

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400107

SARA L. SYNNOTT

CLAIMANT

FOX RIDGE ESTATES

RESPONDENT EMPLOYER

WESTPORT INSURANCE CORPORATION

RESPONDENT CARRIER

ORDER AND OPINION FILED DECEMBER 16, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE RAY BAXTER, Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on October 20, 2004. A prehearing conference was held on August 24, 2004, and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

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

1. There was an employer-employee relationship on August 21, 2003.
2. The average weekly wage was \$515 with temporary total disability/permanent partial disability rates of \$343/257.

The claimant contends she sustained a compensable injury on August 21, 2003 and is entitled to medical benefits. Further, the claimant contends she is entitled to

temporary total disability benefits from August 22, 2003 through August 29, 2003, and from October 7, 2004, to a date to be determined, as well as attorney's fees.

The respondents contend the claimant was not performing employment services at the time of her accident. Alternatively, respondents contend if the claim is found to be compensable, all the claimant's medical expenses are not causally related to the incident of August 21, 2003.

ISSUES TO BE LITIGATED

1. Compensability
2. Medical benefits
3. Temporary total disability benefits
4. Attorney's fees

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an employer-employee relationship on August 21, 2003.
2. The average weekly wage was \$515, with temporary total disability/permanent partial disability rates of \$343/257.

3. The claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her motor vehicle accident on August 21, 2003.

DISCUSSION

The claimant has been employed for five years with the respondent as an activity director. The job duties include taking clients to the doctor, picking up dry cleaning and running all types of errands for clients, as well as coordinating social activities such as Bingo. The employers' facility is an independent living center. The claimant drove her personal vehicle for some things and the 14-passenger company van for some things. The claimant could charge gas for her personal vehicle. When the claimant was running errands, she would report her coming and going with Jennifer or Sally.

According to the claimant, on August 21, 2003, she was driving her personal vehicle to pick up the dry cleaning for a client at Walker's Cleaners on Highway 5. It was raining that day and, according to the claimant, there was no parking available at the cleaners so she decided to drive past the cleaners and go to Fred's, get a Coke and circle around the parking lot and then return to the cleaners, hoping the parking had cleared. As the claimant was heading down Springhill Road, another vehicle ran a red light and hit her vehicle at the intersection. The claimant never made it to Fred's to turn around. The claimant was taken by ambulance to Saline Memorial Hospital and remained off work the rest of the week. The claimant followed up with her family doctor, Dr. Mark Martindale. The claimant pursued some physical therapy and continued to work and began having further problems several months later. According

to the claimant, she did not personally use Walker's Cleaners at the time of the accident.

Under cross examination, the claimant acknowledged her signature on a document that she had received and read the employee manual. The claimant acknowledged the manual indicated authorization for business travel was needed from the supervisor; however, she also verified that requirement was not practiced.

Frankie Herring, an employee of Walker's Cleaners, testified that on August 21, 2003, the claimant called to see how much a particular cleaning bill was and advised she was coming in to pick up that cleaning order. Ms. Herring learned the next day that the claimant had been involved in a motor vehicle accident. Ms. Herring also verified that the parking lot is big; however, sometimes the parking places in front of the cleaners are full.

Kay Skaggs, former kitchen manager of the respondent employer, left the employer in July 2003. Ms. Skaggs testified that she would go to Jennifer Menard's office and might get a check to pick something up and was told to take her own car. Ms. Skaggs testified that she personally knew that the claimant ran errands regularly and used her own vehicle and the claimant got to fill her car up with gasoline paid by the respondents. Ms. Skaggs was not aware that any particular authorization was required when employees ran business errands.

Jennifer Menard, administrator for the employer, testified it was company policy for any person running errands to come by the office and notify management where he/she was going. Ms. Menard had no notice by the claimant of an errand on August

21, 2003. Her first knowledge was her father-in-law's call from the emergency room that the claimant was involved in a vehicle accident.

The claimant contends she was performing employment services at the time of her motor vehicle accident. A compensable injury is defined, in part, as an accidental injury arising out of and in the course of employment. Ark. Code Ann. §11-9-102(4)(A)(i) (Supp. 2003). A compensable injury does not include an injury "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. §11-9-102(4)(B)(iii). The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. *Pilgrims Pride Corp. v. Caldarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

The Supreme Court affirmed the Commission's finding that a traveling nursing assistant's injury in an automobile accident was compensable when she was traveling to care for her patients. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). The Court held that the claimant was required by the very nature of her job description to submit herself to the hazards of travel in her own vehicle back and forth to the homes of her patients. As such, the claimant was acting within the course of her employment with her employer at the time her injuries were sustained. The Court found that the travel was clearly for the benefit of the employer, since its business livelihood depended upon the in-home care of patients provided by the nursing assistants. The Court held it was persuaded by the reasoning offered by the Court of Appeals:

Although we recognize that the appellee was not directly compensated for driving to patients' homes, the pay of compensation is not conclusive to the question of whether employment services are being performed. For example, many workers, such as salesmen, are paid on the basis of commissions, but it is abundantly clear that a salesman who is attempting to make a sale is performing an employment service without regard to whether his attempt is successful.

It is likewise clear that delivering nursing services to patients at their home is the *raison d'être* of the appellant's business, and that traveling to patients homes is an essential component of that service. *Id.*, quoting *Olsten Kimberly Quality Care*, 55 Ark. App. at 346, 934 S.W.2d at 958.

In the present case, respondents contend the claimant was not performing employment services at the time of her vehicle accident but was instead en route to Fred's to purchase a Coke for herself. It is undisputed that the claimant's vehicle accident happened between Walker's Cleaners and Fred's. The claimant testified the parking lot was full and she was unable to pull into Walker's Cleaners to pick up a resident's cleaning; therefore, she traveled past the cleaners and had originally planned to get a Coke and turn around and go back to the cleaners, hoping the parking lot had cleared. It is undisputed that it was raining on August 21, 2003. The claimant's vehicle accident occurred at an intersection before she actually arrived at Fred's. The respondents cite the Court of Appeals' decision in *Matlock v. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001), where a number of factors are identified to help the Commission decide if employment services are being performed. In *Matlock*, the claimant was going to the bathroom when an injury occurred; however, the Court held that the controlling inquiry is not whether an injury occurred while the worker was engaged in personal comfort activity, *per se*, but whether the activity advances the

employer's interest. Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case.

The Supreme Court in *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999), held the claim was compensable because employment services were being performed. The claimant, on break, was injured while on his way to smoke in an area where he could keep an eye on equipment in his work station and could immediately return if necessary. Similarly, the Court of Appeals in *Ray v. University of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1998), held that when an employee is doing something that is generally required by his or her employer, the claimant is providing employment services. In *Ray*, the claimant was a food service worker in a cafeteria and was on break when she fell as she was getting a snack. The Court found the claimant, although she was on a break, was required to assist student diners if the need arose; therefore, the employer gleaned benefits from the claimant being present and available to aid student diners.

In the present case, the claimant was traveling to pick up a client's cleaning, clearly an employment related activity but had deviated to get a beverage for herself and was involved in a motor vehicle accident. The claimant had passed the cleaners and was at an intersection between the cleaners and Fred's, the place to get a Coke. While on her deviation, the claimant was not performing employment services even though her digression from her travel was a minor digression. In *Clardy v. Medi-Homes LTC Serv. LLC*, 75 Ark. App. 256, 55 S.W.3d 791 (2001), the Court affirmed the Commission's denial of benefits to a claimant who deviated approximately ten feet

across a paved driveway adjoining a sidewalk to speak to an off-duty co-worker. She slipped and fell, fracturing her ankle. The Court held that it could find no authority for carving out a “de minimus” exception to the requirement that the employee be engaged in the performance of employment services at the time of the injury. I find the claimant in the present case has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her motor vehicle accident. The claimant had taken a deviation, albeit a “de minimus” deviation, but was not performing employment services.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her motor vehicle accident on August 21, 2003. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**