OPINION ENTERED: MARCH 9, 2012

CLAIM NO. 201001351

SHELBY INDUSTRIES — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE**

ESTATE OF BRIAN LARSH, and SANDRA LARSH, KIEARA LARSH, and BREANN LARSH — RESPONDENTS/ CROSS-PETITIONERS

AND

HON. ROBERT L. SWISHER, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION AFFIRMING

* * * * * *

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

SMITH, Member. Petitioner/Cross-Respondent, Shelby Industries ("Shelby") appeals from the Opinion, Award and Order of Hon. Robert Swisher, Administrative Law Judge ("ALJ") dated August 15, 2011, wherein he found the death of Brian Larsh ("Larsh") occurred in the course and scope of his employment with Shelby. Shelby also appeals the ALJ's

award of the lump sum death benefit to Larsh's estate and the award of benefits to Sandra Larsh, Kieara Larsh, and Breann Larsh, survivors of Brian Larsh. In addition, Shelby appeals the ALJ's order denying Shelby's petition for reconsideration dated September 20, 2011.

Respondent/Cross-Petitioners, the Estate of Brian Larsh, ("Estate") Kieara Larsh, Sandra Larsh, and Breann Larsh, ("Survivors") appeal arguing the ALJ's failure to address the issue of sanctions and his failure to award 18% interest on past due amounts is reversible error. The Estate and Survivors also appeal from the ALJ's order dated September 20, 2011 denying the parties' petitions for reconsideration.

The facts of this case are not controverted. Larsh began working for Shelby as a laborer in 2008, where he was continuously employed until his death. On June 10, 2009, at approximately 11:29 a.m., Larsh clocked out early. He had taken a vacation day to take care of personal matters.

Larsh proceeded through the employee entrance to await a ride from a family member. At the time, an active electrical thunderstorm was working its way through the area. Approximately two minutes later, Larsh’s daughter and fellow employees found his motionless body outside the entrance. Larsh was taken to Jewish Hospital where he died

two days later. Hospital records officially attributed the cause of death to a lightning strike.

Larsh's estate, Sandra Larsh the surviving widow and Kiera and Breann Larsh, his two children filed a Form 101 on November 5, 2010 for the appropriate death benefits. During the litigation that followed, the parties took the depositions of Wayne Allen ("Allen") and Douglas Bailey ("Bailey"). Allen currently serves as chief operating officer of Shelby, a manufacturer of metal components for several other industries. At the time of this incident, Allen was vice president. He recalls there were active thunderstorms in the area on June 10, 2009. Larsh had been granted permission to clock out early and did so at 11:29 a.m.

Allen was in his office when he heard a female screaming. He ran to the door of the plant where he observed a young girl sitting on the floor pointing to the entrance. He then saw Larsh’s body lying face down on the ground outside. He and another employee, Jerry Cook ("Cook"), immediately began performing CPR and continued until EMS arrived approximately seven minutes later. Larsh was transported to the hospital, but never regained consciousness.

Allen indicated the tree under which Larsh had been found did not appear to have lightning damage, nor was there any evidence of lightning burns to anything else in the area. From his initial observation, it did not appear to Allen that Larsh had any visible signs of an entry or exit wound. Larsh had no pulse, was not bleeding, and was not breathing. He and Cook took Larsh into the building because it continued to rain heavily and there was further risk of lightning activity in the area.

Allen checked on Larsh's condition at the hospital. He learned life support was removed after two days and Larsh was pronounced dead.

The parties submitted the matter on the record for decision on 1) whether Larsh's injury/death was work-related, arising out of the course and scope of his employment; 2) whether the going and coming rule applied; 3) whether the plaintiff was off the clock at the time of the injury; 4) whether "an act of God" theory applied; and, 5) whether sanctions should be imposed pursuant to KRS 342.310 for an unreasonable defense of the claim.

In a very well-written and detailed Opinion, Award and Order, dated August 15, 2011, the ALJ made the following specific findings of fact:

1. Plaintiff's decedent, Brian Larsh, was injured on June 10, 2009 when he was struck by lightning on the defendant/employer's premises;

2. Brian Larsh died on June 12, 2009 as a result of his injury;

3. Brian Larsh was off the clock at the time of the injury, having clocked out for the day at 11:29 a.m.;

4. The injury occurred no later than 11:32 a.m. as Larsh was in the process of leaving for the day but while still on the employer's premises; and

5. At the time of his death, Brian Larsh was survived by Sandra Larsh, his spouse, and Kieara Larsh and Breann Larsh, his daughters.

The ALJ then provided a careful review and analysis relating to the contested issues presented. The relevant parts are as follows:

> With the essential facts either stipulated by the parties or as found above, the core analysis in this claim involves a determination as to whether the injury arose out of the course and scope of employment as a matter [sic] law. Subsumed within that central issue are the sub-issues of whether plaintiff's claims are barred either by the going and coming rule, an Act of God, or the fact that the [sic] Larsh was off the clock at the time of injury. While work relatedness/causation was also preserved, the undersigned will treat that, as well, as contained within the general issue of whether the injury is

compensable as arising out of the course and scope of employment.

The initial determination to be made in this matter is whether the Claimants' claim is barred by the going and coming rule as it is undisputed that at the time of the lightning strike Larsh was off the clock and leaving work for the day. Almost by definition, going and coming cases arise when an employee is "off the clock" and that factor is, therefore, not dispositive as to the issue of compensability. Generally, under the principle known as the "going and coming rule", injuries that occur during travel to and from work are deemed non-compensable. *Harlan Collieries v. Shell*, 239 S.W.2d 923 (Ky. 1951). An exception to the rule has developed, however, providing for compensation if, during the course of the coming and going process, an injury occurs on the employer's "operating premises." *Ratliff v. Epling*, 401 S.W.2d 43 (Ky. 1966). In explaining the policy underpinning for the "operating premises" exception to the going and coming rule, the Supreme Court in *Warrior Coal Company LLC v. Stroud*, 151 S.W.3d 29 (Ky. 2004) stated:

> The theory for the exception is that coverage should apply when an injury arises from a peril that is related to the employment, regardless of whether it occurs at the actual work site. Consistent with the theory, an injury that occurs while the worker is on a personal mission that substantially deviates from the employment is not viewed as being work-related even if it occurs on the employer's operating premises. *Id.* In other

> words, although a worker is viewed as being exposed to the risks of his employment when he crosses the threshold onto private property where the job site is located, the cause of his injury must be considered as well as the place. *Hayes v. Gibson Hart Co.,* Ky., 79 S.W.2d 775, 779 (1990). The cause of the injury may outweigh the place if it represents a significant deviation from normal coming and going activity at that place. *Id.* But an injury is compensable if the worker is engaged in normal coming and going activity at the time it occurs and has access to the place where it occurs because of his employment. *Id. Stroud, [sic] at p. 31*

In *Stroud,* the claimant was injured when he fell asleep at the wheel while driving to work on a private access road leading to the employer's coal mine. The accident occurred shortly before the claimant's shift was to begin, occurred on the operating premises of the employer and in affirming a finding that the plaintiff's injuries were work-related and compensable, the Court determined that falling asleep at the wheel is not a substantial deviation from plaintiff's reporting to work.

Pursuant to KRS 342.680, any claim where the employee has been killed, or is physically or mentally unable to testify, … and where there is unrebutted *prima facie* evidence that indicates that the injury was work-related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work-related…

The unrebutted evidence in this case establishes that Brian Larsh was fatally injured during the course of leaving the workplace on June 10, 2009, and that the injury occurred on the employer's operating premises. The claimants have, therefore, established a *prima facie* case that Brian Larsh's fatal injury was work-related. The burden, therefore, shifts to the defendant to establish by substantial evidence that it was not. While Shelby acknowledges the operating premises exception to the going and coming rule, it argues that plaintiff's "standing outside during a thunderstorm" was a substantial deviation and was sufficient to take plaintiff's "going and coming" out of the course and scope of employment as outside the operating premises exception. Shelby contends that the plaintiff was essentially on a personal mission unrelated to the trip home which increased the hazard of injury "in that plaintiff left the premises possibly to smoke or to stand outside during the middle of a thunderstorm, when he could have remained inside the facility to wait for his ride that was delayed." (Defendant's brief at p. 11). Defendant cites the *Ratliff* case itself as illustrative of a deviation from the course of employment which produced the injury ultimately determined to be non-work-related. In *Ratliff,* plaintiff, a coal miner, had quit work for the day (i.e., was off the clock) and planned to ride home with a fellow employee whose car was parked near the drift mouth of the mine. The car would not start and while the driver went to secure assistance, the employee took a box and expressed the intention of gathering loose coal for his personal use along the face of a high wall located on the premises. When the

plaintiff was "about 173 feet from the drift mouth, this embankment caved in upon him, causing his death. The accident happened approximately one-half hour after he had quit work." (*Epling*, p. 44). Under that set of facts, the Supreme Court concurred that the delay in departure in addition to the nature of the deviation unreasonably compounded the risk to which the employer should be subjected and that the claim was, therefore, non-compensable.

It is clear that cases involving the operating premises exception to the going and coming rule are fact-specific and the application of the exception will turn on the particular facts presented. *K-Mart Discount Stores v. Schroeder*, 623 S.W.2d 902 (Ky. 1981). In the present case, it is undisputed that Larsh was injured while leaving his place of employment and that he had clocked out, inside the plant, no more than two to three minutes before the injury occurred. It is undisputed that he clocked out at 11:29 a.m. and that the EMS run sheet reflects that they received the call reporting the injury at 11:32. Shelby's representative, Wayne Allen, testified that he commenced CPR at 11:31 or 11:32. Certainly, there was no delay between the time the [sic] Larsh clocked out and the time that he commenced his journey off the employer's premises. The evidence also persuades the undersigned that Larsh was being picked up by his daughter at 11:30. While Shelby submits that Larsh increased the risk of injury by standing outside during a thunderstorm, there is, in fact, no evidence that he was "standing" at the time of the incident. It is equally , if not more, likely that the [sic] Larsh had either seen

his daughter and was walking to the car or was walking to the parking area to be picked up in anticipation that his daughter would arrive at the appointed time, less than one minute after he had clocked out. Further, Shelby's speculation that Larsh exited the building to smoke is unfounded conjecture.

The Administrative Law Judge is not persuaded from the facts presented that Larsh's leaving the building and walking towards the area where he was to be picked up, even during a storm, was a substantial deviation from his trip home. Certainly, if falling asleep while driving is not considered a substantial deviation from the course and process of travel, Larsh's injury, which occurred only a short distance from the door from which he exited and literally seconds after he clocked out and on the route that he would have taken in order to arrive at the parking lot to be picked up by his daughter was not the result of a deviation from egress, much less a substantial deviation sufficient to render the claim non-compensable. While Shelby argues that Larsh should not have left the building during a thunderstorm, the testimony of Allen establishes that at 11:25 it had not yet begun to storm (it was dark and he knew a storm was <u>coming</u>), and there is no evidence that there had been any lightning <u>prior</u> to the one strike that Allen heard. There is no evidence, therefore, that Larsh actually left the building after the thunderstorm started. Shelby has presented no evidence, must [sic] less substantial evidence, that in leaving work on June 10, 2009, Larsh substantially deviated from the normal going and coming activity. Even in the absence of the statutory presumption in

favor of compensability, the undersigned is persuaded that this claim is compensable under the going and coming rule based on the evidence presented. The Administrative Law Judge, therefore, finds that the decedent's fatal injury occurred on the employer's operating premises while he was in the course of normal coming and going activity, and that Larsh did not substantially deviate from that process. The Administrative Law Judge finds and concludes, therefore, that the claimants' claim is compensable and not barred by the coming and going rule.

The defendant next argues, with respect to the "act of God" defense, that the positional risk or increased risk doctrine does not apply in this claim so as to make the injury compensable. The defendant argues, in essence, that a lightning strike, as an act of God, is a "neutral" risk (i.e., neither personal to the employee nor normally arising from the business operation of the employer) and that Larsh's employment as a press operator did not expose him to a greater risk of being struck by lightning than the general public. Citing § 8.30 of Professor Larson's *Treatise on Workers' Compensation*, the defendant contends that when a claimant is injured by a natural force such as lightning which has no connection with the employment, the claimant cannot recover unless he can sufficiently associate the injury with his employment as through, for example, physical contact of some part of the work place which was actually struck by lightning. Shelby contends that there is no evidence that any part of its premises was struck by lightning and that photographs illustrate that there is no evidence of damage to the

tree near where plaintiff was found, nor the surrounding property to suggest that there was a lightning strike. Shelby further points to an unsubstantiated hearsay statement attributed to personnel at the hospital to the effect that plaintiff was potentially struck in the hip pocket where his cell phone was located. Moreover, Shelby argues that in order for the claimants to recover under the "positional risk" theory, they must demonstrate that the injury would not have occurred "but for the fact the conditions and obligations of the employment placed claimant in a position where he was injured." The employment, according to the defendant, was not a contributing factor in this incident.

The Claimants, on the other hand, contend that the positional risk doctrine applies "when employment places a worker in what turns out to be a dangerous place" and that any resulting injury is considered work-related even though the injury-producing mechanism itself was not necessarily work-related. *Jackson v. Cowden Mfg. Co.*, 578 S.W.2d 259 (Ky. App. 1978). According to the claimants, Larsh was exposed to an increased risk of being struck by lightning as a result of his employment noting that the location of his body was essentially "equidistant from two known risk factors". Those risk factors are Shelby's facility itself which is encased in metal and a large isolated oak tree. Claimants point to the FEMA fact sheet submitted by Shelby describing "guidelines" for what to do if a thunderstorm is likely in the area and specifically provides a list of objects to be avoided. That list includes "natural lightning rods such

as a tall, isolated tree in an open area" and "anything metal." The Administrative Law Judge, therefore, infers from this directive and evidence that the risk of being injured by lightning increases in areas where either a tall tree or metal is present.

Having carefully reviewed the evidence in this matter including the testimony of Wayne Allen in which a map of Shelby's operating premises was reviewed, discussed and certain landmarks identified, it is clear that the decedent's path of egress from the work site to the point where he was to be picked up by his daughter put him directly in a zone of increased risk for injury by lightning strike given the presence of a very large metallic building and a very tall, isolated oak tree, both of which were in the immediate area where plaintiff was injured. In this sense, the "act of God" defense is not a defense in and of itself but merely descriptive of the hazard presented in an increased or positional risk claim. Lightning, like snow, rain, ice or any other naturally occurring phenomenon, is an "act of God" in the sense that it is not a man-made hazard. The origin of the hazard, however, simply provides the basis for liability analysis under either the positional or increased risk doctrine. The fact that the mechanism causing injury is an act of God is not, in and of itself, dispositive of the issue of liability. As set forth above, while the lightning strike may have been an act of God, it was Larsh's employment that was the reason for his presence at what turned out to be a place of danger. I infer from the evidence, including Allen's testimony, that the route Larsh was taking to get from the building to the point where he was

going to be picked up by his daughter was the way employees typically traveled from the parking area to the entrance to the building. Shelby does not argue that the plaintiff should have taken another route out of the building and off the premises but merely that he should have waited. However, plaintiff's presence at the place where he was fatally injured is directly attributable to his presence at work on June 10, 2009, and his leaving for the day. While there is no evidence that lightning struck the oak tree or the premises itself, it is clear from the FEMA publication that all trees and metal attract lightning, thereby creating a zone in which the risk of being struck by lightning is increased and the inference is created that areas in which those objects are located are to be avoided.

Having ruled as above that the claimant's claim is compensable as work-related as an exception to the going and coming rule, it is, perhaps, unnecessary to reach the issue of whether the claim is also compensable under the increased risk doctrine or positional risk doctrine. Since the issue was preserved and addressed by the parties, however, the undersigned believes that addressing the issue is appropriate and, as set out above, the Administrative Law Judge finds and concludes that Larsh's injury is compensable as a result of an increased or positional risk directly related to his employment and that the fact that the lightning strike was an "act of God" does not relieve the employer from liability for the injury sustained by the claimants' decedent. This issue is, therefore, resolved in favor of the claimants.

On the issue of sanctions and the imposition of an 18% penalty interest rate, the ALJ stated as follows:

> Claimants contends [sic] that this claim has been unreasonably denied and defended by Shelby and that they are entitled to the fees and litigation expenses in recovering death and survivor benefits in addition to which past due benefits should be awarded with 18% interest. Shelby contends that sanctions in the form of attorneys' fees and penalty interest are not appropriate in that the claim was not denied or defended without reasonable grounds but that this case is one that "presents various extraordinary facts and one of first impression regarding same" and it is those same facts which the defendant argues makes [sic] the claim non-compensable.
>
> Having carefully considered the parties' arguments in light of the unique facts of this claim, the Administrative Law Judge is not persuaded that Shelby's defense of this claim was unreasonable or conducted in bad faith so as to justify the imposition of sanctions. The central issue in this claim was whether Brian Larsh's injury and death were work-related. With respect to Shelby's defense of the claim on the basis of the going and coming rule, while I ultimately ruled against that defense, I am not persuaded that, as either a matter of fact or a matter of law, Shelby's argument that the conduct of Brian Larsh in leaving the building during a thunderstorm and passing near or under a large tree was a sufficient deviation to constitute, in essence, an exception to the exception to the going and coming rule as completely

> unreasonable. Moreover, while the phrase "act of God" was used in describing one of the bases [sic] for Shelby's defense of the claim, that phrase is no more than a description of a risk to be analyzed through the application of the positional/increased risk doctrine. Given the "neutrality" of the lightning strike as a natural phenomenon or an act of God beyond the control of the employer, I find that the employer's defense of the claim under the positional/increased risk doctrine, although unsuccessful, was not unreasonable. I do not find that Shelby has defended this claim in a way that shocks the conscience by blatantly disregarding the facts and the law. Accordingly, I am not persuaded that Shelby's unsuccessful defense of claimants' claim was unreasonable or taken in bad faith, and I decline, therefore, to impose sanctions with respect to that defense.

Shelby filed a petition for reconsideration arguing the ALJ erred in finding the initial determination was whether the claim was barred by the coming and going rule as it is undisputed Larsh was off the clock and leaving work for the day at the time of the lightning strike. Shelby argued the parties had not stipulated a work injury, yet the ALJ had found a work injury in the absence of any evidence. Shelby argued the ALJ seemingly referred to KRS 342.680 in support of finding the plaintiff's accident to be work-related. That section specifically states where an employee is killed and unrebutted prima facie evidence indicates the injury is

work-related, it shall be presumed the injury is in fact work-related.

Shelby argued the plaintiff was leaving work to perform a personal mission and not performing any task associated with Shelby. It further argued the ALJ's reliance upon KRS 342.680 was misplaced.

Shelby took issue with the ALJ's interpretation of the "going and coming" rule. Shelby argued the ALJ first acknowledged the employer's premises exception, but then failed to properly analyze the exception of the going and coming rule.

Shelby also took issue with the ALJ's interpretation of the holding in Warrior Coal Company vs. Stroud, *supra*, arguing the holding actually supports a finding Larsh's personal mission was a substantial deviation from employment and not work-related even though his injury occurred on the employer's premises.

The Estate and Survivors filed a petition for reconsideration requesting the ALJ make several changes to his Opinion, Award and Order. First, these petitioners argued the ALJ failed to add the interest that was due on the lump sum payment from the date Larsh died until payment. Secondly, these petitioners argued the ALJ erroneously

allowed Shelby to offer proof on "frivolous" defenses. These petitioners stated:

> In these proceedings the plaintiffs were formally denied benefits based upon the following defenses by the defendant: going and coming rule; being clocked out and not performing any job function; and Act of God. Each of said defenses offered by Defendant is clearly not recognized by the law of Kentucky. Based upon controlling case law authority and the statutes, there was absolutely no standing for the Defendant to defend the death of the late Brain [sic] Larsh. As such, the denial and proceedings have been frivolous and unnecessary.

These petitioners once again argued the ALJ should award sanctions and a penalty interest.

The ALJ issued his order on reconsideration on September 20, 2011, addressing all issues raised by the parties. He sustained Shelby's petition for reconsideration relating to benefit calculations and amended his previous Opinion, Award and Order accordingly. He overruled Shelby's petition in all other respects. The ALJ also overruled the petitions for reconsideration by the Estate and Survivors stating:

> With respect to the plaintiffs' petition for reconsideration, plaintiffs contend that the undersigned erred in determining the issue of sanctions without "any proof by the parties." Plaintiffs argue, however, that the defenses relied upon by the defendant in denying the claim were, as

> a matter of law, inapplicable. In other words, there is no factual issue regarding the basis on which the defendant denied the claim and the undersigned ruled on the issue of sanctions taking into consideration that the claim was denied by the defendant on the very bases [sic] that the plaintiffs contend. In other words, there does not appear to be any genuine issue of fact as to why the claim was denied. Moreover, the plaintiffs preserved the issue of "sanctions for alleged unreasonable defense of claim per KRS 342.310" at the time of the Benefit Review Conference on April 13, 2011. Proof time remained open for all parties for a period of 30 days after the Benefit Review Conference. The issue of sanctions was not bifurcated for subsequent determination. Plaintiffs' petition for reconsider [sic] is, therefore, **OVERRULED.**

The Estate and Survivors had the burden of proving each of the essential elements of their cause of action, including causation/work-relatedness. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since they were successful in this burden, the question on appeal is whether there was substantial evidence of record to support 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).

In rendering a decision, the ALJ, as fact-finder, has the sole discretion to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We find no error in the ALJ's determination that the operating premises exception to the going and coming rule applies in this claim. The court determined in Ratliff v.

Epling, *supra* an injury sustained on the employer's "operating premises" arises in the course of employment if it occurs during the reasonable time necessary to accomplish the going or coming process and does not constitute a substantial deviation from the process.

Here, the ALJ determined there was no substantial deviation from the going and coming process. While Shelby speculated Larsh may have been smoking or "standing outside during a thunderstorm", the ALJ found there was no evidence Larsh was smoking or "standing outside". The evidence only indicated Larsh was in the area he was expected to be at the time he was to be picked up by his daughter.

KRS 342.680 addresses the problem of proving work-relatedness in instances where the injured worker dies. It authorizes a rebuttable presumption the death was work-related if there is *prima facie* evidence the death was work-related and there is no substantial evidence to the contrary. The presumption shifts the burden of going forward with substantial evidence the death was not work-related to the employer, but the burden of proving causation remains with the claimant. Williams v. White Castle Systems, Inc., 173 S.W.3d 231 (Ky. 2005). If the employer fails to meet its burden, the claimant is entitled to the presumption and prevails on the issue of causation.

The ALJ was convinced the claimants established a *prima facie* case that Larsh's fatal injury was work related. The ALJ noted there was no delay between the time Larsh clocked out and the time he commenced his journey off the employer's premises. The evidence established Larsh clocked out at 11:29 a.m. and, as found by the ALJ, was struck by lightning no later than 11:32 a.m. The ALJ specifically found the fatal injury occurred on the employer's operating premises while Larsh was in the course of normal coming and going activity. The ALJ noted the burden therefore shifted to the defendant to establish by substantial evidence the injury was not work-related. Shelby produced only speculation and not evidence to support its argument Larsh engaged in a substantial deviation from his trip home. The ALJ stated he was persuaded the claim was compensable under the going and coming rule based on the evidence, even in the absence of the statutory presumption in favor of compensability.

The ALJ considered both the positional risk and increased risk doctrines in finding the injury compensable. Larson's Workers' Compensation Law, Section 5.01 notes, in most lightning cases, the increased risk test has been applied and the issue is whether the work conditions – such as height above the surrounding area, nearness to trees or

tall structures, nearness to metallic objects likely to attract lightning, or presence of wetness and other conditions facilitating transmission of lightning – enhance the probability of injury from lightning. Larson further notes the nearness of metal or electrical wiring has generally, alone or in combination with other facts, been held sufficient to show an increased lightning hazard.

Here, the ALJ specifically found the worksite put Larsh in a zone of increased risk for injury by lightning strike given the presence of a very large metallic building and a very tall isolated oak tree in the immediate area where Larsh was injured. The ALJ was also convinced that, under a positional risk theory, it was Larsh's employment that was the reason for his presence at what turned out to be a place of danger. Thus, under either the positional risk or increased risk theories, substantial evidence supports a finding Larsh's injury arose out of his employment. As noted by the ALJ, and Allen's testimony, the route Larsh was taking was the way employees typically traveled from the parking area to the entrance of the building. The ALJ concluded Larsh's presence at the place where he was fatally injured was directly attributable to his presence at work on June 10, 2009 and his leaving for the day. The ALJ further identified the FEMA publication

which indicated tall trees and metal attract lightning, thereby creating a zone in which the risk of being struck by lightning is increased.

As the ALJ noted, the fact Larsh was clocking out to leave early is of no particular importance. In all cases where the going and coming rule is argued, the claimant is likely to be "off the clock", at the time of the injury. Cases involving the operating premises exception to the going and coming rule are fact specific. K-mart Discount Stores v. Schroeder, 623 S.W. 2d 902 (KY. 1981). Based on the entire record, we cannot say the ALJ's findings were unreasonable.

Our review of the sanction issue is limited. The imposition of sanctions pursuant to KRS 342.310 falls within the discretion of the ALJ. In order to impose sanctions, pursuant to KRS 342.310, it is necessary for an ALJ to determine an action has been brought, prosecuted or defended without reasonable ground. Our review of the appropriateness of an award of costs and attorney fees is based upon the determination of whether or not the fact-finder abused his discretion. The Board has consistently utilized the standard set forth by the Kentucky Supreme Court in Roberts v. Estep, 845 S.W.2d 544 (Ky. 1993). The standard set forth in Estep is whether it can be readily

conceived the object of the proposed costs was acting in good faith when bringing the action.

We find no abuse of discretion on the part of the ALJ in declining to award sanctions and, therefore, affirm. The ALJ, in his order ruling on the Estate and Survivors' petition for reconsideration, noted the issue of sanctions was preserved at the time of the Benefit Review Conference and proof time remained for all parties for a period of 30 days. The issue was not bifurcated. Since proof time remained but no additional proof was taken regarding the issue, we cannot say the ALJ abused his discretion in declining to grant additional proof time after rendition of his Opinion, Award and Order. The ALJ's Opinion, Award and Order addressed the issue of sanctions, indicating the ALJ was not persuaded that Shelby's unsuccessful defense of the claim was unreasonable or taken in bad faith. We are without authority to find otherwise.

Accordingly, the ALJ's Opinion, Award and Order and the order ruling on the petitions for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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