

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609969

JUDY SMITH

CLAIMANT

ROGERS SCHOOL DISTRICT

RESPONDENT

RISK MANAGEMENT RESOURCES
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 15, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 24, 2007, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 29, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between the parties on August 31, 2006.
3. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$487.00 for temporary total disability benefits and \$365.00 for permanent partial disability benefits.

By agreement of the parties the issues to be litigated are limited to the following:

1. Compensability of injury to claimant's right shoulder.
2. Related medical.

3. Temporary total disability benefits from August 31, 2006, through January 22, 2007.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she sustained a right shoulder injury on August 31, 2006, which arose out of and in the course of her employment. She contends she is entitled to temporary total disability benefits from August 31, 2006, through January 25, 2007, related medical, and a controverted attorney fee.

In regard to the foregoing issues the respondents contend the claimant did not sustain an injury arising out of and in the course of her employment as defined by the Arkansas Workers' Compensation Act. More specifically, the respondents contend that the claimant was not performing "employment services" at the time of her accidental injury.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1 and non medical records marked Claimant's Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that she is a retired school teacher but does extended leave teaching for teachers who are off for long periods of time. The claimant testified that on August 31, 2006, she was employed by the respondent as a substitute teacher for an eight-week period of time. The claimant testified that she was a professional teacher and did not punch a clock noting that she was expected to be at school at a certain time in the morning but could leave when her work was done.

The claimant testified that on August 31, 2006, she finished her classroom work around 2:55. The claimant testified that she had been working in another classroom that

day and therefore her classroom had not had students for that particular day. The claimant testified that she went to her room to check on her lesson plans and to lock her room. The claimant testified that she left her room approximately 3:07 p.m. and walked down the hall to the double front doors. The claimant testified that when she reached the front door there were a few teachers standing around waiting for some students to be picked up by their parents. The claimant testified that she chit chatted with the teachers for a few minutes and then opened the front door and took two steps at which time she tripped on a part of the sidewalk that had sunk and fell. The claimant testified that she knows she landed on her left knee but also injured her right arm. The claimant testified that two of the teachers ran over to her and turned her over at which time the claimant remembers that she did not have any feeling in her arm but could move her fingers. The claimant testified that the principal arrived and apologized to her about the condition of the sidewalk. The claimant testified that the school nurse came out and put a pillow under her arm and then put her arm in a sling. The claimant testified that she could not move her arm and remembers that she laid on the ground for fifteen or twenty minutes. The claimant testified that her husband was called to come and get her but before she left she reminded the principal to be sure and fill out an accident report which the principal assured her she would do as soon as she got back to her office.

The claimant testified that she was taken to St. Mary's Hospital and had to be taken into the ER in a wheelchair because she could not walk. The claimant testified that she was in such pain her husband was allowed to give her four Ibuprofen. The claimant testified that when she was taken to x-ray the technicians realized that she was in such pain she could not be x-rayed so the ER nurse was called and he came and gave her a pain shot. The claimant testified that she was referred to Dr. Scott Cooper an orthopedic

surgeon but before she left the hospital she was put in a shoulder brace and given another shot for pain.

The claimant testified that she saw Dr. Cooper the next morning and he re-x-rayed her arm and tried to do a nerve block in hopes of being able to pop her humerus bone back into the socket. The claimant testified that this procedure was not successful and she was scheduled for surgery. The claimant testified that she underwent surgery on September 5 and agreed that she essentially had a shoulder replacement. The claimant testified that she has a titanium rod in her arm as well as a titanium ball that is serving as her shoulder socket. The claimant testified that she was discharged from the hospital on September 7. The claimant testified that she initially was put in a shoulder brace which she wore twenty-four hours a day for the first six weeks to make sure that her body would not reject the titanium. The claimant testified that by the middle of October she had started passive rehabilitation and that by the middle of December she begun active rehabilitation. The claimant testified that when she saw Dr. Cooper in December her arm was still staying swollen and she was in intense pain so he stopped her rehabilitation. The claimant testified that she was still encouraged to do certain exercises at home.

The claimant testified that before her fall in August 2006 she had already contracted with the Farmington School District to substitute from January 25, 2007, until March for a teacher who was to be out on maternity leave. The claimant testified that she discussed this with Dr. Cooper and he released her with restrictions to begin teaching at the Farmington school on January 22, 2007. The claimant testified that between her fall in August 2006 and when she began teaching at the Farmington school on January 22, 2007, she did not work anywhere for wages nor was she capable of working. The claimant testified that she did not draw unemployment during this period of time or any other type of disability benefits.

The claimant testified that her responsibility as a professional teacher does not end when the bell rings at the end of school. The claimant testified that she would have duties after school such as straightening her room or perhaps attending or conducting an open house after hours. The claimant stated that she is not compensated extra for these duties. The claimant testified that she would have papers to grade which she would take home with her and occasionally there would be weekends when she would go to the school to prepare her lessons. The claimant testified that the school where she was substituting had implemented a learning institute program which required that the students master certain objectives over which they were tested. The claimant testified that in order to incorporate these objectives into the math lessons she would have to work at night to find ways to work these objectives into her lessons. The claimant testified that while at school she is not only responsible for just her students but for all the students. The claimant testified that she felt responsible for any child that was in the building once she walked in.

On cross-examination, the claimant testified that around 3:00 PM, when school was out, she had decided to exit the building and go to her car to run some personal errands. The claimant testified that the teachers she stopped to talk with at the front door had car rider duty. The claimant testified that since it was hot outside, the teachers had brought the children inside to wait for their parents. The claimant testified that she did not have the assignment of standing with the kids to be picked up and agreed that the teacher she stopped to visit with had this responsibility. The claimant agreed that although she did not have the duty on August 31st to stand with the children at the door, she always has the duty to look after the students. The claimant agreed that the children who were being loaded periodically had a group of teachers who were assigned the duty to care for them. The claimant agreed that at the time of her accident, she was walking to her vehicle to run a personal errand. The claimant agreed that one of the errands she was to run was to

purchase flowers for the teacher who had taken her class that day. The claimant also agreed that she was doing this voluntarily, out of the goodness of her heart.

On redirect examination, the claimant agreed that the parking lot where her car was located was on school property. The claimant testified that if she had been walking out of the building and saw a child being abducted, mistreated, or some other mishap, she would have the duty to take action.

The medical records set forth that the claimant was seen at St. Mary's Hospital emergency room on August 31, 2006, for complaints resulting from a fall. The medical records set forth that the claimant fractured her right shoulder and injured her right elbow. X-rays of the claimant's right humerus set forth that the claimant had a markedly comminuted fracture of the proximal humerus with suspected dorsomedial placement of the major fracture fragment of the humeral head, and she also had right basilar pulmonary atelectasis. X-rays of the claimant's right wrist showed questionable dorsal subluxation of the ulna. The claimant was discharged from the hospital with a prescription for medication, was instructed to apply ice to the affected area, and to follow-up with Dr. Cooper. Dr. Cooper writes on September 1st, after visiting with the claimant, that he would recommend a hematoma block and try general reduction maneuvers. Dr. Cooper writes that the hematoma block was ineffective, therefore surgical repair was discussed with the claimant. The claimant underwent a right shoulder hemiarthroplasty with Tornier cemented implant performed by Dr. Cooper on September 5, 2006. The claimant was discharged from the hospital on September 7, 2006, with instructions to begin daily dressing changes in two days, and to call if the pain worsens or redness develops. Dr. Cooper prescribed medication and scheduled a follow-up visit.

On September 18, 2006, Dr. Cooper followed up with the claimant where he notes that she is having trouble sleeping and has cut back on her pain medication. Rehabilitation

was discussed with the claimant and she was instructed to hold her shoulder still for another two weeks. The claimant was instructed by Dr. Cooper to begin limbering up her elbow. Dr. Cooper adjusted the claimant's medication. Dr. Cooper writes on October 4, 2006 that the claimant's wound looks good but that her biceps look a little full, so at this visit Dr. Cooper showed the claimant some exercises and encouraged her to wean herself off the sling as comfort would allow. On October 18, 2006, Dr. Cooper adjusted the way the claimant was to do her Codman's exercises and recommended that she start passive motion therapy but would hold off with the active motion therapy for another four weeks. On November 15, as well as on December 13, 2006, Dr. Cooper saw the claimant and observed her progress with physical therapy. On the December visit, Dr. Cooper writes that a physical therapist note indicates that the claimant is in tears and has taken pain medication before she goes for the therapy. Dr. Cooper writes that perhaps they are going a little too fast with the therapy and recommended that she proceed with therapy at her home, at her own pace. On January 15, 2007, Dr. Cooper writes that the claimant on this visit was doing well and that her range of motion has been increased dramatically. Dr. Cooper writes that the claimant does not want to go back to therapy because it hurts, therefore he added weight to her home physical therapy program. The claimant was last seen by Dr. Cooper on February 26, 2007, where her medication was discussed. Dr. Cooper writes that the claimant has been taking Tylenol as well as a cholesterol medication which has raised her liver enzymes. The doctor writes that the claimant is doing better objectively and her range of motion has improved.

The main issue in this case is whether the claimant was performing employment services at the time of her fall. A compensable injury is defined in Ark. Code Ann. §11-9-102, (4) (A) (i) as, "An accidental injury. . . arising out of and in the course of employment." A compensable injury does not include an "injury which was inflicted upon the employee

at a time when employment service were not being performed.” Ark. Code Ann. §11-9-102, (4) (B) (iii). The Arkansas Supreme Court has held that an employee is performing “employment services” when he or she is “doing something that is genuinely required by his or her employer.” See Pifer v. Single Source Transport, **347 Ark. 851, 69 S. W. 3rd 1 (2002)**. Also see White v. Georgia Pacific Corp. **339 Ark. 474, 6 S. W. 3rd 98 (1999)**. The Arkansas Court of Appeals in Econo Inn and MSI v. Nimisha Jivan, ___ **Ark. App. ___, ___ S. W. 3rd ___ (March 14, 2007)**, found that the same test to determine whether an employee is performing employment services is used when determining whether an employee was acting in the course of employment. The Court notes that this 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. In the present case, the claimant was clearly within the time and space boundaries of her employment while she was on the school grounds. However, it is seriously questioned that she was carrying out the employer’s purpose or advancing the employer’s interest as she was walking down the walk to her personal car to proceed with her personal errands. The case law on employment services is varied and still unsettled. However, strictly construing the statute, adding nothing to it or taking nothing away, I find that the claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time she fell exiting the school building.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between the parties on August 31, 2006.

3. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$487.00 for temporary total disability benefits and \$365.00 for permanent partial disability benefits.
4. The claimant has failed to prove by a preponderance of the evidence that she was performing employment services when she fell on August 31, 2006, while on the school grounds. See Discussion above.
5. This claim should be denied in its entirety.

ORDER

The claimant has failed to prove by the preponderance of the evidence that she was performing employment services at the time of her fall on August 31, 2006. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE