

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G000501

JOHNNY W. STEPHENS, EMPLOYEE	CLAIMANT
K W JESTER LOGGING, INC., EMPLOYER	RESPONDENT
SOUTHEASTERN CLAIMS SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 22, 2011

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

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 18, 2011. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the prehearing conference and contained in the Prehearing Order filed November 3, 2010, are hereby accepted as fact.
2. The claimant has proven, by a preponderance of the evidence, that he

sustained compensable injuries as the result of a specific incident when he was involved in a motor vehicle accident on December 30, 2009.

3. The motor vehicle accident on December 30, 2009, arose out of and during the course of claimant's employment. The claimant was performing employment related services at the time of his accident and resulting injuries.
4. Respondents are responsible for all medical related to the claimant's admission to the hospital in Arkadelphia, Arkansas, on December 30, 2009, as well as claimant's hospitalization at UAMS Medical Center for the period beginning December 30, 2009, through his discharge on January 6, 2010.
5. All additional issues, including claimant's entitlement to indemnity benefits, as well as additional medical treatment have been specifically reserved.

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

We therefore affirm the January 18, 2011, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Specifically, I find that the claimant was not performing employment services at the time he had an automobile accident on December 30, 2009.

The claimant was employed by the respondent employer as a skidder driver. The claimant had left the timber woods, dropped his other co-employees off at their homes, filled up the company truck, and was headed home in the company truck when he had an accident about two miles from his house. The claimant was driving down the highway, went off of a curve, and hit a tree. The claimant spent about 7 days at UAMS Medical Center after he had been taken to Arkadelphia Hospital and then transferred to Little Rock.

Approximately 7 or 8 days after the accident, the claimant spoke with Brenda Sellers, the claims adjuster for the respondent carrier. Ms. Sellers testified that the recorded statement was lost because her computer crashed shortly after she took the claimant's statement and all she had was her notes from

the conversation. Ms. Sellers testified that the claimant did not mention having to stop anywhere before arriving at home, and that the claimant stated he was "done for the day" on two different occasions in the conversation.

The claimant testified at the hearing that he had to stop at the respondent employer's shop that was about a mile from his house to get a CB radio for the next day. However, the claimant did not tell Ms. Sellers that, only that he was "done for the day". The respondents controverted the claimant's claim, finding that the claimant was not performing employment services when he sustained his injuries. In the alternative, if the Commission found that the claimant was performing employment services, the respondents argue that the claimant suffered from an idiopathic event, which was totally unrelated to his employment. Based upon my de novo of the record, I find that the claimant was not performing employment services at the time she sustained his injuries.

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury does not include an injury that is inflicted upon the employee at a time when

employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii)(Supp. 2009). The phrase "in the course of employment" and the term "employment services" are not defined in the Workers' Compensation Act. Texarkana Sch. Dist. v. Conner, 373 Ark. 372, 284 S.W.3d 57 (2008).

An employee is performing employment services when he or she is doing something that is generally required by his or her employer. Id. Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). The Commission uses the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. Jivan v. Econ. Inn & Suites, 370 Ark. 414, 260 S.W.3d 281 (2007). 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 employers interest, directly or indirectly. Id. In Conner, 373 Ark. 372, 284 S.W.3d 57, the Court stated that where it was clear that the injury occurred outside the time and space boundaries of employment, 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. Moreover, the

issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. Id.

The Court of Appeals and the Supreme Court have found injuries compensable when the employee was required to stay on his or her employer's premises and perform duties, if the need arises, during their break. See, Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); Wallace v. West Fraser South, 365 Ark. 68, 225 S.W.3d 361 (2006). In these cases, the Courts found that the employee's presence and availability advanced the employer's interest. Injuries have been found not to be compensable when the employer receives no benefit from the activity being performed during the break or when the activity is not inherently necessary for the performance of the employee's job, even though his or her presence or action benefits the employer. E.g., McKinney v. Trane Co., 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004); Smith v. City of Fort Smith, 84 Ark. App. 430, 435, 143 S.W.3d 593, 596-97 (2004).

The Courts have also found that an injury suffered by an employee while on a break is compensable if the employer has imposed some duty or requirement to be fulfilled by the employee during the break. E.g.,

Moncus v. Billingsley Logging and American Ins. Co., 366 Ark. 383, 235, S.W.3d, 877 (2006). In Moncus, although the employee was not engaged in the activity for which he was primarily employed when he was fatally injured, he was carrying out the express directions of his employer by following the employer to a job site to begin working. Similarly, in Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the claimant suffered a compensable injury when she was returning her purse to her locker on her way back from a scheduled break. For security reasons, the respondent required employees to place their belongings in their locker before returning to work. In Wallace v. West Fraser South, the Supreme Court held that an employee suffered a compensable injury when he fell while walking over a board that was placed by his employer across a ditch for employees to use as a bridge when returning from a break. The claimant was advancing his employer's interest during the break because he remained on the clock, was not allowed to leave the premises, and could be called back to work.

The Supreme Court drew a bright-line rule for "residential employees" in Jivan v. Economy Inn, 370 Ark. 44,260 S.W.3d 260 (2007). In this case, the claimant was a hotel manager who lived on the premises

and was "on-call" twenty-four hours a day. She suffered a compensable injury while she was changing clothes in her bathroom to go to the gym. The Court found that the claimant was at an increased risk and held that "[Jivan's] presence on the premises during the fire exposed her to a greater degree of risk than someone who did not live on the premises. ... Thus, [she] indirectly advanced her employer's interests, even while remaining on the premises during the fire." The Courts have additionally found that an injury suffered by a non-residential employee is not compensable where the employee is performing an activity merely for the purpose of attending to his personal needs. In Cook v. ABF Freight Systems, Inc., 88 Ark. App. 86, 194 S.W.3d 794 (2004), a truck driver who was "off the clock" but "on-call" in a motel room provided by his employer was injured while turning on the lights in the bathroom. The Court found that the claimant was not performing employment services because there was no evidence that his going into the bathroom was for any reason other than to attend to his own personal needs.

In Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004), the Court affirmed the Commission's denial of benefits for an injury that occurred within normal working hours, on the employer's

premises, and while the claimant was advancing the employer's interest because the activity the claimant was engaged in was not inherently necessary for the claimant's job. The claimant was a truck driver at the city dump and the city allowed employees to remove debris from the dump for their own personal use. The claimant was injured removing gravel for his own personal use. The claimant's injuries were found not to be compensable because the gravel loading activity was not inherently necessary for the performance of his job as a dump-truck driver.

The Court has previously recognized that an injury is compensable even when an employee was on break or had not yet clocked in as long as the employee was performing employment services at the time the injury occurred. Jonesboro Care & Rehab Ctr. v. Woods, 2010 Ark. 482, \_\_\_ S.W.3d \_\_\_ (2010) holding that an employee was performing employment services when she stepped outside for a break while attending a mandatory seminar and was required to wait afterward to complete paperwork and pick up her paycheck. In Conner, the Court found that an injury sustained by a janitor while opening a gate to a school parking lot upon returning from his lunch break was compensable because the janitor was performing employment services at the time of his injury

particularly where he was not allowed to leave the workplace area during break. In Collins v. Excel Specialty Prods., 347 Ark. 811, 819, 69 S.W.3d 14, 20 (2002), the Court found that an employee's injury, suffered while taking a restroom break, was compensable, because the "restroom break was a necessary function and directly or indirectly advanced the interest of the employer". In the case of White v. Georgia-Pac. Corp., 339 Ark. 474, 6 S.W.3d 98 (1999) the Court held that an employee's injuries were compensable because the employee was required to monitor his work area while he was taking a smoke break and was thus performing employment services.

First and foremost, I give more weight to the testimony of Ms. Sellers than I do testimony of the claimant that stated he was on his way to the respondent employer's shop to pick up a CB radio before he went home. On two separate occasions, the claimant told Ms. Sellers that he was "done for the day" and did not mention that he had to make a stop by the shop in Gurdon. When Ms. Sellers called to inform the claimant that his claim was being denied due to the absence of any employment-related services being performed at the time of the accident, the claimant did not identify any job tasks being performed at the time of the accident.

The claimant did not state at that time that he needed to stop at the shop.

This case is akin to the case of Daniels v. Arkansas Department of Human Services, 77 Ark. App. 99, 72 S.W.3d 128 (2002). In Daniels, the claimant was charged with transporting clients just as the claimant in this case was transporting co-workers to and from the timber woods. In Daniels, the Court of Appeals found that the claimant was not engaged in that particular task at the time of her automobile accident, but she had been returning to the office after lunch. The Court stated, "Because appellant was going to the workplace, we cannot conclude that she was carrying out the employer's purpose or advancing the employer's interest, either directly or indirectly when the accident occurred."

Another case akin to this case is Lepard v. West Memphis Machine & Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995). The Court stated that the going and coming rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from his place of employment. The rationale behind this rule is that an employee is not within the course of his employment while traveling to and from his job. The exceptions to the going and coming rule include:

- 1) one where an employee is injured while in close proximity to the employer's premises;
- 2) Where the employee furnishes to and from work;
- 3) Where the employee is a traveling salesman;
- 4) Where the employee is injured in a special errand; and
- 5) Where the employee compensates the employee for his time from the moment he leaves until he returns home.

In Lepard, the claimant died after he collided with a train while driving a truck owned by his employer. Just prior to the accident, the claimant had hand-delivered a co-worker's paycheck. The testimony at the hearing revealed that the claimant's employer allowed the claimant to use the company truck to get to and from work due to the fact that his family had only one operational vehicle. The Court of Appeals placed a great deal of emphasis on the fact that the employer's decision to allow the claimant to drive a company truck was a gratuitous gesture. The Court of Appeals found that there was no nexus between the employment and the travel because the claimant was merely headed home from work. As in this case presently before us, the claimant was merely headed home from work.

Furthermore, in Swearingen v. Evergreen Lawns, 85 Ark. App. 61, 145 S.W.3d 830 (2004), the Court

affirmed the Commission's denial of benefits based on their conclusion that the act of furnishing a vehicle by the employer was more of a favor for the employee than it was a benefit for the employer. In Swearingen, the claimant dropped off a co-worker at his house before proceeding towards his own home. Like the claimant in the case presently before us, the claimant in Swearingen testified that he was "finished for the day" and was "done with all his work."

When I consider all of the evidence in the case and the precedent cited above, I cannot find that the claimant was performing employment services at the time of his accident. The claimant was employed by the respondent employer as a skidder driver, not as a courier driver or a truck driver. At the time of his accident, he was not driving a skidder, nor was he out in the woods. He was not doing anything related to his normal duties as a skidder driver. The claimant was merely driving home and was not transporting any co-workers at the time of his accident. The claimant's statements given several days after the accident that he was done for the day and that fact that he never told Ms. Sellers that he had to stop by the shop until sometime later lead me to conclude that the claimant was headed home. The claimant is precluded from receiving

Workers' Compensation benefits because he was doing absolutely nothing to further the interests of his employer at the time he sustained his injuries in the automobile accident.

If I were to find that the claimant was performing employment services at the time of his accident, a finding I do not make, I find that the claimant would still be precluded from receiving benefits based upon the fact that his wreck was the result of an idiopathic blackout. The claimant's wreck occurred on a stretch of road the claimant had traveled many times. He straightened a curve and slid sideways into a tree. The claimant had explained to his boss, Kevin Jester, early on that he had likely blacked out due to his blood sugar irregularities associated with his diabetes. When the claimant was questioned at the hearing, he stated that there was not anything on the road that caused him to have the accident and he did not even come to until after he was up against the tree and the emergency personnel were trying to extract him from the vehicle. Further, the claimant and his wife told the doctors that the claimant has passed out when the wreck happened.

The medical records reveal that the claimant has been treated in the past for severe dizziness,

headaches, high blood pressure, and diabetes. At the time the claimant was admitted on the day of the accident at UAMS, he was noted to have chronic renal disease with acidosis.

An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998); Kuhn v. Majestic Hotel, 324 Ark. 21, 918 S.W.2d 158 (1996); Little Rock Convention & Visitors Bur. v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997); Moore v. Darling Store Fixtures 22 Ark. App. 21, 732 S.W.2d 496 (1987). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. ERC, supra. Where a claimant suffers an unexplained injury at work, it is generally compensable. Little Rock Convention & Visitors Bur., supra. Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk by placing the employee in a position, which increases the dangerous effect to the fall. Id. Employment conditions can contribute to the risk or aggravate the injury by, for example, placing the employee in a position which increases the dangerous

effect of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Id.

In Moore, supra, the Court of Appeals offered the following analysis with regard to whether an on-the-job fall will give rise to compensation:

When one suffers an injury at work, the cause is, obviously, either known or unknown. Larson's treatise on workers' compensation law states that the most common example of a situation in which the cause of the harm is unknown is the unexplained fall in the course of employment and that most courts confronted with that situation have seen fit to award compensation. 1 Larson, *The Law of Workmen's compensation*, § 10.31, at 3-87 (1985). However, injuries from idiopathic falls do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of the fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Larson § 12.11.

The word "idiopathic" is defined in *Webster's Third New International Dictionary, Unabridged* (1976), as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Although the two concepts are frequently confused, Larson says "unexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of

personal origin." Larson § 12.11, at 3-314.

Our Arkansas cases have followed the above rules. In Fairview Kennels v. Bailey, 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981), we relied upon a statement from Larson § 10.31 that "It is significant to note that most courts confronted with the unexplained fall problem have seen fit to award compensation," and we held that the claimant's explanation that, while engaged in her work-related duties she "fell and couldn't get up," was sufficient for the Commission to find that the claimant fell in the course of her employment. 271 Ark. at 715. Moore, 22 Ark. App. at 25, 732 S.W.2d at 498.

In my opinion, a review of the evidence demonstrates that the claimant in his case was simply driving home when he passed out due to complications from his diabetes, from low blood sugar and metabolic acidosis. Therefore, I find that the claimant has failed to meet his burden of proof. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner