

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502204

DAVID MELTON, EMPLOYEE	CLAIMANT
HARBOUR DISTRIBUTING CO., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MARCH 2, 2006

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

Claimant represented by HONORABLE NEAL HART, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on October 6, 2005, finding in relevant part, the following:

1. On May 27, 2003, the claimant sustained an injury arising out of and in the course of his employment.
2. The claimant was temporarily totally disabled for the period commencing May 28, 2003, and continuing through a date yet to be determined.

In addition, the Administrative Law Judge found that the respondents are liable for all reasonable and necessary medical expenses related to the claimant's injury. It is from these findings that the respondents appeal to the Full Commission.

Our 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 in the course and scope of his employment with the respondent employer on May 27, 2003. Therefore, the decision of the Administrative Law Judge concerning the compensability of this claim should be and hereby is reversed and all associated benefits are denied.

The claimant, who was 27 years old at the time of the incident in question, was no doubt seriously injured when he was struck by a vehicle driven by a drunk driver as he was walking on an access road off of Interstate 40 at approximately midnight. The claimant testified that on the day preceding the incident, May 26, 2003, he had ridden to work with his shift supervisor, Mr. Tony Fuqua, who is also

his second cousin. The claimant, who had worked for the respondent employer for 88 days prior to this incident, testified that he had been scheduled off on May 26, 2003, which was Memorial Day. At the insistence of Mr. Fuqua, however, he had finally consented to work that day to help cover staff shortages. The claimant testified that he had worked until about 11:30 p.m. that night. Afterwards, Mr. Fuqua gave the claimant and his co-worker, Mr. Coffelt, who was also the claimant's roommate, a ride back to their residence in Cabot. The claimant explained that neither he nor Mr. Coffelt had transportation, and that Mr. Fuqua agreed to give him a ride to and from work in return for working on his day off. The claimant further explained that since his driver's license was revoked at that time, and Mr. Coffelt's vehicle was inoperable, Mr. Coffelt's father or his girlfriend normally transported them to and from work. The claimant testified that the truck in which he was riding was Mr. Fuqua's personal vehicle, in which he had ridden to work with Mr. Fuqua on other occasions. The claimant stated that he had given Mr. Fuqua \$10.00 for

gasoline on the date in question. However, Mr. Fuqua failed to stop for fuel on their way back to the claimant's residence, despite the claimant urging him several times to do so. Consequently, Mr. Fuqua's truck ran out of gas just before the Cabot exit. Thereafter, Mr. Fuqua and his passengers got out of the truck and began walking to the nearest gas station. The claimant testified that he was walking on the "fog line" of the access road when a car "came out of nowhere", veered somewhat, and struck him, causing serious bodily injury. The claimant lost his right arm at the time of the incident, and his left leg was amputated just below the knee some nine months later. The claimant also suffered from some internal injuries, including a ruptured spleen, which had to be removed, a lacerated liver, and injuries to his intestines and a kidney. The claimant testified that he has undergone approximately 18 surgeries since the time of his accident and remains under a doctor's care.

The claimant contends that he suffered a compensable injury to multiple parts of his body on May 27,

2003, for which he is entitled to receive appropriate benefits because he was performing employment services at the time of his accident. More specifically, at the hearing of August 17, 2005, the claimant asserted that his "argument about the whole case" revolves around the fact that his supervisor, Mr. Fuqua, needed the claimant to work so badly that day that he was willing to bring him to work and take him back home. Apparently, the Administrative Law Judge agreed with this assertion, stating in his Opinion that the claimant's work related activities on the evening preceding his injury constituted a special mission or errand, more particularly, on page 14 of the Opinion, the Administrative Law Judge stated:

Since the claimant was not scheduled to work, the effort of reporting to work, loading the trucks, and being returned home constituted a *special mission or errand* wherein the claimant suffered his injuries. Further, the respondent's interests were being directly advanced as a result of him having come in on his day off to load the [beer] truck. The afore was not concluded until the claimant was returned home in accordance with the assurance of his supervisor.

Claimant suffered his injuries while being returned home by the supervisor.

While the above reasoning is somewhat intriguing, it is, nonetheless, flawed. In Linton v. Arkansas Department of Correction, ___ Ark. App. ___, ___ S.W.3d ___ (9-01-04), the Court was presented with comparably disturbing facts when an ADC correctional officer, Mr. Linton, was seriously injured in an automobile accident on his way to a staff meeting. Although it was Mr. Linton's day off, he testified that he was being promoted to captain and that this announcement was being made at the meeting. He further testified that he was being paid to attend this meeting from the time he left home until he arrived back at home. The accident left Mr. Linton paralyzed from the waist down and confined to a wheelchair. In denying the compensability of his claim, the Commission found that Mr. Linton was not performing employment services at the time of the accident. On appeal, Mr. Linton argued that his injury fell within an exception to the "going and coming rule" because he was on a special errand for his employer, he was paid for travel

time, and he was a law-enforcement officer. Mr. Linton's assertion that he was a "law enforcement officer" was later controverted by the testimony of his supervisor and supporting documentary evidence. In addition, that the claimant, or any other ADC officer, was compensated for travel to meetings was also disputed. The Court affirmed the Commission's decision, stating that Mr. Linton's travel on the morning of his accident did not constitute a "special errand". In doing so, the Court distinguished the facts of Linton from those of Fisher v. Poole Truck Line, 57 Ark. App. 268, 944 S.W.2d 853 (1997), wherein an injured employee was found to be performing a special errand (or mission) when his automobile accident occurred. In Fisher, Id., the employee had reported to work in order to obtain a work assignment when he was told he had to retake a urine test before receiving that assignment. The employee was returning the results of the new urine test to his employer at the time his accident occurred. In Linton, supra, the Court found that attending a required staff meeting that just happened to benefit his employer did not constitute

employment services as contemplated by our workers' compensation statutes. In this regard, the Court stated:

[I]t is essential to every employer that its employees come to work, and merely traveling to and from the workplace is not an activity covered under our workers' compensation statutes. Linton also contends that traveling to the meeting on his day off distinguishes this situation from other cases in which compensation was denied and asserts that this extra day of travel increased the "quantity" if not the "quality" of the risk.

Continuing that Mr. Linton cited no controlling authority for this assertion, the Court did not find his argument persuasive. The court concluded that Mr. Linton was in his personal vehicle at the time of the accident, and that he was not a law enforcement officer, in the sense that he could not investigate traffic accidents or issue speeding tickets on his way to work. Therefore, the law enforcement officer exception (See, City of Sherwood v. Lowe, 4 Ark. App. 161, 628 S.W.2d 610 (1982)), to the "going and coming rule" did not apply, and compensation was denied.

Although dissimilar to the facts in Linton, supra,

in that the claimant in the present claim was clearly not a law enforcement officer at the time of his accident and he was traveling from work, rather than to work at the time of his injury, the present claim is similar in that the claimant was likewise not on a special errand at the time in question.

A "compensable injury" is defined as an accidental injury causing internal or external physical harm to the body arising out of and in the course of employment. Ark. Code Ann. §11-9-102(4)(A). Further, Act 793 redefined the term "compensable injury" to exclude an injury that was inflicted upon the employee at a time when employment services were not being performed. Linton, supra; Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1997); Ark. Code Ann. §11-9-102(4)(B)(iii). The same test is used to determine whether an employee was acting within the course and scope of employment at the time of the injury as is used when determining whether an employee was performing employment services. Privett v. Excel Specialty Products, 76 Ark. App. 527, 69 S.W.3d 445

(2002). The test is whether the injury occurred within the time and space boundaries of the employment while the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. Id.

An employee is generally not said to be acting within the course and scope of employment when he is traveling to or from the workplace, and thus, the "going and coming rule" ordinarily precludes compensation for injuries sustained while an employee is going to or returning from his place of employment. Campbell v. Randal Tyler Ford Mercury, Inc., 70 Ark. App. 35, 13 S.W.3d 916 (2000); City of Sherwood v. Lowe, supra. The reason for this general rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. City of Sherwood, supra. There are certain exceptions to the "going and coming rule", where the journey itself is part of the employment service, such as traveling men on a business trip and employees who must travel from job site to job site. Campbell, supra. Other generally accepted exceptions

to the "going and coming rule" include where an employee is injured in close proximity to the employer's premises, where the employer furnishes transportation to and from work, and when the employer compensates the employee for his time from the moment he leaves home until he returns home. See, Jane Traylor, Inc. v. Cooksey, 31 Ark. App. 245, 792 S.w.2d 351 (1990). Moreover, whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. Linton, supra; citing Campbell, supra.

According to the court in Linton, supra, there were no Arkansas cases at that time expressly dealing with the "special errand" exception to injuries sustained after the passage of Act 796 of 1993. And although the court in Linton, supra, focused on the law enforcement officer exception to the "going and coming rule" in making a determination, rather than the special errand exception, we were given some guidance by the court in reference to the Fisher, supra, decision as to what constitutes a special errand as it applies to employment services. Whereas the

employee in Fisher, supra, was traveling back to his employer's place of business for reassignment of duties from having been on a "special errand" for the employer, the claimant in the present claim was officially off the clock and traveling "straight" home after work in his cousin/supervisor's personal vehicle. The claimant testified that he was not on-call, and the only company owned item that he had with him at the time was his uniform. Moreover, it was not mandatory that the claimant work on his day off. Rather, the claimant testified that he finally succumbed to Mr. Fuqua's insistence to come in and work because he was still in his probationary period with the respondent employer and he wanted to make a good impression. Further, the claimant testified that he gave Mr. Fuqua gas money in exchange for giving him a ride to work, but that this was not mandatory. The record demonstrates that the respondent employer neither furnished the claimant transportation nor was it a party to any private arrangements that the claimant made with his cousin, Mr. Fuqua, or other individuals to provide him transportation to and from work. Clearly, the

preponderance of the evidence shows that the claimant was in no way acting within the course and scope of his employment or performing employment services at the time of his tragic accident. Moreover, the claimant's accident does not fall within any of the exceptions to the "going and coming rule". Although it may have been especially gracious of the claimant to work on his day off, the claimant was in no way performing a "special errand" by doing so. The respondent employer was short-handed due to the holiday, and the claimant was offered an opportunity to work on his day off. The claimant accepted this offer of his own free will. Finally, the claimant was not in a company vehicle or on company business when the accident occurred. Instead, according to his testimony the claimant was going home from work to get some rest.

Based upon the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that he was acting within the course and scope of his employment, performing employment services at the time of his accident, and/or that his accident falls within the special errand

exception to the "going and coming rule". Therefore, the compensability of this claim should be denied, as well as all associated benefits. Accordingly, the decision of the Administrative Law Judge is hereby reversed in its entirety.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.