Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 11, 2023

CLAIM NO. 202200320

JOSEPH E. LEE PETITIONER

VS. **APPEAL FROM HON. W. GREG HARVEY, ADMINISTRATIVE LAW JUDGE**

W.G. YATES & SONS CONSTRUCTION CO. and
HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

MILLER, Member. Joseph E. Lee ("Lee") appeals from the November 3, 2022 Opinion and Order and the December 6, 2022 Order on Petition for Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"). The ALJ dismissed Lee's claim for income and medical benefits, finding the injury did not occur in the course and scope of his employment with W.G. Yates & Sons Construction Company ("Yates & Sons"). For the reasons set forth below, we affirm.

BACKGROUND

Lee was born on November 8, 1972, and he lives in Delhi, Louisiana. He has a seventh-grade education and began working as a teenager. He has worked as a pipefitter, welder, and in the construction trade. Prior to working for Yates & Sons, Lee worked for numerous other companies as a general foreman in the construction industry. He testified he worked one job with Yates & Sons when he was 20 years old. This was a "little short job" about 30 years ago. He then worked for a shipyard, and later began working on-the-road construction jobs. He stated his longest on-the-road job lasted approximately a year.

Yates & Sons is a construction company based in Mississippi. It does industrial construction work all over the country. At the time of Lee's injury, Yates & Sons' jobs included an environmental project at the Spurlock Station Power Co-Op in Maysville, Kentucky. The project involved upgrading the plant's ash system.

Lee testified by deposition and at the Final Hearing on September 6, 2022. Lee was hired by Yates & Sons in January 2020 for this particular job. During the hiring process, Lee spoke on the phone with Ken Milby, who was already working in Kentucky. Lee was in Louisiana at the time of the phone call. During the deposition, Lee testified he was hired to work on the project in Kentucky during the call. At the hearing, he acknowledged he was hired out of the temporary office that was already set up at the site in Maysville, but it was unclear whether that occurred in person or over the phone. Lee understood he would have to move to Kentucky to perform the job. Lee testified as follows:

Lee: The night superintendent hired me.

Counsel: Okay. And this was at the temporary office there in Maysville, Kentucky?

Lee: Yes, sir.

Lee drove his truck and pulled a trailer and his motorcycle from Louisiana to the job site. Lee was not paid any travel expenses for his trip from Louisiana to the Maysville, Kentucky job site. Lee moved his trailer to a trailer park in Aberdeen, Ohio, somewhere between three and six miles from the job site, according to his deposition and hearing testimony. He stated he traveled home to Louisiana once during the time he was working on the project in Maysville, and he did not intend to remain in Kentucky after the project was completed.

Lee worked as a general foreman. He worked the night shift from 7:00 P.M. to 7:00 A.M. He worked only at the Maysville job site and never traveled for work purposes. He was not required to travel away from the plant as part of the job. Lee was paid hourly and received a daily *per diem* for food and lodging expenses. At times, Lee communicated with the administration offices in Florida, although he also spoke with onsite administrative personnel at the Maysville site.

On September 19, 2020, Lee left his trailer to get food with a co-worker in Ripley, Ohio, when he was involved in a collision with a vehicle. Lee rode his motorcycle and met up with another worker. They were heading to eat at a hamburger place in Ripley, Ohio. The accident occurred around 4:30 P.M. prior to the start of his shift. Lee was taken for emergency treatment at the University of Cincinnati, which led to the amputation of his left leg, multiple other surgeries, and

physical therapy. Lee testified that Yates & Sons was informed by Patrick Hendry of his injury the night of the accident.

If he had not been injured in the collision, Lee stated he planned on working with Yates & Sons on a project in Mississippi after the project in Maysville was finished. He acknowledged he would have to be re-hired by Yates & Sons and complete new paperwork for that project.

Yates & Sons' counsel deposed Charla Davis ("Davis") and she also testified at the final hearing. Davis has been the division office manager and HR manager at Yates & Sons for 20 years. Her office is in Jacksonville, Florida. Her job consists of managing administrators at the different offices, manning the work forces for the different sites, coordinating trainings, and managing payroll.

Davis stated the Spurlock CCR/ELG project was slated to last from July 2019 through February 2021, but it lasted until February 2022. At times, there were up to 400 people working there and employees came and left the project. When she was needed at the site, she traveled from Jacksonville, Florida.

Davis testified Lee was hired on January 27, 2020, solely for this project. In terms of the specific hiring procedure, she testified as follows:

> A: We would have called him or one of the other supervisors or someone from the site. Word of mouth, we do a lot of hiring of people that have worked with other people before by reference and what not.
>
> So, we would have called him, offered him a position and talked to him and if it came out where we offered him a position in Kentucky he would have went to the job site there and we would have hired him on if he showed up. That's how we hire all of our field work force.

At the hearing, she added Yates & Sons had an office trailer at the Maysville job site. Lee, as well as other employees, were hired at the job site. In order to go to work, Lee would have to be hired at the site and approved by the superintendent of the particular job. When asked about the future Mississippi project Lee mentioned, Davis stated he had not been hired for that job because it did not yet exist.

Davis testified she received a call from the division manager the night of the accident informing her Lee had been in a collision. She also said the night shift was canceled that night because of Lee's accident.

An Ohio Public Safety Report was filed as evidence. It details the accident as another vehicle striking Lee's motorcycle with the other vehicle crossing into Lee's lane. The time of the crash was 16:34 on September 19, 2020. The location was Elk River Road, Union Township, Ohio.

The ALJ bifurcated the claim at the Benefit Review Conference to determine compensability in terms of course and scope of employment, notice, and work-relatedness of the accident. All other issues were preserved.

In his Opinion, the ALJ discussed the "coming and going" rule in determining whether Lee was in the course and scope of his employment at the time of the injury. Initially, workers injured either coming or going from the place where they regularly perform their work are not covered by worker' compensation as the hazards encountered are not incident to the employer's business. Kaycee Coal Co. v. Short, 450 S.W.2d 26 (Ky. 1970). However, as the ALJ noted, there is an exception to this rule for workers who travel as part of their employment and this exception

grants virtually 24-hour coverage unless there is a substantial departure from the purpose of the trip. Hence, eating, sleeping and even recreational activity are considered normal and foreseeable activities that a worker traveling from his regular place of employment must do while away from his or her main base. Gaines and Gentry Thoroughbreds/Fayette Farms v. Mandujano, 366 S.W.3d 456 (Ky. 2012).

Ultimately, the ALJ dismissed Lee's claim finding as follows:

> I find he was actually residing in Aberdeen, Ohio and his work did not require him to travel away from his regular place of employment located in Maysville, Kentucky. As the injury occurred while he was riding his motorcycle to a burger joint, it is clear he was not on a business trip at the time, but instead on a personal venture to eat prior to going to work.

Lee filed a Petition for Reconsideration, requesting the ALJ reconsider his finding that he had relocated to Aberdeen, Ohio in light of several facts: Lee 1) maintained his permanent residence in Louisiana; 2) maintained his Louisiana driver's license; 3) lived in a campground in a "travel trailer;" 4) was paid a *per diem*; and 5) had no intention of remaining in Aberdeen beyond the duration of his job with Yates & Sons. Lee also requested additional findings regarding whether he was a temporary employee or traveling employee, findings regarding his living options, and findings regarding his ability to travel back home. Finally, Lee argued the ALJ committed patent error in finding relocation was required.

Yates & Sons also filed a Petition for Reconsideration. It requested clarification and additional findings of fact regarding the finding that Lee was required to relocate to become employed. Yates & Sons contends Lee voluntarily chose to relocate and was not hired until he arrived at the jobsite in Maysville.

The ALJ rendered an Order addressing both Petitions for Reconsideration on December 6, 2022. The ALJ made additional factual findings, including acknowledging that Lee's employment did not expressly require relocation and noting he did not find Lee abandoned his residency in Louisiana. He also made additional findings regarding whether Lee was a traveling employee. The ALJ found as follows:

> With reference to this issue, the ALJ first points out Parr involved a certified home nursing assistant who provided home health services. Her work required her to travel from her home to the homes of patients and back to her residence. The Supreme Court of Kentucky held:
>
> > [t]ypically, a worker is not performing any service for the employer, or furthering the employer's interests, by merely traveling to and from the job site in order to be part of the work force. However, this is not a case where the employer's business did not benefit, and claimant's employment relationship did not begin, until she reached a particular job site. Rather, driving to and from the patients' homes was a part of her job responsibilities as it was incident to the employer's enterprise. Specifically, as the very character of the employer's services included sending a health care provider to the patients' homes, claimant's travel was occasioned by the very purpose of the employer's business. Therefore, we agree with the Court of Appeals that travel was an integral and necessary part of the employment relationship herein. Olsten Kimberly Quality Care v. Parr, 965 S.W.2d 155, 158 (Ky. 1998).
>
> Here, once Lee arrived in Maysville, Kentucky and set up his temporary residence in Aberdeen, Ohio, travel was not an integral part of his job as all of his actual work was performed at the job site in Maysville,

> Kentucky. Nothing about the job or Yates' business required travel other than arriving at the static jobsite where work was to be performed each day. The ALJ finds the holding in Parr distinguishable from the fact present here. Further, the ALJ finds once Lee accepted the job, travel was not an integral part of the Defendant's business which was construction at the water plant. In making this finding it is further noted that Lee was not traveling to or from Louisiana when he was injured, but rather from his temporary residence to have a meal with a friend. In deciding this case the ALJ was compelled to consider the totality of the circumstances. That includes Lee's decision to take the job in Maysville, Kentucky and to temporarily relocate to do so. Once that was done, for the eight or so months he worked before the accident, there was no travel outside the normal to and from the static jobsite required.

While the ALJ made additional factual findings and provided additional explanation for these findings, he did not change his conclusion reached in the November 3, 2022 Opinion and Order.

There is no question Lee's injuries were severe. The issue is whether his injury arose out of and in the course of his employment. Lee maintains he was a traveling employee which creates an exception to the coming and going rule. Normally, workers' compensation coverage does not apply when the worker is injured either going to or coming from his regular place of employment or injured in off duty hours. The traveling employee exception creates coverage in a virtual continuous state when the work entails travel away from the main base. Because of this threshold issue, there is no evidence regarding medical proof or specific benefit entitlement to discuss. On appeal, Lee argues the ALJ erred in finding his injuries did not arise within the course and scope of his employment.

ANALYSIS

We initially note as the claimant in a workers' compensation proceeding, Lee had the burden of proving each of the essential elements of his claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Lee was unsuccessful in his 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

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 his 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 regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

The "coming and going" rule generally 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. Hazards ordinarily encountered in such journeys are not deemed incident to the employer's business. Kaycee Coal Co. v. Short, supra. One rationale of the coming and going 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) (Designated Not to Be Published). There is a recognized exception to the coming and going rule, for instances when a worker's employment requires travel, and considers an injury occurring while the employee is in travel status work-related unless the worker was engaged in a significant departure from the purpose of the trip. Gaines and Gentry Thoroughbreds/Fayette Farms v. Mandujano, supra.

The Supreme Court held as follows:

> Kentucky applies the traveling employee doctrine in instances where a worker's employment requires travel. Grounded in the positional 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. (Emphasis added).

Id. at 462.

It is undisputed that Lee's injury occurred outside his normal working hours. For this injury to arise out of and in the course of Lee's employment, we must first determine if the evidence is overwhelming that he must be considered a traveling employee. Even if it were found that Lee was a traveling employee, and therefore entitled to protection under the workers' compensation laws, the second question would be whether he had distinctly departed from his normal activities for a personal errand.

Lee cites Standard Oil Co. v. Witt, 141 S.W.2d 271, 283 (Ky. App. 1940) to support his position. Witt was a construction foreman for Standard Oil that had several ongoing projects across the state and the employer sent Witt to the projects. Witt was an employee of Standard when he was sent on the job where he died. Witt was paid a *per diem* when he traveled to the sites. A hotel fire occurred, and Witt was fatally injured. This case is distinguishable in that travel was an integral part of Witt's employment whereas Lee reported to the same job site each day of his employment.

Lee also cites cases from other jurisdictions for the proposition that injuries occurring outside of normal working hours by traveling employees are compensable as being foreseeable. Wright v. Industrial Com., 62 Ill.2d 65, 66 (Ill.

1975). Again, this case is distinguishable as Wright, a field erection supervisor, was sent by his employer to out-of-state locations. The duration of his stays could be many months and he was paid hourly and a *per diem*. He was injured in a car accident on a weekend. Wright was found to be a traveling employee, and therefore, the real question before the Court was whether he had substantially departed from his normal activities.

Shelton v. Azar, 954 P.2d 352 (Wash. App. 1998), another case cited by Lee, is also distinguishable as Shelton worked for a company and was assigned a job out of town. He flew to the job and rented a car and an accident occurred on the way to the hotel. It was undisputed he was traveling at the direction of his employer so as to lose the protection afforded one whose status is as a traveling employee.

Lee also cites Buma v. Providence Corp, 453 P.3d 904 (Nev. 2019) for the proposition that even recreational activities outside of working hours can be compensable when the employee is deemed a traveling employee. Buma was injured in an ATV accident on a Sunday when he was sent out of town to a conference that was to begin Monday. The issue there was the foreseeability of employees doing other activities when in travel status besides simply eating and sleeping. This case is distinguishable in that it is clear Buma was travelling to a conference which would be of benefit to his employer and travel was a required part of his job duties.

Another case cited by Lee involved employees hired in Texas who were transported to Colorado in company vehicles to perform work on the highways. Phillips Contracting v. Hirst, 905 P.2d 9 (Colo. App. 1995). The issue concerned whether the activity causing the injury, a motor vehicle accident ("MVA") on a

weekend, was a substantial deviation from employment or otherwise of such a personal errand that it was viewed as removing the employee from the traveling employee status. The Court's finding that the activity did not remove it from the traveling employee exception is not instructive as to Lee's argument. The duration of the stay did not change the employee's status from temporary to permanent. However, the critical fact was these workers were already employees at the time the employer directed them to a distant work site. Hirst is distinguishable in that travel was an integral part of the job and done at the direction of the employer.

Here, the ALJ found Lee was a new employee when he was hired in January 2020. He did not start work for Yates & Sons until he was hired at the Kentucky job site. His job required no travel. His motor trip from Louisiana to Kentucky, uncompensated, to begin employment does not render him a traveling employee. At most, there was initial contradictory testimony as to when his employment officially began, but Lee conceded at the Final Hearing that he was hired at the job site. It is true the duration of his stay in Maysville, lasting many months, does not determine his status. More so to the point is the ALJ's finding that travel was not an integral part of his job once he was hired and starting work in Kentucky. He was not directed by Yates & Sons to do any travel and there was no inducement of travel-related expenses or direction in the means of travel in reaching the job site. Regardless, Lee was not injured on that trip from Louisiana to Kentucky. The ALJ found there was no benefit to the employer or service to the employer when Lee went to a restaurant to eat outside of working hours and was injured in a MVA in Ohio.

The ALJ found Lee traveled to Kentucky where he set up temporary residence in Ohio, near the job site. His job required no travel, as Lee went to a "static" work site. Lee was injured off the clock when he was traveling to have a meal. Lee was not injured traveling to Kentucky from Louisiana to take the job, rather he was injured many months after he commenced work. The ALJ did not find the *per diem* was an inducement to take the job but part of Lee's compensation. While we do not cite our own decisions as authority, we do reference them for guidance and consistency. This Board has stated before that payment for mileage or travel, like the *per diem* in question here, does not automatically mandate a finding the traveling employee exception is applicable. This is merely a factor to be considered. *See* Owens v. Insperity Services, Claim No. 2018-59752 (Workers' Comp. Bd. Nov. 8, 2019). The ALJ found the contract of hire did not expressly require relocation.

The ALJ found "Lee was not in a company vehicle returning from a trip or on a venture which could be of benefit to the employer. Instead, he was riding his motorcycle prior to going to work to a separate location to get something to eat." There are numerous instances concerning whether a traveling employee loses that status when injured in a particular activity outside of working hours, yet the initial finding must always be whether the employee was in fact a traveling employee. Here, the ALJ found Lee was not a traveling employee, and therefore, the injuries were deemed non-compensable.

The ALJ dismissed Lee's claim as he found the injury did not occur in the course and scope of his employment. Substantial evidence supports the ALJ's decision and evidence does not compel a different result. Accordingly, the November

3, 2022 Opinion and Order and the December 6, 2022 Order on the Petition for Reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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