

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712311

ROSA HERNANDEZ	CLAIMANT
TEC THE EMPLOYMENT CO., INC.	RESPONDENT
LIBERTY MUTUAL INS. CO. CARRIER	RESPONDENT

OPINION FILED JULY 29, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On May 1, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 6, 2008, and a pre-hearing order was filed on March 7, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit No. 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 this claim.

2. On October 19, 2007, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$233 for temporary total disability and \$175 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. This claim is controverted in its entirety.
2. Claimant's entitlement to additional medical.
3. Attorney's fees.

Claimant's contentions are:

"The claimant contends that during and within the scope of her employment while engaged in employment services, the claimant tripped over a stool in the walkway near the production line in the Respondent/Employer's production plant. Upon the claimant tripping on the stool, she fell and stretched her right arm out causing a significant tear to the supraspinatus tendon causing a separation. This injury occurred on October 19, 2007. The claimant was earning sufficient wages to entitle her to a temporary total disability rate of \$233.00 per week and a permanent partial disability rate of \$175.00 per week. The claimant is entitled to temporary total disability benefits from November 28, 2007, to a date yet to be determined. The claimant has objective findings of the supraspinatus tendon tear by MRI of November 8, 2007. The claimant is requesting additional medical treatment at the expense of the respondents and attorney's fees."

Respondents' contentions are:

"The respondents will contend that the Claimant's injury does not meet the definition of a compensable injury under the Arkansas Workers' Compensation Act. Without waiving other potential defenses, the Respondents specifically contend that the Claimant was not performing employment services at the time of the accident."

DISCUSSION

The central issue in this matter is whether the claimant was performing employment services when she sustained her injury. The claimant was working at the respondent's plant on October 19, 2007. She testified on direct examination as follow:

"Q. Okay. Now, on October 19th, did you take a break that morning with the other workers?"

A. Yes. Yes.

Q. And can you tell the judge what occurred when you came back when the break was over?"

A. Yes.

Q. Tell us what happened.

A. I went back to my line. The line hadn't started running yet for us to start back to work. I got back to my place where I was -- where I was supposed to be, where my machine was. Everybody had their uniforms back on, your smock, your cap. A lot of people were already lined up on the line on my side and the other side. On this side over here there were two people that they told me who were from El Salvador. So I was -- I was interested in -- in meeting them. I -- I was looking at them from where I was. When I saw her it seemed like, well, why don't I go around there and -- and ask her. I said, "Are you the same person that studied with me at the police academy, because I graduated from the police academy three years ago?"

Q. Now, wait just a second. At this particular time, had all the employees lined up on the line yet?"

A. No. They were just coming back in because I got back to the line first.

Q. Okay. Now, had the process line actually started yet?"

A. No, not yet. No.

Q. So what's the next thing that you did?

A. Well, what I did was I -- I went around the line, and I had the time figured out because I had to get back to my machine, and I went over to see those people. I had worked there, and I was sure that I was going to be able to get back there in time. When I went back -- when I was going back was when the accident happened, and it was because of that little bench that I didn't see, and I got tangled up with that little bench."

ADJUDICATION

The question is whether the claimant was performing employment services. Ark. Code Ann. §11-9-102(B)(iii) states that a compensable injury does not include an injury which occurred at a time when employment services were not being performed or before the employee was hired or after the employment agreement was terminated. In Collins v Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002) and Pifer v Single Source Transport, 347 Ark. 851, 69 S.W.3d 1 (2002), the Arkansas Supreme Court stated the same test it used to determine whether an employee is performing employment services as is used to determine whether an employee is acting within the course of employment. Specifically, whether the injury occurred within the time and space boundaries of employment when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly.

In McKinney v Trane, 84 Ark. App. 424, 143 S.W.3d 581 (2004), the claimant was a union employee working as a sheet metal fabricator. The union contract provided a scheduled ten minute paid break. A co-worker came to get the claimant to go on his break about five or six minutes before the break. The claimant

walked to the break room to get his cigarettes and turned around to go outside, but decided to go back to get a soda that he had left on the table. He took the most direct route by leaping over two sheet buckets instead of going all the way around, and he landed on the floor on a pile of aluminum fins that he had not seen before leaping. Had he gotten his soda and not fallen, he would have gone outside to smoke on his break. He contended that although he would not have been pinning coils on break, he would have been under a duty to report anything askew in the work place he had observed during that time.

The Court held the claimant, although on the clock, was on his way to his smoke break and was involved in nothing generally required by his employer or carrying out the employer's purpose; thus, the employer gleaned no benefit from his activities on break. In the present matter, the claimant was similarly doing activities not required by her employer and was not carrying out the employer's purpose. In no way did the respondent benefit from the claimant leaving her work station to have a private, non-work related, conversation with another employee.

In Collins v Excel Specialty Products, 347 Ark. 811, 69 S.W. 3d 14 (2002) the Court held that an employee's injury, suffered while taking a restroom break, was compensable because the restroom break was a necessary function and directly or indirectly advancing interest of the employer. However, in the present case the claimant was not performing any type of necessary function. While an employee is likely not able to go to through an entire work day

without taking some sort of restroom break, an employee is certainly able to go an entire work day without any need to hold a private conversation about matters that are wholly unrelated to any task or need requested by or necessary to the respondent/employer. Taking the facts as true as provided by the claimant in this matter, I find that the claimant was not performing employment services at the time she sustained injury to her right shoulder, in that she was not involved in anything generally required by her employer and was doing nothing to carry out her employment's purpose. Inasmuch, the employer gleaned no benefit from her activities. The claimant was also not performing some necessary function such as a restroom break that directly or indirectly advanced the interest of the employer in this matter. The claimant has failed to prove by a preponderance of the evidence that she was engaged in employment services at the time of her injury.

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 March 6, 2008, and contained in a pre-hearing order filed March 7, 2008, are hereby accepted as fact.

2. That the claimant was not performing employment services at the time of her injury.

3. The claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury.

ORDER

____Based upon my foregoing findings and conclusion, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE