

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F704920

PEGGY LOWERY, Employee	CLAIMANT
GEORGE'S, INC., Employer	RESPONDENT
CROCKETT ADJUSTMENT, TPA	RESPONDENT

OPINION FILED OCTOBER 18, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On October 3, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 23, 2007, 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 employee-employer relationship existed between the parties on May 14, 2007.
3. The claimant was earning sufficient wages to entitle her to compensation at the rate of \$147.00 per week for total disability benefits.

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

1. Compensability of injury to right knee on May 14, 2007.
2. Medical.

Prior to the hearing the parties also agreed to litigate the issue of claimant's

entitlement to temporary total disability benefits beginning June 14, 2007 and continuing through August 28, 2007, as well as a controverted attorney fee.

The claimant contends she was injured on May 14, 2007 when her right knee was injured when she was walking up the stairs and fell forward and hit her right knee on the stairs. She contends she is entitled to receive medical treatment, temporary total disability benefits, and an attorney fee.

The respondent contends that on May 14, 2007 claimant slipped and fell while walking up a staircase while on her lunch break. Respondent denies that claimant was engaged in employment services at the time of the incident and denies that she sustained a compensable accidental injury which arose out of and during the course of her employment for respondent.

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 witness and to observe her 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 a pre-hearing conference conducted on July 23, 2007, 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 right knee while employed by respondent on May 14, 2007.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right knee injury. This includes surgery performed by Dr. Arnold. Pursuant to A.C.A. §11-9-411, respondent is entitled to a credit for medical benefits paid by claimant's group health carrier.

4. Claimant is entitled to temporary total disability benefits beginning June 14, 2007 and continuing through August 28, 2007.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits.

### FACTUAL BACKGROUND

The claimant is a 49-year-old woman who began working for the respondent on April 10, 2007. Claimant worked on a processing line where she bagged and boxed chicken. During the claimant's work shift she receives two 30 minute unpaid breaks. The processing line is located on the bottom level of the respondent's building; therefore, it is necessary for employees to walk up a flight of stairs or take an elevator in order to reach the breakroom.

On May 14, 2007, the claimant was walking up the stairs to go on break when she tripped and fell, landing on her right knee. Claimant reported this incident and was taken to the respondent's nurse's station. Claimant was subsequently taken by her husband to the respondent's company doctor. Claimant did not return to the company doctor for medical treatment because respondent denied her claim. As a result, claimant sought medical treatment at an emergency room before coming under the care of Dr. Arnold. Dr. Arnold initially treated claimant with medication and an injection. When the injection provided no relief, Dr. Arnold performed surgery on July 27, 2007.

Claimant has filed this claim contending that she suffered a compensable injury to her right knee while employed by the respondent. She seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

### ADJUDICATION

The claimant contends that she suffered a compensable injury to her right knee

when she slipped and fell on stairs while employed by respondent on May 14, 2007. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

The primary question in this case is whether the claimant was performing employment services at the time she slipped on the stairs while going on break.

Compensable injuries do not include those injuries which occur when employment services are not being performed. A.C.A. §11-9-102(4)(B)(iii). An employee is performing employment services when she is doing something generally required by her employer. *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 205 S.W. 3d 848 (2005). Claimant was performing employment services if her injury occurred within the time and space boundaries of the employment when she was carrying out the respondent's purposes or advancing its interests either directly or indirectly. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W. 3d 14 (2002).

Generally, employees are not performing employment services when they are on a break. However, an injury suffered by an employee while on a break is compensable if the employer has imposed some duty or requirement to be fulfilled by the employee during

the break. *Moncus v. Billingsley Logging and American Insurance Company*, 366 Ark. 383, \_\_\_ S.W. 3d \_\_\_ (2006); *Texarkana School District v. Conner*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W. 3d \_\_\_ (October 3, 2007); *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W. 3d 93 (2002).

In this particular case, claimant was in the process of completing a duty required by her employer before her break actually began. In order to perform her job duties, it was necessary for claimant to wear various articles of clothing; including, rubber boots, gloves, an apron, and a smock. When claimant and other employees went on a break they hung their apron in an area on the same floor as the processing line. However, smocks were to be hung on hooks which were located on the level above the processing line. According to claimant's testimony, wearing a smock is required and it must be hung on a hook in a hallway which is upstairs from the processing line. Documentation from the respondent indicates that smocks are not to be worn in the bathrooms or breakrooms. Instead, smocks are to be hung in available racks and not thrown on the floor. According to claimant's testimony the racks were located on the floor above the processing line. It was while claimant was walking up the stairs to hang up her smock that she tripped and fell injuring her right knee.

In short, I find that claimant was performing employment services at the time she fell on the respondent's stairs. While claimant's break had begun timewise, she was not free to do what she wanted to do while on break until she had walked up the stairs and placed her smock on the appropriate hook. This duty was one which was required by the respondent during the beginning of the break period. Therefore, claimant was performing employment services at the time of her fall.

Having found that claimant was performing employment services at the time of her fall on May 14, I also find that claimant suffered a compensable injury as a result of that fall. Based upon claimant's testimony which I find to be credible as well as the remaining

evidence, I find that claimant has proven by a preponderance of the evidence that the injury arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and resulted in disability and that she has offered medical evidence supported by objective findings establishing an injury. Here, immediately after claimant reported the injury she was taken by her husband to a company doctor. The records of that company doctor were not submitted into evidence. When respondent controverted claimant's injury, she sought medical treatment from the emergency room at Northwest Medical Center in Springdale on May 21, 2007. A review of the emergency room records indicates that swelling in claimant's right knee was noted at that time. Swelling is an objective finding establishing an injury. As a result of claimant's condition she eventually underwent surgery which was performed by Dr. Arnold on July 27, 2007. In a letter from Dr. Arnold to claimant's attorney dated September 11, 2007, Dr. Arnold indicated that he believed the claimant's symptomatology was directly related to her work-related injury.

Based upon the foregoing evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee while employed by respondent on May 14, 2007.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's right knee injury. This includes surgery which was performed by Dr. Arnold. Pursuant to A.C.A. §11-9-411, respondent is entitled to credit for medical benefits paid by claimant's group health carrier.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning June 14, 2007 and continuing through August 28, 2007. The injury to claimant's right knee is a scheduled injury. An employee who suffers a scheduled

injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first, regardless of whether there is a total incapacity to earn wages. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001).

I find that claimant remained within her healing period and that she had not returned to work during the requested time period of June 14, 2007 through August 28, 2007. Claimant was initially evaluated by Dr. Arnold on June 14, 2007 and was given an injection. Dr. Arnold indicated that claimant could return to work but with the restriction of sit-down work only. When claimant's condition did not improve he subsequently performed surgery on July 27. Dr. Arnold did not release the claimant to return to work without restrictions until August 28, 2007, and claimant did not return to work prior to that time. Based upon the evidence presented, I find that claimant remained within her healing period between June 14, 2007 and August 28, 2007. In addition, claimant did not return to work for the respondent or for any other employer during this period of time. Therefore, claimant is entitled to temporary total disability benefits. The fact that Dr. Arnold indicated that claimant could return to work with restriction is of no consequence since claimant does not have the burden of proving that she suffered a total incapacity to earn wages.

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), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee while employed by respondent on May 14, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning June 14, 2007 and continuing through August 28, 2007.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$295.00.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE