STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Tiffany A. Postlethwaite,
Claimant Below, Petitioner

vs.) No. 100640 (BOR Appeal No. 2043792)
(Claim No. 2009007935)

C & L Development Corporation
Employer Below, Respondent

FILED
July 12, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated April 19, 2010, in which the Board affirmed an October 28, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the April 17, 2009, denial of petitioner's claim for benefits by the Claim Administrator. It was found that the claimant's injury was not received in the course of and resulting from her employment. The appeal was timely filed by the petitioner, and C & L Development Corporation filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, the Court is of the opinion that this case is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioner's claim for workers' compensation benefits was rejected by the Claim Administrator on April 17, 2009. Ms. Postlethwaite argued that she was entitled to benefits following an automobile accident that occurred on February 5, 2009, as she was delivering a food order to a customer, despite the fact that her employer restaurant did not offer delivery service. Ms. Postlethwaite, however, was permitted to make the delivery if she "clocked out" in order to receive the benefit of the additional tip offered to her by the customer if she would make the delivery.

The Office of Judges found that Ms. Postlethwaite did not sustain an injury in the course of and resulting from her employment. It found that her "[I]njury occurred off of the employer's premises while the claimant was engaged in an activity that was contrary to the employer's policy and not at the employer's request. The chief beneficiary of the delivery, other than the customer, was the claimant rather than the employer." (Oct. 28, 2009 Office of Judges Order, p. 4.) The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of April 19, 2010.

In Syllabus Point 1 of *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E.2d 698 (1970), this Court held that "[i]n order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment." The third prong, "resulting from", contemplates a causal connection between the injury and the employment.

To assist in determining whether an injury arose as a result of an employee's employment, this Court has held that, "Workmen's compensation law generally recognizes that an employee is entitled to compensation for an injury received while traveling on behalf of his employer's business." Syllabus Point 1, *Calloway v. State Workmen's Compensation Comm'r,* 165 W. Va. 432, 268 S.E.2d 132 (1980). However, to be entitled to compensation for an injury upon the public highway and not on the premises of the employer, an employee must show that "[T]he place of injury was brought within the scope of employment by an express or implied requirement of the contract of employment, of its use by the servant in going to and returning from work." *De Constantin v. Commission*, 75 W.Va. 32, 83 S.E. 88, (1914). The injury must also occur within the zone of the employee's employment, and that zone must be determined by the circumstances of the particular case presented." Syllabus Point 1, *Carper v. Workmen's Compensation Comm'r*, 121 W.Va. 1, 1 S.E.2d 165 (1939).

In the case at hand, discrepancies in the versions of the facts by the parties places into question whether or not the delivery was made at the employer's direction. Ms. Postletwaite maintains that no rule against delivery every existed at Pier 12 Restaurant and that there is no evidence that she was required to "punch out" in order to make the delivery on February 5, 2009. The claimant also argues that the employer failed to submit into evidence a written policy or personnel manual which specifically forbids food deliveries.

Amy Nickerson, the owner of the restaurant, testified by affidavit that Pier 12 does not deliver food and that the claimant was never instructed to make the delivery on February 5, 2009. The record indicates that Ms. Postlethwaite was told by the kitchen manager, William Hunter, that she needed to "clock out" if she wanted to deliver the food.

Nonetheless, the evidence supports the position that the employer, at least to some degree, tacitly acquiesced to the delivery.

The Office of Judges found that "[t]he employer's acquiescence in the claimant's choice to make the delivery of restaurant food is distinct from its policy not to deliver orders." (Oct. 28, 2009 Office of Judges Order, p. 5). However, the Office of Judges failed to fully discuss such distinction. This Court believes that without evidence to show that Pier 12 had a clear and written policy against deliveries, the Office of Judges cannot easily conclude that the delivery by the claimant was not a special errand and an exception to the going and coming rule. We therefore find that the record is insufficient to make a determination as to whether the claimant was acting within the scope of her employment by making the delivery.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of erroneous conclusions of law based upon an underdeveloped finding of facts. This Court consequently reverses the Board's order and this case is remanded to the Board with directions to enter an order remanding the case to the Office of Judges for further consideration on the issue below.

Reversed and Remanded with directions.

ISSUED: July 12 ,2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh