

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301305

MARTIN S. MONTGOMERY,
EMPLOYEE

CLAIMANT

PLUMBING & MAINTENANCE, INC.,
EMPLOYER

RESPONDENT

WESTPORT INSURANCE CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL in Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE BEN RICE, Attorney at Law, Jacksonville, Arkansas and HONORABLE PAUL SCHMIDT, Attorney at Law, Cabot, Arkansas.

Respondents represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 8, 2003 in Little Rock, Arkansas. A prehearing order was entered in this case on May 30, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. There was an employer/employee relationship on October 30, 2002.

2. The claimant's average weekly wage was \$320.

DISCUSSION

By agreement of the parties, this decision is limited to two issues: (1) whether the Arkansas Workers' Compensation Commission has jurisdiction of this matter; and (2) whether the claimant was performing employment services when he became injured while riding as a passenger in a company truck shortly after leaving a work site at 3:30 p.m. on October 30, 2002. See transcript, page 5.

Jurisdiction

The claimant was employed as a plumber by Plumbing and Maintenance, Inc. His normal work hours are 7:30 a.m. to 3:30 p.m. On the morning of October 30, 2002, the claimant met a co-worker, William Lawrence, at a plumbing supply house in Searcy, Arkansas, parked his personal vehicle, and rode to a work site in Searcy with Lawrence in a vehicle owned by Plumbing and Maintenance, Inc.

When their work ended at 3:30 p.m., the claimant and Lawrence got back in the company-owned truck to return the claimant to his own vehicle at the plumbing supply house. En route, however, the two deviated from the direct route to the plumbing supply house in order to buy something to drink. When the first store was closed, the two were en

route to a second store to buy something to drink when the motor vehicle accident at issue occurred.

The documentary evidence indicates that the claimant was a resident of Searcy, Arkansas when he signed his form AR-N, and the respondent employer's office is in Bald Knob, Arkansas. Under the circumstances presented, I find that the Arkansas Workers' Compensation Commission has jurisdiction to determine the facts which establish the applicability or non-applicability of the Arkansas Workers' Compensation law to the injury and accident at issue. See Johnson v. Union Pacific Railroad, ___ Ark. ___, ___ S.W.3d ___ (April 17, 2003); WENCO Franchise Mngm't, Inc. v. Chamness, 341 Ark. 86, 13 S.W.3d 903 (2000); VanWagoner v. Beverly Enters., 334 Ark. 12, 970 S.W.2d 810 (1998.)

Employment Services

The Arkansas Court of Appeals in Daniels v. Arkansas Dept. of Human Services, 77 Ark. App. 99, 72 S.W.3d 128 (2002) succinctly explained the applicable legal standard for determining whether "employment services" are being performed during travel as follows:

Arkansas Code Annotated section 11-9-102(4) (A) (Supp. 2001) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body . . . arising out of and

in the course of employment." Section 11-9-102(4)(B)(iii) provides that the term "compensable injury" does not include an injury that was inflicted upon the employee at a time when employment services were not being performed. The statute does not define the phrase "in the course of employment" or the term "employment services." The supreme court has held, however, that we are to use the same test to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within "the course of employment." *Collins v. Excel Specialty Prods.*, 347 Ark. 811, ___ S.W.3d ___ (2002). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id.* See also *Pifer v. Single Source Transp.*, 347 Ark. 851, ___ S.W.3d ___ (2002).

An employee is generally said not to be acting within the course of employment when he or she is traveling to and from the workplace. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, 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).

There are exceptions to this rule. For instance, in *Olsten Kimberly Quality Care v. Pettey*, *supra*, the court applied 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. There, 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.

Conversely, in *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985), we reversed the Commission's finding of compensability. 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. We held that the going and coming rule precluded an award of benefits. See also, e.g., *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000).

In the present case, even if the claimant might arguably have been engaged in employment-related travel when he and Lawrence were driving from the work site to the plumbing supply house, I am constrained to find that the two deviated from even possibly performing employment services when they deviated from the direct route between the work site and the plumbing supply house in order to buy something to drink. In this regard, I point out that leaving the direct route back to the plumbing supply house in order to buy something to drink is not inherently necessary for the performance of the job that the claimant was hired to do. Accord Daniels, supra. [Automobile accident not compensable for a claimant employed to transport foster care clients were accident occurred during trip from lunch back to the office.] See also Coble v. Modern Business Sys., 62 Ark. App. 26, 966 S.W.2d 938 (1998) [Employee engaged in out-of-town travel was not engaged in employment services while driving to or from a mall at lunch to purchase replacement

panty hose where she was not required or expected by her employer to replace hosiery during the work day.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an employer/employee relationship on October 30, 2002.
2. The average weekly wage was \$320.00
3. The Arkansas Workers' Compensation Commission has jurisdiction to determine whether or not the claimant was performing employment services at the time of the accident that occurred on October 30, 2002.
4. The claimant was not performing employment services when the accident occurred on October 30, 2002.
5. The claimant therefore did not sustain an injury compensable under the Arkansas Workers' Compensation Law.
6. The respondents have controverted this claim in its entirety.

ORDER

Based on my foregoing findings and conclusions, I have no alternative but to deny and dismiss the claimant's claim.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge