

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410155

RONNIE CONNER,
EMPLOYEE

CLAIMANT

TEXARKANA SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RICK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED AUGUST 15, 2006

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on August 18, 2005. Based upon our de novo review of the record, we find that the claimant's injury sustained on or about September 21, 2004 is compensable in that claimant was engaged in employment service at the time of the injury. Accordingly, we reverse the Administrative Law Judge's August 18, 2005 decision denying the compensability of claimant's September 21, 2004 injury.

The claimant has alleged that he suffered a compensable injury on or about September 21, 2004. The claimant, at the time of his injury, was employed by the respondent as a custodian at Texarkana High School. After returning from a personal errand, he was attempted to open a set of gates which allowed entry onto the respondent's parking lot. The claimant testified that when he attempted to use his key to open the gate, the gate fell pinning him underneath. As a result of this accident he suffered a severely broken leg and incurred medical expenses and a period of disability. The respondent controverted the claimant's entitlement to benefits on the basis that he was not performing an employment service at the time of his injury.

The respondent concedes that there is no real dispute over how the claimant was injured or the nature of his injuries. The specific issue presented for determination is whether the claimant was performing an employment service as that term is used in Ark. Code Ann. §11-9-102 (4)(B)(iii). That section provides that an injury is not compensable if the injury is sustained at a time when employment services are not being performed. In applying that section to actual cases, the Arkansas Supreme Court has recently held that the test for

determination is whether the employee is directly or indirectly advancing the interest of the employer at the time of the injury. See Moncus v. Billingsly Logging, ___, Ark. ___, ___ S.W.3d ___ (Arkansas Supreme Court, May 18, 2006).

We believe the claimant provided sufficient evidence at the hearing to meet this standard. Admittedly, prior to his injury, the claimant had been on a personal errand. However, when his injury happened he had returned to the respondent's property and was attempting to open a gate to obtain access to the respondent's parking lot. We believe the claimant was returning to work at this point and was providing a benefit to his employer in doing so.

We reach that conclusion because the claimant was on-call, and subject to being required to perform services for the respondent any time he was on their property. The claimant testified that he was carrying a walkie talkie which kept him in communication with his superior. He also testified that even on his lunch break, if there was something which arose that needed his attention, he was required to end his break and carry out his job duties.

It is also significant that the reason the claimant was using the locked gate is because the normal entrance to

the parking lot was blocked by an apparently disabled truck. In providing access through this gate, the claimant was performing a service to the employer in allowing access to the parking lot.

This situation is very similar to that in Ray v. University of Arkansas, 66 Ark. App. 173, 990 S.W.2d 558 (1999). There, the claimant was a cafeteria worker at a student dining room at the University of Arkansas. The claimant was injured while she was eating lunch. However, the claim was found to be compensable because the claimant was subject to being required to perform work during the time she was on her lunch break. We find that the facts of this case bring it into accord with the Ray decision. The claimant, at the time of his injury, had returned to the employer's premises and was, once again, on-call and subject to being required to carry out all of his employment duties. We therefore find that, at the time of his injury, the claimant was carrying out his employment duties and was advancing the employer's interest. On that basis, We conclude that his accident was job-related and that his injuries are compensable.

Another issue which was raised at the hearing was the employer's request for an offset against their liability pursuant to Ark. Code Ann. §11-9-411. This request should be granted as to the group health insurance benefits the claimant received for his medical treatment. Accordingly, We find that the respondent should be allowed to offset the medical benefits but, should also be required to hold the amount of his offset in reserve for a period of five years, subject to a claim being made by the health insurance carrier. If no claim is made during that period of time, the respondent should pay the amount of the offset to the Death and Permanent Total Disability Trust Fund.

The respondent has also requested that they be granted a credit based upon certain income the claimant received from a "sick leave bank" maintained by his co-employees. Receipt of this income arose because the claimant's injuries left him disabled from the date of the injury through April 28, 2004. For 18 days, he received his full salary based upon accumulated sick leave. After that, he began receiving a portion of his salary based upon contributions of sick leave made by co-employees into the

fund, the purpose of which is to pay benefits to sick or disabled school district employees who lack accumulated sick leave to cover their periods of disability.

The respondent's request for a credit is based upon Ark. Code Ann. §11-9-411 which provides that a respondent is entitled to a credit when an injured worker receives payments from a group health or disability insurance plan. However, the income the claimant received through the leave bank is clearly not group insurance benefits. Since we are required to interpret the Act strictly (see Ark. Code Ann. §11-9-704 (c)(3)), the respondent cannot be allowed to offset any benefits the claimant is entitled to based upon the sick bank payment.

The other section which might provide a credit for the respondent is Ark. Code Ann. §11-9-807. Part (B) of that section provides that injured employees are not entitled to receive compensation during any period in which they are receiving their full wages. However, the undisputed testimony was that the income the claimant received from the sick leave bank was at a reduced amount and was, therefore, not his full wages. On that basis, we find that the respondent is not entitled to a credit to an offset based upon Section (B).

Subsection (A) states that an employer may be reimbursed for compensation if they have made advanced payment of compensation. However, Arkansas Courts have held that in order to obtain reimbursement or an offset under Part (A) of Ark. Code Ann. §11-9-807, the respondent must prove that, at the time the benefits were paid, both parties (that is the claimant and the respondent) understood that the payments were intended to be in lieu of workers' compensation benefits. Here, since the respondent has controverted the claim, it cannot be plausibly argued that any money the claimant received during the disability was intended to be in lieu of workers' compensation benefits.

Since the money the claimant received from the sick leave bank was not group insurance benefits, was not his full wages, or an advanced payment of compensation, we find that the employer is not entitled to an offset or credit based upon the claimant's receipt of this income. On that basis, we would further find that the respondent should be ordered to pay the claimant temporary total disability benefits from September 27, 2004 through April 28, 2005, except for any weeks through that period where the claimant received his full salary. While we realize that this would seem to be a

windfall for the claimant, we are bound by the Workers' Compensation Act to strictly interpret its provisions. Accordingly, we believe we have no recourse other than to order the respondent to pay those benefits to the claimant.

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

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Specifically, I dissent from the majority's finding that the claimant was performing employment services at the time of his injury on September 21, 2004. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that the claimant was returning from an errand when he sustained an injury while unlocking a gate. The claimant had not unlocked that gate in 26 years of his employment with the respondent-employer. In fact, when the claimant left the school property he left through the guard gate. He was gone approximately 15 minutes and when he returned to the parking lot from his personal errand he testified that there was a truck blocking the entrance by the guard shack. The claimant went to the back of the parking lot, which is closed by a locked gate. He got out of his car to unlock the gate and when it opened, it fell, injuring his knee. As stated previously, in his 26 years of

employment as the school custodian the claimant has never opened that gate before.

The claimant admitted that he was free to do whatever he wanted to do during his lunch hour from 11:30 a.m. to 12:30 p.m. The claimant agreed that he did not have to return to the school until 12:30 from his lunch break, if he did not want to. The claimant was free to leave the campus and go run personal errands or eat elsewhere on his lunch break.

The evidence also demonstrates when the claimant returned to school after running his personal errand, he could have parked in a different parking lot, rather than trying to unlock the gate to gain back entrance to the parking lot he selected. He was the only car trying to get in that parking lot when the incident occurred. It is also noted that it was the guard's responsibility to unlock those gates if they needed to be unlocked.

The majority has made much of the fact that the claimant is "on-call" during his lunch break. However, according to the claimant's testimony he stated it was very rare for him to get called off of lunch to do some work. Furthermore, he did not have to clean the cafeteria until 1:30 p.m.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he was performing employment services at the time of his injury. The claimant had left the school premises to go run a personal errand and was unlocking gate that he had not opened in 26 years of employment with the respondent employer when he was injured. He was entering a parking lot that was not the only parking lot available for him to park in. Furthermore, the claimant had 45 minutes left of his lunch hour at the time of the accident.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 21, 2004.

KAREN H. MCKINNEY, Commissioner