

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712627

SUE O'SHEA, EMPLOYEE	CLAIMANT
SOUTH CONWAY COUNTY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
ARKANSAS SCHOOL BOARDS ASSOC., WCT, RISK MANAGEMENT RESOURCES, CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 25, 2008

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on April 14, 2008, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by The Honorable Thomas Mickel, Attorney at Law, Conway, Arkansas.

The respondents were represented by The Honorable Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 14, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on March 4, 2008. This Prehearing Order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

The following stipulations were submitted by the parties either during the prehearing conference or at the time of the hearing, these are hereby accepted.

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at

all relevant times, including December 3, 2007.

3. The date of the incident was December 3, 2007.

4. The claimant's compensation rates are \$154.00 for temporary total disability and permanent partial disability compensation. (At the time of the hearing, the parties withdrew this stipulation. The parties agreed that if this claim is found to be compensable, they will reach an agreement on the appropriate compensation rates).

By agreement of the parties, the issues to be presented at the hearing were limited to the following:

1. Compensability with attendant medical expenses.

2. Temporary total disability compensation dates will be provided at the time of the hearing. (At the time of the hearing, the claimant requested temporary total disability from December 4, 2007, through April 2, 2008, and from April 10, 2008, until a date yet to be determined). Based on the claimant's testimony, she is contending temporary total disability from December 4, 2007, through March 2, 2008.

3. Controversion and an attorney's fee.

The claimant contends that this case is likely to turn on whether the claimant was performing employment services at the time of the injury. Claimant was employed by the respondent-employer as a janitor. As a part of her job, the claimant cleans the school's gymnasium following basketball games. Claimant cleaned up in the

gym after a game on the date of the injury. Claimant had finished cleaning the gym, set the alarm and locked the door, and was going to her car. The parking lot was poorly lighted and claimant ended up falling and fracturing her right patella. Claimant received emergency medical treatment at the Morrilton Hospital, and is now treating with Dr. Benjamin Dodge. Claimant contends that because part of her implied duties are to keep the parking lot clean and assist patrons or others on school property, claimant was performing employment services at the time of her injury. Claimant is entitled to reasonably necessary medical expenses. Claimant has been medically unable to work due to her injury from December 4, 2007, through April 2, 2008 (March 2, 2008), and from April 10, 2008, until a date yet to be determined. Therefore, the claimant contends that she is entitled to temporary total disability compensation during the aforementioned dates. Claimant contends that respondents have controverted this claim with respect to the benefits claimed at present. Therefore, claimant contends she is entitled to maximum attorney's fees on all benefits awarded.

Respondents contend that the claimant was not injured while performing services. The claimant fell in the parking lot after her job duties were finished. The injury is not compensable. See Hightower v. Newark Public Schools, 57 Ark. App. 159.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of March 4, 2008, the claimant's

Response to the Prehearing Questionnaire, and the respondents' Response to the Prehearing Questionnaire, as these have all been marked as Commission's Exhibit No. 1. The claimant's Medical Packet was marked as Claimant's Exhibit No. 1.

The following witness testified at the hearing: the claimant

DISCUSSION

The claimant, age 57 (6/06/50), has worked for the respondent-employer since March of 2006. The claimant initially worked as a substitute cafeteria worker, and since June of 2007, she has performed job duties as a school custodian.

According to the claimant, she has a high school diploma, and some college courses in the course of study as a medical assistant.

She testified she has previous work experience as a waitress, and she has managed and worked in convenience stores, managed a U-Haul center, and worked at call centers.

The claimant testified that under her written contract with the respondent-employer as a custodial worker, she was paid \$12,000 per year, on a twelve-month basis. According to the claimant, she was assigned to the Morrilton Junior High School, as her duties were confined to the Junior High School during the school session, but she worked other buildings during the summer months. The claimant admitted to having fallen at the Junior High School.

Specifically, with respect to her job duties as a custodian during the school year, the claimant testified that she normally

arrives for work in the mornings around 6:00 or 6:30. She is required to unlock the doors to the building, disinfect the doorknobs and student desks, unlock each classroom and the Plato lab, (computer lab), and clean it from top to bottom. After this, the claimant runs a dust mop around the school, and if a teacher is in their planning session, she germicides the desks and puts the room in order. During the lunch period, the claimant works in the cafeteria, as she is required to make sure the garbage cans do not overflow. Once the two lunch periods are over, the claimant has to take the trash to the Dumpster, and check the parking lot to see if anything has been thrown away out there that needs to be picked up. She is also required to empty the trash cans out front, sweep the walk areas and the entrance areas. During the afternoon, before school is dismissed, the claimant runs a dust mop around the building again.

According to the claimant, she worked a standard 40-hour week, but she almost always worked overtime every day due to her having to clean the Plato lab. Aside from her daily chores, the claimant testified that she was asked by Coach Tipton (the Athletic Director for Morrilton Schools), to clean the gymnasium after junior high and high school basketball games, as these are played in the same complex. The claimant testified that during the games, she keeps the bathrooms clean, the trash emptied, and the paper stocked. After the games, she cleans the stands, sweeps up everything, mops

up any spills, and if anything is thrown on the gymnasium floor, she uses a dust mop. Once these tasks have been completed, the claimant puts the supplies away, sets the alarm, closes and locks the doors. According to the claimant, if there is any trash in the parking lot or if there is anyone that needs help or anything, then she makes sure that there is no trash on the grounds and that no one is in distress. The claimant testified that if trash is found, she puts it in the outside trash receptacles.

The claimant admitted that her agreement with Coach Tipton was not written. However, she was required to fill out a written time sheet, and submit the time sheet with the appropriate pay to the bookkeeper. She admitted that she gets paid \$60.00 for 7th grade game, \$80.00 for the 8th grade games, and \$100.00 for the high school games.

With respect to the evening that she got hurt, the claimant testified that it was a 7th grade game, and that it was around 8:15 p.m. Specifically, the claimant testified:

A. After the game was over we cleaned the gym. I set the alarm. We went out the door, and I locked it. And I don't really use that entrance so I wasn't familiar with the end of the entrance into the ramp. And I was walking to the car and looking at the parking lot making sure there was no trash and I got to the end of the ramp, and evidently when they re-paved the parking lot during the summer they missed a spot right at the end of that ramp. There was a dip down and then a step up, and I didn't know it. And my foot, my right foot came to a halt in the dip. And when I fell I fell on my right knee.

According to the claimant it is her understanding that she broke her knee cap. She admitted to seeking emergency treatment for her knee on the evening of the incident from St. Anthony's Hospital in Morrilton, where she was treated, x-rayed, and released. The claimant admitted to seeing her primary care physician, Dr. Howard, for follow-up care. The claimant admitted to being referred to Dr. Dodge for further treatment of her knee. The claimant admitted that on December 10, (2007), Dr. Dodge tried to put her knee cap back together with hardware. According to the claimant, she was off work due to this procedure. The claimant admitted to having subsequent problems with her knee on December 27th, at which point she saw Dr. Roberts for removal of her staples. However, he sent her to Conway Regional for inpatient treatment. At which point, she received antibiotics. According to the claimant, she was released from the hospital on January 2nd. After this, the claimant admitted to being treated by Dr. Dodge, who attempted to return her to work. The claimant admitted she attempted to go back to full duty work on April 3, 2008 (She later corrected this date to be March 3rd), but was unable to do so. She further testified she was unable to work due to her knee swelling and excruciating pain. According to the claimant, she is scheduled to have the hardware removed on Friday (April 18, 2008).

On cross examination, the claimant admitted that although she was paid to clean the gym, her husband and daughter would actually

assist her cleaning up the gym, as they would split the money three ways.

The claimant admitted that on the day of the incident, they had finished cleaning the gym around 8:15 p.m., as the game had ended early. She further admitted that it was dark and cold on the day of the incident, and that she was ready to go home. The claimant testified she had set the alarm and was walking down the sidewalk to the parking lot where her vehicle was located. According to the claimant, her husband was walking a little bit ahead of her and her daughter when she fell in some type of a hole or crack. The claimant admitted that although at the time of her incident, her husband had not gone around to get the car, she was walking to her car when the incident happened.

Upon being questioned about her job duties with respect to the parking lot of picking up trash, the claimant maintains she was required to do so. However, the claimant admitted that she did not see any trash on the parking lot nor had she picked up any trash from the parking lot on the evening of the incident.

ADJUDICATION

The crucial issue for determination in this matter is whether on December 3, 2007, the claimant was performing "employment services" when she slipped and fell in a hole or crack on her employer's parking lot, and injured her right patella.

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). An employee is performing employment services when he or she is doing something that is generally required by his or her employer. Collins v. Excel Speciality Products, 347 Ark. 811, 69 S.W. 3d 14 (2002).

The test for determining whether an employee was acting within the "course of employment" at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly. Pilgrims Pride Corp. v Calderera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

In the present case, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her knee while performing employment services. Specifically, the undisputed testimony elicited from the claimant during the hearing clearly demonstrates that the claimant had completed cleaning the gymnasium, set the alarm, locked the doors, and was walking to her car so that she could go home when she slipped and fell in her employer's parking lot. This was an activity personal in nature. Therefore, under these circumstances I find that the claimant was not engaged in any activity to carry out her employer's purpose or to advance her employer's interest directly or indirectly when she slipped and fell in a hole on the

employer's parking lot. While I realize the claimant was on the employer's premises when her injury occurred; however, at the time of her injury, she was merely walking to her car so that she could go home. Such action does not qualify as performing employment services. See Hightower v. Newark Pub. Sch. Sys., 57 Ark. App. 159, 943 S.W. 2d 608 (1997).

The claimant also contends that because part of her implied duties are to keep the parking lot clean and assist patrons or others on school property, she was performing employment services at the time of her injury. However, based on the claimant's own testimony concerning her unwritten agreement with Tipton, I find that there is insufficient evidence to support a finding that she had any expressed or implied duties to clean the parking lot or assist patrons. The claimant's testimony clearly demonstrates that her unwritten agreement of her job duties with Coach Tipton confined her duties to only the gymnasium area. Such confinement of her duties is also expressed in her contentions, as she alleges these duties to be implied and not expressly given to her by Coach Tipton.

Therefore, on basis of the record as a whole, I find the claimant failed to prove by a preponderance of the evidence that she was performing employment services at the time of her injury. Since I have not found the claim to be compensable, I have not addressed the claimant's request for medical treatment and

temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed at all relevant times.
3. This claim has been controverted in its entirety.
4. The parties will stipulate to compensation rates if this claim is found to be compensable.
5. The date of the incident was December 3, 2007.
6. The claimant failed to prove by a preponderance of the credible evidence that she was acting within the course and scope of her employment at the time of her right knee injury on December 3, 2007.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her injury on December 3, 2007. This claim for benefits is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml