BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209838

ROBERT COOK, EMPLOYEE CLAIMANT

ABF FREIGHT SYSTEM, INC.,
A SELF INSURED EMPLOYER RESPONDENT

OPINION FILED JANUARY 23, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE DAVID M. FUQUA, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed May 6, 2003, in which the Administrative Law Judge found that the claimant was performing employment services and sustained a compensable injury when he was electrocuted while turning on the lights in his motel room. Based upon my de novo review of the entire record, we find that the claimant was not performing employment services at the time of his injury and thus did not sustain a compensable injury. Therefore, we find that the decision of the Administrative Law Judge must be reversed.

The claimant was employed by respondent as a bid driver. As a bid driver the claimant drove a fixed route between Little Rock, Arkansas and Dallas, Texas three days a week. This route occasionally required the claimant to make stops to drop off or pick up along his route between Little Rock and Dallas. The claimant would leave Little Rock in the evening around 6:00 p.m. and would usually arrive in Dallas between 1:00 and 1:30 a.m. Upon arriving in Dallas, the claimant would clock out and catch a ride to the Days Inn in Irving, Texas where the respondent employer had arranged for its drivers to spend the night when the drivers must take a mandatory eight hour break from driving pursuant to Department of Transportation regulations. The claimant testified that upon clocking out he was no longer getting paid and he was free to spend his eight hour break however he chose.

On the morning of June 28, 2002, the claimant arrived in Dallas, Texas around 1:15 a.m. The claimant clocked out, retrieved his belongings from the truck and caught the shuttle to the Days Inn. The claimant requested a 7:30 a.m. wake up call upon arriving at the motel. The claimant received the wake up call at the proper time,

climbed out of bed and proceeded to the bathroom. Upon stepping into the bathroom, the claimant reached for the lights and was electrocuted. This incident is the basis for the claimant's claim for workers' compensation benefits.

During the hearing, the claimant testified that he was required to return to the terminal to pick up a delivery to return to Little Rock. Testimony was gathered regarding whether the claimant was "on call" during the period that he was off duty. Pursuant to the claimant's testimony, he was not "on call" during his required eight hour break, but he was subject to being called back to the terminal after this eight hour break. As the claimant was a bid driver, he knew that he had a scheduled returned trip to Little Rock around 9:15 or 9:30 in the morning. Therefore, the claimant made arrangements to wake at 7:30 so that he could enjoy a couple cups of coffee before he returned to the terminal for his return trip.

In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the

employment. Ringier American v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993); Carman v. Haworth, Inc., 74 Ark. App. 55, 455 S.W.3d 408 (2001). Moreover, the claimant must prove a causal connection between the work related accident and the later disabling injury. Bates v. Frost Logging Co., 38 Ark. App. 36, 827 S.W.2d 664 (1992). The claimant must show a causal relationship exists between his condition and his employment. Harris Cattle Co. V. Parker , 256 Ark. 166, 506 S.W.2d 118 (1974).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2)(Repl. 2002). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavenaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. § 11-9-102(4)(B)(iii) states:

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

Act 796 further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002) In Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002), the Arkansas Supreme Court stated:

> Act 796 defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment. . . ." Ark. Code Ann. § 11-9-102(4)(A)(i). 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) (emphasis added). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services," Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Stephens v.

> Arkansas Sch. for the Blind, 341 Ark. 939, 20 S.W.3d 397 (2000). Although the statute does not define the term "employment services," the Commission as well as the Arkansas appellate courts have previously held that an employee is performing employment services when he is engaging in an activity which carries out the employer's purpose or advances the employer's interest directly or indirectly. Cheri Pettey v. Olsten Kimberly Quality Care, Full Commission Opinion Sept. 13, 1995 (E405037); 328 Ark. 381, 944 S.W.2d 381 (1997). An employee carries out the employer's purpose or advances the employer's interest when he engages in the primary activity which he was hired to perform. Id.; Kenneth Behr v. Universal Antenna, Full Commission Opinion Dec. 6, 1995 (E408376). When an employee engages in incidental activities which are inherently necessary for the performance of the primary employment activity, the employee carries out the employer's purpose or advances the employer's interest. Id.

The Arkansas Supreme Court has held that the same test used to determine whether an employee was acting within "the course of employment" is to be used to determine whether the employee was performing "employment services." Collins v. Excel Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (Mar. 7, 2002); Pifer v. Single Source Transp.,supra. 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 interests directly or indirectly." Id. This test has also been previous stated as whether the employee is

"engaged in the primary activity that [s]he was hired to perform or incidental activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1996), aff'd, 328 Ark. 381, 944 S.W.2d 524 (1997). Employment services are performed when the employee does something that is generally required by his or her employer.

In Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491),the Full Commission found that the claimant "was not engaged in any activity that carried out the employer's purpose or advanced the employer's interest when the claimant deviated from her duties to go outside and smoke before she got "real busy." Likewise, in Carla Ann Cole v. Prince Gardner, Inc., Full Commission Opinion filed August 26, 1996 (E408046), the Full Commission found that when a claimant has finished work and is injured while walking across the employer parking lot, the injury was not compensable since employment services were not being performed. See also, Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998); Harding v. City of Texarkana, 62 Ark. App. 137, 970

S.W.2d 303 (1998). Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case.

In contending that he sustained a compensable injury, the claimant has cited several cases which pre-date Act 796 of 1993, for the proposition that this claim falls within the business travelers exception to the "going and coming" rule. In this regard, the claimant states: "It is well-settled law that 'traveling men are generally within the course of their employment trip until they return, for the self-evident reason that the traveling itself is a large part of the job.'"

However, when the complete text of the Supreme Court's decision in Olsten is reviewed, we find that the claimant's reliance on this case for the adoption of the "traveling man" exception under Act 796 is misplaced. The court in Olsten stated:

> Section 11-9-102(5)(A) defines "compensable injury" as "an accidental injury causing internal or external physical harm . . . arising out of and in the course of employment[.]" The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when

> the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. Pilgrims Pride Corp. v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).
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> Conversely, an employee is generally said not to be acting within the course of employment when he or she is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. Lepard v. West Memphis Mach. & Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995). The rationale behind this rule is that an employee is not within the course of his employment while traveling to or from his job. Id. There are, however, exceptions to this rule.
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> According to Professor Larson, one of those recognized exceptions is where the journey itself is part of the service. It is well-settled law that "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." 1 Arthur Larson, *The Law of Workmen's Compensation* § 16.01 (1996). Another example of travel being an integral part of the job is where the employee must travel from jobsite to jobsite, whether or not he or she is paid for that travel time. Id. § 16.23. As stated by Professor Larson:
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>> [T]he fact that the employee is not paid for his travel

> time does not mean that the trip was not in the course of employment. Payment for time is only one of the evidences that the journey itself was part of the service[.]
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> Id. (Footnote omitted.)

> An additional factor determinative of whether an employee's travel is within the course of employment is whether the employee is required to furnish his own conveyance. "If the employee as part of his job is required to bring with him his own car, truck or motorcycle for use during his working day, the trip to and from work is by that fact alone embraced within the course of employment." Id. § 17.51 (emphasis added) (footnote omitted). The theory behind this principle of law is that the obligations of the job reach out beyond the premises, making the vehicle part of the employment environment and compelling the employee to submit to the everyday hazards associated with road travel, which he or she would otherwise be able to avoid. Id. § 17.52. Furthermore, such a situation is for the benefit of and service to the employer. Id.

The claimant relies upon the above quoted section for the proposition that all of his activities while driving an over the road tractor trailer are covered within the meaning of the workers' compensation statute. However, it is clear from Olsten and the subsequent line of cases which interpret "employment services" that the above quoted

provisions regarding "traveling men" in Olsten are merely dicta.

Subsequent to the Supreme Court's decision in Olsten, the Arkansas Court of Appeals addressed a factual situation which is closely analogous to the facts in this claim. In Kinnebrew v. Little John's Truck, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999), an over the road tractor trailer driver was stopped at a truck stop awaiting further instructions for a possible load to pick up the next day. The claimant in Kinnebrew was off duty pursuant to Department of Transportation's regulations which require a driver to be off duty for eight hours after ten hours of driving time. After being off duty for a little over seven and a half hours, the claimant in Kinnebrew proceeded to the shower facilities to clean up before going back on duty. As this claimant entered the shower stall, he stepped onto a slippery substance and fell causing injury to his neck and shoulder. In finding that the claimant in Kinnebrew was not performing employment services, the Court of Appeals stated:

> This court has affirmed on a number of occasions the Commission's factual findings that a claimant's injury while performing a personal task, even while on the employer's premises, was not performing "employment services" for

> purposes of compensability under Act 796 of 1993. Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997). 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. Consequently, we hold that the full Commission did not err when it found that the appellant was not performing employment services at the time of his injury.

Since the Court of Appeals decision in Kinnebrew v. Little John's Truck, Inc., supra., the courts have addressed the "employment services" issue on many occasions. Contrary to claimant's argument, the broad "traveling man" exception to the "going and coming" rule has not been adopted by the courts. For instance, in Daniels v. Arkansas Dept. of Human Services,72 S.W.3d 128, 77 Ark. App. 99 (2002), the Court of Appeals denied a claim for benefits from a claimant who was driving to work after lunch even though the claimant was required to have her vehicle at work to transport clients, and she was available to receive calls during lunch to perform her work duties. Likewise, in Campbell v. Randal Tyler Ford Mercury, Inc., 80 Ark. App.

35, 13 S.W.3d 916 (2000), the Court of Appeals, affirmed a denial of benefits for a claimant who was killed in a one-vehicle accident while driving to work even though that claimant argued "he was advancing his employer's purposes by bringing paperwork back to work and by making the cellular telephone call, and that bringing an incomplete contract back to the premises for correction and signature constitutes employment services." In denying benefits, the Court of Appeals reasoned that the claimant was not doing something required by his employer when he was traveling to work and carrying an incomplete contract back to the office. Moreover, in Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998), the claimant was on an out of town business trip when she sustained serious injuries in an automobile accident while returning from the mall during a lunch break. The claimant in Coble argued that she was out of town on business, she developed an ugly run in her hose, and she was attempting to purchase new hose during her lunch break so that she could maintain a professional appearance, but she ran out of time. The court reasoned in Coble, that the claimant was not performing employment services because she was not advancing her employer's interest either

directly or indirectly even though she was on an out of town business trip and she wanted to maintain a professional appearance.

In Collins v. Excel Speciality Products, supra, the Arkansas Supreme Court stated, "The test 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." In the present claim, the claimant argues that the court has recognized the personal-comfort doctrine in Collins, supra, and Pifer, supra, and that the personal-comfort doctrine is now the law in Arkansas. Neither Collins nor Pifer adopted the personal-comfort doctrine as the law in Arkansas. In this regard, the court specifically stated in Collins:

> To automatically accept a personal-comfort activity as providing employment services would impermissibly broaden the requirements of Act 796. On the other hand, to automatically reject a personal-comfort activity as not providing employment services would impermissibly narrow the requirements of Act 796. Instead of following either extreme position, the critical issue is whether the employer's interests are being advanced either directly or indirectly by the claimant at the time of the injury...

In reversing the full Commission's decision which had denied benefits in Collins, the Supreme Court stated, "In so holding, we overrule all prior decisions of the Arkansas Court of Appeals to the extent that they are inconsistent with this opinion. Claimant argues that this statement overrules all court of appeals decisions rendered prior to Collins, including Kinnebrew. However, we do not interpret Collins this broadly. The court in Collins had specifically addressed a previous Court of Appeals decision in which the lower court had set out a list of factors to address in cases which concern employment services.(See, Matlock v. Arkansas Blue Cross Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001)). As we read Collins, we find that the Supreme Court intended to overrule Matlock and the line of cases decided by the Court of Appeals after Matlock in which the lower court had established a set of factors to consider in employment services cases, rather than considering each claim on a case by case basis in which "the critical issue is whether the employer's interests are being advanced either directly or indirectly by the claimant at the time of the injury," not the enumerated factors set forth in Matlock.

Even after the Supreme Court's decision in Collins, each claim must still turn on the specific facts relevant to that claim. In Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the Court of Appeals affirmed an award of benefits to a claimant that sustained an injury as she was coming off of a break and was returning her personal belongings to her locker as she was required to by her employer. The court in Sands reasoned that the claimant was advancing her employer's interest by complying with the company's "rather elaborate loss-prevention system." However in Cochran v. Staffmark, Full Commission Opinion filed December 5, 2002 (F106336), the Full Commission found that an employee on break was not performing employment services because she was on break, she was not required to remain on the premises during her break, and the employer did not benefit from the claimant remaining on the premises during her break.

As we analyze this claim under the holdings in Collins and Pifer, supra, we find that the claimant was not performing employment services at the time of his injury. As noted by the Supreme Court in Collins, "the critical issue is whether the employer's interests are being advanced

either directly or indirectly by the claimant at the time of the injury." At the time of the claimant's injury he was on a required eight hour break and was not subject to being called back to work until after this eight hours. The claimant was staying in a motel room; albeit one provided by his employer; but he was not required to stay in this room and he was free to come and go as he pleased. There is no evidence in the record that the claimant was required by his employer to shower and freshen up prior to returning to the terminal to pick up his next load. The claimant's activities on the morning of June 28, 2002, are identical to the activities performing by people in their homes every morning as they prepare to go to work. Merely because this employee was staying in a motel room because his work took him out of town does not bring these activities within the realm of employment services. We find that the activities performed by the claimant on morning of June 28, 2002, when he was electrocuted as he stepped into the bathroom of his motel room did not advance his employer's interests, either directly or indirectly. Therefore, we find that the claimant was not performing employment services at the time of his injury. Accordingly, we find the decision of the

Administrative Law Judge is hereby reversed. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.