

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310881

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| ALVA DON YANCEY, EMPLOYEE | CLAIMANT |
| DEPARTMENT OF CORRECTION, EMPLOYER | RESPONDENT |
| PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER | RESPONDENT |

OPINION FILED MARCH 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on December 20, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE LEWIS E. RITCHEY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on September 23, 2003 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$437.00/\$328.00 in the event this claim is found to be compensable.

The claimant contends he sustained foot and leg injuries in a motor vehicle accident while driving a state car. He seeks payment of medical expenses, temporary total disability benefits from September 24, 2003 to November 1, 2003 and attorney's fees.

The respondents contend this claim is barred by the "going and coming" rule or the "employment services" doctrine. The respondents rely on the recorded statement given by the claimant on April 5, 2004.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant, his supervisor, Dr. Max Mobley, and Chaplain John Threat, whose testimony was corroborative. All of the witnesses seemed sincere in their testimony.

The claimant, age 58 (D.O.B. July 8, 1946), has a college education. He has been employed by the Department of Corrections as a chaplain since 1992. As "Administrator of Religious Services" he is responsible for coordinating, recruiting, and training chaplains and volunteers. He is also required to raise funds for building chapels. Services are provided to both the inmates and prison employees.

The claimant is not considered an hourly employee. He is expected to visit churches and charitable organizations (such as the Rotary Club) after regular business hours or on weekends, seeking volunteers and donations. He stated that he works whenever and wherever he is needed, pointing out that he once worked on their budget even when he was on his vacation time.

The claimant is required to live at Tucker (keeping him within an hour and a half drive to several prisons) in a home provided by the respondent. He is “on-call” at all times in case of a crisis situation and he is provided with a vehicle, cell phone, and pager.

On September 23, 2003, the claimant left his office in Pine Bluff with the intention of returning to his home in Tucker to “freshen-up” before attending a revival in Clarendon at 7:00 P.M. that night to recruit volunteers. While in route, he spoke with Chaplain John Threat at about 3:20 P.M. concerning business. Ten minutes later at 3:30 P.M., after concluding the phone call, his car was struck in the left front fender by an oncoming vehicle.

The claimant sustained injuries to his left leg (broken femur, split kneecap and broken ankle) and was hospitalized ten days. The claimant’s condition is complicated by the fact that he had polio in his left leg as a child. He remains under Dr. Lytle’s care and there is some consideration of a total knee replacement. The claimant presently uses crutches.

When the claimant was released from the hospital, the Department gave him a lap-top computer and he worked out of his home for a couple of weeks while recuperating. The claimant’s wife also works for the prison and she is able to drive him to work.

The adjuster took a recorded statement from the claimant in which the claimant stated his visit to the revival in Clarendon was not a prison activity. He made no mention of the phone call with Chaplain Threat and no mention of his intention to recruit volunteers at the revival. I attribute the discrepancy to the fact that the claimant simply elaborated more on the details at the hearing, and not to any lack of credibility.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment....” Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2003). A compensable injury does not include an “[i]njury which was inflicted upon the employee at a time when employment services

were not being performed....” Ark. Code Ann. 11-9-102(4)(B)(iii)(Supp. 2003). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury 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.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

The Court has reminded the Commission to focus on the activity occurring at the time of injury in analyzing the compensability of the claim. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002) , Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.2d 1 (2002), Wallace v. West Fraser South, et al, ___ Ark. ___, ___ S.W.3d ___ (February 16, 2005). In the case at bar, the claimant was returning home from work at the time of injury to freshen up for a speaking engagement later that night. Therefore, I find the claimant was not performing employment services at the time of injury.

Another test of compensability is the “going and coming” rule. Generally speaking, injuries which occur going to or coming from work are not compensable. Fisher v. Proksch, 20 Ark. App. 80, 723 S.W.2d 852 (1987):

The going and coming rule provides that, since all persons are subject to the same street hazards while traveling, injuries sustained by employees going to and coming from work cannot ordinarily be said to arise out of and in the course of the employment within the meaning of the workers’ compensation law.

There are some exceptions to the general rule, City of Sherwood v. Lowe, 4 Ark. App. 161, 628 S.W.2d 610 (1982):

1. premises exception
2. employer provided transportation
3. traveling salesman
4. special errand
5. compensated travel time

Of these exceptions, the Court has held only one has been invalidated by Act 796 of 1993, (but see O’Guinn v. Georgia Pacific Corporation, Full Commission opinion E317328, affirmed but not designated for publication by the Court of Appeals CA98-372). Nevertheless, even when an employee falls within one of the designated categories, they must still be engaged in a work-related task at the time of injury.

- 1) the premise exception has been eliminated. (where an employee is injured while in close proximity to the employer’s premises at the time of injury) Hightower v. Newark Public School System, 57 Ark. App. 268, 944 S.W.2d 853 (1996).
- 2) transportation provided by the employer does not automatically make the claim compensable, there must be a nexus or connection between the travel and employment. (transportation provided as part of compensation, transportation provided because the employee was perpetually “on call”, transportation customarily supplied to all employees). Arkansas Power and Light Company v. Cox, 229 Ark. 20, 313 S.W.2d 91 (1958), quoting Venho v. Ostrander Railway and Timber Company, 52 P.2d 1267 (Washington 1936), Campbell v. Randal Tyler Ford Mercury, 70 Ark. App. 35, 13 S.W.3d 797 (2000), Swearingen v. Evergreen Lawns, 85 Ark. App. 61, ___ S.W.3d ___ (2004), Lepard v. West Memphis Machine & Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

When a workman is so injured, while being transported in a vehicle furnished by his employer as an incident of the employment, he is within, “the course of his employment”, as contemplated by the

Act. In other words, when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. (Emphasis Added)

- 3) traveling salesman
the journey is considered part of the work and injuries sustained while traveling are compensable.
The travel must be something that is required by the employer or the nature of the job, Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997), American Red Cross v. Hogan, 13 Ark. App. 194, 681 S.W.2d 417 (1985), Coble v. Modern Business, 62 Ark. App. 26, 966 S.W.2d 938 (1998)
4. special mission or errand
There are no Arkansas cases expressly applying this tet after 1993 and it is not clear this exception is still valid. Lepard v. West Memphis Machine Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995), Linton v. Arkansas Department of Correction, ___ Ark. ___ S.W.3d ___ (2004).
5. Employer compensates the employee from the moment he leaves home until he returns home. The employee must be engaged in work-related travel at the time of the injury, Daniels v. Arkansas Department of Human Services, 77 Ark. App. 99, 72 S.W.3d 128 (2002).

Of these exceptions, the claimant could arguably fall within the second or third categories, but he was still not performing a work-related task at the time of the accident. The claimant performs a valuable service and I appreciate his dedication to the job even after normal business hours, however, his trip home to freshen up is not covered under the Workers' Compensation Act.

Therefore, I find the claimant cannot meet his burden of proof under either the "employment services" test or the "going and coming rule".

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 23, 2003.

2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This case is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge