COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2012-SC-665

US BANK HOME MORTGAGE — APPELLANT

vs.

BRIEF FOR APPELLEE, ANDREA SCHRECKER

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

****

Respectfully submitted,

RHOADS & RHOADS, P.S.C.
9 East Center Street
Madisonville, KY 42431
(270) 825-1490

By _____
Thomas M. Rhoads

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing BRIEF has been served upon: Hon. Sherri P. Brown-Keller, FERRERI & FOGLE, 300 E. Main St., Suite 400, Lexington, KY 40507; upon the Hon. J. Landon Overfield, 110 N. Water St., Suite B, Henderson, KY 42420; Workers' Compensation Board, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY 40601; Samuel Givens, Jr., Clerk,, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and the original and nine copies to Susan Clary, Clerk, Supreme Court of Kentucky, Capitol Building, Frankfort, KY 40601, on this the 1st day of February, 2013.

_____
Thomas M. Rhoads

STATEMENT CONCERNING ORAL ARGUMENTS

Appellee, Andrea Schrecker, does not request oral arguments.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The following summary on page 3 of the Workers' Compensation Board opinion succinctly outlines the pertinent chronology of events on the date of the accident—December 31, 2007:

> "On December 31, 2007, Schrecker began her workday at 7:00 a.m. She did not take a lunch break that day due to the necessity of completing end-of-the-year work, and her co-worker being absent. At approximately 1:30 p.m., she took her afternoon break, and followed the telephone procedure for her paid break rather than the unpaid lunch break. Schrecker testified she intended to go across the street to Taco Bell to get something to eat and bring it back to her desk. Specifically, Schrecker testified, "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." Schrecker testified US Bank had no written policy restricting employees from leaving the premises during breaks. She also testified she was never advised she could not leave the premises during breaks." (WCB Decision, p.3).

The following unrebutted testimony given by the Plaintiff at the workers' compensation hearing was important in supporting the Administrative Law Judge's decision and the Workers' Compensation Board's decision and the Court of Appeals' decision to affirm the decision of the Administrative Law Judge:

> "Q. Let me ask you, were there any written policies that restricted employees from leaving the premises during their breaks?
>
> A No.
>
> Q. Were you ever told verbally that you are required to stay on premises during your breaks?
>
> A. No.
>
> Q. Is the clock-out procedure for lunch any different than the clock-out procedure for breaks?
>
> A. Yes.
>
> Q. Explain.

A. At lunch break you would use break one button and on the other breaks, your paid breaks, afternoon and morning break, I can't exactly remember if it was break two or three on the phone.

Q. Now during your morning break and your afternoon break you were paid during that time you are on break?

A. Yes. (T.E., 14).

.....

Q. Do other employees besides yourself routinely cross Frederica to take their breaks?

A. Yes.

Q. And what are some restaurants that you would typically -- you and other employees would typically patronize on your breaks?

A. Taco Bell, Arby's, McDonalds.

Q. And all three of those are across from Frederica?

A. Yes.

Q. When you would go to these restaurants, would you see other US Bank employees?

A. Yes." (T.E., 16).

COUNTERARGUMENT

THE WORKERS' COMPENSATION BOARD AND THE COURT OF APPEALS CORRECTLY AFFIRMED THE FINDING OF THE ADMINISTRATIVE LAW JUDGE THAT THE PLAINTIFF, ANDREA SCHRECKER, WAS IN THE COURSE AND SCOPE OF HER EMPLOYMENT WHEN THE WORK-RELATED ACCIDENT OCCURRED ON DECEMBER 31, 2007.

The Appellant has woven a consistent theme in their brief that is replete with scare tactics. The scare tactic that the Appellant has chosen to employ is their theme that if the Supreme Court affirms this decision, this will begin a dangerous, "slippery

slope" in Kentucky, and an employer's liability will be unlimited as it applies to numerous off premises accidents sustained by employees. This characterization employed by the Appellant ignores the key, unique elements in this case that clearly support the Administrative Law Judge's decision and the subsequent decisions by the Workers' Compensation Board and the Court of Appeals affirming the decision of the Administrative Law Judge.

Instead of a "slippery slope", the decision of the Administrative Law Judge was decided based on unique, narrow facts that support the Administrative Law Judge's decision that Plaintiff was acting in the course and scope of her employment at the time of the accident.

There are two major overlapping areas of the law discussed in Larson Workers' Compensation Law and Couch on Ins., (3rd ed. Updated 2011) that are guiding principles; and these two important principles should be superimposed on the facts of our case:

1. The area of the law involving basic principles to examine concerning breaks taken by the employee and the factors to consider in determining if the injury is work-related while the Plaintiff is on a break; and

2. Considerations of the personal comfort doctrine and whether or not this principle should apply to the facts of our case.

The Appellant, in their brief, attempted to oversimplify the law, narrow the playing field, and basically attempted to argue that if the worker was injured off the premises, the injury is not compensable. The Appellant continues to attempt to apply Baskin v. Community Towel Service, 466 S.W.2d 456 (1971), even though this case involved an

injury off premises while the employee was on an unpaid lunch break in contrast to our facts in which the employee was on a paid afternoon break. The Workers' Compensation Board made it very clear that this case simply is not precedent for the facts in our case and the unique facts of this case involved a case of first impression in Kentucky (WCB Opinion, p.8). In this case, the employee, Baskin, was clearly outside the scope of his employment when he was injured.

The following are the most important, unique facts in this case that fall within the framework of cases which are compensable as it applies to breaks controlled by and beneficial to the employer, and that all fall within the framework of the persona comfort doctrine outlined by Larson Workers' Compensation Law and Couch on Ins.:

1. The breaks taken by the Plaintiff were authorized and paid for by the employer and the employee was still on the clock while the employee was on a break (T.E., 14);

2. The employer benefited by the breaks taken by the employees—especially on the day of the injury when the Appellee worked through her lunch break, clocked out on a paid break at 1:30 and was traveling three (3) minutes across the street to Taco Bell to get something to eat and bring it back to her desk (WCB Decision, p.3; 4/19/2011 T.E., p.15);

3. There was no actual or implied prohibition against walking three (3) minutes across Frederica Street to Taco Bell, Arby's, or McDonald's (T.E., 14, 16);

4. The Appellee's own uncontradicted testimony was that traveling across the street at breaks was a routine practice by numerous US Bank employees (T.E., 16);

5. These twenty (20) minute morning and afternoon breaks were significant benefits given to employees during which time they were paid, and the breaks given to the employee, arguably, were designed to increase their comfort and morale and increase their efficiency on their job;

6. There is no evidence that the Appellee was traveling across the street for any other reason except for the purpose of the paid break, which was to be refreshed and get a bite to eat and return to the job;

7. There was no requirement that an employee take his or her breaks on the premises.

Let us examine the previously mentioned areas of law and superimpose these two areas of the law on the facts of our case.

The Court of Appeals quoted Larson on page 6 of their Decision, in the section on going and coming, lunch, or rest periods (2011) § 13.05[1],[4] Break Periods and Coffee Breaks off the Premises:

> "The going and coming rule has so far been treated as substantially identical whether the trip involves the lunch period or the beginning and end of the work day. This can be justified because most normally the duration of the lunch period, when lunch is taken off the premises, is so substantial and the employee's freedom of movement so complete that the obligations and control of employment can justifiably be said to be in suspension during this interval.
>
> Now that the coffee break or rest break has become a fixture of many kinds of employment, close questions continue to arise on the compensability of injuries occurring off the premises during rest periods or coffee breaks of various durations and subject to various conditions. It is clear one cannot announce an all-purpose "coffee break rule" since there are too many variables that could affect the result. The duration might be five minutes, seven minutes, 10 minutes, or even 20 minutes by which time it is not far from that of a half-hour lunch period. Other variables may involve the question whether the interval is a right fixed by the employment contract, whether it is a paid interval, whether there are

> restrictions on where the employee can go during the break, or whether the employee's activity during the period constituted a substantial personal deviation.
>
> 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. The New York Appellate Division expressly undertook to draw this kind of line between the lunch period and the brief coffee break period, in affirming an award to an employee for injuries sustained in returning to work after getting coffee at the "nearest place" across the street[.]
>
> ...
>
> The fact that a coffee break or rest period is a paid one, or for any other reason might be presumptively within the course of employment, does not of course mean that anything that happens during that span of time is compensable. If the employee uses the interval, not for its basic purpose of rest and refreshment, but for personal errands, such as cashing a check at a bank, or doing some shopping for Christmas, or getting a tuberculin shot checked, the employee leaves the scope of employment if the deviation is such as to be called substantial. On the other hand, a swim during a coffee break has been held not to interrupt the course of employment, in part, because the refreshing effects of the swim would benefit the employer as well as the employee by enhancing the employee's efficiency." (Court of Appeals Decision, p. 6-7).

According to Larson, one factor to be considered is whether the break is a paid interval; Appellee's break was a paid interval. Another factor is whether there are restrictions on where the employee can go during the break; as noted earlier, it was commonplace for employee's to travel three (3) minutes across the street to fast food restaurants and this three(3) minutes during a twenty (20) minute break arguably was not a substantial deviation and there is no evidence to show that Plaintiff was deviating from her intention to buy a snack, like numerous other employees, and immediately return to her work station.

Also, as noted earlier, there was no evidence to show that the Appellee was going to use the break for anything besides rest and refreshment.

The second area of law to be superimposed over the facts of this case is the personal comfort doctrine. On page 9 of their Decision, the Court of Appeals quoted Couch on Ins. (3rd ed. Updated 2011), in which the personal comfort doctrine was explained:

> "§ 135.44, Generally, "Personal Comfort" Doctrine.
>
> An exception to the general rule precluding workers' compensation for acts performed by employees solely for their own benefit has been carved out for acts of personal convenience or comfort. This exception, sometimes referred to as the "personal comfort" or "personal convenience" doctrine was developed to cover the situation where the employee is injured while taking a brief pause from his or her labors to minister to the various necessities of life. Although technically the employee is performing no services for his or her employer in the sense that his or her actions do not contribute directly to the employer's profits, compensation is justified on the rationale that the employer does receive indirect benefits in the form of better work from a happy and rested worker, and on the theory that such a minor deviation does not take the employee out of his or her employment." (Court of Appeals Decision, p.9).

In commenting on this personal comfort doctrine, the Court of Appeals affirmed the logic of this personal comfort doctrine:

> "Couch makes an example of thirst and/or hunger as situations for which recovery of benefits is appropriate. Both Couch and Larson agree that if an employee is on an errand during the paid break for his or her own convenience, it is not compensable while leaving the premises for a "personal convenience" is. We agree with their logic." (Court of Appeals Decision, p.9).

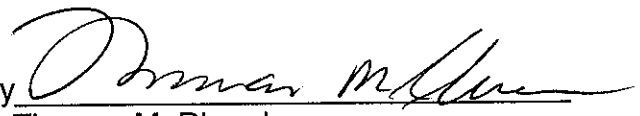
In the facts of this case, Appellee had to work through lunch because of the absence of a co-worker and took a paid break at 1:30 (WCB Decision, p.3). The employer was benefiting from this break, providing the Plaintiff needed refreshment and personal comfort.

CONCLUSION

The standard of review by the Court of Appeals and the Supreme Court of Workers' Compensation Board is narrower than review of findings of fact. The question for the Supreme Court to ask is the following: Is the Workers' Compensation Decision, their legal analysis, and assessment of the evidence "so flagrant as to cause a gross injustice"? Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 687-88 (Ky.1992). Clearly, the Workers' Compensation Board provided a comprehensive, rational analysis of the case and Appellee's counsel respectfully requests that the Supreme Court affirm the Decision of the Administrative Law Judge, the Workers' Compensation Board, and the Court of Appeals.

Respectfully submitted,

RHOADS & RHOADS, P.S.C.
9 East Center Street
Madisonville, KY 42431
(270) 825-1490

By 
Thomas M. Rhoads