

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112222

DENNIS MARTIN,
EMPLOYEE

CLAIMANT

MILLCREEK REHABILITATION OF ARKANSAS,
EMPLOYER

RESPONDENT

ARGONAUT INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 25, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant appeared PRO SE.

Respondents represented by HONORABLE ANDY CAMPBELL, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on February 7, 2003.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on November 18, 2002, and contained in the Prehearing Order filed that same date are hereby accepted as fact.

2. Claimant has proven by preponderance of the evidence that he was performing employment services and was within the course and scope of his employment on October 8, 2001, when he sustained an injury to his hand.
3. Respondents are liable for the medical expenses claimant incurred for his October 8, 2001 injury.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 7, 2003 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority's affirmation and adoption of the Administrative Law Judge's opinion. Based upon my review of the evidence in this case, I find that the claimant was acting outside the scope of his employment at the time he sustained his injury, and that his claim is therefore not compensable and should be denied.

The claimant was working for the respondent as a direct care employee. He was responsible for watching fifteen residents of a cottage, cleaning the cottage, and getting the residents up and ready for school in the morning. When it was time for the claimant's break on the evening in question, he went to the cottage's kitchen and opened a can of soup that he had brought for his own consumption. The claimant severely cut his finger in the process of removing the lid from the can and had to be taken to the emergency room. The claimant's preparation and consumption of his own food in the cottage's kitchen was in direct violation of both written policy and verbal instructions. The claimant did not deny that bringing food from an outside source into the cottage and using the cottage kitchen for his personal food preparation and consumption were prohibited activities. However, he testified that the facility was short-staffed that evening, and that it would have been a violation of state policy to leave only one person in charge of the residents in the cottage. Because he could not leave his co-worker alone in the cottage, and because the facility was short-staffed, there was no one to relieve him for a break, he was compelled to use the cottage's kitchen.

The Administrative Law Judge found that the issue was not whether the claimant had violated company policy, but whether he was performing employment services when he injured his hand. Arkansas Code Ann. § 11-9-102(5)(B)(iii) states that "an injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed." Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Spec. Prods., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). The test to determine whether an employee was performing employment services is 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 interests directly or indirectly." Collins, supra; Pifer, supra. This test has also been stated as whether the employee was engaged in the primary activity that he was hired to perform or in incidental activities which are inherently necessary for the performance of the primary activity. Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997).

The Administrative Law Judge cited Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999), for the proposition that a claimant could be performing job duties while on break. The claimant in Ray slipped and fell while getting a snack from the cafeteria during one of her two paid 15-minute breaks. The respondent in Ray provided free meals to its employees to encourage them to remain on the premises. If a student asked for assistance while an employee was on break, he or she was required to terminate the break and assist the student. The Court of Appeals found that the employer received a benefit from their employees being able to assist the students even while on break, a task inherent their jobs.

The Administrative Law Judge also cited White v. Georgia-Pacific Corporation, 339 Ark. 474, 6 S.W.3d 98 (1999), in which the Supreme Court found that a claimant who had slipped while taking a smoking break had sustained a compensable injury because that claimant had not been provided a relief worker during his breaks, had to monitor his work station during his smoking breaks, and was required to terminate his breaks if necessary.

The Administrative Law Judge found that even though the claimant in the instant case was on break, he was

required to be available to monitor the clients under his care; therefore, the claim was analogous to the facts in Ray and White, and the claimant's injury was compensable.

I disagree that the violation of company policy is not an issue, and find this case to be distinguishable from Ray and White because unlike the claimants in those cases, the present claimant was engaged in an activity that was specifically prohibited by his employer. In Arkansas State Police v. Davis, 45 Ark. App. 40, 870 S.W.2d 408 (1994), the Court of Appeals wrote:

Section 31.00 of 1A A. Larson, The Law of Workmen's Compensation (1993) provides that "[w]hen the misconduct involves a prohibited overstepping of the boundaries defining the ultimate work to be done by the claimant, the prohibited act is outside the course of employment." Likewise, 31.14(a) provides that:

It has already been observed that the modern tendency is to bring within the course of employment services outside regular duties performed in good faith to advance the employer's interests, even if this involves doing an unrelated job falling within the province of a coemployee. This, of course, assumes that no prohibition is thereby infringed. But if the unrelated job is positively forbidden, all connection with

the course of the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed.

Larson's discusses the case of Fowler v. Baalmann, 361 Mo. 204, 234 S.W.2d 11 (1950), which applies the principles above. We find the case of Fowler illustrative. In that case, the decedent, James Fowler, a flight instructor for Baalmann, Inc., was forbidden to fly on a particular night of bad weather by his superior and was aware that the flight had been canceled. However, the decedent proceeded with the flight which resulted in his death. In denying benefits the Missouri Supreme Court observed:

Mere disobedience of an order as to the detail of the work in hand or the mere breach of a rule as to the manner of performing the work are not generally sufficient to deprive an employee of his right to compensation so long as he does not go out of the sphere of his employment. But compensation cannot be allowed when the employee goes outside of the sphere and scope of his employment and is injured in connection with an activity he has been expressly forbidden to undertake.

. . .
An employer has the unqualified right to limit the scope of a servant's employment and activity and to

determine what an employee shall or shall not do. The employer likewise has the unqualified right to determine when an employee shall do a certain thing. The prohibition which the employer laid down in this case (the direct order expressly canceling the flight) goes deeper into the relationship of the parties than any mere rule, for it severed utterly and terminated completely the employer-employee relationship for the day.

The present claimant's injury occurred at approximately 12:30 a.m., and by the claimant's own admission, the cottage residents were asleep. A staff coordinator for the respondent testified that the claimant could have called the shift supervisor and she would have relieved him during his break period. Respondent's policy prohibiting employees to eat their personal food in the residence cottages is required by state and federal regulations, and the employees were provided with a room in the administration building in which to take breaks, and prepare and eat meals. Because the claimant was performing a prohibited activity at the time of his injury, he was outside of the space boundaries of his employment, was not furthering or advancing his employer's interests, and his

activities were not necessary for the performance of the job he was hired to do. Because I find that the claimant was not performing employment services and that the Administrative Law Judge's opinion should be reversed, I respectfully dissent from the majority opinion.

JOE E. YATES, Commissioner