

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207324

PATRICIA L. POLAND, EMPLOYEE	CLAIMANT
HOME BOUND MEDICAL, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 3, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 5, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on February 27, 2006. This prehearing order 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 record.

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

1. The jurisdiction of the Commission.

2. The employer-employee-carrier relationship existed on March 19, 2002, and at all times pertinent hereto.
3. The claimant was earning an average weekly wage of \$321.00, which entitled her to a TTD benefits rate of \$214.00.
4. The claim has been controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability of alleged neck and back injury.
2. TTD benefits. (Reserved)
3. Medical expenses, including past and future medical expenses.
4. Attorney's fees.
5. Ark. Code Ann. § 11-9-506. (Reserved)
6. Ark. Code Ann. § 11-9-526. (Reserved)
7. ALJ recusal.
8. Constitutionality of the Arkansas Workers' Compensation law.

The record consists of the two volume July 5, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION**1. Evidentiary Objections**

On page 63 of the hearing transcript, Mr. Spencer on redirect examination of the claimant objected to Mr. Frye's reference during his cross-examination of the claimant to a letter which Mr. Spencer did not receive in discovery. I find that Mr. Spencer's objection made during the course of his redirect examination to testimony given during the course of cross-examination was not timely. The objection is therefore overruled.

2. ALJ Recusal and Constitutionality of the Arkansas Workers' Compensation Law

I note that the claimant's attorney raised, and the Full Commission rejected, essentially identical constitutional and recusal arguments in the following decisions: Long v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed January 25, 2006 (F309931); Edwards v. Galloway Sand & Gravel, Full Workers' Compensation Commission, Opinion filed October 11, 2005 (F109737); Plummer v. Wal-Mart, Full Workers' Compensation Commission, Opinion filed October 10, 2005 (F209057); Bland v. Baxter Regional Medical Center, Full Workers' Compensation Commission, Opinion filed August 16, 2005 (F204378).

Since the claimant's motion has not alleged any personal bias, prejudice, or impropriety on my part, but instead only alleges potential bias, prejudice, impropriety, and financial interest on the part of all administrative law judges at the Workers' Compensation Commission, and since the claimant has failed to cite any legal mechanism for assigning a replacement administrative law judge to conduct a hearing on the claimant's constitutional arguments, I find that the claimant's motion for recusal must be denied under the rule of necessity. Furthermore, since the Full Commission has previously considered and rejected the claimant's same constitutional and recusal arguments in prior published decisions, I find that the claimant's request that I recuse in order to avoid rendering a decision on the constitutional challenge is moot. Based on the factual and legal conclusions of the Full Commission in the cases cited in the previous paragraph, I find that the claimant's constitutional challenge is without merit.

In addition, I note that the documents purportedly constituting evidence in support of claimant's constitutional arguments are contained on a CD. This CD cannot be admitted into the record under Commission Rule 99.18. Therefore, in the present case, there is no evidence

in the record supporting the claimant's constitutional arguments. Therefore, the claimant's constitutional arguments contained in his brief should not be addressed. See generally, Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 279, 72 S.W.3d 560, ___ (2002) (Declining to consider an argument unsupported by evidence).

3. Compensability of the Claimant's Alleged Injuries Sustained During an Automobile Accident on March 19, 2002

This claim arises out of a one-car motor vehicle accident that Ms. Poland sustained on March 19, 2002.

Ms. Poland was an LPN employed by Home Bound Medical to provide skilled or unskilled care, as needed, to in-home patients. Home Bound Medical paid Ms. Poland \$9 per hour for unskilled care and \$12 per hour for skilled care. In addition, Home Bound Medical paid Ms. Poland \$1 per hour for a "distance fee". Ms. Poland drove her own vehicle, and Home Bound Medical did not pay Ms. Poland mileage in addition to the \$1 per hour distance fee. Ms. Poland was paid for the number of hours that the shift lasted at the patient's home, but not for the travel time each day back and forth between Ms. Poland's home and the patient's home.

The record also establishes that at the time of the accident on March 19, 2002, Ms. Poland had been assigned to

the same patient, a Mr. Morgan in Bethesda, Arkansas, for approximately a year. Ms. Poland's shift at the Morgan home lasted from 8:00 a.m. until 4:00 p.m. each day that she worked, and at her own request, Ms. Poland normally worked three days per week. On those days when Ms. Poland worked, she drove for an hour and ten minutes to an hour and fifteen minutes each way to cover the 53 to 55 mile distance from her own home in Calico Rock, Arkansas to the Morgan home in Bethesda, Arkansas.

At the July 5, 2006 hearing, Ms. Poland described the March 19, 2002 accident as follows:

Q. And tell His Honor what happened to you on the day of this motor vehicle accident, which I believe was March 19th of 2002. Is that right?

A. Yes. Your Honor, I was driving to work, I was driving to my appointment. I already had, the schedule had already been made out, and I was to go directly from home to my place of employment, to my, to where I was to sit with someone, to work with someone. On the way, I took a detour. It was raining; I took a detour because the road that I usually took was under construction. And there was a bridge that turned to the left with no rails, no side rails, no markings. Didn't say there was a bridge or anything. And instead of making the left on the bridge, I went straight ahead, down into a ravine 15 to 18 feet. They had to take, the tow truck had to pull it up, the vehicle up from the bridge.

Ms. Poland presented to the Medical Center of Calico Rock that same day. The March 19, 2002 clinic note

indicates that Ms. Poland was having pain in the sternum area; however, x-rays were negative for a sternum fracture. In a March 20, 2002 follow-up report, Dr. Sitzes noted complaints of stiffness to her neck, and what appears to me to be the presence of spasm on the right in the cervical spine. Dr. Sitzes diagnosed acute cervical strain. On March 27, 2002, Dr. Sitzes diagnosed that Ms. Poland's acute cervical strain was much better. However, a March 28, 2002 clinic note from chiropractor Rocky Joe indicated that Ms. Poland presented that day complaining of headaches, severe neck pain, and pain in her upper and lower back.

Ms. Poland returned to work for Home Bound Medical from March 27, 2002 through April 2, 2002. Ms. Poland has not worked elsewhere since that time. Ms. Poland was initially disapproved for unemployment benefits but later approved. Ms. Poland was also subsequently approved for Social Security disability benefits.

Ms. Poland continued to treat with Dr. Joe through October of 2002. The respondents paid for the claimant to see Dr. Vincent Runnels, a neurosurgeon, on February 21, 2003. In a February 21, 2003 report, Dr. Runnels stated "I think she did injure her neck and back." However, Dr. Runnels also recorded that all of Ms. Poland's symptoms had

virtually subsided, and that he did not think she would have any permanent disability due to the wreck. However, Dr. Runnels stated that "She will have permanent limitations due to her lumbar and cervical spondylosis which is moderately severe for age 56."

Ms. Poland underwent a cervical MRI approximately seven months later on September 11, 2003, which Dr. Matthew Wilson read as indicating "spinal stenosis in the lower cervical spine as described from degenerative disc change, most prominent at C6-7." Ms. Poland underwent an MRI of the lumbar and thoracic spine on May 6, 2004, which Dr. Kyle McAlister read as indicating a mild bulge of the disc at the T4-5 level not causing central canal or neural foraminal stenosis or indentation of the cord. Dr. McAlister interpreted the lumbar MRI as indicating:

DISC DISEASE INVOLVING THE L4-5 AND L5-S1 LEVEL WITH AN INFERIOR END-PLATE COMPRESSION CHANGE VS SCHMORL'S NODE AT THE L5-S1 LEVEL, AS WELL AS PROTRUDING DISC AT THE L5-S1 LEVEL THAT CAUSES CENTRAL CANAL NARROWING AND LEFT NEURAL FORAMINAL NARROWING AND IMPINGEMENT ON THE LEFT NERVE ROOT TO SOME DEGREE. AT THE 4-5 LEVEL THERE IS FLATTENING OF THE THECAL SAC AND MILD LEFT NEURAL FORAMINAL NARROWING ALSO SECONDARY TO DISC DISEASE.

The respondents contend in part that the claimant's injuries did not occur in the course and scope of her

employment. In this regard, I note that the claimant's accident occurred while traveling from her home in Calico Rock to the Bethesda home of Mr. Morgan, where the claimant was to work with Mr. Morgan for the day. The Arkansas Supreme Court most recently discussed travel arising out of the employment, the going and coming rule, and travel as performing employment services in Moncus v. Billingsley Logging & American Ins. Co., ___ Ark. ___, ___ S.W.3d ___ (No. 05-1352, Del. May 18, 2006) as follows:

A compensable injury is "an accidental injury.... arising out of and in the course of employment." Ark. Code Ann. 11-9-102(4)(A)(I) (Repl. 2002). A compensable injury does not include injuries suffered at a time when employment services were not being performed. Ark. Code Ann. 11-9-102(4)(B)(iii). An employee is performing employment services when she is doing something that is generally required by his or her employer. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was acting in the course of employment as we do when determining whether the employee was performing employment services. *Id.* The test is whether the injury occurred "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly." *White*, 339 Ark. at 478, 6 S.W.3d at 100.

An employee traveling to and from the workplace is generally said not to be acting within the course of employment. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). This "going and coming" rule ordinarily precludes recovery for an injury

sustained while the employee is going to or coming from his place of employment. *Id.* The rationale behind this rule is that an employee is not within the course of employment while traveling to or from his job. *Id.* However, there are exceptions to this rule. *Id.* One such exception is where the employee must travel from jobsite to jobsite, whether or not he or she is paid for that travel time. *Id.* (quoting Arthur Larsen, *The Law of Workman's Compensation*, § 16.01 (1996).) The rationale behind this exception is that where the employee is required to travel from jobsite to jobsite, such travel is an integral part of the job itself. *Id.*

In *Olsten Kimberly Quality Care v. Pettey, supra*, we held that injuries sustained by a nurse while on her way to the home of a patient were compensable, even though she was not paid for the travel. There, we noted that the employee was not required to report to the employer's office each day, but instead often went directly from her home to the home of a patient, where she began to work. In reaching our conclusion, we held that the travel was clearly for the benefit of the employer, whose business was to provide in-home nursing care. Additionally, we stated:

[t]he fact that appellee had yet to begin her nursing duties that day does not preclude our conclusion that she was nonetheless performing employment services at the time of the accident. Whether or not she was being directly compensated for her travel is not pertinent to our decision, as the fact of this case clearly demonstrate that travel was a necessary part of her employment. *Pettey*, 328 Ark. at 386, 944 S.W.2d at 527.

Similarly, the travel in the present case was a necessary part of Moncus' employment, and it fits within the jobsite-to-jobsite exception to the "going and coming" rule. Moncus had no fixed place of employment, and was obliged to travel from

jobsite to jobsite as indicated by Billingsley. Also, Billingsley testified that the loggers would occasionally switch jobsites in the middle of the day. Thus, the travel from jobsite to jobsite was an integral and necessary part of Moncus's employment.

In cases of this type, where the injury occurs outside of the time and space boundaries of employment, the critical determination to be made is whether the employee was directly or indirectly advancing the interests of the employer at the time of the injury. The "going and coming" rule is best viewed as an analytical tool to be used in making this determination. Our last consideration of the "going and coming rule," in *Petty, supra.*, indicates that the rule is subordinate to the preeminent consideration, which is whether the employee was directly or indirectly advancing the interests of the employer at the time of the injury. If injuries sustained while traveling to and from work are found to be not compensable in a particular case, that finding should reflect a determination that the travel was not directly or indirectly furthering the interests of the employer. To the extent that the "going and coming rule" prevents recovery for injuries sustained while the employee was furthering the interests of the employer, it is overruled.

Here, it is significant that Moncus was carrying out the express directions of his employer at the time of the accident, even though he was not engaged in the activity for which he was primarily employed. This court has held several times that an employee is performing "employment services" when she "is doing something that is generally required by his or her employer." *Pifer*, 347 Ark. at 817, 69 S.W.3d at 18; *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *White*, 339 Ark. at 478, 6 S.W.3d at 100; *Petty*, 328 Ark. 381, 944 S.W.2d 524. Thus, in *White v. Georgia Pacific*, *supra*, we held that injuries sustained by an employee while on a smoke break were nevertheless compensable, because the employee was required to monitor his

work area during the break. Also, the court of appeals, in a line of cases, has held that injuries suffered by an employee while on a break are compensable if the employer has imposed some duty to be fulfilled by the employee during the break. See e.g., *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999), (the employee was required to come off break in order to assist students); *Wal-Mart Stores v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), (the employee was required to return personal items to a locker after the break); *Wal-Mart Stores v. King*, Ark. App. _____ S.W.3d _____ (Nov. 9, 2005), (the employee was required to assist customers during breaks). The instant case is analogous. Even though Moncus was not performing his primary employment activity of felling trees when he was injured, he was fulfilling a duty placed upon him by his employer.

In this case, the commission fully adopted the findings and conclusions of the administrative law judge. The administrative law judge concluded that Moncus' death was not compensable because he was not performing employment services at the time of the accident, and specifically that Moncus was not advancing his employer's interests at the time of the accident. In reaching this conclusion, the administrative law judge reasoned as follows:

[a]lthough the employees meet Mr. Billingsley and follow him to the tract of land on the first day that timber is cut from such tracts, it cannot be said that their travel to the tract of land advances the employer's purpose or interest on those days any more than any other day when the employees travel to the tract of land where the timber is to be cut.

This conclusion is clearly erroneous. Billingsley testified that the logging crew functions as a team, and the absence of one member frustrates the whole operation. Specifically, Billingsley testified as follows:

I need everybody in my crew because they have a different job to perform. The benefit of Tony showing up for work is that I would have somebody to operate that piece of equipment. If he did not show up, that would have hurt my crew and productivity for that day.

Thus, on the day in question, Billingsley was particularly concerned that the logging crew arrive intact and on time to the new jobsite, and for this reason he instructed them to meet him at the assembly point, so he could ensure that result. Accordingly, Billingsley stated the following at the hearing before the commission, "I wanted the guys to meet me at the service station because they did not know where they were going and I did. I wanted them to follow me to the tract of land to make sure they got there. So I could conduct my business." The meeting was mandatory, not optional.

The present situation is readily distinguishable from the usual "going and coming" scenario, where on any particular day the employee has no interaction and receives no instructions from his supervisor until after his arrival at the place of employment. Here, on the day of the accident, Moncus was doing something specifically required by his employer. Moncus had already arrived at a place specified by his employer, there met with his employer and received express and immediate instructions, which he was performing at the time of the accident. Billingsley instructed Moncus to join the "convoy" and follow him to the jobsite. Thus it was Billingsley, not Moncus, who dictated Moncus' route, his rate of speed, and his order of advance immediately prior to the accident, as well as the time of arrival and departure from the meeting place, and the location of the meeting place. In a real sense, his employer was responsible for Moncus' precise location on the road at the time of the accident.

Thus, we conclude that because Moncus' death occurred while he was carrying out the express and immediate instructions of his employer, doing something specifically required by his employer, and because by the employer's admission, the meeting at the assembly point was an unusual measure undertaken to further the employer's interest by insuring that the logging crew arrived at the jobsite intact, the commission's conclusion that Moncus was not performing employment services at the time of his death was clearly erroneous. That conclusion was not supported by substantial evidence, and reasonable minds could not have reached the same conclusion. Therefore, we reverse the commission's decision and remand for a consideration of benefits.

The Arkansas Courts have on two occasions found that a traveling nurse's injuries sustained while engaged in travel were compensable. As discussed by the Arkansas Supreme Court in Moncus, the Arkansas Supreme Court found a traveling nurse's injury sustained while traveling compensable in Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). The claimant in Pettey used her own vehicle to travel to patients' homes to provide nursing services. Ms. Pettey's automobile accident occurred en route to her first patient's home for the day.

In Southwest Arkansas Development Council, Inc. v. Tidwell, ___ Ark. App. ___, ___ S.W.3d ___ (CA 05-1198 Del. March 22, 2006), the Arkansas Court of Appeals also found injuries sustained during travel compensable. Ms. Tidwell provided in-home assisted-living services to home-bound

persons. When her compensable accident occurred, Ms. Tidwell was traveling between clients' homes, had taken a short break, and had resumed the travel en route to her next job site when the accident occurred.

I find the facts in the present case distinguishable from the relevant facts in Pettey and Tidwell in that there was no evidence presented in the present case that Ms. Poland traveled from home to home during the course of the day to perform her work. The claimant instead testified during her deposition that she had been *assigned the same patient* for approximately a year when her accident occurred. Ms. Poland therefore did not use her personal vehicle to travel during the day from job site to job site as did the claimants in Pettey and Tidwell. Ms. Poland's deposition testimony instead indicates that Ms. Poland had only *one* job site per day, and that job site was in the home of Mr. Morgan in Bethesda. Ms. Poland was not required to report to the offices of Home Bound Medical during the course of her work day, and there is no evidence that Ms. Poland was ever required by her job duties or her employer to change job sites during the middle of the day. Ms. Poland was only compensated on an hourly basis for the time that she was scheduled to be present in Mr. Morgan's home. Under these

circumstances, I find that none of the exceptions to the going and coming rule discussed in Petty, Tidwell, and Moncus apply.

In Moncus, however, the Arkansas Supreme Court stated that the going and coming rule is overruled to the extent that the going and coming rule prevents recovery for injuries sustained while the employee was furthering the interests of the employer. In Moncus, the claimant was a logger whose automobile accident occurred while travelling to a new logging site. On the day of the accident, the employer instructed the logging crew to meet him at an assembly point, Moncus had already arrived at the place specified by his employer, and it was the employer, not Moncus, who therefore "dictated Moncus' route, his rate of speed, and his order of advance immediately prior to the accident, as well as the time of arrival and departure from the meeting place, and the location of the meeting place. In a real sense, his employer was responsible for Moncus' precise location on the road at the time of the accident." Moncus v. Billingley Logging, supra. Therefore, as noted above, the Arkansas Supreme Court concluded "that Moncus' death occurred while he was carrying out the express and

immediate instructions of his employer, doing something specifically required by his employer..." Id.

In the present case, there is no evidence that Home Bound Medical in any way directed Ms. Poland's route from her home to Mr. Morgan's home on the day in question or on any other day. Because there is no evidence to indicate that the employer in any way dictated the route of Ms. Poland's travel from her home to her normal duty station at Mr. Morgan's home, and since there is no evidence to indicate that Ms. Poland was required at any time to travel from job site to job site during the middle of the day for the approximately one year that she had been working in Mr. Morgan's home, I find that the travel between Ms. Poland's home to her duty station at Mr. Morgan's home did not directly or indirectly further the interests of her employer.

For the foregoing reasons, I find that the preponderance of the evidence establishes that the claimant's automobile accident on the way from her home to the home of Mr. Morgan did not occur in the course of her employment, and I find that the preponderance of the evidence establishes that Ms. Poland was not performing

employment services for the respondents when the accident occurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine the compensability of this claim.

2. The employer-employee-carrier relationship existed on March 19, 2002, and at all times pertinent hereto.

3. The claimant was earning an average weekly wage of \$321.00, which entitled her to a TTD benefits rate of \$214.00.

4. The claim has been controverted in its entirety.

5. The claimant has failed to establish that the Arkansas Workers' Compensation Law is unconstitutional.

6. The claimant has failed to establish that I should recuse from rendering a decision in this case.

7. The claimant has failed to prove by a preponderance of the credible evidence that the travel from her home to Mr. Morgan's home on March 19, 2002 occurred in the course of her employment, and the claimant failed to prove by a preponderance of the evidence that she was performing employment services for her employer when she had a motor vehicle accident during that travel.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied in its entirety.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge