

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306369

LINDA BOSS FOSTER, EMPLOYEE CLAIMANT

EXPRESS PERSONNEL SERVICES, EMPLOYER RESPONDENT

AMERICAN HOME ASSURANCE COMPANY,
INSURANCE CARRIER RESPONDENT

OPINION FILED APRIL APRIL 21, 2004

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Texarkana, Miller County, Arkansas.

The claimant was represented by GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

The respondents were represented by CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

-
A hearing was held in this matter on January 22, 2004. A prehearing conference was conducted on November 18, 2004, and a prehearing order was filed on November 18, 2004. A copy of the prehearing order has been marked as Commission Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following stipulations:

1. The employer/employee/carrier relationship existed on June 6, 2004.
2. The respondents have controverted this claim in its entirety.
3. The parties shall be prepared to stipulate to a compensation rate by the time of the hearing.

During the prehearing conference, the parties also agreed that the issues to be litigated

LINDA BOSS FOSTER-F306369

at the hearing were limited to the following:

1. Whether the claimant sustained an injury that is compensable under the Arkansas Workers' Compensation Law.
2. Whether the claimant was performing employment services at the time of her alleged injury.
3. Whether the respondents are liable for any benefits prior to June 16, 2003, when the claimant gave notice.

From a review of the record as a whole, to include the testimony of the claimant, Linda Boss Foster, Shirley Munden, and Janet Langdon, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Claimant's compensation rate for TTD at the time of the incident was \$240.00 and her PPD compensation rate was \$180.00.
3. The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
4. I find that the claimant was not performing any employment duties at the time of her fall.
5. The respondents have controverted this claim in its entirety.

DISCUSSION

On June 6 , 2003, the claimant was employed by the respondent employer as a temporary employee, and she was assigned to McClarty Auto Mall. As part of her duties at

LINDA BOSS FOSTER-F306369

McClarty she was responsible for all accounts receivable, including credit cards, cash, and checks. In addition, she was responsible for putting into the computer system all data pertaining to new and used vehicles acquired by McClarty. Her job duties were primarily performed at her desk; however, the evidence establishes that she was called upon to carry out some duties when she was not at her desk. In this regard, the testimony establishes that she was required to pick up certain documents from the cashier's desk each morning and that she was required to pick up warranty slips from the warranty clerk. In addition, the claimant testified that she was subject to be called upon to perform employment duties at any time that she was on the premises of McClarty, and she testified that she was called upon at times to answer questions or otherwise perform employment duties while she was away from her desk and moving around the facilities at McClarty Auto Mall.

On June 6, 2003, the weather was stormy and raining hard when the claimant arrived at work. In accord with her normal routine, she entered the facility in the service bay area. At some point after she entered the service bay area and was in route to the cashier's desk to pick up her credit cards and e-checks, she slipped and fell backwards. Her hips hit the concrete floor and her head hit one of the parked cars.

The claimant was taken to the emergency room where she was met by her supervisor from the respondent employer. She was complaining of hip pain, low back pain and head pain. A CT Scan of the claimant's brain revealed mild inflammatory changes but no evidence of intra-cranial pathology. An x-ray of her lumbar spine revealed multi-level degenerative changes as well as straightening of the upper lumbar spine which suggested

LINDA BOSS FOSTER-F306369

muscle spasm. The claimant was again seen at the emergency room on July 21, 2003 for complaints of back pain, which had worsened. The claimant ultimately came under the care of Dr. Charles Marrow. Dr. Marrow ordered an MRI on the claimant's lumbar spine which was performed on September 3, 2003. This MRI revealed mild bilateral neural foraminal narrowing at L4/L5 secondary to a broad based posterior disk bulge, as well as a 5mm broad based disk bulge at L5/S1 with associated bi-lateral neural foraminal narrowing. The bulge at 5/S1 also touched both S1 nerve roots within the thecal sac. Dr. Marrow has diagnosed a muscular ligamentous injury of the claimant's cervical and lumbar spines, and he has opined that the claimant's symptoms are as a result of her work related activities.

The claimant has a history of back problems that pre-dates the June 6, 2003 injury. Medical reports show that the claimant was being treated by Dr. John Finck as early as February of 1999, primarily for back pain. According to Dr. Finck's report, the claimant was complaining of back pain which was severe enough to awaken her at night and which radiated into her thigh. In November of 1999 she fell down seven stairs basically on her buttocks and after she returned home Dr. Finck opined that she probably had a coccygeal fracture. According to her symptoms he noted in a report dated November 16, 1999, the claimant's back pain had waxed and waned and that this episode appeared to be a fairly severe exacerbating factor. Dr. Finck ordered a MRI which revealed a probable herniated nucleus pulposus at L5-S1 with impression on the thecal sac. Dr. Finck opined that the claimant needed surgical intervention. Consequently, he referred the claimant to Dr. Queeney. According to Dr. Finck's records, Dr. Queeney performed a microdiscectomy in

LINDA BOSS FOSTER-F306369

December of 1999. However, Dr. Finck again saw her on September 5, 2000, and his report indicates that the claimant was again complaining of similar pain. An additional MRI was performed subsequent to the surgery which revealed scaring at L5/S1 with a probable significant impression on S1. Dr. Finck diagnosed a neuropathy secondary to scaring and again referred her to Dr. Queeney. A report from Dr. Finck dated January 11, 2001, indicates that the claimant fell during an ice storm and landed on her buttocks. She was complaining of pain in her left sacroiliac region, which radiated into her left hip. The claimant returned to Dr. Finck on September 17, 2001 with complaints of worsening back pain. Dr. Finck's report indicates that the claimant had returned to Dr. Queeney in September of 2000, and that an MRI taken at that time did reveal a disk at a new level, as well as some recurrence of her disk at the previous level. This report also indicated that surgery would be offered when the claimant "cannot get around anymore." Again the claimant returned to Dr. Finck on May 7, 2002, with complaints of back pain which radiated into her left leg and she returned to him with similar complaints on September 19, 2002. In a report dated September 26, 2002, Dr. Finck indicated that the claimant advised him that her back pain had worsened to the point where she was unable to work at time.

June 6, 2003, was a Friday and the claimant remained off work the following Monday. Since then she has missed some time due to doctor's appointments; however, she has not otherwise missed any time from work due to her injury. She subsequently began noticing problems with her arms and fingers going numb and her neck hurting. The claimant denied having any back pain immediately prior to the fall on June 6, 2003. However, she

LINDA BOSS FOSTER-F306369

acknowledged having back pain prior to that. According to her testimony she had bursitis in her hips that would effect her lower back.

The claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. § 11-9-102(4)(B)(iii) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated.

Act 796 further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002). In Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002), the Arkansas Supreme Court stated the following

Act 796 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). A compensable injury does not include an "[i]njury 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). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services," Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Stephens v. Arkansas Sch. for the Blind, 341 Ark. 939, 20 S.W.3d 397 (2000). Although the statute does not define the term "employment services," the Commission as well as the Arkansas appellate courts have previously held that an employee is performing employment services when he is engaging in an activity which carries out the

The Arkansas Supreme Court has held that the same test used to determine whether

LINDA BOSS FOSTER-F306369

an employee was acting within "the course of employment" is to be used to determine whether the employee was performing "employment services." Collins v. Excel Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (Mar. 7, 2002); Pifer v. Single Source Transp.,^{supra}. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interests directly or indirectly." *Id.* This test has also been previously stated as whether the employee is "engaged in the primary activity that [s]he was hired to perform or incidental activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1996), *aff'd*, 328 Ark. 381, 944 S.W.2d 524 (1997). Employment services are performed when the employee does something that is generally required by his or her employer.

The claimant was on the premises of the McClarty Auto Mall where she was assigned to work by the respondent employer. However, she was in the service bay, the area where automobiles are to be serviced and repaired, not in the area where she was required to perform her employment duties. In addition, she was not yet engaged in any activity required by McClarty, or the respondent employer when she fell. In fact, the injury occurred at 7:50 a.m., ten minutes before the claimant was required to report for work at 8:00 o'clock a.m. Consequently, Although the claimant testified that she periodically was required to be in the service area for various reasons, and that occasionally she would be asked questions pertaining to her employment duties while she was in the service area, she admitted that no questions had been asked of her on June 6, 2003 prior to her fall. Furthermore, the evidence

LINDA BOSS FOSTER-F306369

does not establish that the claimant was ever required by McClarty to be in the service area as part of her employment duties. I find that the claimant failed to prove by a preponderance of the evidence that she was engaged in an employment activity at the time of her fall on June 6, 2003.

ORDER

Accordingly, based on my review of the entire record and for the reasons discussed herein, I find that this claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. C. MICHAEL WHITE
Administrative Law Judge