

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612221

GERALD WAGNER (DECD)	CLAIMANT
TYSON POULTRY, INC.	RESPONDENT
TYNET CORPORATION INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 13, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by BENNETT NOLAN, Attorney, Fort Smith, Arkansas.

Respondent represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 25, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on February 23, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On October 30, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The respondents have paid or tendered benefits.

4. The claimant has refused to accept a payment to Ocker-Putman Funeral Home in the amount of \$9,787.89.

5. The respondents have paid one day of temporary total disability and the hospital bills from October 30, 2006 through November 7, 2006.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury.

In regard to the foregoing issues it is contended that the claimant was an employee of Tyson Poultry, Inc. on October 30, 2006. On that date in the evening hours, Gerald Wagner took a dinner break with a friend and ate at an area near the plant called the wastewater area. After finishing his dinner and near the end of his dinner break, Gerald Wagner began walking back to his job area when he was struck and seriously injured by a company shuttle. The injuries he sustained by being struck by the shuttle directly and proximately caused his death on November 7, 2006. The accident on October 30, 2006, was not a work or employment related event and, therefore was a non-compensable event for purposes of the Arkansas workers' Compensation laws.

In regard to the foregoing issues the respondents contend that the claimant was performing employment services at the time of the injury on October 30, 2006, which lead to his death on November 7, 2006. Respondents accepted the injury as compensable and paid all appropriate benefits. Specifically, Gerald Wagner was on break the evening of October 30, 2006, at the waste water office on Tyson premises. After finishing his break, he returned to work and was proceeding to the shipping and receiving office nearby when he was

struck in the yard by a company shuttle. Wagner did not clock in and out for breaks and although there was a break schedule, Wagner's break was not taken within that schedule. Wagner and other similarly situated employees are subject to being interrupted while on break to resume employment activities. The accident occurred in the "yard" where trailers which Mr. Wagner shuttled as part of his job were parked. Mr. Wagner was within the time and space boundaries of his employment at the time of the accident and was actually furthering the interest of his employer by returning from that break and proceeding to the office for further assignment.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

Ardaina Elaine Keosleumsack testified that she has been employed by the respondent for the past eleven years. Ms. Keosleumsack testified that for the past two months she has been a line worker but prior to that she worked in shipping and receiving for the respondent. Ms. Keosleumsack testified that on October 30, 2006, she was working in shipping and receiving as a billing clerk. Ms. Keosleumsack testified that she worked the second shift which is from 2:30 to 11:30 p.m. Ms. Keosleumsack testified that part of

her work duties included giving instructions to the shuttle drivers who worked in the yard. Ms. Keosleumsack testified that she would advise the shuttle drivers as to what trailers needed to be moved and brought to the plant. This witness testified that she was acquainted with the claimant and that his title was that of Shuttle Driver. Ms. Keosleumsack testified that the claimant worked the second shift along with one other driver. This witness testified that Johnny Love was the other shuttle driver along with the claimant on October 30, 2006. Ms. Keosleumsack testified that the shuttle or truck which is used in the respondent's trailer yard is referred to as the yard dog. Ms. Keosleumsack testified that the two drivers were to divide up the shift one driving the first four hours and the second driving the second four hours but because Johnny Love lacked part of his certification he could not drive across the street, therefore the claimant was driving the entire shift. This witness testified that Mr. Love could operate the yard dog in the yard itself but could not cross the street. Ms. Keosleumsack testified that on October 30, 2006, the claimant had operated the yard dog for the first four hours of his shift before he went on his first break. This witness testified that the shuttle driver who is not driving at that time has duties such as to fuel, clean pads down, and check the temperatures on the trailers. Ms. Keosleumsack testified that the claimant was entitled to two thirty minutes breaks during his eight hour shift. This witness testified that an employee such as the claimant would come into his shift, clock in, and would not clock in and out for

breaks. This witness testified that if an employee was to leave the premises during his break they would clock out and then clock back in. Ms. Keosleumsack testified that the claimant generally took his breaks either in the break room or at wastewater. Ms. Keosleumsack testified that to her knowledge the claimant was the only employee other than Mike Bangs who works in wastewater who took their breaks in the wastewater area. This witness testified that the claimant and Mr. Bangs are friends and that the claimant had no job duties associated with the wastewater area. Ms. Keosleumsack testified that on October 30, 2006, she remembers that the claimant took his first break around 9:30 and it is her memory that she had told the claimant to go take a break. Ms. Keosleumsack testified that prior to October 30, 2006, when the claimant would return from his break he would come into the office to see what he had to do. Ms. Keosleumsack testified that shipping is a small department and that the claimant had given them his cell phone number in case there was an emergency and they had to call him off of his break but this happened very seldom. This witness agreed that the claimant was not restricted to taking his breaks on the respondent's premises and that he had the right if he wanted to clock out and leave. Ms. Keosleumsack also agreed that about the only time that the claimant would be called in off a break was when he was the only driver on the shift. Ms. Keosleumsack testified that the claimant was not called in off of his break on October 30, 2006. This witness testified that Johnny Love was operating the yard dog and moving trailers during the period of time the claimant

was taking his thirty minute break. Ms. Keosleumsack testified that on the day of the accident she was expecting the claimant to come back in and report from his break but he never made it back. This witness testified that someone came in and reported that the claimant had been hit by Robert. Ms. Keosleumsack testified that at the time she was thinking that there had been a fight. Ms. Keosleumsack testified that as she was coming out of the office and walking down she was stopped by her supervisor and told to go get the plant nurse but she could see the claimant on the ground in front of the trailers. This witness was shown a diagram of the respondent's premises as it relates to the shipping department and she pointed out where the claimant was on the ground indicating where the x was. This witness was asked based on her knowledge what the claimant was doing at the time he was hit by the yard dog and she responded that he was coming back to the office off his break.

On cross examination, Ms. Keosleumsack testified that when the claimant would get to work each day he would come into the office to pick up his instructions. Ms. Keosleumsack was shown the diagram which is designated as Claimant's Exhibit No. 11 and pointed out on the diagram where her office was in shipping and receiving. She then indicated that the claimant's work station was the yard and that was where he performed his work duties. Ms. Keosleumsack testified that the claimant's work duties included moving trailers, fueling, and checking trailers as to their temperature. Ms. Keosleumsack testified that the claimant would

leave the yard to go across the street to get trailers to bring them into the yard. Ms. Keosleumsack again pointed on the diagram as to where she saw the claimant laying on the ground and agreed that this was the area which the claimant would be working in order to perform his job. Ms. Keosleumsack then indicated that the wastewater office was not shown on the diagram but would be off the bottom of the diagram. Ms. Keosleumsack testified that the place where she saw the claimant laying on the ground was closer to shipping and receiving than it was to wastewater. Again, Ms. Keosleumsack indicated that Johnny Love, the second shuttle driver, was limited to driving in the yard and into the loading dock but not across the street. Ms. Keosleumsack agreed that the claimant was subject to being interrupted while on break to come perform his job duties and that on October 30, 2006, he was the only driver who was qualified to go across the street. This witness testified that the claimant always came when he was interrupted on his break. Ms. Keosleumsack testified that although the breaks were unpaid the employees were not required to clock in and clock out if they took their breaks on the premises. Ms. Keosleumsack testified that the claimant nor any of the other employees were permitted to take their breaks in the yard where the trucks are driving through. Ms. Keosleumsack testified that the accident occurred around 10:00 and that the claimant had taken his break around 9:30. Ms. Keosleumsack testified that it was not unusual for the claimant to take his break late because he was their main driver. This witness testified that as long as there was a note for the claimant

instructing him to move trailers he would continue working. Ms. Keosleumsack testified that it was necessary for the claimant to return to the office in shipping and receiving in order to get his instructions for further work. This witness agreed that if the claimant was walking through the trailer yard, where he worked, and he saw something amiss such as a trailer leaking it was his responsibility to tend to the problem.

On redirect examination, Ms. Keosleumsack agreed that there was no indication that the claimant had stopped to look at a leaking trailer on his way back from break. This witness also agreed that the claimant was not an employee that was required to be on call and that it was unusual for him to be called in especially if there was another driver on the shift.

On recross examination, Ms. Keosleumsack agreed that if the claimant was on break and the plant ran out of chicken and he was called to move chicken into the plant he was required to respond.

Lena Recinos testified that she has been working for the respondent for nineteen years and in shipping and receiving for eighteen years. Ms. Recinos testified that she was the shipping/receiving supervisor and had had this position for the past fifteen years. Ms. Recinos testified that on October 30, 2006, she was working the third shift which went from 10:30 p.m. to around 6:30 to 7:00 a.m. Ms. Recinos testified that on October 30, 2006, she was not the supervisor of the employees on the second shift. Ms. Recinos testified that she was the claimant's supervisor in shipping and receiving before she went on third shift

and had been his supervisor for about five years. Ms. Recinos testified that the claimant would report to work, clock in, then report to the office for his instructions and he would pick up paperwork so he could do his trailer readings. This witness explained that there were two drivers on a shift but they would not come in at the same time, therefore when the claimant would get to work the driver from the earlier shift would still be working and the claimant normally would begin to take his trailer readings. Ms. Recinos testified that when the second driver would arrive the two would start working together and the claimant would drive for the first four hours picking up trailers and bringing them to the dock, backing them in, or pulling them out. This witness testified that the other driver would be spraying down the trailer pads or he would be cleaning trailers out. Ms. Recinos testified that she had no idea what the schedule was on October 30, 2006, because she was not the supervisor on that shift. Ms. Recinos testified that when she worked with the claimant he would usually take his breaks with Mike Bangs in wastewater because they were friends. Ms. Recinos testified that the claimant had no job related duties in the wastewater area, he was just there to visit his friend. Ms. Recinos testified that to get from shipping and receiving to wastewater the claimant would have to walk through the yard along side the trailers. This witness agreed that it is very noisy in the yard because of all the refrigeration units running. Ms. Recinos testified that the claimant would always report to the office after his break to receive his work assignments. Ms.

Recinos testified that on October 30, 2006, she got to work around 10:35 to 10:45 and that the claimant had already been loaded into the ambulance. Ms. Recinos testified that it was highly unusual if there were two drivers working on a shift to call back in one of the drivers from his break although it has happened on occasion when equipment had to be moved.

On cross examination, Ms. Recinos testified that during the five years she supervised the claimant he was allowed to take his break either at wastewater or at the break room. This witness agreed that if the claimant took his break on premises he was not required to clock in or out but if he chose to take his break off the premises the policy required him to clock out. Ms. Recinos was shown Claimant's Exhibit No. 11 which was the diagram of the respondent's trailer yard and agreed that where the x was on the diagram is the yard where the claimant performed his work duties which included shuttling trailers in and out, taking trailer readings, and fueling. Ms. Recinos agreed that the claimant was subject to being interrupted while taking his breaks to come back in and perform work activities and in fact as his supervisor she had done so. Ms. Recinos agreed that if one of the shuttle drivers on a shift was not qualified to go across the street to pick up trailers of product it would fall the responsibility of the claimant to do this task if he were on break and product was needed. Ms. Recinos testified that if she interrupted the claimant's break she made it up to him by giving him additional time later in the shift. Ms. Recinos testified that she expected

the claimant to respond if she called him in off a break. This witness agreed that if the claimant's shift was from 2:30 p.m. to 11:30 p.m. on October 30, 2006, the accident would have occurred during his shift.

Violet Rose Chivington testified that she has been working for the respondent for approximately twenty-two years and she has been the supervisor over shipping and receiving, second shift, since April 2006. Ms. Chivington testified that she was the claimant's supervisor on October 30, 2006, and that the second shuttle driver was Johnny Love. Ms. Chivington testified that the respondent encouraged its employees to take their breaks in the break room or the smoking area but the claimant had gotten permission to take his break in wastewater where he could visit with his friend. Ms. Chivington testified that the claimant always came into the office after his break to pick up his work instructions but that on October 30, 2006, he never returned. This witness testified that during the period of time she was the claimant's supervisor she does not recall having to call him in from a break. Ms. Chivington testified that the claimant always tried to make sure that everything was caught up to where he knew that it was ok so he could take his break. Ms. Chivington testified that the accident occurred in the back lot where the respondents keep the trailers and it was kind of in front of where the four doors are where the trailers are parked up against the dock area. Ms. Chivington testified that she was given the news that the claimant had been hit approximately ten minutes after 10:00. Ms. Chivington

testified that the claimant was real bad about not taking both of his thirty minute breaks and that Ardaina had to keep on him to take his breaks. Ms. Chivington, with the use of the diagram and laser, pointed out where the claimant's accident occurred in the trailer yard. This witness testified that when she got word that the claimant had been hit she ran out of shipping and receiving into the trailer yard and got down beside the claimant ordering people to call 911 and others. Ms. Chivington testified that she stayed with the claimant until the paramedics got there. Ms. Chivington was asked, "And to your knowledge, Gerald (the claimant) hadn't reported back from his break yet?" Ms. Chivington responded, "No."

On cross examination, Ms. Chivington was asked to look at the diagram which was Claimant's Exhibit No. 11 and was asked to look at the trailer yard. Ms. Chivington agreed that the trailer yard was the area where the claimant actually performed work duties. Ms. Chivington also agreed that the accident occurred around 10:00 and this was during the claimant's regular shift. Ms. Chivington indicated that during her period of time she supervised the claimant she does not recall having to call him in off of a break but he was subject to being interrupted if he was needed. Ms. Chivington testified that it was part of the claimant's job to report back after his break to receive his work instructions. This witness testified that the respondent's break room and the wastewater plant were approximately the same distance from the shipping and receiving office. Ms. Chivington testified that the

claimant would have had to walk through the trailer yard to get to either location.

On redirect examination, Ms. Chivington was shown a copy of the claimant's job description and agreed that it did not have a requirement that he be on call.

Michael Bangs testified on behalf of the respondent stating that he had been employed by the respondent for twenty-three years. Mr. Bangs testified that he has been working at the Van Buren plant for the past six to eight years in the wastewater plant as its operator. Mr. Bangs testified that he does not have scheduled breaks but he does take them when he has some down time. Mr. Bangs testified that the claimant was a friend of his and recalls that on October 30, 2006, he had come back from the plant and the claimant in the wastewater area on break. Ms. Bangs testified that after he and the claimant visited for a short while the claimant indicated that it was time for him to go off break so they left the wastewater office and started to go back up through the lot walking beside the trailers. Mr. Bangs testified that the claimant was going back to work. Mr. Bangs testified that he and the claimant walked together because he was going up to take some meter readings. Mr. Bangs was looking at the diagram which is Claimant's Exhibit No. 11 and based on this diagram Mr. Bangs indicated that he and the claimant walked up along the left side of the middle row of trailers. Mr. Bangs testified that they walked up along the side of the trailers up to the third trailer down from the top at which time they separated and he continued to walk along the side

of the trailers and the claimant began to veer off to the left into the open area. Mr. Bangs testified that he did not see the accident but that he did see the claimant laying on the ground and indicated, based on the diagram, that it was close to where the x is placed. Mr. Bangs testified that as he and the claimant walked through the yard on October 30, 2006, the claimant was looking for Johnny Love and as they were walking he saw Mr. Love and told the claimant where he was. Mr. Bangs testified that the claimant did not always take his breaks at the wastewater office but he often times did. This witness testified that if he could get loose from his job duties he would take a break with the claimant but not always. Mr. Bangs was asked, "To your knowledge, was the claimant subject to being interrupted by his supervisor if he was needed to work while he was on break?" Mr. Bangs responded, "Yes, Ma'am." Mr. Bangs testified that he did not have any knowledge of the claimant being interrupted on October 30, 2006.

On cross examination, Mr. Bangs agreed that it was his understanding that the claimant was heading back to the shipping and receiving office. Mr. Bangs testified that it was his opinion that as the two of them were headed back up toward the office the claimant was going to get in the shuttle truck and was looking at the lights on the building to see which one needed to be pulled out was his impression. When asked, Mr. Bangs stated that he was just speculating because on other times when they had walked up through the yard together the claimant would be looking to see if the lights were green or red so that he would have some knowledge as to

which trailer needed to be pulled out at that time. Mr. Bangs testified that on October 30, 2006, the claimant did not say anything about the lights. Mr. Bangs stated that he would disagree with the statement that the claimant always went into the office to advise the office help that he was finishing his break and ask what needed to be done. Again Mr. Bangs stated that the claimant had told him before that he always looks to see which lights are on so he will know which trailer to pull out. Mr. Bangs testified that as he and the claimant were walking up through the yard the claimant just kind of disappeared or started walking to his left away from him. Mr. Bangs testified that they did not say anything like goodbye.

On redirect examination, Mr. Bangs was handed his deposition and directed to the portion where he was under examination by the claimant's attorney. In his deposition Mr. Bangs was asked, "So you don't know if the claimant on that occasion was coming over to the office to get his instructions or not?" Mr. Bangs responded in his deposition, "I had not idea, Sir, but what I think he was looking at, I think he was looking at the trailers, you know because they got the little green lights, red lights, which one needs to be pulled out or something like that, I think."

On recross examination, Mr. Bangs was again questioned from his deposition where the question was posed to him, "But he didn't tell you that's what he was going to do." The response in this witness's deposition was, "No, Sir. I didn't hear him say that. Just what I am thinking."

Johnny Michael Love testified on behalf of the respondents stating that he is still employed with the respondent and has been since July 30, 2006. Mr. Love testified that he was hired as a shuttle driver on the second shift. Mr. Love testified that although he had his CDL at the time of his hire he still had to go through the respondent's in house process to be authorized to shuttle trailers across the street. Mr. Love testified that on October 30, 2006, he was working the same shift with the claimant and that the claimant had began driving the shuttle truck at the beginning of their shift. Mr. Love testified that on October 30, 2006, he had taken his first break before the claimant took his first break. Mr. Love testified that Ardaina told him that the claimant had gone on break sometime around 9:30 to 9:45 that evening. Mr. Love testified that he was moving trailers in the trailer yard and had pulled around and parked a trailer, disconnected it, got out of the truck, went back, closed the doors, when back to the truck and started driving around. Mr. Love testified that he saw Mike Bangs and he also saw another guy reading temperatures who he thought was the claimant. Mr. Love testified that as he was going around he looked at Mike, then he looked forward and when he looked forward he pulled up about two feet, heard a thump and he stopped that is when he saw the claimant on the ground. Mr. Love testified that the yard dog sits so high it is difficult to see anyone that is standing in front of it. Mr. Love testified that he never saw the claimant. This witness testified that this accident occurred around 10:00 in the evening.

Mr. Love testified that after the accident he got out of the truck and he thought the claimant was playing with him because the thump he heard when he hit the claimant sounded more like a slap on the side of the truck. Mr. Love testified that he went to the claimant's side and got down and it sounded like he was having a hard time breathing so he lifted his neck. This witness testified that the claimant went to snoring on him and then a few minutes later Violet came out but he kept talking to the claimant and the claimant came to. Mr. Love remembers that Violet came out and then the ambulance got there. Mr. Love remembers that the claimant kept saying, "Get the baby off my chest." Mr. Love indicated that he did not know what that was all about. This witness was asked if when the claimant returned from his break would he have gotten back on the shuttle truck and that if he, Mr. Love, would have gotten back on the brown Tyson truck. Mr. Love indicated that yes this would have happened but first they would have had to go into shipping and receiving to get their instructions.

On cross examination, Mr. Love testified that he received his instructions as to what to do from the manifestor or from Ardaina not from the claimant. Mr. Love agreed that in his deposition he had indicated that from his observations and the way the claimant was lying it appeared he was headed back to the office at the time of the accident.

The medical records set forth that the claimant was taken to St. Edward's Hospital by ambulance on October 30, 2006, where he was treated for multiple injuries specifically severe head injuries.

These same records indicate that the claimant expired on November 7, 2006, as a result of these severe head injuries.

At the conclusion of the hearing the parties requested permission to brief the issue of employment services. Both briefs have been received and considered.

After a complete review of this entire matter, I find that the claimant has failed to prove by a preponderance of the evidence that he was not performing employment services at the time of his injury. The facts in this matter are not in dispute and it is clear that at the time of the claimant's accident he was returning from his first thirty minute unpaid break. The accident occurred in the respondent's trailer yard where the claimant worked, therefore the claimant was within the boundaries of his employment as well as the time of his employment since it has been testified that the accident occurred during his work shift. The issue now is whether the respondent's interests were being advanced either directly or indirectly at the time of the claimant's injury. It is noted that the claimant had gone on his authorized break in an area which he had permission to take his break in on the respondent's premises. The claimant was returning to resume the respondent's work when the accident occurred. The claimant's conduct in returning to the shipping and receiving office is entirely consistent with advancing the respondents. See Collins v. Excel Specialty Products, 347 Ark. 811, 69 SW 3d 14 (2002) and Pifer v. Single Source Transportation, 347 Ark. 851, 69 SW 3d 1 (2002). In the Collins case the Supreme Court reasoned that everything in the

record indicates that Collins was engaged in conduct permitted by the employer, if not specifically authorized by the employer when she fell on the way to the restroom. The Supreme Court noted that Collins was headed to a restroom provided by her employer at the time of her accident, and further noted that Collins' conduct was entirely consistent with the employer's interest in advancing the work. In holding that Collins was performing employment services the Court overruled all prior decisions by the Arkansas Court of Appeals to the extent that they were inconsistent with that reasoning. In the Pifer case the court indicated that the critical issue was whether the employer's interests are being advanced either directly or indirectly at the time of the injury. In the Pifer case the claimant had gone to a restroom provided by his employer and was returning to resume the employer's business when the accident occurred that resulted in his injuries. The claimant's conduct in returning to his truck in the Pifer case was entirely consistent with the employer's interest in advancing the work. In this case the same reasoning applies as in Pifer and Collins at the time of the claimant's injury the testimony is that the claimant was in the process of returning to work from an authorized break area, on his way to the shipping office to receive work instructions. As noted earlier the claimant was also within the time and boundaries of his employment. Therefore, I find that the claimant sustained a compensable injury on October 30, 2006, while working for the respondent. Also see Olsten Kimberly Quality Care v. Petty, 55 Ark. App. 343, 934 SW 2d 956 (1996).

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On October 30, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The respondents have paid or tendered benefits.

4. The claimant has refused to accept a payment to Ocker-Putman Funeral Home in the amount of \$9,787.89.

5. The respondents have paid one day of temporary total disability and the hospital bills from October 30, 2006 through November 7, 2006.

6. The claimant has failed to prove by a preponderance of the evidence that he was not performing employment services at the time of his accident on October 30, 2006.

7. The respondents have accepted this accident as a compensable injury.

8. The respondents have paid all medical costs.

9. The respondents should pay all death benefits resulting from this compensable injury.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he was not performing employment services at the time of his accident on October 30, 2006.

The respondents have accepted this accident as a compensable injury.

The respondents have or will pay all medical costs associated with this compensable injury.

The respondents shall pay all death benefits as a result of this compensable injury.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE