BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G806592

BRON BELL, EMPLOYEE	CLAIMANT
MINERAL SPRINGS SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
ARKANSAS SCHOOL BOARDS ASSOCIATION, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 14, 2022

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on December 30, 2021. The Administrative Law Judge found that the claimant "has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder while performing employment services at the time of his incident on September

27, 2018." After our *de novo* review of the entire record, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he sustained a compensable right shoulder injury on September 27, 2018.

I. HISTORY

The claimant worked for the respondent-employer as an agriculture and shop teacher. The claimant also served as the facilities administrator. The claimant testified that his typical work hours were from 7:00 a.m. to 4:00 or 4:30 p.m. According to the claimant, he took his thirty-minute lunch break between 11:30 and 12:00. The claimant was a salaried employee.

The claimant testified that his workplace accident happened as follows:

> Q Okay. Now, let's talk about your date of injury back in September of 2018 – September 27, 2018. Tell me what happened on that day.
>
> A I – after I had put up everything and all students were dismissed out of my building, I hit the front door of my building, I take a beeline across campus – I'm guessing it's 200 feet – I go in the back door of the cafeteria, otherwise it's another 50 feet around, Nicole has my lunch –
>
> Q Your wife?

> A My wife – literally hands off, I head back out the door. On that particular day when I headed out the door, I hit another building that is 10 to 12 feet away. I can't say if I slipped. I can't say if I – I don't know how it happened. But when I came out of that building, before I knew it, I hit the other building.

Regarding his responsibilities during his lunch break, the claimant testified that during his trip between the agricultural building and the cafeteria he considered himself at work. The claimant held this belief because if a fight had broken out between students, he would have been required to intervene. The claimant added that this had happened before. Additionally, the claimant testified that once he was on campus his responsibilities began because he was always a teacher and always a mandatory reporter.

One day after the accident, the claimant received treatment for right shoulder pain and neck pain at the Oge Medical Clinic. An x-ray taken on November 21, 2018, revealed "right shoulder arthroplasty hardware in place with dislocation of the humeral component from the glenoid component".

Prior to his work accident, the claimant had undergone a right reverse total shoulder arthroplasty in 2013. On March 27, 2019, the claimant underwent a revision of this surgery to correct instability in the shoulder that occurred after his workplace accident.

Following the surgery, the claimant continued to suffer with right shoulder dislocation. On May 30, 2020, the claimant presented to the Emergency Department of Chi St. Vincent Hospital – Hot Springs. The claimant was diagnosed with right shoulder prosthesis dislocation. The claimant underwent a closed reduction, right reverse total shoulder prosthesis.

The claimant was seen by Dr. Christopher Young on December 11, 2020, for complaints of right shoulder pain. The claimant gave a history of "multiple dislocations" in his right shoulder with his last dislocation being a week prior. Dr. Young assessed the claimant with a "painful right reverse shoulder replacement" and noted that he would continue to treat the claimant's shoulder conservatively.

A pre-hearing order was filed on June 16, 2021. The claimant contends that "[o]n 9/27/2018, claimant was returning back to his classroom from the cafeteria when he fell off of a landing and injured his right shoulder, neck and head. The respondent denied the claim. The claimant was forced to treat on his own, and he did not receive any benefits from the respondent. All other issues are reserved."

The respondents contend that "Claimant did not sustain a compensable injury within the course and scope of her [sic] employment."

The parties agreed to litigate whether the claimant sustained a compensable injury to his right shoulder[1];

After a hearing, an Administrative Law Judge filed an opinion on December 30, 2021. The Administrative Law Judge found that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder while performing employment services at the time of his incident on September 27, 2018. The claimant appeals this finding to the Full Commission.

II. 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. 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

[1] The pre-hearing order indicates that the issue of "whether the claimant sustained compensable injuries to his right shoulder, head, neck, and other whole body" were to be litigated; however, the claimant's counsel clarified at the beginning of the hearing that only the compensability of the claimant's right shoulder injury would be litigated during the hearing.

by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *See*, *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *Conway Convalescent Center v. Murphree*, 266 Ark. 985, 585 S.W.2d 462 (Ark. App. 1979); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. *Murphree*, *supra*. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition.

The claimant's accidental injury unquestionably caused internal 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 dislocated right shoulder. In addition, this injury required medical treatment in the form of prescription medication and surgical intervention. Although the claimant had a pre-existing right shoulder condition, it is clear from the fact that surgery was required to stabilize the shoulder that this condition was aggravated by his workplace accident.

The issue in this claim is whether the claimant was performing employment services at the time he sustained his injuries. Employment services may be defined as an activity which benefits 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 Sch Dist. 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 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 Sch. Dist. 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.

Injuries sustained by employees who are "on call" during break or who are performing both employment services and personal services are compensable. *See Univ. Ark. For Med. Sciences v. Hines*, 2019 Ark. App. 557, 590 S.W.3d 183 (employer derived a benefit from employee remaining in the building, immediately available to resume her duties; the fact that employee was on a personal call was of no consequence because the employer required her to resume her duties when called); *Kimbell v. Ass'n. of Rehab. Indus. & Bus. Companion Prop. &*

Cas., 366 Ark. 297, 235 S.W.3d 499 (2006) (employee was advancing his employer's interest by having a conversation with a client of the employer when he fell during a smoke break); *Ray v. Univ. of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1999) (claimant, who was injured when she slipped on salad dressing while reaching for a snack for personal consumption, was performing employment services when her employer received a benefit from appellant's presence during her lunch break because the claimant was required to leave her break if a student needed her assistance).

In the case at bar, the claimant was within the time and space boundaries of his employment, he was paid for his time and, even though he was on his lunch break, he was on the jobsite when he sustained his injury. Additionally, as in *Hines, supra*, the claimant was required to leave his break and return to work if he was needed to assist with a student incident. The claimant testified that he was required to assist if, for example, a fight between students started. The claimant testified further that he had assisted breaking up a fight on his lunch break in the past. Also, it is significant to note that up to the time of this work accident the claimant, and quite possibly other school employees, believed they were required to remain on campus during lunch. (J. Ex 1., p. 20)

In addition to this duty, even if he was on his lunch break, the claimant would be required to report any incidents that mandatory reporters are required to report. This fact is supported by the testimony of Billy Lee,

the superintendent of the respondent school district. Mr. Lee testified as follows:

> Q So if Mr. Bell were in that area between the agriculture building and the cafeteria and he witnessed something, would he have a duty to report it at that time or it's just okay, even if it's harmful to someone, [to] wait until he's done?
>
> A Ethically he would need to report that to the person that was on duty or the principle [sic].
>
> Q Immediately?
>
> A Yes, ma'am.

Clearly, the respondent-employer derived a benefit from the claimant remaining on campus during his lunch break. Despite the claimant's lunch period being designated "duty free", clearly, he was on duty whenever he was on campus. It was of no consequence that the claimant was on his lunch break when the accident occurred because he was on call at the time. *See Univ. of Ark. For Med. Sciences v. Hines*, *supra* and *Ray*, *supra*.

Therefore, for the aforementioned reasons, we 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 a compensable right shoulder injury.

III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable right shoulder injury on September 27, 2018. For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

I respectfully dissent from the majority because I find that Claimant's injury occurred at a time when he was not performing employment services.

Before delving into the facts of this case, I must note that it is my opinion that the bounds of what constitutes employment services – and in particular, the "subject to being recalled" factor employed in what

constitutes employment services – have been, and here continue to be, stretched far beyond the elasticity intended by the Arkansas General Assembly's charge that the Commission strictly construe the Arkansas Workers' Compensation Law. *See*, Ark. Code Ann. § 11-9-704(c)(3). Under Arkansas's Workers' Compensation Laws, injuries sustained by employees who are not providing employment services are not compensable. Ark. Code Ann. § 11-9-102(4)(B)(iii).

I. BACKGROUND

The facts of this case are not complex. According to Claimant's testimony, he was at lunch when he sustained the injury at issue here. Moments before his injury, he had dismissed the students from the class he was teaching, ran to the cafeteria to meet up with his wife, who handed off his lunch to him as he headed out of the cafeteria "to another building that is 10 to 12 feet away." Claimant testified that he does not know how it happened, but he "hit the other building." This caused Claimant to reinjure his shoulder. The issue here is whether Claimant was providing employment services during his lunch break when he was injured.

I. STANDARD

Specifically excluded from compensable injuries are those injuries sustained at a time when the employee is not providing employment services. Ark. Code Ann. §11-9-102(4)(B)(iii). 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 employer's interest, directly or indirectly. *Pifer v. Single Source Transp.*, 347 Ark. 851, 857, 69 S.W.3d 1, 4 (2002). Generally, an employee is not performing employment services while off duty or on break. *McKinney v. Trane Co.*, 84 Ark. App. 424, 426, 143 S.W.3d 581, 583 (2004) (holding employee on way to smoke break was involved in "nothing generally required by his employer and was doing nothing to carry out the employer's purpose."); *Shelton v. Qualserv*, 2013 Ark. App. 469 (finding an injury was not compensable when employee, who was on a lunch break, was doing nothing to further his employer's interest). On the other hand, an employee is considered to be performing employment services when she or he is doing something that is generally required by the employer, or when the employee is doing something that benefits the employer. *See, e.g., Cont'l. Const. Co. v. Nabors*, 2015 Ark. App. 60, 454 S.W.3d 762.

II. DISCUSSION

Claimant's lunch was "duty free"—he was allowed to do as he wished during his lunch. Still, Claimant's self-serving testimony is that he considered himself "at work" during his lunch break because if a fight broke out between students, he could have been called to intervene. Claimant testified that he even had to break up a fight once before. Nevertheless, there is nothing in the record that indicates that anyone had called him back from lunch to do so. Nor is there anything in the record that suggests that

Claimant was required to stick around in case he was needed to break up a fight. In fact, the opposite is true.: Claimant's lunch was "duty free."

Claimant considers himself to be providing employment services anytime he is on campus because he is always a teacher and is always a mandatory reporter. The majority agrees, sinking its teeth into these two facts and its conclusion that Claimant was "paid for his time" in support of its finding that Claimant was providing employment services at the time of his injury: "Despite the claimant's lunch period being designated 'duty free,' clearly, he was on duty whenever he was on campus."

First, Claimant is not "on duty" anytime he is on campus. Under this standard, Claimant would be providing employment services while sitting with his buddies in the stands at the Friday night football game. Or while standing on the sidelines at a Saturday track meet. Or while sitting in the nosebleeds with his wife, trying to stay awake through the sophomore drama club's Sunday-matinee presentation of *Romeo and Juliet*.

Second, it does not follow that, because Claimant is a mandatory reporter, he is providing employment services at all times. Under § 12-18-402 of the Arkansas Code, *teacher* is among the myriad of occupations who are mandated to report 24/7/365. The Arkansas General Assembly does not distinguish between a teacher who is carrying out teacher duties and one who is not; however, it knows how to make such an exception. For example, attorney ad litem is a mandatory reporter "in the course of his or

her duties as an attorney ad litem." Ark. Code Ann. § 12-18-402(31). *Teacher* is not one of those on-off occupations. Thus, Claimant could have been at the lake with his family and would still be a statutorily-mandated reporter.

It is undoubtedly true that teachers have responsibilities outside of their classroom instruction; however, Claimant was not carrying out any of those responsibilities when he was injured. He was not acting as lunchroom bouncer. He was not vigilantly patrolling the halls for wayward truants. He was on his way into a building—void of any students—to eat his lunch.

Moreover, the evidence does not support a finding that he frequently or ordinarily did those things. Claimant testified that he once broke up a fight. This is not sufficient evidence to find that he was providing employment services when he was injured. Claimant's injury occurred at a time when Claimant was not performing employment services. Accordingly, it is expressly excluded from the definition of compensable injury. Because the majority finds that Claimant's injuries are compensable, I respectfully dissent.

CHRISTOPHER L. PALMER, Commissioner