BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F807062

PAULINE BARRETT, Employee	CLAIMANT
C.L. SWANSON CORPORATION, Employer	RESPONDENT
CINCINNATI INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED DECEMBER 1, 2008

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

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

Respondents represented by WILLIAM ROBERT STILL, JR., Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On November 5, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 24, 2008, and a pre-hearing order was filed on September 25, 2008. 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/carrier relationship existed between the parties on July 11, 2008.

3. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of $447.00 for total disability benefits and $335.00 for permanent partial disability benefits.

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

1. Compensability.

2. Medical.

3. Temporary total disability benefits from July 12, 2008 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing claimant modified her request for disability benefits to contend that she is entitled to temporary total disability benefits from July 12, 2008 through October 7, 2008, and temporary partial disability benefits from October 8, 2008 through a date yet to be determined.

The claimant contends that on July 11, 2008 while in the course and scope of her employment she tripped on a rug and fell, injuring her left upper extremity. She further contends that because of her injury she is entitled to reasonable and necessary medical treatment, temporary total/temporary partial disability benefits, and a controverted attorney fee.

The respondents contend that on July 11, 2008 the claimant had clocked out and was leaving the work place for the day and was walking through the front office when she tripped on a rug that covers the carpet. As such, claimant's injuries, if any, do not arise out of or in the course of her employment with respondent under the "going and coming" rule and related laws. As such, the Arkansas Workers' Compensation Commission lacks jurisdiction to make any award of benefits to claimant.

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 witnesses and to observe their 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 the pre-hearing conference

conducted on September 24, 2008, and contained in a pre-hearing order filed September 25, 2008, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left arm while employed by the respondent on July 11, 2008.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

4. Claimant is entitled to temporary total disability benefits beginning July 12, 2008 and continuing through October 7, 2008. Claimant is entitled to temporary partial disability benefits beginning October 8, 2008 and continuing through a date yet to be determined.

5. Respondent has controverted claimant's entitlement to all indemnity benefits.

The claimant is a 63-year-old woman who has worked for the respondent approximately nine years. For the last seven years claimant has worked as a commissary catering manager. Claimant's job duties include responsibility for production of food which is delivered by drivers on various routes. Claimant also is responsible for catering business. This includes conversations with customers who want food catered, determining the cost of the requested food, and putting together the quote. If a bid is accepted claimant is responsible for obtaining the necessary food products which are required for each individual catering request. Claimant testified that she frequently uses the respondent's fax machine to conduct her business. This fax machine is not in her office, but instead is in the main office which is in the front of the building.

The physical layout of the respondent's office is relevant to this case. When an individual enters the front door of the respondent's business there is a long linoleum floor hallway. That hallway leads to a door which opens into the respondent's warehouse.

Before arriving at the warehouse door the respondent's main office is in an open area just off this hallway. This area is depicted in the photographs introduced by the parties. Claimant's office is not in this main office area. Instead, to get to claimant's office one must continue down the linoleum hallway and go through the warehouse door. The claimant and other hourly employees are required to punch a time clock which is located in the back of the warehouse which the claimant estimated to be approximately two blocks away.

Claimant's normal working hours were from 3:00 to 3:30 a.m. until approximately 12:00 to 1:00 p.m. Claimant testified that her daily routine at the end of her work shift involved her walking to the time clock and clocking out. After she returned to her office to pick up her purse she would walk through the warehouse door and walk down the linoleum hallway until she reached the main office. Once claimant reached the main office she would go to the fax machine area to check her mail. If there were any last minute faxes which needed to be addressed claimant would address them at that time. Claimant also testified that her normal routine required her to check with James, her supervisor, to see if there was any last minute business to which she needed to attend. Finally, claimant testified that she would also converse with Marjorie Plichta, the respondent's office manager, for any last minute items which needed to be addressed.

On July 11, 2008 the claimant clocked out and eventually went into the respondent's main office. Claimant walked across the office to check her mail box near the fax and there was no mail. Claimant also testified that James, her supervisor, was not present that day. Claimant next walked over to Plichta's desk and had a conversation with her. As the claimant turned to leave she tripped over a rug and fell striking her head against a wall and falling to the floor, landing on her upper left arm. Claimant was taken by ambulance to the emergency room where she was diagnosed as suffering from an acute fracture of the proximal humerus. Claimant was given an immobilizer, medication, and instructed to

receive follow-up treatment from Dr. Powell. Since that time the claimant has remained under the care of Dr. Powell. Dr. Powell has treated claimant conservatively with use of the sling immobilizer, medication, and physical therapy. Dr. Powell released the claimant to return to work with restrictions of no more than four hours of work per day. In addition, claimant is not to lift, push or pull more than one pound with her left arm.

Claimant has filed this claim contending that she suffered a compensable injury to her left arm while employed by the respondent. Respondent contends that claimant was not performing employment services at the time of her injury.

ADJUDICATION

There is no question that claimant suffered an injury to her left upper extremity when she tripped and fell at the respondent's place of business on July 11, 2008. The primary question in this case is whether or not the claimant was performing "employment services" at the time of her injury. 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,,,," A.C.A. §11-9-102(4)(B)(iii).

Employment services are performed when the employee does something that is generally required by his or her employer. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W. 3d 14 (2002); *Pifer v. Single Source Transport*, 347 Ark. 851, 69 S.W. 3d 1 (2002); *White v. Georgia-Pacific Corporation,* 339 Ark. 474, 6 S.W. 3d 98 (1999). The test used to determine whether an employee was performing "employment services" is the same test used when determining whether an employee was acting within "the course of employment". *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W. 3d 593 (2004); *Collins, supra*; *Pifer, supra; White, supra.* 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." *Collins,*

supra; Pifer, supra; White, supra.

Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test is whether the employee was engaged in the primary activity that he/she was hired to perform, or in incidental activities that are inherently necessary for the performance of the primary activity. *Matlock v. Arkansas Blue Cross & Blue Shield*, 72 Ark. App. 322, 49 S.W. 3d 126 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant was performing employment services at the time of her injury on July 11, 2008. Therefore, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity on that date.

As previously noted, the claimant had already clocked out at the time of her injury on July 11, 2008. However, claimant's daily routine after she clocked out was to go to the respondent's main office and check her mail box for any last minutes faxes or mail which might need to be addressed before she left the office that day. Claimant also normally checked with her supervisor and Plichta, the office manager, for any other last minute items which needed to be addressed. On this particular date, the claimant checked her mail box and there was no mail. Claimant did not see her supervisor because he was not present that day. However, the claimant did have a conversation with Plichta immediately before she tripped and suffered her injury. Both claimant and Plichta admitted that while they occasionally had conversations about things that were not business related, their conversations at the end of the day generally dealt with business-related items. Claimant testified that she does not specifically remember what she talked to Plichta about on that date and she does not specifically remember what she was talking to Plichta about at the exact moment of her fall. Likewise, Plichta testified that she does not remember exactly

what their conversation was about at the moment of claimant's fall. However, Plichta did admit that she and the claimant had talked about business related things after claimant came into the office and before her fall.

It does not appear that the Full Commission or the courts have addressed the particular issue of an employee who is injured while in the process of leaving with respect to whether employment services are being performed. There are numerous cases involving employees who are arriving at work and who are either going on a break or returning from a break.

However, I believe that the facts in *Foster v. Express Personnel Services*, 93 Ark. App. 496, 222 S.W. 3d 218 (2006) are analogous to the facts in this case. In *Foster*, the claimant worked in the accounts receivable department for an auto dealership. Claimant's job duties required her to process credit card slips and e-checks. Claimant was also required to pick up warranty slips from a warranty clerk and confer with the auto service manager. Foster's office was located on the second floor of the dealership's used car building. However, the service manager's office and warranty clerk's office were located in a separate service building. Between those two buildings was a service-bay area where customers brought their vehicles to be serviced. Foster's normal routine when she arrived at work was to walk into the service bay area, go into the used car building and go to a cashier's desk on the first floor to pick up credit card receipts before going to her own desk. On the date of Foster's injury the claimant arrived at work and walked into the facility at the service bay area. After she entered the service bay area and was on her way to the cashier's desk to pick up the credit cards and e-checks she slipped and fell. The claimant suffered an injury and filed a claim for compensation benefits. Both the administrative law judge and the Full Commission found that claimant was not performing employment services at the time of her injury. In doing so, the administrative law judge noted that at the time of Foster's accident it was not yet time for her to report to work, the claimant was in

an area where she was not required to perform employment duties, and she was not performing any employment duties at the time of her injury.

The Court of Appeals reversed this decision and found that Foster was performing employment services. In doing so, the Court of Appeals noted:

> Regardless of the fact that Foster had not reached her desk or the cashier's desk or was outside of the building in which her office was located, she was unquestionably injured in an area in which employment services were expected of her. In short, workers' compensation law does not require the infinitesimal scrutiny of a claimant's conduct posited by the employer in this case. The real issue is not whether Foster was 'on the clock' when she was injured or whether she was on her way to the cashier's desk or her own desk. Rather, the issue is whether the injury occurred within the time and space boundaries of the employment when Foster was carrying out the employer's purpose or advancing its interest directly or indirectly.

The Court went on to note that the fact that Foster was not actually questioned by the service manager or the warranty clerk on the day she was injured was not dispositive. The Court noted that Foster was expected to advance her employer's interest away from her desk and that she was specifically expected to advance her employer's interest in the area where she was injured.

Even though the claimant in *Foster* was arriving at work while the claimant in this case was leaving work, I find the fact situations to be very similar. As in *Foster*, the claimant was expected to perform work-related services while not "on the clock". Likewise as in *Foster,* this claimant was injured in an area where employment services were expected of her. Claimant on a daily basis went into the respondent's main office to check her mail box and the fax machine for any items which needed to be addressed before she left work for the day. On July 11, as on other days, the claimant also checked with Plichta

to determine whether there were any last minute issues which needed to be addressed. As previously noted, the Court in *Foster* stated that the fact that the claimant was not specifically questioned by the service manager was not dispositive of the issue. Instead, the Court noted that Foster was expected to advance her employer's interest away from her desk and was specifically expected to advance her employer's interest in the area where she was injured. Likewise, the fact that claimant did not have to address any last minute faxes or mail or any specific issues with Plichta on July 11, 2008 does not change the fact that claimant was expected to advance her employer's interest away from her desk and she was specifically expected to advance her employer's interest in the area where she was working. Claimant was not in the main office where she tripped and fell for her own benefit. Claimant was in the main office checking her mail box, the fax machine, and checking with the office manager for the benefit of her employer to determine whether any last minute items needed to be addressed before she left for the day. The fact that there were no items to address that day does not change the fact that claimant was in the main office for the benefit of her employer, not for any personal reasons.

Respondent also contends that this claim is barred by the going and coming rule. The same argument was made in the *Foster* case. The Court in *Foster* noted that the going and coming rule had no application because Foster was not driving to work nor was she injured in the parking lot while walking to their job. The Court noted that no cases had been cited in which the going and coming rule had been applied to facts similar to those in *Foster*. Likewise, I know of no cases in which the going and coming rule has been cited with respect to an individual walking through an office.

In short, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury when she injured her left upper extremity on July 11, 2008. I find that claimant was performing employment services at the time of her fall. Claimant was in an area in which employment services were expected

of her and she had gone into that area for the specific purpose of performing employment services before she left work for the day. Based upon this evidence, I find that claimant has met her burden of proof.

Thus, claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment and that her injury was caused by a specific incident identifiable by time and place of occurrence. Finally, I find that the injury caused internal physical harm which required medical services and that claimant has offered medical evidence supported by objective findings establishing the injury.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable 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 has remained within her healing period since the time of her injury. Following her initial treatment at the emergency room claimant has been under the care of Dr. Powell who has treated claimant conservatively with the use of a sling immobilizer, medication, bone stimulator, and physical therapy. Claimant was off work at her physician's instructions until she was released by Dr. Powell to return to work with restrictions of no lifting more than one pound and no more than four hours of work a day as of October 7, 2008. Claimant testified that since that time she has worked four hours a day, four days per week for the respondent. Based upon the foregoing, I find that claimant is entitled to temporary total disability benefits beginning July 12, 2008 and continuing through October 7, 2008. I also find that claimant is entitled to temporary partial disability benefits beginning October 8, 2008 and continuing through a date yet to

be determined. Pursuant to A.C.A. §11-9-520, temporary partial disability benefits are to be calculated in an amount equal to 66 and 2/3s of the difference between the employee's average weekly wage prior to the accident and the wage earning capacity after the injury. Here, I find that claimant is entitled to 66 and 2/3s of the difference between her average weekly wage and her wage earning capacity of four hours a day for four days a week as she is currently working for the respondent.

Finally, I note that during the hearing the respondent proffered a videotape from the claimant's deposition. Claimant objected to the introduction of the videotape and I sustained the objection. There were two reasons for my ruling. First, the videotape deposition is redundant in that the respondent had already submitted into evidence a transcript from the claimant's deposition. Thus, any statements made by claimant at the deposition were already in evidence. Second, the videotape did not include the entire deposition, but instead was selected excerpts. Accordingly, the proffered evidence would be redundant in that the deposition transcript was already in evidence and second it would be incomplete since the videotape contained only selected portions of the deposition.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her left upper extremity while employed by respondent on July 11, 2008. 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 July 12, 2008 and continuing through October 7, 2008. Claimant is entitled to temporary partial disability benefits beginning October 8, 2008 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to unpaid indemnity benefits.

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 $410.90.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE