

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401404

DEBBIE R. FOSTER, EMPLOYEE

CLAIMANT

**AUBURN HILLS HEALTH &
REHABILITATION, INC., EMPLOYER**

RESPONDENT

**CANNON COCHRAN MANAGEMENT SERVICES,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 19, 2006

Hearing before Administrative Law Judge Barbara W. Webb on April 19, 2006, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 19, 2006. A Pre-hearing Order was entered in this case on January 4, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. In addition, the parties announced at the hearing that they had reached an additional stipulation as to the applicable compensation rate or average weekly wage. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as stated on the record are hereby accepted:

1. The employee/employer/carrier relationship existed on February 7, 2004, and at all relevant times.
2. The claimant's average weekly wage at the time of the alleged injury was \$328.00, resulting in a temporary total disability rate of \$219.00.
3. Respondents controvert this claim in its entirety.

By agreement of the parties, the issues to be litigated are:

1. Whether claimant was performing employment services at the time of her alleged incident.
2. Whether claimant sustained a compensable specific incident injury on February 7, 2004.
3. Whether claimant is entitled to medical benefits.
4. Whether claimant is entitled to temporary total disability benefits from February 7, 2004 until April 11, 2004.
5. Whether claimant is entitled to an attorney's fee.

The record consists of a one volume transcript of the April 19, 2006 hearing, consisting of the testimony of Gloria Pillar and Debbie Foster and all documentary evidence consisting of Claimant's Exhibit No. 1 (medical records).

DISCUSSION

The claimant contends that she was injured when she fell on ice in the parking lot while attempting to retrieve her money locked in her vehicle to purchase a soda while on break. She contends she was injured while performing employment services in accordance with the case of *Matlock v. Blue Cross Blue Shield*, 74 Ark. App. 322 (2001). She argues that she was injured while taking a brief pause from her work to minister to a basic life necessity; that compensation is justified under the personal comfort exception; and that such a minor deviation does not take the employee out of the employment under the doctrine that her actions did not conflict with any specific instructions and were those normally expected for an employee to indulge in under the conditions of the work.

The respondents contend that the facts of this case are more in line with the case of *Hightower v. Newark Schools*, on the basis that the alleged incident

happened in the parking lot and that the activities of the claimant were purely personal and therefore not employment services.

Gloria Pillar testified that she had been an employee of the Auburn Hills Health and Rehabilitation Center for twelve and one-half years. She retired on March 6, 2006. She had performed the job of a cook and worked alongside the claimant, who was a cook's aide. She explained that in February of 2004, the Center had discovered that they had a thief. She testified money had been taken out of all of the staff's purses and that at the time of claimant's incident, it was the practice of the employees to keep their purses in their cars. She explained that staff personnel were given two ten minute breaks and a half-hour lunch. She testified that on February 7, 2004, she was the head cook. On that day, she recalled seeing the claimant crawling through the back door on her knees. She immediately called the head nurse and the claimant was taken to the emergency room with the van owned by the Center. She testified that it was the normal practice of the employees to keep all their money in their cars. She testified that it was the practice of the employees to go out to their cars to get money and then go to the soda or snack machine to get something. She testified that on the day in question it was the claimant's intent to go to the car to get money. On cross-examination she testified that the claimant was on her way to take a break. She explained that the claimant left the facility and went into the parking lot to go to her personal automobile. The purpose of her trip was to get money so she could come back into the facility and purchase a soda while on break. She recalled that there had been an ice storm three days before and the parking lot was full of ruts and ice. She testified that the company sanded the parking lot after the claimant fell.

Debra Foster, the claimant, testified that she is currently fifty-three (53) years old. She is currently employed by Auburn Hills. She described the February 7, 2004 incident as follows:

We had been working, and I decided I wanted a Coke before break, so I told Gloria and Laurie that I was going to my car to get some money to get a Coke, and I'd meet them outside for break. When I got back – on my way out to the car, I slipped on the ice and fell.

She testified that she went to the car to get the money to purchase a pop because she was thirsty. She testified that this was the practice of other employees to keep money in the car in light of the fact that money had been stolen out of their purses two or three times and that they had been told that it was their job to protect their money. She testified that the car was parked just across the parking lot from the kitchen exit. She testified that her head supervisor and the Center's Administrator were aware of the practice of employees keeping money in the vehicles to keep it safe. She explained that after the fall, she crawled to the car, got up, and then "hopped" to get back to the door. She was taken to the emergency room, wore a cast for several weeks, and was off work until she returned on April 12, 2006. She testified during that time she did not work anywhere else. She testified that the parking lot was icy with snow and ruts. She made it back from the parking lot to the office and was taken by wheel chair in the van to the emergency room. She was attended by Dr. Buford and released. She was referred to Dr. Knox, where she sought treatment on the following Monday. She testified that she had spent \$1,700.00 in medical bills. On cross-examination the claimant testified that she was on her second break for the day. She agreed that her work duties were in the kitchen and that she did not have any work duties where her car was located. She testified that she was going to meet the rest of the girls outside in the smokers' break area after she got her money and her Coke from the machine which was also

located outside. She testified that her car was located approximately 25 to 30 feet away from the building. She testified that when she fell she broke her right ankle but that surgery was not required. She testified that she had returned to work and did not anticipate any future medical treatment to her ankle.

Medical records from the emergency room at the Baxter Regional Medical Center reflect that the claimant presented to the emergency room on February 7, 2004 at 12:11 with a twisted right ankle from a fall on the ice at approximately 11:15. The report noted that there was bruising and swelling on the lower right leg and the claimant was unable to stand due to pain in the right ankle. X-rays of the right ankle were taken and a plaster splint was applied to the claimant's right leg. She was instructed on the use of crutches and released. She was instructed to rest, ice, and elevate the leg and to use the crutches with no weight bearing. She was directed to take Tylenol for pain as directed. She was scheduled for a follow-up with Dr. Knox on the following Monday. The radiology report reflects that the reading showed "There is a minimally-displaced distal fibula fracture, as well as a fracture off the medial malleolus." The radiologist noted the impression as "Bimalleolar fracture with minimal displacement. . . There is a small inferior calcaneal spur present also."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee/employer/carrier relationship existed on February 7, 2004, and at all relevant times.
2. Claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her alleged incident.
3. Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury as defined by the Arkansas Workers' Compensation Act.

DISCUSSION

The critical issue in this case is whether the claimant was performing “employment services” at the time of her injury. 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) (Repl. 2002). 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”. *Wallace v. West Fraser South, Inc.*, ___ Ark. ____ (No. 05-254, January 26, 2006). In *Wallace*, the Arkansas Supreme Court noted that those terms should be defined “in a manner that neither broadens nor narrows the scope of Act 796 of 1993”, citing *Pifer v. Single Source Transportation*, 247 Ark. 851, 60 S.W.3d 1 (2002). The Court has held that employment services are being performed when the employee is doing something that is generally required by his or her employer, *Pifer*, 347 Ark. at 857; *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 816, 69 S.W.3d 14, 18 (2002), or is engaged in an activity that carries out the employer’s purpose or directly advances the employer’s interests. *Schultz v. Pulaski County Special School District*, 63 Ark. App. 171, 976 S.W.2d 399 (1998); *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). If the activity in which the employee is engaged only indirectly advances the employer’s interest and is not inherently necessary for the performance of the job for which the employee was hired to perform, the activity is not sufficient to constitute “employment services” under the statute. *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998). One’s mere presence at his place of employment does not equate to the performance of employment services. *Hoyt v. Discovery, Inc.*, 1997 AWCC 414 (E602380). In *Wallace*, the

Court noted that the same test is used to determine whether an employee was performing “employment services” as used in determining whether an employee was acting within “the course of employment”. The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly. The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury.

Recent cases have addressed the issue of whether an employee was performing employment services during a break period. In *White v. Georgia Pacific*, the employee’s injuries were deemed compensable because he was required to monitor his work while he was taking a smoke break. 339 Ark. 474, 6 S.W.3d 98 (1999). In *Ray v. University of Arkansas*, the Court of Appeals held that an employee’s injury was compensable even though it was sustained during a break because the employee was required to stop what she was doing and assist students if required, even during a paid break period. 66 Ark. App. 177, 990 S.W.2d 558 (1999). In *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the Court of Appeals held that an employee was performing employment services when she was injured at the end of a break returning her personal belongings to a locker, because she was required by her handbook to keep her personal items in a locker. In *Wallace*, the employee was injured returning from an authorized rest period. The Court found the claim compensable, noting that the employee was on the business property, on call while on his break, and not able to leave his workplace during his break. The Court noted that they were not adopting a bright-line rule that an employee who is on a break is *per se* performing employment services. The Court noted that Wallace’s actions were permitted and specifically

authorized by his employer and were not demonstrated to be inconsistent with the employer's interests in advancing the work. Similarly in *Matlock*, the case relied upon by the claimant herein, the Court held that the determination must be made on a factual case-by-case basis and is not dictated by a single feature of the employment relationship but rather a combination of factors relevant to a determination of whether the activity advances the employer's interest.

Respondents contend that the Court of Appeals' decision in *Hightower v. Newark Public School System*, 57 Ark. App. 159, 943 S. W.2d 608 (1997), is on all fours with the instant case. In *Hightower*, the claimant, a pre-school day-care teacher, was injured when she slipped on ice in the parking lot of the day care on her way into work. The Court held that under a strict construction of the Act, merely walking to and from one's car, even on the employer's premises, does not qualify as performing employment services.

In *Robinson v. St. Vincent Infirmary Med. Ctr.*, ____ Ark, App. ____ (CA 04-165, October 27, 2004), the Court of Appeals found the claimant was not performing employment services when she slipped in a puddle of spilled coffee as she was stepping off the elevator on the 4th floor of the hospital to get her coin purse and lunch while on her way to her lunch break in the cafeteria. In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S. W. 2d 303 (1998), the Court of Appeals held that the claim was not compensable because employment services were not being performed when Harding tripped over a piece of carpet on her way to a designated smoking area in the work place. In *Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), the injured worker was denied benefits when she slipped on a wet floor as she approached the buffet table at a training seminar on the basis that she was not required to eat at a certain location or with her group, although she was allowed an allowance for the meal. In *McKinney v. Trane*, 84 Ark. App. 424 (2004),

the Court of Appeals found that the claimant was not performing employment services when he chose to jump over tube sheeting to retrieve his soda on his way to his smoke break. The Court noted that McKinney was on his way to his smoke break and was doing nothing to carry out the employer's purpose and rejected his argument that his injury was compensable because it occurred during a paid break.

Based on my review of the credible evidence in this case, I find that this case is distinguishable from *Matlock*, *White*, *Ray*, and *Sands*, and more akin to the facts in *Hightower*, *Robinson*, *McKinney*, *Harding*, and *Beaver*. In the instant case, the claimant was going into the parking lot to obtain her personal money on her break. From there, it was her intention to go to the outside designated smoking area to drink a Coke and smoke a cigarette while on break. The respondent received no benefit from the claimant going to her car. Her action was totally personal in nature. Respondent contends that she was required to keep her money in her car due to the recent theft situation and that supervisors were aware of the practice. However, there is no evidence that the employer required her to keep her personal belongings or money in her vehicle, especially on a day where the parking lot was filled with snow and ice. I therefore find that the claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her injury.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

BARBARA W. WEBB
Administrative Law Judge