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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA09-534

	Opinion Delivered February 24, 2010
BARON K. RHODES APPELLANT V. COMMERCIAL METALS CO. and ACE AMERICAN INS. CO. APPELLEES	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F803190] AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Baron Rhodes appeals the decision of the Arkansas Workers' Compensation Commission, finding that he was not performing employment services when he was injured on March 25, 2008. Appellant argues that the Commission's determination that he was not engaged in employment services at the time of his injury should be reversed. We find no error and affirm.

Appellant's foot got "hung" in some hoses and he fell and injured his left knee on March 25, 2008, at the conclusion of his shift. Appellees did not doubt that appellant fell on March 25; however, they contended that appellant's injury was not compensable because at the time of his fall, he was not performing employment services. A hearing was held before the administrative law judge (ALJ) on September 18, 2008.

Appellant testified that he had worked for appellee Commercial Metals Company (CMC) for approximately twenty years. At the time of his injury, appellant was the angle master operator, commonly known as a welder. Appellant testified that his shift was from 5:30 a.m. to 2:00 p.m. and that his lunch break was from 12:30 to 1:00. Appellant stated that on a normal day he would place his lunch box in the refrigerator, located in the break room, until lunch time. According to appellant, at the conclusion of his lunch break, he would take his lunch box to his work area and put it on top of a welder until it was time to leave. Appellant testified that he would also have his coat with him and hang it on a pole by the welding machine. Appellant stated that at the conclusion of his shift, he would gather his lunch box and coat and go to the break room to clock out. On the day of his accident, appellant testified that he clocked out and then remembered that he had left his lunch box and coat in the plant. Appellant went back into the plant to get his items and as he started walking out, he hung his foot in some hoses and fell and hurt his left knee. Appellant testified that his act of going into the plant to retrieve his personal items benefitted his employer in that "it wasn't in anyone else's way." He also stated that it benefitted him personally by the fact that he would have it for the next day. Appellant further stated:

> After I checked out after 2:00 p.m. maintenance was in that area. Maintenance could have been over there and it could have been in their way and I didn't want it to be in anyone's way. Maintenance, basically, in the afternoons like that they just go around and make sure that the welders are working fine, and the cranes, making sure that everything is fine.

> My lunch box was sitting on top of a welding machine. It is possible that some maintenance personnel would have had to come in and would have been in and around that welding machine before I came back in at 5:30 the following morning. I have told you all that there are 5 lines that are working during the daytime and only 2 that work at night. I do not know for a fact that my line would have been in operation on the evening shift that night. It is possible that under certain circumstances, though, that my line could have been used in the night shift before I would have come back to work the following morning. There have been times that they have shut lines down and they have moved them over to the line that I work on. So my personal items would have potentially been in an area where others would have needed to be working in and around.

Appellant testified that if he had left his personal items in the plant overnight and if those items caused a problem or prevented night shift from working, he would have gotten in trouble. According to appellant, he contacted John Gorley the following morning to report his accident and to have CMC set him up a doctor's appointment; however, appellant stated that CMC called him later that day and informed him that he would have to set up his own doctor's appointment. Appellant stated that he received treatment for his knee and was off of work for seventeen weeks. Appellant testified that he received short term disability during the time he was off of work.

On cross, appellant stated that he was not on call or subject to being recalled into the plant when he clocked out. He also stated that having his personal things at his work station was not necessary in order to perform his job. Appellant testified that his personal items were located out of his way while he was working. He stated that he was not being paid when he went back into the plant because he had completed his "job tasks for the day."

Appellant said that he did not know if he was supposed to put anything on the welder but that he had been doing it for twenty years.

Upon questioning by the court, appellant stated:

> I do not know of anything maintenance would have done in my work area on the day that I tripped and fell. I do not know what they would have done in my area that evening after I had gotten off. I do not know when they are scheduled to do that area.

The ALJ issued an opinion on October 30, 2008, rejecting appellant's claim as compensable. Appellant appealed to the Commission, which affirmed and adopted the decision of the ALJ in an opinion filed April 21, 2009. Under Arkansas law, the Commission is permitted to adopt the ALJ's decision. *See Odom v. Tosco Corp*., 12 Ark. App. 196, 672 S.W.2d 915 (1984). Moreover, in so doing, the Commission makes the ALJ's findings and conclusions the findings and conclusions of the Commission. *See ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991). Therefore, for purposes of our review, we consider both the ALJ's order and the Commission's majority order.

In pertinent part, the ALJ stated:

> I find on the record before me that the claimant has failed to establish by a preponderance of the credible evidence that he was performing employment services when he went back to his work station to retrieve his coat and lunch box after clocking out on March 25, 2008. Not only was the claimant clocked out, there is no dispute that he is not "on call" after he clocks out. Since he was clocked out, he was also not getting paid. There is no dispute that he had in fact completed his job tasks for the day. While the claimant contends that he went back to get the lunch box and coat so they would not be in anyone else's way, he acknowledged that the items were not *in his* way when he worked in the area. Further, the claimant conceded that he did not know whether or not maintenance would be working in his area. The lunch box and coat were not at the claimant's work station as necessary equipment to do his job.

> When asked whether he was permitted to put items on the welder the claimant testified, "I been doing it for about 20 years."
>
> In summary, the evidence establishes that the claimant went to get his lunch box and coat on his own time after he was clocked out and finished working for the day. The claimant has not presented any credible evidence of a company policy which either allowed or required him to place the personal items on the welder in the first place, or which required him to take the personal items with him when he left for the day. Likewise, since the claimant has worked with his personal items on the welder for 20 years, and since the claimant had no personal knowledge whether anyone would be in his area on a later shift, the claimant has failed to persuade me that his personal items on the welder presented any type of inconvenience for others or a safety hazard so as to necessitate his returning to his work station to retrieve his coat and lunch box after clocking out for the benefit of his employer. I find under these circumstances that the preponderance of the credible evidence instead establishes that the claimant returned to his work station to retrieve his lunch box and coat after clocking out so he would have the coat to wear and the lunch box to use in the future. Because I find that the preponderance of the evidence establishes that the claimant returned to his work station to retrieve his personal items for his own benefit, and not as a benefit or service to his employer, I find that the claimant was not performing employment services when he fell on March 25, 2008.

The Commission affirmed and adopted the ALJ's opinion. Appellant filed a timely notice of appeal.

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 findings, and we affirm if the decision is supported by substantial evidence. *Foster v. Express Pers. Servs*., 93 Ark. App. 496, 222 S.W.3d 218 (2006). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance

of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004).

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. 2007). A compensable injury does not include an injury which was inflicted upon the employee at a time when employment services were not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). We use 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. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). 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.*

In the instant case, appellant argues that his act of removing his personal items from the work area indirectly benefitted his employer. However, appellant had the burden of establishing he was performing employment services at the time of his injury. He testified that at the time of his injury he had completed his daily tasks and had clocked out. He also stated that he was neither on call nor subject to being recalled into the plant. Based on these

facts, reasonable minds could reach the Commission's decision that appellant was not performing employment services on March 25, 2008, when he fell and injured his left knee. Therefore, we affirm.

Affirmed.

HART and GLADWIN, JJ., agree.