

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404310

LESLIE TOIA, EMPLOYEE

CLAIMANT

HIT LOGISTICS, AN UNINSURED EMPLOYER

RESPONDENT

**OPINION FILED DECEMBER 13, 2006**

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

Claimant represented by HONORABLE RICHARD WHIFFEN, Attorney at Law, Sikeston, Missouri.

Respondent represented by HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on June 29, 2006, making the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 9, 2002, and at all times pertinent thereto respondent employed the requisite number of employees to bring its operation within the purview of the Arkansas Workers' Compensation Act, however did not have in place a policy of workers' compensation insurance nor was it an authorized self-insured employer.

3. On May 9, 2002, the relationship of employee-employer existed between the claimant and the respondent.

4. On May 9, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00/\$319.00, for temporary total and permanent partial disability.

5. On May 9, 2002, the claimant sustained an injury to his back arising out of and in the course of his employment with respondent, which rendered him temporarily totally disabled for the period beginning May 10, 2002, and continuing through the end of his healing period, or until such time as he was released to return to gainful employment.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 9, 2002.

7. The respondent has controverted this claim in its entirety.

The claimant alleges that he injured his back on May 9, 2002, when he slipped and fell while stepping into the cab of his semi truck. Unfortunately, there are no medical records in the file to corroborate the claimant's injury; only the claimant's testimony and the testimony of a woman

who worked in the office for the respondent employer at the time. However, the claimant's alleged injury is not in dispute in this appeal. The real issue in this claim is whether the claimant was performing employment services at the time of his alleged injury.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant was not performing employment services at the time of his alleged incident. Therefore, the decision of the Administrative Law Judge must be reversed, and benefits for the claimant's alleged injury denied.

According to the claimant, he was parked in the parking lot of a mall in Burlington, Vermont, at the time this injury causing incident supposedly occurred. The claimant testified that he was returning to his truck from after eating dinner, with intentions of retiring for the night. The claimant stated that he lost his footing while stepping into the cab of his truck, and fell backwards onto the ground. The claimant stated that he lay helpless on the ground for about 45 minutes before finally being able to get

into the cab of his truck, and eventually driving himself to the emergency room of a nearby hospital. The claimant testified that he was examined at the emergency room, but that no x-rays were taken. He further testified that he was released with pain killers and Ibuprofen.

The claimant stated that he delivered his load the next morning, then contacted the respondent employer to notify them of his injury. He stated that he was told that he would have to return to Jonesboro for further medical treatment. First, however, he was instructed to pick up a load over 300 miles away in up-state New York. He eventually arrived at his destination in New York where he again sought treatment at the emergency room of a local hospital. The claimant testified that surgery was recommended at that time, which he refused in preference of being treated in his home state of Montana. He then flew home to Montana where he was examined by a neurosurgeon, who allegedly performed surgery the same day. Again, there are no medical records to corroborate the claimant's version of events surrounding his alleged injury. At any rate, the claimant stated that after

two months of recovery time from this surgery, he returned to work for the respondent employer. He left his employment with the respondent approximately four to five months later for a higher paying position with another trucking company.

The claimant admitted during his hearing of May 5, 2006, that he had given false statements during his deposition of July 6, 2005. These false statements pertained primarily to the times at which events occurred on the date in question. The claimant explained that he been untruthful because he had corrected his D.O.T. logs, to which he had referred during his deposition, in order to avoid violations. The claimant further explained that he had been reprimanded on numerous occasions for violating D.O.T. regulations in reporting. Notwithstanding these admitted indiscretions, the preponderance of the credible evidence, which includes the testimony of Ms. Tobie Israel, demonstrates that the claimant was an employee of the respondent at the time of his alleged accident. The respondent furnished the claimant's truck and trailer; licensed, tagged, and insured this equipment; told the

claimant what, where, and when to load and unload; paid him on a weekly basis, per mile; and, withheld state taxes. The testimony of Ms. Israel, who was responsible for auditing the claimant's log books at the time of his alleged accident, corroborates the claimant's testimony with regard to his employment status, if not the specific times at which the events in question occurred. Therefore, the Administrative Law Judge was correct in finding that the claimant was an employee of the respondent at the time of his alleged incident.

However, with regard to the issue of employment services, as previously mentioned, the claimant admitted at the hearing that he made false statements during his deposition concerning the events surrounding his alleged accident. Among other things, the claimant gave false testimony about the time he arrived in Vermont; his activities immediately following his arrival there; his activities immediately prior to his alleged accident; and, the time the accident occurred. Although he admitted that he had essentially lied during his deposition about the

chronology of events on May 9, 2002, it appears from his testimony at the hearing that he most likely did sustain a legitimate injury on that date. The truth appears to be that the claimant was returning to his truck from taking a dinner break, with plans to sleep before delivering his load the next morning. Apparently, the claimant mis-stepped while he was climbing into the cab of his truck, and landed on the ground. He admitted that he had three beers with his meal earlier, but he denied being intoxicated at the time this incident allegedly occurred. Unfortunately, there is no toxicology report contained within the record to verify the claimant's level of blood alcohol at the time of this incident. Apparently, however, the claimant contacted the respondent in a timely manner concerning this alleged incident, as was corroborated by the testimony of Ms. Israel. Therefore, the remaining issue is whether the claimant was performing employment services at the time of his alleged accident.

An employee is performing "employment services" when he or she "is doing something that is generally

required by his or her employer. White v. Georgia-Pacific Corp., 339 Ark 474, 6 S.W.3d 98 (1999). We use the same test to determine whether an employee was performing employment "employment services" as we do when determining whether an employee was acting within "the course of employment." White v. Georgia-Pacific Corp., supra; Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1977). 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., supra; Olsten Kimberly Quality Care, supra.

Whether the claimant is performing employment services depends on the particular facts and circumstances of each case. The following factors are to be considered in determining whether the claimant's conduct falls within the meaning of "employment services":

- (1) whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;

(2) whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work;

(3) whether the activity engaged in when the accident occurs is an unexpected part of the employment;

(4) whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities;

(5) whether the employee is compensated during the time that the activity occurs; and

(6) whether the employer expects the worker to stop or return from permitted non-work activity in order to advance some employment objective.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). See; Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); White v. Georgia-Pacific Corporation, 66 Ark. App. 337, 989 S.W.2d 942 (1999);

Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998); Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999); Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

Notwithstanding the contradictions and inconsistencies in the claimant's testimony, whether he was injured on the date in question is not disputed. However, the preponderance of the evidence fails to substantiate that the claimant was performing employment services at the time that he was injured. The credible testimony demonstrates that the claimant was off duty at the time he slipped and fell. Further, he was not returning to his truck with the intention of performing any work related activity. By his own testimony, the claimant was returning to his truck in order to sleep for the night. Moreover, he was not planning to deliver his load until the following morning. Simply because he chose to sleep in his truck, which was fully equipped to accommodate him in such a manner, does not imply that he was advancing the employer's interests, either directly or indirectly, by doing so. Rather, the claimant

was off duty, and as reflected by his testimony, free to do as he as he pleased at the time of the alleged incident. This is demonstrated by the claimant's admission that he had consumed several beers with his meal. Obviously, had the claimant intended to resume driving after dinner, he would not have engaged in the consumption of alcohol. This is especially relevant because the claimant was paid by the mile, and was, therefore, only paid for the actual time he was driving. Hence, logic dictates that the claimant had no intentions of performing the particular employment activity for which he was paid, which was driving, after intentionally having consumed a significant amount of alcohol.

With regard to other "employment activities" in which the claimant might have conceivably been performing, for which he was not necessarily paid, the claimant testified that he was expected to insure the safety of his truck and load at all times. He further testified that he inspected his truck upon returning to it on the evening in question, in order to make sure that it had not been

vandalized in his absence. However, the claimant explained that this was as much for his own personal safety as it was for the safety of his equipment. Therefore, the claimant's activity of inspecting his truck does not rise to the level of employment activity as anticipated by our workers' compensation law. Further, the claimant inspected his truck *prior* to his alleged accident. Therefore, even if the claimant's act of inspecting his truck constituted an employment activity, a finding with which we would not agree, his act of climbing into his truck after he had completed his inspection in order to retire for the evening does not constitute an employment activity. In sum, had the claimant been injured while inspecting his truck, it would be marginally arguable that he was performing employment services at the time. However, in light of the facts of this case, that argument is without merit.

In Cook v. ABF Freight Systems, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2004), the employee, a truck driver, was injured while taking a mandated 8 hour overnight rest break. The Court held that the employee was not

performing employment services at the time he was injured, even though his injury occurred in a hotel room furnished to him by the employer. The claimant was "off-the-clock" at the time of his injury, and was not being paid. Further, although he was expected to be "on call" at the motel, the claimant was not prohibited from leaving the hotel room, and was generally "free to do as [he] pleased" during his scheduled break period. Likewise, in Kinnebrew v. Little John's Trucking, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999), the Court of Appeals agreed with the Commission that the employee was not performing employment services when he was injured while taking a shower while off duty. In stating that showering is not inherently necessary for the job the employee was hired to do, the Court refused to extend the personal comfort doctrine to include such an activity.

In the present claim, the claimant agreed that he had disposed of his D.O.T. log prior to the hearing. Therefore, whether or not he had "officially" signed off-duty at the time of his alleged injury cannot be verified by documentation. However, the claimant's account of his

activities prior to and at the time of his alleged injury, regardless of the actual times these activities occurred, gives every indication that he was off duty and "free to do as he pleased" during the time in question. It is common knowledge that truck drivers are required by the Department of Transportation to take scheduled rest breaks. The claimant credibly testified that he had arrived in Vermont on the afternoon prior to his scheduled delivery date with the intention of delivering his load first thing the next morning. Therefore, the preponderance of the evidence demonstrates that, for all intents and purposes, the claimant was on a required break at the time of the alleged incident. Moreover, by the claimant's own testimony, he was not performing employment services at the time the incident occurred, nor was he planning to resume any type of employment activity upon returning to his truck. He was stepping into the cab of his truck with the intention of going to sleep when he allegedly slipped and fell, injuring his back.

Based on the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of the alleged incident. Therefore, the decision of the Administrative Law Judge is hereby reversed and benefits for this claim are hereby denied.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion, finding that the claimant was an employee, but that he was not performing employment services at the time of his injury. Specifically, I concur with the portion of the decision finding that the claimant was an employee. However, I must respectfully dissent from

the portion of the opinion finding that the claimant was not performing employment services at the time of his injury.

The Majority concludes that the claimant is not credible, but does not deny him benefits on that basis. Rather they deny the claimant on the determination that he was climbing in the truck at the time of his injury in order to sleep for the night and that such action did not further the interests of the employer. However, after reviewing the record, I find that the claimant's action was performed in the course and scope of employment and directly advanced the employer's interest. Accordingly, I would have awarded benefits.

An employee is performing "employment services" when he or she is "doing something that is generally required by his or her employer." Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002). The same test is used to determine whether an employee was performing "employment services" as to determine whether an employee was acting within "the course of employment". Id. The test is whether the injury occurred "within the time and

space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly." White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999). The strict construction requirement of Act 796 does not require that the courts review workers' compensation claims and appeals as simply a matter of determining whether the worker was performing a job task when the accident occurred. Wallace v. West Fraser South, Inc., \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Jan. 26, 2006) (citing Matlock v. Arkansas Blue Cross Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001)). Furthermore, when the injury occurs outside of the time and space boundaries of employment, the critical determination to be made is whether the employee was directly or indirectly advancing the interests of the employer at the time of the injury. Moncus v. Billingsley Logging, \_\_\_, Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (May 18, 2006).

I find that by virtue of the fact that the claimant was returning to the truck to sleep, the claimant was advancing the employer's interests by insuring the

safety of the truck. It is undisputed that in the present case, the employer required employees to maintain control of their truck and to make sure the contents of the truck and the truck itself were safely secured. Both the claimant and Jodie Israel, the former payroll and personnel employee testified that the claimant would be required to secure his vehicle and the contents therein. The claimant also testified that there were facilities in the truck that were designed to let drivers sleep. More importantly, the claimant testified that employees would rarely get a motel room. He indicated as follows,

Q. Did you sometimes get a motel?

A. No. Very rarely we would. If we're on a two-day layover and we needed to get a motel room we would tell them but we had to have the truck (inaudible) and we would get up and walk around the truck to make sure it was still secure.

As the claimant was not on a two-day layover and the claimant testified that generally workers could not get a hotel unless it was a two-day layover, it is apparent that he saved the employer money by staying in the truck.

It is further evident that the claimant provided security by staying in the truck. The claimant specifically testified that there were benefits to staying in the truck and that it prevented theft. He testified as follows,

Q. Why would you spend the night in the truck?

A. Because if anything's going to happen to your trailer you can feel it rocking. I mean, as soon as you open the door, actually physically lift the handles and pull it open and when you feel the doors open you can actually feel the vibration right through the whole truck.

In fact, the claimant testified that in the past someone was attempting to break in his truck and that he was able to get out of bed, reverse his truck, and to stop what was apparently an attempted robbery.

\_\_\_\_\_ In the present case, I find it is clear that the claimant was doing something that was generally required by his employer. It is undisputed that he was required to make sure his truck was safe. It is further undisputed that the drivers were generally expected to sleep in their trucks to make sure the trucks were safe, indicating that the claimant

was doing something generally required by his employer and that he was furthering the interests of the employer.

The Majority attempts to compare the present claim to Cook v. ABF Freight Systems, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2004) and Kinnebrew v. Little John's Trucking, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999). However, I find that the present case is distinguishable. The claimant in the present case, while off duty, was furthering the interests of the employer by virtue of the fact that he was staying in his truck to sleep to insure its safety. However, in both Cook and Kinnebrew, there was no evidence that the workers were in any way attempting to comply with management's instructions by virtue of the manner in which they carried out their actions. Rather, they simply happened to be on the road and off duty when the accidents occurred. However, in the present case the claimant was complying with management's wishes by staying in the truck. In fact, the truck was equipped with a sleeper indicating his actions were encouraged and the claimant testified that workers usually did not stay in a hotel unless they were on

a two-day layover. Furthermore, the claimant testified that in the past he had been successful in preventing a break-in because of his actions, indicating that his actions directly benefitted the employer. Accordingly, I find the claimant was acting in the course and scope of employment and that his actions directly advanced the interests of the employer.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

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SHELBY W. TURNER, Commissioner