BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410155

RONNIE R. CONNER, EMPLOYEE	CLAIMANT
TEXARKANA SCHOOL DISTRICT, SELF -INSURED EMPLOYER	RESPONDENT
RICK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED AUGUST 18, 2005

Hearing held on May 24, 2005, at Texarkana, Miller County, Arkansas before the HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

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

STATEMENT OF THE CASE

A hearing was conducted on May 24, 2005, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Law.

A prehearing telephone conference was conducted on March 9, 2005, and a prehearing order was filed on the same date. At the hearing the parties announced that the stipulations, issues, and their respective contentions were properly set out in the prehearing order, subject to additional stipulations, contentions and issues agreed to at the hearing. A copy of the prehearing order was introduced into evidence as Commission Exhibit No. 1, and made a part of the record without objection.

The parties stipulated to the following:

1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2) That the employee/employer/carrier relationship existed at all relevant times, including September 21, 2004.
3) The claimant's average weekly wage is $320.00, which would entitle him to a temporary total disability rate of $213.00 per week, and a permanent partial disability rate of $160.00 per week.

By agreement of the parties, the primary issue for determination at the full hearing was compensability, and, if overcome, to what extent the claimant would be entitled to associated indemnity and medical benefits and attorney fees.

The claimant contended he sustained a compensable injury while performing work-related functions on September 21, 2004, to his right knee, and that as a result he is entitled to TTD benefits from September 21, 2004 through April 28, 2005. Claimant further contends that respondents should be ordered to pay for all medical treatment associated with the alleged compensable injury.

The respondents contended the claimant did not sustain an injury arising out of and in the course of his employment. Specifically, respondents contended the claimant was not performing employment services at the time of the accident on

DISCUSSION

The claimant, forty-eight (48) years of age, worked for the respondent school district about twenty-six (26) years as a custodian. The claimant worked primarily as a custodian at the Texarkana High School. The claimant testified his duties as a custodian consisted of emptying trash, cleaning floors, cleaning bathrooms and cafeteria clean-up. (T. pg. 14m lines 2-12).

The claimant testified there was more than one parking lot he could park his vehicle; however, he testified the parking lot directly behind the high school was the one he used primarily because it was in the closest proximity to his work area. (T. pg. 16, lines 15-21.) The claimant testified the parking behind the school had one main entrance with a guard shack and also had red gates that were typically kept locked. Based on the claimant's testimony, this examiner concluded that there were two possibilities for ingress and egress; however, one of these possibilities (the red gates) were usually kept locked.

The claimant changed his testimony about three times when asked where he exited the parking lot on September 21, 2004, at 11:30 a.m. The claimant testified that he normally took his lunch break between 11:30 a.m. and 12:30 p.m. He stated that during his lunch break he was permitted to leave campus and eat wherever he wanted. However, he testified that if he chose, he could eat in the school cafeteria for free.

On September 21, 2004, the claimant testified he needed to go to the bank for personal reasons. He stated that at 11:30 a.m. he left the campus to go to the bank. As mentioned, the claimant was somewhat unclear about where he exited the parking lot; however, ultimately the claimant stated he did not leave through the red gates, but rather that he did, in fact, leave by the guard shack. (T. pg. 44, lines 11-13.)

> Q. ...two red gates, those iron gates were open, Did I understand you correctly on that? Was it open or was it closed at that point?
>
> A. I went this way going out. All I know is that when I come back around that way, they was closed.
>
> Q. So you left through the - the iron gates were open?
>
> A. I went another way, a different way. I went back this way and I don't remember if they was open or closed until I got back.
>
> Q. So you didn't actually go through those red gates when you left?
>
> A. No, ma'am.

The claimant testified his errand to the bank took about fifteen minutes and at about 11:45 a.m. he returned to the school. The claimant testified upon his return to the rear parking lot, there was a truck blocking the entrance by the guard shack. The claimant testified he drove around to the iron red gates. The claimant testified the gates were locked and he attempted to unlock them to get into the parking lot. The claimant testified when he opened the locks, the gate fell on top of him breaking his leg in two

places. The claimant testified that in his twenty-six (26) years of working at the school he had never unlocked the gates. (T. pg. 45, lines 2-5.)

This case comes down to whether the claimant was performing employment services when the gate fell on him. A.C.A.§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."

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 employer's purpose or advances the employee's interest directly or indirectly. Cheri Pettey v. Olsten Kimberly Quality Care, Full Commission Opinion September 13, 1995 (E405037); 328 Ark. 381, 944 S.W. wd 381 (1997).

An employee carries out the employers purposes or advances the employer's interest when he engages in the primary activity which he was hired to do perform. Id.; Kenneth Behr v. Universal Antennas, Full Commission Opinion, December 6, 1995 (E408376). In the case at hand, the claimant testified that in twenty-six (26) years of employment, he had never been asked to unlock the gates. He testified it was the guard's duty.

Q. Okay. It is not part of your job to lock and unlock those gates everyday, is it.

A. No, ma'am.

Q. That's something that if they need to be unlocked, it's the guard's duty to do that? Is that right?

A. Yes. (T. pg. 44, lines 17-23)

It is clear to this examiner the claimant was not performing an activity he was hired to perform at the time of his injury, nor was the activity inherently necessary for the performance of his primary employment.

The Arkansas Supreme Court has held that the same test used to determine whether 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 Speciality Products, 347 Ark. 811, 69 S.W. 3d 14 (March 7, 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 purpose, or advancing the employer's interests directly or indirectly. The claimant argued at the full hearing that since the guard shack entrance was blocked, he advanced the employer's interest by unlocking the red gates so that others could enter and exit the parking lot. That

argument fails because of several reasons. First, the claimant testified no one else was attempting to enter or leave the parking lot when he unlocked the gate:

> Q. When you got back, there weren't any cars lined up trying to get into the parking lot, were there?
>
> A. No, ma'am.
>
> Q. You were the only one trying to get in at the time that you opened the gate?
>
> A. Right.
>
> Q. And there weren't any cars in the parking lot trying to get out when you opened that gate, were there?
>
> A. No, ma'am.

Further, the claimant's testimony lead this examiner to believe that in twenty-six (26) years he had never been required to lock or unlock this gate in question. Also, the claimant testified the guard who operated the guard shack actually had the responsibility of locking the gate. It would make sense that the school has a vested interest in closely monitoring who comes onto the school campus. In fact, it would make sense that the red gates would be locked so that the guard could closely monitor all vehicles which entered the area. It would make no sense to have an entrance

monitored with a guard if there were other places where you could pass without a guard. Therefore, a preponderance of the evidence leads this examiner to find it would be in the employer's interest to keep the red gates locked so that the guard could best do his job. By the claimant opening up other means of ingress and egress to the parking lot, I find he acted against the employer's interest.

The claimant also argued that since he wore a walkie talkie and was subject to being "on call" if he remained on campus during his lunch break, that he was performing employment services by unlocking the gate and trying to get back to work. This administrative law judge acknowledges the list of "on call" cases that find "employment services" even when the employee is on break; however, in this case the claimant left the school to run a personal errand. If someone had tried to communicate with him on his walkie-talkie, I doubt it would have reached to his bank. In this case the claimant was not "within the time and space boundaries of his employment" both figuratively and literally. Obviously, he was outside the gate, and unlocking a gate in which it was not his job to do. He may have been returning to eat his free lunch at the cafeteria; however, the claimant has failed to prove by a preponderance of the evidence that he performed employment services at the time of injury. Similarly, in Carla Ann Cole v. Prince Gardners, Inc., Full Commission Opinion filed August 26, 1996 (E408046)

the Full Commission found that when a claimant has finished work and is injured while walking across the employer's parking lot, the injury was not compensable since employment services were not being performed.

Whether an employee is performing employment services at the time of an accident depends on the particular set of facts in each case. In this matter, I find the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of the accident.

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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A. C. A. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2) The stipulations agreed to by the parties are hereby accepted as fact.
3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his leg as a result of a specific

incident identifiable in time and place of occurrence on September 21, 2004. Specifically, the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of the accident.

ORDER

After careful consideration of all the evidence in this matter, and viewing such impartially, and without giving the benefit of the doubt to either party, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on September 21, 2004. Therefore, the above captioned claim is hereby denied and dismissed.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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