

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F805442

|                                       |            |
|---------------------------------------|------------|
| GEORGE T. TEDDER, EMPLOYEE            | CLAIMANT   |
| AMERICAN RAILCAR INDUSTRIES, EMPLOYER | RESPONDENT |
| SPECIALTY RISK SERVICES, CARRIER      | RESPONDENT |

**OPINION FILED MAY 29, 2009**

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

Claimant represented by HONORABLE JIM R. BURTON , Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE RANDY P. MURPHY, 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 January 21, 2009.

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. A preponderance of the evidence reflects that the claimant was not performing employment services at the time that an incident occurred at the workplace which resulted in injuries to the claimant.

4. Because the claimant was not performing employment services at the time of his injury, his remedy, if any, would be in a different forum.

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.

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A. WATSON BELL, Chairman

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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 that he sustained a compensable injury on April 24, 2008. Based upon a de novo review of the record, I find that the claimant has met his burden of proof by a preponderance of the evidence for a compensable specific incident injury, and therefore, I must respectfully dissent. The claimant alleges he sustained a compensable injury on April 24, 2008. The accident occurred when the claimant was struck by a golf cart-type vehicle driven by a co-employee. The respondent has controverted the claim in its entirety, contending the claimant was not performing an employment service when he was struck, and that any physical ailments he is presently

suffering from were not the result of the accident occurring on their premises.

After a hearing, an Administrative Law Judge held the claimant did not sustain a compensable injury, in that, he was not performing an employment service at the time he was struck by the cart. From that decision, the claimant filed the present appeal. Based upon my review of the evidence, I find that the Administrative Law Judge's decision should be reversed and the claimant be found to have had a job-related accident resulting in physical injury. I further find that the claimant is entitled to reasonable and necessary medical treatment and temporary disability benefits from June 4, 2008, to a date yet to be determined.

On the date of the accident, the claimant had been employed with the respondent for approximately four years. His job duties included pipe fitting and welding, and his duty station was in a building immediately adjacent to the main manufacturing facility. Because of the large size of the factory, transportation to different areas was often accomplished using small gas-powered carts which were scattered at various locations throughout the facility.

The claimant testified that, on the day he was injured, he was threading a pipe using a machine located in

his work area. As he was finishing up this task, T. J. West, one of his immediate superiors, advised him it was time for a break. According to the claimant, he placed the pipe he finished threading in a rack and followed Mr. West and another employee to what he called the grind shop, where a table was located. The table doubled as both a work table and a place where employees commonly sit at when taking breaks or having lunch.

Shortly after becoming seated, Leon Pajak, another of the claimant's co-employees, was noted to be driving one of the carts past the area where the claimant and his co-employees were sitting. According to the testimony of Mr. Pajak, he had been to another area of the plant bending a pipe and was returning to the pipe fitting area when he noticed the claimant and the other workers sitting at the table. He stated he heard them call out to him, advising him it was time to take a break. Mr. Pajak indicated he was going to return the pipe to the fitting area and then begin his break. The claimant testified when he noticed Mr. Pajak, he "appeared to be driving the cart from the passenger's side." He stated Mr. Pajak's cart apparently struck another pipe projecting from a stand, and he lost control of the vehicle. The claimant testified he shoved Mr. West out of the way but he was unable avoid being struck by the cart

when it hit the table. The claimant was knocked against a pipe rack and lay on the ground, momentarily dazed.

In denying this claim, the Administrative Law Judge relied on Ark. Code Ann. §11-9-102 (4) (B) (iii). That section provides, in essence, an injured employee is not entitled to workers' compensation benefits unless the injury was inflicted while the employee was performing an employment service. The majority's conclusion was, because the claimant was on a break when he was injured, he was not performing an employment service, and the circumstances of the injury did not, therefore, arise out of his employment. I find that the majority fails to properly review appellate court cases interpreting the relevant statutory section. I believe those decisions require a finding the claimant sustained a compensable injury.

An Arkansas Supreme Court case on this issue is Jivan v. Economy Inn and Suites, 370 Ark. 414, \_\_\_ S.W.3d \_\_\_ (2007). Mrs. Jivan was killed when the motel in which she was the live-in manager burned. At the time of the fire, she was changing clothes preparatory to leaving on a personal errand, and was not performing any job-related duties. In reviewing the employment services question, the Court held the test determining whether an employee was performing an employment service was the same as whether an

employee was acting within the course of employment. The Court went on to state the injury would arise out of the employment if it was a natural and probable consequence or incident of the employment and a natural result of one of its risks. In finding Mrs. Jivan's dependents were entitled to benefits, the Court held her presence on the premises during the fire exposed her to a greater degree of risk than someone not living on the premises.

I realize a significant difference in the present case and the Jivan decision was the claimant not residing at his place of employment. However, the same result has been reached in non-residential situations. In Texarkana School District v. Conner, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Arkansas Supreme Court, May 8, 2008), the claimant was returning from a lunch break. While attempting to open a locked gate, the gate fell on him and he was injured. The respondent had controverted the claim, contending the claimant was still on his lunch break at the time of the injury and was, in any event, performing an activity not authorized by his employer. The Court of Appeals reversed a Commission finding of compensability. However, the Supreme Court reinstated the Commission's Opinion, finding the claimant was performing an employment service at the time of his injury. In reaching this decision, the Court noted the injury occurred outside

the time and space boundaries of the employment, but the employer's interest was being advanced by the conduct of the claimant.

A Court of Appeals decision with facts similar to the present case was Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). There, the claimant was injured while on a scheduled break. The accident occurred while she was returning personal items to her locker and was struck by another employee pushing a cart of merchandise. The Court noted the claimant was following the direction of her employer in returning the personal items to her locker when she was struck by the cart. Accordingly, she was following her employer's directive, was engaged in advancing their interest, and had sustained a compensable injury.

Another case involving a claimant injured on a break was Wal-Mart Stores v. King, 93 Ark. App. 101, 216 S.W.3d 648 (2005). That claimant was injured on the way from her duty station to an employer-furnished break room when she slipped and fell, fracturing her right wrist. The respondent argued that the claimant was not entitled to benefits because her injury occurred while she was on a break. In attempting to distinguish this case from the Sands case cited above, the respondent argued the claimant was not following any employer-mandated procedure in going to the

break room to take a break. Rather, the respondent contended the evidence established that she could have taken a break any where in the store, and was not required to do so in the furnished break area.

In finding the claim was compensable, the Court noted even though the claimant was not required to take her break in the designated area, it was apparent the claimant and the store's other employees were encouraged to do so. Even the respondent's managers agreed that normal procedure was for employees to take their breaks in an employee lounge. This situation is clearly similar to the present case, in which the claimant was performing his job duties when an immediate superior advised him to take a break. Following the normal procedure, the claimant went to the grinding room and sat down at a table where breaks were normally taken. While at this location he was injured.

A recent Court of Appeals decision with facts nearly identical to those here is Mitchell v. Tyson Poultry, Inc. \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Arkansas Court of Appeals, February 11, 2009). A fatal injury occurred when the deceased was returning from his lunch break. The decedent was working the night shift and had gone to have dinner with an acquaintance who worked in a nearby department. While returning to his duty station, he was

struck and killed by a co-worker driving a shuttle truck through the respondent's truck yard. In affirming the Commissions award of benefits, the Court of Appeals cited Wal-Mart Stores v. Sands, *supra*, and held its facts were identical with the case at bar. One of the factors cited by the Court in its decision was an injury having occurred within the time and space boundaries of the employment.

I find that several critical factors compel a finding of compensability in this case. First, the claimant had been directed to stop work and take a break by his immediate superior. In stopping work and reporting to the break area, he was directly following the instructions from his superior.

I also find that it is significant that the source of the injury was undeniably related to the claimant's employment. The cart which struck the claimant was being driven by a co-worker who clearly was not on a break. Also, there is no indication Mr. Pajak was engaged in horseplay or was making any intentional attempts to strike the claimant or any other co-worker. Rather, the testimony establishes either a mechanical failure occurred in the cart or, at worst, Mr. Pajak was momentarily negligent and simply lost control of the cart.

I also find that the claimant, in being where he was, was clearly at an increased risk of sustaining the type of injury that he did. The designated break area was where work duties were often performed. As described by the claimant and Mr. Pajak, the table where the claimant was seated doubled as a work table, and the area was very close to where other employees passed through, occasionally driving carts, to carry out their work duties. The claimant testified he believed the accident may have been precipitated by a piece of pipe stored in the area striking the edge of the cart as it went by. Obviously, taking a break in this area increased the claimant's risk of being injured, whether he was on break or not.

Lastly, I note in my review of the cases dealing with the employment service issue, claims are generally held to be compensable when the cause of the injury was associated with the employment, or was particular to the place of employment. In addition to the cases cited above, see Ingle v. Thompson Murray, Inc. 96 Ark. App. 200, 239 S.W.3d 561 (2006), where a claimant was injured on a company retreat; CV's Family Foods v. Caverly, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (February 25, 2009), where a claimant fell while escorting a co-employee to her car in a darkened parking lot after the business had closed; and, Shults v.

Pulaski County Special School District, 63 Ark. App. 171, 976 S.W.2d 399 (1998), where a claimant was injured while disabling an alarm before clocking in. On the other hand, in Kinnebrew v. Little John's Trucks, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999), claim was held not compensable when the claimant was injured while taking a shower at a truck stop; Cook v. ABF Freight Systems, Inc., 88 Ark. App. 86, 194 S.W.3d 794 (2004), a truck driver was found not to have suffered a compensable injury in a motel room provided by his employer; or, McKinney v. Trane Company, 84 Ark. App. 424, 141 S.W.3d 581 (2004), where a claimant was found not to have a compensable injury when he hurt himself jumping over an obstacle to retrieve a soda.

In my opinion, the Courts of this State, in interpreting the employment service doctrine, have a marked preference for finding injuries which are connected with the place of employment to be compensable. Clearly, the nature of the claimant's injury in this case is attributable to him being at work in a place his job required him to be. The cart which struck him was furnished by his employer to be driven by employees while performing their job duties. While the claimant was on a break when he was injured, he was still at risk for an injury arising out of his employment.

Since it cannot be disputed his injury arose out of his employment, while he was following a directive from his employer and was directly connected to the time and space requirements of his employment, I find that he has established he sustained a compensable injury.

I also find that the claimant is entitled to related disability and medical benefits. The claimant testified he first saw a physician on May 7, 2008, who, according to his testimony, directed that the claimant remain off work. However, my review of the medical records show the report of that date relating to a visit to Dr. Roger Troxel, the claimant's treating physician, does not reflect the claimant was taken off work. However, in a report from Dr. Jeffrey Kornblum, of the Northeast Arkansas Neurosurgical Clinic, the doctor stated the claimant was being given an "off work" slip. I find, therefore, that the claimant is entitled to temporary total disability benefits from June 4, 2008 to a date yet to be determined. Also, the respondent has not even questioned the propriety of the treatment the claimant has received from Drs. Troxel or Kornblum. I, therefore, find this treatment is reasonable and necessary and associated with the claimant's compensable injury.

In conclusion, I find that the Administrative Law Judge's decision be reversed. I further recommend the claimant be awarded the requested medical and disability benefits.

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PHILIP A. HOOD, Commissioner