Cite as 2010 Ark. App. 471

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-1198

RICKY GASKINS APPELLANT V. JEFF MINNER TRUCKING and GREAT AMERICAN INS. CO. OF NEW YORK APPELLEES	**Opinion Delivered** JUNE 2, 2010 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F707970] REVERSED AND REMANDED

RITA W. GRUBER, Judge

This workers' compensation appeal is brought by Ricky Gaskins, a former long-haul truck driver for appellee Jeff Minner Trucking, who sustained serious injuries on July 6, 2007, when he attempted to put out a fire on a company-owned truck that he was driving. He contended at a hearing before the administrative law judge that the injuries were sustained in the course and scope of his employment, at a time when employment services were being rendered. Minner Trucking responded that because Gaskins had deviated from his route, he was not within the course and scope of his employment. The law judge denied the claim after finding that Gaskins had failed to prove that his injuries occurred within the course of his employment.

The Commission adopted and affirmed the law judge's opinion in a 2-1 decision. Gaskins appeals the Commission's denial of his claim. He argues that the fire that caused him

to be injured was associated solely with his employment, and that he was within the course and scope of employment and performing services at the time of the injury. We agree and reverse.

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 inflicted upon the employee at a time when employment services are 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 Am., Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007).

Evidence at the hearing before the administrative law judge included testimony by Gaskins, safety inspector Thurman Carr of the Arkansas Highway Police, and Jeff Minner, owner of Jeff Minner Trucking. The following facts, revealed through their testimony, were largely undisputed and are not challenged on appeal.

On the afternoon of July 6, 2007, Gaskins was in the company office and received an assignment to drive a load of I-beams from Blytheville, Arkansas, to the Dallas/Fort Worth area. His pay was based on a percentage of a load after delivery. In a conversation with Jeff Minner, Gaskins said he would like to stop along the way to visit his ill grandmother in Beedeville, Arkansas; Minner said that would be "fine." He arrived in Blytheville before dark, the truck was loaded in a couple of hours, and he left Blytheville with a state-issued

oversize permit that specified his route.

Gaskins drove down Interstate 55, as specified on his permit, and exited onto U.S. Highway 63, a highway not listed on the permit but which was permissible for an over-length load such as the one he was hauling. He was on Highway 63 en route to his grandmother's residence around 11:00 p.m. when motorists alerted him to a fire at the back of the truck. He stopped the truck, set the brake, jumped out, and tried to extinguish the fire. A tire exploded and seriously injured him, leaving him unconscious on the ground. As a result of his injuries, he underwent extensive medical treatment that included surgeries to his left arm and hand.

The Commission found that Gaskins conveyed to his employer his plans to spend the night at his grandmother's Beedeville residence and restart his DOT log the next morning, that he had his employer's permission "to go by and visit with his grandmother while delivering the load," and that his injuries were sustained while he was attempting to extinguish a fire on the employer's equipment. The Commission denied his claim, however, on the following basis:

> [T]he visit represent[ed] a personal side trip for the claimant as well as a "substantial deviation" from his business trip and was not in the course of his employment. *Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73, 923 S.W.2d 292 (1996).
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> With permission from his employer to visit/or spend the night at his grandmother's residence on July 6, 2007, and with the clear intention of the afore providing an opportunity to "re-start" his log, the claimant's departure from the route designated on the permit was analogous to departing work for the day with the intent to resume same the following day, July 7, 2007. Any injury sustained during the afore would be governed by the "going and coming" rule, which precludes recovery

> because the employee is generally not acting within the course of employment when traveling to and from the workplace.
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> The claimant has failed to sustain his burden of proof by a preponderance of the evidence that the accidental injuries he sustained on July 6, 2007, were within the course of his employment with respondents. The claimant is respectfully denied and dismissed.

Gaskins raises the following points on appeal: 1) that he did not substantially deviate from the course and scope of employment by choosing a route slightly longer that the one on the permit; 2) that he was performing employment services when he was attempting to extinguish the fire on his employer's truck; 3) that he was entitled to benefits under the increased-risk doctrine; and 4) alternatively, that his injury was compensable under the positional-risk doctrine. We find that the second point requires reversal.

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. *Parker v. Comcast Cable Corp.*, 100 Ark. App. 400, 269 S.W.3d 391 (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 employer's interest directly or indirectly. *Id.* 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).

The facts of the present case are markedly different from those of *Lytle*, *supra*, under

which the Commission denied this claim. Appellant Lytle, who was driving a load from Center, Texas, to Metamora, Illinois, had an extra two-and-a-half days and decided to visit friends in Meridian, Mississippi. He was injured in a wreck outside Meridian, at least a hundred miles off his route. His employer's "Policies, Procedures and Agreement" stated that all trucks were routed over specific routes and that drivers agreed to accept all dispatches as given with no deviation from the destination or specified route. It was a general practice that Lytle's employer was open to working with drivers with excessive time who called about something they wanted to do in route or a deviation, but Lytle did not tell the employer he was taking time off to go to Meridian.

We agree with the dissenting Commissioner that *P.A.M. Transportation v. Miller*, 24 Ark. App. 163, 750 S.W.2d 417 (1988), is more applicable to this case than *Lytle*. As stated by the Commissioner:

> In *Lytle*, the injury occurred while the claimant was in the act of driving the truck on a personal errand. Driving a truck on a personal errand, without other facts known, is not performing employment services. However, in the instant claim, the injury did not occur while the claimant was driving the truck on a personal errand. The claimant had stopped driving and was in the act of putting out a fire on the respondent's truck when the truck tire exploded, causing the claimant's grievous injuries.
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> [But] *Miller* takes into account the traveling employee doctrine, and states:
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> > . . . when the employee abandons the deviation and returns to the performance of his duties, he regains his status as a traveling employee. Appellee, at the time of his injury, was returning to his rig with the intention of driving it to appellant P.A.M. headquarters in Tontitown. Clearly there is substantial evidence that *appellee, whatever his earlier deviation might have been, was at that moment acting within the course and scope of his employment.*

(Omission in original, emphasis added.)

We observe that our workers' compensation cases have long recognized the protection of an employer's property as a legitimate duty of an employee. *Office of Emergency Servs. v. Home Ins. Co.*, 2 Ark. App. 185, 618 S.W.2d 573 (1981) (citing *Parrish Esso Serv. Ctr. v. Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964)). As in *Emergency Services*, we note this passage by Professor Larson:

> Under familiar doctrines in the law relating to emergencies generally, the scope of an employee's employment is impliedly extended in an emergency to include the performance of any act designed to save life or property in which the employer has an interest. . . .
>
> It is too obvious for discussion that emergency efforts to save the employer's property from fire, theft, runaway horses, destruction by strikers, or other hazards are within the course of employment. The fact that the rescue effort takes place outside of working hours does not detract from its work-connected status. Thus, an employee who lived near the employer's plant, and who ran to fight a fire in the middle of the night, was held covered, as was a security guard who suffered a fatal heart attack while fighting a fire, rather than simply call "911."

Arthur Larson, *Larson's Workers' Compensation Law*, § 28.01 (2009) (footnotes omitted).

The relevant inquiry in the present case is not whether Gaskins deviated from his route before he got out of the truck, but what he was doing at the moment of his injury. As the Commission found, Gaskins was attempting to put out the fire on his employer's truck at the moment he was injured. Whatever his previous deviation might have been, this act of protecting his employer's truck directly advanced the interest of his employer and constituted performance of employment services. We reverse the Commission's finding that the injuries Gaskins sustained were not compensable, and we remand for entry of an order consistent with

this opinion.

Reversed and remanded.

ROBBINS and HENRY, JJ., agree.