

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 14, 2015

CLAIM NO. 201260799

FIRST CLASS SERVICES, INC.

PETITIONER/
CROSS-RESPONDENT

VS.

**APPEAL FROM HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE**

GURAL W. HENSLEY
and
HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE

RESPONDENT/
CROSS-PETITIONER

RESPONDENT

**OPINION
VACATING & REMANDING
AND ORDER**

* * * * *

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

ALVEY, Chairman. First Class Services, Inc. ("First Class") appeals from the Opinion and Order rendered December 23, 2013, the February 11, 2014 order denying its petition for reconsideration, and the decision rendered April 27, 2015 by Hon. Otto Daniel Wolff, IV, Administrative Law Judge

("ALJ") finding Gural W. Hensley ("Hensley") sustained multiple injuries in a motor vehicle accident ("MVA") in the course of his employment with First Class. The ALJ awarded permanent total disability ("PTD") benefits and medical benefits. Hensley filed a cross-appeal of the April 27, 2015 decision.

On appeal, First Class argues the ALJ erred in finding Hensley's injuries compensable, arguing the departure to attend to a personal illness was not temporary, but was substantial. First Class also argues Hensley's driving the truck to his home without a tanker or trailer was a prohibited deviation from its policy, which bars the claim. On cross-appeal, Hensley argues the question regarding whether he deviated from work upon his return trip home is a question of fact to be determined by the ALJ. Likewise, he argues whether the attempt to return home was a prohibited deviation from employment is a factual determination reserved for the ALJ. Hensley argues because he did not commute to and from a regular place of employment, there can be no application of the "going and coming" rule. Hensley next argues the claim is compensable not only pursuant to the "personal comfort or convenience" exception, but also pursuant to the "service to the employer" and "positional risk" exceptions to the "going

and coming" rule. Because we determine the ALJ erred in relying upon the personal comfort doctrine, we vacate and remand for additional determinations as set forth below.

Hensley filed a Form 101 on February 18, 2013 alleging injuries to his back, neck, head, ribs, heart, lung and arm in a MVA which occurred on November 15, 2012 while driving for First Class as an over-the-road truck driver. Hensley drove a truck for First Class from 1998 until the November 15, 2012 accident. Medical records filed with the claim from the Southern Indiana Rehabilitation Hospital outline Hensley's injuries consisted of a traumatic brain injury, L2 inferior articular fracture, left rib fracture at 11 and 12, right pulmonary contusion, nasal septum fracture-nonoperative, respiratory failure s/p tracheotomy tube, dysphasia, congestive heart failure, cardiac contusion, and left ventricular thrombus, s/p pneumonia, influenza A, and left upper extremity weakness due to diffuse axonal injury versus brachial plexopathy.

Hensley testified by deposition on June 5, 2013 and at the hearings held October 23, 2013 and February 25, 2015. Prior to working for First Class, Hensley worked at a saw mill, drove a dump truck at a coal mine, and drove a dump truck hauling rock. Hensley drove a truck for First Class from 1998 until the November 15, 2012 accident. He

generally hauled product from Frankfort, Kentucky to Ada, Oklahoma. Occasionally he hauled loads out of Lawrence, Kansas or Chicago. During his employment with First Class he kept one of their trucks at his home at all times except when he was driving, or when he took it to the terminal at Lewisport, Kentucky for service. He stated he called the dispatcher to receive assignments, and left on assignment from his home. When he was finished he returned home with the truck. He stated sometimes he brought a trailer home with him, and sometimes he did not. He stated keeping a truck at home was to First Class' benefit. He lived approximately an hour from Lewisport and close to the interstate. If he went to Lewisport, he was going away from the route. By keeping the truck at home he saved the company fuel cost, wear and tear on the vehicle, and maintenance costs.

Hensley has no recollection or memory of the day of the accident. He was taking no prescription medication prior to the accident. He is no longer employed by First Class, and has not driven a truck since the November 15, 2012 accident. He continues to treat for multiple health issues stemming from the injuries he sustained in the accident. Since the accident, he has difficulty understanding instructions, gets confused, and believes he

would have difficulty performing a full time job due to his difficulty with mental processing. Hensley's wife, Barbara Hensley testified at the February 25, 2015 hearing regarding his treatment and condition, but since that is not at issue, neither her testimony nor the medical evidence will be summarized.

Randy Cutrell ("Cutrell"), vice-president for First Class testified by deposition on August 5, 2013, and at the hearing held October 23, 2013. Prior to his employment with First Class, Cutrell was a trooper/detective with the Indiana State Police for twenty-seven years. He was initially hired as the safety director for the company and was subsequently promoted to vice-president. His duties include overseeing drivers, shops, dispatch operations and office personnel. He stated First Class is a trucking company which hauls loads consisting of Hazmat loads, dry bulk and liquids. After delivering plastic pellets, the tanks are washed to avoid contamination between loads.

Cutrell stated it is impermissible for employees to take trucks home unless under dispatch, although this was not a written policy. He stated on the date of the accident, Hensley had not been given permission to drive the truck home, and it provided no benefit to the company for him to do so. He stated Hensley was no longer under

dispatch, and he had no load. He stated Hensley was only permitted to take a truck home when he was considered en route. He stated Hensley had been verbally reprimanded previously for taking his truck home while not under dispatch, however there is no written record of any reprimands or discipline. He stated typically Hensley drove to the terminal in Lewisport to pick up a truck and begin his route. He stated Hensley did not drive the same route every week. Occasionally he would be held on dispatch in order to take the truck home.

A day or two before the accident, Hensley advised Cutrell he was getting sick. On the morning of the accident, Cutrell stated he called Hensley to advise him to leave the truck at the washing facility in Louisville and have a family member pick him up, but he was already on the way home in a First Class truck with no trailer. He stated Hensley was out of route at the time of the injury. Subsequent to the accident, Cutrell prepared a first report of injury and reported the injury to the workers' compensation insurer.

James Craig ("Craig") is the customer service representative for First Class. He had dispatched Hensley prior to the accident. On November 14, 2012, he advised Hensley to proceed to Louisville to have his trailer washed,

and then proceed to Frankfort, Kentucky to pick up a load. Later that evening Jeff Belcher ("Belcher") advised Craig Hensley was not feeling well. Craig then called Matt Diliha, another driver, to pick up Hensley's trailer in Louisville and proceed to Frankfort. On the morning of November 15, 2012, another driver, Dennis Dunham, called to advise Hensley was sick. Craig advised Cutrell to call Hensley. He stated drivers may take a truck home if it is en route, which includes pulling a trailer. Craig admitted by keeping the truck at home, Hensley saved First Class fuel costs, wear and tear on the vehicles, and conserved driving hours.

Belcher, another truck driver for First Class, testified by deposition on August 15, 2013. Belcher stopped at a truck stop near Indianapolis on November 14, 2012. Hensley was there and appeared to be ill. Belcher was also headed to the truck wash in Louisville, and offered to follow Hensley there. When they got to Louisville, he disconnected Hensley's trailer. After his trailer was washed, Belcher departed for Frankfort and called Craig to report on Hensley's condition. Belcher testified he only takes his truck home when he is en route. He testified it saves the company money if the truck is taken home.

Jackie Moon ("Moon"), another truck driver with First Class, testified by deposition on August 15, 2013. Moon spoke to Hensley multiple times prior to the date of the accident. He was aware of Hensley's illness. Moon agreed it was beneficial for drivers to start from home rather than Lewisport. He admitted this saved on mileage, fuel costs, less driving time, and less wear and tear on the vehicles.

A benefit review conference ("BRC") was held on October 23, 2013. The BRC order and memorandum reflects the parties agreed to bifurcate the issue for a determination regarding the going and coming defense. A hearing was held the same date subsequent to the BRC. On January 6, 2013, the ALJ rendered an Opinion and Order.

In the decision, the ALJ noted Hensley drove a truck for a company located in Lewisport, Kentucky which provided hauling services to multiple states. He noted Hensley began working for First Class in 1998 and sustained multiple injuries in a MVA on November 15, 2012. The ALJ noted Hensley testified he kept a First Class truck at his home during his employment there, unless he was driving on a route. The ALJ noted Hensley testified this was beneficial for both Hensley and First Class in that it reduced travel/drive time, wear and tear on the vehicle, maintenance

costs and fuel costs. The ALJ also noted First Class disputed this contention. The ALJ noted Hensley left his home in a First Class truck on November 13, 2012. He subsequently developed flu-like symptoms and was unable to complete his run. He left Louisville and headed home to recuperate from his illness.

The ALJ determined First Class was responsible for payment of benefits to Hensley as follows:

Chapter 342 requires a compensable injury to arise out of and in the course of the worker's employment. KRS 342.0011 (1).

The "going and coming" rule generally operates to exclude from workers' compensation coverage, absent exceptional circumstances, injuries sustained by an employee while commuting to and from his regular place of work. The rationale supporting the "going and coming" rule is that the general perils encountered during travel to and from work are no different from those encountered by the general driving public, and, thus, are neither occupational nor industrial hazards for which the employer is liable. Fortney v. Airtrain [sic] Airways, Inc., 319 S.W.3d 325 (Ky., 2010).

A determination whether a particular injury is covered under the Act or excluded from coverage pursuant to the "going and coming" rule, must be made upon the "quantum of aggregate facts rather than the existence or non-existence of any particular fact." Jackson v. Cowden Manufacturing Co., 578 S.W.2d 259 (Ky., 1978).

Both Plaintiff and Defendant have spent substantial time addressing the question of whether Defendant's drivers were allowed to take trucks home, and if so, under what conditions were they allowed to do so. Both sides apparently believe this is a significant factor in determining whether the "going and coming" rule operates in this particular claim to defeat Plaintiff's claim. This would usually be [sic] significant factor in determining a "going and coming" issue. This point is not particularly significant to the ultimate determination now being addressed.

Though there are several factors suggesting application of the rule should not be considered - the presences of "exceptional circumstance" surrounding the situation, the rationale for the rule is not present, etc. - that issue will not be addressed or determined at this time. It will be assumed the rule is applicable herein. Having assumed the rule is applicable, it is next appropriate to ascertain whether Plaintiff's situation falls within one or more of the exceptions to the rule. The recognized "doctrine of comfort and convenience" operates to remove Plaintiff from being subject to the "going and coming" rule.

Jackie Moon, another of Defendant's drivers, testified he spoke with Plaintiff, via cell phone, several times on November 14 and 15, 2012. When Moon spoke to Plaintiff on the 15th, he told Plaintiff to call his wife or son or someone with Defendant, to come pick him up, because he didn't need to be driving. (Depo., P. 8).

"In Kentucky, application of the comfort and convenience doctrine has been based

upon the belief that where an injury was caused by a danger inherent in the workplace or resulted from a risk peculiar to or increased by the employment, the fact that the injury occurred because the worker was ministering to his own comfort and convenience while at work should not render the resulting disability noncompensable. Where the worker has proved that a nexus existed between some danger or risk associated with the employment and the injury which has caused his occupational disability compensation benefits have been allowed." Meredith v Jefferson County Property Valuation Administrator, 19 S.W.3d 106 (Ky., 2000).

"An exception to the general rule precluding workers compensation for acts performed by employees solely for their own benefit has been carved out for acts of personal convenience or comfort. This exception, sometimes referred to as the "personal comfort" or "personal convenience" doctrine was developed to cover the situation where an employee is injured while taking a brief pause from his or her labor to minister to the various necessities of life. Although technically the employee is performing no service for his or her employer in the sense that his or her actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefit in the form of better work from a happy and rested worker, and on the theory that such a minor deviation does not take the employee out of his or her employment." US Bank Home Mortgage v. Schrecker, (2012 WL 4069572 (Ky. App.)) (Only the Westlaw citation currently available).

"Ordinarily, the employee must be engaged in the work of the employer in order to recover for workers' compensation. Were the employee engaged in some type of personal mission, any injury suffered during that personal mission is usually assumed to be outside of workers' compensation. If, however, the employee is merely administrating to some personal needs or comfort and only away from work for a brief period of time, any injury during that "personal comfort" may be covered by workers' compensation." KYPRAC - WC (9.2) (October 2013).

"Examples of personal-comfort activities that are reasonably incident to the employment, and thus would be compensable under workers' compensation law, include seeking protection from heat or cold or other physical discomforts, and sleeping or resting." 82 Am. Jur. 2d Workers' Compensation Sec. 240 (November 2013).

Included in the above quoted list, from 82 Am. Jur. 2d, the personal comfort activity of "other physical discomfort" relies specifically on the Kentucky case of Meredith v. Jefferson County Property Valuation Administrator, Supra.

In the case sub judice Plaintiff is entitled to rely on the "personal comfort or convenience" doctrine to the "going and coming" rule.

This determination is based upon the following facts:

1. Being severely ill is a recognized reality of life.
2. A danger inherent in the business of hauling cargo to locations around the states, via the services of over-the-

road drivers of trailer-trucks, is that a driver may become severely ill while on an interstate run and cannot safely proceed to drive. This risk is peculiar to such a business, employer and employee.

3. Another risk associated with the over-the-road hauling business, is that, for whatever reason, a driver could find himself stuck in a relatively far away location.

4. The risk of a driver being so ill he cannot proceed on his dispatched interstate run or is stuck in a relative far away spot, should merit the employer having a standing protocol addressing such risks.

5. Plaintiff was at Derby City because he obeyed Defendant's dispatch.

6. Defendant was aware from several sources over several hours Plaintiff was severely ill and there was expressed concern for Plaintiff's capacity to drive.

7. Defendant was aware of the risk of Plaintiff continuing to drive to Frankfort and pick up a load to go to Oklahoma, because it made arrangements for Plaintiff's trailer to be disconnected from his truck at Derby City, and, with a new driver, proceed on Plaintiff's assigned route. Obviously, Defendant was sensitive to the risks of a late delivery, but not sensitive to the immediate needs of its employee.

8. Before arriving at Derby City and while at Derby City, Plaintiff appeared so ill several drivers contacted Defendant with their concerns.

9. While at Derby City Plaintiff was in great physical discomfort due to his severe illness.

10. Plaintiff departed Derby City and started to drive home because he was in great discomfort.

11. Plaintiff's MVA occurred as Plaintiff was in the course of ministering to his substantial discomfort.

12. A recognized personal-comfort activity includes a worker ministering to his personal discomforts.

It has been proven that a nexus existed between a danger or risk associated with Defendant's business, Plaintiff's employment with Defendant's business, and Plaintiff's injury which result in his occupational disability.

It is determined that when Plaintiff was driving from Derby City and experienced his MVA, he was ministering to his personal needs and discomfort which arose while working for Defendant and therefore his resulting occupational disability is compensable.

It is anticipated Defendant may raise the question of whether the time it took Plaintiff to go from Derby City to his home (unknown) did not constitute a "brief period of time," but the time it took Plaintiff to drive from Derby City is compared to the around the clock, solid week or more, he was weekly dispatched to do for Defendant, it is determined his journey from Derby City constituted a "brief period of time." Regardless of the time period, it cannot be denied all that time was spent by Plaintiff in his effort to attain relief from his severe illness.

It is also noteworthy, Defendant's VP Cutrell, testified during Plaintiff's final Hearing, that before calling Plaintiff on the 15th, "I was informed that he (Plaintiff) was ill and they were going to assign another driver to follow so that Mr. Hensley could either stay there in the truck, and rest or come home." (Emphasis added) (FH p.37).

Obviously Defendant's VP was told by someone within the operation of Defendant's business (probably Dispatcher Craig) that Mr. Hensley could drive home from Derby City. It is clear from the available proof, that when Plaintiff was driving from he was ministering to a personal need, seeking relief and comfort from his serious illness, and, therefore, he is within the "personal comfort and convenience" exception to the rule.
(Emphasis added).

In its petition for reconsideration, First Class argued the ALJ erred in finding it liable pursuant to the personal comfort and convenience doctrine. Citing to Meredith v. Jefferson County Property Valuation Administrator, 19 S.W.3d 106, 108 (Ky. 2000), First Class argued this is only applicable if the departure from employment is not so great as to create an abandonment of employment. It argued Hensley was out of route, and therefore was no longer at work at the time of his accident. The petition for reconsideration was overruled by order entered February 11, 2014.

First Class then appealed the ALJ's decision to this Board. The appeal was dismissed by an opinion rendered by this Board on March 28, 2014 as being taken from a decision which was not final and appealable.

After the appeal was dismissed, the ALJ allowed the parties to introduce evidence pertaining to the extent and duration of Hensley's injuries. Again, because the medical evidence is not pertinent to the issues on appeal it will not be further discussed.

A second BRC was held on February 25, 2015. The issues preserved were benefits per KRS 342.730; work-relatedness/causation; unpaid medical expenses; injury as defined by the Act; coverage under the Act; and whether Hensley retains the capacity to return to the type of work he performed on the date of injury. A hearing was held subsequent to the BRC.

The ALJ rendered a decision on April 27, 2015. After performing an analysis pursuant to Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky., 2000), the ALJ awarded Hensley PTD and medical benefits.

As the claimant in a workers' compensation proceeding, Hensley bore the burden of proving each of the essential elements of his cause of action. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App.

1979). Because Hensley was successful in his burden, the question on appeal is whether substantial evidence existed in the record supporting the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value

to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Here the ALJ determined Hensley was still on the job at the time of his accident due to the personal comfort exception. However, this doctrine is not applicable to the case *sub judice*. Unlike the situation in Meredith, supra, Hensley did not temporarily deviate from this job to attend to a personal need, he completely curtailed his work activities and headed home. That said, the ALJ failed to make a determination of whether Hensley kept a First Class truck at his home during the duration of his employment there except when he took it in for maintenance, or was on his route. Contrary to his statement in the December 2013 decision, it is imperative for the ALJ to make a determination of whether Hensley kept a First Class truck at his home from where he began and ended his routes. Once this determination is made, the ALJ can then determine whether the traveling employee and/or service to the employer exceptions to the going and coming rule are applicable.

Hensley testified he began his work week after being dispatched from his home, where he kept his truck. Hensley testified he had driven for First Class for fourteen years at the time of the accident and always kept the truck

at this home except when he was on a route or having the truck serviced. He testified he was dispatched from his home to begin his route, and returned to his home when he completed his assignment. In this instance, he was unable to complete the assignment due to his illness, but there is no evidence he would not resume this arrangement when healed. All of the testimony presented, except Cutrell's, demonstrates this arrangement was beneficial to both Hensley (reduced driving time) and First Class (reduced wear and tear, maintenance and fuel costs). If so, clearly this provided some benefit to First Class.

The "going and coming" rule was succinctly stated by the Supreme Court in Receveur Construction, Co. v. Rogers, 958 S.W.2d 18, 20 (Ky. 1997), as follows:

The general rule is 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 the employment as the hazards ordinarily encountered in such journeys are not incident to the employer's business.

See also Haney v. Butler, 990 S.W.2d 611 (Ky. 1999); Olsten-Kimberly Quality Care v. Parr, 965 S.W.2d 155, 157 (Ky. 1998); Baskin v. Community Towel Service, 466 S.W.2d 456 (Ky. 1971); Kaycee Coal Co. v. Short, 450 S.W.2d 262

(Ky. 1970). The "going and coming" rule generally applies to travel to and from a fixed-situs or regular place of work where an employee's substantial employment duties begin and end. 82 Am.Jur.2d Workers' Compensation § 270 (2003); Larson's Workmen's Compensation § 13.01[1]. One rationale of the "going and coming" rule is that going to and coming from work is the product of the employee's own decision on where to live, which is a matter ordinarily of no interest to the employer. Collins v. Kelley, No. 2002-CA-002472-MR, 2004 WL 1231633 (Ky. App. 2004).

Several exceptions to the "going and coming" rule have been recognized, one of which is the traveling employee doctrine. That doctrine provides:

When 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, then 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.

William S. Haynes, Kentucky Jurisprudence, Workers' Compensation, § 10-3 (revised 1990). Professor Larson elaborates that "[e]mployees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment

continuously during the trip, except when a distinct departure on a personal errand is shown." Larson's Workmen's Compensation, § 25.01.

The traveling employee doctrine is well-established in Kentucky jurisprudence. In Black v. Tichenor, 396 S.W.2d 794, 796-97 (Ky. 1965), the Supreme Court held as follows:

It is quite a different thing to go to and from a work site away from the regular place of employment, than it is to go to and from one's home to one's usual place of employment; it is the latter which generally comes within the so-called 'going and coming rule' absolving employers from Workmen's Compensation liability. The former comes within the principle stated in Larson, Workmen's Compensation Law, Vol. 1, Sec. 25.00: 'Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.' Turner Day & Woolworth Handle Company v. Pennington, 250 Ky. 433, 63 S.W.2d 490 [(1933)]; Standard Oil Company v. Witt, 283 Ky. 327, 141 S.W.2d 271 [(1940)].

Although traffic perils are ones to which all travelers are exposed, the particular exposure of Tichenor in the case at bar was caused by the requirements of his employment and was

implicit in the understanding his employer had with him at the time he was hired. Palmer v. Main, 209 Ky. 226, 272 S.W. 736 [(1925)]; Hinkle v. Allen Codell Company, 298 Ky. 102, 182 S.W.2d 20 [(1944)]. In the recent case of Corken v. Corken Steel Products, Inc. (1964), Ky., 385 S.W.2d 949, where a traveling salesman was killed on a public street by a demented stranger, we approved an award of compensation, and said:

We accept the view that causal connection is sufficient if the exposure results from the employment. Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed.

Thus, the traveling employee exception to the "going and coming" rule is grounded in the "positional risk" doctrine, articulated by the Supreme Court Corken v. Corken Steel Products, Inc., 385 S.W.2d 949 (Ky. 1964).

We also note the "service to the employer" exception to the going and coming rule as set forth in Receveur, supra, and Bailey Port v. Kern, 187 S.W.3d 329 (Ky. App. 2006). In Receveur, the employer's construction company was located in Louisville and the employee's residence was in Campbellsville. The employee worked at remote job sites around the region. Shortly before the fatal MVA underlying the claim, Rogers had been promoted to

project superintendent and was issued a company vehicle. The truck was equipped with a CB radio which 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 Roger's 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 fuel for the vehicle. He was not paid for travel time between his home and work though he was paid for travel time between the central office and remote job sites. On the day of the accident, Rogers had been working at a remote job site in Indiana. He returned in the company truck to the central office in Louisville where he unloaded a truckload of rubbish. Rogers then left for home in the company truck when the accident occurred.

The Kentucky Supreme Court acknowledged generally injuries incurred while traveling to and from work are not deemed to arise out of and in the course of the employment. Receveur, 958 S.W.2d at 20. However, the Court held the accident to be 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); and

Palmer v. Main, 209 Ky. 226, 272 S.W. 2d 736 (Ky. 1925)).

The Court in its reasoning did not focus on the particular trip during which the accident occurred, but rather the benefit the employer received generally from Rogers' use of the company vehicle. The Court applied "some benefit" 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.

Id. at 21

The Kentucky Supreme Court acknowledged the majority of jurisdictions have held injury or death occurring while an employee is commuting to work in a company vehicle is compensable as a work-related activity. However, the Court refused to go that far; instead it applied the "some benefit" test. The Court further noted the claim contained no specific allegation of substantial deviation from the course and scope of employment.

In view of the foregoing, we need not . . . reach the question of whether we adopt the theories that an employer's deliberate and substantial payment for the expense of travel, the employer's issuance of a company vehicle, or the employer's furnishing of transportation in a conveyance, makes the journey held to be in the course of employment. [citation omitted]. **Nor do we find that the evidence compelled the conclusion that there was a substantial deviation from the course and scope of the employment, and there is no such specific allegation herein.**

Id. at 21. (emphasis added)

The Kentucky Court of Appeals also applied the "some benefit" doctrine expressed in Receveur in the case of Kern, supra. In Kern, the claimant 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 which it found established Kern was given the use of the vehicle for the company's benefit and not as a requisite for himself. It found significant the fact 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.

In Fortney v. Airtran Airways, Inc., 319 S.W.3d 325, 329 (Ky. 2010), the Kentucky Supreme Court held the rule excluding injuries occurring off the employer's premises, during travel between work and home, does not apply if the travel is part of the service for which the worker is employed, or otherwise benefits the employer. Fortney, a pilot for the employer, resided in Lexington, Kentucky while his work was based in Atlanta, Georgia. He flew between Lexington and Atlanta, and was not reimbursed for his commuting-related expenses. However, the employer provided free or reduced fare travel to its employees and their families. Fortney was killed when the plane in which he was a passenger crashed on takeoff in Lexington in route to Atlanta. Ultimately, the Court remanded the claim to the ALJ since he failed to consider whether the free or reduced fare arrangement induced the claimant to accept or continue

employment with Airtran. Id. at 330. There was no allegation of substantial deviation on Fortney's part.

More recently, the Kentucky Supreme Court held in Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456, 463-464 (Ky. 2012) as follows:

Kentucky applies the traveling employee doctrine in instances where a worker's employment requires travel. Grounded in the position risk doctrine, the traveling employee doctrine considers an injury that occurs while employee is in travel status to be work-related unless the worker was engaged in a significant departure from the purpose of the trip. The ALJ did not err by concluding that the traveling employee and position risk doctrines permitted compensation in this case.

The claimant's accident did not occur while he was working for Eaton or Paramount but while he was traveling from Saratoga back to Lexington. As found by the ALJ, the parties contemplated that he would work at the sales and return to his duties at the farm when the sales ended. The accident in which he was injured occurred during the "necessary and inevitable" act of completing the journey he undertook for Gaines Gentry. In other words, travel necessitated by the claimant's employer placed him in what turned out to be a place of danger and he was injured as a consequence.

If the ALJ determines Hensley kept a First Class truck at his home from where he was dispatched, began and ended his routes, clearly he was a traveling employee since

the entirety of his employment consisted of loading and delivering product on behalf of First Class. If he kept the truck at this home when he was not on a route, this provided a benefit to his employer in the form of reduced wear and tear, maintenance and fuel costs. A mere deviation from his usual employment due to an illness would not negate the fact Hensley was still working until he returned home. Again, there is no evidence Hensley would not have resumed his employment with First Class after recuperating from his illness. On remand, the ALJ must make a determination of whether Hensley kept the truck at his home from where he began and ended his routes. If so, he must then determine whether the traveling employee or service to the employer exceptions, or both, are applicable.

Hensley filed a motion for sanctions pursuant to 803 KAR 25:010§21(11) stating First Class Services' reply was eight (8) pages in length. It is noted Hensley's reply brief is eight (8) pages in length. Therefore, **IT IS HEREBY ORDERED AND ADJUDGED** the motion for sanctions is **DENIED**.

First Class has requested oral arguments be held. Having reviewed the record, we conclude oral arguments are unnecessary. Consequently, **IT IS HEREBY ORDERED AND ADJUDGED** the request for oral arguments is **DENIED**.

Therefore, the December 23, 2013 and April 27, 2015 opinions rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, along with the February 11, 2014 order denying the petition for reconsideration filed by First Class are hereby **VACATED**, and the claim is **REMANDED** for additional determinations as outlined above.

ALL CONCUR.

MICHAEL W. ALVEY, CHAIRMAN
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