# Commonwealth of Kentucky
# Workers' Compensation Board

**OPINION ENTERED: May 14, 2021**

CLAIM NO. 201953330 & 201901490

PATSY HERNDON PETITIONER

VS. **APPEAL FROM HON. TONYA M. CLEMONS, ADMINISTRATIVE LAW JUDGE**

PILGRIM'S PRIDE AND
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

**OPINION**
**REVERSING & REMANDING**

* * * * * *

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

**BORDERS, Member.** Patsy Herndon ("Herndon") appeals from the February 10, 2021 Opinion and Order and the March 5, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge ("ALJ").

The ALJ denied Herndon's claim against her employer, Pilgrim's Pride ("Pilgrim"), finding she was not within the course and scope of her employment at the time of her injury. Herndon argues the ALJ erred in determining she was not injured within the course and scope of her employment. For reasons to be set forth, we reverse, and remand this claim to the ALJ for further proceedings.

The ALJ considered the following evidence on the bifurcated issues on appeal. No medical evidence was considered in determining the bifurcated issues so we will not outline the medical evidence.

Herndon testified on January 9, 2020 at a hearing regarding her motion for interlocutory relief, by deposition in February 2020, and at the hearing held December 16, 2020. Herndon worked as an inspector helper on a production line. Her job duties consisted of trimming chickens, and disposing those unfit for consumption. Herndon's shift began at 9:07 p.m., and she clocked out at 6:00 a.m. For several years, she arrived for her shift by 7:30 p.m. Many people, including supervisors, had observed her routine, but no one objected or advised her to not arrive for work so early. Upon arrival, she would put on a hair net, steel-toed boots, and safety glasses, take her items to her locker, and then eat dinner with a second-shift co-worker in the breakroom. She generally finished or almost finished her dinner by 8:00 p.m. She stated she had no supervision from 7:00 p.m. to 9:00 p.m.

On November 11, 2019, Herndon arrived in the parking lot around 7:10 p.m. The ground and parking lot were covered with snow and ice. She pulled her vehicle close to the building, got out, and walked to the passenger side where she slipped on the ice and fell. She got up, opened her door, and fell again on a piece of

cardboard that was covered by ice and snow. She landed on her left foot and heard her left knee pop. She went to the breakroom and notified her supervisor. She was taken to the medical station after 9:00 p.m. and then released to work in the supply room on light duty. She worked her entire shift and returned to work the next evening despite experiencing pain and difficulty walking. On November 13, 2019, Herndon again arrived early to dine with her friend. Her legs went numb and she fell as she was walking to the turnstiles to enter the plant. Two employees found her and helped her to a picnic table outside the facility. Herndon was taken to the local hospital by ambulance.

Charles Bishop ("Bishop") testified by deposition on January 8, 2020. He is a second shift sanitation worker. He heard the commotion Herndon made at the time of her fall on November 13, 2019 but did not see her fall. Herndon was located close to the turnstiles in the parking lot. Bishop saw Herndon exiting the turnstile. He was talking with Danny Eden ("Eden") at the time of the incident. Eden and Bishop went to help Herndon. They took her by the arms and assisted her to a picnic table. She was able to walk with difficulty and their assistance. Bishop then went to get a supervisor.

Eden testified by deposition on January 8, 2020. He worked from 1:00 p.m. to 9:30 p.m. in the pet food department at Pilgrim. Eden testified he was leaving through the turnstiles to go to lunch on November 13, 2019. Herndon was sitting on the sidewalk, but he did not see her until she asked for help. He stated Herndon told him she had fallen before and they were making her come back to

work. Eden and Bishop helped her to a picnic table. Herndon asked for a supervisor. Bishop went to get a supervisor and Eden went to lunch.

Deborah Mills ("Mills"), LPN, testified by deposition on January 9, 2020. She saw Herndon for complaints of right knee pain after a fall in the parking lot on November 11, 2019. Herndon did not appear to have any signs or symptoms, although her notes reflect she walked with a limp. Mills did not see Herndon on November 13, 2019. Mills further clarified that her note documented Herndon's subjective reporting of a fall and feeling a pop in her left knee. Further, Mills stated she observed some slight swelling of the knee. Mills testified regarding the protocol for paperwork filled out after an incident.

Rocky Johnson ("Johnson") testified by deposition on January 8, 2020. He is a second shift supervisor for Pilgrim. With respect to the incident on November 13, 2019, Johnson stated he was told a woman fell and needed assistance. Herndon stated she had been sick and nauseous at home the night before coming to work and had fallen in the parking lot. Johnson said he was aware Herndon was an employee and regularly arrived at work well before the start of her shift. Because he worked second shift, Johnson was not Herndon's direct supervisor. He testified it was normal for employees on his shift to arrive approximately thirty minutes early.

Roxanne McClure ("McClure") testified by deposition on January 9, 2020. She is an RN and occupational health manager for Pilgrim. She stated Herndon's job did not require her to come in early prior to her scheduled shift as employees cannot clock in before 9:07 p.m., and the cafeteria is not open on third-shift. McClure testified she did not know why Herndon was present so early and

there was no reason for her to be on the premises more than thirty minutes prior to the start of her shift, but she did not state there was any company policy against it. McClure stated the sanitation manager called her at 7:00 p.m. on November 13, 2019 and advised Herndon reported her legs went numb and she fell. Herndon denied slipping or tripping.

Valerie Roberts ("Roberts") testified by deposition on January 9, 2020. She works as a third-shift supervisor in the evisceration department. She was Herndon's direct supervisor on November 11, 2019. Roberts stated Herndon reported falling on a cardboard box covered by snow in the parking lot on November 11, 2019. Roberts and her supervisor went to the parking lot and saw the cardboard beside Herndon's truck. Roberts informed Herndon she would take her to medical when medical arrived. Roberts testified nothing about Herndon's work required her to arrive more than thirty minutes prior to her shift but did not state any company policy prohibited it. Roberts was not aware of what Herndon was doing for the two hours prior to the shift. Roberts believed that sometimes Herndon arrived at work early to eat in the breakroom. Herndon occasionally arrived around the same time as Roberts, which was approximately forty-five minutes to an hour before her shift. Roberts explained, however, she had duties to perform prior to her shift. Herndon had no such duties.

The ALJ made the following Findings of Facts and Conclusions of Law relative to the issues on appeal, which are set forth, *verbatim*:

> The primary determination to be made in these matters is whether Plaintiff's injuries on November 11, 2019 and November 13, 2019 arose out of and in the course of her employment. Plaintiff maintains that her

injuries are compensable under an exception to the "coming and going" rule as the incident occurred on the employer's operating premises. Defendant argues that Plaintiff's claims are barred by the "coming and going" rule as the injuries were not in the course and scope of her employment.

"Injury" is defined by KRS 342.0011(1) as a "work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximately causes a harmful change in the human organism as evidenced by objective medical findings." Thus, under the Workers' Compensation Act (the Act), an injury must arise out of and in the course of employment to be compensable. Accordingly, it must be work-related.

The phrase "in the course of employment" has been interpreted to mean "the time, place, and circumstances of the accident while "arising out of employment" relates to the cause or source of the accident. Abbott Laboratories v. Smith, 205 S.W.3d 249, 253 (Ky. App. 2006); *see also* Colwell v. Mosley, 309 S.W.2d 350, 351 (Ky. App. 1958). An injury occurs in the course of 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).

"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." Receveur Construction, Co. v. Rogers, 958 S.W.2d 18, 20 (Ky. 1997). An exception to the rule permits compensation if an injury occurs on the employer's operating premises. Ratliff v. Epling, 401 S.W.2d 43 (Ky. 1966).

An employee is not, however, automatically covered simply because the accident occurred on the employer's premises. Id. at 44. 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. Further, an employee remains in the course of his or her employment only for reasonable time necessary to accomplish the going or coming process. Id.

Thus, even when an employee is on the operating premises, the cause of the injury must be considered as well as the place as the cause may outweigh the place if it represents a significant deviation from normal coming and going activity at that place. Id; *see also* Hayes v. Gibson Hart Co., 789 S.W.2d 775, 779 (Ky. 1990). In determining whether an injury is work-related, the determination is based upon an aggregate of facts rather than the existence or non-existence of any particular fact. Hayes, 789 S.W.2d at 777 (internal citations omitted).

In this matter, Plaintiff was in a parking lot on Defendant's premises at the time of the incident. Plaintiff's falls occurred, however, approximately two hours prior to the beginning of her shift while on her way to have a preshift meal with a friend employed on a different shift.

Defendant cites to the decision in Ratliff v. Epling, supra, for the proposition that the time frame that the incident occurred was unreasonable for the purpose of accomplishing the normal coming and going process and; thus, took Plaintiff out of the course of her employment. The Ratliff court explained in its decision that the delay in the injured workers' departure coupled with the nature of his deviation was such as to take the employee out of the course of his employment. Ratliff, 401 S.W.2d at 46.

Defendant argues that Plaintiff was outside a reasonable window of time to be on the employer's premises prior to her work to be considered in the course of her employment as her activities to prepare for work were not lengthy, she was not subject to supervision, and there were no activities to attract an employee to the premises. In making its arguments, in part, Defendant quotes Larson's Workers' Compensation Law for the proposition that an employee may be found to have

been outside the scope of her employment if she merely loiters around the workplace before and after hours outside of a reasonable interval. See Larson's Workers' Compensation Law, §21.06(1)[c]. Defendant also cites several cases from other jurisdictions identified by Larson's Workers' Compensation Law on this issue.

Plaintiff cites to Barnette v. Hospital of Louisa, Inc., 64 S.W.3d 828 (Ky. 2002) for the proposition that an employee injured on the employer's premises even when he or she has no intention of working is work-related. The employee in Barnette was on the employer's premises solely to pick up her paycheck. Therefore, the Barnette court noted that the injured employee's activity of picking up her pay was a work-related activity and; thus, her injury was covered by the Act.

Here, Plaintiff testified that she came to work on the evening of the two incidents between 7:00 p.m. and 7:30 p.m., which was approximately two hours prior to the time she was permitted to clock-in for her shift at 9:07 p.m. She stated that she was not allowed to put on her work apron until she clocked-in. She explained that she arrived early in order to have supper with a friend that worked the afternoon shift. She testified that to prepare for work and finish her meal, she was finished by 8:00 p.m.

Testimony indicates that Defendant's cafeteria in the facility was closed during the third shift and Plaintiff would bring her own meal from outside the facility. Ms. Roberts testified that Plaintiff had no duties to perform when arriving early. Plaintiff also testified that she had no supervisor during a period when she arrived early.

The ALJ is not convinced that an unpaid, pre-shift meal approximately two hours prior to the beginning of a work shift is work-related or incidental to Plaintiff's work. The evidence does not establish that Plaintiff was serving the employer's interests or an employer requirement that arriving early to have a pre-shift meal was an activity that was in the course of her employment.

> Having reviewed all the evidence, the ALJ relies upon the testimony of Plaintiff and lay witnesses such as Ms. Roberts and Ms. McClure in finding that the November 11, 2019 and November 13, 2019 incidents do not constitute injuries as defined by the Act as they were not in the course of her employment. Accordingly, Plaintiff's claims for income and medical benefits due to the alleged November 11, 2019 and November 13, 2019 incidents are dismissed as not occurring in the course of her employment and; thus, not work-related.

Herndon filed a Petition for Reconsideration. The ALJ made additional findings but otherwise denied the petition, reaffirming her original determination.

Herndon appeals, arguing she was not injured while dining with a co-worker but while performing the essential, work-related activity of parking her vehicle and walking into the building. She argues the activity is in the course and scope of her employment whether she is two hours early or ten minutes late. She argues the activities she performed at the time of her injury were within the operating premises exception to the going and coming rule and are compensable.

As the claimant in a workers' compensation proceeding, Herndon had the burden of proving each of the essential elements of her case. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra. However, the Board is empowered with the authority to assure the decision of the ALJ is in conformity to the provisions of this chapter. See KRS 342.285(2)( c) .

On appeal, Herndon argues the ALJ erred in determining she was not within the course and scope of her employment at the time she suffered her injuries.

She argues the true question in this case is whether she was in the course and scope of her employment **at the time her accident actually occurred** (emphasis added).

KRS 342.0011(1) defines injury as a "work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximately causes a harmful change in the human organism evidenced by objective medical findings". The phrase "in the course of employment" refers to the time, place, and circumstances of the accident while the phrase "arising out of employment" relates to the cause or source of the accident. *See* Abbott Laboratories v. Smith, 205 S.W.3d 253 (Ky. App. 2006). An injury occurs in the course of employment if it takes place during employment, at a place where the employee may reasonably be, and while the employee is working or otherwise serving the employer's interest. Clark County Bd. Of Ed. v. Jacobs, 278 S.W.3d 140 (Ky. 2009).

The Kentucky Supreme Court in the case of Hayes v. Gibson Hart Co., 789 S.W.2d 775 ( Ky. 1990), cited Ratliff v. Epling, 401 S.W.2d 43 (Ky. 1966) and stated the following regarding whether an employee is covered under the "operating premise" exception to the "going and coming" rule:

> As stated in Larson's treatise, Workmen's Compensation Law, Vol. 1, § 15.11, while "[t]he course of employment is not confined to the actual manipulation of the tools of the work, nor to the exact hours of work[,] ... it is generally taken for granted that workmen's compensation was not intended to protect [the worker] against all the perils of [the] journey" between his home and his place of work. The employee is not entitled to coverage while "still subject to the common risks of the street." This is the "basic going and coming rule." Nevertheless, as Larson states, "with a surprising degree of unanimity" the cases applying this

> rule interpret "course of employment" to cover "going and coming" injuries occurring "on the employer's premises." The question in the present case is whether this "on premises" protection applies to the facts of this case.

The Supreme Court further held that the "operating premise" rule must be applied on a case-by-case basis. Hayes v. Gibson Hart Co., supra. The Court in Hayes stated:

> It is inherently difficult, if not impossible, to draw any line defining "operating premises" for purposes of the "on premises" modification of the "going and coming" rule short of the property line that separates public from private use. As a general rule, once the employee of a contractor, whether independent or subcontractor, has crossed the threshold onto the private property upon which the job site is located where his employer is providing services, he should be considered exposed to the risks because of his employment and entitled to coverage under the "on premises" modification of the "going and coming" rule. However, we recognize that the location or position where the accident occurs is just one factor to be considered in deciding whether a person who has not yet reported to work should be covered by the workers' compensation law. While the employee is still in a "going and coming" status the Ratliff case requires the cause of the injury to also be considered, and this may outweigh the importance of the place of the injury if the cause of the injury represents a significant deviation from normal activity involved in going and coming.

In the case of Kmart Discount Stores v. Schroeder, 623 S.W.2d 900 (Ky. 1981) the Kentucky Supreme Court stated as follows:

> The "operating premises" rule must be applied on a case by case basis. In other words, what we are holding is clearly and simply that if an employer provides or maintains a parking lot or other premises for the convenience of its employees, and an employee, while on said premises, sustains a work-connected injury, then the employer is responsible' to the employee for workers'

> compensation benefits. Two factors must be present to fix liability on the employer. First of all, the employer must control the area, and second, a work-related injury must have been sustained on the area. What we are saying is that "operating premises" constitute a part of the work area, and an employee, under those conditions, -receiving a work-related injury is in a "work connected activity.Id. at 902.

Whether an employee is on the "operating premises" of the employer when an injury occurs is an important factor to be considered, but it is not the only factor. The ALJ must also consider the cause of the injury, and this factor may outweigh the importance of the place of the injury if it represents a significant deviation from normal activity. Therefore, it is necessary to consider the aggregate of facts rather than the existence or non-existence of any particular facts. Hayes v. Gibson Hart Co., supra.

It is undisputed that both falls and subsequent injuries to Herndon's left leg and low back occurred on Pilgrim's operating premises. She argues the first part of the test, regarding where the incident occurred, has been proven to be on Pilgrim's operating premises, where she was engaged in normal going and coming activity **at the time the accident occurred** (emphasis added) and had access to the place it occurred because of her employment. Herndon was in the process of gathering her work gear when she fell on November 11, 2019, and was walking across the parking lot toward the building where she worked on the day of her second fall on November 13, 2019. These facts clearly indicate Herndon was performing normal employment activity **at the time she fell on both occasions** (emphasis added).

Pilgrim argues Herndon was on a personal mission on the day of her accident. It argues she was not due to work on the two accident dates until 9:07 p.m. It argues the fact she was injured when she arrived at work hours before her assigned shift is clear evidence that her act of being on Pilgrim's operating premises was not for the benefit of her employer, and she did so for the personal purpose of having dinner with a co-worker who worked the second shift. Pilgrim therefore believes the ALJ was correct when she found Herndon was outside a reasonable window of time to be on the employer's premises, prior to her work, to be considered in the course of her employment. Pilgrim believes Herndon's purpose for availing herself of the company parking lot and breakroom at that time was to engage in a social call with her friend.

We believe the ALJ misapplied the facts of this case to the law. The work-related accidents Herndon suffered on November 11, 2019 and November 13, 2019 clearly occurred on the operating premises of Pilgrim and the parking lot where Herndon was required to park was controlled by Pilgrim. **At the time of the accidents** (emphasis added) Herndon was engaged in the normal work activity of going to work. Thus, but for being scheduled to work on November 11, 2019 and November 13, 2019, Herndon would not have been on Pilgrim's operating premises and no injuries would have occurred. The true test is whether Herndon was in the course and scope of her employment at the time of the injuries on November 11, 2019 and November 13, 2019, and we determine she clearly was. As stated by the Kentucky Supreme Court in Hayes v. Gibson Hart Co., supra:

> While the employee is still in a "going and coming" status the Ratliff case requires the cause of the injury to

> also be considered, and this may outweigh the importance of the place of the injury if the cause of the injury represents a significant deviation from normal activity involved in going and coming. There is no such deviation here. The employee's work assignment placed him where he was exposed to the injury for which he seeks compensation, and he could not have been there otherwise. This constitutes a "work-related" injury.

The evidence firmly demonstrates that Herndon was injured on Pilgrim's "operating premises" and there was no significant deviation from her normal work activities to take her outside the course and scope of her employment. At the time of both accidents, Herndon had not deviated from the normal coming and going activity from the time she arrived in the company parking lot until she experienced the two work falls. While Pilgrim believes it should not be liable because Herndon arrived at work early to have dinner with a co-worker, the facts of this case simply do not support this position.

Accordingly the Opinion and Order of February 10, 2021, as well as the March 5, 2021 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are **REVERSED.** This claim is **REMANDED** to the ALJ to adjudicate all remaining issues.

ALL CONCUR

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