bid on these construction contracts without a workforce they could rely upon to show up at these remote sites every day and on time. The Defendant certainly recognized this to be the case and even provided some

> employees with company vehicles and had a policy to reimburse employees for trips exceeding fifty miles. Notwithstanding that Plaintiff could have driven his own car, and that this particular job did not qualify for reimbursement [footnote omitted], the fact these perks are provided at all shows the Defendant recognizes that employee travel is an integral part of their business. Finally, the fact company vehicles and/or rides to these sites may have been for the convenience of the employees does not prevent a benefit from accruing to the employer. After all, the converse was also true since the Defendant was assured Plaintiff would show up for work and stay there the entire day since he arrived and left with his supervisor. It is clear from the evidence they knew workers would be riding with supervisors and, to some extent encouraged this arrangement.
>
> Based on the foregoing, I conclude Plaintiff's claim for benefits is not excluded by the going and coming rule and that his injury arose out of and in the course of his employment.

East & Westbrook filed a petition for reconsideration requesting additional findings regarding whether the injury occurred within the course and scope of employment. In the March 18, 2016, Order denying the Petition for Reconsideration, the ALJ set forth, in relevant part, the following:

> . . .

> KRS 342.281 limits review in Petitions for Reconsideration by the administrative law judge to "correction of errors patently appearing upon the face of the award, order, or decision." Therefore, the statute has been interpreted as expressing a legislative policy to prohibit the fact-finder from reconsidering the merits of the case. *Beth-Elkhom Corp. v. Nash*, 470 S.W.2d 329 (Ky. 1971) It appears that Defendant is rearguing the merits of the case and requesting relief that is prohibited by the statute. The parties have been sufficiently apprised of the factual basis for determining employee travel was an integral component of the jobs which East and Westbrook Construction contracted to perform at the time of Plaintiff's injury. In addition, it was noted in the Opinion that Mr. Kottak and Mr. Westbrook both testified the Defendant provided vehicles to supervisors and knew workers besides Mr. Carroll carpooled with their supervisors. Finally, the undersigned found it was reasonable to restrict Plaintiff from repetitive bending/stooping, in addition to the fifty pound restriction Defendant cites in their Petition.

The general rule is that injuries sustained by workers when traveling to or from the place where they regularly perform the duties connected with their employment are not deemed to arise out of and in the scope and course of employment, as the hazards ordinarily encountered in such journeys are not incident to the employer's business. Kaycee Coal Company v. Short, 450

S.W.2d 262 (Ky. 1970). As pointed out, however, in Receveur Construction Company/Realm, Inc. v. Rogers, 958 S.W.2d 18 (Ky. 1997) the general rule is subject to several exceptions.

In Receveur, the employer's construction company was located in Louisville and the employee's residence was in Campbellsville. He worked at remote job sites around the region. Shortly before the fatal automobile accident giving rise to the claim, Rogers had been promoted to project superintendent and issued a company vehicle. The truck was equipped with a CB radio that allowed him to communicate with Receveur Central Office during the day. The truck was to be used as a means of transportation both during the course of the work day and between Rogers' home and job site so he would not be required to first go to the central office in Louisville. Rogers was provided a credit card to cover the cost of gasoline for the vehicle. He was not paid for travel time between his home and work, although he was paid for travel time between the central office and remote job sites. On the day of the accident, Rogers had been working a shift with a co-employee at a remote job site in Indiana. The two men returned together in the company truck to the central office in Louisville where they unloaded a truckload of rubbish. The co-

employee then went home in his own vehicle and Rogers left for home in the company truck. The accident occurred while Rogers was in route to his home.

In Receveur, after acknowledging the general rule the Kentucky Supreme Court held injuries resulting from the accident were compensable under the "service to the employer" exception. Id. *citing* Standard Gravure Corporation v. Grabhorn, 702 S.W.2d 49 (Ky. App. 1985); Spurgeon v. Blue Diamond Coal Company, 469 S.W.2d 550 (Ky. 1971); Ratliff v. Epling, 401 S.W.2d 43 (Ky. 1966); Palmer v. Main, 209 Ky. 226, 272 S.W.2d 736 (Ky. 1925). In its reasoning, the Supreme Court did not focus on the particular trip during which the accident occurred. Rather, the Supreme Court looked at the benefit the employer received generally from Rogers' use of the company vehicle. The Supreme Court applied the "service to the employer" test to the particular facts and in finding work-relatedness stated:

> Therefore, based on our interpretation of the applicable case law as summarized above, as well as the facts presented in the case at bar, it appears that there was substantial evidence to support a conclusion that Rogers' use of the company truck was of benefit to the company. The employer's purpose in providing such a vehicle to Rogers was to allow him to better perform the requirements and completion

> of his duties. Included within such objective was the premise that use of the company truck as transportation between Rogers' home and the job site would allow Rogers to begin his actual duties earlier,and to remain productive longer, by avoiding a stop at the company's business office in Louisville.
>
> Thus, although the use of such a conveyance was a convenience for Rogers, it was primarily of benefit to the employer. Hence, as it can be concluded that Rogers was performing a service to the employer at the time of his death, it can be determined that his death was work-related under the service to the employer exception to the going and coming rule.
>
> ...
>
> Therefore, regardless of the fact that the ALJ may have applied an unrecognized theory in reaching his conclusion, since there was substantial evidence that the use of the company vehicle acted as a direct benefit to the employer as being in furtherance of the employer's business, there was substantial evidence to support the conclusion that Rogers' death occurred in and during the course and scope of his employment.

Id. at 21.

The Court of Appeals applied the "benefit to employer" doctrine expressed in Receveur in the case of Bailey Port v. Kern, 187 S.W. 3d 329 (Ky. App. 2006). In Bailey Port, supra, the claimant Kern was supplied a company vehicle. Kern sustained injuries when involved in

a MVA while driving home from work in the company owned vehicle. Kern kept tools in the vehicle and was on call all times of the day and sometimes at night. The court discussed the holding in Receveur in connection with the evidence before it. It found the evidence established that Kern was given the use of the vehicle for the company's benefit and not for himself; therefore, Kern's accident occurred within the scope and course of his employment. The Court found significant the facts Kern stored his tools in the company vehicle and the company allowed him to travel directly to a job site instead of stopping at the place of work to pick up his tools.

The "benefit to the employer" rule as adopted by the Court in Receveur requires a weighing of the facts particular to the specific claim. Thus, the ALJ as fact-finder has the authority to rely on facts he deems most important when engaging in that weighing process.

As Carroll was successful before the ALJ in demonstrating the October 23, 2013, car accident occurred within the scope and course of his employment, the question on appeal is whether some evidence of substance supports the ALJ's ultimate determination. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). Substantial evidence has been defined as evidence of substance and relevant

consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict if the matter were being tried before a jury. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008).

We acknowledge the ALJ could have reached a different result based on the evidence. However, substantial evidence supports the ALJ's ultimate conclusion Carroll's accident occurred within the scope and course of his employment, and this Board will not disturb this conclusion. As noted by the ALJ, the record indicates extensive travel to remote construction sites was an integral part of Carroll's employment with East & Westbrook. The record further indicates Carroll was paid for travel to construction jobs located outside of a 50-mile radius of East and Westbrook's offices regardless of whether he used his own vehicle or carpooled with Kottak or other foremen. Also, Carroll testified he occasionally used a company vehicle in traveling to and from jobs. As cited by the ALJ, these facts implicate Fortney v. Airtran Airways, Inc., 319 S.W.3d 325, 329 (Ky. 2010) in which the Supreme Court of Kentucky stated as follows:

> In most cases involving “a deliberate and substantial payment for the expense of travel” or the provision of a vehicle under the employee's control, the journey during which an injury occurs is viewed as being in the course of employment. The Larson treatise notes that transportation is normally “singled out for special consideration” when it “involves a considerable distance, and therefore qualifies under the rule ... that employment should be deemed to include travel when the travel itself is a substantial part of the service performed.” The fact that an employer uses transportation or transportation expense as an inducement to accept or continue employment is material to supporting compensability, particularly when the journey is sizeable and when the employer pays all or substantially all of the expense. We note that such an inducement benefits the worker who accepts it and places a financial burden on the employer but also that the inducement benefits the employer when its purpose is accomplished. An employer is unlikely to provide such an inducement unless it views the resulting benefit as outweighing the burden.

The fact that the particular job at issue did not qualify for travel reimbursement, as it was inside the 50-mile radius, has little relevance to the fact Carroll's job necessitated considerable travel, East & Westbrook provided travel reimbursement to its employees on a regular basis, and Carroll has used a company vehicle in working at past jobs.

Further bolstering our decision is Carroll's deposition testimony, alluded to by the ALJ in the February 1, 2016, Opinion and Order, demonstrating that one benefit to East & Westbrook stemming from its employees riding with foremen is the assurance its employees show up to work on time. Additionally, Carroll testified that as he and Kottak rode together to and from this particular jobsite, they discussed the job and what needed to be accomplished that day. Once at the jobsite, Carroll relayed the information discussed during the drive to the other employees while Kottak handled office work.

Additionally and importantly, the record contains clear testimony from Kottak indicating that regardless of how early Carroll arrived at this particular jobsite when carpooling with Kottak, Carroll’s time started when the other employees’ time started. In other words, regardless of how early Carroll arrived at the jobsite via carpooling with Kottak, he was paid when he and the other employees actually began their work. In the same vein, Carroll could not leave the jobsite until Kottak left.

Finally, as noted by the ALJ and testified by Carroll, management knew its employees carpooled with its foreman, and the tenor of the record, particularly

Carroll's testimony, supports the ALJ's conclusion carpooling was "encouraged" by East & Westbrook.

Even though evidence supports a finding the carpooling arrangement between Carroll and Kottak provided a benefit to Carroll, substantial evidence also supports the ALJ’s determination the carpooling arrangement provided a benefit to East & Westbrook and the ALJ's ultimate conclusion the October 23, 2013, MVA and Carroll’s injury occurred within the scope and course of Carroll's employment with East & Westbrook and is compensable. The February 1, 2016, Opinion and Order and the March 18, 2016, Order on the Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON SHERRI KELLER
300 E MAIN ST STE 400
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON WAYNE C DAUB
600 W MAIN ST STE 300
LOUISVILLE KY 40202

CHIEF ADMINISTRATIVE LAW JUDGE:

HON ROBERT L SWISHER
657 CHAMBERLIN AVE
FRANKFORT KY 40601