ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-1302

TERRY WITT APPELLANT V. ALLEN & SON, INC., FIRSTCOMP INSURANCE CO., and DEATH & PERMANENT TOTAL DISABILITY FUND APPELLEES	**Opinion Delivered** SEPTEMBER 2, 2009 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F612045] REVERSED AND REMANDED

WAYMOND M. BROWN, Judge

In this workers' compensation case, Terry Witt was involved in a motor-vehicle accident on the morning of October 3, 2006, while riding to get a tractor from another job site. His employer, Allen and Son, Inc., and its carrier, Firstcomp Insurance Company, controverted his entitlement to workers' compensation benefits. The Workers' Compensation Commission denied Witt's claim, finding that he was not performing employment services at the time of the accident. This decision is not supported by substantial evidence, as Witt was clearly engaged in employment services when he was involved in the crash. Accordingly, we reverse and remand for an award of benefits.

Allen and Son performs land-leveling work in northeast Arkansas. Michael Allen, Witt's supervisor, depended on Witt to communicate with the other workers. Each morning, the two would meet, either by phone or at the Chicken Stop in Marked Tree, to discuss

personnel and job matters. Both Witt and Allen testified before the administrative law judge (ALJ) that these meetings were an expected part of the job. Other employees would meet at the Chicken Stop in order to ride in Allen's company trucks or to car pool. Allen did not pay mileage or gas money unless the job site was more than thirty miles away. On the day of the accident, he did not pay any travel money.

On the morning of the accident, Witt rode with co-worker Jimmy Cook to the Chicken Stop and talked to Allen for ten or fifteen minutes. Allen instructed Witt to get a tractor from a job site in Dyess and bring it to a job site in Payneway. He originally wanted Witt to ride with him to Lepanto first, but Allen agreed to allow Cook to drive Witt to Dyess. Witt explained that by riding with Cook, the two could bring other supplies in Cook's truck rather than in the cab of the tractor. Cook would have also been available to escort the tractor through the morning fog. Though Allen disputed the need for Witt to ride with Cook, he admitted that someone, be it he or Cook, had to take Witt to Dyess to get the tractor. Cook and Witt were hit head-on by a truck just before they reached the tractor. Witt was not wearing his seat beat and suffered serious injuries, requiring him to be air-lifted to a trauma center in Memphis. Allen testified that Witt was off the clock when he left with Cook, but that Witt would have been on the clock had he opted to go with him (Allen) to retrieve the tractor.

The ALJ awarded benefits, finding that Witt was performing employment services at the time of the accident. On de novo review, however, the Commission reversed the ALJ and denied Witt's claim. It found that Witt was not engaged in employment services, as he was

not being paid wages or travel expenses at the time of the accident. The Commission also relied on the evidence that Witt was not in a company vehicle and that Witt opted to ride with Cook to get the tractor.

The sole issue in this appeal is whether Witt was engaged in employment services at the time of his accident. In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's decision and affirm if that decision is supported by substantial evidence. *Smith v. City of Ft. Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Williams v. Prostaff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). The issue is not whether the reviewing court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, we must affirm the decision. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The Arkansas Code defines a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2007). The definition of compensable injury excludes injuries inflicted upon an employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). 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. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). An employee is performing "employment services" when he is doing something that is generally required by his

employer. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006). 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. *Id.* The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Id.* The term "employment services" is not limited to duties that an employee was hired to do; an employer has the power to enlarge the course of employment by assigning tasks outside the usual scope of the employment. *Ark. Dep't of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Whether an employer requires an employee to do something has been dispositive of whether the activity constituted employment services. *See Ray v. Univ. of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1999).

Witt argues that this case is most analogous to *Bell v. Tri-Lakes Services*, 76 Ark. App. 42, 61 S.W.3d 867 (2001).[1] We agree. There, the claimant was injured in an automobile accident after his employer instructed him to drive to another city to pick up tools needed for work. The claimant's job required him to travel on occasion, and on the day of the accident, evidence showed that the claimant would have been given the option to either finish the workday or go home. We held that the claimant was engaged in employment services at the time of his accident.

The decision in *Moncus v. Billingsley Logging & American Ins. Co.*, 366 Ark. 383, 235

[1]This case was also relied upon by the ALJ in initially awarding benefits and by the dissenting commissioner in his opinion supporting an award of benefits.

S.W.3d 877 (2006), is also helpful. There, the claimant worked for a logging company where the employees normally drove directly to the job site. One particular morning, the employees met at a central location and then caravanned to the work location. The claimant was involved in a fatal accident on the way to the location, and the supreme court held that the claimant was engaged in employment services at the time of the accident. In so holding, the court acknowledged the going-and-coming rule, which ordinarily precludes recovery for an injury sustained while the employee is going to or coming from his place of employment. *Id.* However, it held that the going-and-coming rule was subordinate to the preeminent consideration, which is whether the employee was directly or indirectly advancing the interests of the employer at the time of the injury. *Id.*; *see also Jones v. Xtreme Pizza*, 97 Ark. App. 206, 245 S.W.3d 670 (2006) (holding that an employee was engaged in employment services when he was involved in an automobile accident while traveling from an employer-mandated meeting in Little Rock to his normal work shift at his store in Benton).

After reviewing these cases, we have no hesitation in holding that Witt was engaged in employment services at the time of the automobile accident. Like the claimant in *Bell*, Witt was instructed by his employer to run an errand that specifically benefitted the employer. The fact that Witt was riding with a co-worker is of no consequence, particularly given Allen's testimony that *someone* had to take Witt to get the tractor. This case is also analogous to *Moncus* in that Witt was expected to meet at a central location before going to that day's work site. As was the case in *Moncus*, the fact that Witt was directly advancing his employer's interests trumps any application of the going-and-coming rule to this case. Finally, the

Commission appeared fixated on facts showing that Witt was not being paid at the time of the accident. Though it is relevant, payment for services is not dispositive in determining whether an employee is engaged in employment services at the time of an accident. *See Olsten Kimberly Quality Care v. Petty*, 328 Ark. 381, 944 S.W.2d 524 (1997).

The Commission erred in finding that Witt was not engaged in employment services at the time of his accident. Accordingly, we reverse and remand for an award of benefits.

ROBBINS and GRUBER, JJ., agree.