BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G901764

WILLIAM ACEVEDO, EMPLOYEE — CLAIMANT

PAM TRANSPORT, INC.,
SELF-INSURED EMPLOYER — RESPONDENT NO. 1

DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND — RESPONDENT NO. 2

OPINION FILED APRIL 1, 2021

Upon review before the Full Commission in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE WHITNEY JAMES, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals the Administrative Law Judge's Opinion filed September 24, 2020, in which the Administrative Law Judge found, among other things, that Claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury on February 25, 2019 because Claimant was not performing employment services at the time of his injury.

We have carefully conducted a *de novo* review of the entire record and find 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 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.

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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CHRISTOPHER L. PALMER, Commissioner

Commissioner Willhite dissents

DISSENTING OPINION

After my *de novo* review of the record in this claim, I dissent from the majority opinion, finding that the claimant "failed to prove by a preponderance of the evidence that he sustained a compensable injury on February 25, 2019. Claimant was not performing 'employment services' at the time of his accident."

The claimant worked for the respondent-employer as a truck driver. The claimant testified that the frame of the truck he was driving had been damaged in an incident in a snowstorm. On February 21, 2019, the claimant took the truck to Tontitown to be assessed by the respondent's mechanic. The mechanic determined that the truck needed to be retired.

The claimant remained in Tontitown at one of the respondent's facilities for several days while waiting for a replacement truck. The claimant explained that he stayed in Tontitown because there were other people there waiting for trucks and he did not want to miss the opportunity to get a truck and get back to work.

While in Tontitown, the claimant received layover pay. Andrew Christensen, the respondent employer's Vice President of Safety, explained that layover pay was paid to "help compensate for lost wages".

On February 25, 2019, the claimant was struck by a pickup truck while walking to a store to buy a jacket. After the accident, the claimant was taken by ambulance to Washington Regional Medical Center. The claimant was diagnosed with a head concussion, displaced fracture of shaft of the left femur, left anterior tibial fracture, and a fracture of the dorsal aspect of the navicular bone. The claimant underwent an "IM nailing of left femur fracture".

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. 2012), 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 claimant's accidental injury unquestionably caused internal or external physical harm and is identifiable by time and place of the occurrence. Additionally, there are clearly objective findings of the claimant's injuries in the form of a head concussion, swelling and bruising over the right eye, displaced fracture of shaft of the left femur, left anterior tibial fracture, and a fracture of the dorsal aspect of the navicular bone. In addition, this injury required medical treatment in the form of prescription medication, an "IM nailing of left femur fracture", and rehabilitation. The issue in this claim is whether the claimant was performing employment services at the time he sustained his injuries.

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, 304 S.W.3d 671 (2009) (citing *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006)); *Texarkana v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (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, 374 S.W.3d 14 (2009).

It is clear that the claimant was advancing the employer's interest, at least in an indirect manner, by staying in Tontitown, being available to resume work as soon as a truck was made available to him. This becomes even more evident when considering the claimant was

compensated for remaining in Tontitown and would not have been compensated if he had returned home while waiting. While the claimant was not performing his duty of driving at the time of his accident, he explained that while he was waiting, he "had to be basically on standby, so you're near enough so they could send me back out". "It is clear that when an employer requires an employee to be available for work duties, the employee is performing employment services." *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). It was of no consequence that the claimant was going to purchase a jacket when the accident occurred because he was on call at the time. See *Univ. of Ark. For Med. Sciences v. Hines*, 590 S.W.3d 183, 2019 Ark. App. 557 (2019) and *Ray*, *supra*. Therefore, for the aforementioned reasons, I find that the claimant was performing employment services at the time of his accident. Thus, the claimant has proven by a preponderance of the evidence that he suffered compensable left leg, left ankle, head and face injuries.

For the foregoing reason, I dissent from the majority opinion.

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M. Scott Willhite, Commissioner