Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 19, 2016

CLAIM NO. 201260799

GURAL W. HENSLEY PETITIONER

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

FIRST CLASS SERVICES INC AND
HON. OTTO DANIEL WOLFF IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AND

FIRST CLASS SERVICES INC PETITIONER

VS

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

OPINION
AFFIRMING IN PART
VACATING IN PART
AND REMANDING
* * * * * *

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

RECHTER, Member. Gural W. Hensley ("Hensley") and First Class Services, Inc. ("First Class") appeal from the December 11, 2015 Remand Opinion and Order and the February 16, 2016 Order on Petition for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ") finding Hensley's injuries compensable because he was providing a service to the employer at the time of a motor vehicle accident ("MVA"). On appeal, Hensley argues the ALJ erred in finding the traveling employee exception to the going and coming rule did not apply to this case. First Class argues application of the service to the employer exception to the going and coming rule was error as a matter of law. For the reasons set forth herein, we affirm in part, vacate in part and remand.

Hensley testified by deposition on June 5, 2013, and at hearings held October 23, 2013 and February 25, 2015. He sustained multiple injuries in an MVA on November 15, 2012 while employed by First Class as an over-the-road truck driver. Hensley kept his truck at home at all times except when he was driving, or when he took it to the terminal at Lewisport, Kentucky for service. He called the dispatcher from his home to receive assignments, and left

on his routes from his home. When his route was finished, he returned home with the truck. He generally hauled plastic from Frankfort, Kentucky to Ada, Oklahoma. Sometimes he brought a trailer home with him, and sometimes he did not.

In discussing why he kept his truck at home, Hensley explained his home is located near the interstate, and the Lewisport facility was approximately one hour away and off of his route. He stated keeping a truck at home provided a benefit to First Class by reducing fuel cost, wear and tear on the vehicle, and maintenance costs. This testimony was corroborated by James Craig, Jeff Belcher, and Jackie Moon, all employees of First Class.

The day before the MVA, Hensley became ill while returning to Kentucky from a delivery in northern Illinois. He told Randy Cutrell, Vice President of First Class, that he was not feeling well. Hensley took his truck to Derby City Tank Wash in Louisville, where he was to have the tank cleaned then proceed to Frankfort to pick up a load. On the day of the accident, it was determined Hensley should not complete his dispatch and another driver was sent to the tank wash to pick up Hensley's trailer to take it to Frankfort for a load to finish the dispatch. Hensley was

on his way home from the tank wash in his truck without his trailer, when his truck left the road and crashed into trees.

Cutrell testified employees were not permitted to take trucks home unless under dispatch, although this was not a written policy. On the date of the accident, Hensley did not have permission to drive the truck home, and it provided no benefit to the company for him to do so. Cutrell stated Hensley was no longer under dispatch, and he had no load. He also indicated Hensley was only permitted to take a truck home when he was considered on a route. In fact, according to Cutrell, Hensley had been verbally reprimanded previously for taking his truck home while not under dispatch, however there is no written reprimand or discipline documenting this incident. On the morning of the accident, Cutrell stated he directed Hensley to leave the truck at the washing facility in Louisville and have a family member pick him up. However, when he reached Hensley by telephone with these directions, he was already on the way home in the truck with no trailer. He stated Hensley was out of route at the time of the injury.

In his initial December 2013 decision, the ALJ determined Hensley was still on the job at the time of his

accident due to the personal comfort exception. In our prior decision rendered August 14, 2015, we determined the personal comfort exception is not applicable to the case *sub judice*. We explained as follows:

> . . . . 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.

We further directed the ALJ as follows:

> 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.

On remand, the ALJ specifically determined Hensley kept his truck at home, and commenced and concluded his routes from home, which provided a benefit to the employer. The ALJ then considered the traveling employee exception, and noted the Board had rejected application of the personal comfort exception. He stated:

> The Board having said what it said, it would seem fruitless to now determine [Hensley], at the time of his MVA, was not on a distinct departure from his work route due to a personal matter; consequently, it is determined [Hensely] does not qualify for the "traveling employee" exception to the "going and coming" rule.

Both parties filed petitions for reconsideration. First Class argued Hensley was on a purely personal mission at the time of the accident. Hensley argued he was a traveling employee at the time of the accident, and that

returning home, even due to illness, constituted a work activity.

In his February 16, 2016 Order on Petition for Reconsideration, the ALJ held that Hensley's presence at the scene of the accident was related to his employment with First Class; he would not have otherwise been at that specific location. The ALJ further noted Hensley was traveling from Derby City, where First Class had directed him to go, to his home. Because Hensley kept his truck at home and began and ended his routes at his home, the ALJ concluded he would be considered a traveling employee.

However, the ALJ acknowledged the traveling employee rule does not apply when the employee has engaged in a significant departure from the purpose of the trip. He determined Hensley was not driving in a customary phase of his work assignment and had completely curtailed his work activities. The ALJ determined Hensley was engaged in a significant departure from the purpose of the trip at the time of the MVA and, therefore, fell within the exception to the traveling employee exception to the going and coming rule.

On appeal, First Class argues the application of the service to the employer exception was in error. It

reasons Hensley could not be providing a service to the employer because he did not have a trailer at the time of the MVA. It further contends he was attending to his illness, a personal consideration, and had completely curtailed his work activities.

As noted by the ALJ, in making a determination of whether there is a benefit to the employer, the focus is not on the particular trip during which the accident occurred, but rather the benefit the employer received generally from the employee's use of the company vehicle. *See* Receveur Construction, Co. v. Rogers, 958 S.W.2d 18 (Ky. 1997). The record contains ample evidence that First Class received a benefit from the practice of drivers taking their trucks home with them. Hensley, Craig, Belcher, and Moon all testified the practice reduced mileage, fuel and maintenance costs, wear and tear on vehicles, and allowed the drivers to spend more time on the road. Although Hensley did not have a trailer with him at the time of the accident, he testified there were times he took his truck home without a trailer. Craig testified Hensley could meet a driver to pick up a trailer or one could be brought to him. Because the determination is supported by substantial evidence, we affirm application of

the service to the employer exception. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Hensley argues the ALJ's failure to apply the traveling employee exception is erroneous as a matter of law. He argues his return trip home due to illness is a mere deviation from his usual employment, therefore bringing the MVA within the traveling employee exception to the going and coming rule. Because the ALJ determined Hensley kept the truck at home and began and ended his trips at home, he was engaged in work activity until he arrived home, even if he was travelling home early due to illness. Stated otherwise, the accident occurred within the necessary and inevitable act of coming home from a trip he was making for First Class. Furthermore, Hensley contends becoming ill while on the road is an inherent risk or danger of the employment, and such hazards of the journey are properly regarded as hazards of employment covered under the traveling employee exception.

We find it necessary to reverse the ALJ's finding regarding the traveling employee exception. The holding in Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456 (Ky. 2012) is directly on point concerning

return trips by traveling employees. There, the Kentucky Supreme Court held 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.

Here, it is uncontroverted Hensley's work placed him in the location he was in at the time he became ill. There is no indication Hensley engaged in any non-work-related activity with the truck while on the road. There is no indication he deviated from the route to his home. Most importantly, the ALJ specifically found Hensley was on

his way home. As was the case in Mandujano, the return trip was a “necessary and inevitable” act of completing the journey undertaken for the employer. As we noted in our prior decision, a mere deviation from his usual employment due to an illness would not negate the fact Hensley was still working until he returned home. Because the ALJ determined Hensley kept his truck at his home, began and ended his routes at his home, and was merely in the process of returning from his route, as a matter of law Hensley must be viewed as a traveling employee at the time of the accident.

Accordingly, the December 11, 2015 Remand Opinion and Order and the February 16, 2016 Order on Petition for Reconsideration rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge, are hereby **AFFIRMED IN PART, REVERSED IN PART and REMANDED** for entry of an amended decision consistent with the views expressed herein.

ALL CONCUR.

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