

The social security number and dates of birth
have been redacted from this opinion.

**STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY
WORKERS' DISABILITY COMPENSTION AGENCY
BOARD OF MAGISTRATES**

Dale D. Smith,
SS#: XXX-XX-XXXX,

Plaintiff,

vs.

Mark Harwell Trucking, LLC/
Secura Insurance Company,

Defendants,

and

Farmers Insurance Exchange,

Intervening Plaintiff.

APPEARANCES:

No Appearance for the Plaintiff.

Timothy D. Finegan (P-44195) attorney for Defendants.

Russell F. Elder (P-47277) attorney for Intervening Plaintiff

TRIAL DATE:

A hearing was held on November 9, 2022 in Kalamazoo, Michigan. The parties were given until December 7, 2022 to file post-Trial briefs. The record was closed on that date and submitted for Decision.

OPINION

CASE SUMMARY AND PROCEDURAL HISTORY:

This matter was initiated by an Application for Mediation or Hearing-Form C which was received by the Agency on May 10, 2018, which alleges Dale Smith was working within the scope and course of his employment for Mark Harwell Trucking, when he was injured in a work-related motor vehicle accident. The no-fault insurer, Farmer's Insurance Exchange, seeks a determination of rights and it further seeks reimbursement of any benefits paid arising out of this accident. The employer has denied liability for workers' compensation benefits. The parties have agreed to bifurcate the Trial on this matter and try only the issue of whether it was in the course and scope of employment. Further, the parties agreed to forego any interlocutory appeal as a result of my Decision in this matter. The only Application pending is the Form C which was filed by Farmer's.

STIPULATIONS:

Because there is only one issue before us, the Stipulations only address numbers 1 through 4 on the Stipulation Sheet. They apply to a single date of injury of June 22, 2017. It was stipulated that the parties were subject to the Act, Secura Insurance Company carried the risk and that Mark Harwell Trucking, LLC employed Mr. Smith on the date of injury. It was left to proofs or denied that a personal injury arose out of and in the course of his employment.

The parties were given the opportunity to file post-Trial briefs which were due on December 7, 2022. The record was closed and the case submitted for decision on that date.

WITNESSES TESTIFYING PERSONALLY:

Plaintiff: Dale Smith

Defendants: Mark Harwell
Craig Henry

WITNESSES TESTIFYING BY DEPOSITION:

No depositions were offered.

ISSUES FOR TRIAL:

The sole issue before the Court is whether Mr. Smith was in the course and scope of his employment on June 22, 2017 when he was a pedestrian and hit by a pizza delivery driver.

EXHIBITS:

Intervening Plaintiff:

1. Company handbook.
2. 49 CFR Section 396.11 – Driver Vehicle Inspection Statute.
3. Police Report.
4. Map outlining the intersection and numbers to identify where things occurred.

Defendants:

- A. Aerial map taken from snipping tool over the location of where the incident occurred.

SUMMARY OF TESTIMONY.

LAY TESTIMONY

Plaintiff:

Dale Smith. Dale Dewayne Smith resides at 1061 Tupper Lake Street in Lake Odessa, Michigan. He is currently 70 years old. Mr. Smith confirmed that he was involved in a motor vehicle accident on June 22, 2017, or more accurately he was hit by a vehicle in the roadway. He did work that day for Mark Harwell Trucking. Mr. Smith worked that day using his tractor/trailer to get to work, and he was driving the same tractor/trailer at the time he was hit by a motor vehicle. On the day of the incident, he was employed by Harwell Trucking. The incident occurred on the corner of Tupper Lake and Jordan Lake Avenue. He was alone when the incident occurred.

On June 22, 2017, Mr. Smith got up at 5:00 a.m. He left his house between 5:30 a.m. and 6:00 a.m. The truck was parked in his yard. The terminal where the truck was located, where some of the employees picked up their trucks, was approximately 70 miles from his house. Mr. Smith's house was located approximately four miles from the first pick up spot. Harwell Trucking paid for his fuel, and he was allowed to keep the vehicle at his house. Mr. Smith testified that both Jeff Smith (his brother) and an individual by the name of "Joe" were also allowed to keep their trucks at their house. He explained they were also located a long distance from the yard.

Mr. Smith started working for Mark Harwell Trucking about eight weeks before the accident. He testified he would have taken the job had he been required to drive the 70 miles to pick up the truck. The truck and trailer had the employer name on it and he kept both the tractor/truck and the trailer at his house. Mr. Smith has been a truck driver for about 50 years. While working for Mark Harwell Trucking, his route did not vary. He would go to Woodbury, pick up his first load four miles from his house and he would take it to Hamilton to unload it. (At the time it was called Farm Bureau Elevator.) He then would go to Lowell and pick up a load of mids and take it to Holland at the old Delmar Plant, and then he would return home. He always left his house to go to Woodbury. He always went to the same location.

On the morning of June 22, 2017, he stopped down on the corner to pick up his supplies for the day, which were two Dr. Pepper's and a pouch of Red Man Chewing Tobacco. He did not pick up any extra items or general household items for home. On that day he only had a \$100.00 bill. It was so early in the morning, the owner could not break that bill. Mr. Smith was going to stop somewhere else, and the owner just said, "Dale, just take the items. I will write it on a piece of paper, and you can stop back through sometime and pay me." Mr. Smith explained that the owner knew him well and trusted him.

Mr. Smith was not aware of anything in the employee handbook which prohibited him from making such stops. He does not recall the employer ever telling him he was not allowed to make stops.

When questioned on how many hours he was on the road or gone per day, he said it would depend on how long he had to sit in line to get loaded and unloaded. He gave a rough average of ten to fourteen hours per day. Mr. Smith testified that he never did personal errands or other activities during the day. He did not know how it was set up, but knew he was paid per load. He explained, "I got my check deposited on Fridays, and I was happy with it." He didn't know the exact formula, but he got paid per load, not on salary or hourly. The more loads he hauled, the more he got paid. He confirmed that the longer he worked hour-wise did not mean he would get paid more. When questioned if he thought he could do more, he testified, "I think I could have." When questioned whether the employer was getting paid for the loads he picked up, Mr. Smith testified, "I assume so or else I wouldn't get paid." He was allowed to stop for lunch or coffee breaks.

He explained he would pick up a load and deliver that, and then he would go pick up another load and deliver it, so he hauled two loads. He explained that there was sometimes waiting time if there were other trucks waiting to load or unload, he would have to wait. It would depend on the time he got there. Mr. Smith did not actually load or unload. He explained that is why he would leave so early in the morning, because they did not start loading until 7:00 a.m., so he would want to get there and be further up in line.

Mr. Smith confirmed he had to do some paperwork as part of his job, he had to do logbooks. They were required by State and Federal law. At any time he could not be behind any more than four hours. The log is apparently a grid and he has to write in where he starts and what time. He has to put in the vehicle inspection report, and any time he stops, he has to log where and how long he was stopped. At the end of the day, he would have to log the time and another vehicle inspection report. A copy went to the office and a copy was kept in his vehicle. He would also have to get a bill of lading signed to wherever he delivered something.

He would try to take a picture of it and send it to "Dusty" at the office because he wasn't going in. He would then have it in an envelope and when he got down there every week or so, he would hand the hard copies in the envelope to Dusty.

When he was sitting in line waiting to be loaded or unloaded, he could catch up his log book. However, he could not do anything with the bill of lading until it was signed. He explained that he did the log book every day. He was required, and if he got caught on the road without the log book up-to-date, he would get a ticket. He did have to fuel his truck, but he did not have a fuel card, so he would meet up with another driver and use their card to fuel his truck.

Mr. Smith had to do inspections as outlined in the handbook. He would have to walk around the vehicle, check the oil and antifreeze, which included lifting the hood. He would spot check the tires and brakes. He would also check the lights to make sure they were all working. If a brake was out of adjustment, he would adjust it. These inspections were required. He would check a little closer at night because the vehicle was going to sit for eight hours, but he did have to do an inspection both before and after work. He also performed periodic walk-arounds if he stopped for coffee and a sandwich or something. He would look under the truck to make sure there was nothing leaking or dripping. He did note Harwell is very up-to-date in keeping their equipment up, so he never found anything he had to report.

Mr. Smith reviewed proposed Exhibit #1, the Employer Handbook. He confirmed that it was the handbook for Mark Harwell Trucking. Mr. Smith never did the end of the day inspection at his last spot. He would wait until he got home, because he still had 70 or so miles to go. Counsel asked about the pre and post-inspections, and he confirmed they were required by his employer and the State. He asked Mr. Smith about the specific statute, and Mr. Smith says he has never seen that exact document. With that foundation, it was stated that he could question Mr. Smith about pre and post-inspections, but since he has never seen the statute, he really could not comment on that. He did agree that the statute listed the items which had to be evaluated and inspected, and when asked whether it was similar or the same, Mr. Smith said, "well that's pretty much

what would have to be covered.” He also mentioned air horns and said people did not want them to test them, but he did anyway. Mr. Smith testified that he had to report on the back of his log book after he inspected it. He testified, “it’s State law to do the inspections.”

Mr. Smith testified it is not easy to park the tractor/trailer. If he went around a short block, he could go through the alley and across his back lot and be right in the driveway. If there was something in the alley, he would park out front which was okay so long as it was between April and November.

Mr. Smith did not go directly home on June 22, 2017, but he stopped on his way back because it bugged him all day that he had not paid for his stuff. He did not go directly home from his last drop, but this was “on my way home.” He wanted to take care of the debt and get more supplies for the next day.

Mr. Smith testified that the items he picks up at night he will leave in the cooler overnight. He did not pick up anything that he was going to consume at home. He explained that on the night he stopped, it was roughly between 9:00 p.m. and 9:30 p.m. and it was raining. He testified that if he had not picked up those items, he would have picked them up the next morning. He was supposed to work the next day.

Mr. Smith testified that he parked his tractor/trailer in the center turn lane when he went back to pay for his items. Counsel then showed him what had been labeled as Plaintiff’s Exhibit #4. Mr. Smith testified that was the intersection where he was hit. The box that has a “1” in it was Mr. Smith’s house. He explained that number “3” is the store, Jay’s. He testified it is approximately 2.5 blocks from his house to the store. He testified when he left in the morning, he would leave and go east on Tupper Lake Street to Jordan Lake Avenue. He testified that on the morning when he stopped to purchase the items, number “2” is where he stopped and parked his truck when he went into Jay’s Store. In the morning, he would take Jordan Lake Avenue down to M-50. Therefore, in the morning when he was going to work, he would turn right on Jordan Lake Avenue. In the evening when he returned, he would be coming down Jordan Lake from the north, because he would have exited 96 at the Lake Odessa exit. So he would have been driving south on Jordan Lake Avenue from the north. He parked his car in a turn lane. Counsel asked him where the number “3” and number “4” was, as there was an arrow going back and forth. He explained that he imagines that was where he was in the street. He explained that he walked from the star by number “4” and went across, and then walked towards Jay’s. So he really did like an “L” shape going across Jordan Lake Avenue and then across Tupper Lake Street.

He testified he went into the store, paid for the supplies he had picked up that morning and bought some more. He walked back across Tupper Lake Street and when he got up even with his truck, he crossed to the truck. Mr.

Smith testified he remembered sticking the key into the door, and that was the last thing he remembered.

Mr. Smith testified that was his usual route when he left home in the morning, he would go south on Jordan Lake Avenue, but when he came back in the evening he would be coming from the north and going south on Jordan Lake Avenue. He testified that stopping at Jay's did not alter his route. Further, he had not been home yet and had not passed his house. Mr. Smith testified that he has lived at that house for going on 34 years. He acknowledged that he may not have been parked properly. He testified he has seen semi's, Prime delivery trucks, UPS trucks and FedEx trucks parked there before. He said they do it because they "have no other place to go." He did not receive a ticket for having parked there. When questioned whether he had picked up stuff in that area before, he said it was possible.

Mr. Smith confirmed that there was no prohibition against stopping and getting supplies while in the truck. He testified that if possible, he usually tried to stop and pull into a regular truck stop, if there was time. Mr. Smith did not see anything in the handbook, nor was he told by the employer that he was no longer in the course of his employment. He did confirm the truck was owned by the employer and that he had no directives on what time he could leave in the morning or had to get back home. Again, he testified it varied on what time he got home, depending on how long he had to sit in line. When questioned whether it was usual for him to get home at 9:00 p.m., he said it was a little later than usual, but he could have to "set" longer in line. He did not do anything of a personal nature to extend the day.

Mr. Smith confirmed that his vehicle did not have a day-cab, which meant he did not have a sleeper. The only advantage to that particular run would be for his "health reasons." Mr. Smith testified that he told Mark and Greg he needed a truck with a sleeper on it. He explained that he occasionally gets bad muscle spasms. Mr. Smith could not take the meds, because he could not pass the DOT exam if he were on the meds. However, when questioned whether it would affect his route, he said no. He was, however, hoping to do more runs in the future.

On the day of the accident, Mr. Smith did not stop anywhere from after he dropped his load until he got to the intersection where the accident occurred. He confirmed that the employer had never told him he could not stop that late in the day. Mr. Smith testified that in his opinion, Mr. Harwell trusted him with his truck 24/7, so he was working 24/7 watching his truck. But then he stated, "was I working then, no." With further questioning, he confirmed his last load was dropped off in Holland. He could not have left the truck there; he had to go to Woodbury the next morning, so he had to take his truck home. He testified he always had his last load in Holland. There was no other way to get home. Mr. Smith testified he was employed as a driver and he would pick up and drop off loads. The last drop in Holland was about an hour-and-a-half to two-hours from

his home. Mr. Smith testified that it depended on the time of the year, but it was usually after dark when he got home. He confirmed there was no prohibition against drinking soda or chewing tobacco in the truck. Mr. Smith testified that the employer did not set his hours, but the people he was delivering to "set them." Mr. Smith testified that it was dark when he left in the morning, and it was dark when he got home in the evening to pay for his supplies and pick up more supplies. When he returned to the store on the evening of the accident, his headlights were on, his running lights were activated, and his flashers were activated. Mr. Smith confirmed that he had no set lunch hour, breakfast hour or dinner hours. He merely stopped and ate whenever he could.

Mr. Smith testified that he drove for this employer five days per week. He testified that after the accident, he could not return to work for this employer. He said he would have liked to. He was not aware of being actually terminated; in fact, he stated, "if they did, they did not tell me." When questioned whether he was disciplined following this accident, he testified, "I thought I was disciplined enough," and then he responded, "no."

On **cross-examination**, Mr. Smith confirmed that he chewed Red Man tobacco. He confirmed that the only reason he stopped at that Sunoco on the night of the accident was to pay his personal debt and pick up supplies for the next day. He confirmed the employer did not require him to drink soda or chew Red Man tobacco, that was his personal preference. He confirmed he was not getting gas for his truck. He did not get any gas or any windshield cleaning fluid or anything like that. He confirmed the first spot or pick up spot is four miles from his house. He also agreed he left his house between 5:30 a.m. and 6:00 a.m. in the morning. He also confirmed that Woodbury did not open until 7:00 a.m. or 7:30 a.m. He confirmed that he was over there in line pretty close to 6:00 a.m. in the morning. Mr. Smith explained that when he was in line, sometimes he could do paperwork, but first thing in the morning he does not have any paperwork.

He explained the CAM scan. He said he took a picture of a bill of lading or something, and then he sends it in a text. He has to do that after every delivery. He can take the picture after every time he delivers a load and send it. He did say that he is new at this stuff and a lot of times he had a lot of phone time with Dusty because it wouldn't go through and he would call her to see if she got the picture.

He confirmed he came down Jordan Lake Avenue from the expressway. The police report said he parked about 65 feet from the intersection, and Mr. Smith stated, "if that is what they said, they must have measured it." He did agree that he parked in the center turn lane. He also agreed that he left enough space in front of his truck to allow people to make a left turn onto Tupper Lake Road. He then stated it could have been 65 feet. He stated he stayed back a ways, and he didn't measure it. He testified he went straight to the curb and then across in kind of like an "L" shape, just like it was drawn on the map. There was

no crosswalk. He confirmed he was probably 75 feet from the intersection, because it is probably ten feet from the bumper to where he gets out of his door, and where he was struck. He confirmed it was not a four-way stop and there was no light. There were stop signs on Tupper Lake Road. Mr. Smith testified he made that same final delivery every day. He always came in on Jordan Lake Avenue, he never came in from Tupper Lake Road on the west. Mr. Smith explained that he came in that way because M50 west of Lake Odessa is not a truck route and he had to stay on a truck route, so he would come in on Jordan Lake Avenue, turn right on Tupper Lake Road, and he would go a little over two blocks to his house.

Mr. Smith is not disputing that parking in the center lane is illegal. He agreed that normally when he crosses the street, he crosses at an intersection. He got out of the truck in the northbound lane, he then walked to the corner and crossed Tupper Lake Road. He confirmed he was not doing an inspection at the time, he was not doing his log book, and he was not doing anything which was connected to his work. He was paying his debt and getting some soda and things for his personal needs. He confirmed that in this case he could have parked his truck and took his personal vehicle down and paid his debt. He said, "that could have happened." He confirmed he could have done this, but it may have been closed. When counsel questioned him further, Mr. Smith thought the gas station closed at 10:00 p.m. and this happened between 9:00 p.m. and 9:30 p.m., so he could have parked his truck and gone back to pay his debt and get his supplies. He confirmed he could have gotten stuff a week in advance. He agreed it was a personal choice and had nothing to do with Harwell. The reason he stopped was because of the debt, because he would rather stop at a truck stop where there is a better place to park.

Mr. Smith got paid a percentage of each load. Counsel suggested this was 27 percent, and Mr. Smith stated he got paid by each load, he was not sure of the percentage. Mr. Smith could have taken his truck to Harwell's depot and driven from there each day. Mr. Smith testified that would have been, "awful stupid on my part," if he was not getting paid anything and that is 140 miles that he would have had to pay for fuel. He was not paid by the hour, he was not paid mileage, he was only paid by the load. It was to his advantage as well to get a pick-up as close to his house.

He did not think he called dispatch that night and told them he finished the last load because it was just late enough at night and it was out of respect for Greg. He said that the Delmar Plant was fast at unloading, but they took a lot of loads.

Mr. Smith confirmed that after the accident, his wife hired a lawyer and there was litigation involved in the accident. He did not have any understanding as to why his attorney did not file a workers' compensation case.

Mr. Smith testified that he was not having any trouble with his vehicle that day. It didn't need any repairs. It was due for service, but he would have taken it back to the garage and they would have done the service. He had conducted his inspection walk-about checklist. He did confirm his log book stays in the truck, and he marks it off. He has a briefcase in the truck, and his practice is to keep the log book in the truck. He confirmed that not having a sleeper cab did not have any affect on this incident. He was not having any trouble with his legs that day. He agreed that the only reason he was at that place at that time was to pay his personal debt and to get soda and chewing tobacco for the following day.

On **re-direct examination**, Mr. Smith confirmed that he wouldn't have had any log work to do while he was sitting in line at the first stop, because he hadn't done anything yet except drive four miles. He also confirmed that he took direct routes from the truck. He did an angle that was like an "L" and that was how he walked, as reflected on the map. He did park back from the intersection purposely to allow people to turn. He once again confirmed there were no cross-walks. Mr. Smith testified that he was not aware that he was no longer on the clock after he dropped his last load until after the accident. He testified that is what "they" said after the accident. But he was not sure who said it.

Mr. Smith confirmed that by having his vehicle at his house, it did save fuel costs for the employer.

Defendants:

Craig Henry. Craig Dennis Henry is currently employed at Mark Harwell Trucking, Inc. Back in 2017, he worked for Mark Harwell Trucking, LLC. In 2017, he worked as the dispatcher. He was a dispatcher/driver for many years. Mr. Henry learned of Mr. Smith's accident by a phone call from Jeff Smith; Mr. Smith's brother. Jeff also worked for Mark Harwell, and he had learned from dispatch that Mr. Smith had been hit by a car. At that time, Mr. Henry got into his pickup and drove over there. He was about an hour away, and on the way, he called Mark and informed him of the accident. When he arrived at the scene, the truck was still in the center lane. The vehicle that hit Mr. Smith was north of the truck a ways and the State Police were there. (Samantha Morrison was driving the car that stuck Mr. Smith.) Mr. Smith had already been transported by ambulance. The State Police were measuring. He thought it was estimated it was 30 to 50 feet from the intersection, but he had no reason to dispute the police report measurement of 65 feet. He did say he remembers that night vividly, at least as far as the situation, but that detail, no. After the State Police were done measuring, he inspected the vehicle. There was no damage to the truck and he was able to move it. He drove it down to Caledonia's Farmers Elevator; about three blocks away. One of the fireman brought him back to his pickup. He did not have to purchase anything for his truck that day, other than fuel. When questioned that he said he didn't have a fuel card yet, Mr. Henry

said, "you can't get them overnight, so we either give him a card or make arrangements with another driver so that they have means to fill up.

Counsel asked if there was a reason he had his truck at his house. Mr. Henry indicated when Mr. Smith was hired, Harwell needed a truck and a guy in that area, so it worked for both of us. His house is about five miles from where he loads every morning. It obviously works out for Mr. Smith because he has a shorter distance to drive from where he picks up his first load. Mr. Henry confirmed he was paid a percentage of what the load pays. He is not paid by the hour, he is not paid mileage, and he is not paid a salary. Essentially after he delivers his last load, he is not being paid to drive the truck home. Mr. Henry believed they hired him in at 27 percent load pays. Usually they do 24 percent, but because he knew him from when he worked for other companies and was familiar with Mr. Smith, he used his discretion and hired him at the 27 percent. Mr. Henry confirmed that he was the one who hired Mr. Smith.

Mr. Henry explained the CAM scan. It is a free app on your phone, and you take a picture of paperwork and it automatically converts it to a pdf file. Then the person taking the picture selects the grade of brightness and it puts it in an e-mail and then sends it to the office. It can take anywhere from two to three minutes. Depending on the savviness of the person, he said some do it right away and some do it while they are sitting in line. He confirmed that some days they have to sit in line for a while. He did say that while they are sitting in line, they can update their log books or do the CAM scan.

He explained that the drivers are supposed to do an inspection and it is supposed to be 15 minutes long, either before the beginning of the day or the end of the day. They are to go around the vehicle, check the oil, tires, lights, horn, etc. If there is not an issue with the truck, they electronically go in and log and say no violations found, and then there is a spot for an electronic signature, and then they press "submit." Mr. Henry thought all of the trucks were electronically set up, but Mr. Smith commented from the background, "no" and Mr. Henry said, I don't know when they were all set up. It was right at the time they were switching, otherwise there is a hard copy log book. If it was a hard copy log book, it was a book and had the same type of form, and you could put checkmarks by things that were not okay. If everything was okay, you would check okay and then you sign it. Mr. Henry explained that Federal law requires either a post or pre-route inspection; not both. He also confirmed that he is not required to have chewing tobacco or soda on his runs. He could not recall whether he would text or call at the end of his shift. He confirmed Mr. Smith could have kept his truck at the yard in Coldwater if he wanted. Mr. Henry testified that he had driven for 29 years. He didn't really know whether it was illegal, he was concerned about Mr. Smith. He was parked in the center turn lane. He confirmed it was on the approved portion of the road, not a median or grassy area. Mr. Henry confirmed there was no reason he had to be in that exact

location that night on behalf of the employer. Mr. Henry confirmed there was not any work reason that required Mr. Smith to park in that location that night.

On **cross-examination**, Mr. Henry confirmed that he would have been Mr. Smith's supervisor and he did hire Mr. Smith. Mr. Henry confirmed that he got the call that Mr. Smith was hit as a pedestrian by another vehicle. He got there about 45 minutes after the accident occurred. He reported that a fireman told him that the truck was not moved. Mr. Henry confirmed that this night stood out for him as it was very traumatic. He did admit it was five years ago, but there are certain things he remembers and this is one of those things. He did state that it was a benefit to both he and the company and Mr. Smith to keep his truck at his house. Mr. Smith could start later and it was a lower fuel cost for the trucking company. He also confirmed they needed someone in the area. In addition, Mr. Smith had knowledge of truck driving, and he had knowledge of the type of work they did. Out of 35 trucks, probably ten of their trucks park at home. He confirmed that parking at home was of benefit to both with the same kind of rationale. In fact, Mr. Henry stated that some live two or three hours away.

Mr. Henry confirmed that Mr. Smith was paid by the load. Although he was done dropping off the load, he still had to get the truck back or get the truck home. He couldn't leave it there; it would be a "long walk home." Mr. Henry acknowledged that some drivers are better at the CAM scan than others, as well as the paperwork. He did note that he encouraged the drivers to keep it up-to-date; whether they do it while they are in line or at the end of the day is up to them.

Mr. Henry confirmed that, "if Dale said he does his last entry or inspects when he gets home, he has no reason to dispute that. Dale is a very honest individual." When questioned whether Mr. Smith called at the end of the day, Mr. Henry stated he had no recollection. He said, "some drivers, Dale would be included, that I trust that get their jobs done." He does not have to baby sit them. Mr. Henry confirmed that he drove a truck for 29 years and admitted that during that time he did have occasion to park in areas which were not most favorable. He testified part of the problem is there is not enough room or accommodations.

Mr. Henry was also questioned about the police report and that Mr. Smith was parked 65 feet back from the intersection, and whether that was the safest possible place, he said, "well, at that time of the night, it is probably not that busy. But it was probably a little close." He did testify, "I would have no idea why they would not see him," with reference to the driver that struck Mr. Smith.

With reference to inspections, Mr. Henry testified that inspections are company policy, not Federal. They have it mainly for the drivers who come back at night, because if they catch something that is wrong, they can fix it before morning. They encourage the inspection, but it is not required.

Mark Harwell Trucking did not set specific driving times or hours. Mr. Henry said that occasionally they had an assigned load time at a farm or mill, but he didn't have to make sure Mr. Smith was there, as he was always on time. He noted Mr. Smith was an extremely conscientious employee. Mr. Henry also agreed that there was not anything that said he could not stop for coffee or a meal or anything. Mr. Henry noted they are going to make stops. Mr. Henry confirmed there was nothing to prohibit him from stopping for something during the day; it was totally up to the driver. Mr. Henry confirmed that once Mr. Smith dumped his last load, he still had to go home. He was done with his employment, but he was paid by the load. Mr. Henry noted he is, "responsible for the truck and has to get home." Mr. Henry did not recall ever having a conversation with Mr. Smith that because he had dropped his last load, he was no longer in the course of his employment. Mr. Henry confirmed Mr. Smith was hoping he would get rehabilitation and be able to come back to work. Mr. Henry did confirm that there would be times when he would need to stop for things such as restroom breaks. Mr. Henry confirmed that the company logo was on the side of the vehicle; not that trailer but some might have it.

Mr. Henry confirmed that the drivers have to maintain copies of all of the documents, and if they send the bills of lading in through CAM scan, they have to retain them for one month. Mr. Henry confirmed that at the time Mr. Smith was driving for them, he was responsible for keeping the inside vacuumed and the dashboard dusted. At the time they had commercial places where they could get the vehicles washed. They did not prohibit the use of personal items in the vehicle, other than they are not allowed to smoke in the spare trucks. This is so that it does not affect other drivers. Mr. Henry did confirm that there is a requirement that they should call in after completing each load, but if it is quite late in the day, they are probably instructed that this is all they are going to be able to do.

On **re-direct examination**, Mr. Henry confirmed that in his opinion, the fact he had parked in that other area before, and other drivers have done it, does not make it legal.

When Mr. Henry arrived at the accident scene, it was dark and it was done raining, but the pavement was still wet. He was asked to assume that the front of the truck was 65 feet from the intersection. He also confirmed there were no traffic lights on Jordan Lake Avenue. There was a stop sign on Tupper Lake Road. He confirmed it would have been safer for Mr. Smith to park at home and either walk or take his own vehicle back to the convenience store. When questioned whether it would increase the risk of injury, Mr. Henry said, "obviously I guess it did." He also confirmed that Mr. Smith's stop was personal in nature.

On **recross-examination**, Mr. Henry confirmed they had no reason to believe Mr. Smith wasn't on his usual route home. He did not hear anything that Mr. Smith had stopped elsewhere or done something beforehand. He confirmed

that he did not terminate Mr. Smith because of the accident, nor did he discipline him for this accident. Mr. Henry confirmed Mr. Smith did not get a citation to the best of his knowledge, but he noted, "I am sure he will remember it for a long time." When counsel stated where Mr. Smith parked, although not a perfect situation, would not have been unreasonable and Mr. Henry stated, "for what it's worth, yes."

On **further re-direct examination**, Mr. Henry confirmed that where Mr. Smith parked was still illegal.

Mark Aaron Harwell. Mark Aaron Harwell then took the stand. In 2017, he was an owner member of Mark Harwell Trucking, LLC. He confirmed he was the boss, not just a driver. He owned that business for 27 years, and was also a driver for 27 or 28 years. At one time he had 40 trucks. He was also responsible for paying the workers' compensation insurance premiums. When questioned whether he thought the accident in question was a workers' compensation claim, he said, "I do not believe it is." He stated, "in my opinion, if something had been wrong with my truck, if he was driving my truck and there was something wrong with the equipment or there was a safety issue, it would have been a workers' compensation claim. However, Mr. Smith was out of his truck on personal business, and his truck didn't run over him. It had nothing to do with his work. He was a pedestrian going to get chewing tobacco and pop. It was not work related." Further Mr. Harwell stated, "the truck was parked illegally in the center lane 65 feet back from the intersection. He was our employee, but our company did not cause him harm. Nothing the employer required increased his risk of injury."

Mr. Harwell testified Mr. Smith was a great employee, and lots of great employees or drivers have mechanics to work on their trucks. All they ask is to keep the trucks clean. They have wash days and all they have to do is keep the inside clean. Mr. Harwell testified there was nothing about Mr. Smith's job which led to this injury. Mr. Harwell testified Mr. Smith was still an employee, but what he was doing at the time of the accident was personal. There was nothing about the job which led to Mr. Smith's injury.

On **cross-examination** by Attorney Elder, Mr. Harwell confirmed that the company's name now is Mark Harwell, Inc. He is retired from running the business. He kept his own truck and his trailers. Mr. Henry runs the company now and in fact has been running the company for several years. Mr. Harwell enjoys driving trucks more than he does dealing with people, so he drives a truck but the truck is leased onto Mark Harwell, Inc. He has zero ownership interest in the company as of July 2022. On July 1st, 2022, Mr. Harwell got a check and ran down to the bank. He confirmed that it is his personal belief that it was not work related. He understands there are legal issues and his insurance agent explained to him what is workers' compensation and what is not. However, he

has testified that is his “moral belief.” He does not know the legal standard. He also does not know whether the deviation he was involved in would be reasonable and within expectations. He confirmed that he sat through the testimony of Craig Henry and he did not refute any of his testimony. He ultimately testified, “I consider them employees 24-hours-a-day, but if they do something on their personal time, I do not think I am responsible.”

With that, the lay testimony was concluded.

Mr. Elder offered a brief closing statement. He believed this is clearly a work-related event. Mr. Smith was clearly within the scope of his employment. Deviations are allowed, and in fact it is expected to happen. The fact that he was picking up personal items, it is allowed, and it is expected. It is unfortunate that this accident happened, but everything points to it being work related.

Mr. Finegan offered a brief closing statement. He noted that it is a two-pronged test. Talk about log books and inspections, which could arguably extend the course of Mr. Smith’s employment. However, there is a second prong which is within the scope of Mr. Smith’s employment. The scope prong is fatal to this case. The scope does not extend. Mr. Smith created the risk of injury, not related to his work. Mr. Smith was disassociated with his work, and this is what created the risk and resulted in this injury. Therefore, it is not work related.

EXHIBITS

Intervening Plaintiff’s Exhibit 1 – Company Handbook

Attached at the front of the handbook is a two-page letter form Mark Harwell. The handbook is six pages long. The first page outlines the Inspection of Vehicle requirement (Pre and Post trips). It does reference the Federal Motor Carrier Safety Regulations. The written inspection requirements were consistent with Mr. Smith’s testimony.

Intervening Plaintiff’s Exhibit 2 – 49 CFR Section 396.11 Driver Vehicle Inspection Statute. The statute is three pages in length. This statute outlines driver vehicle inspection report(s) that must be prepared after the completion of each days’ work on each vehicle. Mr. Smith testified regarding his practice. He also testified he was not familiar with this particular statute. Ultimately, I found Mr. Smith to be very credible and I relied on his testimony regarding his inspection practices.

Intervening Plaintiff’s Exhibit 3 – Police Report dated 6/22/17. The police report is a lengthy document which included witness statements. The report notes the semi-truck was illegally parked in the center turn lane facing southbound on Jordan Lake Avenue.

Samantha Kay Morrison advised that she “had a receipt in her hand as she was looking at it, she looked up and he was walking across the road. She had the receipt in her hand. She was double checking the address.” She slammed on the brakes, “there was no way she was going to stop in time.” (First page of report following three-page case report detail).

After the investigation was completed, the Ionia County Assistant Prosecutor Adam Dreher, Sergeant Listerman and Chief Bender spoke, and it was decided to issue Samantha Kay Morrison a citation for MCL 257.627 Violation of the Basic Speed Law-Unable to Stop in Assured Clear Distance.

Intervening Plaintiff’s Exhibit 4 – Hand Drawn Diagram of the Accident Scene.

Dale Smith identified the numbers depicted on the diagram as follows:

1. Dale Smith’s House
2. Where Dale Smith parked the truck that morning when he went to Jays
3. Convenience Store – Jays
4. Where the truck was parked the evening Dale Smith got hit
5. Arrow where Dale Smith walked across Tupper Lake to go to Jays

Defendant’s Exhibit A – Arial Picture of area of convenience store with handwritten indication of location of the Smith residence.

ANALYSIS AND FINDINGS

MCL 418.301 (1) states “An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act.”

The parties have stipulated that the employer was subject to the act, that Secura Insurance Company carried the risk on the alleged date of injury and that Mr. Smith was employed by Harwell Trucking on the date of injury. The sole issue is whether Mr. Smith sustained an injury arising out of and in the course of his employment.

The facts in this case are fairly straightforward. Mr. Smith was a truck driver for the Defendant. Mr. Smith had a set route he drove every day. He lived about 70 miles from the truck garage/employer. He kept his truck at home, and he picked up his first load about four or five miles from his residence. All testimony agreed this benefited both Mr. Smith and Harwell Trucking.

He was paid a percentage of the load. He was not paid mileage or on an hourly basis. On the day of the injury, he had dropped off his second/last load. He was a few blocks from home when he stopped to pay his debt from the morning and buy pop and chewing tobacco for the next day.

Mr. Smith parked in the center turn lane. He walked east from his truck across Jordan Lake Road. He then walked south across Tupper Lake Street in an L like pattern to get to Jays. Mr. Smith made it across both streets and went in to the store. He paid his debt and got his items and was on his way back to the truck when he was hit by a pizza delivery person.

The case law is varied and overlapping when it comes to this issue. There is caselaw that supports the legal principle that “arising out of” and “in the course of” are two separate concepts. I find this caselaw persuasive and consistent with my analysis of this statute. Not every injury that occurs in the course of plaintiff’s employment is an injury that arises out of employment. *Ruthruff v Tower Holding Corp*, 261 Mich App 613, 684 NW2d 888 (2004). See also *Simkins v General Motors Corp*, 453 Mich 703, 556 NW2d 839 (1996)

In *Thomason v Contour Fabricators, Inc* 469 Mich 960, 671 NW2d 41 (2003), the court noted that there is a distinction between “in the course of” and “arising out of” the employment and that they should be examined separately. The Court found that the Court of Appeals erred by blurring the distinction between these two requirements. Therefore, although the standard of analysis has shifted, I am persuaded that the current status of the law is that they are two separate elements.

After a careful review of the facts and the law, I find that I need not make a decision on the first element, or course of employment, which I admit is a close call. I find that Mr. Smith’s injury did not arise out of his employment. Mr. Smith testified that he stopped to pay his debt and get pop and chewing tobacco for the next day. While the employer did not prohibit the use of those personal items, the purpose of the stop was entirely personal. Mr. Smith testified that he was not doing anything connected to his work when he stopped that night. In fact, when asked if he thought he was working at the time of the accident, he testified, “I am responsible for my truck 24-7, but was I working, no.” Craig Henry testified that there was no work reason for him to be parked in that location.

Clearly Mr. Smith suffered unfortunate and serious injuries as a result of being hit as a pedestrian by a pizza delivery person while stopped at the convenience store. That event is in no sense attributable to the nature of or risks involved in his employment, and therefore cannot be said to arise out of it. See *Appleford v Kimmel*, 332 Mich 210, 213; 50 NW2d 762 (1952).

Therefore, I find that Intervening Plaintiff, Farmers Insurance, failed to prove that Mr. Smith’s injuries arose out of and in the course of his employment. The Petition for Determination of Rights is hereby denied.

CONCLUSIONS

After a careful review of all the evidence presented, and application of the law, I find that Intervening Plaintiff failed to establish the injuries sustained to Mr. Dale Smith arose out of and in the course of his employment pursuant to MCL 301(1). As such all benefits are denied.

WORKERS' COMPENSATION BOARD OF MAGISTRATES

LISA L. WOONS, MAGISTRATE (254G)

Signed on this 12th day of January, 2023 at Kalamazoo, Michigan.