Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 12, 2021

CLAIM NO. 201392143

PROFESSIONAL FINANCIAL SERVICES PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

SERENA GORDON AND
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. Professional Financial Services ("PFS") appeals from the November 9, 2020 Opinion on Remand, and the December 20, 2020 Order denying its Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge ("ALJ"). The ALJ found Serena Gordon ("Gordon") was engaged in an activity benefitting her employer when she tripped and fell on a crumbling sidewalk on February 25, 2013. The ALJ therefore determined her injuries are work-related,

and he reiterated his previous award of temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits.

On appeal, PFS argues substantial evidence does not support the ALJ's determination regarding an exception to the "Coming and Going" rule. PFS also argues the ALJ failed to provide sufficient findings of fact or analysis of law. We find the ALJ's decision on remand for additional analysis regarding the compensability of Gordon's claim due to the "benefit to the employer" exception of the "Coming and Going" rule is minimally sufficient; therefore, we affirm.

Gordon filed a Form 101 on October 2, 2015 alleging injuries to her left knee, ankle, and foot on February 25, 2013 when she twisted her left leg as she stepped from a curb while going to her car. At the time she filed her claim, Gordon was a resident of Lexington, Kentucky. Her work history reflects she has worked in automobile sales, financing, and management. At the time of the accident, she was the branch manager for PFS, an automobile financing company. We will not review the medical evidence since it has no bearing on the issues raised on appeal.

In his decisions rendered in 2016 and 2020, the ALJ determined PFS did not own, operate, control or maintain the parking lot where the accident occurred. The ALJ also determined Gordon was not required to park in a specific spot or area in the parking lot. The ALJ therefore determined the parking lot was not part of the employer's operating premises. We will not address that determination since it was not appealed.

In the October 5, 2016 Opinion, Award, and Order, the ALJ found Gordon sustained compensable work-related injuries on February 25, 2013. He

found the activity of retrieving her tablet provided some benefit to the employer, and therefore found the exception to the "Coming and Going" rule applicable. This Board affirmed the ALJ's decision in an Opinion dated March 31, 2017. The Court of Appeals affirmed this Board in a decision rendered June 8, 2018. The Kentucky Supreme Court reversed the Court of Appeals in Professional Financial Services v. Serena Gordon, 2018-SC-000363-WC (June 13, 2019) (Designated Not To Be Published). That decision specifically directed the ALJ to make additional determinations as follows:

> The ALJ did not make any findings as to exactly when Gordon's activities became for the "benefit of the employer" and when they ceased. And the ALJ's reliance on one case for the general rule that workers' compensation coverage can cover injuries sustained outside an employer's operating premises is insufficient to resolve the issue at bar, as demonstrated by the analysis in the Board's majority opinion. While we do not opine whether Gordon's injury is compensable, we do remand for the ALJ to perform an appropriate analysis and to make a determination supported by the record.

Gordon testified by deposition on December 21, 2015, and at the hearing held June 17, 2016. Gordon began working for PFS, an automobile financing company, in March 2007. As branch manager, she spent approximately seventy percent of her time in the office. She spent the remainder of her time attending automobile auctions, visiting dealerships, and collecting accounts.

On February 25, 2013, Gordon was working late to catch up on collections because it was nearly the end of the month. Upon reaching her car, Gordon realized she had left behind the tablet PFS provided for her to use while out of the office. She returned to her office, got the tablet and returned to her car. When

she stepped off the curb prior to entering her car, she rolled her left ankle causing her to fall.

Nat Reider ("Reider"), the regional manager for PFS, testified by deposition on February 3, 2016. Reider testified branch managers, like Gordon, may take tablets home with them to conduct business. Branch managers are on call to dealerships in order to process credit applications. It is not unusual to take tablets home for this purpose. Reider acknowledged approximately thirty percent of a branch manager's time is spent in the field, which includes visiting dealerships and collecting payments from individuals.

Jason Scott Claypool ("Claypool"), current branch manager for PFS in Lexington, testified by deposition on April 12, 2016. He was Gordon's assistant manager when she was the branch manager. He testified that as branch manager he has the option to take a tablet home with him, as did Gordon when she was branch manager. He stated he tries to complete all of his work before he goes home.

In the decision rendered November 9, 2020, the ALJ determined as *verbatim* follows:

> In the case at hand, the Plaintiff had returned to her office to retrieve a tablet, which was issued to her by the Defendant-employer for the sole purpose of the Plaintiff working from home. The Plaintiff testified the tablet could not be used for any other purpose rather than work. After retrieving the tablet form her office the Plaintiff slipped and fell on her way back to her vehicle.
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> The claimant, Serena Gordon, in her discovery deposition at pages 22 and 23 testified to-wit:
>
> > Q. Well, just kind of walk me through what happened on the date of the injury.

> A. We were trying to finish up our day, and it was me and one of the other collectors there, end of the month, so we was trying to, you know, you have to stay late to collect. We were getting ready to leave, and I had forgot – I was walking outside to get in my vehicle, and I forgot my tablet, and it was dark outside and there was some loose concrete where they had been redoing the walks. When I stepped off the curb of the sidewalk, I rolled my ankle one way, rolled it the other way, flipped face forward and hit the ground.

Additionally, Nat Reider, the regional supervisor of the Defendant-employer testified at pages 28 and 29 to-wit:

> Q. So let me clarify then. On the night she was injured, you would agree with me that Serena had the use of a business tablet?
>
> A. Yes, ma'am.
>
> Q. And was it normal practice e that she – and you called her a branch manager?
>
> A. Yes, ma'am.
>
> Q. And would have been doing work at different times for the benefit of the business at her home on the business's tablet?
>
> A. We got to make ourselves, like when we talk to the people that we do business with, we let them know that we are available in case that they some customers who come into their dealership after business hours that we are available, and we can review credit applications on the tablet that the company provides us.

> Q. So if she testified that she was taking that tablet home to do work for the company, that would have been a normal course of practice, especially for Serena Gordon?
>
> A. Correct.

At the hearing, the claimant, Serena Gordon, testified on page 24 and 25 to-wit:

> Q. Based upon your experience there, tell the Administrative Law Judge what your regular hours were.
>
> A. Usually from 8:00 to whenever we got done. It could be 8:00, 9:00 o'clock at night time or 10:00. It just depended on how they -- you know, the month was ending. It is was -especially in our slow months where people are lacking income, like, right before Christmas or right after Christmas, we could be there collecting till 10:00 o'clock at night and out on the road till 10:00 o'clock at night. And, then after I would leave, I would take my tablet home and work from and call back deals or stop by the dealers and see them and keep the rapport because sometimes we'd get so busy in there, I wouldn't be able to get it all done, so I'd have to go out and see the dealers.
>
> Q. Well, now, you said something there about a tablet. Explain to the Administrative Law Judge what that is and –
>
> A. It is a computer or a tablet that you – that all the managers got, and only the managers. And, we used those to call back deals from home or on the weekends as well. And, so that's we used them for.
>
> Q. And, who issued those tablets?

A. The VP of the company

Q. And, on the night that you slipped and fell, were you doing something in relation to that tablet?

A. Yes. I had come out to get my vehicle and I forgot my tablet, so I ran back in to get it. And when I come back out, that's when I fell.

The above-cited testimony establishes the claimant was injured when she had returned to the office to retrieve a tablet that was issued to her by the employer and the purpose of the tablet was to allow the Plaintiff to work from home. The claimant had originally reached her car when she realized that she needed to retrieve the tablet. The sole purpose of retrieving the tablet was for the benefit of the employer. But for her retrieving the tablet for the employer's benefit, she would have been in her car on the way home and would not have fallen. Her activity at the time of the injury was clearly for service to the employer or to benefit the employer and was not for her personal use.

The ALJ notes Receveur Const. Company vs. Rogers, 958 SW2d 18 (Ky. 1997) holds that there is a distinction in Kentucky workers' compensation law when a worker sustains an injury when traveling to or from the place where he regularly works. Receveur holds that travel is work-related if it is for the convenience of the employer and not work related if it is for the convenience of the employee.

In the case at hand, the Plaintiff was issued a tablet, which would allow her to make calls to dealerships as well as work from home. The tablet was of no personal benefit to the Plaintiff; however, it would have allowed the Plaintiff to better perform her job duties, which included working from home and calling dealerships. OlstenKimberly Quality Care vs. Parr, 965 SW2d 155, 157 (Ky. 1998) holds that transitory activities of employees are covered if they are providing some service to the employer. Additionally, Fortney vs. Airtran Airways, Inc., 319 SW3d 325 (Ky. 2010) holds

> "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." In Receveur the Court held the Plaintiff's injuries were compensable because the Plaintiff using a company vehicle was benefit to the employer because it allowed him to "better perform the requirements and completion of his duties" to the Defendant-employer.
>
> After reviewing the evidence, the ALJ is persuaded that at the time of her injury, the claimant, Serena Gordon, was performing a service of benefit to her employer. The act if retrieving the tablet to take same home for use was for the benefit of the employer and not for her personal benefit. The employer obtained a benefit by her having the employer-issued tablet at her disposal at home. The ALJ is persuaded the claimant was performing a service for benefit of the employer at least until she reached her car to go home. In response to the decision of the Supreme Court, the ALJ is persuaded the claimant's activities became for the "benefit of the employer" when she realized she had forgotten the company-issued tablet and returned to get same and did not cease until she again got to her car. The ALJ is persuaded the short excursion, upon realizing she had forgotten the tablet and returning to retrieve same and the returning to her car, was for the benefit of the employer. It would have ceased when she got to the car. However, she fell and the injury occurred prior to her getting back in the car. Under the specific facts of the case, the ALJ is persuaded the claimant, Serena Gordon, sustained a work-related injury.
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> The ALJ reaches the same conclusions as in his original Opinion and the prior Order and Award is adopted by reference.

PFS filed a Petition for Reconsideration arguing the ALJ erred in determining Gordon was providing a benefit to PFS at the time of the accident. It specifically requested the ALJ to determine whether Gordon's travelling across the parking lot prior to realizing she forgot the tablet was in service to or for its benefit.

It additionally requested the ALJ to determine whether the travel across the parking lot if she had not forgotten the tablet would have been in its service. It also requested the ALJ to determine whether Gordon's drive to her home provided a benefit to PFS. PFS requested a finding as to why retrieving the tablet was any more of a service to the employer than leaving the office to go home normally. PFS requested additional findings supporting the ALJ's determination Gordon had reached her car before she returned to the office to retrieve her tablet. PFS also requested additional findings as to why her service to the employer ended when she reached her car. It also requested additional findings as to why the holding in Receveur Const. Company vs. Rogers, 958 S.W.2d 18 (Ky. 1997) is applicable to Gordon's case. It also argued the finding of compensability was patently erroneous.

In his Order denying the Petition for Reconsideration issued December 7, 2020, the ALJ found *verbatim* as follows:

> This matter is before the undersigned Administrative Law Judge (ALJ) upon the Defendant/employer's Petition for Reconsideration for Additional Findings of Fact and Analysis of Law. Having considered the Petition and record herein,
>
> **IT IS HEREBY CONSIDERED AND ORDERED** that the Petition for Reconsideration is **OVERRULED**.
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> The Defendant/employer's Petition is essentially an attempt to re-argue the merits of the claim. The request for additional findings of fact and analysis of law is nothing more than an attempt to re-argue the case. The ALJ made his Findings of Fact on Pages 5-9 of the Opinion on Remand. Those findings are sufficient to find the injury work-related and compensable.
>
> The additional findings requested are not necessary and are essentially answered in the ALJ's findings on Pages 5-9 of his Opinion on Remand.

> Concerning whether the Plaintiff had reached her car, the ALJ notes on Page 3 of the Board's decision which states: "Upon reaching her car, Gordon realized she had left behind a tablet PFS provided for her to use while out of the office." Similarly, in the Court of Appeals decision on Page 2, the Court notes: "Upon arriving at her parked car, she realized she had left her employer-issued tablet in her office."
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> The employer questions the relevance of the holding in Receuver Const. Company vs. Rogers, 958 SW2d 18 (Ky. 1997). The ALJ would point out the WCB originally cited said case on Page 7 of their Opinion since it explains the doctrine of "service to the employer" exception. The Court of Appeals also referred to said case on Pages 3 and 4 of their Opinion.
>
> In the dissent, the Court of Appeals noted: "The fact of this case are not in dispute." The dissent, also on Page 5, states: "Serena had reached her car when she realized that she had forgotten a tablet and returned to her place of work to retrieve it."
>
> The issue in this case quite simply is whether the claimant was providing a service to her employer at the time of the injury. The ALJ remains persuaded that she was providing a service to the employer and, hence, the injury is work-related and compensable.
>
> For the above reasons, the Petition for Reconsideration is overruled.

As directed by the Kentucky Supreme Court, the ALJ revisited his determination regarding whether Gordon was providing a benefit or service to PFS at the time of the accident. The ALJ made additional findings and determined the deviation from her normal route to her car to drive home was for PFS' benefit. He noted the tablet, solely used for business, allowed Gordon to work from home after hours. We find the ALJ's determination is supported by substantial evidence. 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).

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).

The fact Gordon sustained injuries to her left lower extremity is not disputed. Likewise, there is no question as to where or how the injury occurred. The ALJ determined the parking lot was not part of PFS's operating premises. We therefore determine the ALJ needs to provide no additional analysis regarding those issues.

The question which must be reviewed is whether some other exception to the "going and coming" rule is applicable. The "going and coming" rule was articulated by the Supreme Court of Kentucky in Receveur Construction, Co. v. Rogers, supra, 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.

See also Haney v. Butler, 990 S.W.2d 611 (Ky. 1999); Olsten-Kimberly Quality Care v. Parr, 965 S.W.2d 155, 157 (Ky. 1998); Baskin v. Community Towel Service, 466 S.W.2d 456 (Ky. 1971); Kaycee Coal Co. v. Short, 450 S.W.2d 262 (Ky. 1970). The "going and coming" rule generally applies to travel to and from a fixed-situs or regular place of work where an employee's substantial employment duties begin and end. 82 Am.Jur.2d Workers' Compensation § 270 (2003); Larson's Workmen's Compensation § 13.01[1].

Gordon testified she frequently worked from home where she used her tablet to process requests for financing from dealerships. Since the "traveling employee" exception to the "coming and going" rule is not applicable to Gordon's case, the ALJ was only required to determine whether her trip to retrieve the tablet provided "some benefit" to PFS.

The "service, or benefit to the employer" exception to the going and coming rule is set forth in Receveur, supra, and Bailey Port v. Kern, 187 S.W.3d 329 (Ky. App. 2006). In Receveur, the employer's construction company was located in Louisville and the employee's residence was in Campbellsville. The employee worked at remote job sites around the region. Shortly before the fatal MVA underlying the claim, Rogers had been promoted to project superintendent and was issued a company vehicle. The truck was equipped with a CB radio allowing him to communicate with Receveur Central Office during the day. The truck was to be

used as a means of transportation both during the course of the work day and between Roger's home and job site so he would not be required to first go to the central office in Louisville. Rogers was provided a credit card to cover the cost of fuel for the vehicle. He was not paid for travel time between his home and work though he was paid for travel time between the central office and remote job sites. On the day of the accident, Rogers had been working at a remote job site in Indiana. He returned in the company truck to the central office in Louisville where he unloaded a truckload of rubbish. Rogers then left for home in the company truck when the accident occurred.

The Kentucky Supreme Court acknowledged generally injuries incurred while traveling to and from work are not deemed to arise out of and in the course of the employment. Receveur, 958 S.W.2d at 20. However, the Court held the accident to be compensable under the "service to the employer" exception. Id. Citing Standard Gravure Corporation v. Grabhorn, 702 S.W. 2d 49 (Ky. App. 1985); Spurgeon v. Blue Diamond Coal Company, 469 S.W. 2d 550 (Ky. 1971); Ratliff v. Epling, 401 S.W. 2d 43 (Ky. 1966); and Palmer v. Main, 209 Ky. 226, 272 S.W. 2d 736 (Ky. 1925). The Court in its reasoning did not focus on the particular trip during which the accident occurred, but rather the benefit the employer received generally from Rogers' use of the company vehicle. The Court applied "some benefit" test to the particular facts and in finding work-relatedness stated:

> Therefore, based on our interpretation of the applicable case law as summarized above, as well as the facts presented in the case at bar, it appears that there was substantial evidence to support a conclusion that Rogers' use of the company truck was of benefit to the company. The employer's purpose in providing such a vehicle to

> Rogers was to allow him to better perform the requirements and completion of his duties. Included within such objective was the premise that use of the company truck as transportation between Rogers' home and the job site would allow Rogers to begin his actual duties earlier, and to remain productive longer, by avoiding a stop at the company's business office in Louisville.
>
> Thus, although the use of such a conveyance was a convenience for Rogers, it was primarily of benefit to the employer. Hence, as it can be concluded that Rogers was performing a service to the employer at the time of his death, it can be determined that his death was work-related under the service to the employer exception to the going and coming rule.
>
> Id. at 21

The Kentucky Supreme Court acknowledged the majority of jurisdictions have held injury or death occurring while an employee is commuting to work in a company vehicle is compensable as a work-related activity. However, the Court refused to go that far; instead it applied the "some benefit" test. The Court further noted the claim contained no specific allegation of substantial deviation from the course and scope of employment.

> In view of the foregoing, we need not . . . reach the question of whether we adopt the theories that an employer's deliberate and substantial payment for the expense of travel, the employer's issuance of a company vehicle, or the employer's furnishing of transportation in a conveyance, makes the journey held to be in the course of employment. [citation omitted]. **Nor do we find that the evidence compelled the conclusion that there was a substantial deviation from the course and scope of the employment, and there is no such specific allegation herein.**
>
> Id. at 21. (emphasis added)

The Kentucky Court of Appeals also applied the "some benefit" doctrine expressed in Receveur in the case of Kern, supra. In Kern, the claimant was supplied a company vehicle. Kern sustained injuries when involved in a MVA while driving home from work in the company owned vehicle. Kern kept tools in the vehicle and was on call all times of the day and sometimes at night. The Court discussed the holding in Receveur in connection with the evidence, finding Kern was given the use of the vehicle for the company's benefit and not his. It found significant the fact Kern stored his tools in the company vehicle and the company allowed him to travel directly to a job site instead of stopping at the place of work to pick up his tools.

In Fortney v. Airtran Airways, Inc., 319 S.W.3d 325, 329 (Ky. 2010), the Kentucky Supreme Court held the rule excluding injuries occurring off the employer's premises, during travel between work and home, does not apply if the travel is part of the service for which the worker is employed, or otherwise benefits the employer. Fortney, a pilot for the employer, resided in Lexington, Kentucky while his work was based in Atlanta, Georgia. He flew between Lexington and Atlanta, and was not reimbursed for his commuting-related expenses. However, the employer provided free or reduced fare travel to its employees and their families. Fortney was killed when the plane in which he was a passenger crashed on takeoff in Lexington in route to Atlanta. Ultimately, the Court remanded the claim to the ALJ since he failed to consider whether the free or reduced fare arrangement induced the claimant to accept or continue employment with Airtran. Id. at 330. There was no allegation of substantial deviation on Fortney's part.

The Kentucky Supreme Court held in Gaines Gentry Thoroughbreds/ Fayette Farms v. Mandujano, 366 S.W.3d 456, 463-464 (Ky. 2012) as follows:

> Kentucky applies the traveling employee doctrine in instances where a worker's employment requires travel. Grounded in the position risk doctrine, the traveling employee doctrine considers an injury that occurs while employee is in travel status to be work-related unless the worker was engaged in a significant departure from the purpose of the trip. The ALJ did not err by concluding that the traveling employee and position risk doctrines permitted compensation in this case.
>
> The claimant's accident did not occur while he was working for Eaton or Paramount but while he was traveling from Saratoga back to Lexington. As found by the ALJ, the parties contemplated that he would work at the sales and return to his duties at the farm when the sales ended. The accident in which he was injured occurred during the "necessary and inevitable" act of completing the journey he undertook for Gaines Gentry. In other words, travel necessitated by the claimant's employer placed him in what turned out to be a place of danger and he was injured as a consequence.

Based upon the foregoing, we find the ALJ did not err in determining Gordon was providing "some benefit" to PFS when she fell, therefore sustaining a compensable work-related injury. The ALJ noted Gordon used the tablet solely for business purposes. He also determined she used the tablet late into the evening, at home, to process documents received from customers. We believe the ALJ's findings are sufficient to support his determination, which will not be disturbed. We additionally note the Kentucky Supreme Court only reversed the ALJ's determination regarding his analysis of the work-relatedness, not the award of income and medical benefits, so those determinations, likewise, will not be disturbed.

Accordingly, November 9, 2020, Opinion on Remand and the December 20, 2020 Order denying PFS' Petition for Reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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