

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305061

IRENA KING,
EMPLOYEE

CLAIMANT

WAL-MART, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED DECEMBER 7, 2004

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

Claimant represented by HONORABLE ORVIN FOSTER, Attorney at
Law, Mena, Arkansas.

Respondents represented by HONORABLE CURTIS NEBBEN, Attorney
at Law, Fayetteville, 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 June 21, 2004.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 12, 2003, the relationship of employee-self insured employer existed between the parties.

3. On May 12, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$251.00 for total disability and \$188.00 for permanent partial disability.
4. On May 12, 2003, the claimant sustained a compensable injury to her right wrist/forearm. The claimant has established by medical evidence, which is supported by "objective findings," the actual existence of this physical injury. The claimant has further proven by the greater weight of the credible evidence that this physical injury arose out of and occurred in the course of her employment with this respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to her body, and required medical services and resulted in temporary disability. Finally, the greater weight of the credible evidence shows that the claimant was performing "employment services" for the respondent, at the time of her accident fall and resulting injury.
5. The medical services, which were provided by and at the direction of Dr. Andrew David of the Mena Medical Clinic and by and at the direction of Dr. Bruce Smith of the Hot Springs Bone and Joint Clinic constitutes reasonably necessary medical services for the claimant's compensable injury. Pursuant to Ark. Code Ann. § 11-9-508, the expense of these medical services is the liability of the respondent

herein, subject to the medical fee schedule established by this Commission.

6. The claimant was rendered temporarily totally disabled as a result of the effects of her compensable scheduled injury for the period beginning May 13, 2003 and continuing through at least July 2, 2003. The claimant has proven by the greater weight of the credible evidence that during this period she continued with the healing period from the effects of her compensable injury and had not returned to work.
7. The respondent has controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all compensation herein and hereinafter awarded to the claimant.

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 June 21, 2004 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 McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding, in relevant part, that the claimant has proven by a preponderance of the evidence that on May 12, 2003, she sustained a compensable injury to her right wrist/forearm, and that the existence of this physical injury is established by medical evidence which is supported by "objective findings." Moreover, and more importantly, the Administrative Law Judge found that the claimant's injury occurred in the course of her employment with the respondent, and that it otherwise meets the statutory requirements for a specific incident injury.

My carefully conducted de novo review of this claim reveals that the claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury to her right wrist or forearm while performing employment services for the respondent. Therefore, I find that the decision of the Administrative Law Judge should be reversed.

On May 12, 2003, the 75-year-old claimant was working the 2:00 a.m. to 11:00 a.m. shift in the bakery at Wal-Mart Number 67 in Mena. At approximately 5:00 a.m., the claimant slipped and fell on a wet spot in the floor while

leaving the bakery area headed toward the employee lounge for her morning break. The claimant admitted that she was going to the break room to sit down and have a cup of coffee. After she fell, the claimant received medical treatment in the emergency room of a nearby hospital.

Both the manager of the Mena Wal-Mart, Mr. Charles Walter "Chip" Bentley, and the assistant manager of the Mena Wal-Mart in charge of the bakery, Ms. Carol Moran, testified by deposition on February 26, 2004. Mr. Bentley testified that, according to store policy as of May 12, 2003, the claimant was not required to clock in and out at break time, nor was she required to take her breaks in the break room. Ms. Moran verified through her testimony that the claimant was not required by store policy to take her breaks in a designated area at that time. Ms. Moran further testified that bakery employees are sometimes required to leave the bakery area in order to do other things, i.e., stock shelves with bakery items. Ms. Moran stated that because bakery employees are still technically "on the clock" during their breaks, they have a general obligation to assist customers should they be approached by them outside of the bakery area. Both Mr. Bentley and Ms. Moran testified, however, that the claimant began her break when she walked out of the

door of the bakery on the morning of May 12, 2003. Furthermore, the claimant admitted that she was not assisting a customer at the time she fell.

Act 796 of 1993 defines a compensable injury as an accidental injury arising out of and in the course of employment...." Ark. Code Ann. § 11-9- 102(4)(A)(i) (Repl. 2002). 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) (Repl. 2002). Although Act 796 does not define the phrases "in the course of employment" or "employment services," our Supreme Court has interpreted the term "employment services" to mean the performance of something that is generally required by an employer. Pifer v. Single Source Transp., 347 Ark. 851, 856, 69 S.W.3d 1, 3 (2002) (citing Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997)). Furthermore, 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 Prod., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer, supra. The test is whether the injury occurred "within the

time and space boundaries of employment, when the employee [was] carrying out the employer's interests directly or indirectly." Id. Stated differently, whether the employee is "engaged in the primary activities that are inherently necessary for the performance of the primary activity" determines whether the employee was performing employment services at the time of their injury. Olsten Kimberly Care, supra. Finally, employment services are performed when the employee does something that is generally required by his or her employer. White v. Georgia-Pacific Corporation, 39 Ark. 474, 6 S.W.3d 98 (1999).

It is well established through prior decisions by the Full Commission and our courts that, as general rule, an employee is not performing employment services while on break from their regular employment activities. See, Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491); See also, McKinney v. Trane & Travelers Indemnity, ___ Ark. App. ___, ___ S.W. ___ (Opinion delivered January 28, 2004). Moreover, our courts have found that a determination of whether an employee is performing employment services at the time of his accident depends on the particular facts in each case.

_____ In the present case, the evidence reveals that the claimant's accidental fall occurred while the claimant was on her break, while she was still "on the clock," and while the claimant was still inside the store. Evidence further reveals that at the time of the claimant's incident, employees of the Mena Wal-Mart were "encouraged" to leave their work area when they took a break. The claimant's testimony that she was required to take her breaks in the employee lounge is contradicted by the testimony of store manager, Mr. Bentley, and bakery manager, Ms. Moran. These two witnesses contend that the claimant was allowed to take her break wherever she wanted, even outside. Moreover, both Mr. Bentley and Ms. Moran testified that the claimant's break began when she left her assigned work area. Ms. Moran indicated, however, that any time an employee is outside their designated work area, they are expected to assist customers by whom they are approached.

In support of his opinion that the claimant was performing employment services at the time of her fall, the Administrative Law Judge cited Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In the Ray case, the Court found that the claimant was performing employment services when she slipped and fell while reaching

for a snack during her break. In reversing the Commission's decision in this case, the Court stated the following:

When a claimant is doing something that is generally required by his or her employer, the claimant is providing employment services. ... Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services in a lot of case.

In the Ray case, the Court found that the employer university benefitted from the claimant being on break because the claimant was *required* to be available to students during her break, presumably to assist them as needed. In addition, the Court specifically noted that the employer in Ray furnished food for its resting employees and paid for their breaks in order to induce them to be available to serve students even during their breaks.

The Court distinguished the Ray case from an earlier case in which the claimant was found not to be performing employment services when she tripped and fell over rolled-up carpet as she exited an elevator on her way to a smoke area. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998). In denying the compensability of Ms. Harding's claim, the Court rejected the claimant's argument that her employer gained a benefit from her breaks

by her being more relaxed, which in turn helped her work more efficiently. Furthermore, the Court stated that an employee is performing "employment services" when she is engaged in the primary activity that she was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity. Finally, the Court stated that although the employee's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Harding, supra.

In the present case, the fact that the claimant was being paid for her break and was *expected* to assist customers is not synonymous with her being *required* to assist customers while on her break. And unlike the respondent in Ray, the respondent in this case was not attempting to induce the claimant to take her break in a designated area in order to ensure her availability to customers. Thus, the facts in Ray are similar to the facts in this claim, specifically in that both claimant's were paid for their breaks and both were to some degree available to assist patrons. However, the critical difference between the facts in Ray and the facts presented here is that this respondent did not *require* that the claimant be available to

assist customers while on her break. In addition to this, the claimant was not assisting a customer or performing any other employment activity at the time of her incident. Therefore, although the claimant's break may have potentially advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. See, Harding, supra.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her fall on the morning of May 12, 2003. Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner