

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200737

IRENE C. TIDWELL

CLAIMANT

**SOUTHWEST ARKANSAS DEVELOPMENT
COUNCIL, INC.
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED NOVEMBER 4, 2004

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE SCOTT A. SCHOLL, Attorney at Law,
Jacksonville, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law,
Little Rock, Arkansas.

STATEMENT OF THE CASE

This opinion is on the record following a hearing in Hope, Arkansas on September 17, 2004, before Administrative Law Judge C. Michael White. A prehearing conference was held on May 26, 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. The employer/employee/carrier relationship existed on January 9, 2002.
2. The claimant was involved in a motor vehicle accident on January 9, 2002.
3. The respondents have controverted this claim in its entirety.
4. The compensation rate is \$177.

The claimant contends that she was injured in an automobile accident on January 8, 2002, when she was driving between the homes of two clients in the course and scope of her employment. The claimant contends she is entitled to medical benefits.

The respondents contend the claimant was not performing employment services at the time of her automobile accident on January 8, 2002. The respondents contend the claimant was working on the day of the accident but it contends the claimant had deviated from her employment and had not returned back to her scope of employment when she was involved in the automobile accident.

Issues to be litigated:

1. Whether the claimant sustained an injury that is compensable under the Arkansas workers' compensation law.
2. Whether the claimant was performing an employment service at the time of the motor vehicle accident.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, 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. The employer/employee/carrier relationship existed on January 9, 2002.
2. The claimant was involved in a motor vehicle accident on January 9, 2002.
3. The respondents have controverted this claim in its entirety.

4. The compensation rate is \$177.

5. 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 January 9, 2003.

DISCUSSION

The claimant, 54 years old, was a client service assistant for the respondent employer and filled in for other employees. The claimant's activities would include cooking, cleaning, bathing, personal care, shopping and running errands for clients. The clients were elderly or middle aged persons who had trouble taking care of themselves. The claimant had worked in this capacity for about 20 years and had been with the respondent employer for about 18 years. The claimant has not worked since the accident and is now on social security disability.

According to the claimant, on January 9, 2002, as she was coming off of Highway 53, she stopped at a station to get a drink and as she was leaving the store to go to her next client, she was hit by a car. The claimant had left one client and was on her way to another client. The claimant's job required her to travel from one client's home to another with her own vehicle. The station where she stopped to get her drink was on the way to the next client's home and did not require a deviation. The claimant sustained a fractured ankle requiring two surgeries and causing the claimant to remain off work. The claimant testified that she can only be on her ankle for an hour or two before she has to get off her feet. The claimant wears open shoes most of the time and uses a cane now.

Under cross examination, the claimant verified that she had stopped by a

convenience store and bought a soda pop while traveling from one client en route to her next client. The claimant verified that she was pulling out of the parking lot onto the highway when she was hit by a truck.

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.

Pilgrim’s Pride Corp. v. Cadlarera, 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.

The respondents contend the present case is distinguishable from *Petty* in that in the present case the claimant had stopped to get a soft drink at a convenience store and was pulling back out onto the highway at the time of her accident. The respondents rely on Court of Appeals cases, *McKinney v. Trane Co.*, ___ Ark. App. ___, ___ S.W. 3d ___ (2004) and *Smith v. City of Fort Smith*, ___ Ark. App. ___, ___ S.W.3d ___ (2004). In both cases, benefits were denied. In *McKinney*, the claimant was found not to be performing employment services when he was attempting to retrieve a soft drink from the table. In *Smith*, the Court admitted that the claimant was engaged in an activity that benefitted the employer somewhat but further clarified that in order to be compensable the activity must also have been inherently necessary for the performance of his primary job. The respondents contend the claimant stopping to get a soft drink was not inherently necessary for her job performance.

The claimant references the Court of Appeals in *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 343, 49 S.W.3d 126, 142 (2001), where the court held that while it is true that workers' compensation statutes are to be strictly construed, "strict

construction is not the enemy of common sense....”

The claimant also references *Larson’s Workers’ Compensation* §20.1 (Desk Edition 2004), which holds that “Injuries arising out of the necessity for a traveling employee to stop for food or drink are compensable because it would be inhuman to snatch away compensation protection from a worker at each momentary rest.”

In *Matlock*, 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 from one client's home to another to perform services; however, she took a deviation to obtain a beverage for herself and was involved in a motor vehicle accident in her attempt to get back onto the highway for her trip. 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. 156, 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 January 9, 2003. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**