

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F402683

JUDITH CASTERLINE, Employee	CLAIMANT
NHS MANAGEMENT (FAYETTEVILLE HEALTH & REHAB), Employer	RESPONDENT
WAUSAU INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MARCH 23, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 2, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 22, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on December 10, 2003.
3. The respondent has controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's back on December 10, 2003.
2. Temporary total disability benefits.
3. Related medical.
4. Attorney fee.

At the time of the hearing the claimant withdrew as an issue her entitlement to temporary total disability benefits. Claimant also acknowledged that some of her medical treatment had been paid for by group health carriers.

The claimant contends she suffered a low back injury while employed with the respondents on December 10, 2003.

The respondents contend the claimant was not performing employment services at the time of the incident. She was taking a break outside the facility on her way to a designated smoking area when she slipped and fell.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 22, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent on December 10, 2003.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's low back injury. Respondent is entitled to a credit for group benefits paid pursuant to A.C.A. §11-9-411.

FACTUAL BACKGROUND

The claimant went to work for the respondent for the second time in September 2003. Claimant was hired by the respondent as an LPN charge nurse and was

responsible for one section of the building which had an average of 30 to 35 patients.

The primary facts are not in dispute. On December 10, 2003, the claimant had gotten a cup of coffee and was in the process of going to break at a designated break area which is outside the respondent's dining room. Claimant testified that she was some 5 to 6 feet outside the building when she slipped on ice and fell. Claimant laid on the ground for several minutes before she was discovered by other employees. Claimant was sent by the respondent to Dr. Haws for medical treatment. In addition, claimant has also received treatment from Dr. Horton, Dr. Knox, and the Eureka Springs Walk-In Clinic. Claimant has been treated conservatively and has been permitted to continue working with limitations.

Claimant has filed this claim contending that she suffered a compensable injury to her low back while working for respondent on December 10, 2003. She seeks payment of medical treatment.

ADJUDICATION

Compensability in this claim is primarily governed by the provisions codified at A.C.A. §11-9-102(4)(B)(iii) which states:

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

Although the term "employment services" was not defined by statute, the Arkansas Supreme Court has held that in determining whether employment services were being performed, the same test used to determine whether an employee was acting within "the course of employment" is to be used. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W. 3d 14 (2002); *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002). The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's interest directly or

indirectly.” *Id.* This test has also been previously stated as whether the employee is “engaged in the primary activities that are inherently necessary for the performance of the primary activity.” *Olsen Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W. 2d 524 (1997).

Generally, employees who are injured while on break are not considered to be performing employment services. See *McKinney v. Trane Company*, 84 Ark. App. 424, 143 S.W. 3d 581 (2004); *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W. 2d 303 (1998). However, employees who are injured while on break may also be performing employment services. In *White v. Georgia-Pacific Corporation*, 339 Ark. 474, 6 S.W. 3d 98 (1999), the employee on break was injured while on his way to smoke in an area where he could keep an eye on equipment at his work station and could return immediately if necessary. The Supreme Court found that even though the claimant was on a personal break he was nevertheless performing employment services because he was monitoring the equipment.

A similar situation occurred in *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W. 2d 558 (1999). In that case, the employee was employed by the University of Arkansas as a food service worker in its cafeteria. During one of her two paid breaks the claimant slipped and fell as she was getting a snack to eat from the cafeteria. The Court of Appeals held that claimant was performing employment services because she was paid for her 15 minute break and was required to assist student diners if the need arose.

In the present case, I find that the circumstances surrounding the claimant’s injury are similar to the circumstances in *White* and *Ray*, *supra*. Here, claimant had obtained a cup of coffee and was on her way outside to the designated break area. According to claimant’s testimony, all employees were required to take breaks at this designated area if they were smoking, eating, or drinking. Rules prevented employees from eating, drinking, or smoking inside the building. More importantly, claimant was subject to recall

to her job during the break period. In fact, claimant testified that respondent had a loud speaker installed outside of the building to page employees who were on their break should their services be required. Claimant testified that it would be unusual for her to go through two 15 minute breaks and a 30 minute lunch break without being paged. Thus, while the claimant was on her way to her break, she was subject to being paged by the respondent to return from her break at any time. In my opinion, the fact that respondent had a loud speaker installed for the purpose of paging employees to return from their break before their break was over is similar to the facts presented in *Ray v. University of Arkansas, supra*. As in *Ray*, the claimant was on break but was subject to recall by her employer should she be paged. According to claimant's testimony this was not an infrequent occurrence. Given this evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she was performing employment services at the time of her injury.

Accordingly, for the foregoing reasons, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury. First, I find that claimant was performing employment services at the time of her fall on December 10, 2003. Therefore, claimant's injury arose out of and in the course of her employment with respondent and it was the result of a specific incident identifiable by time and place of occurrence. I also find that claimant's injury resulted in physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. Claimant sought medical treatment from Dr. Haws and other physicians after her injury. The medical records reflect muscle spasm of the claimant's lumbar spine. These are noted in the reports from Health South Rehabilitation as well as the medical reports from the Eureka Springs Walk-In Clinic. Furthermore, an MRI scan performed on April 8, 2004 reveals a disc bulge at the L4-5 level which is displacing the L4 nerve root.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on December 10, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury. Given claimant's admission that some medical treatment has been paid for by other group carriers, respondent is entitled to a credit for those payments pursuant to A.C.A. §11-9-411.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on December 10, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's low back injury. Respondent is entitled to a credit for benefits paid by group carriers pursuant to A.C.A. §11-9-411.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE