

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F510457

**NELLIE HENRY,
EMPLOYEE**

CLAIMANT

**GLOVE CORPORATION,
EMPLOYER**

RESPONDENT

**LM INSURANCE
CORPORATION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 24, 2006,

Pursuant to a hearing conducted April 17, 2006, before Administrative Law Judge Richard B. Calaway in Searcy, White County, Arkansas, with

Mr. Richard H. Mays, Attorney at Law, Heber Springs, Arkansas, appearing for the claimant, and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

The primary issue at this hearing was whether the claimant's injuries were compensable because they occurred at a time when employment services were being performed, as required by the Act.

On September 23, 2005, the claimant, approximately 69 years of age and a 25 year employee, inadvertently stepped off the edge of the sidewalk at work, lost her balance, and fell face forward onto the sidewalk, suffering injuries, including the loss of two teeth, as well as scrapes and bruises.

This incident on the premises of the employer occurred before work had started. The claimant had arrived at work, left her car in the employer's parking lot, and was proceeding toward the front door of the factory at about 6:15 a.m., before the beginning of her 6:30 a.m. shift, when she fell about 10 or 12 feet from the front door. It was her usual practice to arrive a little early in order

to clock in and to prepare for the day's work by gathering material around her sewing machine which would be used to make gloves. The incident occurred when the claimant stepped out of the way of a younger and faster walking co-employee who was walking up behind her on the sidewalk at the time.

The claimant contended that the accident was compensable even though it occurred outside the workplace before her shift had started, and she should requested benefits, including temporary total disability benefits from the date of injury until October 5, 2005, as well as reasonably necessary medical and related expenses. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant's injuries were not compensable because they did not occur at a time when employment services were being performed, as required by the Act.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including September 23, 2005; the claimant suffered injuries on that date on the employer's premises; her average weekly wage was \$214.20; and the claim has been controverted in its entirety.

3. The claimant's injuries are not compensable, within the meaning of the Act, because they did not occur at a time when employment services were being performed.

DISCUSSION

This claim is subject to the requirements of Act 796 of 1993, which applies to injuries occurring after July 1, 1993. Under Act 796, the term “compensable injury” is defined to exclude any injury suffered by the employee when employment services were not being performed. Ark. Code Ann. §11-9-102(5)(B)(iii).

Had the claimant’s accident occurred before July 1, 1993, the effective date of Act 796, it would likely have been compensable under an exception to the rule which, even then, ordinarily denied compensation for an injury sustained while the employee was coming to or returning from the place of employment. This exception, now often called the “premises exception,” was adopted by the Arkansas Supreme Court in Bales v. Service Club Number 1, 208 Ark. 692 (1945), which awarded benefits for a cook who had slipped on an icy sidewalk, fracturing her ankle, at about 7:30 a.m. on her way to work in Fort Smith. During hospitalization, a pulmonary embolism developed and the claimant passed away about five days later. In awarding benefits and adopting a close proximity exception to the “coming and going rule”, the Court observed that the employer had a duty to keep the sidewalk clear of snow and ice and, further, noted that the Act should be liberally construed. Under this analysis, the present claim would likely be compensable.

However, since the development of the premises exception, the law has been changed in two significant ways by Act 796 of 1993. First, under Section 29 of Act 796 of 1993, Ark. Code Ann. §11-9-704(c)(3), the entire Workers’ Compensation Act is to be construed strictly. Thus, the parties may no longer invoke the doctrine of liberal construction, an essential element of the rationale for adopting the premises exception in Bales. Secondly, the “employment service” requirement of Act 796 has itself been interpreted in Hightower v. Newark Public School System, 57 Ark. App. 159

(1997), to be clearly aimed at eliminating the premises exception to the going and coming rule, applying the current doctrine of strict construction.

In Hightower, compensation was denied because the claimant was not performing employment services when she slipped on ice in the employer's parking lot after she had arrived to start her work as a teacher at a pre-school daycare center. The Court noted that under the law before Act 796 of 1993, the claimant's injury would have been compensable under the premises exception to the going and coming rule, since the exception allowed compensation for an employee injured on or in close proximity to the employer's premises, if there was a causal connection between the injury and the employment or the condition of the place, means, or appliance furnished or controlled by the employer. The Court cited Wentworth v. Sparks Medical Center, 49 Ark. App. 10 (1995) as a contrasting example of the law before Act 796. Finally, the Court concluded that the employment services requirement seemed clearly aimed at eliminating the premises exception since, under a strict construction of the requirement, merely walking to and from one's car, even on the employer's premises, does not qualify as performing employment services.

Since the Hightower decision, other cases have tended to find employment services were being performed, once the employee had arrived on the premises and had also undertaken some activity connected with the employment. The claimant cites several such cases. For example, in Shults v. Pulaski County Special School District, 63 Ark. App. 171 (1998), the Court reversed the Commission and found that a building custodian was performing employment services after he entered a school building and tripped as he was attempting to check the alarm system, consistent with his first duty as custodian, even though the system had already been disarmed, unbeknownst to him.

In Olsten Kimberly Quality Care v. Petty, 328 Ark. 381 (1997), the Court affirmed the Commission finding that a nursing assistant, who was required to travel to patient's homes to provide nursing services, was performing employment services when she was injured in a motor vehicle accident after reporting to the employer's office and then going to talk to a friend at a shopping mall before the motor vehicle accident occurred on the way to the home of her first patient.

In Matlock v. Arkansas Blue Cross Blue Shield, 74 Ark. App. 322 (2001), the Court of Appeals reversed the Commission and found that the claimant was performing employment services when she fell on the stairs and was injured while returning from the 10th floor restroom to her 9th floor work station.

In Southwest Arkansas Development Council, Inc. v. Tidwell, ___ Ark. App. ___ (March 22, 2006), the Court affirmed the Commission finding that the claimant was performing employment services when she was injured in a motor vehicle accident as she was driving from a parking lot of a convenience store after purchasing a soft drink, since she was starting to travel to her next work assignment. The Court considered the holding in Wallace v. West Frasier South, Inc., ___ Ark. App. ___ (January 26, 2006), which found that the claimant was performing employment services when he fell and was injured while walking back from a break on the employer's work site, because returning to work after a permissible break period was not inconsistent with the employer's interests in advancing the work.

However, in all the cases cited by the claimant where injuries occurred while employment services were being performed, the employee had not only arrived on the premises but had also started, in some way, to attempt to perform the duties of employment. At this time, no case has been cited that found employment services were being performed where the claimant was simply coming

to work and had not attempted some additional work-related duty. Accordingly, the claimant's injuries were not suffered at a time when employment services were being performed and, thus, they are not compensable.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge