BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F908093

KYLE WATZ (Deceased) CLAIMANT

RED ROBIN GOURMET BURGERS RESPONDENT

FEDERAL INSURANCE COMPANY, INSURANCE CARRIER RESPONDENT

OPINION FILED MARCH 9, 2011

Before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by LEE MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case is currently before the Commission by Order of Remand from the Circuit Court at Benton County, Arkansas (Civil Division), pursuant to Moses v. Hanna's Candle Company, 366 Ark. 232, 234 S.W. 3rd 872 (2006). In this Order, the Circuit Court of Benton County requested the Commission to determine whether the relationship of employer-employee existed between Kyle Watz and Red Robin Gourmet Burgers at the time of Mr. Watz' fatal injury on January 8, 2006, and whether this injury "occurred during the course of this employment". The Court also requested the Commission to resolve the issue of whether the fatal injury sustained by Mr. Watz was "compensable under the Arkansas Workers' Compensation Act or whether the Arkansas Workers' Compensation Law in another State applies". Based upon the briefs of the parties, it would appear that this second request involves a determination by this Commission as to whether it had jurisdiction over the

parties and subject matter of this dispute or whether such jurisdiction lies with another State.

Both parties have waived their right to a hearing and requested these issues be submitted solely on a stipulated record. This stipulated record was filed with the Commission on December 15, 2010, and consists of some 39 separate exhibits.

DISCUSSION

I. JURISDICTION

The first issue to be addressed is whether this Commission has jurisdiction over the parties and subject matter involved in the current dispute. The evidence on this issue must be considered in light of the statutory presumption that this Commission has such jurisdiction, Ark. Code Ann. §11-8-707(i).

In International Paper Company v. Tidwell, 250 Ark. 623, 446 S.W. 2d 488 (1971), the Supreme Court quoted 3 Larson's Workmen's Compensation Law, 368 Section 86.10. This Section addresses the Federal Constitution limits on the application of State laws in workers' compensation and sets out six "grounds" on which applicability of a particular Workers' Compensation Act has been asserted. The Supreme Court indicated that these six "grounds" were factors that were to be considered in determining whether this Commission had jurisdiction over an alleged employment-related injury. These six "grounds" are:

> "(1) Place where the injury occurred;
>
> (2) Place of making the contract (of hire);

(3) Place where the employment-relationship exists or is carried out;

(4) Place where the industry is localized;

(5) Place where the employee resides; or

(6) Place whose statute the parties expressly adopted by contract.

In his treatise, Dr. Larson indicates that a State, which is the locus of any one of the first three grounds and perhaps any one of the next two, can constitutionally apply his workers' compensation statute, and survive "full faith and credit" attacks, if that State so desires. However, I can find no case in which Arkansas has actually exercised jurisdiction based on only one of any of these grounds. In fact, in McKeag v. Hunt Transportation, Inc., 36 Ark. App. 46, 818 S.W. 2d 581 (1991), jurisdiction was denied where it was based solely on the fact that Arkansas was the site of the injury. See also Baker v. Frozen Food Express Transport, 336 Ark. 451, 987 S.W. 2d 658 (1999). In Patton v. Brown & Root, Inc. and Highlands Insurance Company, 31 Ark. App. 141, 789 S.W. 2d 745 (1990), jurisdiction was declined where the only ground for invoking such jurisdiction was that the claimant had, at all relevant times, been a resident of this State.

In the present case, the greater weight of the evidence clearly shows that Mr. Watz' fatal injury occurred in the State of Arkansas. The contract of hire between Mr. Watz and Red Robin Gourmet Burgers, Inc. was made in Colorado. At the time of his fatal injury, Mr. Watz was assigned to carry out his job duties at

a place of business maintained and operated by Red Robin in the State of Arkansas. At the time of his fatal injury, the claimant's employment activities were supervised and directed by Red Robin personnel, out of this Arkansas location.

It is my opinion that the greater weight of the credible evidence establishes that, on January 8, 2006, the relationship of "employee" existed between Kyle Watz and Red Robin, and that this was an "employment" as defined by Ark. Code Ann. §11-9-102(ii)(A), which was being performed within the State of Arkansas, at a place of business maintained and operated by Red Robin in the regular course of its business. The greater weight of the evidence further shows that the injury involved in this case also occurred within this State. Therefore, I further find that the greater weight of the credible evidence establishes sufficient contacts between the State of Arkansas, Kyle Watz, Red Robin, and the injury involved in this case for this Commission to exercise jurisdiction over the parties and matter to apply the Arkansas Workers' Compensation Act to any injury allegedly arising out of and occurring in the course of this employment.

In reaching this decision, I recognize that Colorado may have even more contacts with this case than Arkansas. However, jurisdiction in workers' compensation cases is generally not considered exclusive, as between States. There is no requirement that this type of action must be brought in the State with the most contacts or greater interests. Rather, it is accepted that concurrent jurisdiction may lie in multiple States. I simply find

that Arkansas has sufficient contacts for this Commission to exercise jurisdiction. Further, I can make no finding that would bar some other State, such as Colorado, from exercising concurrent jurisdiction over these same parties and subject matter, if that State so chooses and that State's laws so provide.

II. IN THE COURSE OF

The remaining issue to be addressed is whether Mr. Watz' fatal injury of January 8, 2006 "occurred in the course of his employment". Intertwined with this issue is the question of whether this fatal injury occurred "at a time when employment services were not being performed", Ark. Code Ann. §11-9-102(4)(B)(iii). Under applicable case law, the criteria and considerations for resolving both of these issues are essentially the same.

The Appellate Courts have announced, on repeated occasions, that the test for determining if an injury "occurred in the course of the employment", requires the following:

> "The injury occurred within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose or advancing the employers' interest directly or indirectly."

Clearly, an employee is performing "employment services", when they are performing any activity that they have been expressly instructed by the employer to perform. The Appellate Courts have held that an employee is also performing "employment services" when they are performing functions which are essential to the success of the enterprise in which the employer is engaged, Olsten Kimberly

Quality Care v. Pettey, 55 Ark. App. 243, 334 S.W. 2d 956 (1996), Aff'd, 328 Ark. 381, 944 S.W. 2d 524 (1997), when an employee is doing something that is generally required by his or her employer, White v. Georgia Pacific Corporation, 339 Ark. 474, 6 S.W. 3d 98(1999), when performing an incidental activity which is inherently necessary for the performance of the primary employment activity, Ray v. Wayne Smith Trucking, 68 Ark. 115, 4 S.W. 3d 506 (1999), when performing an activity which benefits the employer directly or indirectly, Wallace v. West Fraser South, Inc. 90 Ark. App. 38, 203 S.W. 3d 646 (2005), or when they are engaging in conduct permitted or anticipated by the employer, *Engle v. Thompson Murray, Inc.*, 96 Ark. 200, 239 S.W. 3d 561 (2006). The Appellate Courts have also held that "employment services" must be determined within the context of the individual cases, employments, and working relationships, not generalizations made to void the practical working conditions, Honeysuckle v. Stout, 209 Ark. App. 696 (2009).

In the present case, the evidence shows that Mr. Watz initially entered into a contract of hire with Red Robin on July 4, 2002, in Colorado, where he resided. In January of 2006, Red Robin opened a new restaurant in Rogers, Arkansas. To assist in the opening of this new restaurant, Red Robin sent a number of employees from other locations, including Mr. Watz. This group of employees consisted of a "new restaurant opening team", who were to train and educate new employees at the Rogers restaurant in performing their assigned duties, and a "support team", who would

assist in the performance of the day-to-day activities of the restaurant until new members could be hired and properly trained. Mr. Watz was a member of the "support team". Red Robin made arrangements for living quarters for the "support team" by leasing two townhouses, one for the male members and one for the female members. The support team members were "expected" by Red Robin to reside in the provided facilities (affidavit of Peter M. Cardillo, Exhibit No. 34). The record is almost non-existent on the claimant's specific job duties and assigned hours of employment. However, it appears that he had an assigned shift and was paid only for the hours he worked at the Red Robin restaurant. There is absolutely no evidence that the claimant actually did or was expected to perform any of his regular job duties in or about the residence, which was provided to him and his fellow co-employees by the respondent. There is also no evidence that the claimant was "on call", after completing his assigned shift at Red Robin's restaurant facility.

On the afternoon or evening of January 7, 2006, the claimant completed his assigned duties at the Red Robin restaurant in Rogers and departed the premises. Sometime later that evening or afternoon, he returned to the house that had been rented for his use and that of the other male member of the "support team". Upon his return to the furnished residence, Mr. Watz and other employees of Red Robin (primarily from the "support team"), had a party at the rented residence. This party was ostensibly held as an early birthday party for the claimant, whose birthday was January 8. At

this party, alcoholic beverages were consumed by various participants, including the claimant. There is no evidence that this party was in any way promoted, sponsored, or facilitated by Red Robin. In fact, there is no evidence that any management personnel of Red Robin were even aware of this party. Clearly, the consumption of alcoholic beverages at this party would have violated the rules established by Red Robin for its support team members.

At some point, during the latter stage of this party, the claimant left the residence for a period of time. Upon his return, the claimant went into his bedroom, laid down on his bed, and listened to his iPod. He subsequently requested one of his co-employees, Autum Chavez, to close the bedroom door, which she did. A brief period of time later, it was discovered that the bedroom door was locked. Entry was made by several employees from the support team. At that time, the claimant was found hanging by his belt from a rod in the closet. The appropriate authorities were called. CPR was provided by two of the support team members without success. The claimant was subsequently pronounced dead at the scene.

This case is unusual, although not unique, in the fact that it is the employer, who contends that the claimant's fatal injury occurred in the course of his employment. Whereas, the deceased employee or claimant takes the position that employment services were not being performed at the time of the fatal injury.

Clearly, there is no presumption that an injury occurred in the course of the employment or while employment services were being performed. The respondents' cannot establish these required facts by merely unilaterally agreeing that they are true. These facts have been disputed must be proven. The burden of proving these facts rest upon the party asserting their validity. In this case, this happens to be the respondents, Red Robin and their insurance carrier.

The respondents' argue that Watz' presence in Arkansas was due solely to his employment with Red Robin. Therefore, he should be considered to be advancing the interests of Red Robin, either directly or indirectly, during the entire period of his presence within the State of Arkansas. Thus, he should be considered to be "in the course of" this employment and performing "employment services" at any point during this entire period of time. Red Robin contends that this conclusion is supported by both the traveling employee doctrine and the residential employee doctrine.

In support of this argument, the respondents cite Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997), which recognizes the traveling employee rule. In this case, the Supreme Court quoted the general rule for "traveling employees", as stated by Professor Larson in *1 Arthur Larson, The Law of Workmen's Compensation*, §16.01 (1996), which states:

> "Traveling men are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job."

However, both Larson and the Arkansas Appellate Courts have recognized that this is only a generalization and is not to be blindly applied in every traveling employee case. The Arkansas Supreme Court and Court of Appeals have both mandated that these cases must be decided on a case-by-case basis with attention to be given to the particular activities that were being performed by the injured worker at the exact time of the accidental injury. Further, applicable case law requires that the greater weight of the credible evidence must prove that the particular activities that were being performed, at the exact time of the accidental injury, must be something that is required by the employment or bears a causal connection with the employment, Wilson v. United Auto Workers, 246 Ark. 1158, 441 S.W.2d 475 (1969).

Respondents have cited the case of Arkansas Department of Health v. Huntley, 12 Ark. App. 287, 675 S.W. 2d 845 (1984), in support of their contention that the claimant, as a traveling employee, was in the course of his employment and performing employment services from the time he left his home in Colorado until the time he returned. In Huntley, it was held that the claimant's actual activities, at the exact time of her accidental injuries (i.e. returning to her room), were of a personal nature, but that these activities were not "forbidden by the employer and were to be reasonably expected". Therefore, these personal activities become a material incident of the employment and the injuries suffered in the course of such activities are thus in essence a part of the employment. It is left to wonder whether the

result in Huntley would have been the same, if the claimant had been attacked while going to the bar.

Regardless, the *Huntley* case occurred prior to the enactment of 796 of 1993, when the established law was that all inferences were to be drawn favorable to the claimant (i.e. that the accidental injury arose out of the employment), and before the express requirement that the injury must occur while "employment services" are being performed.

In the more recent case of Kinnebrew v. Little John's Trucks, Inc., 66 Ark. App. 90, 989 S.W. 2d 541 (1999), the Arkansas Court of Appeals affirmed a finding by the Commission that an accidental injury sustained by a traveling employee (i.e. a truck driver) did not occur in the course of the employment. In that case, the claimant had stopped at a truck stop, at the direction of his employer, to await assignment of a run. While taking a shower at the truck stop, the claimant slipped and fell, injuring his neck and shoulder. In this case, the Court of Appeals stated:

> "Even if the Appellant was acting within the course of his employment under the 'traveling salesman exception,' the evidence still does not support a finding that the Appellant was performing 'employment services' when he fell while taking a shower while off duty. Showering is not inherently necessary for the performance of the job he was hired to do."

In another post-Act 796 case of Cook v. ABF Freight Systems, Inc., 88 Ark. App. 86 (2004), the Court of Appeals affirmed the Commission's finding that a "traveling employee" was not performing employment services at the time of an accidental injury he sustained from an electrical shock when he stepped in to the

bathroom of his motel room. The Court noted that the evidence showed that the employer arranged and paid for the motel room and "expected" the claimant to be "on call" at the motel, even though he was not being paid for his time. The Court also noted that the evidence showed that during this "rest period" the drivers were not prohibited from leaving the motel, nor were they required to stay there. The Court held that since the claimant was "off the clock" and not being paid, his entry into the bathroom was simply only to attend to his own personal needs and did not constitute the performance of employment services.

In Cook, the Court of Appeals recognized that, in the case of Pifer v. Single Source Transport, 347 Ark. 851, 69 S.W. 3d 1, the Supreme Court held that an accidental injury that occurred during a bathroom break occurred in the course of the employment and while employment services were being performed, and that in this case the Supreme Court cited Olsten Kimberly Quality Care v. Pettey, as authority that injuries that occur while the employee is performing a "necessary function", that is at least permitted by the employer remains in the course of the employment and is performing activities that benefit the employer, at least indirectly. However, the Court of Appeals distinguished Cook on the grounds that the bathroom break in Cook, did not occur while the claimant was actually performing his assigned duties, but rather occurred during an unpaid rest period. Apparently, the additional fact that the employer provided the actual facility for this unpaid rest period

was not sufficient to cause the claimant in Cook to be in the course of his employment or performing employment services.

In support of their argument, the respondents also cite Deffenbaugh Industries v. Angus, 39 Ark. App. 24, 832 S.W. 2d 869 (1992), which recognizes the resident employee rule. Again, it must be noted that Deffenbaugh was handed down prior to the effective date of Act 796 of 1993, with its mandate of strict interpretation of all sections of the Workers' Compensation Act, and the addition of the specific requirement of Ark. Code Ann. §11-9-102(4)(B)(iii).

Deffenbaugh recognizes that there is several requirements necessary to invoke the "resident employee" rule. First, as a condition of the employment, the employee must be required to live on the premises of the employer. Secondly, the employee must be continuously on duty or "on call". The evidence presented in the present case, fails to show that the present claimant, Mr. Watz, would meet either of these requirements. The evidence shows that the "residence", which was furnished the claimant by the respondent, was not located on the respondent's "premises". It was not owned or operated by the respondent and was not the place where Mr. Watz' actual employment activities were to be performed. There is also no evidence that the present claimant was continuously on duty or even on call. In fact, the evidence indicates that Mr. Watz had regular shifts at the respondent's restaurant, and once these shifts were completed, Mr. Watz was free to go and do whatever he pleased.

In the case of Jivan v. Economy Inn and Suites, 370 Ark 414, 260 S.W. 3d 260 (2007), the Supreme Court again addressed the "resident employee" issue. In this Opinion, the Supreme Court held that Act 796 of 1993 did not preclude the application of the residential employee rule, as stated in Deffenbaugh, and that the mere onsite presence of a residential employee indirectly advances the interests of the employer. However, the Court again made it clear that this rule only applied to those employees who were required to reside on the employer's premises, which is where the work duties were to be provided, and who were continuously on duty or on call. The Supreme Court clearly distinguished Cook v. ABF Freight Systems, Inc. (cited supra) on the grounds that the claimant in Cook was not a "residential employee", because the motel in which he stayed while furnished by the employer, was neither owned or operated by the employer, and was not the place where the employment services were to be performed.

The respondents appear to recognize that the evidence in this case would not support a finding that Mr. Watz was a "residential employee", as that type of employment has been defined by the Supreme Court in Deffenbaugh and Jivan. Thus, the respondents advanced the theory, that Mr. Watz would be considered a "residential employee", if the definition of "residential employee" was expanded under the "Bunkhouse Rule" and the "Remote Site Residence Rule".

However, I can find no cases where Arkansas has ever recognized either of these rules, either before or after the

passage of Act 796 of 1993. In Jivan, the Court recognized that Act 796 of 1993 did not preclude application of the residential employee rule, as enunciated in Deffenbaugh. However, the Court's basis for this conclusion was that Act 796 of 1993 required strict construction of all of the workers' compensation statutes, that the interpretation of the term "employment services", in regard to residential employees had been made by the Court in Deffenbaugh, that this interpretation then became part of the statute, that the Legislature was aware of this interpretation, and that the Legislature made no change in this interpretation when it enacted Act 796. However, for this Commission to expand the definition of the residential employee, which would, in turn, expand the definition of employment services for this type of employees, from that given by the Supreme Court in Deffenbaugh and essentially approved by the Legislature in its enactment of Act 796 of 1993, would be a violation of the Legislature's mandate in Ark. Code Ann. §11-9-1001.

After consideration of all the evidence presented, it is first my opinion that the claimant, in this case, does not satisfy the requirements to be a resident employee or residential employee, under Arkansas law. Clearly, he was not required to live on the employer's premises and was not continuously on duty or on call. His residence was also not the place where his regular work duties were to be performed.

Rather, it is my opinion that the greater weight of the credible evidence establishes that the claimant was a traveling

employee, as that term is defined by Arkansas law. I further find that the evidence shows that, at the time of the claimant's fatal injury, he was "off duty" and was not being paid. He was not on call and was free to come and go as he pleased. Although he was staying at living quarters provided to him by the employer, he was not residing on the employer's "premises". At the time of his fatal injury, he was engaged solely in personal activities and was not performing any services that could be reasonably expected to benefit the employer, either directly or indirectly. It is my opinion that these facts closely resemble those in the case of Cook v. ABF Freight Systems, Inc. (cited supra), and that this case is controlling here.

In summary, it is my opinion that the greater weight of the credible evidence fails to show that, at the time of the claimant's fatal injury, he was acting in the course of his employment. I further find that at the time of his fatal injury, he was not performing employment services for the respondent. Therefore, the claimant cannot be awarded any benefits for his fatal injury under the Arkansas Workers' Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over the parties and issue of whether the claimant's fatal injury occurred in the course of his employment and while he was performing employment services.

2. On January 8, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The greater weight of the credible evidence fails to show that, at the time of the claimant's fatal injury, he was acting in the course of his employment with the respondent.

4. The greater weight of the credible evidence fails to prove that, at the time of the claimant's fatal injury, he was "performing employment services", as required by Ark. Code Ann. §11-9-102(4)(B)(iii). Specifically, the greater weight of the credible evidence fails to establish that, at that time, the claimant was performing his regular employment activities, any activities inherently necessary to carry out his regular employment activities, or any activities that would advance his employer's interests directly or indirectly.

5. The claimant would have no right to benefits, under the Arkansas Workers' Compensation Act for his fatal injury of January 8, 2006.

ORDER

Based upon my foregoing findings and conclusions and pursuant to the Order of the Circuit Court of Benton County, Arkansas, this matter is remanded back to the Circuit Court of Benton County, Arkansas, for any further disposition it might deem appropriate.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE