

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203336

THOMAS MAUPIN

CLAIMANT

**PULASKI COUNTY
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED OCTOBER 24, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KEVIN ODUM, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on September 10, 2003. A prehearing conference was held on September 11, 2002 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on November 13, 2001.

2. The temporary total disability rate is \$369.

The claimant contends that he was engaged in employment services at the time of his head-on collision on November 13, 2001, and that he has sustained catastrophic injuries. The claimant was a police officer and is on duty 24 hours a day, 7 days a week. The claimant contends he is entitled to medical benefits and temporary total

disability benefits from November 13, 2001 to a date to be determined. Permanency is reserved.

The respondents stipulate the claimant sustained an accidental injury and he has sustained medical bills and a substantial amount of temporary total disability. The respondents contend the claimant was not performing employment services at the time of the accident. The claim has been controverted in its entirety.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on November 13, 2001.
2. The temporary total disability rate is \$369.
3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of his employment at a time when employment services were being performed.

DISCUSSION

The claimant, 29 years old, testified that he began his career with the respondent in July 1998, as a jailer. He moved to the streets in December 1999 and attended the academy in January 2000. The claimant's job was general patrol where you are

observing and are a public relations officer all the time. The claimant described his job as answering calls from wrecks to disturbances and interacting with the community. The claimant further described his duties as being an observer, as being trained to look for things out of the ordinary.

The claimant testified that on the evening of November 13, 2001, he left home about 9:30, after making sure all his equipment was in proper working order, particularly with his weapon loaded and in the holster, locked down and his radio is in its shoulder harness and on. The claimant lives in Perry County and works in Pulaski County. The claimant testified that he listens to his police radio on his drive to work. The claimant was driving on Highways 9 and 10, when he saw a pair of headlights on his side of the road and coming toward him. The claimant testified he swerved left to avoid the oncoming vehicle but, as he did, he noticed a set of lights in that lane as well so he swerved back to the right and was involved in a head-on collision. The claimant's vehicle flipped over, landing upside down toward the ditch in the opposite lane. The accident happened three-quarters of a mile into Perry County.

The claimant described his injuries:

I had multiple fractures to my lower extremities. I had a compound fracture to my lower right leg. The tibia compounded, and it required rods to be put into those. My left leg was pretty much crushed. The femur broke and lacerated my femoral artery, causing a hematoma there. My tibia and fibula were totally crushed, as well as some of the ankle bones, which required total reconstruction. I sustained a large blow to the head which created a large knot. My lower back was – At the time all I knew was that it was in a large amount of pain. I found out later that I have herniated discs – the lower four lumbar. I also sustained several internal injuries.

During the accident a condition set in called rhabdomyolysis, which caused my muscles to break down which, in turn, caused kidney failure. Due to the loss of blood from the femoral artery, I suffered cardiac arrest, I believe twice, in the emergency room. (T., p. 14, lines 21-25; p. 15, lines 1-12.)

The claimant continues to receive medical treatment and has been in a wheelchair since the accident. The claimant can walk short distances on crutches. The claimant has not been released to return to work.

On the night of the accident, the claimant confirmed that he was in uniform at the time of the 9:50 p.m. incident and in his personal vehicle. The claimant testified that as a police officer he signed a code of ethics. According to the claimant, as a police officer, you are not always serving the public in the sense of directly serving them but by setting an example and by living your life right and by doing anything you can to help anybody when the time arises. The claimant elaborated on his furthering the interest of the state and the respondent employer:

To me, anytime that I'm in uniform and I have a badge that says Pulaski County Sheriff's Department on it, I'm a representative of the county. And, therefore, just my general behavior, if it is good, favors the county. If it's bad, it doesn't favor the county. And I'm very proud of my profession, and I behave accordingly.

If I do something to assist in my plain clothes, I'm still a police officer, and I'm still doing what I can to help somebody. But, if I'm in a uniform, I'm a representative of the county, and they're saying, 'Hey, a Pulaski County deputy helped me out; they're good guys.' (T., p. 18, lines 11-21.)

The claimant was questioned about being able to be a police officer in Perry County versus Pulaski County. The claimant responded:

Police officers are a brotherhood. Even though I can't take direct actions per se, as in I'm not going to take down a bank robber in Perry County, the observation of, say, I see a car in the ditch and stop and get out and everything's okay. Then it's 'I'm going to call Perry County and let them know that you're here. And I'm going to wait here with you' - - especially if you're by yourself - - 'until they get here.' You know, I'm still performing the duty of a police officer although I'm not in my county. I'm still representing my county because I'm in that uniform and I'm sitting there with that person. And he thinks, 'This is an okay guy; they have good officers in Pulaski County.' (T., p. 19, lines 3-14.)

The claimant testified that by having his radio on during his drive, he was able to know what has been happening the previous 30 minutes before he is actually in his unit at work. According to the claimant, since there is no shift briefing, he has a better feel for what is going on in the area with listening to the radio on his drive to work.

Under cross examination, the claimant confirmed that he is not paid for travel time nor is he required to have his radio on before he arrives at work. The claimant confirmed that he has never been dispatched to a crime scene when he was in his personal vehicle. The claimant confirmed that he has no official authority in Perry County beyond those of a non-officer.

Bob Scarborough, major with the respondent employer, testified he has been so employed since December 1994. Mr. Scarborough testified that he has 25 years in law enforcement and investigations before joining the respondent employer. Mr. Scarborough confirmed that the claimant was not required to wear his uniform to work or have his radio on and confirmed that dispatching officers in their private vehicles is strongly discouraged. Mr. Scarborough confirmed that travel time for the officers is not paid time. Mr. Scarborough also confirmed that he understood that officers were asked

to arrive at their shift 15 minutes early and their shift ended 15 minutes early. The claimant's shift at the time of the accident was 11:00 p.m. until 7:00 a.m., but actually his shift was 10:45 p.m. until 6:45 a.m. The claimant's vehicle accident happened about 10 minutes until 10:00 p.m. In his December 12, 2002, deposition, Mr. Scarborough was asked about a police officer being an officer 24 hours a day, 7 days a week and he responded:

He is furthering the interest of the state 24 hours a day by being a police officer, if you want to look at it that way. We pay him to do a job during a certain period of time, which he is compensated for. We do not compensate him for stuff that he does when he is not working. So in my mind, he is not furthering the interest of the sheriff's office. (D., p. 8, lines 17-22.)

The respondents have stipulated that the claimant sustained a specific incident accident causing injury and supported by objective findings. The respondents have controverted the claim and contend the claimant sustained his injuries at a time when employment services were not being performed, relying on Ark. Code Ann. §11-9-102(4)(B)(iii) (Supp. 2001).

Ark. Code Ann. §11-9-102(4)(A)(i) (Supp. 2001), defines compensable injury as an accidental injury causing internal or external physical harm arising out of and in the course of employment. The test for determining whether an employee was acting in the course of employment at the time of his injury requires that the injury occur within the time and space boundaries of his employment while he is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). An employee is generally said not to be acting within the course of employment when he is traveling to

and from the workplace, the rationale being that an employee is not within the course of his employment while traveling to or from his job. *Id.* Some exceptions to this rule are where the journey itself is “part of the service,” such as traveling men on a business trip and employees who must travel from job site to job site. *Id.* Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. See, *Ray v. Univ. of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1999); *Coble v. Modern Business Systems*, 62 Ark. App. 26, 966 S.W.2d 938 (1998).

The “going and coming” rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from work. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

The Arkansas Supreme Court gave an exception to this rule in *Pettey, supra*, with the application of the “traveling men” exception where the employee’s journey is considered part of the service or where travel is an integral part of the job. The Court affirmed an award of benefits to a traveling nurse who was injured in a car accident en route to a client’s home.

The Court of Appeals reversed the Commission’s finding of compensability in *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985). In that case, the claimant was a nurse who worked in a mobile unit that traveled to various locations to collect blood donations. She was involved in a car accident one day on her way to meet the mobile unit at a designated location. The Court held that the going and

coming rule precluded an award of benefits. See, also, *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000).

In the present case, it is not disputed that the claimant was going to work for his regular shift. Going to and coming from work are activities, which are normally excluded from a covered activity for entitlement to workers' compensation benefits. The claimant contends that as a law enforcement officer, he is furthering his employer's interest 24 hours a day and seems to rely on the Court of Appeals holding in *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). In *Lowe*, the claim was compensable and the Court found the claim was not barred by the going and coming rule.

The present case can be distinguished from the *Lowe* case in a number of ways. In *Lowe*, the claimant was an officer with the Sherwood Police Department who wore a police uniform and was riding a motorcycle equipped with police blue lights. Officer Lowe was authorized to carry a weapon, make arrests and keep the peace and the City of Sherwood derived a benefit from his presence on the city streets. In the present case, the claimant was deputy for the Pulaski County Sheriff's Department and was en route to work in Perry County driving his personal vehicle. There was no mention of special police lights or equipment on his personal vehicle. While the claimant did have his police uniform on, he had no authority to make arrests and perform police officer duties outside of Pulaski County. The Court of Appeals decision in *Lowe* was also based on pre-Act 796 workers' compensation law. There were a number of changes in the law with Act 796, with one change being the exemption to a compensable injury is

an injury inflicted at a time when employment services were not being performed. Ark. Code Ann. §11-9-102(4)(B)(iii) (Supp. 2001).

I find this case akin to *Campbell v. Randal Tyler Ford Mercury*, 7 Ark. App. 13 S.W.3d 916 (2000). The claimant in *Campbell* was on his way to work at the time he sustained fatal injuries in a one-vehicle accident. The Commission found and the Court of Appeals affirmed the finding that the claimant was not performing employment services at the time of the accident. The claimant's job duties in *Campbell* required him to draw up contracts and paperwork and also handle the financing associated with purchasing a vehicle. The claimant used a company car to go to and from work and to handle company business after hours. The claimant often brought contracts home and, in fact, had one in his car at the time of his fatal accident. The claimant was traveling to work at the time of the accident. The Commission found that the claimant in *Campbell* was not exposed to any greater risks driving to work than other employees. The Commission found that the *Campbell* case was a classic going and coming case when the accident occurred and was not compensable.

After considering all the credible evidence, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment at a time when employment services were being performed. The claimant while dressed in his police uniform was driving to work in his personal vehicle from his home and was in Perry County when he sustained his serious head-on collision. The claimant was without authority to perform official police officer duties in Perry County, as his employment was in Pulaski County. The claimant

testified that he was listening to his police radio and getting familiar with the activities in Pulaski County as he was driving to work and contended this furthered his employer's interest. I found the claimant to be a credible witness; however, I am still constrained to find that listening to the police radio and being in uniform and observant are not sufficient to satisfy the requirements of activities that "further the employer's interests." I find the claimant was going to work and was not performing employment services and is, therefore, precluded from receiving workers' compensation benefits.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of his employment at a time when employment services were being performed. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**