

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712175

GEORGE HILL, EMPLOYEE	CLAIMANT
LDA LEASING, INC., EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INC., TPA	RESPONDENT

OPINION FILED JUNE 3, 2009

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

Claimant represented by HONORABLE STEPHANIE LINAM, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 29, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable right shoulder injury on November 8, 2007. Specifically, the claimant has failed to prove by a preponderance of the evidence

that his right shoulder injury on November 8, 2007, arose out of and in the course of his employment with LDA Leasing, Inc.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove the compensability of a shoulder injury incurred on November 8, 2007. More specifically, the Administrative Law Judge found that the claimant's injury did not arise out of and in the course of his employment with the respondent because the claimant was on the way back from the restroom, getting food from a vending machine, when the injury occurred. After a de novo review of the record, I find that the claimant has met his burden of proof by the preponderance of the evidence that the claimant's injury did arise out of and in the course of employment, as the

claimant was in the time and space boundaries of the employment, and advancing the employer's interest when the injury occurred. Therefore, I must respectfully dissent.

History

_____ The claimant worked for the respondent as a truck driver. On November 8, 2007, the claimant was picking up a trailer from a Pilgrim's Pride facility. The claimant checked in to the facility and was assigned a loading dock to unload his truck and receive his shipment. The claimant testified that the loading crew could take between 30 minutes and three hours to finish loading his truck, but that he was only allowed to record 15 minutes in his log book for loading. The claimant testified that he could be terminated for unhooking and taking the tractor from the trailer section of the truck for his convenience. The claimant testified that he was responsible for the truck at all times, and that his main employment duties were to make sure it was not damaged. The claimant testified that he observed his truck being loaded, and then he went to go to the restroom. On his way back from the restroom, the claimant went to the employee break room to purchase a snack. As he was pushing a button on the vending machine,

the claimant slipped and fell backwards into a table, injuring his right shoulder. The claimant then returned to his truck's cab and attempted to lie down, but his pain was too great. The claimant then presented to the nurse's station at the Pilgrim's Pride facility. The nurse told the claimant that he did not have a dislocated shoulder and gave the claimant heating pads for the pain. The nurse did not document the claimant's visit.

The claimant testified that he contacted the respondent's dispatcher on duty, John Curry, about the injury via Qualcomm. The claimant testified that Mr. Curry did not send a response to this message, so the claimant then left a message about the injury for Mr. Curry on his mobile phone's voicemail.

The claimant testified that because he had already notified his dispatcher of the injury and had already been told by the company nurse that his shoulder was not dislocated, he did not call his employer or seek further medical attention until November 15. Then, on November 15, 2007, the claimant contacted his employer regarding the shoulder injury and was instructed to go to Dr. Cynthia Almond at Concentra Health Center. Dr. Almond examined the

claimant and referred him to Dr. James Tucker, an orthopaedic surgeon. On November 21, 2007, Dr. Tucker diagnosed the claimant with a "massive rotator cuff tear" which he related to the claimant's fall at the Pilgrim's Pride Chicken Plant on November 8, 2007.

The claimant testified that as a result of his shoulder injury he is not able to drive a truck, operate a forklift, or drive any of the respondent's company vehicles. The claimant also testified that he has difficulty showering, shaving, combing his hair, and performing any activities with his right hand.

Discussion

The claimant has met his burden of proof by the preponderance of the evidence that his injury arose out of and in the course of employment, as the claimant was in the time and space boundaries of the employment, and advancing the employer's interest when the injury occurred. The Arkansas Supreme Court held in Texarkana School District v. Conner, ___ Ark. ___, ___ S.W.3d ___ (May 8, 2008), that the test for determining a compensable injury was 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 either directly or indirectly." Here, the claimant was clearly within the "time and space boundaries" of his employment when the injury occurred. Specifically, he was still on the employer's premises, in an area where he could still have been called to carry out his employment duties if such a need arose. By not allowing the claimant use of his tractor to leave, the claimant was required to stay in the facility, near his truck while it was being loaded. This situation is similar to Wallace v. West Fraser South, 365 Ark. 68, 225 S.W.3d 361 (2006), where the claimant had been on a break while awaiting a piece of machinery to be repaired. After he inquired as to the status of the disabled machinery, he was returning to the break area by way of a plank which had been placed across a muddy ditch. The claimant slipped and fell and was injured. The Supreme Court concluded his injury was compensable. In Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the claimant was returning from a break, but had not yet resumed her duties, when she was run over by a coworker pushing a hand cart. The Court of Appeals found that the injury was compensable, and noted that the claimant was injured on the

employer's premises at a place her employment caused her to be. This was found to be an injury which occurred within the time and space boundaries of the employment.

Another case involving an on-the-premises injury while the claimant was not clearly performing job duties was Jivan v. Economy Inn Suites, 370 Ark. 414, ___ S.W.3d ___ (June 28, 2007). The claimant was a live-in employee at the respondent's motel. While changing clothes, she was killed in a fire. The respondent denied the claim, contending Mrs. Jivan was not performing an employment service at the time of the injury. But, the Supreme Court held the claimant was in the time and space and constraints of her employment and was performing employment services and was, therefore, entitled to workers' compensation benefits.

In all of the above-cited cases, the claimants were injured on their employer's premises at a time when they were not actually performing any employment duties. All of the claimants were in an area their employment duties required them to be. Here, the claimant was using the snack machine in the facility on the way back to the area where his truck was being loaded. As in the cases cited above, the injured worker was in an area his employment caused and

required him to be. Furthermore, the claimant was not allowed to detach the tractor to leave the facility, and he was required to make sure his truck was not damaged and to obtain a bill of lading from the facility, all tasks requiring him to remain at the respondent's facility. The claimant observed his truck being loaded, and then he went to go to the restroom. On his way back from the restroom, the claimant went to the employee break room to purchase a snack. While he was pushing a button on the vending machine, the claimant slipped and fell backwards into a table, injuring his right shoulder. The claimant has clearly satisfied the requirement set out by the Arkansas Supreme Court in the Conner decision as his injury was in the time and space boundaries of his employment.

In conclusion, I find that the claimant has met his burden of proof by the preponderance of the evidence that the claimant's injury did arise out of and in the course of employment, as the claimant was in the time and space boundaries of the employment, and advancing the employer's interest when the injury occurred.

PHILIP A. HOOD, Commissioner