Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 26, 2024

CLAIM NO. 202149967

FEDEX PETITIONER

VS. **APPEAL FROM HON. AMANDA M. PERKINS, ADMINISTRATIVE LAW JUDGE**

ROBERT FIGUEROA and
HON. AMANDA M. PERKINS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. FedEx appeals from the September 25, 2023 Opinion, Award, and Order, and the October 16, 2023 Order denying its Petition for Reconsideration rendered by Hon. Amanda M. Perkins, Administrative Law Judge ("ALJ"). The ALJ found Robert Figueroa ("Figueroa") was shot in the right eye by an assailant on September 1, 2021, in the course and scope of his employment with FedEx, rendering him permanently totally disabled (as stipulated by the parties).

On appeal, FedEx argues a "road rage" incident, culminating in Figueroa being shot in the head by an assailant occurred outside the scope of his employment. FedEx argues the going and coming rule bars this claim. FedEx also argues Figueroa was not in travel status at the time of the incident, and it had no control over the circumstances of the shooting. Finally, FedEx argues the ALJ abused her discretion when she determined Figueroa was not on his break at the time of the shooting. We find the ALJ appropriately reviewed the evidence, and the circumstances of the incident in finding Figueroa sustained a work-related injury in the course and scope of his employment with FedEx, and therefore, we affirm.

A Form 101 was filed on May 9, 2022 by Figueroa's mother, who was duly appointed as his guardian by the Jefferson District Court on November 1, 2021 due to his incapacity from the injuries he sustained on September 1, 2021 in the course and scope of his job duties with FedEx, when he was shot in the head by an assailant. The parties stipulated Figueroa is permanently totally disabled, and therefore, his work history is irrelevant; however, we note he was gainfully employed most of his adult life.

Figueroa filed the Incident/Investigative Report from the Louisville Metropolitan Police Department ("LMPD") in support of his claim. That report prepared by Detective Rusty Holland ("Det. Holland"), reflects as follows:

> On the listed date and time, 1st Division officers responded to a shooting. Officers arrived to find the listed victim suffering from a gunshot wound to the head. The victim was transported to The University of Louisville Hospital for treatment. The prognosis for the victim is grim and he is not expected to survive his injuries. Video surveillance showed the victim and a BM

> suspect involved in a verbal altercation when the suspect produced a weapon and shot the victim.

Also attached to the Form 101 is the patient care record from Louisville Metro EMS dated September 1, 2021, prepared by William Kone, paramedic. That report reflects Figueroa sustained injuries to his right eye and head from a firearm assault on September 1, 2021. Figueroa was sitting in the driver's seat of a FedEx-type van and he was unresponsive when EMS arrived. The report specifically notes Figueroa sustained a gunshot wound to the right eye and the crown of his head, and he had "skull and brain matter bulging outward." Figueroa was transported by ambulance to the University of Louisville Hospital.

The claim was assigned to the ALJ by Order dated May 17, 2022. FedEx filed a Form 111 denying the claim on June 6, 2022, averring Figueroa's injuries did not arise out of the course and scope of his employment. It acknowledged Figueroa's injuries occurred on September 1, 2021. FedEx filed a Motion to Dismiss the claim on June 15, 2022, arguing Figueroa did not attach a medical opinion to the Form 101 establishing a causal connection between any work events and the medical condition that is the subject of the claim. Figueroa responded to the motion on June 17, 2022, noting the EMS records establish he was found in his FedEx truck, unresponsive, after receiving the gunshot wound. Figueroa then filed over 300 pages of records from the University of Louisville Hospital into evidence. On June 27, 2022, the ALJ entered an Order passing a decision on the motion to the merits of the claim.

On June 26, 2023, FedEx filed a Special Answer asserting Figueroa was engaged in horseplay at the time of the incident, and therefore his claim is

barred. On July 13, 2023, the parties submitted joint stipulations indicating Figueroa's contested treatment was reasonable and necessary. The joint stipulations also note the parties agree Figueroa is permanently totally disabled.

Figueroa was evaluated by Dr. Jules Barefoot on July 6, 2023. Dr. Barefoot noted the extensive treatment Figueroa has undergone due to the injuries he sustained in the gunshot incident. Dr. Barefoot assessed a 96% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Dr. Barefoot outlined Figueroa's history of sustaining a gunshot wound to the head resulting in a massive traumatic brain injury, from which he remains in a semi-vegetative state. He also noted Figueroa has upper and lower extremity spasticity due to the injuries he sustained from the gunshot wound, confining him to a wheelchair. Dr. Barefoot found Figueroa reached maximum medical improvement as of the date of the evaluation.

A Benefit Review Conference ("BRC") was held on July 27, 2023. The BRC Order and Memorandum reflects the issues preserved for determination included whether Figueroa sustained a work-related injury on September 1, 2021, credit for short-term and long-term disability benefits, TTD benefits, KRS 342.730 benefits, and medical benefits. FedEx stipulated it had paid no medical benefits, but the medical expenses incurred for the treatment of Figueroa's injuries were reasonable and necessary. Also preserved as an issue was whether Figueroa was engaged in the course and scope of his employment at the time he was shot, and whether the claim may be precluded based on the going and coming rule.

Figueroa's mother testified at the hearing. Her testimony is essentially irrelevant to the issues raised on appeal; however, she confirmed Figueroa sustained a gunshot wound to his head on September 1, 2021, and he now resides in a skilled nursing facility. She also confirmed the FedEx facility is located on 12th Street in Louisville, Kentucky, only a short distance from where the incident occurred.

Karen Mayer ("Mayer"), Figueroa's senior manager at FedEx, testified by deposition on June 13, 2023. She oversees FedEx station locations in Louisville; Evansville, Indiana; and Huntingburg, Indiana. She has worked for FedEx for over 25 years, and she has been a senior manager for over four years. She indirectly supervised Figueroa, noting she has six managers working directly under her.

Mayer testified Figueroa was a courier who had an assigned pickup route in the riverport area, down Dixie Highway. She spoke with him daily. She stated Figueroa reported to work at approximately 2:00 p.m., Monday through Friday, working until approximately 11:00 p.m. His job entailed going to customer locations along a specific route and picking up outgoing packages. When he picked up the packages, they were scanned into a handheld device called a LEO.

Mayer testified drivers were afforded a one-hour unpaid break each night. Drivers logged in and out of breaks using the LEO scanning device. She testified FedEx policy states drivers should not leave their routes when taking their breaks. However, Mayer testified, "I do know he did go home for his breaks. He spoke frequently of it. You know, it was out of his area, but it was on his way back to the station. So his residence is probably six minutes away from the station so . . .

He talked frequently about going home on his way back." She noted the shooting occurred in the parking lot for Figueroa's apartment. She took a photograph at the scene after the shooting depicting the van Figueroa drove. She noted the van was backed into a parking spot.

Mayer testified drivers log out of work to start their breaks after they have parked and exited the vehicle. On the date of the incident, Figueroa had completed his route, as was his normal practice, and stopped by his apartment to take his break. The only work duties he had remaining were at the FedEx facility. She testified Figueroa had never been instructed to not take his break at his residence. She stated Figueroa's stopping at his residence to take his unpaid break was not an issue with FedEx. She testified his job involved travel within the city of Louisville. She also noted Figueroa had not entered his break into the LEO when the shooting occurred.

Det. Holland, with the LMPD homicide unit, testified by deposition on June 12, 2022. Det. Holland investigated the incident involving Figueroa's shooting. The call was received at approximately 8:00 p.m. Figueroa had already been transported to the hospital from the scene in the 500 block of Armory Place when he arrived. He noted a white van loaded with several packages was in the lot. Blood was visible inside the driver's side of the vehicle. Figueroa's wounds were deemed catastrophic, and he was not expected to survive.

Det. Holland noted videos of the incident existed, however they could not be released due to the ongoing open criminal investigation since the assailant had never been apprehended. He noted Figueroa was operating the van eastbound on

Chestnut Street, followed by a motorcycle. Figueroa used his turn signal, and turned left onto Armory Place. He then stopped and backed left into a parking lot. A motorcycle was following and swerved to avoid hitting the van. When Figueroa parked and exited the van, the motorcycle rider, or assailant, verbally confronted him. A verbal altercation occurred, and the assailant displayed a weapon. Figueroa returned to the van, and the assailant followed, opening the passenger door, and shooting him in the face. Det. Holland noted there was no physical altercation except for the gunshot. Det. Holland noted this was a verbal argument over a "near" traffic accident, and there was no justification for the shooting. He classified this as a "road rage" incident. At the time of the shooting, Figueroa was sitting in the driver's seat, and the van was not moving. The assailant opened the passenger door, leaned in, and shot Figueroa.

The ALJ rendered her decision on September 25, 2023 finding Figueroa permanently totally disabled due to work-related injuries he sustained when he was shot in the head on September 1, 2021. She specifically found *verbatim* as follows:

> As the claimant in workers' compensation proceeding, Figueroa has the burden of proof and the risk of non-persuasion to convince the trier of fact of every element of his workers' compensation claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979).
>
> FedEx argues Figueroa's injuries did not arise out of the course and scope of his employment because of the "coming-and-going" rule and he was getting ready to take his break at his apartment. It also argues Figueroa's claim is not work-related because he escalated the altercation.

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. *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 *Clark* Court went on to explain that an injury arises out of employment if the employment causes it, *i.e.*, if the employment subjects the worker to an increased risk of injury. *Id*. at 143.

After reviewing the evidence, I find Figueroa's injury arose out of and in the course of his employment as a courier with FedEx. I am particularly persuaded by the following undisputed facts:

• Figueroa was operating his FedEx vehicle following his work requirements, *i.e.*, he was likely attempting to take his one-hour break at a location allowed by FedEx's policy before he returned to its facility to finish his shift.

• Figueroa's operation of his FedEx vehicle caused the assailant to perform an evasive driving maneuver.

• Figueroa was inside of his FedEx vehicle and still on the clock when the assailant opened his passenger door and shot him.

Figueroa meets the *Clark* Court's definition of injuries that occur during the course of employment. First, his injury took place during his employment because he was still clocked in, en route to take his one-hour break, and operating his FedEx vehicle when he

cut off the assailant. Second, his injury occurred in a place where it was reasonable for him to be, *i.e.*, a parking lot close to his apartment. Mayer explained Figueroa had to return to FedEx's facility at the end of his shift and it was fine to take his one-hour break at his house because it was on his way to FedEx's facility. Third, Figueroa was still clocked in and working when he was shot. FedEx argues he was not performing any work duties at the time of the shooting, but it is undisputed he was sitting inside his FedEx vehicle and had not clocked out when the assailant opened Figueroa's passenger door and shot him in the head.

Based on the unrebutted evidence, I also find the shooting arose out of Figueroa's employment. It is undisputed that Figueroa's operation of his FedEx vehicle led the assailant to follow Figueroa, park close to him, and then proceed toward him with a gun. Detective Holland opined Figueroa's operation of his FedEx vehicle was the cause of the shooting. There is no evidence the shooting was the result of a personal conflict or animosity between Figueroa and the assailant. Although Detective Holland described an audio recording where you can hear two people exchanging "some words," I find the catalyst for the altercation and subsequent shooting was Figueroa's operation of FedEx's vehicle in a way that caused the assailant to perform an evasive driving maneuver.

As Figueroa's gunshot injury arose out of and in the course of his employment, I find he suffered a work-related injury.

FedEx argues the "coming-and-going" rule applies here, thus, he was not in the course and scope of his employment when he was shot. The "coming-and-going" rule provides that injuries sustained while an employee is coming or going from his or place of employment do not "arise out of" or "in the course of" employment, and, as such, are not covered by workers' compensation.

The Supreme Court of Kentucky recently addressed the "coming-and-going" rule in an unpublished case, *Personnel Cabinet v. Timmons*, 2021-SC-0271-WC, 2023 WL 2623247, at *3 (Ky. Mar. 23, 2023).

In *Timmons*, the Court summarized the rule and the recognized exceptions:

> The "coming-and-going rule" creates an exclusion from workers' compensation coverage for an employee's travels to and from work, despite an assumption that those travels arise out of and in the course of employment. The rule is meant to relieve the employer of liability for those "common risks of the street" over which the employer has no control.
>
> Since the inception of the coming-and-going rule, this Court has recognized several doctrines governing the rule's application. Most broadly, this Court has analyzed employer liability, and thus workers' compensation applicability, under the positional-risk doctrine. This doctrine provides that if a person's employment is "the reason for his or her presence at what turned out to be a place of danger," and if, except for the employee's presence at that place, the employee would not have been injured, the employer may be liable for the employee's injuries.
>
> The traveling-employee exception to the coming-and-going rule is an application of the positional-risk doctrine. This exception applies in cases where a worker's employment requires travel, and it "considers an injury that occurs while the employee is in travel status to be work-related unless the worker was engaged in a significant departure from the purpose of the trip." In other words, when an employee's travel is for the service or benefit of the employer, injuries arising during that travel can be considered to be work-related.
>
> *Id.*

Figueroa argues he was a traveling employee, an exception to the "coming-and-going" rule, thus, his injury is compensable. FedEx does not address whether Figueroa was a traveling employee. Instead, it relies on the *Timmons* Court's holding to argue his injury is not compensable because he was parked at his residence when he was shot.

I find Figueroa was a traveling employee and falls well within the exception to the "coming-and-going" rule. His job as a courier for FedEx required him to spend most of his shift away from FedEx's premises. Mayer classified his job duties as being mainly "on road." (Mayer Depo. 25:6-9). Since Figueroa was a traveling employee, any injuries that occurred while he was in travel status are work-related unless I find he engaged in a significant departure from the purpose of his trip. *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456, 462 (Ky. 2012).

Here, I find Figueroa's driving down Armory Place and parking in a lot off Armory Place to take his one-hour break was not a significant departure from the purpose of his trip. Mayer testified the couriers take a one-hour break and FedEx wanted the couriers to take a break along their routes. Instead of taking his break along his route, Figueroa took his break at his apartment, which was located six minutes from FedEx's facility. (Id. 8:21-25). She indicated this was agreeable to FedEx because it was on his way back to FedEx's facility which he was required to return to at the end of every shift. Further, Mayer made it clear FedEx knew he took his breaks at his apartment and was agreeable to this practice. Thus, I find his turn onto Armory Place to take his break was not a significant department from his work as a courier.

FedEx also asserts Figueroa's injuries occurred at his home, as such, his injuries did not arise out of the course and scope of his employment under the Court's holding in *Timmons*. However, I am not persuaded the holding in *Timmons* applies to the facts here.

In *Timmons*, the claimant fell exiting her home on her way to travel for her employer. The Court did not deny she was a traveling employee. Instead, it held her

travel did not begin until she left her property and exposed herself to the common risks of the public street.

Here, unlike in *Timmons*, Figueroa was injured in a parking lot and not in his apartment or even his apartment building. Detective Holland explained the assailant approached Figueroa after an incident of road rage and shot him while he was sitting inside his FedEx vehicle that was parked immediately off the street in a paved parking lot. Figueroa's circumstances are squarely within the common risks of the public street the Court found did not exist in *Timmons*.

Based on the above, Figueroa was a "traveling employee" who did not significantly depart from the purpose of his trip. Thus, he was in the course and scope of his employment when the assailant shot him.

FedEx further argues that because Figueroa was getting ready to take his break, he was not in the course and scope of his employment. It alleges an injury during a break would only be work-related if Figueroa met the criteria set forth and further explained in *American Greetings Corp. v. Shelia Bunch*, 331 S.W.3d 600, 603 (Ky. 2010). However, I am not persuaded the criteria outlined in *Bunch* applies to Figueroa. First, I am not convinced the criteria in *Bunch* applies to traveling employees like Figueroa. Second, the assailant shot Figueroa while he was still on the clock and sitting inside his FedEx vehicle. He was not yet on his break or engaged in a recreational activity at the time the assailant shot him.

Finally, FedEx alleges Figueroa escalated the altercation, thus his injuries are not compensable. It appears FedEx is attempting to raise the defense found in KRS 342.610(3):

> Liability for compensation shall not apply to injury, occupational disease, or death to the employee if the employee willfully intended to injure or kill himself, herself, or another

In *Advance Aluminum Co. v. Leslie*, 869 S.W.2d 39, 40 (Ky. 1994), the Court explained that "KRS

> 342.610(3) encompasses situations including horseplay, intoxication, or other employee conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another.
>
> In *Trevino v. Transit Authority of River City*, 569 S.W.3d 400 (Ky. 2019), the Court further interpreted KRS 342.610(3), and held, "the key question here is whether the claimant's willful conduct was the proximate cause of his injury."
>
> While I did not have the benefit of reviewing the audio or video, I am not persuaded there is substantial evidence that Figueroa's conduct before the shooting was the proximate cause of his injury. Although Detective Holland described an exchange of words between Figueroa and the assailant before the shooting, it is clear from Detective Holland's description that the assailant approached Figueroa first, holding a gun and initiating the verbal altercation. More importantly, it appears Figueroa attempted to deescalate the situation or at a very minimum put additional space between him and the assailant when he got back inside of his FedEx vehicle. Thus, I am not persuaded Figueroa's willful conduct was the proximate cause of his injuries.

FedEx filed a Petition for Reconsideration requesting 13 additional findings. The ALJ issued an Order on the Petition for Reconsideration on October 16, 2023. She noted that in addition to the 13 requests for additional findings, FedEx also argued she committed several errors. The ALJ's Order denying the Petition for Reconsideration states *verbatim* as follows:

> Request (a), I found the FedEx vehicle was parked at the time of the confrontation and shooting based on Detective Rusty Holland's unrebutted testimony. (Opinion pages 3, 6; Holland Depo. 11:18-21, 12:3-7).
>
> Request (d), the only evidence addressing where Plaintiff and the assailant exchanged words comes from Detective Holland's unrebutted testimony:

> So there appears to be a verbal altercation between the two. Once Mr. Figueroa comes to a complete stop, the gentleman on the motorcycle, the suspect, walks towards him. Mr. Figueroa exits the vehicle. There are words exchanged. There's no physical altercation whatsoever.
> (Id. 12:8-14).

Requests (f) and(m), I did not address whether Plaintiff provided a service to his employer when he exited or returned to his vehicle. Whether Plaintiff provided a service to Defendant by exiting or returning the vehicle is immaterial to my findings. I found Plaintiff's injury arose out of the course and scope of his employment. Whether Plaintiff's exiting or returning to the vehicle provided a service to Defendant is only material if addressing the service to employer exception of the going and coming rule. I found Plaintiff was a traveling employee. Thus, whether exiting or returning to his vehicle provided a benefit or service to Defendant is irrelevant. Further, the reason Plaintiff departed and returned to his vehicle is unknown as Plaintiff is incapacitated and cannot testify.

Requests (g) through (k) were addressed on pages six, nine, and ten of the Opinion, Award and Order, but are also repeated below:

> Detective Holland opined Figueroa's operation of his FedEx vehicle was the cause of the shooting. There is no evidence the shooting wasthe result of a personal conflict or animosity between Figueroa and the assailant. Although Detective Holland described an audio recording where you can hear two people exchanging "some words," I find the catalyst for the altercation and subsequent shooting was Figueroa's operation of FedEx's vehicle in a way that caused the assailant to perform an evasive driving maneuver.
> ….

Finally, FedEx alleges Figueroa escalated the altercation, thus are not compensable. It appears FedEx is attempting to raise the defense found in KRS 342.610(3):

> Liability for compensation shall not apply to injury, occupational disease, or death to the employee if the employee willfully intended to injure or kill himself, herself, or another

In *Advance Aluminum Co. v. Leslie*, 869 S.W.2d 39, 40 (Ky. 1994), the Court explained that "KRS 342.610(3) encompasses situations including horseplay, intoxication, or other employee conduct shown to have been an intentional, deliberate action with a reckless disregard of the consequences either to himself or to another.

In *Trevino v. Transit Authority of River City*, 569 S.W.3d 400 (Ky. 2019), the Court further interpreted KRS 342.610(3), and held, "the key question here is whether the claimant's willful conduct was the proximate cause of his injury."

While I did not have the benefit of reviewing the audio or video, I am not persuaded there is substantial evidence that Figueroa's conduct before the shooting was the proximate cause of his injury. Although Detective Holland described an exchange of words between Figueroa and the assailant before the shooting, it is clear from Detective Holland's description that the assailant approached Figueroa first, holding a gun and initiating the verbal altercation. More importantly, it appears Figueroa attempted to deescalate the situation or at a very minimum put additional space between him and the assailant when he got back inside of his FedEx vehicle.

> Thus, I am not persuaded Figueroa's willful conduct was the proximate cause of his injuries.
>
> Request (l), Detective Holland's unrebutted testimony is that Plaintiff first walked away from the confrontation. (Holland Depo. 12:20-23).
>
> Defendant's paragraphs (2) through (4) are simply an impermissible re-argument of the merits of the claim. I addressed the evidence I relied on to find Plaintiff's injuries arose out of the course and scope of his employment, he was a traveling employee who did not significantly depart from the purpose of the trip, and he did not engage in willful conduct that proximately caused his injuries.
>
> Again, Defendant's Petition is DENIED. because it is an impermissible re-argument.

On appeal, FedEx argues Figueroa's injuries from the apparent "road rage" incident occurred outside the course and scope of his employment. It argues his claim is barred by the going and coming rule. FedEx argues Figueroa was not in travel status at the time of the incident, and it had no control over the circumstances of the shooting. Finally, FedEx argues the ALJ abused her discretion when she determined Figueroa was not on his break at the time of the shooting.

The "going and coming" rule states 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. 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]. One rationale of the "going

and coming" rule is that going to and coming from work is the product of the employee's own decision on where to live, which is a matter ordinarily of no interest to the employer. Collins v. Kelley, No. 2002-CA-002472-MR, 2004 WL 1231633 (Ky. App. 2004).

Several exceptions to the "going and coming" rule have been recognized, one of which is the traveling employee doctrine. That doctrine provides that when travel is a requirement of employment and is implicit in the understanding between the employee and the employer at the time the employment contract was entered into, then injuries which occur going to or coming from a workplace will generally be held to be work-related and compensable, except when a distinct departure or deviation on a personal errand is shown. William S. Haynes, Kentucky Jurisprudence, Workers' Compensation, § 10-3 (revised 1990). Professor Larson elaborates that "[e]mployees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown." Larson's Workmen's Compensation, § 25.01.

The traveling employee doctrine is well-established in Kentucky. In Black v. Tichenor, 396 S.W.2d 794, 796-797 (Ky. 1965), the Supreme Court held as follows:

> It is quite a different thing to go to and from a work site away from the regular place of employment, than it is to go to and from one's home to one's usual place of employment; it is the latter which generally comes within the so-called 'going and coming rule' absolving employers from Workmen's Compensation liability. The former comes within the principle stated in Larson, Workmen's Compensation Law, Vol. 1, Sec.

> 25.00: 'Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.' Turner Day & Woolworth Handle Company v. Pennington, 250 Ky. 433, 63 S.W.2d 490 [(1933)]; Standard Oil Company v. Witt, 283 Ky. 327, 141 S.W.2d 271 [(1940)].
>
> Although traffic perils are ones to which all travelers are exposed, the particular exposure of Tichenor in the case at bar was caused by the requirements of his employment and was implicit in the understanding his employer had with him at the time he was hired. Palmer v. Main, 209 Ky. 226, 272 S.W. 736 [(1925)]; Hinkle v. Allen Codell Company, 298 Ky. 102, 182 S.W.2d 20 [(1944)]. In the recent case of Corken v. Corken Steel Products, Inc. (1964), Ky., 385 S.W.2d 949, where a traveling salesman was killed on a public street by a demented stranger, we approved an award of compensation, and said:
>
> We accept the view that causal connection is sufficient if the exposure results from the employment. Corken's employment was the reason for his presence at what turned out to be a place of danger, and except for his presence there he would not have been killed.

The traveling employee exception to the "going and coming" rule is grounded in the "positional risk" doctrine, articulated by the Supreme Court in Corken v. Corken Steel Products, Inc., 385 S.W.2d 949 (Ky. 1964). Hazards ordinarily encountered in such journeys are not deemed incident to the employer's business. Kaycee Coal Co. v. Short, 450 S.W.2d 262 (Ky. 1970).

In Fortney v. Airtran Airways, Inc., 319 S.W.3d 325 (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, was a resident of Lexington, Kentucky, although his work was based in Atlanta, Georgia. He flew between Lexington and Atlanta, and was not reimbursed for his commuting 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 enroute to Atlanta. Ultimately, the Court remanded the claim to the ALJ for consideration of 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.

We also note the Court's holding in Louisville Jefferson County Air Bd. v. Riddle, 190 S.W.2d 1009 (Ky. App. 1945), that when an injury occurs while performing a service for the employer in the line of duty, it is compensable. It additionally noted, "[T]he words 'arise out' refers to the cause of the accident, while 'in the course of' relate to the time, place, and circumstances of the accident." Abbott Laboratories v. Smith, 205 S.W.3d 249 (Ky. App. 2006); Clark County Bd. Of Educ. v. Jacobs, 278 S.W.3d 140 (Ky. 2009). Whether an action by an employee was or was not a benefit or service to the employer is a finding of fact and will not be disturbed on appeal if supported by evidence of probative value. Howard D. Sturgill & Sons v. Fairchild, 647 S.W.2d 796 (Ky. 1982).

The ALJ found this claim is similar to the facts in Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456, 463-464 (Ky. 2012).

There, Mandujano traveled to a Saratoga racetrack at his employer's request. At the conclusion of the Saratoga business, Mandujano returned to Kentucky. He was injured on his return trip to Kentucky. The employer argued that Mandujano spent additional time in New York after the business was concluded, extinguishing its responsibility for the return trip. The Kentucky Supreme Court disagreed and found Mandujano's injuries compensable.

The facts in this case are simple. Figueroa reported to work on September 1, 2021. He completed his route for FedEx, and attempted to go to his apartment to take his unpaid break, a practice condoned by his employer, when the incident occurred. The incident was apparently initiated by the backing of the van driven by Figueroa into the parking lot of his apartment building. When he backed up from the street, Armory Place, as corroborated by Det. Holland's testimony, a motorcycle traveling closely behind, swerved to avoid an accident. The assailant then confronted Figueroa who then returned to the van after a verbal exchange. The assailant then opened the passenger door, leaned in, and shot Figueroa. The incident began as Figueroa was driving the van, and culminated in the shooting. As noted by Mayer, Figueroa had not clocked out on break when he was shot.

This is not a case where Figueroa's job duties ended when he completed his route. In fact, he was merely going to take his mandated unpaid break before resuming his workday at the FedEx station. The incident began while he was driving to his break location, but he had not actually initiated his break. Although the senior manager was aware Figueroa routinely drove to his home to take his break, he had never been advised not to do so, and the activity was clearly condoned.

Driving was an integral part of Figueroa's job. The very character of his employment as a courier involved driving the van along a route and returning to the FedEx station.

We acknowledge the street risk rule explained by Professor Larson at 1 Larson's Workers' Compensation Law §6.04. "Under this test, if the employment occasions the employee's use of the street, the risks of the street are risks of the employment, noting it is immaterial whether the nature of the employment involves continuous or only occasional exposure to risk dangers." Professor Larson additionally noted this doctrine is applicable in situations involving assaults, as outlined in 1 Larson's Worker's Compensation Law §8.01(c). Clearly, a "road rage" incident such as Figueroa experienced is a risk of the street.

The fact Figueroa was intending to take a break at his home, en route to the FedEx station, an activity clearly condoned by his employer, does not in and of itself bar the claim. This incident began during his driving activity, and the shooting occurred before he could initiate his break, and therefore occurred in the course and scope of his employment.

As noted by the ALJ, the holding in the unpublished opinion of Personnel Cabinet v. Timmons, 2021-SC-0271-WC, 2023 WL 2623247, at *3 (Ky. Mar. 23, 2023) has no application to this case. There the Kentucky Supreme Court determined Timmons had not yet initiated her journey. To the contrary, Figueroa initiated travel when he left the FedEx facility to begin his route. Since the sequence of events began while Figueroa was driving, and he never initiated his break, we find no error in the ALJ's determination the incident occurred in the course and scope of

his job with FedEx. Because the ALJ appropriately outlined the facts in evidence, and applied them to existing law, her determination will not be disturbed.

For the foregoing reasons, the September 25, 2023 Opinion, Award, and Order, and the October 16, 2023 Order on Petition for Reconsideration rendered by Hon. Amanda M. Perkins, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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