

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F703265**

<b>LYNDA HAMNER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BELLEVILLE SHOE MFG. CO., EMPLOYER</b>	<b>RESPONDENT</b>
<b>SAFETY NATIONAL CASUALTY CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 31, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 29, 2008 at Stuttgart, Arkansas County, Arkansas.

Claimant represented by the HONORABLE H. MIKE SMITH, Attorney at Law, Wynne, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, and attorney's fees.

At issue is whether or not the claimant sustained a compensable gradual injury and whether or not the claimant was performing employment services at the time of the second injury pursuant to Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer/employee/carrier relationship on March 27, 2007 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$321.00/\$241.00, in the event this claim is found to be compensable. The claimant received short-term disability benefits.

The claimant contends she injured her left foot at work on March 27, 2007. She seeks payment of medical expenses, temporary total disability benefits from March 28, 2007 to June 18, 2007, and attorney's fees.

The respondents contend the claimant reported a gradual foot injury on March 26, 2007, from standing on a concrete floor at her work station. This was initially accepted as a “medical only” claim before it was controverted. This gradual injury is not compensable because her job is not rapid and repetitive. The claimant also injured her left foot and ankle on March 27, 2008 when she fell in the break room. This injury is not compensable because she was not performing employment services at the time of the incident and her condition is a continuation of the first non-compensable injury. Alternatively, in the event of an award, the respondents seek a credit against benefits paid by third parties.

The following were submitted without objection and comprise the evidence of record: the parties’ prehearing questionnaires and exhibits contained in the transcript.

The claimant was the only witness to testify at the hearing. She seemed sincere in her testimony.

The claimant, (D.O.B. May 2, 1949), has worked for the respondent-employer for 4 years constructing boots. She works with 6 co-workers to sew a production quota of 273 boots per day. Her job requires her to operate different sewing machines for different tasks, using foot pedals.

Sometime in February, 2007, the employer removed the seats in front of the sewing machines, requiring the employees to stand on concrete all day. The claimant operated the foot pedals using her right foot and shifted her weight to her left foot.

The claimant gradually developed pain on the bottom of her left foot. She reported the problem to her Human Resource officer on March 26, 2007, and was instructed to see the company physician, Dr. Burleson, the next day. The claimant left work to see Dr. Burleson. He diagnosed plantar fasciitis but offered her no treatment other than home exercises.

The claimant returned to work but her usual parking space was occupied so she had to park in the back of the building and enter through the break room. It was her intention to clock in and resume work. Unfortunately, she tripped over a metal strip in the threshold of the door, fell and broke her left ankle. Ultimately, she came under the care of Dr. Hahn, and wore a boot cast until

July, 2007.

The claimant stated that her claim was denied “on the spot” and she used her group insurance, United Health, to pay for medical expenses and drew short-term disability benefits (\$190.00 weekly).

The claimant returned to work on June 18, 2007, at the same pay, with no work restrictions. She remains symptomatic with plantar fasciitis, pain and swelling in her ankle.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

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or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A compensable injury does not include an injury 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).

In order for the claimant to prevail on the gradual injury of the plantar fasciitis claim, she would have to prove that the injury was caused by rapid and repetitive motion. Under prior law only a causal connection was required.

The test for a gradual injury is two-pronged requiring that the tasks be repetitive and the repetitive motion be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998). As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Even repetitive tasks and rapid work do not satisfy the definition; the repetitive tasks must be completed rapidly. Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). In this case, the claimant's plantar fasciitis was the result of pressure on the foot, not rapid and repetitive motion.

In order for the claimant to prevail on the second injury, the broken ankle, she would have to prove that she was performing employment services at the time of injury. Under prior law, workers' compensation would have covered this injury because it happened on the employer's premises. Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

The test for determining whether the employee was performing employment services at the time of the injury 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." Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

At the time of her fall, the claimant had not yet clocked in and was not working. She was returning from her doctor's appointment and used the back entrance because the regular parking lot was full. Accordingly, I find the claimant was not performing employment services at the time of her injury. Texarkana School District v. Ronnie Conner, 100 Ark. App. 100, \_\_\_ S.W.3d \_\_\_ (2007).

There is case law that would find the claimant's second accident a "compensable consequence" of the first injury, see Preway, Inc. v. Davis, 22 Ark. App. 132, 736 S.W.2d 21 (1987). However, it should be noted that this case was decided before Act 796 of 1993, and the respondents controverted the first injury which I am constrained to find non-compensable under Act 796 of 1993.

1. The Workers' Compensation Commission has jurisdiction of this case in which the employment relationship existed among the parties during, March, 2007.
2. The claimant gradually developed plantar fasciitis manifesting itself by March 26, 2007.

The claimant has failed to prove by a preponderance of the credible evidence of record that she sustained a gradual injury, caused by rapid and repetitive motion arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, which was the major cause of disability or the need for medical treatment, pursuant to A.C.A. §11-9-102.

3. The claimant broke her ankle in a specific incident on March 27, 2007. The claimant was not performing employment services at the time of the injury and therefore I find she did not sustain a compensable injury.
4. Because both of the claimant's injuries are not covered by workers' compensation, the claimant is free to sue her employer in tort. Van Wagoner v. Beverly Enterprises, 334 Ark. 12, 970 S.W.2d 810 (1998), Ark. Code Ann. §11-9-105.

These claims are respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge