

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612045

TERRY WITT, EMPLOYEE	CLAIMANT
ALLEN & SON, INC., EMPLOYER	RESPONDENT NO. 1
FIRSTCOMP INSURANCE CO., CARRIER	RESPONDENT NO. 1
PERMANENT & TOTAL DISABILITY BANK FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 17, 2008

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

Claimant represented by HONORABLE NOYL HOUSTON, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on October 3, 2006. Specifically, the Administrative Law Judge found that the claimant was

performing employment services at the time of his automobile accident. Additionally, the Administrative Law Judge found that the claimant also sustained a lower back injury as well as a neck injury at the time of the incident and that the claimant continued to be temporarily totally disabled beginning October 4, 2006, through a date yet to be determined. Based upon our de novo review of the record, 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 automobile accident on October 3, 2006. Therefore, we find that the decision of the Administrative Law Judge must be, and hereby is, reversed.

The claimant was employed by the respondent employer in their field leveling business. On October 3, 2006, the claimant was on his way to a job site in Dyess, Arkansas, when the vehicle in which he was a passenger was hit head on. It was very foggy that morning and the person driving the vehicle did not see the approaching vehicle until it was too late. The accident happened at

approximately 7:17 a.m. The claimant's normal start time for work was 7:00 a.m. The testimony revealed that the claimant was running late that morning because of the fog. The claimant was riding with Jimmy Cook, another employee of the respondent employer. Mr. Cook was taking the claimant to the job site in Dyess so the claimant could pick up a piece of equipment and take it to a job site in Payneway. That morning, the claimant and Mr. Cook had met with Mike Allen, the owner of the respondent employer, at the Chicken Stop. Mr. Allen and the claimant spoke in the parking lot for approximately 10 to 15 minutes. The claimant and Mr. Cook then went and got breakfast at the Chicken Stop and then proceeded to the field in Dyess. The did not make it because of the automobile accident. Mr. Allen asked the claimant to proceed with him to the field in Dyess and he had to go to Lapanto first. The claimant declined and said that he would go with Mr. Cook instead.

Mr. Allen testified that he was primarily responsible for the land leveling portion of the family

business. Mr. Allen's testimony reflects, regarding the manner in which his employees got to field job sites:

Well, different job sites, different times of the month, a lot of times they would come to my house at Marked Tree. And then my wife started griping so much about the pickups being left and the cars being left in the front of the house, so we had to start leaving them at the Chicken Stop, or the Case Place had a big parking lot. And all Cave did, if I left something, you know, their vehicle was there during the day or something. And a lot of times they would come in from two or three different directions, and they would get together and come to the field in one. And Terry, I told Terry, you know, a time or two we would have the service truck at my house. And we would bring it in one night and re-stock it, filled it up full of gas, and then somebody would get out and take it back to the field. But that was a very rare occasion. Maybe one time out of two or three weeks, that would happen, but it was necessary to re-stock or re-supply.

The respondent owned three service trucks in addition to the other equipment. Mr. Allen testified regarding payment for someone driving the service truck:

If they was in my truck, it would take, oh, like I would give them an extra half-hour on their payroll. I

would consider when they came in late at times, I would overlook 15 or 20 minutes here. You know, I was - - I kept a lot of that, you know, kept it in the back of my mind, or wrote down.

Mr. Allen testified about jobs that were more than 30 miles away:

That's where my other truck becomes involved. It's a four-door crew-cab. And it would carry five to six people comfortably, and we would meet at Marked Tree, and they would all gang into there. We have a policy of one way. And when they got to the truck at Marked Tree, say at 7:00, and we would get them in the truck. And it would take an hour to drive to the job that we would today, that we would quit at 7:00. And that they would drive home, and we would get home by 8:00, but they would get paid from the time they got into the truck until the time we quit at the job.

The testimony reflected that the job in Dyess was 16 miles away.

Mr. Allen testified about meeting employees at the Chicken Stop:

It's just a - - I live two blocks behind it. I would come out. That's the only little restaurant around in that area that's opened up early enough to

get breakfast. And it was a handy spot, and Terry would be there with his son, and the other crew would be there so that's where we would - - I always liked to find out who is going to show, who had probation, who had a doctor's appointment, who got too involved that night before and didn't show up the next day. It was to stay up - -

Mr. Allen acknowledged that he had a cell phone and the claimant also had a cell phone. Mr. Allen testified that a lot times the information about who was showing up for work was obtained over the telephone.

Mr. Allen's testimony reflects that he did not prohibit employees from driving their own vehicle to the job site, however he did not pay any mileage or gas if the job site was under 30 miles away from Marked Tree. Mr. Allen observed, regarding employees driving their own vehicles to the job site:

Well, if they were in their vehicle, sometimes they would have a doctor's appointment, or they had a ball game, or the babysitter was going to leave early, it's just, you know, too numerous things sometimes they come up with. But they would, you know, beneficially they would all - - A lot of time they would all ride in two or three

vehicles instead of come out there in four or five.

On October 3, 2006, neither the claimant nor Mr. Cook were paid any travel money by respondent-employer. Mr. Allen denied that the claimant's work day would start while traveling to the job site. Mr. Allen testified regarding his conversation with the claimant on October 3, 2006, about travel:

I was at the Chicken Stop. We met there. I got some ice and drinks, and I wanted Terry to come with me, and we had some work going on at two different places. And Jimmy was there in his vehicle. And I wanted Terry to come over there and bring a tractor back to Payneway that the customer wanted some more finishing work done. And I already had a bucket already at Payneway. And I wanted Jimmy to stay with him there so they would have two vehicles, I mean, two of my tractors. And Jimmy would have his truck, because he just lived across the road, and it would be convenient.

Mr. Allen explained that Mr. Cook lived across the road from the field that they would be working on at Payneway. He thought Mr. Cook had been to the Dyess field previously. The claimant did not ride with Mr. Allen to

Lepanto and Mr. Allen explained that the claimant wanted to make sure he had supplies. Mr. Allen testified that if the claimant had chosen to get in the vehicle with him at the time they departed the Chicken Stop the claimant would have been "on the clock" at that point.

On cross-examination, Mr. Allen testified that on the morning of October 3, 2006, he wanted the claimant to go to Dyess to get the tractor that the claimant normally operated, and bring it back to Payneway.

The claimant, as the finishing man, was responsible for final approval of field that respondent leveled. Mr. Allen acknowledged that the claimant, as finishing man, had more responsibilities than any of the other drivers. Mr. Allen testified that the claimant ran the crew in his absence or that of his father and wife. Mr. Allen confirmed that he ordinarily met with the claimant in the morning before going to the job site. Additionally, Mr. Allen testified that the claimant would ordinarily know what the other employees were doing. Mr. Allen noted that he would go to the claimant for information rather than going

to each individual employee. Mr. Allen confirmed that he expected to meet with the claimant, either in person or via phone, at the beginning of or before the day began.

Mr. Allen described the claimant as an excellent worker.

The medical records indicate that the claimant was initially seen at the Regional Medical Center on October 3, 2006. The claimant was complaining of pain in his thoracic and cervical spine. The thoracic spine was normal but the MRI exam of the cervical disclosed objective findings which were compared to a CT scan of the same day. The claimant was discharged on October 10, 2006. The Discharge Summary reflected, in pertinent part:

HISTORY: The patient is a 52-year-old male, status post MVC on 10/03/2006. CT of the spine revealed severe canals stenosis and central cord syndrome. Orthopedic was consulted for spine. They placed a Miami J collar on him and placed on spinal precautions. The patient was admitted to the ICU for further care. On the first day he complained of inability to move his upper extremities and increasing numbness and tingling. The patient was placed on spinal precautions. His sensation remained intact. Throughout his stay he regained function of his upper extremities and hands... . The

patient was then transferred to the floor. Orthopedics planned for an ACDF this week. On the day of discharge, the patient's strength improved ... Orthopedics decided to do the ACDF as an outpatient and the patient was discharged home. He will need to wear Miami J at all times until follow up with orthopedic surgery.

FINAL DIAGNOSIS:

1. Status post motor vehicle collision.
2. Central cord syndrome with severe stenosis.

On October 19, 2006, the claimant returned to Regional Medical Center at Memphis, was admitted and underwent anterior cervical discectomy and fusion at C3-4 with corpectomy at C5 with fusion. The claimant was discharged on October 23, 2006. The claimant was seen in follow-up on October 31, 2006. During the October 31, 2006, visit, claimant was instructed to return to the clinic in two (2) weeks.

The claimant was again seen on November 14, 2006 and the clinic note reflects the notation of "new onset L4-5 paresthesia". Further, the November 14, 2006, clinic note reflects plans to work-up the lumbar spine, start the claimant on Neurontin, and schedule a MRI of lumbar spine.

The claimant was direct to return in two (2) weeks. On November 29, 2006, claimant underwent a MRI of the lumbar spine which showed degenerative changes and mild left L4 root foramen stenosis.

On December 12, 2006, claimant was seen at the Outpatient Clinic of the Med. The clinic notes from that visit reflected that the claimant's treating physicians were in agreement that a rehabilitation evaluation was necessary. On January 18, 2007, the claimant underwent a physical therapy evaluation at the Med. The claimant was again seen at the Outpatient Clinic on February 20, 2007. The claimant underwent additional radiology studies on February 20, 2007.

Act 796 defines a compensable injury as a "an accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death." Ark. Code Ann. §11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury which was inflicted

upon the employee at a time when employment services were not being performed... ." Ark. Code Ann. §11-9-102(4)(B)(iii).

Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transport, 347 Ark. 851, 69 S.W.3d 1 (2002); 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 services" as we do when determining whether an employee was acting within "the course of employment." Smith v. City of Ft. Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004); Collins, supra; Pifer, supra; White, supra; Olsten Kimberly Quality Care v. Pettey, 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." Collins, supra; Pifer, supra; White, supra; Olsten, supra. The critical

issue is whether the interests of the employer were being carried out by the employee at the time of the injury. Collins, supra. In Collins and Pifer, the Arkansas Supreme Court specifically overruled "all prior decisions by the Arkansas Court of Appeals" to the extent that they were inconsistent with the holdings in those two cases. Wal-Mart Stores, Inc. v. King, 93 Ark. App. 101, ___ S.W.3d ___ (2005).

An employee is generally said not to be acting within the course and scope of employment when he is traveling to and from the workplace, the rationale being that an employee is not within the course and scope of his employment while traveling to and from his job. Pettey, supra.

Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test is whether the employee is engaged in the primary activity that he/she was hired to perform, or in

incidental activities that are inherently necessary for the performance of the primary activity.

In our opinion, a review of the evidence demonstrates that the claimant was not performing employment services at the time of the automobile accident. Neither the claimant nor Mr. Cook were paid any travel money by the respondent employer. Mr. Allen testified that he did not prohibit his employees from driving their own vehicles to the job site since they might, on occasion, have to leave for a doctor's appointment, a child's ball game, etc. He did not pay his employees any mileage or gas if the job site was under 30 miles away from Marked Tree where the respondent's home office was located. The testimony reflected that the job site in Dyess was approximately 16 to 20 miles from the respondent employer's home office.

Although there was testimony that the claimant and other employees would meet at the Chicken Stop or the Exxon in the mornings and would talk to Mr. Allen about what needed to be done that day, there was also testimony that Mr. Allen would frequently simply give the claimant a call

and give him directions via cell phone. The claimant admitted that he was not required to meet at the Chicken Stop or at the Exxon. He testified that there were times that he chose to go straight to the job site.

It is also telling that Mr. Allen testified that on the morning of the accident he wanted the claimant to ride with him because he wanted the claimant to go to a different location. However, Mr. Allen testified that he could not make the claimant ride with him because he was not on the clock at that point. Neither the claimant's nor Mr. Cook's travel expenses were being paid that day. The claimant was riding with Mr. Cook for his own benefit to save on gas expenses. When we consider all of the evidence, we cannot find that the claimant proved by a preponderance of the evidence that he was performing employment services at the time of the motor vehicle accident. Clearly, the claimant was not on the clock nor was he being paid mileage or was he even given any kind of expenses. The claimant was sharing the vehicle with Mr. Cook in order to save gas expenses. Although the claimant was running late that

morning because of the bad weather, and the accident occurred after the normal start time, he was not performing employment services. While the claimant's accident resulted in traumatic injuries to the claimant's cervical spine, and we have great sympathy for the injuries that he has sustained, we cannot find that the claimant was performing employment services at the time of his accident.

Therefore, after considering all of the evidence, we cannot find that the claimant has proven by a preponderance of the evidence that he was performing employment services at the time of his motor vehicle. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, reversing the Administrative Law Judge, finds that claimant was not performing employment services at the time of the automobile accident. After a de novo review of the record, I find that the majority has clearly erred as a matter of fact and of law. The claimant was performing employment services at the time of the automobile accident and is entitled to workers' compensation benefits for compensable neck and back injuries, as well as the temporary total disability benefits as awarded by the Administrative Law Judge.

The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose of advancing the employer's interest, directly or indirectly. Olsten Kimberly Quality Care v. Petty, 328 Ark. 381, 944 S.W.2d 524 (1997). It is well recognized that an employee is

performing "employment services" when he is doing something that is generally required by his employer. White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999).

The same test is used to determine whether an employee is performing "employment services" as when determining whether an employee was acting within "the course of employment". Moncus v. Billingsley Logging, 366 Ark. 383, ___ S.W.3d ___ (2006). 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, supra. Additionally, 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 interest of the employer at the time of the injury. Moncus, supra.

The particular facts and circumstances of each case will determine whether the claimant was performing employment services. Among the factors which may be considered in determining whether a claimant's conduct falls within the meaning of "employment services"; whether the

accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests; whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work; whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially from work activities. Matlock v. Blue Cross Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

The facts in the present claim are not unlike those in Bell v. Tri-Lakes Services, 76 Ark. App. 42, 61 S.W.3d 867 (2001). In Bell, supra, the employee was required to travel to Gillham for the purpose of loading tools. Bell died in a motor vehicle accident while in route to Gillham. The Courts have held that employment is not limited to that which the person was hired to do, whatever the normal course of employment may be, the employer and its supervisory staff have it within their power to enlarge the course of the employment by assigning tasks outside the usual scope of the employment. Arkansas Department of Correction v. Glove, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Furthermore, whether an employer requires an employee to do

something has been dispositive of whether the activity constituted employment services. Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In Bell, supra, the Court of Appeals held that it was irrelevant whether or not the employee's normal work duties involved travel; on the day of the accident, that is what his employer required of him.

In the instant claim, the evidence preponderates that the claimant met with his supervisor, the owner of the respondent-employer, at 6:00 a.m., to discuss the work force and job assignments. The duration of the meeting was approximately ten minutes. At the time the meeting ended, claimant was authorized to ride with Jimmy Cook, another employee of respondent-employer, to the Dyess job site in order to get his tractor and take it to a job in Payneway. Whether or not the claimant rode to the Dyess field with his supervisor or the co-worker, he would have to be taken there in order to get his tractor.

The evidence reflects the weather condition on the morning of October 3, 2006, was extremely foggy. The plan in place following the 6:00 a.m. meeting between the

claimant and the owner of respondent-employer was that the claimant would ride with Jimmy Cook, the co-worker, to the Dyess job site, retrieve his tractor, and be escorted from Dyess to Payneway by Mr. Cook. An escort was even more needful in light of the dense fog that was in place. Mr. Allen, the claimant's employer, attributed the hour elapse between the conclusion of the 6:10 a.m. meeting and the 7:10 a.m. motor vehicle accident to the claimant traveling very slow and careful in the foggy weather condition.

In addition to having the authorization of the respondent-employer to ride with Mr. Cook to get his tractor which was required at another location of respondent, the evidence reflects that Mr. Cook would serve as an escort for the claimant from the Dyess location to the Payneway location. This action benefitted the respondent-employer directly, in that, it provided a means for the claimant's tractor to get to the Payneway location and freed-up respondent-employer to go to Lepanto to obtain supplies.

The "going and coming rule" which is asserted by the respondent-employer in the present claim, ordinarily precludes recovery for an injury sustained while the

employee is going to or coming from his place of employment. An employee traveling to and from the workplace is generally held not to be acting within the course of employment.

Olsten, supra. One exception to the "going and coming rule" is where the employee must travel from job site to job site, whether or not the employee is paid for the travel time. In the present claim, as in Moncus, supra, the travel was a necessary part of the claimant's employment and, accordingly, fits within the job site-to-job site exception to the going and coming rule. Where the injury occurs outside of the time and space boundaries of employment, as in the present claim, 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. Here, the evidence of record clearly shows that at the time of the claimant's accidental injury, the interests of the employer were being directly advanced. For the majority to conclude otherwise is directly contradicted by the evidence of record, particularly by the following testimony of Mr. Michael Allen, the respondent-employer:

Q: So whether he rode with you or
whether he rode with Jimmy, somebody had

to take him there to get it in order for him to do what you wanted, which was to bring it from what you're now saying from Dyess back to Payneway to work that day, is that right?

A: Correct.

Q: And you did testify that it was beneficial to your interests for Terry to go with Jimmy to get the tractor at Dyess and bring it back to Payneway, is that right?

A: Yes.

Q: Now, you told him to take his time and be careful that day because of the fog, didn't you?

A: Yes.

The above testimony of the respondent-employer himself, in light of the Arkansas Supreme Court holding in Moncus, mandates a finding that the claimant was performing employment services at the time of the automobile accident. The majority's conclusion otherwise is erroneous not only as a matter of fact but as a matter of law. The claimant is entitled to workers' compensation benefits for his compensable neck and back injuries, including temporary total disability benefits as awarded by the Administrative Law Judge.

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For the aforementioned reasons I must respectfully
dissent.

PHILIP A. HOOD, Commissioner