BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F613748

CHRISTINA D. COX, EMPLOYEE CLAIMANT

KAZIM KAHN D/B/A NEWARK PETROLEUM, INC.
D/B/A RACE TRAC, UNINSURED EMPLOYER RESPONDENT

OPINION FILED AUGUST 21, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Texarkana, Miller County, Arkansas.

The claimant was represented by HONORABLE NELSON V. SHAW, Attorney at Law, Texarkana, Texas.

The respondent was represented by HONORABLE LISA MILLS WILKINS, Attorney at Law, Texarkana, Texas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 19, 2008, in Texarkana, Arkansas. A Prehearing Order was entered in this case on May 16, 2007. The following stipulations were submitted by the parties either in the Prehearing Order or during the course of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine the facts which establish jurisdiction of the within claim.
2. The claimant was an employee of Race Trac on November 30, 2006.
3. The corporate status of Newark Petroleum, Incorporated was revoked at the time of the

claimant’s alleged injury so that this claim is against Kazim Khan doing business as Newark Petroleum.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether this claim is compensable.
2. Whether the claimant is entitled to TTD, medical expenses and attorney’s fees.
3. Whether the respondent has violated Ark. Code Ann. §11-9-401, and should be subject to Ark. Code Ann. §11-9-406.
4. Whether the respondent had sufficient employees to be subject to the Arkansas Workers’ Compensation Code (withdrawn at the hearing).
5. Employment Services.
6. Legal status of Newark Petroleum, Inc. as a corporate entity (withdrawn by stipulation).

The record consists of the June 19, 2008, hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant was employed at the respondent’s gas station/convenience store as a cashier. Her primary job

duties included running the register, stocking, and cleaning. The claimant contends she sustained a compensable injury on November 30, 2006, when she slipped and fell while attempting to carry a case of root beer to load into a customer’s car.

The respondent contends that the claimant was not performing employment services, when and if the incident occurred, on several grounds. First, the respondent notes that the customer was the claimant’s mother, and the respondent sold the root beer to the claimant’s mother at a discounted price. The respondent contends that the store received virtually no benefit from selling the root beer to the claimant’s mother at a reduced price. Second, the respondent contends that the claimant carried out the case of root beer for her mother as a gratuitous service for her mother and not as a condition of her employment. While the respondent acknowledges that the store owner and store manager have carried items for customers on occasion, the respondent contends that carrying items for customers is not one of the claimant’s job duties. Third, the respondent contends that the claimant had left her register to begin a smoke break when she took the root beer to her mother’s car.

The claimant contends that she was performing employment services when the incident occurred and that she is entitled to medical benefits, temporary disability and attorney fees.

1. Applicability Of The Arkansas Workers' Compensation Law.

At the start of the hearing, the respondent's attorney acknowledged that the employer had four employees. Therefore, I find that the provisions of the Arkansas Workers' Compensation Law apply to this claim for benefits pursuant to Arkansas Code Annotated Sections 11-9-102(10)-(11) and 11-9-103.

2. Compensability/Employment Services.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused

by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

With regard to the employment services issue, I note that the Arkansas Supreme Court in *Texarkana School Dist. v. Conner*, ___ Ark. ___, ___ S.W.3d ___ (No. 07-1068 Del. May 8, 2008) recently summarized this area of law as follows:

> This court has repeatedly pointed out that Act 796 of 1993 significantly changed the workers' compensation statutes and the way workers' compensation claims are to be resolved. *See Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002) (citing *White v. Georgia-Pac. Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999)). Now, pursuant to Act 796, we are required to strictly construe the workers' compensation statutes. See Ark. Code Ann. § 11-9-704(c)(3) (Repl. 2002).
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> 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) (Supp. 2003). 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) (Supp. 2003). Act 796 fails, however, to define the phrase "in the course of employment" or the term "employment services." *Wallace*, 365 Ark. 68, 225 S.W.3d 361; *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, it falls to this court to define these terms in a manner that neither broadens nor narrows the scope of Act 796. *Pifer*, 347 Ark. 851, 69 S.W.3d 1.
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> This court has held several times that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *Wallace*,

> 365 Ark. at 72, 225 S.W.3d at 365 (quoting *Pifer*, 347 Ark. at 857, 69 S.W.3d at 3-4); *see also Collins v. Excel Specialty Prods.*, 347 Ark. 811, 69 S.W.3d 14 (2002); *White*, 339 Ark. 474, 6 S.W.3d 98. We use the same test to determine whether an employee was performing employment services as we do when determining whether an employee was acting within the course of employment. *Wallace*, 365 Ark. 68, 225 S.W.3d 361. Specifically, we have held that 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." *Id.* (quoting *White*, 339 Ark. at 478, 6 S.W.3d at 100). The critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Id.* Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id.*; *see also Moncus v. Billingsley Logging & Am. Ins. Co.*, 366 Ark. 383, 235 S.W.3d 877 (2006).

The Arkansas Court of Appeals has indicated that an employee who leaves a work station to take a smoke break is not generally performing employment services while walking to a smoke break. *McKinney v. Trane Co.*, 84 Ark. App., 143 S.W.3d 581 (2004). See also *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

However, the Arkansas Supreme Court found an employee of the Association of Rehab Industry & Business to be performing services when he fell while on a smoke break where the employee discussed a client’s “ticket to work”

when the client walked up to the employee during the employee's smoke break. *Kimbell v. Association Of Rehab Industry & Business*, 366 Ark. 297, 235 S.W.3d 499 (2006). Likewise, a lumber mill employee who slipped while on a smoke break was nevertheless performing employment services at the time of the injury where the employee was required to take his break in view of dryers and to watch the dryers during the break in case the dryers required immediate attention. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

Finally, I note that in *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004), a dump-truck driver employed by the City of Fort Smith became injured while attempting to load refuse-gravel into his own pick-up truck. The dump-truck driver spent his work day hauling the same type of waste material from a temporary dump to the city landfill in a truck owned by the City. Near the end of his work day, however, he was loading the waste into his personal truck to use on his driveway. At the time of the incident, the City permitted its employees to remove waste material for their own personal use. Smith's injury occurred when he climbed into his pick-up truck in order to

throw a block that he did not wish to keep back onto the City’s waste pile.

Under the circumstances of the injury, the majority of the Court in *Smith* found that the claimant was not performing employment services when the injury occurred. Specifically, the majority noted that removal of the waste for the employee’s own personal use may have at least indirectly advanced the City’s interests but was not inherently necessary for the dump-truck driver to perform his job for the City. The majority noted in this regard that the incident occurred near the end of the driver’s shift after the last load of waste had been hauled to the landfill. The majority also noted that under the usual scope of Smith’s duties, the gravel would have been loaded in the City’s truck and hauled to the landfill. Thus, the driver would not have been climbing up his own truck in order to remove unwanted debris while hauling waste for the City.

In the present case, Ms. Cox’s slip and fall occurred within the time boundaries of Ms. Cox’s employment. There is no dispute that the claimant was still on the clock when she left the store with the root beer to load in her mother’s car. I also find that the claimant was advancing

her employer’s interests in loading the root beer. I note that there is no dispute that the store paid $14 per case for the root beer and sold it to the claimant’s mother at a discounted price of $17 per case, reduced from a normal retail price equivalent to $32 per case. Therefore, the preponderance of the evidence establishes that the store earned a profit from the root beer sale to the claimant’s mother. Because the store profited from the sale and since the sale was to the claimant’s mother and not to the claimant, I find this case fundamentally different from *Smith v. City of Fort Smith*, *supra.*, in both respects.

To the extent that the respondent seeks to characterize the claimant’s carrying the root beer to load in her mother’s car as a gratuitous service provided by a daughter to her mother, I note that the claimant made her supervisor, Mohammed Naeem, aware of her mother’s bad back at the time of sale. (T. 104-105) In fact, Mr. Naeem acknowledged that he was aware of the claimant’s mother’s back problems and that the claimant had on occasion assisted her mother by carrying out items even before the case of root beer. (T. 103) Moreover, both the supervisor, Mr. Naeem, and the store owner, Kazim Khan, testified that they had themselves on occasion assisted customers by carrying heavy items out

of the store for customers. (T. 92, 102, 111) In light of the store's practice of assisting customers out with heavy items, I find that the claimant's assisting a customer, albeit her mother, out of the store with a heavy case of root beer directly advanced her employer's interest.

Kazim Khan testified that <u>only</u> he or the store manager help older or disabled customers out with heavy items. (T. 111) The respondent seems to contend that the carrying out a heavy item for a customer was not inherently necessary to perform her job duties, since she was neither the store owner nor the store manager. However, I note again that Mohammed Naeem was aware of the claimant's mother's disability when the claimant offered to carry the case of root beer outside and load it in her mother's car. If as Kazim Khan suggested, only he or the store manager were permitted to carry out heavy items, then it was certainly Mr. Naeem's prerogative as manager to carry out the heavy item himself and require the claimant to remain in the store to assist other customers if he chose to do so. Instead, he agreed with his employee's volunteering to carry out the heavy item while Kazim Khan remained in the store to assist any other customers. In light of Mr. Naeem's agreement that the claimant would carry out the case of root beer and then

take a smoke break while she was out, I find that the task of carrying the root beer was inherently necessary for the claimant to perform her assigned duties for the store. I therefore find that the claimant was performing employment services when she slipped and fell carrying the case of root beer to her mother's car.

Finally, to the extent that the respondent contends that the claimant was not performing employment services because she fell during a smoke break, I note that there is no evidence that the claimant was smoking a cigarette when she slipped and fell. She was instead carrying a heavy item sold to a customer and thereby advancing her employer's interest. Even if she intended to smoke when she completed the task, I find that she was nevertheless engaged in employment services when the incident occurred, in much the same manner as in *Kimbell v. Association Of Rehab Industry & Business*, *supra*. and *White v. Georgia-Pacific Corp. supra*., where the employees performed employment services while on their smoke break.

I also find that the claimant established the other requirements necessary to establish a compensable injury. Specifically, I find that slipping and falling while carrying a case of root beer represents a "specific

incident" within any reasonable interpretation of the term "specific incident." I note that the claimant's diagnosis of a contusion is contained in a document from Wadley Regional Medical Center dated December 12, 2006. (C. Exh. 1 p. 7) The contusion diagnosis identifies internal harm to the body.

With regard to the objective findings requirement, I note that the Arkansas Supreme Court has previously found in *Fred's Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005), that a claimant satisfied the objective findings requirement with prescriptions for Celebrex and Flexeril to treat a diagnosed contusion/strain. However, in *Rodriguez v. M. McDaniel Co. Inc.*, 98 Ark. App. 138, ___ S.W.3d ___ (2007), the Court distinguished *Fred's* where the record established that medication was prescribed for prophylactic purposes.

In the present case, the claimant was prescribed Indocin for inflammation and Flexeril to relax her muscles on November 30, 2008. Because there is no indication in the record that these medicines were prescribed for prophylactic purposes, I find that these prescriptions represent objective findings within the meaning of the Arkansas Workers' Compensation Law.

Because I find that the claimant was both on the clock and performing employment services when the incident occurred, I also find that the claimant has established the requirement that the injury arise out of and in the scope of employment.

For all of the reasons discussed herein, I find that the claimant has established by a preponderance of the evidence each of the requirements necessary to establish that she sustained a compensable injury.

3. Average Weekly Wage/Compensation Rate.

By adding up the weekly hours worked as contained in Claimant's Exhibit 2, pages 1 - 3, I calculate that the claimant worked 556.4 hours in the nineteen weeks beginning with the July 21, 2006, check and ending with the November 24, 2006, check. The parties agree that the claimant earned $6.25 per hour when she became injured, although she earned less than $6.25 per hour before the October 13, 2006, check. The Full Commission has previously concluded that an hourly employee's average weekly wage is properly based on the contract of hire at the time of the accident ($6.25 per hour in the present case) multiplied by the average number of hours worked each week before the accident. *Steven Jones v. Griffin Gin Company*, Full Workers' Compensation Commission,

Opinion filed February 13, 1998 (E317917). Consequently, I have calculated the claimant's average weekly wage as follows:

566.40 hours X $6.25 per hour / 19 weeks = $186.32

The claimant's temporary total disability compensation rate is two-third's of her average weekly wage, rounded to the nearest dollar, or $124 per week. Because the claimant's temporary total disability compensation rate is less than $154 per week, her permanent partial disability compensation rate is also $124 per week.

4. Temporary Total Disability.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Arkansas State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

However, compensation for temporary disability shall not be provided for the first seven days of disability after the date of injury, unless the disability lasts for a period

of at least two weeks. Ark. Code Ann. § 11-9-501(a) (Repl. 2002).

In the present case, on November 30, 2006, the claimant was placed in off-work status for the first two days after her injury. (C. Exh. 1 p. 1) On December 12, 2006, the claimant was placed in off-work status for December 12 and 13. (C. Exh. 1 p. 6) The claimant was terminated from her job shortly thereafter for being habitually late to work. The claimant has failed to prove by a preponderance of the evidence that her injury rendered her temporarily disabled from working for any period after December 13, 2006. Because the claimant only experienced four days of temporary disability after November, 30, 2006, the claimant did not experience enough days of temporary disability to receive an award of temporary disability compensation.

5. Reasonably Necessary Medical Treatment.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App.

100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

After considering the claimant’s description of her slip and fall injury on November 30, 2006, I find that the claimant’s treatment, diagnostic testing, and prescriptions at Wadley Regional Medical Center on November 30, 2006, and on December 12, 2006, were reasonably necessary to diagnose the nature and extent of the claimant’s injury and to properly treat the injury.

In light of the claimant’s termination for cause for tardiness at Race Trac, I do not find credible the claimant’s testimony that she lost her job from a subsequent employer due to ongoing injury symptoms. Because I do not find credible the claimant’s testimony regarding ongoing back symptoms and in light of the claimant’s lumbar MRI read as a normal study, I find that additional treatment proposed from Dr. Alkire or another physician is not reasonably necessary for treatment of the claimant’s contusion injury.

6. Attorney's Fees.

Because this claim has been controverted in its entirety, the claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled in the future as a result of the finding that she has sustained a compensable injury. However, I am without statutory authority to award the claimant's attorney a fee on the medical treatment awarded herein.

7. Violation Of Arkansas Code Annotated Section 11-9-401.

The claimant seeks a finding as to whether the employer should be subject to sanctions pursuant to Arkansas Code Annotated Section 11-9-406. As I explained in the prehearing conference, I understand from both the language of the statute and practice at the Commission that the Compliance Division of the Arkansas Workers' Compensation Commission, not the injured worker or an administrative law judge, has the authority to originate an action for a fine under this statute.

8. Legal Status Of Newark Petroleum, Inc.

The parties stipulated during the course of the hearing that the corporate status of Newark Petroleum, Incorporated

was revoked at the time of this injury so that the claim is against Kazim Kahn doing business as Newark Petroleum. (T. 11)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction to determine the facts which establish jurisdiction of the within claim.
2. The claimant was an employee of Race Trac on November 30, 2006.
3. The corporate status of Newark Petroleum, Incorporated was revoked at the time of the claimant's alleged injury so that this claim is against Kazim Khan doing business as Newark Petroleum.
4. The Arkansas Worker's Compensation Law applies to the employment at issue in this claim.
5. The claimant proved by a preponderance of the evidence that she sustained a compensable contusion injury.
6. The claimant's average weekly wage at the time of her injury was $186.32. Her compensation rate for temporary total disability and permanent partial disability is $124 per week.

7. The claimant did not experience enough days of temporary total disability from her injury to be entitled to benefits for temporary total disability.
8. The claimant's treatment, diagnostic testing, and prescriptions at Wadley Regional Medical Center on November 30, 2006, and on December 12, 2006, were reasonably necessary to diagnose the nature and extent of the claimant's injury and to properly treat the injury.
9. The claimant has failed to establish by a preponderance of the evidence that additional treatment from Dr. Alkire or another physician at this time is reasonably necessary for treatment of her contusion injury.

AWARD

Kazim Kahn is directed to pay medical benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983

S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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MARK CHURCHWELL
Administrative Law Judge