NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210325

VERNEAL WILLIAMS, EMPLOYEE	CLAIMANT
SOUTHWEST SECURITY COMPANY, INC., EMPLOYER	RESPONDENT NO.1
COMMERCE & INDUSTRY INSURANCE CO., CARRIER	RESPONDENT NO. 1
SUPERMARKET INVESTORS, INC., D/B/A/ HARVEST FOODS, EMPLOYER	RESPONDENT NO. 2
LIBERTY MUTUAL INSURANCE CO. CARRIER	RESPONDENT NO. 2

OPINION FILED DECEMBER 16, 2005

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

Claimant represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE MICHAEL E. RYBURN, 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 February 28, 2005.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the claimant was an employee of Southwest Security Co.,Inc., at all pertinent times, including September 1, 2002, and that his average weekly wage was $250.00.

3. The preponderance of the evidence fails to show that the claimant suffered injuries arising out of and in the course of his 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.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The claimant appeals the decision of the Administrative Law Judge finding that he did not sustain a compensable injury. Specifically, the Administrative Law Judge found that the claimant failed to show that his injury occurred during the course of performing employment services. The Administrative Law Judge did not specifically address whether the claimant was an employee of both

respondents. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own.

After a de novo review of the record, I find that the claimant’s injury was sustained during the course of performing employment services. For this reason, I respectfully dissent. In my opinion the claimant was an employee of both companies, and has proven by a preponderance of the evidence that remained in his healing period and should be entitled to temporary total disability benefits for the six weeks he missed work after his injury. However, as the Majority found the claimant was not performing employment services, I will not specifically address the issues of temporary total disability benefits and joint liability of the respondents.

The claimant worked as a security guard for Respondent No. 1, Southwest Security Co., Inc. Respondent No. 1 provided security guards for Respondent No. 2, Affiliated Foods Southwest, which does business under the name of Harvest Foods. The claimant worked as an hourly employee that was assigned to various work locations by

Respondent No. 1 and was paid by Respondent No. 1. Respondent No. 1 would give the claimant orders; however, once the claimant was at a particular assignment, he would be responsible for following orders from employees of Respondent No. 2.

On September 1, 2002, the claimant, while dressed in his uniform, went to eat lunch at the work place of Respondent No. 2. The claimant had previously worked at the Main Street location, where he was eating, but was not scheduled to work at that location on September 1, 2002. As the claimant walked in the door, Bonner Force asked the claimant to help stop a shoplifter. The claimant got into a "scuffle" with the thief and injured his hand and wrist. The claimant indicated, "- -we wrestled to the floor. I didn't get my hand out from under him quick enough. It hit a paper stand. And I heard something kind of pop, but it didn't bother me till later on that evening."

The claimant testified that he reported the injury after he got off work that night. On September 2, 2002, the claimant went to the doctor. A radiology report from that

date indicates, “Oblique fracture through the base of the right fifth metacarpal.” The Emergency Room Report from that date indicates, “REVIEW OF SYSTEMS: Negative, except for pain and swelling to right hand.” Under a section entitled “EXTREMITIES” the emergency room report reads,

> The right upper extremity is neurovascularly intact. The skin is intact. There is no gross bony deformity noted, but he is noted to have some mild swelling and tenderness located over the dorsum of the right hand, particularly overlying the fifth metacarpal proximity.

The claimant’s arm was placed in a splint. A doctor’s note from September 5, 2002, indicated that the claimant was in need of “internal fixation”. The note further stated that the procedure would be done in the “next day or so” as an outpatient procedure. The procedure was performed on September 6, 2002. The doctor’s note also indicated the claimant was instructed to elevate the hand. On September 18, 2002, the claimant’s treating physician, Dr. Tom Rooney indicated, “The fracture is internally fixed with two screw so I think it needs to be immobilized for

further protection for another month, so a short-arm fiberglass cast was applied and I will see him in a month."

On November 18, 2002, Dr. Rooney released the claimant to return to work and indicated the claimant had "full function" of his hand. A letter form Dr. Rooney indicates,

> On reviewing Verneal's chart, the last mention I have of him returning to work was on 11-18-02. This would have been 2 ½ months following the surgery on his hand. I don't have any mention of it in his record, but I think it would have been fair to give him a couple of more weeks before he could safely expose his hand to further injury.

The claimant testified he was released to return to work immediately after the injury, but said he did not because he would be unable to use his right hand in handling his gun. The claimant testified he had used his gun while working twice in the past year. He further testified that the employer had work that would not require use of his right hand, but that he was never asked to work in that position. He also indicated that there was discussion of that position, but that it was never scheduled. The claimant

testified he was off work for six weeks following his injury.

The Majority, by adopting the decision of the Administrative Law Judge as their own, opines that the claimant was not acting in the course and scope of employment at the time of the alleged injury. They argue that the claimant was not working at the time he sustained his injury and therefore, was not performing employment services as required to receive benefits due to sustaining a compensable injury.

Arkansas Workers' Compensation law defines a compensable injury as, "An accidental injury causing internal or external physical harm to the body ... arising out of the course of employment and which requires medical services or results in disability or death. A.C.A. §11-9-102(4)(A)(i). Employment services are performed when the employee does something, "within the time and space boundaries of employment," and the injury occurred when the employee was acting to benefit the employer directly or indirectly. Collins v. Excel Spec. Products, 347 Ark. 811,

69S.W.3d 14(2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1(2002).

The Majority and respondents argue that the claimant was off duty and in a location at which he was not scheduled to work. However, in my opinion, that does not preclude a finding that the claimant was acting in the course of employment. Instead I find that the claimant was furthering the interests of both employers and was performing employment services.

There are several cases which are relevant to the issue at hand. The first three involve police officers. In City of Sherwood v. Lowe, 4 Ark. App. 161; 628 S.W. 2d 610, (1982), the claimant was a police officer that was off duty but wearing his uniform. At the time of his injury, he was driving a personal motorcycle which had been equipped with police lights. The Court indicated that even though the claimant was off duty, he appeared to be on duty and the employer derived benefit by virtue of the fact he appeared to be on duty. Accordingly, the claimant was deemed to be performing employment services at the time of his injury.

Similarly, in City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430, (1987), the claimant was an off-duty police officer that was deemed to be performing employment services. The claimant was off duty and injured when accosted by a criminal suspect he had testified against. The Court indicated that the claimant was motivated by the public interest and that the employer benefitted from his actions.

Likewise, in James Bragg v. City of Stuttgart, Claim No. F312185, (Opinion filed July 18, 2005), the Commission held that an off-duty police officer was acting in the scope of employment despite not being on duty. In Bragg, the claimant was off-duty and eating dinner when the owner of the restaurant asked the claimant to assist him in removing an intoxicated patron. At the time the claimant was out of his jurisdiction, but in an area where his employer had agreed to provide police services. The respondent argued that the agreement between the claimant's employer and that of the police department in the area where he was injured was improper and that as a result the claimant was not

acting in the course of employment. The Commission rejected this argument, reasoning that regardless of whether the agreement was proper, all parties involved believed the policy was correct and that their actions were valid.

Finally, I note the case of Spence v. Miller Trucking, 1996 AWCC 64, Claim No. E410594, (Opinion filed April 16, 1996.) In Spence, the claimant worked as a truck driver. While making a delivery to Sunbeam, a company in a leasing contract with his employer, the claimant was injured while assisting another driver that worked for Sunbeam in closing his trailer door. The Commission reasoned that while the claimant was not engaging specifically in his primary function of driving, loading, or unloading his trailer, he was acting towards a common interest of making sure that the cargo was properly loaded, transported, and unloaded. The Commission further indicated that because of the claimant's common interest with the worker he assisted, he was rendering employment services.

In this instance it is undisputed that the claimant was not “on the clock” at the time of his injury. However, he was acting in the employer’s best interest by rendering a thief on behalf of the employer. Though the claimant is not a police officer, his functions were similar to that of a police officer and the benefits gained by the employers were largely the same as that would be derived if he were a police officer. As a security guard he was responsible for protecting Respondent #2's property and interests and was wearing a uniform and a gun. This attire helped maintain peace in the store and acted as a deterrent for shoplifting and other unlawful actions. While the respondents argue the claimant had been reprimanded for wearing his uniform while off duty, the claimant denies receiving such warning. Furthermore, the claimant had worked in this location before and his attire made him appear to have authority to patrons of the employer and to the employer’s personnel. Accordingly, both respondents benefitted from him being there and his actions acted as a deterrent for illegal behavior by customers.

Additionally, just as in the cases listed above, there is no dispute that the employers benefitted from the claimant’s services and that those were the types of actions the employers expected him to engage in during his ordinary work duties. Lastly, had the claimant failed to act, it likely would have resulted in the loss of property for Respondent No. 2, and almost certainly would have caused ill-will between the two respondents.

For the aforementioned reasons, I respectfully dissent.

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SHELBY W. TURNER, Commissioner