

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301229

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| LAWRENCE Q. MOORE, EMPLOYEE | CLAIMANT |
| HELENA/WEST HELENA SCHOOL DISTRICT, EMPLOYER | RESPONDENT |
| RISK MANAGEMENT RESOURCES, CARRIER | RESPONDENT |

OPINION FILED FEBRUARY 2, 2005

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

Claimant represented by HONORABLE MIKE J. ETOCH, Attorney at Law, Helena, Arkansas.

Respondent represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed August 19, 2003.

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

1. The employee-employer-carrier relationship existed at all relevant times.
2. There is no agreement concerning the average weekly wage.
3. The preponderance of the evidence reflects that the claimant did not sustain a compensable injury on November 21, 2002. The preponderance of

the evidence reflects that the claimant was not performing "employment services" when he fell, injuring his back on November 21, 2002; and therefore, the injury did not arise out of and in the course of employment.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I dissent from the majority opinion. I find that the preponderance of the evidence establishes that claimant was performing employment services at the time of his injury. Accordingly, I find that claimant incurred a compensable injury.

At the time of his alleged injury, the claimant was elementary school custodian for the Helena/West Helena School District. The claimant testified that, after taking out the trash from the school cafeteria, he re-entered the cafeteria and observed one of the cafeteria workers attempting to shelve a number of food items which had been previously delivered. Even though it was not one of his job duties, he began helping her place the food items on shelves. He stated that he was giving his coworker assistance since she was very short and the shelves were high. Apparently, the cafeteria worker was removing cans of food from boxes, handing them to the claimant, who then placed them on the higher shelves. When the claimant had worked his way down to the lower shelves, he sat in a chair

which then broke, causing him to fall heavily on his back. The claimant then testified that after getting up, he completed the shelving project and then notified the appropriate person with his employer of his injury. He then returned to work and completed his duties of that day. He eventually sought medical treatment and it was determined that he had a herniated disc at L5-S1.

The claimant's version of events was essentially corroborated by the testimony of four other witnesses. Each of these witnesses was employed at the same school at which the claimant worked, and all stated that they had observed the claimant's accident. Essentially, all four ladies testified to the same thing. They all stated that the claimant entered the cafeteria at approximately 10:30 a.m. for the apparent purpose of taking a break. They all stated that when he observed one of the workers, Shirley Goings, attempting to stock the shelves, he went into the storeroom to assist her in this endeavor. All of the witnesses stated that they saw him putting items on the shelves and, likewise, sitting down in a chair which collapsed causing him to fall to the floor.

The majority's opinion discusses the claimant's testimony and how his various inconsistent statements regarding his injury and his child support obligation effected the claimant's credibility. The majority has concluded that the claimant had little credibility and that his testimony regarding being injured while stocking a shelf could not be relied upon, so the claimant therefore failed in his burden of proving that he was performing an employment service at the time of the injury.

I disagree with the majority's analysis and find that the testimony of the four witnesses who corroborated the claimant's testimony is entitled to great weight. In reviewing the testimony of these four coworkers, I find that their testimony was almost identical in all of the relevant particulars. All of the four witnesses, including the lady whom the claimant was assisting when the injury occurred, emphasized that he was putting the groceries on the shelves when the accident occurred. While the majority does mention the testimony of these witnesses, they do not give any reason as to why they chose not to rely on the credible testimony of these witness and instead concluded that the claimant's injury occurred while he was on a lunch break.

The majority opinion states that the claimant's demeanor is further cause to doubt his credibility. However, it obvious from reading the claimant's testimony both at the hearing and in his deposition, that he is not an articulate man nor is he used to participating in formal proceedings. Further, he underwent a rigorous cross examination and became somewhat flustered and confused, which is exemplified by respondent's counsel's questioning of "arrearage." The claimant, who was obviously confused by this term, stated that he was current on his child support payments. The child support records indicate that several months prior to the hearing the claimant was ordered to make weekly payments toward his outstanding arrearage in addition to his regular child support amount. At the time of the hearing, the claimant was current on those payments. Therefore, I find that this discrepancy is adequately explained. In sum, I find that claimant's testimony, when taken in conjunction with that of his four coworkers, is sufficient to establish that he injured his back while performing employment services that directly benefitted his employer.

I also believe that the majority decision errs on another ground. Specifically, after concluding that the

claimant's testimony was no longer credible, they determined that the claimant was not performing an employment service at the time of his injury. However, the majority neither discussed or explained the basis of that conclusion.

Presumably, they are accepting the respondent's assertion that since the claimant was on a "break" or eating lunch, he was not performing an employment service. In my opinion, that conclusion is not supported by the applicable case law.

I find that the facts presented here are similar to those of Ray v. University of Arkansas, 66 Ark. App. 177, 990 S. W.2d 558 (1999). In Ray, the claimant was an employee of the University of Arkansas who was working in the student union. The claimant was on a break, eating her lunch, and was injured while getting some food from the salad bar. The Court reversed the Commission and held that the claimant was performing an employment service because she was required to provide assistance to students or others needing help while she was on a break.

Essentially the same situation is presented here. Respondents contend that the claimant was on a lunch break when he was injured while sitting down on a chair. However, the claimant's job was that of a custodian, which means that

he was required to perform general duties regarding the upkeep and cleaning of all of the ground and buildings of the school as those needs arose. Clearly, even if he was on a lunch break in the cafeteria, events could arise that would require him to immediately return to regular duty. The claimant and his coworkers established this through their testimonies. Therefore, even under the theory advanced by the respondent, the claimant herein, just as the claimant in Ray, should be entitled to benefits even if he was injured while beginning his lunch break.

For these reasons, I dissent from the majority opinion and find that claimant incurred a compensable injury in the course and scope of his employment.

SHELBY W. TURNER, Commissioner