

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201487612

TRAVIS CARTER

PETITIONER

VS.

APPEAL FROM HON. STEVEN G BOLTON
ADMINISTRATIVE LAW JUDGE

CIRCLE K
HON. STEVEN G BOLTON,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING AND REMANDING

* * * * *

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

RECHTER, Member. Travis W. Carter ("Carter") appeals from the April 14, 2015 Opinion and Order dismissing his claim rendered by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"). The ALJ determined Carter's injury did not arise out of and in the course of his employment. The question on appeal is whether Carter's actions, in violation of a

company safety policy, amounted to a deviation from the scope of his employment. Under the circumstances of this case, we conclude Carter injured himself within the course and scope of his employment. Therefore, we reverse.

The factual circumstances relevant to the issue on appeal are not in dispute. Carter was employed as a third shift cashier at Circle K. On the evening of March 29, 2014, he arrived at work at 9:30 p.m. to allow time to eat prior to his shift beginning at 10:00 p.m. Shortly after his arrival and before he had clocked in, he observed a young male shoplifting. He stepped out of the office where he was having his meal, and told the young man to "come here." Instead, the young man turned and walked out the door of the store. Carter testified he exited the store directly behind the young man and grabbed the hood of his sweatshirt. The young man then took off running, causing Carter to lose his balance and fall on the pavement. He fractured his arm and tore his rotator cuff. Circle K prohibits employees from pursuing or attempting to apprehend shoplifters. Relevant provisions of the Circle K Handbook include the following:

If you ever witness a shoplifting or a robbery, do not chase or attempt to apprehend the thief.

The use of force to prevent a crime is outside the scope of employment, and may subject an associate to substantial personal liability.

Additionally, the Store Expectation Form includes the following:

For my safety, and that of others, I agree not to confront, chase or pursue persons committing crimes on store property; as such behavior is extremely dangerous and could result in severe injury. In addition, I understand that it is the Company policy that I will work INSIDE the store late night hours unless there is a safety emergency that requires my attention.

Carter acknowledged he signed the Store Expectation Form when he was hired in 2011. He testified he was aware of the policy against chasing shoplifters. Shortly after this incident, Carter was terminated for breaking company policy.

At the final hearing, Carter argued he was injured during the course of his employment with Circle K, notwithstanding the fact the injury occurred before he had clocked in. Noting Circle K did not vigorously challenge this proposition, the ALJ agreed and concluded:

I do find that [Carter's] practice of reporting 30 minutes early for his shift to have an evening meal, while incidentally performing job-related functions that accrued to the benefit of the employer, especially in view of [Circle K's] acceptance of this

practice, operates to eliminate the "going to/coming from" rule as a bar to [Carter's] claim.

The ALJ then turned to Circle K's primary argument: that Carter's actions constitute a substantial deviation from his employment so as to bar his claim. Citing Phillips v. Genmar, Inc., 998 S.W.2d 483 (Ky. 1999), the ALJ recognized an employer's right to limit the scope of employment. Finding no factually analogous Kentucky cases, the ALJ examined Wright v. Bi-Lo, Inc., 442 S.W.2d 186 (S.C. App. 1994) and Scheller v. Industrial Comm'n of Arizona, 656 P.2nd 1279 (Ariz. Ct. App. 1982). In both Wright and Scheller, a claim for injuries was barred where an employee was injured while chasing a shoplifter or trespasser in violation of company policy. Additionally, the ALJ relied upon Professor Arthur Larson, who stated "If the act which the employee undertakes outside of regular duties is positively prohibited, it will probably be held to be outside the course and scope of employment, even if designed to advance the employer's work..." 1A A. Larson, Workmens' Compensation Law, §27.14 at 5-261. Finally, the ALJ considered Carter's argument that his actions amount to a violation of a safety rule, but do not constitute a substantial deviation from the course and scope of the employment. He then concluded:

KRS 342.0011(1) requires that, for a traumatic event such as the one sustained by Mr. Carter to be compensable, it must arise out of and in the course of employment. The term "arise out of" is the causation element of that requirement and applies when it is apparent to the rational mind upon consideration of all circumstances that there is a casual connection between the conditions under which Mr. Carter's work was to be performed and the resulting injury. The phrase "course of employment" refers to the time, place, and circumstances under which the accident occurs. Phil Hollenbach Co. v. Hollenbach, 204 S.W.152 (Ky. 1918); State Highway Commission v. Saylor, 68 S.W.2d 26 (Ky. 1933). Carter has the burden of providing both elements, i.e. that his accident was caused by his employment at Circle K and that it occurred in the time, place, and circumstances of his employment. Masonic Widows and Orphans v. Lewis, 330 S.W.2d (Ky. 1959).

While the specific fact scenario of a convenience store cashier chasing an observed shoplifter out of the store and physically grabbing the shoplifter in an attempt to apprehend and detain him is one of first impression in Kentucky, Plaintiff's argument that the Defendant's protections against such conduct are limited to a safety penalty under the provisions of KRS 342.165 (1) is not compelling here. Although this is certainly a safety issue in part, it goes far beyond the bounds of safety as it affects an employer's interests. These interests include exposure to civil liability, employee health, welfare and morale, the welfare of the consuming public and last, but not least, the goodwill of the consuming public, who may not want their local

"quick pick" to turn into a battleground.

I do not believe that Mr. Carter's actions, however laudable his intent, arose out of or within the course and scope of his employment with Circle K. Those actions were not caused by his employment with Circle K. In fact, they were specifically prohibited by written policies concerning which he acknowledged his familiarity. He took it upon himself to knowingly violate Company rules by following a shoplifter out of the store and forcibly grabbing him in an attempt at detention. Actions of an employee that are in clear violation of Company rules or employer instructions cannot be found to have arisen from such employment. Chesser v. Louisville Country Club, 313 S.W.2d 410 (Ky. 1958).

Mr. Carter's actions that resulted in his accident did not arise out of and in the course and scope of his employment with Circle K. There was no service or benefit to Circle K by Carter's actions. There is no evidence that would support a finding that Circle K had permitted or acquiesced to actions such as those engaged in by Mr. Carter. As admitted by Mr. Carter, there is no dispute that he violated express and known company rules in doing what he did. As Mr. Carter's actions constitute a substantial deviation from his employment Mr. Carter's actions constitute a substantial deviation from his employment as a matter of law, I must dismiss Carter's claim in its entirety Ratliff v. Epling, (supra).

Carter did not file a petition for reconsideration. On appeal, he argues the undisputed facts

do not establish he acted outside the course and scope of his employment. Rather, he claims he committed a safety violation by failing to follow Circle K's policies.

KRS 342.0011(1) provides that a compensable injury must arise "out of and in the course of employment." An injury arises "out of" the employment when there is a causal connection between the conditions of the employment and the injury. Louisville & Jefferson County Air Bd. v. Riddle, 190 S.W.2d 1009, 1011 (Ky. App. 1945). An injury occurs "in the course" of the employment when it is sustained while performing some service for the employer while in the line of duty. Id. "[T]he words 'arise out' refer to the cause of the accident, while 'in the course of' relate to the time, place and circumstances of the accident." Id. See also Abbott Laboratories v. Smith, 205 S.W.3d 249, 253 (Ky. App. 2006). Stated otherwise, "[a]n injury occurs in the course of an employment if it takes place during the employment, at a place where the employee may reasonably be, and while the employee is working or otherwise serving the employer's interests." Clark County Bd. of Educ. v. Jacobs, 278 S.W.3d 140, 143 (Ky. 2009).

At this point in the analysis, it must be reiterated that the ALJ determined Clark's claim is not barred by the "coming and going" rule, notwithstanding the

fact the injury occurred before his shift began and before he had clocked in. That finding has not been appealed, and we note it is supported by substantial evidence. The testimony was undisputed Circle K was aware of Clark's habit of arriving before his shift began to eat a meal, and the employer derived some benefit by his early presence during shift changes. Thus, our attention turns exclusively to whether Clark's actions fell outside the scope of his employment with Circle K.

"To arise 'out of' the employment the accident sustained must have a causal connection with the work to be performed; it must be one which is possible to trace to the nature of the employee's work or to the risks to which the employer's business exposes the employee." Colwell v. Mosley, 309 S.W.2d 350, 351 (Ky. App. 1958). An employee's actions may take him out of the scope of his employment if he deviates or departs from the business of his employer. In Colwell, a truck driver was killed when he briefly stopped to assist a relative with a stalled car, and was struck by an oncoming motorist. The Court of Appeals determined the employee's actions took him outside the scope of his employment as a truck driver:

The extent of the deviation from the usual route over Highway No. 421 is not the controlling factor in the instant

case, but rather the fact that Mosely made the deviation for the sole purpose of accommodating his brother-in-law. He had departed from the scope of this employment and at the time and place of the accident was engaged on a personal mission which severed the relation essential to fix liability upon his employer under our Workmen's Compensation Act.

The Court of Appeals subsequently noted, in analyzing the Colwell case, that the nature of the personal mission itself created the hazard which resulted in Mosely's death. Ratliff v. Epling, 401 S.W.2d 43, 45 (Ky. App. 1966). The hazardous nature of the personal mission was a consideration for the Court of Appeals in Ratliff. There, Ratliff had quit work for the day and was on the way home, though still on his employer's property, when the car stalled. He exited the vehicle and proceeded to gather loose coal for personal use when the embankment caved in on him, causing his death. Though Ratliff was killed on the operating premises of his employer, the act of collecting loose coal was a personal mission involving increased hazard because he was near a high wall of the embankment. For these reasons, the injury did not "arise out of" the employment.

However, the issue in this case is not whether Carter deviated on a personal mission from the scope of his

employment, as in Ratliff and Colwell. The more narrow issue is whether Carter's failure to follow his employer's policies can constitute a deviation; or, stated otherwise, whether an otherwise work-related injury is non-compensable because it occurred as a result of the employee's disregard of a safety policy. KRS Chapter 342 does not squarely answer this question. KRS 342.165 requires the reduction of an employee's award if the injury was caused "in any degree by the intentional failure of the employee to use any safety appliance furnished by the employer or to obey any lawful and reasonable order or administrative regulation of the executive director or the employer for the safety of employees or the public..." The fact this provision exists evinces the legislature's intent to reduce an employer's liability for injuries caused by a safety violation, but not remove the employer's liability altogether.

Still, in some instances, the employee's failure to follow his employer's orders constitutes a deviation so substantial as to remove the action from the scope of employment. In Phillips v Jenmar, Inc., 998 S.W.2d 483 (Ky. 1999), the claimant was instructed by his supervisor not to report to work because he was suffering from severe side-effects of alcohol withdrawal. The claimant disobeyed this order and reported to work nonetheless. He was injured when

he climbed a ladder, suffered an attack of tremors related to the alcohol withdrawal, and fell to the concrete floor below. The Kentucky Supreme Court affirmed the dismissal of his claim, and explained why the claimant should not merely be subject to a safety violation penalty:

Safety rules generally pertain to the manner in which work is to be performed; however, claimant's injury did not result from a failure to obey an order concerning the manner in which his work should be performed or concerning workplace safety. He was injured because he disobeyed an order not to work due to his physical condition.

Id. at 486.

Chesser v. Louisville Country Club, 313 S.W.2d 410 (Ky. App. 1958), involved an injury which occurred while the employee was breaking company policies. While waiting to be called to service, Chesser, a golf caddy, chased a cat into the club's boiler room and drank from a bottle of whiskey he found there. Unfortunately, the whiskey bottle actually contained a chemical cleaning compound and he was severely injured. The Court of Appeals concluded the injury did not occur within the scope of Chesser's employment because he did not have permission to enter the boiler room that day, and was prohibited from drinking alcohol while working. The Court determined Chesser had "abandoned the place of his employment and had entered a forbidden area on a venture of

his own which was wholly unrelated to his employment." Id.
at 411.

More recently, in U.S. Bank Home Mortgage v. Schrecker, the Kentucky Supreme Court deemed the employee's injuries non-compensable when she was struck by a vehicle while on a paid lunch break. 455 S.W.3d 382 (Ky. 2015). Placing emphasis on the fact the employee was jaywalking when injured, the Court determined her chosen route "exposed her to a hazard completely removed from normal going and coming activity, and which was expressly prohibited by the Commonwealth and impliedly prohibited by [her employer]." Id. at 387. The Court was most persuaded by the fact the employee's injuries occurred off-premises, and were caused by and during a substantial deviation from the normal going and coming activity; i.e., by crossing the street between intersections. Id.

It is important to note, however, the Schrecker Court recognized the result might be different if the employee's injury had not occurred during a work break off the employer's premises. Responding to the dissent's claim that the decision injected negligence into the realm of workers' compensation, the majority provided the following quote from Professor Larson:

[T]he implied prohibition test ... permits us to draw a consistent pattern of principle uniting the rules of unreasonableness and prohibited method. We first divide all activities into operating acts and incidental acts. As to operating acts, that is, acts in direct performance of the precise tasks assigned to the claimant, we find that method—whether unreasonable, impliedly prohibited, or even expressly prohibited—is immaterial. As to incidental acts and situations, including ... personal comfort, ... we find that a single test will also suffice: they are outside the course of employment if they are expressly or impliedly forbidden.

Larson's Workers' Compensation Law,
§21.08(4)(d).

Thus, it's clear that an employee's failure to follow an employer's orders or safety policies may render an injury non-work-related and, therefore, non-compensable. However, we find the uncontested facts of this case establish a scenario which is qualitatively different than that in Chesser, Schrecker, and Phillips. Carter was not in a prohibited area when his injury occurred, as in Chesser, or off work premises during a personal comfort break, as in Schrecker. He had not been prohibited from reporting to work, as in Phillips. Nor had Carter deviated from his work duties on a personal mission as in Ratliff and Mosley.

Carter was on his employer's premises at the time of the injury. Certainly, shoplifters are a hazard incident

to employment at Circle K: the simple fact it has numerous policies in place to guide its employees' interactions with lawbreakers establishes Circle K recognized the hazard. Furthermore, Carter's supervisor, Jay Jones, acknowledged shoplifters are a recurrent aspect of employment at Circle K. He admitted his cashiers would routinely identify shoplifters, confront them verbally, write down license plate numbers, and call police. Thus, Carter was at his place of work, encountering a known hazard peculiar to his employment. He failed to follow the directives of his employer in dealing with this known hazard, and an injury resulted from this failure. This behavior constitutes a violation of a reasonable order of his employer within the meaning of KRS 342.165, but it does not constitute a substantial deviation from the scope of his employment. See Warrior Coal Co., LLC v. Stroud, 151 S.W.3d 29, 31 (Ky. 2004) ("Although a worker's negligence may result in decreased benefits under KRS 342.165, it is not a factor in determining whether an injury is work-related.").

Accordingly, the April 14, 2015 Opinion and Order rendered by Hon. Steven G. Bolton, Administrative Law Judge, is hereby **REVERSED** and this claim is **REMANDED** for further proceedings consistent with this Opinion.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FURNISHES A SEPARATE OPINION.

ALVEY, CHAIRMAN. I respectfully dissent. Carter was not working at the time of the accident, and acted outside the policies set forth by Circle K. The mere fact he was at the worksite eating his dinner prior to going to work does not make this claim compensable. Unlike the claimant in U.S. Bank Home Mortgage v. Schrecker, 455 S.W.3d 382 (Ky. 2015), in which the Kentucky Supreme Court held the claim noncompensable, here Carter was not working at the time of the incident. Even if he were, his actions were clearly outside the scope of his employment with Circle K, and in accordance with the holdings in Ratliff v. Epling, 401 S.W. 2d 43 (Ky. 1966); Whitehouse v. R.R. Dawson Bridge Company, 382 S.W.2d 77 (1964); and Phillips v. Jenmar, Inc., 998 S.W. 2d 77 (Ky. 1999), the ALJ did not err in dismissing this case, and his decision should be Affirmed.

COUNSEL FOR PETITIONER:

HON SCOTT C JUSTICE
455 S FOURTH ST #1250
LOUISVILLE, KY 40202

COUNSEL FOR RESPONDENT:

JUDSON DEVLIN
1315 HERR LN #210
LOUISVILLE, KY 40222

ADMINISTRATIVE LAW JUDGE:

HON. STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601