

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312912

ROSIE COLLIER, EMPLOYEE	CLAIMANT
CITY OF LITTLE ROCK, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED JANUARY 21, 2005

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal the decision of the Administrative Law Judge finding that the claimant sustained a compensable injury. Based upon our de novo review of the entire record, we find that the claimant has failed to prove by a preponderance of the credible evidence that she was performing employment services when she sustained an injury to her knee on October 23, 2003. Therefore, we find that the decision of the Administrative Law Judge must be reversed and this claim for benefits denied and dismissed.

The claimant contends that she was going to her car to retrieve pamphlets on October 23, 2003, when she sustained an injury to her left knee as her foot caught on a board covering a temporary water line. Conversely, the respondents contend that the claimant was not performing employment services at the time of her injury. We agree with respondents.

The claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. § 11-9-102(5)(B)(iii) states:

An injury is not compensable if it was inflicted upon the employee at a time when employment services were not be performed, or before the employee was hired or after the employment relationship was terminated.

Act 796 further requires that the provisions of the workers' compensation statutes be strictly construed. Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). In Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002), the Arkansas Supreme Court stated:

Act 796 defines a compensable injury as "[a]n accidental injury ... arising out of and in the course of employment. ..." Ark. Code Ann. § 11-9-102(4)(A)(i). 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)

(emphasis added). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services," Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope Act 796 of 1993. Ark. Code Ann. § 11-9-1001 (Repl. 1996). When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Stephens v. Arkansas Sch. for the Blind, 341 Ark. 939, 20 S.W.3d 397 (2000). 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 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 Sept. 13, 1995 (E405037); 328 Ark. 381, 944 S.W.2d 381 (1997). An employee carries out the employer's purpose or advances the employer's interest when he engages in the primary activity which he was hired to perform. Id.; Kenneth Behr v. Universal Antenna, Full Commission Opinion Dec. 6, 1995 (E408376). When an employee engages in incidental activities which are inherently necessary for the performance of the primary employment activity, the employee carries out the employer's purpose or advances the employer's interest. Id.

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 Spec. Prod., 347 Ark. 811, 69 S.W.3d 14 (Mar. 7, 2002); Pifer v. Single Source Transp., 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 purpose or advancing the employer's interests directly or indirectly." Id. This test has also been previously stated as whether the employee is "engaged in the primary activity that [s]he was hired to perform or in incidental activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Quality Care v. Pettey, 55 Ark. App. 343, 934 S.W.2d 956 (1996), aff'd, 328 Ark. 381, 944 S.W.2d 524 (1997). Employment services are performed when the employee does something that is generally required by his or her employer.

In Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491), the Full Commission found that the claimant "was not engaged in any activity that carried out the employer's purpose or advanced the employer's interest when the claimant deviated from her duties to

go outside and smoke before she got "real busy." Likewise, in Carla Ann Cole v. Prince Gardner, Inc., Full Commission Opinion filed August 26, 1996 (E408046), the Full Commission found that when a claimant has finished work and is injured while walking across the employer parking lot, the injury was not compensable since employment services were not being performed. See also, Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

Whether an employee is performing employment services at the time of an accident depends on the particular facts in each case. In addition, the Commission has held that when an employee leaves work five minutes early to go to the bathroom and wash her face and clean her glasses after being sprayed with catfish intestines, that employee was engaged in incidental activities which were inherently necessary for the performance of her job as a catfish gut sucker. Joan Jones v. FF Services, Inc., Full Commission Opinion filed April 23, 1996 (Claim No. E409045). If the claimant in Jones were not a gut sucker, she would not accumulate blood and guts on her glasses necessitating the need to clean her glasses.

In Beaver v. Benton Co. Child Support Unit, Full Commission Opinion filed April 727, 1998 (Claim No. E706094), the claimant was a child support investigator attending a two-week instructional seminar. The claimant and her co-workers typically ate their meals together, and the respondents provided an allowance for two dinner meals and lunch each day of the seminar. Eating with the group was not mandatory, and lunch was considered free time. At lunch, the claimant and her co-workers went to look at a buffet when the claimant slipped and was injured. In making our decision that the claimant in Beaver was not performing employment related services, the Commission looked to Jackson v. Arkansas D.H.S., Full Commission Opinion filed May 12, 1995 (Claim No. E319835), in which the Commission determined that the claimant was not performing work related services during her voluntary presence in the food line at an office potluck, before her actual lunch break started even though she was susceptible to telephone calls until the very moment she began to eat. The Commission also looked to Stenhouse v. Harvest Foods, Full Commission Opinion filed October 13, 1995 (Claim No. E402789). There, the claimant was not performing employment services when he was injured when he fell while attempting to step onto a pallet jack, en route to the respondents' cafeteria to eat lunch

when this incident occurred. The Commission found that the claimant had "substantially deviated" from his employment duties when he attempted to step onto the pallet jack. The evidence established that riding on a pallet jack was not part of the claimant's job.

The Arkansas Court of Appeals upheld the Commission's decision in Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999). After reviewing the facts, the Court discussed the case of Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998), in which the court held that even if there was an indirect benefit to the respondent in that her break allowed the claimant to relax, which in turn helped her to work more efficiently throughout the rest of her work shift, "it was not inherently necessary for the performance of the job she was hired to do," and thus there was no error in finding that appellant was not performing employment services when she was injured. The Court went on to find that, in the Beaver case, the appellee paid for the lunches was of no moment, and it was inconsequential that appellee encouraged the group to eat together when viewed against all of the other evidence. The Court stated that there was substantial evidence to support a finding that appellant was not

advancing her employer's interest when she was on her lunch break walking to the buffet.

After conducting a de novo review of the record, we find that the claimant's testimony is not sufficiently credible to find that she sustained her injury as she was carrying out her employer's interests. When the claimant first reported her injury, she provided a statement to the claims adjuster advising that she injured her knee as she was leaving work early due to a headache. After learning that her claim had been denied, the claimant advised the claims adjuster that she wanted to change her story. At that point the claimant advised the claims adjuster that she was going to her car to retrieve a pamphlet and that she intended to go back into the building before actually leaving for the day. On direct examination, the claimant testified that she had been receiving phone calls from Dana Sparks about an elderly lady and that she had advised Ms. Sparks that she would take some brochures to this elderly lady. Pursuant to the claimant's testimony, as she was about to leave on October 23<sup>rd</sup>, Ms. Sparks called again, and she told Ms. Sparks that she was getting ready to go and take some brochures to this elderly lady. The claimant then advised a co-worker that she "was going out in the field." As she was exiting the building, the claimant's heel caught on

the temporary board causing an injury to her left knee. After this injury, the claimant proceeded to her car where she just sat for a few minutes before she drove herself home. However, on cross-examination, when the claimant was questioned about whether she was going to pick up her daughter when she left work on October 23<sup>rd</sup>, the claimant testified; "No, that's not where I was going, I was going home."

Although the claimant's co-worker, Daniel Smith, corroborated the claimant's testimony regarding her comment about going out into the field, the remainder of the evidence fails to corroborate the claimant's story. Claimant's supervisor, Aaron Theodore, testified that the claimant had left him a voice mail on October 23<sup>rd</sup> advising that she was going to use her flex time and leave early on October 23<sup>rd</sup> because she had a headache. Mr. Theodore further testified that the claimant "always" used her afternoon break to pick her daughter up from school.

Further conflicting testimony concerns the claimant's testimony regarding which vehicle she was going to when the accident occurred. The claimant testified that she was proceeding to her personal vehicle to retrieve brochures. The claimant further testified on direct examination that she did not have a city car at that time. However, on cross-examination, the

claimant corrected her testimony and admitted that she did have a city car, but she had to retrieve the brochures from her personal car. When questioned by the Administrative Law Judge about her actual intentions had she not sustained an injury, the claimant testified that she would have used the city car to deliver the brochures to the elderly lady. However, the claimant later admitted that she testified in her deposition that her intentions at the time of her injury were to retrieve the brochures from her personal car, then return to the building to make phone calls.

Claimant's testimony simply is not sufficiently credible to support a finding that her injury arose out of and in the course of her employment. Mooney v. Monday & Associates, Full Commission Opinion filed August 15, 1996 (E4104794); Riley v. Craighead Nursing Center, Full Commission Opinion filed January 13, 1998 (E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion filed December 12, 1998 (E700104); and Arnold v. Dino's, Inc., Full Commission Opinion filed August 1, 2002 (F001514). When we consider the claimant's testimony in whole, we cannot find that her story is credible. First, the claimant advised the claims adjuster that she was leaving for the day due to a headache when her accident occurred. Upon learning that her claim had been denied the claimant changed

her story and advised the claims adjuster that she was going to retrieve a brochure from her car and bring it back into the building. At the hearing, the claimant testified that she was actually going "out in the field" and was going to take a brochure to an elderly lady when she left the office. Finally, on cross-examination, when the claimant was adamantly denying that she was not leaving to pick up her daughter, she actually testified that she was going home instead. Given the claimant's inconsistent stories of her intended purpose at the time of her injury, we are unable to find that she has established by a preponderance of the credible evidence that she was, in fact, performing employment services when she sustained her knee injury.

Since we find that the claimant has failed to prove by a preponderance of the evidence that she was actually performing employment services at the time of her injury, we find that the claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury to her knee. Therefore, we find that the decision of the Administrative Law Judge must be reversed. Accordingly, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that Claimant failed to establish by a preponderance of the evidence that she sustained a compensable knee injury on October 23, 2003, arising in and out of her employment with Respondent. I find that Claimant was performing employment services within the course and scope of her employment when her injury occurred.

The majority has rejected the testimonies of both Claimant and her co-worker, Daniel Smith, a disinterested witness, who testified that Claimant was going "out in the field" to retrieve brochures from her vehicle to deliver to an elderly woman in the neighborhood. Further, the log sheet kept at the Alert Center reflects that Claimant left to work in the field. I find both Claimant and Mr. Smith to be credible witnesses.

The majority opinion has cited many cases that are easily distinguishable from the facts surrounding Claimant's injury. Specifically, it has not been asserted that Claimant was going to lunch, going on a smoke break, or running a personal errand. Claimant testified that had she not been injured, she would have used her city-issued vehicle to deliver the brochures after she returned to her desk to make phone calls. Claimant did not tell Mr. Smith, nor did she write on the log sheet that she was going home or that she was going to pick up her daughter.

Based on the foregoing, I find that Claimant incurred a compensable injury, arising in and out and within the course and scope of her employment with Respondent, for which she is entitled to benefits. Accordingly, I dissent.

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SHELBY W. TURNER, Commissioner