NOT DESIGNATED FOR PUBLICATION

No. 113,117

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JESSE J. ATKINS,
Appellant,

v.

WEBCON

and

KANSAS BUILDING INDUSTRY WORKERS COMPENSATION FUND,
Appellees.

MEMORANDUM OPINION

Appeal from Workers Compensation Board. Opinion filed January 22, 2016. Affirmed.

Melinda G. Young, of Bretz & Young, of Hutchinson, for appellant.

Roy T. Artman, general counsel, of Kansas Building Industry Workers Compensation Fund, for appellees.

Before MALONE, C.J., HILL and STANDRIDGE, JJ.

Per Curiam: Jesse J. Atkins appeals from a decision by the Workers Compensation Board (Board) in which it found the injuries he suffered as a result of being hit by a car while on foot did not arise out of or in the course of his employment. Atkins argues the Board should have applied the intrinsic travel exception to the going and coming rule to find his accident compensable because he was injured while on a 5-

day trip to a remote work site. For the reasons stated below, we affirm the Board's decision.

FACTS

In June 2009, Atkins was employed as a general laborer for Webcon, Inc. (Webcon), doing mostly commercial roofing. Webcon was based in Hutchinson, Kansas, but it performed roofing projects around Kansas as well as outside of the state. During the relevant time period, Webcon was in the process of completing a roofing project on a large grain elevator in Enid, Oklahoma. This project took over 2 months to complete, and Webcon was simultaneously engaged in other projects.

The crew working on the Enid project did not commute from Hutchinson every day. Rather, the crew would meet at Webcon's premises on Monday morning and drive company vehicles to Enid. Employees could have driven their personal vehicles to Enid, but they would not have been offered any mileage reimbursement by Webcon. The crew would work Monday afternoon after arriving, stay in Enid at a hotel called the Baymont Inn & Suites (Baymont Inn) until Friday, at which time they would drive back home to Hutchinson. Webcon selected the hotel. Webcon also paid for the cost of the hotel rooms and employees' lunches and dinners while they were staying in Enid. The hotels at which Webcon employees stayed usually offered breakfast. Finally, in addition to their hourly wages, the employees received an extra $25 for every night that they slept in Enid. This extra money was offered to employees as an incentive to volunteer on jobs that required overnight stays.

While working on the grain elevator in Enid, Webcon's employees were paid hourly wages from the time they got into the company vehicles and left the Baymont Inn in the morning until the time they arrived back at the hotel in the evening. Once the crew arrived back at the Baymont Inn, they were no longer on the clock and free to do

whatever they chose to do. As a general rule, the crew did eat dinner together. The crew usually decided as a group whether to eat out at a restaurant or to grill food for themselves at the hotel. Either way, the cost of the meals was covered by Webcon.

Tim Lemen was the foreman for the grain elevator project in Enid. Lemen testified that Atkins was part of the crew working in Enid on June 15, 2009. During this particular week, Lemen was sharing a hotel room with Atkins. Regarding the events of June 15, 2009, Lemen said the crew worked until about 6 p.m. and then grilled food at the Baymont Inn for dinner. Lemen said the crew ate dinner around 7 p.m. After dinner, Atkins told Lemen that he was going to go play darts, but Atkins did not say where.

Nicholas Wittekind, another general laborer for Webcon, testified that he and Atkins agreed to go to the Ramada Inn hotel for a few drinks after dinner on June 15, 2009. The Ramada was about 2 blocks away and had a bar with a dart board. Wittekind and Atkins left the Baymont Inn at around 9 or 10 p.m. Wittekind testified that upon arrival at the Ramada they sat down at the bar because there were other people already playing darts. Wittekind drank four alcoholic mixed drinks in 2 hours. Wittekind said Atkins drank some beer and also had some mixed drinks, but Wittekind did not know how much of each Atkins had. Wittekind left the Ramada at about 11:30 p.m., but Atkins stayed there.

When Lemen woke up on the morning of June 16, 2009, Atkins was not in their room. Later, Atkins had failed to report to work. During his lunch break, Lemen drove to the Ramada to look for Atkins based on Wittekind's report that the Ramada was the last place Wittekind had seen Atkins the night before. When Lemen arrived at the Ramada, there were some police officers present who told Lemen that Atkins had been hit by a car at about 2 a.m. Lemen called Robert Webster, the Operations Manager for Webcon, and reported what he knew about Atkins' accident.

Atkins testified that he did not remember being struck by the vehicle. He also said he did not remember working that day or going to the Ramada. A police report of the accident indicated that Atkins was hit by a vehicle at 2:25 a.m. Atkins later learned the driver of the vehicle that hit him was drunk. Atkins was initially transported to Enid Hospital, but the medical personnel there were unable to stabilize him so Atkins was flown to the University of Oklahoma for further medical care. As a result of the car accident, Atkins' right leg was amputated, as was one of his fingers and one of his toes. Atkins also underwent skin grafts, lost vision in his right eye, could not move his left elbow, was forced to use a catheter, and had numerous internal injuries. Atkins was in a coma for somewhere between 49 and 59 days after the accident.

On October 6, 2009, Atkins completed an application for hearing to the Kansas Department of Labor's Division of Workers Compensation. A preliminary hearing was held on February 18, 2010. The administrative law judge (ALJ) presiding over the hearing found that Atkins' injuries occurred as a result of a hazard created by the conditions of his employment in that he was required to travel to Enid for work. As such, the ALJ awarded Atkins temporary total disability at the rate of $529 per week. The ALJ also ordered Webcon to pay medical bills incurred by Atkins to pay for continuing medical treatment. Webcon appealed from the ALJ's preliminary order for compensation, but the Board affirmed the ALJ's order.

A regular hearing was held on April 21, 2014. Before the hearing began, the ALJ reviewed some stipulations made by the parties. Among other things, Webcon admitted that Atkins suffered a personal injury by accident on June 16, 2009. It also admitted coverage by the Workers Compensation Act. In addition, both parties stipulated that Atkins was permanently and totally disabled as the result of his accident. Webcon, however, denied receiving timely notice of Atkins' claim. Webcon also denied that Atkins' injury arose out of and occurred in the course of employment.

The ALJ determined that Atkins had provided proper notice under K.S.A. 44-520 because Webcon was notified of the accident within 24 hours of its occurrence and because Atkins was in a coma for approximately 2 months after the accident, meaning that he could not provide personal notice. The ALJ also found that Atkins' accidental injury arose out of and occurred in the course of his employment with Webcon. As such, the ALJ concluded Atkins was entitled to future medical care upon application and review as well as unauthorized medical care up to the statutory limit. Finally, the ALJ awarded Atkins temporary and permanent total disability benefits that equaled $125,000.

Webcon requested the Board review the ALJ's award. The only issue presented to the Board was whether Atkins suffered an injury arising out of and in the course of his employment with Webcon. Upon review, the Board reversed the ALJ's decision and found that Atkins did not suffer an injury arising out of and in the course of his employment.

ANALYSIS

On appeal, Atkins argues the Board erred in finding that his injury did not arise out of and in the course of his employment. Whether an injury arose out of and in the course of employment is a question of fact. *Moore v. Venture Corporation*, 51 Kan. App. 2d 132, 137, 343 P.3d 114 (2015). When reviewing questions of fact in the context of a workers compensation appeal, this court must review the record as a whole to determine whether the Board's factual determinations are supported by substantial evidence. See K.S.A. 2014 Supp. 77-621(c)(7) and (9). This analysis requires the court to (1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determination, if any; and (3) review the agency's explanation as to why the evidence supports its findings. K.S.A. 2014 Supp. 77-621(c)(9); *Williams v. Petromark Drilling*, 299 Kan. 792, 795, 326 P.3d 1057 (2014). "Substantial evidence" is evidence possessing something of substance and relevant

consequence to induce the conclusion that the award was proper or furnishing a basis of fact from which the issue raised could be easily resolved. *Ward v. Allen County Hospital*, 50 Kan. App. 2d 280, 285, 324 P.3d 1122 (2014). This court does not "weigh conflicting evidence except to determine whether the evidence supporting the Board's decision has been so undermined by conflicting evidence that [it] no longer [has] confidence in the substantial nature of the evidence." *Messner v. Continental Plastic Containers*, 48 Kan. App. 2d 731, 750, 298 P.3d 371, *rev. denied* 297 Kan. 1246 (2013).

In any employment covered by the Workers Compensation Act, the employer is held legally responsible to pay compensation for personal injury to an employee who is injured by an accident "arising out of and in the course of employment." K.S.A. 2008 Supp. 44-501(a). "The two phrases arising 'out of' and 'in the course of' employment . . . have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable." *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995). "'[A]n injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.'" *Rinke v. Bank of America*, 282 Kan. 746, 752, 148 P.3d 553 (2006). An injury occurs in the course of employment when it happens while an employee is at work in the employer's service. 282 Kan. at 752.

These definitions are statutorily limited by K.S.A. 2008 Supp. 44-508(f), which states in part:

> "The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of

> the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency."

The limitation described in the statute above is commonly referred to as the "'going and coming rule'" and works to exclude some injuries from being compensable even though they may have arisen out of and in the course of employment. See *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 938, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008). The rationale for this limitation on compensable injuries is that during an employee's commute to and from work, he or she is exposed only to the same risks or hazards as the general public. As such, those risks are not causally related to employment. 39 Kan. App. 2d 938-39.

Numerous exceptions exist to the going and coming rule. Relevant to this case, the rule does not apply when travel is an "'intrinsic part of the job'" or "is 'required in order to complete some special work-related errand or special-purpose trip.'" 39 Kan. App. 2d at 939. This exception "extends to the normal risks involved in completing the task or travel." *Mendoza v. DCS Sanitation*, 37 Kan. App. 2d 346, 350, 152 P.3d 1270 (2007). For example, the going and coming rule would not apply to a traveling salesman who was injured driving from account to account. An injury occurring during such travel would be compensable. See *Halford*, 39 Kan. App. 2d at 939. Significant to the issue presented here, the Kansas Supreme Court dictates that when determining whether an injury occurred during travel that arose out of and in the course of employment, "the entire undertaking is to be considered from a unitary standpoint rather than divisible." *Blair v. Shaw*, 171 Kan. 524, 529, 233 P.2d 731 (1951).

Atkins argues on appeal that his injury was compensable because travel was an intrinsic part of his work in Enid. Relying on *Blair*, he argues his entire trip to Enid on

behalf of his employer must be viewed from a unitary standpoint rather than a divisible perspective. Thus, Atkins claims his visit to the bar at the Ramada must be considered an indivisible part of his work trip to Enid, which necessarily means his injury must be considered to have arisen out of and in the course of his employment.

In concluding Atkins' injury did not arise out of and in the course of his employment, the Board specifically found that the circumstances of this case were comparable to two cases: *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001), and *Ostmeyer v. Amedistaff*, No. 101,909, 2009 WL 4931359 (Kan. App. 2009) (unpublished opinion). In *Butera*, the claimant was an iron worker and rigger whose employer required him to temporarily relocate to remote construction sites. In 1997, the claimant took a job at a site about 360 miles from his primary residence. The job was expected to last 6 months, so he moved into a hotel that was 30 minutes from the job site. The claimant was reimbursed by his employer for the cost of the hotel as well as for the cost of mileage to and from the job site before moving into the hotel. He was not, however, reimbursed for his shortened commute from the hotel to the job site once he moved into the hotel. While driving to work one evening, the claimant collided with a concrete barrier, which caused him to sustain personal injury.

Butera argued his injury was compensable under the Workers Compensation Act because he was required by the nature of his work to take up a remote residence. Therefore, he asserted, his entire trip was within the scope of his employment. A panel of our court disagreed, finding that Butera was a "fixed-situs employee" and that travel was not a part of Butera's job as an iron worker and rigger. 28 Kan. App. 2d at 546. The court noted that the claimant relocated to a hotel for the sole purpose of shortening his commute and that, contractually, Butera was not under his employer's supervision during his off-hours, nor was he expected to accomplish anything on behalf of his employer during those hours. 28 Kan. App. 2d at 546-47. Thus, when he was injured, the court held

he "faced no greater risk than other commuters who were traveling from their permanent residence." 28 Kan. App. 2d at 547. Relevant to the issue presented here, the court stated:

> "Fluor [Daniel Construction Corporation] paid a mileage rate for the initial journeys to the work site in order to set up a residence. . . . If Butera had been injured on one of those trips, he would have a good argument for compensation because the special purpose of those trips was to lay groundwork for the job. The parties contemplated in their contractual relationship that those trips would be specially treated. However, once Butera set up long-term residence in the local hotel, the special purpose disappeared, and he simply commuted from the hotel to the job site. At that point, he lost the explicit mileage allowance and received a general stipend." 28 Kan. App. 2d at 547.

The facts in *Ostmeyer* presented a similar legal issue. The claimant Ostmeyer was a traveling nurse who provided temporary nurse staffing to hospitals for periods ranging from 13 to 26 weeks. During these contractual periods, Ostmeyer would live in a local hotel rather than commute from her primary residence. During a stay in Hutchinson for a job, she was attacked and injured on her way back to the hotel from dinner. The attack occurred on a day off from work. Similar to *Butera*, Ostmeyer argued that travel was a necessary part of her job and that any injury occurring during her extended out-of-town trips should be compensable. This court again disagreed, finding that Ostmeyer's case was comparable to *Butera* and did not arise out of and in the course of her employment. 2009 WL 4931359, at 3-4. It found that "[a]t the time of the assault, she faced no greater risk than if she had been at her home or any other hotel." 2009 WL 4931359, at *3. At the end of its opinion, the *Ostmeyer* court made the following observation:

> "Finally, to embrace Ostmeyer's position here would substantially broaden the employer's exposure for such claims. If Ostmeyer's injuries arose out of and in the course of employment, virtually any conceivable mishap during her hotel stay would be compensable—even a slip and fall in the hotel shower or food poisoning from a local restaurant. We do not believe such broad coverage to be consistent with legislative intent or with the appellate case law considering such questions." 2009 WL 4931359, at *4.

In his brief, Atkins makes several arguments attempting to distinguish the facts in his case from the facts presented in *Butera* and *Ostmeyer*. First, he argues that, unlike the claimants in *Butera* and *Ostmeyer*, Atkins and the entire Webcon work crew carpooled to Enid and would not have been reimbursed by the company if they had chosen to drive their own vehicles. But the relevance of this distinction is unclear, as Atkins was not injured on the way to or from Enid. Further, the record reflects that Atkins did not have a driver's license, so driving himself to and from Enid was not an option.

Second, Atkins points out that the claimants in *Butera* and *Ostmeyer* lived continuously in one location for months at a time, but the Webcon employees stayed at a hotel during the work week and returned to Hutchinson every weekend during the grain elevator project. Admittedly, Atkins' 5-day stays in Enid were significantly shorter than either of the claimants' stays in *Butera* or *Ostmeyer*. Nevertheless, the purpose of the lodging was the same. Both Butera and Ostmeyer relocated to hotels to shorten their commutes to work. Here, Lemen specifically testified that the only reason the crew obtained lodging in Enid was the grain elevator job.

Third, Atkins argues he was not a fixed-situs employee like the claimants in *Butera* and *Ostmeyer*. Atkins claims he was not a fixed-situs employee because he did not live continuously at the hotel in Enid for the duration of the grain elevator project. But Atkins misinterprets the meaning of the term fixed-situs. As the term is used in *Butera* and *Ostmeyer*, a fixed-situs employee is one who has a fixed location where he or she goes to work each day. See *Ostmeyer*, 2009 WL 4931359, at *3. Here, Atkins' work site, the grain elevator in Enid, was static. Thus, substantial evidence supports the Board's finding that Atkins was a fixed-situs employee.

Fourth, Atkins points out that, unlike the employers in *Butera* and *Ostmeyer*, Webcon chose the hotel and assigned roommates for each trip to Enid. Atkins' claim that Webcon assigned roommates is unsupported by the record. Lemen only testified that two

employees slept in each room at the Baymont Inn. In fact, Wittekind specifically testified that the workers in Enid were *not* assigned roommates but instead chose their own roommates. That said, the record is clear that Webcon chose to house its employees at the Baymont Inn. But like the facts here, the facts in *Ostmeyer* reflect that the employer assigned the hotel claimant was staying in when her injury occurred. Even if it were not the case, the fact that Webcon chose the hotel where the employees stayed does not detract from the Board's finding that Atkins was a "fixed-situs employee" and that his walking to and from recreational activities during personal time in the evenings was not a part of Atkins' job working on the grain elevator.

Finally, Atkins notes that he was paid $25 for each night that he stayed in Enid as an incentive to work at a fixed site out of town. He argues without elaboration that this indicates Webcon derived a benefit from the fact that employees stayed overnight. Although there is no indication by the court in *Butera* or *Ostmeyer* whether the claimants were offered an incentive to work at a fixed site out of town, the relevance of this alleged distinction is unclear even if it were true. Atkins cites no cases establishing that a company's decision to provide a monetary incentive for employees to work at a fixed site out of town brings those employees within the intrinsic travel exception.

Having reviewed the entire record as a whole and considering evidence both supporting and detracting from the decision reached by the Board, we find substantial evidence to support the Board's decision. Atkins was a general laborer performing commercial roofing at a fixed site in Enid, Oklahoma. And once the crew arrived at the Baymont Inn, the hotel was akin to a temporary residence. Atkins was only paid from the time he left the hotel to the time he arrived back at the hotel. Once he arrived back at the Baymont Inn from the job site each night, he was free to do as he wished. Atkins was injured at 2:25 a.m. while walking back to his hotel after spending the evening at a bar. Based on these facts, the Board correctly applied this court's sound reasoning in *Butera* and *Ostmeyer* to this case. See also K.S.A. 2008 Supp. 44-508(f) ("'arising out of and in

the course of employment' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties").

To be clear, Atkins was required to travel to Enid in order to perform his duties for Webcon. As noted in *Butera*, any injury that may have occurred while he was traveling in a vehicle to or from Enid may well have been compensable as a special purpose trip that was necessary to establish the groundwork for his job. See 28 Kan. App. 3d at 547. But Atkins' injury did not occur on one of these trips. Instead, it happened in the early morning hours after the crew had already completed its roofing work for the day and arrived back at the Baymont Inn in Enid. Any special work purpose that existed on his trips to and from Enid disappeared once Atkins took up residence at his hotel. See 28 Kan. App. 2d at 547. At the time he was injured, Atkins faced no greater risk than any other person walking back home to his or her permanent residence. For this reason, we affirm the Board's finding that Atkins' injury did not arise out of or in the course of his employment with Webcon. There is nothing in the record that causes us to lack confidence in the substantial nature of the evidence supporting the Board's decision.

Affirmed.