

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F301229

LAWRENCE Q. MOORE, EMPLOYEE

CLAIMANT

**HELENA/WEST HELENA
SCHOOL DISTRICT, EMPLOYER**

RESPONDENT

RISK MANAGEMENT RESOURCES, CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2003

The hearing was conducted on July 10, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Helena, Phillips County, Arkansas.

The claimant was represented by Mike J. Etoch, Attorney at Law, Helena, Arkansas.

The respondent was represented by David C. Jones, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in Helena, Arkansas on July 10, 2003. It was stipulated as follows:

1. The employee-employer-insurance carrier relationship existed at all relevant times.

2. There is no agreement concerning the average weekly wage.

The issues to be litigated at the hearing were as follows:

1. What is the claimant's average weekly wage?

2. Did claimant sustain a compensable injury on November 21, 2002?

(Was the claimant engaged in employment services?)

3. Is claimant entitled to temporary total disability from January 31, 2003,

to a date to be determined?

4. Is claimant entitled to medical treatment and medical mileage?
5. Is claimant entitled to an attorney's fee?
6. Respondent seeks an off-set (should compensability be found) for

benefits paid by a third party provider.

The claimant was a school janitor at an elementary school. It was the claimant's testimony, basically, that he was in or near the lunch room area moving heavy items when he saw one of the lunch room employees, Shirley Goings, having difficulty stocking items of food. According to the claimant, he had planned to eat lunch in the cafeteria prior to working at the children's snack bar at 11:00 a.m., at the J. F. Wahl's Elementary School in Helena, Arkansas. According to the claimant, even though he was in the lunch room, he was helping Ms. Goings put up the cans of food, and when he sat down on a chair to put cans on a lower shelf, the chair collapsed and he injured his back.

In support of that position, the claimant called Shirley Goings as a witness. She has worked for the school district for eighteen years. On November 21, 2002, she was working for the J. F. Wahl's Elementary School. Part of her duties involved putting up groceries and serving the food in the cafeteria. She testified as follows regarding her contacts with the claimant on that date:

"A. Well, I was back there putting up groceries and there was a few of them you know sitting out there.

...

A. And he come back there in the storage room and offered to help me and he was putting up cans. They're pretty heavy, he was putting, I was handing him a can, number 10 can and he was putting it down low and

then the shelf goes up high and he was going to put the can up high and he sat down the chair just collapsed and he fell backwards.

Q. You saw this happen yourself?

A. Yes. I was standing over about two or three - -

Q. At that particular time he was putting up cans, he was not eating?

A. No, he was not eating.

Q. Okay. The action report shows that this happened sometime between 10:35 and 10:45. Do you recall him eating at that time?

A. No, no he wasn't eating.

Q. Is there any question in your mind about the chair breaking?

A. No sir. And it fell.

Q. Where is the chair now?

A. The other janitors got rid of it. They took the chair out. I don't know. They said they threw it away. I don't know.

Q. It was broke, they just throwed it away?

A. Yeah."
(T-15, 16)

Ms. Goings testified that the claimant was not eating in the cafeteria when this happened. She testified that, prior to him sitting down and injuring his back, he entered the lunch room with another custodian, and the other custodian was actually eating lunch. (T-24) Ms. Goings testified that the claimant sat down at the lunch table, (but was not eating), and when claimant saw her having difficulty stocking the food items, he began helping her. According to Ms. Goings, the claimant sat down in a chair and the chair collapsed.

Linda Bryant testified that she has worked 22 years in the cafeteria at J. F.

Wahl's Elementary School. She was also in the lunch room when the claimant was injured. She testified as follows:

"A. Mr. Lawrence Moore was helping Ms. Shirley put up the groceries in the storage room and Ms. Shirley was opening up the cases of fruit or vegetables or whatever and she was handing Mr. Moore the cans to put on the cart - - on the shelf.

Q. About what time did this happen, do you recall? I don't need the exact times, just about. If you don't know, that's all right.

A. I don't.

Q. And you say the chair broke and he fell. What part of his body hit the floor?

A. His back.

Q. You saw that happen yourself?

A. Mmm hmm."
(T-29)

According to Ms. Bryant, the claimant was injured at approximately 10:30 in the morning. It was her testimony, however, that there was no other janitor in the lunch room eating when the claimant was there (which Ms Goings said was the case.). According to Ms. Bryant, the claimant had not started eating anything. She testified as follows:

MS. BRYANT: He came in and helping Ms. Shirley putting up groceries.

JUDGE CURDIE: Did you see him walk in the room?

MS. BRYANT: Uh huh. We were sitting - - I was sitting there before Mr. Moore came in.

JUDGE CURDIE: Why'd he come in?

MS. BRYANT: He just come in there.

JUDGE CURDIE Do you know why? **Was he on break?**

MS. BRYANT: **Probably.**

JUDGE CURDIE: When you go on break, do you clock out?

MS. BRYANT: No sir.

JUDGE CURDIE: You just take your break?

MS. BRYANT: Yeah.

JUDGE CURDIE: When did he usually take his breaks?

MS. BRYANT: I don't know that.

JUDGE CURDIE: Did he usually come in there when he took his breaks?

MS. BRYANT: Sometimes.

JUDGE CURDIE: Okay. When he came in there to take his break, what did he do before he started helping Shirley put up the groceries?

MS. BRYANT: He just come in and speak to everybody and say good morning.

JUDGE CURDIE: And then what happened?

MS. BRYANT: Ms. Shirley was opening up the cases of the fruit or vegetables and putting them on the shelf and Mr. Moore started helping." (T-36, 37)

.....

MS. BRYANT: Helping Ms. Shirley. She was opening up the cans - - opening up the cases, handing Mr. Moore the cans and he was putting them on the shelf and when he got lower well he couldn't reach up higher and he got lower, he sat down in the chair.

JUDGE CURDIE: Okay, all right.

MS. BRYANT: And she was still giving him canned goods.

JUDGE CURDIE: And what happened to the chair?

MS. BRYANT: That when it fell." (T-38)

On cross-examination, she testified that the claimant normally took his break at that time. She also testified that at the time the claimant fell there were no other janitors in the lunch room.

Rose Foster testified that she has been working for 10 years in the cafeteria. She testified that on the day the claimant was injured she was having her lunch in the lunch room. She testified as follows:

“A. And we was sitting back there eating and Shirley Goings was putting up groceries. It was her day to put groceries up her and another worker. And so she was late helping so she had to wind up by herself doing her part so he was back there and he started helping them to put the cans up on the - - out of the box.

JUDGE CURDIE: Who was he?

MS. FOSTER: Mr. Moore was helping her put the groceries up on the rack out of the boxes, the cans. And all of sudden the chair, the thing on the chair just fell on the floor, the swivel thing up under it. The swivel thing.

JUDGE CURDIE: Was he standing on the chair?

MS. FOSTER: No, he was sitting.
(T-42)

Also, unlike Ms. Goings, Ms. Foster testified that there were no other janitors in the lunch room when the claimant was injured.

Pauline Evans testified that she has worked at the school cafeteria for approximately 17 years. She testified as follows:

Q. Would you describe in your own words what happened? What you saw happen?

A. Well, he was in the seat and he leaned back and he fell on the floor. The seat broke, the back of the seat broke with him and he fell on the floor.

Q. Okay. Did he hit it hard or soft?

A. To me, he hit it hard.

Q. And what part of his body did he hit?

A. His back and his - - this part.

Q. And what were you doing at the time?

A. Just sitting in a seat back there.

Q. Were you eating then or not?

A. I can't recall whether I had got through eating but I knew we, it's where we would eat at.

Q. And do you know what he was doing at the time when he hurt himself?

A. I can't recall that either.

Q. You don't particularly remember. You just remember the fall?

A. I remember him falling. I really do."
(T-52)

Ms. Evans did not recall any other janitors eating at the lunch table when the claimant fell. She was not sure whether the claimant was eating at the time the chair fell.

The claimant testified that he 44 years of age and has worked at Wahl's Elementary School for 11 or 12 years. He testified that at approximately 10:35 or 10:40 he was in the lunch room area. He operates the snack bar (in another area of the school), which opens around 11:00 am, which is the same time when the cafeteria workers start serving food to the elementary school students. He stated that he operated the snack bar until 1:15 pm or so.

The claimant testified that he does whatever the employees ask him to do

in the kitchen. He testified:

“Well, if I walk in and I see a light bulb out, they don’t have to ask me to change that because that’s part of my duty, you know, I’ll change that.”
(T-62)

The claimant testified as follows:

“A. Well, no I didn’t go in there (the kitchen) to eat. I was going to eat later on. I was going to eat true enough later on. But I was going to help her finish putting those canned goods and everything up and if I had time left when we finished those chores then I was going to get me something to eat. It was something they had that day I think was pretty good that I thought I might eat a little of it.

Q. Now, you say if you had time left, you mean time - -

A. Before I had to go to the snack room.

Q. Okay. Now on this particular occasion where your eating?

A. No sir. I never did eat that day. After I fell and I didn’t want nothing to eat then.

Q. You specifically remember that or you just think that?

A. No, I remember. I remember.”
(T-67)(Emphasis added.)

The claimant testified concerning his injury:

“A. Well, on that particular day I took some garbage out. Well, I guess I better start at the front of the day. I went to work about 7:00 or 7:30, opened up the building and checked out everything, set up for breakfast. After the kids finished with the breakfast, I took the garbage out. On the way out taking the garbage out, it was some buckets of pickles sitting in the floor by one of the steam tables so I moved the pickles because they was kind of in my way. I set them over there where they supposed to be. They don’t go on the rack, they goes just right beside the cooler over there. And when I done that, I pushed the garbage can back out in the cafeteria where they normally be and I seen Shirley back there, Shirley Goings. She was trying to get these cans up in this tall rack and I went back there and I started helping her put the cans in the rack. And I stood up, and was reaching up putting them in and when I got them down low enough where I could sit down in the folding chair and get them for her,

well, I reached and got the rolling chair and just as I went to sit in the chair, the chair broke and it threwed me in the floor.

Q. What part of your body did you hit?

A. My back and shoulder basically. I snatched my neck up to keep my head from hitting the concrete floor. I couldn't catch myself.

Q. Was this a hard or soft fall?

A. Pretty hard fall.

Q. Now on the fall, did you get up and start going back to what you were doing?

A. ... - - I finally got up and continued to help her finish that,... which I think we didn't like but a few more rows then and went to the office and reported the accident."
(T-59, 60)

The claimant testified at the hearing that after reporting the injury, he operated the snack bar and worked the remainder of the day.

The next morning, the claimant experienced pain in his back and went to see a doctor. X-rays were negative and claimant received pain medication and physical therapy. The claimant was released to return to light duty. An MRI was negative. The claimant did not work from January 31, 2003 until the date of the hearing.

The claimant testified on cross-examination as follows:

"Q. I want you to explain to the Judge why you made out the report that you went to eat.

A. I was not aware that you had to put down exactly what was going on at the time. I never heard anything about you can't eat or you can't go to the bathroom or you can't do this and you're not considered as doing your work. I never heard of such thing like that and I just put down what I was going to do prior to when I finished doing what I was doing.

Q. With regard - -

A. And once I was aware of what was going wrong with what I put down, well I just you know - - that wasn't what I was doing but I was going to eat later on, but I never got to eat.

Q. Do you recall whether or not you ate anything?

A. I didn't eat that day. I know I didn't eat that day."
(T-79, 80)

An issue arose during cross-examination regarding whether claimant was in arrears in any child support payments. He testified as follows:

Q. Did you go to Court over your child support?

A. I got an attorney that we went to Court and I been paying the child support ever since I come out of Court so that's all I -

JUDGE CURDIE: Are you behind in any child support payments at this time?

MR. MOORE: From the day we come out of Court - -

JUDGE CURDIE: Just yes or no. I mean either you know or you don't know?

MR. MOORE: Well, I don't - -

JUDGE CURDIE: Just straight up. Are you behind or aren't you?

MR. MOORE: Not that I know. I mean I'm not supposed to. I mean I don't know.

JUDGE CURDIE: Has anybody told you you're behind?

MR. MOORE: No sir.

JUDGE CURDIE: I don't know what else to do unless there's some indication or some letter in the file.

MR. JONES: I just wanted to establish to protect my client as far as.

JUDGE CURDIE: And the reason why we're asking this, I mean if there's some indication usually it's because the child support people find out and they file something with the Commission that if any benefits are awarded

we have to take a percentage of those benefits and pay for back child support but you've stated under oath that there's no back child support ordered and that you're not in any arrears and given the fact that there's nothing in the file here and from your statements I see no reason to hold any benefits. Now should they file something prior to that and that would have to be prior to the opinion which would give you benefits if any, then I would have to deal with that at the time but right now I don't see any reason to withhold anything if I were to award him something."
(T-82, 83)(Emphasis added.)

The claimant testified, on cross-examination, that on the day of his injury, November 21, 2002, the truck from the food supply company had delivered supplies of food to the cafeteria. However, on cross-examination, the claimant stated that he would not be able to deny that the Sysco delivery was not there on the 21st, but was there on the 19th of November, two days earlier.

The claimant testified regarding inconsistent statements in a deposition he had given regarding a claim form he had signed:

"Q. Okay. And as you testified in your deposition, that's (the claim form) something you filled out yourself, is it not?"

A. I did.

Q. Okay. And if you can just read to us what you wrote down there on this section as far as - - it says briefly discuss the cause of the injury. If you can read that for us.

A. "Chair broke. I sat down to eat lunch when I got in the chair, the chair broke and I fell on my back."

Q. Okay, read the whole thing consistent all the way through.

A. I just read the whole thing consistent. "The chair broke. I sat down to eat lunch. When I got in the chair, the chair broke and I fell on my back."

Q. And that's totally inconsistent with what you testified to today is it not?"

A. Well, that's totally inconsistent with what I was doing at the prior time but I didn't know that what I put on this paper that y'all was going to take it

and try to make an issue out of it. Like I told my lawyer that I didn't know.

Q. Does that make much sense that you'd write down something totally different than you testified to today?

A. Well, any way you see it. I don't know. I mean I don't know what you getting at.

.....

Q. Okay, it is inconsistent with what you put on this AR-N Form is it not? And what did you tell them that you were doing at the time. It says briefly describe the cause of injury and the body part injury. If you can briefly.

A. "Was in the cafeteria, break and sit in chair and it broke caused to hit the floor. Injured his back."

Q. And obviously they didn't just make that up? They did what?

A. That's what I told them."
(T-97,98,99)

The claimant also testified as follows:

JUDGE CURDIE: Okay. I just happened to flip to page 43 of this deposition and this is what your testimony was. I just want to have an explanation or maybe I'm wrong but this is what it says. It says when I fell, page 9, I'm sorry line 9, page 43 and "so I got up and I looked at the chair had broke" - - I'm sorry - - "and I looked and the chair had broke. So I just moved the chair out of the way and went and got me another chair and we finished putting up the groceries. And it was something like 10:30 I believe, 10:35 that morning. And after that I felt a little pain but I just kind of thought the pain would go away." Question: Okay. Answer: "But it never did. It just increased." Question: "Okay. And had you started eating your lunch yet?" Answer: "No sir, not - - well, I got some food afterwards, after we finished the canned goods." Okay. Yes sir. Now, you testified just now that didn't get some food. Can you explain the difference there?

MR. MOORE: I didn't eat no food.

JUDGE CURDIE: No, but listen to my question. Can you explain the difference in what you said a minute ago and what's in this deposition because it seems like it's just totally different? Can you explain why it's different, so different because in the deposition you say I got some food afterwards after we finished the canned goods?

MR. MOORE: If I got some food it was after, it had to have been after I closed the snack room at 1:00 o'clock but I didn't eat nothing that day. If I got it, I still didn't eat it.

JUDGE CURDIE: Okay.

MR. MOORE: But now, looks like they might have left me a tray or not but I didn't eat nothing that day."
(T-125, 126)

At the hearing, Phyllis Ann Jones testified for respondent. She testified that she is an employee of the Helena/West Helena School District. She stated that her records reflect that the Sysco (food supply company) delivery truck delivered food to the cafeteria at the Wahl's Elementary School on November 19 and not November 21, 2002.

Brenda Sellars testified that she is the claims adjuster for Risk Management Resources, the TPA for the respondent/employer. She testified that she talked to the claimant about the incident and obtained a statement from him on February 4, 2003. She testified as follows:

"A. I contacted Mr. Moore to let him know that I would be sending a letter out to him that I wanted to let him know personally that we would no longer pay any further benefits under his claim. That it had been determined that the claim would not be considered compensable.

Q. And did you tell him anything else?

A. Yes I did. I explained to him that the reason for the determination was because the investigation had indicated that he was not within the course and scope of his job duties. That he was not engaged in employment services at the time that he was hurt because he was eating, just eating lunch.

Q. You told him that?

A. Yes I did.

Q. What was his reaction?

A. He was not happy with it and argued and he indicated to me during that conversation that he was simply eating a snack.

Q. And he said he was eating a snack and the chair broke.

A. Yes.

Q. Okay. What else did he mention about his work or activities that day?

A. Nothing.

Q. He didn't tell you about the canned goods, putting up goods or anything.

A. No sir.

Q. So he was given the opportunity I guess to explain what happened?

A. Right. We discussed- I tried to explain to him as best I could the reasons for the denial and that it was because he was not engaged in employment services and because the information that was received that he was eating at the time."

(T-134, 135)(Emphasis added.)

The medical records in this case reflect that an MRI in January, 2003, showed that the claimant had a bulging disc at L5-S1. Dr. Pillow, his treating physician, stated that the disc was the result of an acute trauma, and the claimant was removed from work. No back surgery was performed on the claimant.

The claimant's deposition of April 7, 2003, was included as Claimant's Exhibit #3. The claimant testified that as a result of the accident he experiences neck problems, along with left side and low back problems. He stated that he has never married, but has two children. At the deposition, the issue of child support was addressed. The claimant testified that as of approximately April 7, 2003, he was not

behind in child support “as far as I know.” He testified that he went to court regarding paternity and child support in January, 2003. According to the claimant, it was his “first time around.” He stated: “It’s \$150.00, I believe it is \$155.00 a pay period. I get paid every two weeks.” He stated that the child support office was deducting an amount straight out of his pay check for child support for his seven year old child.

The claimant testified that he has been off work since January 31, 2003. According to the claimant at his deposition, he was paid sick leave up until approximately April 1, 2003. (Cx-3, p. 31)

The claimant testified at his deposition that after he was injured he moved the broken chair out of the way, obtained another chair, and continued to load cans on the shelf. He stated that after he finished loading the cans in the shelf, the cafeteria fixed him “fixed me something to eat.” (Cx-3, p. 41)

Exhibit 1 to the deposition (given April 7, 2003,) was an Arkansas Workers’ Compensation Commission Form AR-N, the Employee’s Notice of Injury. That notice was filed November 21, 2002, and signed by the claimant. On that Form N, there is a number of lines where the claimant discusses “Cause of Injury.” The claimant wrote: “Chair broke. I sat down to eat lunch when I got in the chair the chair broke and I fell on my back.”

Exhibit #2 to the deposition is a Arkansas Workers’ Compensation Commission Form AR-C, a claim for compensation. That claim form was signed by the claimant on February 6, 2003. Under “Briefly describe the cause of injury and the part of body injured,” it states “Was in cafeteria on break and sit in chair and it broke causing to hit the floor injuring his back.”

Respondent's Exhibit 1, pages 5 through 19 is a tape recorded conversation between Melanie Tipton, with Risk Management Resources, and the claimant. The date of the conversation is January 31, 2003. The claimant stated as follows:

"Q. And where were you when you were injured:

A. In the cafeteria.

Q. And what happened?

A. **A chair broke just as I sat down to eat lunch.**

Q. Are you restricted?

A. When I got in the chair.

Q. Okay.

A. A chair broke and I fell on my back.

Q. There were witnesses?

A. Yes, ma'am.

Q. Do you normally take your lunch break that early?

A. Well, I (inaudible) I, I have to take my lunch break before 11:00 'cause I've got other duties that I start on at 11:00 o'clock.

Q. And you normally just go to the cafeteria for your lunch?

A. Yea, lunch will be ready at 10:00 o'clock.

Q. For the kids?

A. It's ready at 10:00 o'clock; the kids don't start until 11:00."
(Rx-1, p. 10, 11) (It is noted that in no part of that statement does claimant

state that he was assisting a cafeteria worker in stocking items on a shelf when he was injured.)

A few days after the full hearing in this case, the attorney for respondent, David Jones, faxed a letter dated July 11, 2003, to the Administrative Law Judge. Mr. Jones stated that he had contacted the Phillips County Office of Child Support Enforcement and determined that the claimant was in arrears in his child support in the amount of \$1,470.06. A copy of the letter from Mr. Jones and attachment is marked as Commission Exhibit 1. It was obvious he wanted the discrepancy to reflect of the claimant's credibility.

Based on that correspondence from Mr. Jones, the Administrative Law Judge requested that Mr. Jones submit the additional evidence by way of an affidavit from the Phillips County Office of Child Support and a copy of the Court Order. That letter is marked Commission Exhibit 2.

Based on Commission Exhibit 2, the attorney for claimant wrote a letter to the Phillips County Office of Child Support Enforcement dated July 21, 2003. (Commission Exhibit 3). The letter requested an affidavit be submitted from appropriate personnel regarding the amount of child support arrearage.

On August 5, 2003, the attorney for respondents sent to the Commission documents which are marked as Commission Exhibits 4 and 5. (All of these exhibits and letters were submitted by claimant's attorney.)

Commission Exhibit 5 reflects the terms of the Judgement of Paternity and Support against the claimant and a notation that as of July 31, 2003, he was in child support arrears in the amount of \$1,470.06. The hearing in this case was on July 10, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. There is no agreement concerning the average weekly wage.
3. The preponderance of the evidence reflects that the claimant did not sustain a compensable injury on November 21, 2002. The preponderance of the evidence reflects that the claimant was not performing “employment services” when he fell, injuring his back on November 21, 2002; and therefore, the injury did not arise out of and in the course of employment.

DISCUSSION

The primary issue in this case was whether claimant was injured while he was performing employment services. The claimant, basically, alleges that even though he was in the lunch room and had planned to eat lunch before going to open the snack bar at 11:00 a.m., he was engaged in employment services when he assisting the lunch room worker, Ms. Goings, in putting up food items on a low shelf. The respondents, however, indicate that the claimant was not performing employment services, but was sitting down to eat lunch or was on a break.

For the claimant to establish a compensable injury as a result of specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. § 11-9-102(4)(A)(i) (Repl. 2002), must be established:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment:
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death:

(3) medical evidence supported by objective findings, as defined in A.C.A. § 11-9-102(16), establishing the injury:

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence;

If the claimant fails to establish by a preponderance of the evidence any of the requirement for establishing the compensability of a claim, compensation must be denied. (A.C.A. § 11-9-102(5)(B)(iii) (Repl. 2002) states:

“An injury is not compensable if it was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated.”

Employment services are performed when the employee does something that is generally required by his or her employer. Colling v. Excel Spec. Prods., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing “employment services” as we do when determining whether an employee was acting within “the course of employment.” The test is whether the injury occurred “within the time and space boundaries of employment, when the employee was carrying out the employers’ purpose or advancing the employer’s interests directly or indirectly.” This test has also been previously stated as whether the employee was engaged in the primary activity that he was hired to perform or in incidental activities which are inherently necessary for the performance of the primary activity. Olsen Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997).

I do not believe that the fact that the claimant was in the lunch room is in any way dispositive of the “employment services” issue in the case, if in fact the claimant was assisting another worker as a janitor in stocking food items in the

cafeteria. If true, I believe he was performing a necessary function and was directly or indirectly advancing the interest of the employer. The preponderance of the evidence certainly shows that the claimant would perform duties as a janitor in that building at various times. If one believes, by a preponderance of the evidence, that the claimant was assisting Ms. Goings by stocking items of food, then the preponderance of the evidence would show that he was performing a necessary function and, directly or indirectly, advancing the interest of the employer.

The preponderance of the evidence, however, reflects that the claimant was not credible and was not injured in the manner in which he would hope the Arkansas Workers' Compensation Commission would believe.

Ms. Shirley Goings, the person whom the claimant was allegedly assisting in stocking food items on the shelf when he was injured, stated that another custodian (other than the claimant) was in the lunch room when the claimant sat on the chair and was injured. She stated that the claimant was "on a break." (T-24) (These details are different from what the claimant alleges.) It is noted that neither Linda Bryant, nor Rose Foster remembered any other janitors being in the lunch room when the claimant was injured.

In assessing whether the claimant was a believable witness, his demeanor at the full hearing on July 10, 2003, his testimony at the deposition in April, 2003, and his attitude demonstrated by the taped-transcribed statement of January 31, 2003, do not help him in the least. His combative and uncooperative nature were suspicious. Additionally, the inconsistencies are overwhelming. The claimant testified that he was, in effect, performing employment services when he was sitting down to

assist a co-worker in stocking food items. However, Respondent's Exhibit 1, page 3, the Arkansas Workers' Compensation Commission Form AR-N, signed by claimant and dated on the date of the claimant's injury, November 21, 2002, indicates that the claimant **sat down to eat lunch when the chair broke**, and claimant fell on to the floor hurting his back. Nothing was stated on the initial "Notice of Injury" regarding the claimant performing any employment services or sitting down on the chair for something other than eating lunch. Similarly, Exhibit #2 to the claimant's deposition, the Arkansas Workers' Compensation Commission Form AR-C reflects that the claimant, on February 6, 2003, stated that **he was in the cafeteria on break when he sat in a chair and the chair collapsed injuring his back. Once again, nothing was said regarding claimant doing any work for the employer at that time.**

On January 31, 2003, the claimant was given the opportunity in a taped statement over the phone to tell that he was injured while performing employment services. **All of his statements regarding the cause of the fall indicated that a chair broke just as he sat down to eat lunch.** All of his assertions during that statement was that he took a lunch break during that time because lunch was ready to be served at 10:00 in the morning. It was clearly the claimant's statement that he went to the cafeteria to eat lunch because the students began eating lunch at 11:00 a.m., and he had to finish eating lunch to open up the snack bar at that time. He did not mention at all about assisting Ms. Goings in stocking food items, nor did he say anything regarding completing the stocking duties after he fell in the faulty chair. It is very suspicious that he would omit the work-related nature of the accident.

Also, at the hearing, the claimant was asked whether he was in arrears in any child support. The hearing was on July 10, 2003. Arkansas Workers' Compensation Commission Exhibit #5 reflects that the claimant was in arrears in child support payments in the amount of \$1,470.06 as of July 31, 2003. The preponderance of the evidence reflects that the claimant did not testify truthfully when he stated on the date of the hearing, July 10, 2003, that he was not in arrears in his child support payments. The preponderance of the evidence also reflects that the claimant, in spite of his efforts to state otherwise, knew that he was not in arrears in any child support payments. According to his own testimony, he had not been working since January 31, 2003. He apparently received some sick leave payment up to the end of March, 2003. Apparently, his child support payments were being directly deducted from his pay check and the preponderance of the evidence reflects that he certainly knew whether he was in arrears based on the fact that he was not working at that time. All that said, the preponderance of the evidence reflects that the claimant was not truthful in a number of incidences. In my opinion, the claimant's credibility is lacking. The discrepancies show that the claimant obviously has problems recalling what happened on November 21, 2002. It is the exclusive function of the Commission to determine the credibility of the witnesses, and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. The Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. If the claimant really injured his back as he

stated at the hearing, why did he tell different versions in sworn testimony, taped telephone conversations, and on hand written statements on printed forms. The evidence contains numerous inconsistencies and discrepancies.

I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. The preponderance of the evidence reflects that the claimant was not performing employment services on November 21, 2002, when he fell while sitting in a chair. Having failed to meet his burden of proof, the claimant's claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

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