COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2012-SC-000005

US BANK HOME MORTGAGE — APPELLANT

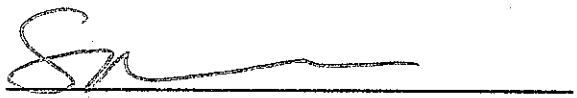
V.

BRIEF ON BEHALF OF APPELLANT
ON APPEAL FROM COURT OF APPEALS
FILE NO. 2011-CA-002253-WC
WORKERS' COMPENSATION BOARD
CLAIM NO. 2009-01385

ANDREA SCHRECKER;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD and
KENTUCKY COURT OF APPEALS — APPELLEES

***** ***** *****

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was mailed, postage prepaid, to the following on this 28 day of December, 2012:: Thomas M. Rhoads, Esq., Rhoads & Rhoads, P.S.C., P.O. Box 1705, Madisonville, KY 42431; Hon. J. Landon Overfield, Chief Administrative Law Judge, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601; Workers' Compensation Board, c/a Hon. Dwight Lovan, Commissioner, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, KY 40601; Samuel Givens, Jr., Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; and the original and nine copies to: Susan Clary, Clerk, Supreme Court of Kentucky, Capitol Building, Frankfort, KY 40601.

Sherri P. Brown-Keller

INTRODUCTION

This is a workers' compensation claim in which the Administrative Law Judge erroneously concluded that Andrea Schrecker was in the course and scope of her employment with US Bank Home Mortgage when she was struck by a motor vehicle while jaywalking on a street near her office while on break.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellant requests oral argument. The decision of the Administrative Law Judge and lower appellate tribunals represents a significant break from Kentucky precedent applicable to workers' compensation claims involving the premises rule. The Appellant submits that oral argument would be helpful to the court, by allowing the justices an opportunity to explore the intended and unintended consequences of such departure. Also, oral argument may be useful to assist the court with visualizing the spatial relationship between the Appellant's premises and the location of the accident at issue.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts relevant to the issue before the Court are not in dispute. Andrea Schrecker ("Schrecker") is a 30-year-old college graduate with specialized training in accounting. She was working in the payment research department of US Bank Home Mortgage ("US Bank") on the date of injury at issue in this claim, December 31, 2007. Schrecker typically reported for work at 7 a.m., "clocking in" via the office phone system. She was allowed a one-hour lunch break, which she generally took around 11 a.m. This was an unpaid break. She was also allowed two 20-minute breaks, one in the morning and one in the afternoon, which were paid. (Schrecker, 12). She was required to "clock out" for both her paid breaks and her unpaid lunch break, using a different code for each. US Bank had a break room with vending machines on-site, which employees could utilize during these breaks. (Roberts, 8).

On the date of injury in question, Schrecker clocked out and left the premises for a late lunch. She did not use the code for an unpaid lunch break, however, opting instead to use the code for a paid break. It was around 1:30 p.m. (Schrecker, 17-19.) She determined to get something to eat from a Taco Bell restaurant on the other side of Highway 431, a divided four-lane highway with an additional turn lane, thus requiring her to cross five lanes of traffic. It was a busy highway. (Mitchell, 6). It is undisputed that Schrecker was on a personal errand to get something to eat when she crossed the street. She was not performing any service for US Bank. (Schrecker, 20). She crossed the highway near its intersection with Fulton Street, but outside the crosswalk. Schrecker was struck by a car. (Id at 21.).

Schrecker's well-coached testimony regarding the circumstances of her trip went as follows:

Q. Okay. And where did you go when you clocked out?

A. I went outside just on break, just break that afternoon.

Q. Okay, and what made you cross the street?

A. I was just going across the street. It's like an everyday event. People just go across the street, you know, just on their afternoon breaks.

Q. What was right across the street?

A. All the restaurants are over there.

Q. Was there a McDonald's over there?

A. Yes, there's a McDonald's and a Taco Bell.

Q. Were you going to McDonald's?

A. No, I was going down that way more towards Taco Bell.

Q. So you were going to get something to eat?

A. Yes.

Q. Was that your lunch then?

A. It was my break. It was my break that afternoon. I didn't have a lunch at all that day.

Q. Okay, but you were going to eat lunch?

A. Just going to eat, not a lunch. It was a break. I was, you know, going to be back in twenty minutes. There's signed time cards to prove that also.

Q. So once you left that building, you weren't doing any work; is that correct?

A. It was break, paid break.

Q. But you weren't doing any work when you were crossing that street? You weren't running any documents across the street to another bank?

A. No, there's not any bank –

Q. You didn't have any work with you?

A. No.

* * * *

Q. And where did you cross the street?

A. Frederica.

Q. Where at?

A. I can't tell you.

Q. Where's the next cross street?

A. I think there's Fulton Drive there.

Q. Did you walk down to Fulton to cross the street?

A. Just on that corner wherever Fulton is.

Q. Well, what I'm trying to get at, did you go to a crosswalk?

A. It was like right beside the crosswalk, yeah, right beside there.

(Schrecker, 19-21).

The Traffic Collision Report completed by the police officer called to the scene was filed into evidence. It is clear from both the description of the accident and the diagram completed by the officer that Schrecker was neither in nor near a crosswalk when she was struck. She was a sufficient distance from the nearest cross street that the officer did not even illustrate the intersection on the diagram. (TCR, 6). The officer listed as a pedestrian factor contributing to the accident "Not at intersection." (TCR, 3).

Relying on Meredith v. Jefferson County Property Valuation Administrator, 19 S.W.3d 106 (Ky. 2000), the Chief Administrative Law Judge ("CALJ") concluded that Schrecker was acting in the course and scope of her employment when she crossed Frederica Street to get

something to eat at Taco Bell, and awarded benefits accordingly. The CALJ rejected the argument by US Bank that Baskin v. Community Towel Service, 466 S.W.2d 456 (Ky. 1971), should instead apply. The CALJ's rationale for applying Meredith, supra, was that it is "much more recent and much more similar factually" to the case *sub judice*. (CALJ opinion, 34).

US Bank appealed the CALJ's determination that Schrecker was acting within the course and scope of her employment at the time of the accident. The Workers' Compensation Board ("Board") agreed that the CALJ erred in relying on Meredith, supra, as precedent, inasmuch as that claim involved a traveling employee, whereas Schrecker worked at a fixed location. (Board opinion, 8). Nonetheless, the Board affirmed the CALJ's determination, concluding that Baskin, supra, also did not apply, inasmuch as that claim involved an unpaid lunch break. The Board observed that this claim presents a matter of first impression for Kentucky courts, writing, "No Kentucky case specifically addresses accidents occurring off-premises during a paid break."

The Board then recited at length excerpts from three authoritative treatises, Larson's Workers' Compensation Law (hereinafter "Larson's"), Couch on Insurance, and American Jurisprudence 2d, concerning the compensability of rest breaks and the personal comfort doctrine, before concluding that Schrecker was acting in the course and scope of her employment at the time of the accident. The Board set forth the following rationale for this holding:

> Based upon the fact Schrecker's deviation from employment or rest break was relatively minor and further bolstered by the fact it was apparently a condoned practice to cross the street to get something to eat during the afternoon break, we do not believe the CALJ erred in finding Schrecker's injury to be compensable.

(Board opinion, 17).

US Bank appealed the Board's holding to the Court of Appeals, which affirmed. The Court of Appeals agreed with the Board that the particular issue presented in the case *sub judice* is novel in Kentucky. The court then purported to cite Larson's treatise as identifying three distinct elements to which the fact-finder should look in determining whether an injury occurring during an off-premises break is within the course and scope of employment; *i.e.,* amount of control retained by the employer; whether the break is paid; and whether the accident occurred "as a result of the hazard being encountered in going to and from the workplace." (COA opinion, 8). Notably, the court did not go on to analyze any of these three elements in the context of the facts of this case. Instead, the court simply noted that it was a common and condoned practice for employees of US Bank to cross the street for food during their paid breaks. The Court of Appeals affirmed the Board on this fact alone.

We bring this appeal because the Court of Appeals failed to apply the correct legal standard to the determination of compensability in this case. There is but one element identified by Professor Larson as dispositive of the issue before the court, and that is the element of control. Every other factor cited by the CALJ and the lower appellate tribunals are merely indicia of control. There is no substantial evidence in this case that US Bank retained any kind of control whatever over Schrecker once she clocked out for her break and left the premises. Indeed, it will be observed that the Court of Appeals essentially relied on a total lack of control by US Bank to saddle the employer with liability. Accordingly, the decision of the CALJ must be reversed, as a matter of law.

ARGUMENT

A. THE COURT OF APPEALS ERRED IN ITS RESTATEMENT AND APPLICATION OF THE LEGAL STANDARD IN THIS CASE.

On page 8 of its opinion, the Court of Appeals purported to restate the standard proposed by Professor Larson when it cited three elements to which the fact-finder must look in determining whether an injury occurring off-premises is compensable. The court identifies the three elements as "amount of control the employer retains over her, whether it is a paid break and whether the accident occurred as a result of the hazard being encountered in going to and from the workplace." (COA opinion, 8). This is a misstatement rather than a restatement of the legal standard proposed by Professor Larson.

On pages 5 – 7 of its opinion, the Court of Appeals quotes the Board, quoting from Larson's, §13.05[1], [4], which provides, in pertinent part, as follows:

> **The operative principle** which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

(emphasis added). Thus, we see that Professor Larson, drawing upon decisions rendered in jurisdictions across the country, distills the various facts relevant to the compensability determination down into a single "operative principle." That single operative principle is "retained authority." The court will observe that each of the distinct factors cited by Professor Larson is relevant because it weighs either for or against a finding of retained control by the employer.

The Court of Appeals' opinion suggests that retained control and whether the break is paid are co-equal factors in the compensability analysis. On the contrary, whether the break is paid is nothing more than one factor to be analyzed in determining whether the employer retained authority over the employee so as to render it fair and proper to hold the employer liable for the injury in question. The case *sub judice* is a prime example of how an over-emphasis on payment,

to the exclusion of the other indicia of control, may lead to a skewed and inequitable result. Though it is conceded Schrecker clocked out for a paid break[1], every other factor negates retained authority by US Bank at the time and place of her injury.

Moreover, while the Court of Appeals acknowledged retained control as one element to which the fact-finder must look in determining compensability, if not the operative principle, it nonetheless failed to analyze the circumstances weighing for and against a finding of control. Though the court suggests that retained control and payment are co-equal factors, it apparently gives no weight at all to the fact Schrecker clocked out before leaving the premises of US Bank, clearly demarcating the time during which US Bank retained authority to direct her activities and the time during which it did not. Instead of analyzing whether US Bank retained any control over Schrecker, the court instead focused on whether Schrecker's activity was condoned by the employer. The irony, of course, is that the employer's acquiescence in its employees' activities while on break is the polar opposite of control. Had US Bank instructed its employees not to jaywalk across the four-lane highway to procure food and drink during their breaks, would that not have constituted control?

In other words, by the Court of Appeals' logic, US Bank is liable if it does and liable if it does not retain control over Schrecker. US Bank did not prohibit its employees from crossing the highway to procure food and drink during their breaks, either paid or unpaid, for the very reason that the employees were on their own time and no longer under the retained authority of the employer. The employer exercised no control whatever over the employees from the moment they clocked out until the moment they clocked back in, and yet the Court of Appeals' ruling

[1] On page 4 of its opinion, the Court of Appeals indicates that US Bank cites Baskin, supra, "in support of its argument that Schrecker was on an unpaid lunch break at the time of her injury." The court seems to

would turn this intentional relinquishment of control by US Bank into the primary hook upon which liability hangs. Such an outcome constitutes a total perversion of the legal standard set out in Larson's. The Court of Appeals' opinion equates an absence of control by the employer with acquiescence and concludes that US Bank's permitting its employees to do as they pleased on their own time is sufficient to saddle them with liability for such activities.

If this is to be the rule in Kentucky, then employees will soon find their freedom of movement significantly hindered during the paid breaks required by state law. If the employer is to be liable even when it exercises no control over an employee and permits her to go and do as she pleases during her break, then the only logical response by Kentucky employers is to forbid employees from leaving the premises or otherwise exposing themselves to hazards of the street, even on their "own time." After all, by the Court of Appeals' logic, there is no such thing as an employee's "own time," so long as they are being paid. In short, the Court of Appeals' holding is tantamount to a rule that injuries occurring on a paid break are compensable, regardless of the degree of control exercised by the employer over the employee during that break. We respectfully submit that this is not the legal standard proposed by Professor Larson and should not be the legal standard adopted in Kentucky.

B. KENTUCKY SHOULD NOT ABANDON THE PREMISES RULE IN CLAIMS INVOLVING PAID BREAKS.

In Baskin, supra, the Court of Appeals (then the highest appellate court in the state of Kentucky), summarized the issue before it succinctly, as follows:

> In this workmen's compensation case we are asked to review the current applicability of the "going and coming" rule to the claim of an employee who was employed on a fixed-time basis at a fixed place of work and who was injured while returning from lunch to the premises of his employer.

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misunderstand our position. US Bank has never contested the fact Schrecker was clocked out on a paid break at the time of her injury.

Id. at 456. The claimants in Baskin, supra, were not paid while on their lunch break, and this fact is referenced in the opinion. However, it is conspicuously absent from the first paragraph of the decision, set out hereinabove, in which the court summarized the dispositive facts. The fact their break was unpaid was not determinative. Likewise, the fact Schrecker was paid while on break should not be determinative, though that is the only fact cited by the CALJ to support application of Meredith, supra, to this claim, and it is the only distinction cited by the Board to disregard Baskin, supra, as precedent.

Like the Court of Appeals, the Baskin court also looked to Professor Larson's treatise for guidance, noting that this respected authority "recognizes that when an employee with fixed time and place of work has left the premises for lunch, he is outside the course of his employment while off the employer's premises during the lunch break 'if he falls, is struck by an automobile crossing the street' or is the victim of some other non-work-connected accident. See Larson's Workmen's Compensation Law, Section 15.51." This remains the majority rule proposed by Professor Larson and followed by Kentucky's appellate courts. See Larson's at §13.05[1].

Professor Larson acknowledges that the "premises limitation" is to some extent arbitrary, but further offers that since some limitation is unavoidable, "it is perhaps as good as any that can be devised." He goes on to write, "It can be defended in part on a sort of presumption that as long as the employee is on the premises he or she is subject to all the environmental hazards associated with the employment, and also that, although he or she may be free to go elsewhere during the interval, the employee is in some degree subject to the control of the employer if the employee actually chooses to remain on the premises, merely by virtue of being present on the employer's property." Thus, he observes that "most courts have concluded that the unpaid lunch

hour on the premises should be deemed to fall within the course of employment." Larson's, supra, §21.02[1][a]. The majority rule further underscores that employer control over the premises outweighs consideration of whether the employee was "on the clock."

One question that instantly arises in response to the Court of Appeals' opinion is "What of the salaried worker?" Professor Larson poses the hypothetical, "Suppose the employee is an executive taking two hours out for lunch." Id. Is every trip taken by that executive off the premises over the course of the workday to attend to her personal comforts within the course and scope of her employment, merely because she is always "on the clock" or merely because the employer acquiesces in her coming and going as she sees fit? What if she drives 20 minutes across town to meet her husband at Starbuck's for an afternoon latte? What if she drives to have lunch at the clubhouse at Keeneland and decides to spend the rest of the afternoon gambling on horse racing, in order to unwind from the stresses of the morning? Undersigned counsel is optimistic that the Court will agree that the line of compensability must be drawn somewhere in advance of the ticket window, but if not at the employer's threshold, then where? The fact that Schrecker elected to clock out for a paid "afternoon break" rather than an unpaid "lunch break" should not be determinative.

As with most rules, there are exceptions to the "premises limitation." Professor Larson discusses them in the following passage:

> The **exceptional facts** which will bring lunch-time traveling within the course of employment are of the same type as those applicable to the going and coming rule generally. For example, if the normal route to and from lunch lies across a hazardous crossing, an injury on that crossing may be held compensable. But, as stressed above, the extension should be limited to injuries flowing from the hazard that occasioned the extension; therefore, a mere fall on the highway, as in the *Desautel* case, should not be brought within the course of employment because a traffic injury at the same place might have been compensable.

> This type of extension has not been carried beyond hazardous routes or crossings somewhat contiguous to the premises of which it may be said that they are either the necessary or the normal means of access to the plant. The argument might be made that there is no difference in principle when, because the restaurants available to a downtown employee are accessible only as the result of a battle with downtown traffic, the employee is injured in an accident in traffic necessarily encountered on the way to lunch. The District of Columbia Court of Appeals has, however, affirmed a denial of an award on these facts. The claimant stenographer, having no place to lunch on or near the premises, was crossing the street in front of the employer's building to catch a bus which she intended to take to reach a cafeteria several blocks away, when she was struck by a taxicab. The claimant was unsuccessful at every level of the litigation. Although the opinion contains little discussion of the precise issue, preferring to rely on the general propositions that each case must be decided on its own facts and that the findings below were supported by some evidence, it may be inferred that this court's or any court's reluctance to sanction this expansion of coverage would be traceable to a feeling that the expansion could not logically stop short of complete coverage of lunch-time accidents. To make a distinction between those public traffic and travel hazards which are necessarily encountered in procuring lunch, and those which are avoidable or abnormal, would be very nearly impossible. On the other hand, it is reasonably possible to arrive at such a distinction respecting a railroad crossing at the threshold of the factory.

Larson's at §13.05[2] (emphasis added).

Plainly, the Court of Appeals hereinbelow did not share the reluctance to sanction such an expansion of coverage as Professor Larson presumed any court would possess. We urge this court to consider not only the intended but also the unintended consequences of the Court of Appeals' opinion, which demonstrates the "slippery slope" against which Professor Larson cautions fact-finders and appellate courts throughout Chapter 13 of his treatise, relating to the going and coming rule. Professor Larson admonishes courts for "making law by measuring only the distance to the last precedent while completely losing sight of the essential principle involved in the rule." Larson's Workers' Compensation Law, §13.01[2][b].

He cites Michigan and New Jersey as illustrating the "perils that beset any jurisdiction which abandons the security of the premises rule." Id. "Although both are again safely within

the majority fold, the story is well worth retelling, together with the treatise's persistent and emphatic warnings, for the benefit of any other states that are under pressure to poke supposedly harmless holes in the premises dike." Id. After detailing the states' ill-advised "venture into the uncharted seas beyond the premises rule," Professor Larson goes on to write:

> The real reason for the premises rule is, and always has been, the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting and applying the rule would not be unmanageable.
>
> The **Treatise** wondered, for example, if the New Jersey court had thought through what it would do when situations arose like some of the following.
>
> Let us assume the case of an ordinary office worker in a downtown Newark office building, with an hour off for lunch, during normal daytime work. The worker sets out on foot, and a half-hour later is found somewhere in Newark, beaten and robbed in an amusement arcade, a pool room, a porno movie, or a massage parlor. Had the New Jersey court prepared itself *now* for the prospect of explaining how this was "reasonably incidental" to the employment? If not, what stood between it and the necessity of calling these cases compensable? Would it resort to a case-by-case attempt to label some such excursions deviations? On what principle? In its opinion it quoted a Hawaii case, *Dependents of Pacheco v. Orchids of Hawaii.* "An employer may derive substantial benefits from an employee who is allowed time away from the job to accomplish pressing personal business." Thus, if an employee on the way to lunch deviated a block to buy a phonograph record, the New Jersey court would no doubt find this deviation insubstantial. Where is the line between this and the poolroom? Both relate to recreational activities of the employee. Moreover, all this presupposes that one knows (as in *Hornyak*) where the employee was going at the time of injury. In downtown Newark there are restaurants in all directions. If the employee is mugged, run over, or hit by a falling brick anywhere in town during lunch hour, is it to be presumed that he was on his way to lunch, or on a permissible deviation, provided only the incident occurred during that hour?
>
> Now suppose the case of a young female automobile assembly-line worker who never eats lunch. She uses the lunch hour to run personal errands, visit friends, and window shop. She is injured when a bookcase falls on her while she is browsing in a book store. Is this to be considered reasonably incidental to automobile manufacture?
>
> The next complication arises from the fact that the court would have difficulty stopping short of covering the lunch itself, since all its arguments logically reach this far. There is no lack of cases, such as those cited in Ch. 21, *§21.02[3], below,*

> in which under the same "special circumstances" rule that permits coverage of lunchtime travel there may also be coverage of food poisoning from the lunch itself. Was the court prepared to compensate for every case of poisoning, choking, and indigestion resulting from any worker's lunch anywhere?
>
> Millions of workers go home for lunch. Presumably this trip would also be covered, along with an incalculable variety of deviations along the way. Where would coverage stop? At the employee's premises? At the front steps? Inside the door? Or perhaps the coverage would extend inside the employee's house for the entire period, while the employer was eating or perhaps doing little incidental things around the house. After all, how can one distinguish downtown deviations and home deviations? Perhaps the employee tries to fix a light switch, or chops some wood, or cleans a shotgun, or merely falls down the basement stairs with an armload of canning jars. Or perhaps the worker gets food poisoning from eating leftovers. If this was not to be called "reasonably incidental" to employment, someone should have thought out in advance where the stopping-point was, and what the rationale was.

Id.

Again referring to the "ill-fated Michigan-New Jersey experiment," Professor Larson writes:

> The real flaw in these opinions was that they ignored the special doctrine that accounts for extension of the premises rule to the trip to parking lots. This is the principle that travel between two parts of the employer's premises is compensable. By establishing or sponsoring a parking lot not contiguous to the working premises, the employer has created the necessity for encountering the hazards lying between these two portions of the premises. No such considerations apply to a trip to some bus stop or railway terminal or to some parking location on a public street over which the employer has no conceivable control.

Id.

Likewise, it is this essential element of control that is missing in the case *sub judice*. It is undisputed that Schrecker was not on the premises of US Bank at the time of the accident in question. Rather, she was crossing a four-lane, public highway on her way to a Taco Bell restaurant. The Court of Appeals cites to the fact that US Bank "condoned" the practice of employees walking across the street to get something to eat. The evidence was that the

management of US Bank did not instruct employees one way or the other how or where they might spend their break time away from the premises. Why should they? Up to this point in the history of Kentucky workers' compensation, employers have not been liable for injuries sustained by employees who were injured off-premises by a hazard of the street and while performing no service to the employer. In other words, historically, Kentucky employers have been liable only for those injuries arising out of and occurring in the course and scope of employment. Accordingly, US Bank had no reason to exert control over Schrecker's off-premises activities while on break.

As the court stated in Baskin, supra:

> We are constrained to believe that if we hold appellants' claims to be compensable we would thereby convert our workmen's compensation law into an accident insurance program against the hazards of traffic with the premiums paid by one's employer.

We submit that to hold US Bank liable for Schrecker's accident after she had clocked out and left the premises is to open precisely that Pandora's box.

C. THE PERSONAL COMFORT DOCTRINE DOES NOT APPLY TO RENDER SCHRECKER'S CLAIM COMPENSABLE.

KRS 342.0011(1) defines an "injury" as a work-related traumatic event "arising out of and in the course of employment" Not long after the inception of the Workers' Compensation Act, Kentucky's high court explained in Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 159 (1918), that "in the course of employment" refers to the time, place, and circumstances of an accident, while "arising out of" refers to the cause or source of the accident. Kentucky has adopted the "personal comfort doctrine," pursuant to which workers are deemed not to have left the course of their employment "while ministering to personal needs, provided that the departure from the employment is not so great that an intent to abandon the job

temporarily may be inferred or that the manner of the departure is not so unreasonable that it cannot be considered an incident of the employment." Meredith v. Jefferson County PVA, 19 S.W.3d 106 (Ky. 2000).

We are hard-pressed to imagine a more certain "intent to abandon the job temporarily" than Schrecker's clocking out for her afternoon break and leaving the premises. It should be emphasized at this point that US Bank provided a break room with vending machines on-site for its employees to utilize during their breaks. Had Schrecker been injured while purchasing a snack from the vending machine or walking to the break room for a rest, there is no question but that her injury would be deemed compensable, regardless of whether her break was paid or unpaid.

In Section 21 of his treatise, which was not cited by the Court of Appeals hereinbelow, Professor Larson offers the following discussion of the personal comfort doctrine:

> Injuries occurring *on the premises* during a regular lunch hour arise in the course of employment, even though the interval is technically outside the regular hours of employment in the sense that the worker receives no pay for that time and is in no degree under the control of the employer, being free to go where he or she pleases.
>
> There are at least four situations in which the course of employment goes beyond an employee's fixed hours of work: the time spent going and coming on the premises; an interval before working hours while waiting to begin or making preparations, and a similar interval after hours; regular unpaid rest periods taken on the premises, and unpaid lunch hours on the premises. A definite pattern can be discerned here. In each instance the time, although strictly outside the fixed working hours, is closely contiguous to them; the activity to which that time is devoted is related to the employment, whether it takes the form of going or coming, preparing for work, or ministering to personal necessities such as food and rest; and, **above all, the employee is within the spatial limits of his or her employment.**
>
> It has already been observed several times that the "premises" limitation is to some extent arbitrary and artificial, but, since some limitation is unavoidable, it is perhaps as good as any that can be devised. It can be defended in part on a sort of presumption that as long as the employee is on the premises he or she is subject to

all the environmental hazards associated with the employment, and also that, although he or she may be free to go elsewhere during the interval, the employee is in some degree subject to the control of the employer if the employee actually chooses to remain on the premises, merely by virtue of being present on the employer's property.

In any case, most courts have concluded that the unpaid lunch hour on the premises should be deemed to fall within the course of employment. One can arrive at this result by the following chain of argument: If going to and from work on the premises is covered, then going to and from lunch on the premises must be covered; if going to and from lunch on the premises is in the course of employment, then simply remaining on the premises for lunch must also be. The actual eating of lunch is no more remote from the employment than the traveling to it; and both are outside strict hours and within the premises. There is no ground for distinction.

* * * *

[3] Meal Periods off the Premises

When the **exceptional facts** are present which convert an off-premises excursion for lunch into a part of the employment for purposes of injuries received while going and coming, it may be argued that, in the interests of consistency, an injury occurring in the course of or resulting from the lunch itself is also in the course of employment.

The leading case establishing this rule is *Krause v. Swartwood,* in which a physician's secretary, who ordinarily lunched at home, was requested by her employer to take her lunch at a nearby restaurant because of his absence, and to have phone calls from the office transferred there. The lunch was to be paid for by the employer. The secretary suffered chemical poisoning from coffee made in a new urn at the restaurant, and compensation was awarded by the Supreme Court of Minnesota, reversing the Industrial Commission's denial.

With this case may be compared the unsuccessful claim in *Schwartz v. Industrial Commission* an example of a case in which the **special circumstances** were insufficient to support an award. There a store manager, on duty continuously throughout Saturday, and at liberty to take his meals when and where he pleased, went to a restaurant with his fiancee at 5:00 P.M., leaving word that he could be called there if needed, and returned about 5:30 P.M., to become ill from and finally succumb to food poisoning. **There is not quite enough here to distinguish the facts from any off-premises excursion for meals of the kind which is routine for most urban office workers.**

Larson's Workers' Compensation Law, §21.02[1][a] (*italics in original*)(**emphasis added**).

None of the "exceptional facts" or "special circumstances" cited as justifying an extension of the personal comfort doctrine beyond the premises of US Bank is present here. Certainly, there was less of a work-connection in the case *sub judice* than in Schwartz v. Industrial Commission, 39 N.E.2d 980 (1942), where the manager was still considered "on duty" while eating lunch off-premises.

Moreover, despite Schrecker's insistence that she left the premises for an "afternoon break" and not a "lunch break," it is undisputed that she crossed Frederica Street because Taco Bell was on the other side. The nearest place for her to purchase a drink or light refreshment was in the break room located on the premises of US Bank. Schrecker elected instead to cross a divided four-lane highway in order to purchase a meal that can only reasonably be described as "lunch."

The brief "coffee break" contemplated under §13.05[4] of Larson's treatise, quoted by the Board, is illustrated by Caporale v. State Dept of Taxation and Finance, 2 A.D.2d 91 (N.Y.App. 1956). There, the New York Appellate Division affirmed an award of benefits to a stenographer who was injured when she tripped while returning from a building across the street from her office, which was the nearest place she could purchase a cup of coffee. However, the court cited several factors upon which to distinguish Caporale, supra, from the present case. Specifically, the court wrote, "Some distinction is to be observed between off-premises injuries while an employee is going to or from or at his lunch, and cases where, with the specific approval of the employer he has a short break for a rest period or for a relief period or allowed [sic] to "go for coffee." Id. (citations omitted). The court continued:

> The basic theory of decisions denying compensation for mealtime injuries is that the employer then exerts no authority over the employee. There is some logical distinction in control and closeness to employment, we think, between the

> circumstances under which an employee ventures forth on his own for lunch and those under which he takes a short break, under close control, for rest or coffee.
>
> Here it could be found that authority of the employer continued during this approved coffee break, short in duration, and short in distance from the claimant's desk, and that the employment itself was "not interrupted" at the time of accident.

Id. at 740.

The same cannot be said of Schrecker's excursion. Schrecker did not leave the premises of US Bank to find the nearest cup of coffee or other drink or snack, all of which was available on-site. Rather, she crossed a divided highway in order to purchase a meal from Taco Bell, which was not even the nearest restaurant to her office, Schrecker acknowledging that McDonald's was closer. The stenographer in Caporale, supra, had already eaten her lunch, which required her to clock in and out, unlike the brief coffee break she later took, which did not require her to clock in and out. Most importantly, it is clear from the synopsis of the facts in Caporale, supra, that the stenographer's supervisor closely controlled her coming and going throughout the day. We submit that this exercise of control is the dispositive fact distinguishing cases such as Caporale, supra, from the case *sub judice.*

Unlike the employee in Caporale, supra, Schrecker had complete discretion with respect to when she took her breaks and where. Moreover, once she clocked out for her afternoon break, Schrecker's time was her own. The moment she left the premises of US Bank, the employer ceased having any control whatsoever over her activities. Had the employer been able to exercise control over Schrecker's actions that afternoon, it undoubtedly would have insisted that she cross Frederica Street at a crosswalk, rather than jaywalking. It is this element of control emphasized by Professor Larson in the following passage from §13.05[4]:

> The operative principle which should be used to draw the line here is this: If the employer, in all the circumstances, including duration, shortness of the off-

> premises distance, and limitations on off-premises activity during the interval can be deemed to have retained authority over the employee, the off-premises injury may be found to be within the course of employment.

Thus, it is clear that proximity of an accident to the workplace alone is not sufficient to establish a compensable claim. Rather, the fact-finder must consider whether the proximity of the accident was such as to permit the employer to retain control over the employee. Of course, it was Schrecker's burden to prove this element of her claim, and we submit there is no evidence whatever to support a finding that US Bank retained control over Schrecker at the time and place of the accident in question, notwithstanding her paid status.

D. SCHRECKER'S DEVIATION FROM EMPLOYMENT WAS SUBSTANTIAL.

Lastly, it is well-recognized that an employee who might otherwise be deemed in the course of her employment by virtue of the personal comfort doctrine may yet lose that protection if the method chosen is unreasonable or dangerous. Larson's Workers' Compensation Law, §21.08. Professor Larson observes that the most likely case in which compensability will be denied is that in which the abnormal means are chosen despite the availability of satisfactory normal facilities, as was the case here. Despite the availability of drinks and snacks for purchase in the break room, Schrecker chose to travel across Frederica Street to purchase a meal at Taco Bell.

While Schrecker testified that it was normal for employees to cross the street to visit the restaurants on the other side, there is no evidence that it was normal for employees to cross the street other than in the crosswalk at the nearby intersection. Indeed, we submit that the only reasonable inference that might be drawn from Schrecker's testimony attempting desperately to place herself within that crosswalk is that it was not at all reasonable for her to cross Frederica

Street at the location where the accident occurred. Indeed, it is clear from the Traffic Collision Report that Schrecker was illegally jaywalking at the time of the accident. "[T]he use of a prohibited method of seeking personal comfort or going and coming is fatal to coverage of such acts, although a similar violation of instructions would be immaterial as to some act in direct accomplishment of the work." Id. at §21.08[1].

Thus, even if Schrecker's excursion might otherwise be deemed compensable under the "personal comfort" doctrine, we submit that her failure to utilize the nearby crosswalk, subjecting her to the very hazard that caused her injury, constituted a substantial deviation so as to render her claim non-compensable.

CONCLUSION

It is undisputed that Schrecker was not performing some act in direct accomplishment of her work. She had clocked out from her work for an afternoon break and left the business premises in order to purchase a meal from Taco Bell. She was jaywalking across a divided, four-lane, public highway when she was struck by a vehicle. She was not in an area owned, maintained or controlled by the employer. Moreover, US Bank did not retain any authority over Schrecker after she clocked out and left the premises. Even if Schrecker's excursion might otherwise be deemed a compensable one under the "personal comfort" doctrine, her failure to utilize the nearby crosswalk constituted a substantial deviation from her employment.

Schrecker's accident, though unfortunate, did not occur within the course and scope of her employment with US Bank and should be dismissed.

Respectfully submitted,

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APPENDIX

I. COURT OF APPEALS OPINION

II. OPINION OF THE WORKERS' COMPENSATION BOARD

III. OPINION OF THE ADMINISTRATIVE LAW JUDGE

IV. ORDER ON RECONSIDERATION

V. CASES CITED FROM FOREIGN JURISDICTIONS