

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F710511

CINDY LYBARGER, EMPLOYEE

CLAIMANT

**NORTH LITTLE ROCK SCHOOL DISTRICT,
EMPLOYER**

RESPONDENT NO. 1

**RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED MAY 8, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

Respondent No. 1 was represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas, and did not appear at the hearing.

STATEMENT OF THE CASE

A hearing was conducted on February 13, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Law. A prehearing conference was conducted on January 17, 2008, and a Prehearing Order was filed on January 18, 2008. At the hearing, the parties agreed that the Prehearing Order would be admitted into the record as Commission Exhibit "1", subject to any modifications made at the full hearing.

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At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer-employee-carrier relationship existed at all relevant times, including September 27, 2007.
- 3) The claimant's compensation rates are \$424.00 per week for temporary total disability and \$318.00 per week for permanent partial disability.
- 4) All issues related to permanency are reserved.
- 5) Respondents are entitled to an offset pursuant to A.C.A. § 11-9-411 for any benefits previously paid under the respondents' short-term disability.
- 6) The parties agree that claimant's fall on September 27, 2007, occurred on the campus of Lakewood Junior High at Northeast Campus.
- 7) The parties stipulate that should the claim be found compensable, that claimant's temporary total disability period would be the period between 9/27/07 through 2/3/08. (T. pg. 4, lines 17-19).

At the full hearing, the parties agreed to litigate the following issues:

- 1) Compensability of the claimant's September 27, 2007, right leg injury.
- 2) If compensability is overcome, whether claimant is entitled to all associated medical expenses, temporary total disability benefits, and attorney's fees.

At the full hearing, claimant contended, in summary, that on September 27, 2007, she was employed as a teacher's aide and morning duty assistant at Boone Park

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Elementary; that on September 27, 2007, her employment required her to attend a staff development day at Lakewood Junior High at Northeast Campus; that while at the Lakewood Junior High Campus on September 27, 2007, she was attempting to leave her staff development meeting, and that while attempting to go up steps to leave the Lakewood Junior High Campus, she fell down concrete steps resulting in a fracture of the right femur that required surgical intervention to repair; that claimant's job duties require her to be diligent at all times, to be available to assist students and visitors at all times when on school property. Therefore, the claimant was for these and other reasons, performing employment services by indirectly advancing the employer's interest while on school property. Claimant contends that since the injury, she has suffered a total incapacity to earn wages as a result of the injury she sustained from September 27, 2007, through February 3, 2008, and that the claimant maintains she was temporarily totally disabled during that time period. The claimant also contends that respondents have controverted this claim with respect to the benefits claimed at present. The claimant contends she is entitled to the maximum attorney's fees on all benefits awarded.

At the prehearing conference, Respondent No. 1 contended, in summary, that the claimant did not suffer a compensable injury on September 27, 2007; that the claimant was not performing employment related services at the time of her injury.

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Additionally, in the event claimant's counsel intends to pursue wage loss disability benefits and compensability is found, it is the respondents' position that the Second Injury Fund should be found liable for wage loss.

Respondent No. 2, Second Injury Fund, deferred to the outcome of litigation in this matter and were not present at the full hearing of February 13, 2008. Respondent No. 2 deferred to the outcome of litigation due to the fact that all permanency issues were expressly reserved by the parties.

DISCUSSION

The claimant, 61 years of age, has worked for the respondent school district for approximately eighteen years. The claimant has primarily worked for the respondent school district as a teacher's aide. The claimant testified as follows regarding her duties as a teacher's aide assigned to kindergartens:

A Okay. I assist the teacher, and we work – or I work with the children who need extra help. And I just walk around the rooms, and we – we work – I work with them, along with the teacher, and whatever she, you know, has me to do, I do. That's consisting of helping with their lessons, and then, like I said, students that are lower and need assistance, that's what we are required to do, is to give one-on-one attention to them.

Q Now, you have another duty that you do for them, that you get paid something separate for, that's included in with what we have talked about today as what your average weekly wage is, something called morning duty.

A Yes.

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(T. pp. 12-13, lines 21-25 & 1-8).

The claimant credibly testified that part of her requirements as a teacher's aide required her to attend "staff development days." The claimant testified as follows regarding what goes on at staff development days:

A They just set up meetings and they pertain to different things. They're not the same each time we go to one. Sometimes our staff development days are spent in our school. And then other times, they schedule them at other schools within the district. And we go to meetings and sit through classes and what have you. And that's what I had been doing that morning.

(T. pg. 14, lines 17-23).

The claimant testified that on September 27, 2007, she was required as part of her employment as a teacher's aide to attend a staff development day at Lakewood Junior High at Northeast Campus. The claimant testified that the Lakewood Junior High Campus was a few miles away from Boone Park Elementary where she was assigned as a teacher's aide. The claimant testified that on September 27, 2007, she arrived at Lakewood Junior High to attend the staff development day at 8:00 a.m. The claimant testified that at approximately 10:55 a.m. her meeting adjourned, whereby she then intended to proceed to her car in order to return to her primary job location at Boone Park Elementary.

The claimant testified that upon leaving the building where she attended her staff development meeting she then proceeded outside to a different building to go

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through in order to reach the parking lot where her car was located. The claimant testified that while going up the steps in the second building she fell and broke her leg. The claimant testified as follows regarding the events that led up to her right leg injury on September 27, 2007:

Q Okay. Was there a point where, that morning, that the schedule ended at that facility for the day, or at least, period, for the day?

A Yes, sir.

Q Okay. And about what time was that?

A I believe it was around 11:00.

Q And when it ended, what did you do next?

A When it was over, I came out of the – like, went out of that building, went back down through the ground, the – and was fixing to go up the steps to go through Northeast, which is – and that's when I –

Q And so –

A – broke my leg.

Q So you were going up the stairs into that last building, to get through that last building, to then go out of that building to get to your car?

A To get to the parking lot, yes, sir.

Q Okay. Tell the Judge what happened when you started going up those steps.

A I just was going to go up the steps, and I hit the step, is what I believe I did. I did not fall down the steps. I never did get up them. I

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was – it’s like you’ll trip sometimes or just stumble and hit it. And I hit the step or tripped or something, is what I did. I never went any further, and I was just there. And I held on – there was a railing, and I held on to the railing, because I knew I was hurt, because it hurt so bad. And I couldn’t move. I never – I never went any further than that.

Q What hurt?

A Pardon?

Q What hurt?

A My leg.

Q Your right or left leg?

A My right leg.

(T. pp. 17-18, lines 6-25 & 1-14).

Upon falling, the claimant testified that she was taken by ambulance to a hospital where she was treated by a Dr. Rooney who performed surgery on her right leg.

This case comes down to whether the claimant was performing employment services at the time of her fall at the Lakewood Junior High Campus on September 27, 2007. Arkansas Code Annotated § 11-9-102(4)(B)(iii) states “an injury is not compensable if it was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired, or after the employment relationship was terminated.”

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Although the statute does not define the term “employment services”, the Commission, as well as the Arkansas Appellate Courts, have previously held that an employee is performing employment services when he or she is engaging in an activity which carries out the employer’s purpose or advances the employer’s interest directly or indirectly. Cheri Pettey v. Olsten Kimberly Quality Care, Full Commission Opinion, September 13, 1995 (E405037); 328 Ark. 381, 944 S.W.2d 381 (1997).

An employee carries out the employer’s purposes or advances the employer’s interest when he or she engages in the primary activity which he or she was hired to perform. Kenneth Behr v. Universal Antennas, Full Commission Opinion, December 6, 1995 (E408376). In the case at hand, the claimant testified that her usual place of employment was Boone Park Elementary. The only reason the claimant was at the Lakewood Junior High Campus on September 27, 2007, was because she was so required by her district to attend the staff development day.

It must be noted that I found the claimant to be an extremely credible witness. However, this case turns on “employment services.” The Arkansas Supreme Court has held that the same test used to determine whether an employee was acting within the “course of employment” is to be used to determine whether the employee was performing “employment services.” Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (March 7, 2002). The test is whether the injury occurred “within

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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."

Respondents argued at the full hearing that the claimant was not doing anything that either directly or indirectly benefitted her employer other than going to lunch.

Respondents argued that upon the claimant's meeting at Lakewood Junior High adjourning she then had a lunch break and then was to return to her duties at Boone Park Elementary. Respondents argued that as soon as the meeting ended, at approximately 10:55 a.m. on September 27, 2007, the claimant was then on lunch break and therefore not advancing her employer's interest directly or indirectly. I disagree.

I recognize that Act 796 of 1993 eliminated the premises exception to the going and coming rule. However, I liken the facts in the case at hand to the situation in Olsten v. Pettey. In Olsten, the Court held that the claimant was required by the very nature of her job description to submit herself to the hazards of travel in her own vehicle back and forth to the homes of her patients. As such, the claimant was acting within the course of her employment with her employer at the time her injuries were sustained. The Court found that the travel was clearly for the benefit of the employer since its business livelihood depended upon the in-home care of patients provided by the nursing assistants. In the case at hand, the claimant was at a school campus miles

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away from where she normally conducted her job duties. Respondents argued that the instant the claimant's staff development seminar was over she then was on lunch break and thereby not advancing her employer's interest. I find that the claimant would never have been on the campus of Lakewood Junior High but for the staff development seminar which her employer required her to attend. The mere fact that the claimant was at Lakewood Campus fulfilling her job requirements leads this examiner to find that she was in fact directly advancing her employer's interest. The claimant credibly testified she never made it to her car to go to lunch.

One of the recognized exceptions to the coming and going rule is where the journey itself is part of the service; traveling men are generally within the course of their employment from the time they leave home on a business trip until they return for the self-evident reason that the traveling itself is a vital part of the job. This case turns on whether the claimant was performing employment services when she fell following the conclusion of her staff development seminar while on the Lakewood Junior High Campus. I find that by the very fact that the claimant was on a foreign campus attending a work required seminar that she was directly performing an employment service for the North Little Rock School District. Had the claimant reached her car and proceeded to go eat lunch, there could be doubt as to whether employment services were being performed. However, in this case, it is clear that

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employment services were being performed at the time the claimant sustained her right leg injury on September 27, 2007, while on the Lakewood Junior High Campus and directly advancing the interest of her employer. Respondents would like to argue that the claimant was on a lunch break at the time of her compensable injury; however, I find that the claimant had never began her lunch break while on the foreign campus.

For claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. § 11-9-102(4)(A)(i) must be established:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing an injury; and,
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

I find that the claimant has proven by a preponderance of the evidence all of the elements of compensability outlined above. Specifically, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable right

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leg injury arising out of and in the course of her employment. An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). The claimant has met her burden of proving by a preponderance of the evidence that she sustained a compensable right leg injury on September 27, 2007, and therefore I find that the respondents are liable for all associated medical treatment.

The parties stipulated at the full hearing that if compensability was overcome that claimant would be entitled to temporary total disability benefits for the period of September 27, 2007, through February 3, 2008. I find that claimant is entitled to temporary total disability benefits at the stipulated rate for the period of September 27, 2007, through February 3, 2008. I further find that claimant's attorney is entitled to maximum statutory attorney's fees for all indemnity benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 claimant and to observe her demeanor, without giving the benefit of the doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right lower extremity on September 27, 2007, supported by objective medical findings.
- 4) The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period between September 27, 2007, through February 3, 2008.
- 5) The claimant has proven by a preponderance of the evidence that respondents are responsible for all reasonably necessary medical treatment related to the claimant's September 27, 2007, compensable right leg injury.
- 6) The claimant is entitled to the maximum attorney's fees allowed by Arkansas law consistent with the findings herein.

AWARD

The claimant sustained a compensable right leg injury on September 27, 2007, as she was performing employment services at that time. Respondents are ordered to pay for all reasonably necessary medical treatment associated with the claimant's September 27, 2007, right leg compensable injury. Respondents are herein directed and ordered to pay the claimant temporary total disability benefits at the stipulated rate for the period of September 27, 2007, through February 3, 2008. Said sums accrued shall be paid in a lump sum without discount.

Further, respondents to pay all reasonably necessary and related medical

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expenses for treatment to the claimant's right lower extremity associated with her September 27, 2007, compensable right leg injury.

Maximum attorney's fees are herein awarded to the claimant's attorney, the Honorable Thomas Mickel, pursuant to A.C.A. § 11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb