NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F900391

ROSELIE E. GINGRAS, EMPLOYEE CLAIMANT

LIBERTY BANK, EMPLOYER RESPONDENT

CNA INSURANCE COMPANY, CARRIER RESPONDENT

OPINION FILED MARCH 12, 2010

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

Claimant represented by the HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE FRANK NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed August 24, 2009.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 8, 2009, and contained in a pre-hearing order filed April 9, 2009, are hereby accepted as fact.

2. claimant has failed to prove by a preponderance of the evidence that she

suffered a compensable injury on April 9, 2007.

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

After my de novo review of the entire record, I must respectfully dissent from the majority opinion, as I find that the claimant has proven a compensable injury.

1. Evidence

The claimant, Roselie Gingras, testified that she had worked full-time for the respondent employer, Liberty Bank, since December 2006 as a teller. Her duties were exchanging and depositing money and cashing checks. She was never on call after her regular hours. She was one of four tellers. She opened the bank at times, and she had a key to the bank. She had codes to all the vaults and all the money. She was able to access the bank drawers. Overnight, the vault would hold between $50,000 to 80 to $100,000.

The claimant explained that as an opener, she was responsible for opening the bank doors, the vault and her own teller drawer at 6:45 am. The opener was supposed to wait for another employee to arrive, so that there were two people present. In practice, the other person would often be late, so the claimant would open the bank alone so it would be open on time for customers. First, she opened the

doors and then all the vaults. The vaults had to be open by 7:00 am when the bank opened. She had a key to the bank and codes to the vault. Everyone who worked at the bank had a key to the bank. Sometimes she was an opener, working 6:45 am to 3:45 or 4:00 pm. Sometimes she was a closer, which would be 10:00 am to 7:00 pm.

The bank employees were trained in case of a robbery. They had a code to use over the phone to the police, trip areas in the bank and a sign to hold up in the window. They were instructed "just not to be cooperative." The bank trained her how to handle threats in the bank, but not at home.

The claimant worked on April 9, 2007. She opened the bank that day at 6:45 am. She left work late, at 4:15 pm, and had her taxes done after work at H&R Block. When she arrived home, she followed her normal routine, letting her dog in the house and going in herself. She had almost entered her kitchen, when her assailant stepped out. He did not touch her then. Her assailant had on a mask which looked like plaster of Paris, as well as a hat and glasses. He had the mask on the whole time. The claimant testified

that she had never seen her assailant before she discovered him in her home. He was average size - 5'9" or 5'10".

The claimant testified that her assailant said, "I'm not here to hurt you. It'll be alright." She screamed. She saw that he had a gun in his hand, and she ran to the front of her house. He did not point the gun at her or fire it, but carried it down. When she ran, her assailant tried to catch her. He did not say anything when he chased the claimant. She explained that her couch is placed in front of the front door, with only enough room to squeeze out in an emergency. While trying to squeeze out of the door, her assailant tried to grab her. He was wearing gloves, and his hand slipped on her short hair. This gave her enough to "wiggle" out of the screen door. She was pushing her way out, while he was trying to pull her back inside, grabbing her shirt. As she escaped, she fell on the front steps and broke her wrist. He did not come out of the front door after her.

The claimant testified that she ran across the street to an RV park and knocked on one door but got no answer. She hid "because I was scared he was going to come get me," and she watched her attacker walk around and then

into the woods behind her house. She had her cell phone with her, so she called the police. She stayed there until the police came. She went to the police station, where they took her statement.

The claimant testified that the police investigated the crime. At that time, they did not know what was going on. They gathered all the evidence that they had. It took a long time for everything to come back from the crime lab of Arkansas. The detective is still not sure how he got in her house. Her doors were locked when she left the house, and the doors were not forced. Her assailant left the gun in her house. There was DNA evidence on the mask, which was sent off to the state crime lab. The crime lab results from the gun and the mask took a year. When the police got the results from the lab, they connected the crime to the man that did it.

The claimant testified that her assailant, whose name is Huddleston, is in a Texas jail now, and that she did not know anything about the Texas criminal case against him. She understood that Huddleston was working with someone else, and that both were apprehended, in Texas. She does keep in touch with the Arkansas detectives who were

attempting to bring him to Arkansas for criminal prosecution.

The claimant went to the emergency room the next day for her left wrist. She did not go to work the day after the assault. She missed four days of work. Normally, she worked Monday through Friday and every other Saturday. She returned to work on light duty for a few days, but then she had to do her normal job. She did not have problems doing the light duty, but it was difficult to do the teller job with the cast. She was slower than normal. Light duty meant that she did not have as many customers. The cast came off, and she continued to work on a regular schedule. When she returned to work she continued opening the bank, at 6:45 am, most of the time. This would change periodically, but for a long time, she was opener. The duty was assigned to the person whose schedule was flexible to do it. She did not get paid extra to open. Her shift was just different from the tellers who did not open. She worked from 6:45 am to 3:45 pm.

On April 9, 2007, she hurt her left arm escaping from the assailant. She never had trouble with her left arm before that time. She went to the emergency room on April

11. She waited a day, because she was so shaken up, and then went to the ER for her wrist early the next morning. She saw Dr. Park on April 17. He put her in a cast, which helped. Both the hospital and Dr. Park took x-rays. She had broken a small little bone which would be problematic in the future if it did not heal properly. Dr. Park was very concerned about her thumb and placed her in a thumb cast for eight weeks. After that, Dr. Park put a brace on it. She could remove it to wash her hand, but she had to wear it most of the time. She also had therapy twice which helped. She had not had any problems with it "so far." She understood that if she had problems in the future because it did not heal properly, then she would need surgery. Since then, her wrist has been "ok:"

> I don't - my wrist is okay now, but I don't know what that's going to be in the end. .. The doctor said, "if it heals properly, that's great," but it could give me problems down in the end too. We just don't know. That's something we don't know.

The claimant was not still having treatment.

The claimant testified that the injury has changed her life. She felt she had some problems from an emotional or psychiatric standpoint. She lived by herself before and after the injury, but "I definitely don't like to walk into

a house alone any more." After the assault, she had people meet her when she got home to check out the house, and her sister would go into the house with her. The claimant had her house and car re-keyed after the assault for fear that her assailant was going to come back, because at first she could not find her keys and her assailant was at large. She never moved back into that house. She never went back. The claimant testified that she was encouraged to get counseling by the detective, and that she did speak to a woman in the prosecutor's office who helped crime victims.

The claimant explained that at the time of the assault, her medical insurance coverage with the bank had not started, but it did start later. When she left the bank, her coverage ended, and she did not have insurance coverage anymore. She did not think she could try to claim on an incident before her coverage started.

The claimant paid out-of-pocket for her emergency costs and for her first visit with Dr. Park's treatment. She had an outstanding bill for the brace. She is still getting bills from Dr. Park. After her medical insurance kicked in, her therapy was covered, but up to then, she paid out-of-pocket. Her insurance coverage became effective

either May 1 or the last week of April. She did not ask the bank to pay for her emergency room care. She did not know until a year later that the assault was an attempted bank robbery, which why she did not ask the bank to pay for her treatment. When she found out, she had already left the bank.

The claimant explained that if she had not been able to get away from her assailant, she would have been able to let him into the bank. She would have been able to enter codes to give him access to money and rob the bank. She had all the information they needed. If she had not escaped him, gotten away, she could have been hurt worse. The claimant testified that if her assailant had taken her to the bank that evening, timers would have kept her from getting access to the vault. The vault timers are usually off by 6:30 am. The recommendation is for two people to open the vault, for safety reason, but it is not necessary. There is no mechanism to prevent one person from opening on their own. She has opened the vault by herself in the past.

The claimant also testified that if she had opened the bank at 6:30 am, the next person might show up at 6:45. She was one of the people who was normally there by that

time, and the other person was sometimes late. This would have given her assailant fifteen minutes to rob the bank. Theoretically, he could grab a lot of money in 15 minutes. If she had been forced to open the vault after 6:30 am, they could have gotten the vault money and the drawer money. Each teller has a drawer.

The claimant left the respondent employer on July 2, 2008, on good terms, to take a different job in advertising, then a few months later she changed jobs again. She worked for GPS Auto Tracker, since November 2008, in administration. She works on a computer now. She is not having problems with that at this time. Keyboarding does not give her trouble "yet." She is left-handed.

David Williams Testified that he is a detective with the Fayetteville Police Department and was in charge of the criminal investigation. He investigates violent crimes and crimes against children. He has worked there eleven years. He instructs officers. He is a certified instructor, with a primary emphasis in domestic violence and stalking crimes. He also teachers classes in how to effectively deal with the mentally ill for law enforcement officers. He has been in law enforcement 12 years.

Det. Williams first met the claimant in April 2007, when he was assigned to investigate a case in which she was the victim. The claimant had called 911 to report that she had been attacked in her home by a man wielding a gun and that she was able to get away from him during a struggle and run to a nearby RV park. Det. Williams stated that Neil Crawford, her neighbor, called 911 at about the same time to report that a woman was being attacked by a man running from her home. Crawford is the owner of Jose's Restaurant and a long-term, respected businessman in Fayetteville. Det. Williams was able to talk to Mr. Crawford when he arrived at the scene. Crawford described the man in the attack. Crawford's description was very similar to the claimant's description.

Det. Williams testified that the claimant and Crawford had given descriptions of her assailant. He was wearing a mask, which the claimant described as plaster of Paris, that it was peeling and that it was eerie. Crawford said that it was a Halloween-type mask and that there did not appear to be a nose. Det. Williams and his partner spent a lot of time in and around the claimant's house. The next morning, they found a mask. It was located on the

ground in the woods, about one hundred yards of her house in the same direction that the witnesses reported that he traveled. Det. Williams stated that the plastic was peeling off of the mask and it was an off-white color. This "jived" with the claimant's description of "plaster of Paris." Additionally, the nose feature of this plastic mask was pushed inside out from the inside of the mask, which was consistent with Crawford's observation that he did not have a nose. When the detectives showed the mask to the claimant and Crawford, they said, "That's it." The mask was sent to the crime lab, for DNA testing.

Det. Williams explained that they did an extensive search for evidence. They looked for surveillance video and tried to find witnesses. They spoke with all the neighbors and the people living out in the woods. There were homeless camps in the woods, a couple hundred yards from the neighborhood, and also near the Salvation Army. They were able to get DNA samples from everyone they interviewed, in order to compare them to the DNA sample found on the mask. All of this was sent to the crime lab, and later they learned that none of those people were a match for the DNA.

Det. Williams testified that during the initial investigation, he assumed the assault was a robbery or attempted rape or attempted murder. There was a possibility that the assault has something to do with an old boyfriend, but he was in Florida at the time. Det. Williams stated, "We didn't know what the motive was. We just knew it was violent and very dangerous."

Det. Williams testified that the crime lab results concerning the mask and the DNA evidence on it took close to a year to come back. The results matched a man named Gary Huddleston who was and is still in jail in Weatherford, Texas. He had been arrested based on a DNA hit from a crime scene in Texas. The elements of that crime were remarkably similar to the crime against the claimant, which the detectives "found interesting from the get-go."

Det. Williams testified that he was able to talk to the Texas Rangers and other law enforcement personnel, including a special agent with the FBI, the prosecutor on the case and a lieutenant with the local police department who had arrested him, about Huddleston's Texas crime. He learned that Huddleston and his accomplice, Gary McGowan, had kidnaped and held, at gunpoint, a petite female banker

and her husband. They had threatened the to mutilate the husband by cutting off all of his fingers and to kill both of them if she did not take them to the bank and open up the bank with her key. She was an opener for the bank. Huddleston and his accomplice had targeted the Texas banker, by watching the bank for several days, monitoring the employees who worked there and who opened. They identified which vehicle she drove and followed her home. The Texas authorities learned this much from Huddleston before he stopped cooperating with the police. Det. Williams understood from the Texas authorities that Huddleston had kidnaped the Texas woman "with the intent of taking her to the bank; having her use her key to open the bank, and then they were going to have free rein to take whatever they could take before the bank actually opened."

Det. Williams testified that when he learned the details that the Texas authorities had unearthed, he went to the claimant and asked her if she had a key to the bank. She explained that she did and that she was an opener. He explained to her what he had learned.

Det. Williams testified that there was other physical evidence tying Huddleston to the crime against the

claimant. The claimant's assailant had dropped the gun when he was trying to hold onto her as she tried to squeeze out of the front door. The assailant ran out of the house after her, then turned to go back toward the house, but saw Crawford and took off for the woods, according to the witness Crawford. Det. Williams believed that the claimant was going to go back to the house for the gun, but he panicked and left. The gun is an older model, nine-millimeter Beretta with a wood stock. The serial number was filed off. When Det. Williams was talking to the Texas authorities, he learned that the husband of the victim in the Texas crime owned an older model, nine-millimeter Beretta with a wood stock that he had never registered. That gun was stolen by the criminals in the Texas crime. Det. Williams believed it is the same gun. While Det. Williams could not say, for a fact, that the gun the claimant's assailant left behind is the same gun stolen from the victim in Texas, he could say, for a fact, that it is the same make, model, and approximate age, and that it matched the very specific description given, and that the serial number had been obliterated by the time it came into

his possession. This is another fact linking Huddleston to the claimant's assault.

Det. Williams testified that Huddleston had not yet been convicted of anything. At the time of the hearing, Williams had not talked to him at all. Williams had read Huddleston's statements to the Texas authorities, which do not mention Arkansas. However, Det. Williams noted that "[w]e certainly know that Mr. Huddleston's DNA is on that mask. We know that for a fact. I know that a person wearing that mask that has Mr. Huddleston's DNA was in Ms. Gingras' home, and held her at gunpoint." Det. Williams felt that it was unlikely that someone put Huddleston's DNA on the mask.

Det. Williams that the crime attempted in Arkansas is very similar to the one that occurred in Texas. The claimant was an opener with keys to the bank where she worked. He stated that her assailant, Huddleston, was not able to rob the bank, "because she got away." Huddleston and an accomplice have tried to rob banks in other locations at least once before.

Det. Williams identified Hearing Exhibit B as his report requesting a warrant for Huddleston's arrest. The

charges listed at the end of the report are the charges that Williams recommended to the prosecutor's office. He was currently awaiting an August trial in Texas. Williams intended that after that trial, Huddleston would be tried in Arkansas for his crimes against Ms. Gingras.

Det. Williams recommended counseling through the victim advocate program at the Washington County Courthouse in the Washington County Prosecutor's office, because the claimant had been through a life threatening incident.

Detective Williams also testified that because the claimant's car and house keys were missing, he recommended that she change the locks to her home and car. He explained that at the time of the assault, the identity and motive of the assailant were unknown. Without being sure that the assailant did not have her keys, Detective Williams felt that changing the locks was necessary.

The claimant also presented a Warrant Request prepared by Detective David Williams of the Fayetteville Police Department, dated January 19, 2009, which stated:

> The Arkansas State Crime Lab has reported that a DNA sample taken from the mask dropped by the suspect at the time of the incident was identified as belonging to a Gary N. Huddleston 11/03/50 (SS#440-56-0698). Mr. Huddleston is a resident of Muskogee, OK, but he is currently incarcerated in

the Parker County Texas Sheriff Office jail on offenses of aggravated attempted robbery, and a host of other charges.

Texas authorities with whom I've spoken include District Attorney Kathleen Catana, Texas Ranger Russ Authier, Lt. Mark Arnett of the Weatherford, TX police department, and Special Agent Deborah Trickey of the FBI (Ft. Worth R.A.).

The M.O. in the Texas incident which occurred in January 2007 appears similar to the one occurring in April of 2007 in Fayetteville. The victim in the Texas case was a female bank employee assigned to open the bank most mornings. Our victim, Roselie Gingras, was also a bank employee in charge of opening each morning. Ms. Gingras has since reported that her bank was routinely not in compliance with its own policy of having two people open the bank together each morning, and that it was more often than not she was the only employee present at the time the facility opened each morning. It was very clear in speaking with the Texas investigators that Huddleston and his accomplice spent time and energy learning the habits of various bank employees before deciding on their victim. It was also clear that they followed that victim to her home and were familiar with her habits. Ms. Gingras' bank, Liberty Bank on West Sixth, is highly visible from a number of public areas and businesses, and performing surveillance on the bank and its employees would have been a simple matter and not likely to raise suspicion.

In the Texas incident, just as in our incident, the suspect was waiting inside the victim's home as the victim walked in. The suspect in the Texas incident stated something along the lines of, "I'm not here to hurt you. I'm just here for the money." Ms. Gingras reported that her attacker stated, "I don't want to hurt you," right before she ran toward the door to escape. Mr. Huddleston

fits the basic size as described by Ms. Gingras during her report given that night.

The investigators in Texas reported that Huddleston and an accomplice by the name of Cary Deon McGowan kidnaped the bank employee's husband and held him until she got home from work. The couple was threatened with mutilation and death should they not cooperate. The plan as described by the victims was to have the bank employee open the facility the next day so that Huddleston and McGowan could collect money at their leisure. A series of mishaps (detailed in incident reports provided by Texas) resulted in the plan failing and Mr. Huddleston getting cut on the finger. The blood from that cut allowed the investigators to identify him months later. He was arrested for their offenses in November of 2007.

Huddleston and McGowan stole a model 92 Beretta 9 mm from the victims in the Texas incident. It was noted that the same make/model gun was dropped by the suspect in our case, and that the serial number had been filed off. The owner of the stolen gun in Texas had never registered his weapon, and he had no record of the serial number. I've sent photos of the gun we recovered. Lt. Arnett indicated it was potentially the gun stolen in their case, though neither he nor the owner could say positively. The fact that the gun was never registered and that it was originally imported from Italy could account for the fact that ATF has never been able to identify an owner.

Mr. Huddleston used a phone with the number 918.760.3051 (AT&T) during the Texas incident, and he was in possession of the same phone and number when he was arrested in November. A subpoena for his phone records during the time of our incident was requested through the Washington County Prosecutor's Office. Phone calls made on that phone in the hours before and after the robbery were not to anyone in the Fayetteville area, and subsequent phone record subpoenas on the numbers

> dialed have caused delays without any significant new information being gathered.
>
> The investigators in Texas have indicated they don't believe Mr. Huddleston will make a statement in our matter as he has stopped speaking with all law enforcement officials. Mr. McGowan's whereabouts are unknown, but I was informed that he is believed to be in Mexico. I spoke with Mr. Huddleston's attorney, Tommy Wise (817.599.4136) on 08/04/08. He did not believe his client would be interested in making a statement in this matter unless his client thought Arkansas charges would get him away from the Texas prison system. Texas authorities have been clear that they have no intention of relinquishing their priority in this case to federal or other state authorities. District Attorney Catana said her best offer for a plea bargain to Mr. Huddleston will likely be fifty years.
>
> Given that, I will submit this case to the County Prosecutor as a warrant request for Mr. Huddleston to include the following recommended offences: [aggravated residential burglary, kidnaping, aggravated robbery, aggravated assault, batter in the first degree].

Also entered into evidence was an affidavit, dated December 10, 2009, of Detective David Williams, in which he explained that he obtained documents from the Texas prosecutor handling Huddleston's criminal charges there who discovered the attached documents in her investigation. Detective Williams explained in the affidavit that Attachment A was a document listing numbers representing radio frequencies used by the Fayetteville Police

Department. He stated that "[w]ith an inexpensive policy frequency scanner and the correct frequencies, any person would be able to listen in on what the police were doing." The document also contained descriptions of vehicles, three of which were confirmed to have belonged to employees working at Liberty Bank at the time of the assault on Miss Gingras. Detective Williams' affidavit also explained that Attachment B was a document listing phone numbers and hours of operation for all the Liberty Banks in northwest Arkansas, as well at the addresses of other banks in Fayetteville. Lastly, Detective Williams affirmed that "I spoke with Gary Huddleston regarding his conviction for the Texas crime and his involvement in the crime against Miss Gingras, including his objective of robbing Liberty Bank, and I feel confident that he will cooperate and offer a formal statement of admission in the present case."

The medical records include the claimant's initial visit to the Washington Regional Emergency Room on April 11, 2007. This record states that "Patient complained of right hand and wrist pain. Patient had an intruder in her home Monday night and is not sure if she injured it pushing him away or when she fell down some stairs." The diagnosis was

a closed navicular (scaphoid) fracture. The records also reflect that the claimant saw Dr. Park for an evaluation of her right wrist fraction on April 17, 2007 and a re-evaluation on June 5, 2007.

2. Adjudication

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4)(D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The issues in this claim are whether the claimant's injury arose out of and in the course of her

employment and then whether she was performing employment services at the time of the injury. "Arising out of the employment" concerns the origin or cause of the accident, and that in "order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks." Arkansas Dept. of Health v. Huntley, 12 Ark. App. 287, 291-2, 675 S.W.2d 845 (1984). "In the course of the employment" concerns the time, place, and circumstances under which the injury occurred. Arkansas Dept. of Health v. Huntley, supra at 291-2. The Arkansas Workers' Compensation Act of 1993 excluded injuries which occur when the employee is not performing employment services. Ark. Code Ann. Sec. 11-9-102(4)(B)(iii).

a. Arising out of and in the course of employment

The first question, whether the claimant's injury arose out of employment, is answered in the affirmative, where she was an employee charged with opening the bank on a regular basis, and often alone. Evidence gathered in the criminal investigation of her assault and of a similar crime in Texas revealed that one Gary Huddleston had "cased" the bank, observing its employees and their vehicles, as well as

monitoring police activity. The evidence also connected Huddleston to the mask worn by her assailant. The descriptions by the claimant and by her neighbor Crawford of the assailant match the mask which was found near her home in the area through which he was observed to flee, and on the mask DNA evidence was found which was Huddleston's, according to crime lab testing. Huddleston was accused of crimes with a similar modus operandi in Texas. His plan was to identify employees with access to the bank, kidnap them, and force them to open the bank and vaults in order for Huddleston to rob the bank. I note the respondent employer's concern about the evidence in this case. Huddleston is not on trial, and this is not a criminal case. The burden of proof is much lower in a workers' compensation claim, and the Commission is not bound by the rules of evidence. The evidence is sufficient and reliable enough to come to the conclusion that the claimant was the victim of a botched attempted bank robbery, without resort to speculation.

I also noted that there is no evidence of a personal motive or personal connection to the assault.

Simply stated, had the claimant not been an employee charged with the responsibility of opening the bank and of being in possession of a key and codes to the bank and vaults, she would not have been the victim of this assault. Her employment was directly and causally related to the injury. In general, injuries from assaults with a causal connection to the employment are compensable, while injuries from purely personal assaults are not, and assaults "arise out of the employment either if the risk of assault is increased by the nature or setting of the work..." Westark Specialties v. Lindsey, 259 Ark. 351, 532 S.W.2d 757 (1976). The nature of the claimant's work, opening the bank regularly, working as a teller and being responsible for the key and codes, increased the risk of assault.

This claim is very similar to Craig v. Electrolux Corp., 212 Kan. 75, 510 P.2d 138 (1973) in which the claimant, an outside salesman who collected money from customers, was murdered in his car, while waiting for a prospective customer to return to his office. Evidence showed that the assailants had observed the claimant with a large amount of money and had attempted to rob him. The court held that since the reason for the murder was the

money which decedent had collected for his employer, there was causal connection between the employment and the murder, and the death was compensable. Likewise, there is a causal connection between the employment and the injurious incident, and the present claimant's injury arose out of her employment.

The second hurdle for the claimant is "the course of employment" question. There is a great deal of caselaw supporting the position that the course of employment factor, time and space, "may be proved by showing that the causative factors occurred during the time and space limits of employment." Strother v. Morrison Cafeteria, 383 So.2d 623, 628 (Fla. 1980). The claimant was a cashier at a cafeteria. The injury:

> had its genesis at the place of employment since the assailants were actually on the business premises, casing it so to speak, and, then when [the claimant] left, they followed her home and there assaulted her and robbed her of her purse which they thought contained the cafeteria's cash receipts. The time bomb began ticking while she was on the business premised and during working hours.

The Arkansas Courts followed this logic in Jones v. City of Imboden, 39 Ark. App. 19, 832 S.W.2d 866 (1992). In that case, an injury which occurred after the claimant

had left the employ of the city was compensable, where the assault had its origins in the employment. The court discussed several cases from other jurisdictions holding that the "course of" requirement is "satisfied by a showing of an unbroken course beginning with work and ending with injury under such circumstances that the beginning and the end are connected parts of a single work-related incident." Jones, 39 Ark. App. at 22, quoting Graybeal v. Board of Supervisors of Montgomery County, 216 Va. 77, 216 S.E.2d 52 (1975).

The claimant's injury was the end result of a course of action beginning with her employment and her assailant's observation of the activities of her employer and herself on the work premises. The link between the assault and the claimant was the employment and the claimant's access to the bank's cash deposits. There is no question that the claimant's injury was in the course of her employment.

I note that both parties argue that the positional risk doctrine applies to their benefit, but the law is clear that the positional risk doctrine applies only when there is no evidence of a personal motive to an assault and no

evidence of work-relatedness too. Kendrick v. Peel, Eddy and Gibbons Law Firm, 32 Ark. App. 29, 795 S.W.2d 365 (1990); Deffenbaugh Industries v. Angus, 313 Ark. 100, 852 S.W.2d 804 (1993).

The third hurdle for the claimant is that she was performing employment services at the time of the injury. The term "employment services" is not defined in the Arkansas Workers' Compensation Act, but the Supreme Court has stated that "an employee performs employment services when doing something that is generally required by the employer." CV'S Family Foods v. Caverly, 2009 Ark. App. 114, 2 (2009)(citing Wallace v. West Fraser South, Inc., 365 Ark. 68, 225 S.W.3d 361 (2006)); Texarkana v. Conner, 373 Ark. 372, 376 (2008). The test for "employment services" is "the same as that used to determine whether an employee was acting within the course of employment, i.e., 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." Id. The Supreme Court in Texarkana v. Conner, supra, stated that the "critical inquiry is whether the interests of the employer were being

directly or indirectly advanced by the employee at the time of the injury," and that the issue depends on the particular facts and circumstances of each case. The Court of Appeals has also explained that "[w]hatever 'employment services' means must be determined within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions." Honeysuckle v. Stout, 2009 Ark. App. 696 (2009).

The courts have found that activities in which claimants were engaged after work hours ended or while on break were employment services. In CV'S Family Foods v. Caverly, 2009 Ark. App. 114 (2009), the claimant was the night manager of the appellant grocery store. He was injured escorting a sixteen-year-old employee to her vehicle in the store parking lot after dark and after the store had closed. The Court of Appeals held that he was performing employment services:

> Watching the young employee to ensure her safety at night was more than gentlemanly and laudable: it was an activity that came within the scope of his oversight, and it benefitted the employer by ensuring the safety of a trained and valuable employee, and by helping establish a record of safety on the premises that would benefit the employer in its attempts to recruit future

> employees and to alleviate any fears that potential customers might have about the safety of the parking lot after dark.

In Texarkana v. Conner, 373 Ark. 372 (2008), the claimant was injured opening a locked gate to a parking lot. He was returning from a break in his vehicle, and the normal entrance to the parking lot was blocked. His intent was to park and go to the cafeteria to eat lunch, where he would be on call to perform his job duties if necessary. By creating access to the parking lot, he was advancing his employer's interests, even if he was the only employee seeking access at that time. In that case, the Arkansas Supreme Court made a statement crucial to the current claim:

> It is clear that in a case such as the present one, where an injury occurs outside the time and space boundaries of the employment, the critical inquiry is whether the employer's interests were being advanced, either directly or indirectly.

Conner, supra at 377 (emphasis added). The Court went on to say that the pertinent question was whether the employer's interests were advanced by the employee at the time he unlocked the gates and injured himself. Thus, according to the Arkansas Supreme Court, the fact that "an injury occurs outside the time and space boundaries of the employment" does not bar a finding that an employee was

engaged in employment services at the time of an injury. Here, the claimant was not at her work premises when she was injured, and she was not on the clock or being paid for her time. These facts do not prevent a finding of employment services.

At the time of her injury, the claimant was in possession of a key and of codes necessary for access to the bank facility and vaults. Her possession of these access tools was for the benefit of the employer, in having a trusted employee capable of opening the bank for business each morning. The requirements of "arising out of," "in the course of" and "employment services" are interrelated in the law and in these facts. The claimant's activity, carrying the keys and codes to access the bank and the money contained therein, may not have been an activity for the benefit of the employer had her injury not otherwise been related to her employment, but in this case it was that very activity, carrying those keys and codes, which precipitated the injury. The evidence shows that it was more likely than not that the claimant's assailant intended to rob the bank through her access to it.

Furthermore, the claimant's behavior in escaping her assailant was a benefit to the bank directly in that she thwarted the robbery and indirectly in that she was not acting intentionally to do more than escape him and was unaware of the purpose behind the assault. In CV'S Family Foods v. Caverly, supra, the claimant testified that escorting the young employee to her car was the "gentlemanly" thing to do, but the court found that, while "gentlemanly" behavior was laudable, his behavior benefitted the employer for other reasons including preserving the safety of a valued employee and the reputation of the business as a safe place. Thus, the intent behind the claimant's behavior is not the important factor in this analysis. Rather, the existence of a benefit is the important factor.

When taken as a whole, within the context of this situation, this employment and employer, these working relationships and practical working conditions, the claimant's injury occurred while she was carrying the keys and codes to access the bank and vaults and while she was evading an assault by a person intending to rob the bank and vaults, both to the benefit of her employer. The origin of

the assault was physically the bank premises where the claimant and the bank were studied by the assailant. Furthermore, the purpose of the assault was to use the claimant's access to the bank, through her possession of the keys and codes, to rob the bank. Therefore, the claimant proved by a preponderance of the evidence that she sustained an injury arising out of and in the course of employment, at a time when employment services were being performed.

b. The injury caused internal or external physical harm to the body which required medical services

The claimant credibly testified, and the medical records support this testimony, that she injured her wrist when she was escaping from her assailant. I find this element is satisfied.

c. Medical evidence supported by objective findings

The emergency room record of April 11, 2007 shows that the claimant underwent an x-ray which revealed a closed fracture in her right wrist, satisfying this element.

d. The injury was caused by a specific incident and is identifiable by time and place of occurrence.

The claimant credibly testified as to the circumstances of her injury, which the testimony of Det. Williams and the documentary evidence support, that on April

9, 2007 in the early evening she fell and broke her wrist on her front porch as she was escaping her assailant. This element is likewise satisfied.

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 9, 2007.

3. Conclusion

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury.

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PHILIP A. HOOD, Commissioner