

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409394

MARK FIELD,
EMPLOYEE

CLAIMANT

USA TRUCK,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 11, 2006

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

Claimant represented by the HONORABLE KEITH WREN,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE J. RODNEY
MILLS, Attorney at Law, Van Buren, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed August 11, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On July 30, 2004, the relationship of
employee-self insured employer existed
between the parties.
3. On July 30, 2004, the claimant earned
wages sufficient to entitle him to
weekly compensation benefits of \$453.00

for total disability and \$340.00 for permanent partial disability.

4. On July 30, 2004, the claimant sustained a compensable injury to his left leg. Specifically, the greater weight of the credible evidence shows that at the time of the accidental injury to the claimant's left leg, he performing (sic) activities that indirectly benefitted the respondent employer (in that he was returned to his work station to resume his regularly assigned employment activities). Further, the evidence presented shows that the claimant's injury to his left leg arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal harm to his body, required medical services and resulted in temporary disability, is "established" by the medical evidence, and is supported by "objective findings".
5. The medical services initially provided to the claimant for the compensable injury by the personnel at the hospital in the Atlanta, Georgia area and the subsequent medical services provided to the claimant by and at the direction of Dr. Jeffrey Sandman represent reasonably necessary medical services for the claimant's compensable injury. The respondents are liable for the expense of these services, subject to the Commission's medical fee schedule.
6. The claimant is entitled to temporary total disability benefits, under the provisions of Ark. Code Ann. §11-9-521(a), for the period beginning July 31, 2004, and continuing through a date yet to be determined.
7. The respondents have denied the occurrence of a compensable injury to the claimant's left leg and have

controverted his entitled (sic) to any benefits.

8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the indemnity benefits herein awarded and which may hereinafter be awarded to the claimant for his compensable injury.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 11, 2005, decision 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 on appeal.

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, in relative part, that the claimant sustained a compensable injury to his left leg on July 30, 2004, in the course and scope of his employment. My carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove

by a preponderance of the evidence that he sustained a compensable injury to his left leg on July 30, 2004, while performing employment services for the respondent employer.

On July 30, 2004, the claimant was employed as a driver/trainer for the respondent employer. As such, the claimant testified that he was paid for his work "by the mile". It is undisputed that on the evening of July 30, 2004, the claimant was struck by a car as he was crossing a street either on his way to or from a Waffle House in Jonesboro, Georgia, which is near Atlanta. The claimant received emergency medical treatment for his injuries at nearby hospital. Thereafter, the claimant received medical treatment primarily under the direction of orthopedic physician, Dr. Geoffrey A. Sandman of Grand Rapids, Michigan.

The claimant's student co-driver, Mr. Tom Clark, who according to the claimant was an eye witness to the event, was not available to testify. The claimant, however, testified as follows concerning events surrounding the incident of July 30, 2004. First, the claimant testified that Mr. Clark was operating the truck upon their arrival in Jonesboro. The claimant further testified that at approximately 6:30 p.m., they received notice from central dispatch that they would

need to swap loads with another truck in the Atlanta area. The team arrived in Jonesboro, Georgia, at approximately 7:55 p.m. Eastern Standard Time. According to the claimant, who stated he was still in the sleeping berth of the truck, Mr. Clark parked the rig in an empty lot across from a Waffle House restaurant off of the Old Dixie Highway because the claimant was familiar with that particular location. The claimant stated that this location was approximately 8 to 10 miles from the drop yard.

After reiterating their arrival time, that they parked across the street from a newly constructed Waffle House, and that Mr. Clark was driving, the claimant continued ...

A. Tom had been driving and it was my turn to drive. So we did our log books up to that point, and I was getting dressed and clearing out the bunk so he could sleep, and he went across the street to the Waffle House.

Q. Okay.

A. I was waiting for dispatch to call me on the Quall-Comm to see where we were going. Well they didn't and they didn't, you know, get back with me. I sent them two or three messages. So I said to heck with it, I had to get to the bathroom. So after I got done doing my paperwork, putting my clothes and stuff up, changing clothes, I went across the street to use the phone to call dispatch.

The claimant explained that he could not get a signal on his cell phone, so he went across the street to call the 1-800 dispatch number from a pay phone. The claimant testified that he did, in fact, call the Van Buren dispatch office and spoke to someone there who answered the phone, but was then put on hold for 10 to 15 minutes. The claimant further testified that when no one got back to him on the telephone line, he finally hung up and went in the Waffle House to use the restroom. Afterwards, he told his co-driver, Mr. Clark, that dispatch had not returned his call, and then the two of them had a brief conversation as Mr. Clark finished his meal. The claimant testified that the crux of their conversation was job related. On cross-examination, the claimant admitted that he "took a sip of tea" while he was visiting with Mr. Clark in the Waffle House. He further stated that he spent a total of 15 to 20 minutes in the restaurant following the phone call he made earlier to dispatch. The claimant stated that after Mr. Clark finished his meal and paid his meal ticket, they stepped outside to smoke, then the two of them started back to the truck.

It was allegedly during his walk back to the truck that the claimant was struck from behind by a female driver who had veered off of the road.

I crossed Old Dixie Highway - - it's a two-lane highway with a turn lane in the middle via what the police report shows - - I crossed the street and there's a little sidewalk, asphalt - - more like a drainage ditch thing that goes into a sidewalk, I got about 30 feet from the rear-end of my trailer, Tom was standing in the middle of the highway and a girl was coming down the road and she must have - - she said she looked at Tom - - she looked at Tom and when she turned around she veered off the road and that's when Tom yelled at me, and she hit me from behind.

The claimant's testimony concerning the events that occurred after Mr. Clark parked the truck contradicts prior statements he had made to his fleet manager, Mr. John Noggle, and to comp analyst supervisor for the respondent employer, Ms. Carol Webb. Further, other evidence presented in the record, such as phone logs, the police report, and the claimant's DOT log, clearly contradict the claimant's version of the times and events surrounding his accident.

For example, phone logs introduced into evidence by the respondent reflect that on the evening in question, someone from the Atlanta, Georgia area called the Van Buren central dispatch office at 6:03 p.m. Central Standard Time. As the claimant and his co-driver were not in Atlanta at that time, and based upon

the claimant's testimony that they received a Quall-Comm message at approximately 6:30, this call likely reflects a call from the other truck hoping to swap loads with the claimant. The next call received at the Van Buren office from Georgia on the evening of July 30, 2004, occurred at 9:38 Central Standard Time. This call was specifically placed from Jonesboro, Georgia, which is where the claimant was at the time of his accident. Since it would have been 10:38 p.m. Atlanta time when this call was placed, it had to have been made by the claimant's co-driver, Mr. Clark, who obviously did not accompany the claimant to the hospital, but rather, stayed with the truck. This conclusion is logical considering that the accident report and the claimant's testimony demonstrate that the accident occurred at 9:58 p.m. Eastern Standard Time. Therefore, it would have been physically impossible for the claimant to have phoned dispatch an hour after the accident, considering that his emergency medical treatment was well under way by that time. This leaves reasonable minds to conclude that Mr. Clark made the call in question, which was identified by the claimant as the call that corroborates his story. Otherwise, there is no documented entry of a call from the Jonesboro, Georgia, area at the approximate time the claimant alleges he phoned the Van

Buren dispatch office and was placed on hold, which according to his testimony, would have been around 8:45 p.m. Eastern Standard Time.

The claimant testified that he did not personally contact anyone about his accident until the next day, which was Saturday, July 31, 2004. The deposition testimony of Mr. Noggle reflects that he first learned of the accident on Monday, August 2, by way of a note from a dispatcher who had been on duty that weekend. When Mr. Noggle first spoke to the claimant about the incident on the following Wednesday, Mr. Noggle testified that the claimant informed him that "he and his student [Mr. Clark] were crossing the road going to the Waffle House to get something to eat..." when the accident occurred. Further, Mr. Noggle verified the authenticity of the phone records showing that a call was made to dispatch from the Jonesboro area at 9:38 p.m. Central Standard Time, (or 10:38 p.m. Eastern Standard Time) on July 30, 2004.

The testimony of Ms. Webb reflects that her first and only conversation with the claimant concerning the accident of July 30, 2004, occurred on September 8, 2004. Regarding the details of her conversation with the claimant, Ms. Webb testified as follows:

He contacted me and was questioning how his bills were going to be paid and I asked him what happened and he indicated that he and his student had gotten lost so they parked and were going to get something to eat and he was struck by a vehicle.

In his rebuttal testimony, the claimant stated that he was well familiar with the Jonesboro area, and he denied telling Ms. Webb that he had gotten lost. The claimant further denied having made prior statements that he was going to the restaurant at the time of the accident. Unfortunately, the medical records offer no insight as to the particular circumstances surrounding the claimant's injury. The accident report, however, tells a great deal about the nature of the claimant's accident.

Although the accident report does not state which direction the claimant was traveling when he was struck by the oncoming vehicle, it clearly shows that he was in the street at the time, not on the sidewalk as he had testified. Furthermore, the accident report does not indicate that the car that struck the claimant veered off of the road in any way. Moreover, the accident report lists another pedestrian, Marty Marlow of Griffen, Georgia, as the only witness to the incident. This not only contradicts the claimant's testimony that

Mr. Clark witnessed the accident and even tried to warn him of the approaching vehicle, it begs the obvious question: if the claimant was walking back to the truck with Mr. Clark, who allegedly witnessed the accident, why was Mr. Clark not required to give a statement to the police. In addition, if the claimant was in the street, as the accident report shows, he would have logically been struck in the left leg if he was crossing the street on his way to the Waffle House. Moreover, according to the accident report, the claimant stated that he was "crossing the roadway" when he was struck by the vehicle; not that he was on an asphalt sidewalk when the vehicle veered off the roadway and struck him.

Finally, the claimant's DOT log reflects that he had logged out and was on "off duty" status from approximately 8:30 p.m., forward on the evening of July 30, 2004. A careful review of this log reveals that the times reflected on the log are representative of the "local time standard at the home terminal", which in the claimant's case was Van Buren, Arkansas. Therefore, whereas the claimant logged off duty at 8:30 Van Buren or Central Standard Time, he literally logged off duty at 9:30 p.m. Atlanta time. The ramifications of this, especially considering the claimant's testimony, are obvious. As previously stated, the accident occurred at

9:58 p.m., which would not have given the claimant time to do all of the things he described in his testimony prior to this event.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as an accidental injury causing internal or external physical harm to the body, arising out of and in the course of employment and which requires medical services or results in disability or death. Further, an injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident", so the employee is required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Generally, a compensable injury does not include an injury which was inflicted upon the employee at a time when employment

services were not being performed. Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); citing, Ark. Code Ann. §11-9-102(4)(B)(iii). Finally, the injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In determining that the claimant's injury occurred while he was performing employment services, and is, therefore, compensable, the Administrative Law Judge, and now the majority, rely on the Arkansas Supreme Court's interpretation of our workers' compensation Act in the Pifer, supra, and the Court of Appeals interpretation of the Act in Ricky Wallace v. West Fraser South, Inc., CA 03-1335 (Arkansas Court of Appeals 2-16-2005); later decided by the Arkansas Supreme Court as Ricky Wallace v. West Fraser South, Inc., CA No. 05-254, (Opinion delivered 1-6-2006). The Court defined "employment services" in Pifer as follows:

An employee is performing employment services when he or she is doing something that is generally required by his or her employer.

In order to determine when an employee is performing employment services, the Pifer Court set forth the following test:

We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within the "course of employment." *White v. Georgia Pacific.*, supra; *Olsten Kimberly*, [328 Ark. 381, 944 S.W.2d 524 (1997)]. 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." *White v. Georgia-Pacific Corp.*, 339 Ark. at 478, 6 S.W.3d at 100 and *Olsten Kimberly*, supra.

In Pifer, supra, the Court found that Mr. Pifer was performing employment services when he was injured while he was returning to his truck from the restroom. Similar to the facts in the present claim, late on the evening of June 7, 1999, Mr. Pifer, a truck driver, had returned to his employer's terminal after delivering a load. In need of a restroom break, Mr. Pifer locked down his truck, and "ran to use the bathroom upstairs." Upon completion of this task, he stopped and spoke briefly with co-workers. Afterwards, Mr. Pifer started to return to his truck in order to do his paperwork, complete his log book, secure the truck,

and do a safety check. While returning to his truck, Mr. Pifer was struck by a co-worker's pick-up truck. In affirming the compensability of Mr. Pifer's injury, the Court refused to automatically accept or reject a personal-comfort activity, i.e., restroom break, as providing employment services. Rather, the Court looked to whether the employer's interest were being either directly or indirectly advanced by the claimant at the time of injury.

Subsequent to the Administrative Law Judge's decision, the Arkansas Supreme Court issued its opinion in Wallace, supra. The Court found that Mr. Wallace was engaged in employment services when he slipped and fell off of a muddy plank, thus injuring his knee. Mr. Wallace was on his way back to his work area from a scheduled break when the incident occurred. Wallace's testimony was inconsistent and ambiguous concerning the events that led to his injury and the time at which his alleged accident occurred. However, the Court stated that because the claimant's injury occurred as he was returning to work after coming off of a scheduled break, he was advancing the employer's interests. In finding that Mr. Wallace was performing employment services at the time of his injury, the Court made clear that it was not adopting a "bright-line rule that an employee who is

on break is *per se* performing employment services." The Court explained as follows:

We need not address that issue [*per se* performing employment services] because we conclude, on the facts of this case, that Wallace was performing employment services at the time of his injury. As in *Pifer* and *Matlock*, Wallace was returning to his work area after an authorized rest period. Wallace testified that in the past, he had been asked to return to work during his break. We note similarities to *Ray v. University of Arkansas, supra*, where the employee was required to assist students if required, even during a paid break period. In addition, Wallace remained on the clock and was not able to leave his workplace during break. In *Wal-Mart Stores, Inc. v. King, supra*, the court of appeals held that where an employee was required to go to the employee lounge for her break and was required to assist customers during her break, if requested to do so, the employee was performing employment services.

In a concurring opinion, Justice Robert L. Brown stated his agreement that compensability must be determined on a case-by-case basis. He further stated that the pivotal facts in the Wallace case were that he was on a regularly scheduled paid break in mid-afternoon and on company property at the time of his injury.

In contrast to the above cited cases, in other relatively recent decisions, our courts have found that

employees who were in similar situations as that of this claimant's, were not performing employment services at the time of their injuries. For example, in Kinnebrew v. Little John's Trucks, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999), the claimant was found not to be performing employment services when he fell while taking a shower while he was off duty. More particularly, the claimant, a long-haul truck driver, stopped at a truck stop pending further instructions, per the advisement of his dispatcher. After notifying his dispatcher of his arrival at the truck stop, the claimant parked his truck and was off-duty until the following day in compliance with DOT regulations. Later in the evening, the claimant slipped and fell while showering, injuring his back. In finding that he was not performing employment services at the time of his injury, the Court stated:

This court has affirmed on a number of occasions the Commission's factual findings that a claimant injured while performing a personal task, even while on the employer's premises, was not performing "employment services" for the 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 and scope of 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.** (Emphasis added)
Showering is not inherently necessary for the performance of the job he was hired to do.

Likewise, in Cook v. ABF Freight Systems, Inc., CA 04-266 (Ark. App. 10-6-2004), the appellant/claimant, an overnight bid driver, suffered an electrical shock while turning on a light switch in his motel room. Although the claimant was provided a motel room by his employer, and he was expected to be "on-call" while at the motel, the claimant was not on the clock nor was he being paid for his "rest break". The Court of Appeals affirmed the Commission's finding that the claimant was not performing employment services at the time of his injury, and that his injury was, therefore, not compensable. Distinguishing this case from the Pifer decision, the Court stated:

While the supreme court held in Pifer that the use of "toilet" facilities while at work is a necessity and that an employee who is injured while using the toilet during working hours is performing employment services, ... [h]ere, Cook was "off the clock" and taking a mandated eight-hour overnight rest break when the accident occurred.

The Cook court concluded that the performance of routine personal grooming and related tasks upon

arising in the morning are not the performance of employment services for the purposes of compensability.

The present case is clearly distinguishable from the Pifer, supra, and Wallace, supra, and is more consistent with the Kinnebrew, supra, as follows. First, in the present claim, the claimant testified that his co-driver, Mr. Davis, was driving and that he was in the sleeping berth at the time of their arrival in Jonesboro, Georgia. The claimant admitted that they had not been instructed to stop at the Waffle House, which was about 8 to 10 miles from the drop yard, but chose to do so because he was familiar with the location. Once they arrived and were parked, the claimant testified that he and Mr. Davis worked on their DOT logs. When they were finished working on Mr. Clark's logs, Mr. Clark walked to the Waffle House for supper, allegedly leaving the claimant behind to finish up some things as he waited on a message back from dispatch. Yet, although the claimant stated he finally said "to heck with it" because he needed to "go to the bathroom", he testified that he did not leave immediately to go to the restroom. Instead, the claimant stated that he first finished his paperwork, put away his clothes, then changed clothes. According to the claimant, even after he exited the truck, he did not immediately seek restroom facilities

as might be expected of someone with an urgent need to relieve himself. Rather, the claimant testified that he "went across the street to use the phone to call dispatch"; a phone call that allegedly lasted 10 to 15 minutes, but which was not reflected on the respondent's July 30th call log. After he allegedly abandoned his telephone call to dispatch, the claimant stated that he entered the restaurant in order to finally use the restroom facilities. Finally, the claimant testified that he stayed in the restaurant for about 20 minutes chatting with Mr. Clark before the two finally left, smoked a cigarette, then started for the truck.

Perhaps more important than his reason for allegedly going to the restaurant, the claimant acknowledged that the entries made in his DOT log on the evening in question reflect that the last entry he made was at 8:34 p.m. According to that entry, the claimant was "off duty" pursuant to DOT regulations from 8:34 p.m., forward. However, as previously discussed, this log clearly instructs drivers to log time pursuant to their local dispatch time zone. This being the case, the 8:34 p.m. entry logged by the claimant on the evening of July 30, 2004, reflects Central Standard Time. Therefore, the claimant actually logged off at 9:34 p.m. Eastern Standard Time.

Finally, the claimant denied that he had made the off duty entry, or that he was in fact "off duty" after 8:30 p.m., as he had previously testified. Rather, the claimant maintains that he was not really off duty, but rather "on duty" just "not working". This assertion, however, has no merit. The claimant had the option under category No. 4 of the log book of entering "ON DUTY (Not Driving)"; however, this is not the option he chose. An earlier entry shows that the claimant had logged in under the category 4 status at 1:00 a.m. until 1:15 a.m. that morning, thus indicating his knowledge of the appropriate use of that category. Further, the claimant testified that part of his duties were to instruct his students in the proper DOT reporting procedures. In fact, the claimant testified that an erroneous entry by Mr. Clark was one of the things they discussed in the restaurant. Surely then, when the claimant logged "off duty" at 8:34 p.m. on the evening of July 30, 2004, that is exactly what he meant to do. And even if the claimant intended to return to his truck in order to "resume his regularly assigned employment activities", the claimant's log entry does not reflect that intention. Further, the claimant admitted that he commonly logs "off duty" when he goes into a restaurant.

Regardless of the above and whether or not the claimant left his truck and went to the Waffle House to specifically use the restroom or for some other personal reason, and in spite of his stated intentions to resume his work activities upon returning to his truck, the determination as to whether he was performing employment services at the time of his accident should turn on the fact that he was officially off-duty when the incident occurred, and obviously headed to the restaurant at the time. The claimant had logged out and was off duty when he left his truck, and was, therefore, free to do whatever he wanted, whether that be use the restroom, have a glass of tea, or smoke a cigarette. Furthermore, although the Administrative Law Judge gave more weight to the claimant's version of his accident, and little weight to the testimony of Mr. Noggle and Ms. Webb, the telephone records, log book, and accident report are not biased in this matter. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). The fact remains that there was no call recorded at the time the claimant claims to have called dispatch on the evening in question. The one call that was made during the time in

question was made after the claimant's accident - not before. Further, considering such factors as the time the claimant logged off duty, the time the accident occurred, the location of the claimant at the time of the accident, and the fact that Mr. Clark was apparently not an eyewitness to the accident, the evidence preponderates against the claimant being hit by a car while returning to his truck.

In summary, the preponderance of the credible evidence contradicts the claimant's testimony concerning events surrounding his accident to such a degree as to render the claimant an incredulous witness. This is compounded by the fact that the claimant's key witness, Mr. Clark, did not even testify. Furthermore, the accident report, phone logs, and DOT log do not corroborate the sequence of events as set forth by the claimant. In conclusion, the pivotal facts in this case are as follows: at the time of his injury the claimant was not on a regularly scheduled paid break, he was not on company property, he was not engaged in employment activities, he was officially logged off duty, and there is no evidence that he was returning to his vehicle in order to resume employment activities. The unbiased evidence refutes the claimant's biased testimony, rendering it unreliable. Under the unrefuted facts of

the case, it is clearly unlikely that the claimant was on his way to the restaurant for his stated purposes of making a work related call to dispatch, or even strictly for the purpose of taking a "restroom break". Rather, the preponderance of the evidence indicates that the claimant, who had been resting in the sleeper berth, had dressed, straightened the berth, logged off duty, and was on his way to the restaurant, probably to join his co-driver for an evening meal considering the time and location, when the accident in question occurred. Therefore, I find that the preponderance of the evidence fails to demonstrate that the employer's interest were being either directly or indirectly advanced by the claimant at the time of injury.

Accordingly, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner