

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204406

SHEILA ROWLAND,
EMPLOYEE

CLAIMANT

BEVERLY ENTERPRISES,
EMPLOYER

RESPONDENT

AIG CLAIMS SERVICES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 27, 2004

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

Claimant represented by HONORABLE KENNETH OLSEN, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE MICHAEL RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on December 30, 2003.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. The stipulations agreed to by the
parties are reasonable and are
hereby accepted as fact.

3. The claimant has proven by a preponderance of the evidence that her injury is established by medical evidence supported by objective findings.
4. The claimant has proven by a preponderance of the evidence that her injury arose out of and in the course of her employment, and that she was engaged in employment services at the time of her injury.
5. This claim is not barred by the going-and-coming rule, and is specifically excepted from the rule by the dual-purpose doctrine.
6. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 11, 2002.
7. The claimant has proven by a preponderance of the evidence that her work injury combined with or aggravated her preexisting condition to bring about her need for treatment, and that she is therefore entitled to medical treatment for her compensable injury.
8. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning April 12, 2002, through July 11, 2002, and from August 8, 2002, until such time as she regains her capacity to earn wages or her healing period ends, whichever occurs first.
9. The respondents are entitled to a credit for all group disability insurance benefits and group health insurance benefits paid to the claimant for this injury.

10. The respondents have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 30, 2003 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in

the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Special Commissioner Mike Wilson dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable low back injury on January 20, 2002. Based upon my de novo review of the record I find that the claimant has failed to meet her burden of proof.

The claimant was employed as a nurse consultant for the respondent employer. As such, it was the claimant's job to oversee nursing home facilities in different locations within the state. In order to facilitate her travel to these nursing homes, the respondent employer furnished the claimant with a company car. She was also furnished with a laptop computer and a cell phone which she kept with her at all times. In addition to her car, cell phone, and laptop computer, the claimant shared a furnished

office in the Camden facility, and she had various office equipment in her home from which she testified she often did "administrative" work. The claimant testified that she was a salaried employee, and was "on-call" 24 hours per day, seven days per week. The claimant also testified that she was also allowed unlimited personal use of her company vehicle, for which she reimbursed the company.

At around 1:30 a.m. on the morning of April 11, 2002, the claimant was driving her company furnished vehicle home from the nursing home in Camden, when she swerved to miss a deer. Her car left the road and struck a telephone pole, causing damage to the right front of her car. The claimant testified that the local sheriff was called to the scene to take an accident report. Afterwards, at approximately 2:45 a.m., the claimant stated that she drove her car to her home, which was approximately one quarter of a mile from the scene of the accident. After arriving home, the claimant stated that she went to bed. The claimant testified that she could not return to work the following day, but that she saw Dr. William Daniels instead.

Arkansas Code Annotated §11-9-102(4)(A) defines, in relevant part, a compensable injury as an accidental injury causing internal or external harm to the body ...

arising out of and in the course of employment. Section 11-9-102(4)(B)(iii) provides that the term "compensable injury" does not include an injury which was inflicted upon the employee at a time when employment services were not being performed. See also, Swearengin v. Evergreen Lawns, ___ Ark. App. ___ (February 11, 2004). Although the relevant statute does not define the phrases "in the course of employment" or "employment services", our Supreme Court has held that we are to use the same test to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within the "course and scope of employment" at the time of his accident. Swearengin, supra; citing from Collins v. Excel Specialty Prods., 347 Ark. 811, 69 S.W.3d 14 (2002). The test we use 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. Id.; Citing from Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). An employee generally has been found not to be acting within the course of employment when he or she is traveling to or from the workplace. Id.; Citing from Olsten v. Kimberly Quality Care v. Pattey, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the going-and-coming rule

ordinarily precludes recovery from an injury sustained while the employee is going to or returning from work. *Id.*; Citing from Woodard v. White Spot Café, 30 Ark. App. 221, 785 S.W.2d 54 (1990).

There are exceptions to the going-and-coming rule as outlined in Jane Traylor, Inc., v. Cooksey, 31 Ark. App. 245, 247, 792 S.W.2d 351, 352 (1990). These exceptions are as follows:

- (1) Where an employee is injured while in close proximity to the employer's premises;
- (2) where the employer furnishes the transportation and to and from work;
- (3) where the employee is a traveling salesman;
- (4) where the employee is injured on a special mission or errand; and
- (5) when the employer compensates the employee for his time from the moment he leaves home until he returns home.

In my opinion, this claim is barred by the going-and-coming rule. The claimant was traveling to her home at the time of her accident and was neither carrying out the employer's purpose nor advancing the employer's interest,

directly or indirectly. She was simply going home. The claimant testified that she had dropped by her office at the Camden facility prior to going home on the evening of April 10th, in order to copy inserts for packets she was preparing to use in a training session the next day. She further testified that, having completed as much as she could complete at her Camden office, she left for her home with the intention of completing her task upon her arrival there. Whether or not she would have finished preparing for the next day's training session immediately upon returning home, or at all, is a matter of speculation at this point. And, conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. Of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

Moreover, the claimant admitted that she was not performing an employment task at the time of the accident. In her own words, "I was driving home." (T-37) She also admitted that she planned to sleep, shower, and eat sometime before returning to work the following morning. (T-43) Again, it would be speculative to assume that she would not have done those things before finishing her work-related project. Furthermore, the claimant puts forth the notion that because she had her cell phone and laptop with her, and she was driving a company vehicle at the time of

the accident, she was somehow acting within the course and scope of her employment. However, prior court decisions have established that the rationale for the going-and-coming rule is based on the fact that all persons, including employees, are subject to the recognized hazards of travel to and from work. City of Sherwood v. Lowe, 4 Ark. App. 161, 628 S.W.2d 610 (1982). When traveling to and from the regular place of employment, the employee is not exposed to risks attributable to the employment. Instead, the employee is only exposed to risks which are common to all members of the general public. (Id.)

In Campbell v. Randall Tyler Ford Mercury, 70 Ark. App. 25 (2000), an employee was found not to be acting within the course and scope of his employment when he was involved in a fatal car accident on his way to work. At the time of the accident, the employee, Mr. Campbell, was driving a company car, and he had his employer furnished cell phone and work related documents with him. The Court of Appeals agreed with the Full Commission's reversal of the Administrative Law Judge's finding that Campbell was performing employment services at the time of his accident. In rendering its decision, the Court of Appeals quoted the Commission, in relevant part, as follows:

In our opinion, claimant's traveling to work does not elevate claimant'

activities to the level of activities which carry out the employer's purpose or advances [sic] the employer's interests. Claimant was not employed as a courier to transport documents. . . . As a finance manager, he [claimant] was required to work on sales contracts. Whether he worked on these contracts at home or at the office is immaterial to this claim, as the claimant was not working on a sales contract at the time of his injury.

In presenting his argument, the claimant in Campbell relied on the Pettey case, in which a nursing assistant was injured in an automobile accident on her way to a patient's home. Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). The Supreme Court in Pettey found that the claimant was required by the very nature of her job description to submit herself to the hazards of day-to-day travel back and forth to the homes of her patients, and as such was acting within the course and scope of her employment at the time of her injury. *Id.* The Campbell court, however, found that the nature of his job description did not require Mr. Campbell to carry contracts back and forth in his vehicle.

I find the Campbell case to be controlling in the present claim for the following reasons. First, although the claimant here had both her company furnished cell phone and laptop computer in the car at the time of her accident, she was using neither at the time of her accident. Second,

albeit as a nursing consultant the claimant was required to produce training materials for that aspect of her job, whether she worked on these materials at home or at the office is immaterial to this claim, as the claimant was not working on training materials at the time of her accident. Third, in regards to the claimant driving a car furnished by her employer when her accident occurred, the claimant was driving the car home at the end of a long work day. The claimant was clearly not traveling between work destinations.

Although an exception under the going-and-coming rule permits a finding of compensability where the employer furnishes transportation to and from work as an incident of the employment, Arkansas Power and Light Co. v. Cox, 229 Ark. 20, 313 S.W.2d 91 (1958); Chicot Memorial Hospital v. Veazey, 9 Ark. App. 18, 652 S.W.2d 631 (1983), the Court still looks to the totality of the evidence to determine compensability. The rationale for this exception is that the journey itself becomes an inherent part of the service because the employer's interests are somehow furthered by the travel, making the travel a substantial part of the services rendered. Cox, supra; Veazey, supra. Consequently, the exception is only applicable where there is a connection, or nexus, between the travel and the

employment. Rankin v. Rankin Construction Co., 12 Ark. App. 1, 669 S.W.2d 911 (1984); Veazey, supra. In determining whether there is such a nexus, the existence of a benefit to the employer is an important element. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1970). Consequently, even when the accident occurs in a vehicle furnished by the employer, the injury is not compensable if the vehicle was being used at the time of the injury for purposes purely personal to the employee. Howard v. Arkansas Power and Light Co., 20 Ark. App. 98, 724 S.W.2d 193 (1987).

If the claimant in the present case had been traveling between facilities at the time of her accident, the facts in this case would more closely match those in the Pettey case. And if this were the case, the above-stated exception might apply. The claimant was not traveling between facilities at the time of her accident, and the exception, therefore, does not apply. Instead, the claimant was using her car for personal reasons at the time of her accident: namely, traveling to her home. Perhaps the claimant would have done more work when she arrived home - perhaps not. It is undisputed that despite the claimant's stated intentions, she did not perform more work upon arriving home. Therefore, there is no evidence to support a

finding that a connection or nexus existed between the claimant's travel and her employment.

I also find that the dual purpose doctrine does not apply to the facts of this case. Specifically, as defined in Day v. Central Day Care, 38 Ark. App. 241, 833 S.W.2d 783 (1992), the dual purpose doctrine provides that an injury is within the scope and course of employment if it is sustained during a trip which serves both a business and a personal purpose, if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal injury. This rule was adopted by Arkansas in Martin v. Lavender Radio & Supply, Inc., 228 Ark. 85, 305 S.W.2d 845 (1957), which embraced this doctrine as enunciated by Judge Cardozo in Mark's Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929). Pursuant to the dual purpose doctrine, the decisive test is whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils. *Id.*; Lytle v. Arkansas Trucking Servs., 54 Ark. App. 73, 923 S.W.2d 292 (1996). Moreover, the service to the employer must at least be a concurrent cause for the travel, and "sufficient within itself to occasion the journey." *Id.*

The Courts have not addressed whether the dual purpose doctrine is still the law since the enactment of Act 796. Whether a worker is performing employment services depends on the facts and circumstances of each case.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001); See also, Matlock v. Arkansas Blue Cross and Blue Shield, 74 Ark. App. 332, 49 S.W.3d 126 (2001). As stated by the Supreme Court in Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002), the Court would impermissibly narrow or broaden the requirements of Act 796 if it were to automatically reject or accept the personal-comfort doctrine. Likewise, Act 796 would be impermissibly broadened or narrowed should the Court declare the "dual purpose doctrine" alive or dead. Rather, 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 her injury." In the present claim, the claimant was traveling home after a long day at work. She was not engaged in the service of transporting training material from one work facility to another, she was not dictating notes from the days activities, she was not checking or sending email over her laptop, nor was she conducting a business call on her cell phone. Thus, she was

not engaged in work-related travel. Instead she was simply returning home after work. Because the claimant was going home and she sometimes compiled work material at home, I cannot conclude that she was carrying out her employer's purpose or advancing her employer's interest, either directly or indirectly, when the accident occurred. See Daniels v. Arkansas Dept. of Human Services, 77 Ark. App. 99, 725 S.W.3d 128 (2002) (where a motor vehicle accident on the way back to work after lunch was not compensable although the claimant was going to work after lunch).

Accordingly, after analyzing facts of this claim, I cannot find that the claimant was performing employment services at the time of her accident.

Therefore, for all of the reasons set forth herein, I respectfully dissent from the majority opinion.

MIKE WILSON, Special Commissioner