Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 20, 2015

CLAIM NO. 201402101

TIMOTHY DAVENPORT PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

ECONOMY MAINTENANCE, INC.
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Timothy Davenport ("Davenport") appeals from the June 16, 2015, Opinion and Order dismissing his claim for income and medical benefits, and the July 9, 2015, Order on Petition for Reconsideration of Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). On appeal, Davenport claims the ALJ utilized an incorrect standard in determining he was not acting in the course and scope of

his employment at the time of the January 16, 2014, motor vehicle accident.

The Form 101 alleges Davenport injured his back and right hip and leg on January 16, 2014, in the following manner:

> Plaintiff was traveling in an employer provided vehicle and was in a single vehicle motor vehicle accident on January 16, 2014. Plaintiff suffered injury causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

Davenport was deposed on January 19, 2015. Economy Maintenance is a handyman service, and Davenport was hired to work on drywall, paint, install windows, and do whatever else came up at people's houses and businesses. Davenport's supervisor was Dexter Carey. Davenport's first day of employment was January 2, 2014. The alleged work-related car accident occurred on January 16, 2014, the last day he worked for Economy Maintenance.

Davenport testified that when he went on a job assignment, he used a company vehicle. He testified concerning the events of January 16, 2014, as follows:

> A: Well, roads were slick, it started snowing pretty heavy. And a car stopped real quick in front of me and I swerved to miss it and tried to keep from hitting anything else but hit a pole.

Q: So you swerved and just went off the road and that was that?

A: Uh-huh. (Nods head.)

Q: What car were you driving at that time?

A: The Economy Maintenance van.

Q: Where were you coming from?

A: I was coming from downtown, down around the end of Bank Street. I'd been down there putting windows in.

...

Q: So you had finished installing or repairing windows?

A: I finished putting the one in I had out.

Q: Okay. And was there any more work to be done on the project?

A: Yes.

Q: Was there anyone working with you on the project?

A: Yes. One fella. I don't remember his name. He didn't work there long.

Q: And where were you headed when you were leaving that place?

A: Going home.

Q: You didn't have to take the truck back- or the Economy Maintenance vehicle back to-

A: My supervisor called and told me to go on home and he'd clock me out.

> Q: Okay. And why did he tell you to go on home?
>
> A: It was late.
>
> Q: What time of day are we talking about?
>
> A: Five o'clock.
>
> Q: So what about your regular vehicle, what did you do about that?
>
> A: It was at home.
>
> Q: So how did you get to work that day?
>
> A: I drove the van straight from home to the job.
>
> Q: Oh, so they let you take the van home and-
>
> A: Yes.
>
> Q: Okay. Was that normal for them to do or?
>
> A: Well, they give [sic] me the van as part of the job.
>
> Q: Was it normal for a supervisor to clock someone out at the end of the day if it was getting late?
>
> A: He clocked me in that morning and told me to go to the job, so I guess that's all right for me to do it. I just do what I'm told.

Davenport testified that he drove the company vehicle home every day.

> Q: Okay. So you never left your vehicle at Economy Maintenance? You always took it home?
>
> A: Yes.

A couple of weeks before the alleged work-related accident on January 16, 2014, Davenport was involved in a car accident while driving a friend's vehicle. Davenport explained:

> Q: Okay. So were you driving or was it somebody else driving?
>
> A: I was.
>
> Q: Okay. Now, why were you driving your friend's vehicle?
>
> A: I was going to see about a job.
>
> Q: Okay. And was there a problem with your vehicle, about it being unreliable?
>
> A: I was having work done on it.
>
> Q: What was wrong with it?
>
> A: Water pump.
>
> Q: And where did you have it worked on?
>
> A: My brother worked on it.
>
> Q: Does your brother, I guess, own a car repair shop or does he just know-
>
> A: He just knows cars.
>
> Q: Okay. Was he able to repair the water pump?

A: Yes.

Q: So was your car in good working order after that?

A: Yes.

Q: Did you ever have any problems with it after that?

A: Serpentine belt broke, but I got another one put on.

Q: When did the serpentine belt break?

A: Right after he put it back together.

Q: After your brother fixed the water pump?

A: Yes.

Q: And who fixed the serpentine belt?

A: I did.

Davenport also testified at the April 27, 2015, hearing. Regarding his understanding of the reason he was provided a company vehicle, Davenport testified as follows:

A: To stay on the job- continue to work there.

Q: What do you mean by that?

A: As part of the job he offered me that and more money to stay.

Q: And when did he offer you that and more money to stay?

A: About a week before.

Q: Are you aware of any other employees that had company vehicles, that they would drive to and from work?

A: Not all the time.

Q: What do you mean by not all the time?

A: Well, Dexter Carey drove one some of the time.

Q: And would he take his vehicle home?

A: Yes.

Q: Were there occasions- well, let me ask it this way; did you always go to Economy Maintenance office before you started your work shift?

A: Not every day.

Q: Tell us how you would typically start your work shift.

A: Well, in the mornings I would go there, but sometimes Dexter would call me and tell me to go straight to the job. Q: And why were you able to go straight to the job site?

A: Because I had the work van- tools and everything already- it saved time- saved me from coming in the office.

...

Q: The materials that you would need to do the jobs that you were doing, say, if you were installing windows or repairing drywall, how would the materials; windows, drywall, and that sort of thing get to the job site?

A: Sometimes the supervisor would bring them. If it was a small thing, I would go pick it up.

Q: Where would you pick it up from?

A: Well, I picked up some over at the hardware- by Oak Street, over there somewhere, the one they had an account at, at one time.

Q: Did you carry tools in your work vehicle?

A: Yes.

Q: Were those tools yours or Economy Maintenance?

A: Both.

Regarding the availability of his personal vehicle, Davenport testified:

Q: And we've also- there has also been testimony about your personal vehicle during this time. Tell us about the personal vehicle that you owned during the time that you were working at Economy Maintenance.

A: It was a Ford F-150.

Q: Was it working?

A: At the time of the wreck, yes.

Q: What about when you first started working there?

A: No, the water pump was out.

Q: And you didn't have a vehicle the first week that- a work vehicle the first week that you worked there?

A: No.

Q: How did you get to and from work that week?

A: A couple of days Dexter picked me up. After that, I started driving a company truck.

Q: And you mentioned at the time of the accident your personal vehicle was working?

A: Uh-huh.

Q: Is that a yes or a no?

A: Yes.

Q: You had had the work completed on that?

A: Yes, I got done with it.

On the day of the accident, Davenport did not make any stops or detours after leaving the work site on his way home.

Davenport was questioned about his clock-in protocol.

Q: I have just one more question for you. When you would begin your day, how would the clock in process work? When would you clock in?

A: Well, most of the time I'd go to the job and clock in whenever they said what time we were starting, which at the time it was cold weather, and that varied. There wasn't no set eight o'clock or nothing. We would usually

> start a little bit later on account of- it was cold.
>
> Q: What about on days when you didn't go to the job site first, when would you clock in?
>
> A: When everybody happened to get there, and that would vary, like I say, accounting on the weather. We would sometimes clock in at nine, sometimes nine-thirty- eight. It just depended on what time we got there.
>
> Q: On days where you went to the office first and got your work orders, would you clock in when you got to the office or would you clock in when you got to the job site?
>
> A: When I got to the office.
>
> Q: So, you were paid for your driving time to a job site?
>
> A: After that, yeah.

The April 22, 2015, deposition of Stephen Thomas ("Thomas") was introduced. Thomas has been owner of Economy Maintenance since 1994. Thomas testified regarding the occurrences surrounding Davenport's use of a company vehicle.

> Q: All right. Now, during the short time that Mr. Davenport was employed at Economy Maintenance, was there ever a conversation about him using a company vehicle?
>
> A: There was never a conversation when he first started, but he called me and he- I think somebody brought him in.

And then he said to me he had a truck broke down. He wanted to know if he could borrow the truck.

Q: And when you say 'the truck,' which-

A: I'm talking about my little service truck.

Q: Okay.

A: - to, you know, use it to go home. And I told him, *You can use it for one week*. And in that week, that's when the accident occurred and stuff.

Q: Okay. So he used that because he didn't have transportation?

A: He didn't have transportation.

Q: All right. Now, is it typical for you to let your employees use a company Economy Maintenance truck?

A: Yes. They use-

Q: All right.

A: I have an on-call guy that I pay $75 a week to, and he also uses the truck. He goes out on emergency calls.

Q: Okay. So you pay him his typical- or his normal wage for the hours he works, plus an additional $75 for being on call?

A: Plus overtime, yes.

Q: Plus overtime?

A: Yes.

Q: Okay. Other than him, and other than Mr. Davenport, have you ever let anyone use the company-

> A: Mr. Davenport never worked no [sic] overtime.
>
> Q: Okay. And was he ever on call?
>
> A: Never.
>
> Q: Okay. So I guess other than the person that you have working on call, that does take a company truck home, do you have anyone else- or I guess, do you ever let anyone, other than the time you let Mr. Davenport do it, take the company truck home-
>
> A: No.
>
> Q: - and bring it back?
>
> A: No.
>
> Q: Okay. So would it be fair to say that the reason you let him take it home was because his truck was broke, his personal truck?
>
> A: That's correct.

The April 14, 2015, Benefit Review Conference ("BRC") Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the ACT; exclusion for pre-existing disability/impairment; and TTD. Under "other" is the following: "Course or scope of employment - deviation from going and coming in company vehicle."

In the June 16, 2015, Opinion and Order, the ALJ put forth the following findings of fact and conclusions of law:

> **2. Course or scope of employment – deviation from the going and coming in the company vehicle.**
>
> There are two issues outlined within this one statement of contested issues. The undersigned will begin with this contested issue of whether Plaintiff was within the course and scope of his employment with Economy Maintenance at the time of this MVA.
>
> It is initially noted that Plaintiff has the burden of proof. Caudill vs. Maloney's Discount Stores, 560 SW2d 15 (Ky. 1977). The general rule to be applied to facts in this case is: 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. However, this general rule is subject to several exceptions. For example, transitory activities of employees are covered if they are providing some service to the employer, i.e., service to the employer exception. See Receveur Const. Co. vs. Rogers, 958 SW2d 18, 20 (Ky. 1997). In Fortney vs. Airtran Airways, Inc. 319 SW3d 325 (Ky. 2010) the Kentucky Supreme Court further elaborated:
>
> 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 employment, the lack of payment does not exclude a trip from the course of employment.

The Kentucky courts have held that whether an employee is performing a service to the employer is a question of fact for the ALJ. Howard D. Sturgill & Sons vs. Fairchild, 647 SW2d 796, 798 (Ky. 1983).

In Receveur Const. Co. vs. Rogers, *supra*, the court further held:

"[w]e do agree that where there is evidence that the use of the company owned vehicle is of some benefit to the employer, an exception to the going-and-coming rule is created." 958 SW2d at 19

In Fortney, 319 SW3d at 330, the Court held that a paid or reduced-fare arrangement for transportation on an airplane provided by the employer was an inducement for an employee to work for that employer because it allowed the individual to live where he wanted.

Here, the only evidence that supports a finding that the use of the company truck was an inducement for Plaintiff to stay in the employment of the Defendant/employer is the statement from Plaintiff that he was given a

raise and the use of the company truck because “they wanted to keep me.” However, he never testified as to how it came to be that he was driving or “was given” a company truck.

The evidence would indicate that Plaintiff had just been hired by the Defendant/employer within a few weeks of the MVA. He testified he was hired at $10.00 an hour and was given a raise to $13.00 per hour and the use of the truck within two weeks of his being hired. Mr. Thomas testified that Plaintiff was hired at $8.00 per hour and given a raise to $10.00 per hour within the two weeks because Dexter Carey came to him and said his “dad” could not make it on $8.00 per hour and that he did “good work”. Mr. Thomas said he went out and looked at some of Plaintiff’s carpentry skills and offered him more money. Mr. Thomas testified that he increased Plaintiff’s hourly rate to $10.00 per hour.

The stipulation of the parties regarding average weekly wage was $460.00 per week. That wage amount divided by 40 hours is an hourly rate of $11.50. This is a rate that neither of the parties confirmed with their testimony and is perhaps a “compromised rate” for purposes of the stipulation, but it evidences an ambiguity as to Plaintiff’s testimony and Mr. Thomas’ testimony. Mr. Thomas testified the only employees that were allowed to use a company truck were “on-call guys” that were paid $75.00 a week plus overtime to go out on emergency calls. Plaintiff nor Mr. Thomas testified that Plaintiff was an “on call guy”. Mr. Thomas specifically testified that Plaintiff never worked any overtime. Mr. Thomas testified Plaintiff was only given permission to use the company

truck for “one week” because his personal truck had broken down.

The testimony of Mr. Thomas was that Plaintiff was never allowed to go out on a job alone. He stated there was always another person with him. Additionally, Mr. Thomas testified that he was the person who gave Plaintiff his work orders – everyday. Plaintiff disagreed with that statement.

On the day of the MVA, Mr. Thomas testified:

He only took it home. (the company truck) He never – I gave him the opportunity to take it home. The day that they went down there to Portland Avenue is the day Dexter – Dexter had the machine that had the brace and everything, had to bring back. So I let him take the truck down there for them to do the work.

Mr. Thomas also indicated that Plaintiff was never given permission by him to go straight to a work site. Plaintiff testified that his personal truck had been broken down when he first started working for the Defendant/employer, but that at the time of this MVA it was operational and at home. He testified he did not know any other employees that had company vehicles that would drive to and from work all of the time. He testified his supervisor “drove one some of the time”.

In reviewing the evidence as a whole, I find that Plaintiff was not given the use of the company truck either as an incentive to keep him employed or as a service to the employer. The Plaintiff admits that even his supervisor was not allowed to drive a company vehicle all

of the time. It is not logical that a small company (whose experienced supervisors were not given the use of a company vehicle, unless they were performing specific jobs for the employer) would give unfettered use of a company vehicle to an employee who had been there less than two weeks. Here, the use of the company truck was not a condition or "perk" that Plaintiff even asked for, according to his testimony. His new job did not require the use of a company truck. He did not have to travel from job site to job site engaging in work activities, such as a supervisor might be required to do. He was never "on call" to respond to emergencies. On the date of the MVA, Plaintiff may have driven to the job site without going to the office to clock in. However, I find the reason he was able to do so was that his stepson, who is also his supervisor, told Plaintiff he would clock him in. I do not find that it was done for the benefit of the employer. Additionally, Plaintiff testified he was not "on the clock" or being paid while he traveled in the company vehicle – and would have to wait until his supervisor or other employee arrived at the worksite to be "clocked-in".

I find that Mr. Thomas, as owner of Economy Maintenance, responded affirmatively to a request for Plaintiff to use a company vehicle for a limited time while his personal vehicle was being repaired. While this may have allowed Plaintiff the convenience [sic] not having to find another way to work, I do not find that his use of a company vehicle was a service or a benefit to the employer. Accordingly, Plaintiff was not acting within the exception to the "coming and

> going" rule and his MVA accident and injuries are not covered under our Workers' Compensation Act. Plaintiff's claim for workers' compensation benefits is **DISMISSED**.
>
> Having found that Plaintiff's injuries were not in the scope or course of his employment, the remainder of the contested issues are moot and will not be addressed.

Davenport's June 26, 2015, petition for reconsideration requested additional findings as to whether Economy Maintenance derived some benefits from his use of the company vehicle and whether he was a traveling employee.

In the July 9, 2015, Order on Petition for Reconsideration, the ALJ provided the following additional findings:

> . . .
>
> Without reiterating the undersigned's findings, the initial determination that the work van was gratuitously loaned to the Plaintiff for the Plaintiff's convenience negates the need for any further determinations, i.e. that Plaintiff was in the scope of his employment or whether he had deviated from his route. Plaintiff was using the work van for his convenience, not his employer's. The most convincing evidence to the undersigned was that employees who were assigned a work vehicle for work purposes were (1) supervisory employees and/or (2) employee's that were "on call" –

> neither category in which Plaintiff fit. Indeed, Plaintiff was employed for less than two weeks when this MVA happened.

On appeal, Davenport requests remand for the ALJ to address the issue of course and scope of employment consistent with two exceptions to the going-and-coming rule - the "service to the employer" exception and the "traveling employee" exception.

The “going and coming” rule was articulated by the Supreme Court of Kentucky in Receveur Construction, Co. v. Rogers, 958 S.W.2d 18 (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.

Id. at 20.

There are several exceptions to the "going and coming" rule, including the "service to the employer" exception and the "traveling employee" exception. See Receveur Construction, Co. v. Rogers, supra; Black v. Tichenor, 396 S.W.2d 794 (Ky. 1965); *et al*. The details of these exceptions are not germane to the issues on appeal as

Davenport has only asked this Board to remand the case to the ALJ for additional findings. We affirm.

We decline Davenport's request to remand for additional findings regarding Davenport's use of the company vehicle and whether this provided a service to Economy Maintenance. The June 16, 2015, Opinion and Order contains a five-page analysis on the issue of whether Davenport's use of a company vehicle provided a benefit to Economy Maintenance. The ALJ clearly cited to the substantial evidence supporting her determination that Davenport's use of the company vehicle did not provide a benefit to Economy Maintenance, including testimony given by Thomas, owner of Economy Maintenance, indicating Davenport was given use of the vehicle for one week because his personal truck was under repair. To request the ALJ to render additional findings on this issue would be unreasonable. An ALJ is only required to effectively set forth adequate findings of fact from the evidence in order to apprise the parties of the basis for his decision. The ALJ is not required to recount the record with line-by-line specificity nor engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Min. Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Cmty. Action Program v.

Chaffins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ provided a sufficient analysis apprising all parties of the basis for her determination Davenport's use of a company vehicle did not comprise a service or a benefit to Economy Maintenance and he was therefore not acting within the "service to the employer" exception of the "going and coming" rule. We will not ask the ALJ to reinvent the wheel.

Regarding Davenport's request this Board remand for findings on the "traveling employee" exception to the "going and coming" rule, we note the first time this argument was raised was in Davenport's June 26, 2015, petition for reconsideration. In the April 15, 2015, BRC Order, under "other," is the following language: "course or scope of employment - deviation from going and coming in company vehicle." The wording of the BRC Order seemingly limits the contested issue to Davenport's use of the company vehicle and whether that provided a benefit to Economy Maintenance. More importantly, in his brief to the ALJ, Davenport asserted an argument that the "service to the employer" exception to the "going and coming" rule, but failed to argue the "traveling employee" exception. The first time Davenport asserted the "traveling employee" exception is applicable was in his petition for

reconsideration; therefore, the issue was never properly brought before the ALJ during the pendency of the litigation. The ALJ should have been given the opportunity to rule on this issue in her decision on the merits. Asserting this exception for the first time in a petition for reconsideration is too late.

Accordingly, the June 16, 2015, Opinion and Order and the July 9, 2015, Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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