

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308708

TINA ENGLE, EMPLOYEE	CLAIMANT
THOMPSON MURRAY, INC., EMPLOYER	RESPONDENT
CONTINENTAL CASUALTY COMPANY, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2005

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

Claimant represented by HONORABLE DAVID WALL, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed March 3, 2005.

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 August 7, 2003. the relationship of employee-employer-carrier existed between the parties.

3. On August 7, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that any injury she sustained in the accidental fall, on August 7, 2003, constitute "compensable injuries" within the meaning of the Act. Specifically, these injuries are expressly excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iii), in that the claimant was not performing "employment services" at the time of her accident.

5. The respondents have denied the occurrence of any "compensable injuries" and have controverted this claim in its entirety.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the

elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the opinion of the Majority affirming and adopting the Administrative Law Judge's decision that the claimant has failed to prove by a greater weight of the credible evidence that any injuries she sustained in an accidental fall, on August 7, 2003, constitutes "compensable injuries" within the meaning of the Act, and specifically, that these injuries are expressly excluded from the category of "compensable injuries" by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iii), in that the claimant was not performing "employment services" at the time of the accident. The respondent cross-appeal to the extent that the Administrative Law Judge's decision can be read as a denial that the claimant's claim is barred by Ark. Code Ann. §11-9-102(4)(B)(ii).

_____After a de novo review of the record, it is my opinion that the claimant has met her burden of proving by a greater weight of the evidence that the injuries she

sustained from the August 7, 2003 accidental fall would constitute "compensable injuries" within the meaning of the Act. I further find that the claimant's claim is not barred by Ark. Code Ann. §11-9-102(4)(B)(ii).

_____The claimant was thirty-six years old at the time of the hearing. Her job title with the respondent-employer was executive coordinator for the vice-president of account service. Charlie Anderson was the vice-president of account service. Her job duties including keeping Mr. Anderson's calendar; scheduling his meetings; scheduling his travel; scheduling any event and acting as event coordinator for any event that he was responsible for; and, being general support staff for the whole account service department.

_____The respondent-employer encouraged each department to have an "offsite" annually or biannually to promote team bonding and to set goals for the departments. The claimant was responsible for planning and executing the offsite for the account service department. From May until August, the claimant was in the planning stages of organizing the offsite. She met with Mr. Anderson to determine what the

offsite would consist of, what the presentations would be, what was going to be done at the offsite, and where they were going to go for the offsite.

_____About a week before the August 7-8, 2003 offsite, the claimant met with Mr. Anderson to make sure that everything was on schedule. At that meeting, Mr. Anderson brought with him a document he had prepared entitled "Needed for Account Management Offsite." This document included a list of arrangements to be made and a schedule of the activities for Thursday, August 7, 2003.

- 9:00 am - Depart from Office
- Completed handout books
- Team bags - sunscreen, towels, snacks, water guns, disposable cameras, etc will be distributed to the team as we arrive at Gaston's.
- Transportation - Surburban, Excursions, ect
- 'Beverages' for the trip in coolers
- Lunch arrangements for the lake

- 12:00 pm - Arrive at Gaston's Resort
- unload and change for the party pontoon

- You and I will manage check-in on MY Amex
 - You will again reiterate time and place to meet to pull out for the Lake
 - You will direct us to dock location and you and I will check in at the dock
- 12:30pm
- Set sail on the Party Pontoon & wave runners
 - You will nominate a boat driver and let the group decide who starts out on the wave runners
 - Get map of the lake with directions to a good 'hang out' spot that may include a beach area, cliff/rocks to jump off
- . . .

On the morning of August 7, 2003, the employees of the account service department met at the office to see a short video presentation before loading into the two vehicles rented by the company to take them to Gaston's Resort and Bull Shoals Lake where the offsite was to take place. The employees were paid for the two days of the offsite, and had the employees not been at the offsite they would have been expected at the office. The employees were

due to return to the office by 5 o'clock pm on August 8, 2003.

The claimant was responsible for making sure that everybody was in the right place at the right time, paying various bills, renting the vehicles, renting the boat and wave runners, and making arrangements for food. The claimant was the contact person for the various activities planned for those two days. The claimant was the event coordinator for the account service offsite and was not present as an account manager. She was expected to keep the program running and take care of anything unexpected that might come up.

On August 7, 2003, while on the company offsite the claimant was injured when she fell from a cliff. The employees were enjoying time together for bonding on a pontoon boat and wave runners on Bull Shoals Lake. As had been planned earlier the claimant had obtained maps of the lake so that they could locate a cliff or rocks that they could jump off of into the lake. They noticed some people jumping from some rocks and decided to head in that

direction. Three people left the boat to jump from the rocks, the claimant, Mr. Anderson, and Molly Anders. Prior to the claimant's accident both Mr. Anderson and Molly Anders had jumped from the rocks. A picture of the site of the accident was introduced into the record and the claimant testified as follows to the circumstances shown in that picture:

Well, at the time that that picture is taken, we were both standing there and I told Charlie, like, "I don't know if I can clear all those rocks," and he indicated, "Well, you just have to get a good pushoff, your last pushoff," and so I said, "Okay. Will you go first?" and he said, "No, you go first, in case something happens." So after Molly landed in the water, then I backed up to where I could jump off and I went back and forth two or three times and then that's whenever I slipped, when I knew that I wasn't going to get a good pushoff the very last jump, and so I tried to stop and it was too late; I was already falling forward.

The claimant also testified to the specific injuries sustained and as to how the accident related to her job activities.

Q. Okay. We're here today concerning an accident that's been stipulated to that you sustained on August 7, 2003. Tell me what happened to you, Tina.

A. We were up on the top of a cliff and I fell from the cliff and had a fracture to my vertebra and was paralyzed from the waist down; broke both my wrists, my left leg, five ribs. And they ended up Care Flighting me to Springfield.

Q. Now, you say you were jumping from a cliff; is that right?

A. I fell from the cliff.

Q. You fell from a cliff. How is it - I mean how was that connected to your employment?

A. What we were doing was every department has an offsite every year or biannually, and the purpose of the retreat is to go in and go over what we did in the past year and look at what we were going to do going forward, how can we make the numbers better, how can we make our department better, how can we make each individual better. That's what we do for the benefit of the offsite. Charlie would present, you know, the whole presentation. We go for two days. One day, the first day, is just to rest and relax and do activities. The second day is the actual presentation. And we went to Gaston's Resort in Missouri and Bull Shoals Lake. That's how we ended up on the cliff. We rented a pontoon boat

and two wave runners by the instruction of Charlie Anderson and ended up going to, you know, just out on the lake. We were then going to go and have a picnic out on the lake, somewhere on an island, but we ended up going to the cliff first.

Both parties agreed to stipulate that on August 7, 2003, the claimant was involved in an accidental fall that caused physical injuries to at least her back, ribs, left foot, left leg, leg [sic] arm and both hands. Further, that these injuries are established by medical evidence and supported by objective findings. Finally, that these injuries required medical services and resulted in disability. The claimant credibly testified that she had consumed one beer approximately one hour before the time of the accident.

The parties are agreed that at the present time only the issue of the claimant's entitlement to the payment of medical expenses for her various stipulated injuries.

Arkansas Code Annotated §11-9-101(b) states, in pertinent part:

[T]he primary purpose of the workers' compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom....

Additionally, under Arkansas law, no presumption arises to the effect that an alleged injury arises out of and in the course of a worker's employment. O.K. Processing, Inc. v. Servoid, 265 Ark. 352, 578 S.W.2d 224 (1970). Furthermore, in interpreting a statute, a court must give effect to the legislature's intent, making use of common sense and giving words their usual and ordinary meaning. Kyle v. State, 312 Ark. 274, 849 S.W.2d 935 (1993).

Arkansas Code Annotated §11-9-102(4)(A)(i) explains that an accidental injury causing internal or external harm that arises out of and in the course of employment is a compensable injury. Conversely, 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). However, the workers' compensation statutes do not define the phrase "in the course of employment" or the term "employment services". Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002). Therefore, when the meaning of a statutory term is ambiguous, the court is to 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).

In 1999, the Supreme Court of Arkansas held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer" White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999). The Court of Appeals for Arkansas emphasized that the test for determining whether an employee

was injured while performing employment services is the same as the test for determining whether an injury occurred out of and in the course of employment. Arkansas Methodist Hospital v. Hampton, ___ Ark. App. ___, ___ S.W.3d ___ (2005). The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." Collins, 69 S.W.3d at 18. Therefore, the critical issue is whether the employer's interests are being advanced either directly or indirectly by the claimant at the time of injury. Id. at 19.

Additionally, whatever "employment services" means must be determined within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions. Matlock v. Arkansas Blue Cross Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001). Therefore, Arkansas courts have found several factors that are instructive when examining the issue to

determine whether conduct falls within the meaning of "employment services," and include:

- (1) Whether the accident occurs at a time, place, or under circumstances that facilitate or advance the employer's interests;
- (2) Whether the accident occurs when the employee is engaged in activity necessarily required in order to perform work;
- (3) Whether the activity engaged in when the accident occurs is an expected part of the employment;
- (4) Whether the activity constitutes an interruption or departure, known by or permitted by the employer, either temporally or spatially, from work activities;
- (5) Whether the employee is compensated during the time that the activity occurs; and
- (6) Whether the employer expects the worker to cease or return from the permitted non-work activity in order to advance some employment objective.

Id. While the Arkansas Supreme Court has declined to adopt these factors formally, the Supreme Court has not held that

these factors are wrong. Collins, 69 S.W.3d at 19. In fact, the Supreme Court quotes language from Matlock that essentially traces the factors in support of the Supreme Court's reasoning in its opinion. Collins, 69 S.W.3d at 19. Therefore, these factors are viable. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002) (Griffen, J., concurring).

In addition, although a specific activity may not be a specific job duty, recreational or social activities are within the course of employment when the employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment. Author Larson, Larson's Workers' Compensation Law, §22-01(2004); see also, 42 Am. Jur. Proof of Facts 2d 481, Workers' Compensation, §1 (2004) (explaining recreational activity maybe so bound up with employment as to create risks incidental to employment, so that resulting injury will be deemed compensable under the workers' compensation act).

Furthermore, Larson explains that if the activity, although not an integral part of the job, is in effect required, it is clear enough that the employer has brought that activity within the employment. Id. at §22-04[2]; see also, 42 Am Jur. Proof of Facts 2d at §4 (explaining that where the employee's attendance or participation is in pursuance of the orders, rules of requirements of the employer, the employee is doing something which the employer has annexed to the employment and made incidental to it). Thus, if an employee is required to go to a company event at which he is hurt, the course of employment continues. Larson's at §22.04[2]. Moreover, the compulsion need not take the form of a direct order, if the employee is made to understand that he is to take part in the affair. Id. Therefore, for purposes of workers' compensation, an employer retains the power to expand the scope of employment by directing the employee to engage in tasks outside of the employee's general job duties; if the activity, although not an integral part of the job, is in effect required, it is clear enough that the employer has brought that activity

within the employment and there is a sufficient nexus between the injury and the employment.

Arkansas cases provide some guidance in determining whether an employee was performing "employment services" at the time of their injury. For example, in Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999), the court explained that an employee was performing "employment services" when the employee slipped and fell while reaching for an apple for personal consumption during her break since the employer required the employee to be available to work during her break and the employee was paid for the time she was on break. Id. Moreover, the employer furnished food for its employees, paid for the break to induce employees to be available and benefitted from the employee being available. Id. Therefore, when an employer requires an employee to be available for work duties, the employee is performing employment services. Id. at 562; see also White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999) (holding that employee was performing employment services, when employee slipped and fell while on his way to

an area adjacent to his work area to have a smoke, since the employer gleaned a benefit from employee remaining near his work station to monitor machines, which was a requirement of his job duties); Wal-Mart Stores, Inc. v. Sands, supra (holding clocked-out-employee was performing employment services at the time of injury since employee was carrying out employer's purpose or advancing employer's interest by complying with employer's loss prevention system by returning to her locker to secure personal items, as required, before returning to cash register).

Additionally, the Court of Appeals applied the Matlock factors in determining that a hospital employee was performing employment services when the employee was injured in a fall at work while going to obtain meals for herself and her ICU co-workers during their shift. Arkansas Methodist Hospital v. Hampton, supra. The court explained that the accident occurred under circumstances that advanced the hospital's interest because it reduced the number of times that the ICU unit was less than fully staffed. Id. Also, the employer-hospital permitted the employee's

activity. Id. Finally the accident occurred at a time when the employee was compensated; therefore, the employer was at all times receiving benefits from the time that the claimant was "on the clock." Id.

Furthermore, the Arkansas Supreme Court traced the Matlock factors when it held that an employee's injury resulting from a fall when the employee left the production line to go to the bathroom was compensable since the restroom break was entirely consistent with the employer's interest in advancing the work. Collins v. Excel Specialty Products, supra. Moreover, by going to the restroom, the employee was engaged in conduct permitted by the employer, if not specifically authorized by the employer; also, the employer provided restroom facilities on its premises. Id. Therefore, the employee's injury directly or indirectly advanced the interests of the employer. Id.

Conversely, in Clardy v. Medi-Homes LTC Services LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001), the court upheld the decision that an employee, who slipped and broke her ankle after deviating to speak to an off-duty co-worker,

was not performing employment services, since there was no evidence concerning the nature of the employee's conversation, how the activity might have in any respect served the employer's interests, or was necessary to the performance of any of employee's duties. See also, Coble v. Modern Business Systems, 62 Ark. App. 26, 966 S.W.2d 938 (1998) (holding employee was not performing "employment services" at time of automobile accident, while returning from attempt to replace pantyhose containing a run because there was no evidence that claimant was expected to replace hosiery during the workday, in the event of a run in her hosiery).

In the case at bar, claimant's injuries are compensable because her accidental injury arose when "employment services" were being performed. Foremost, as in Arkansas Methodist Hospital, the accident occurred at a time, place, and under circumstances that facilitated or advanced respondent-employer's interests. Here, the injury occurred during an activity at respondent-employer's offsite, which was planned and designed to help the members

of the account service department bond and for team building purposes. Analogous to the employee's compliance with the employer's loss prevention system in Wal-Mart Stores, Inc., participation in the respondent-employer's offsite is mandatory to fulfill the purpose of the offsite.

Furthermore, claimant's role as the event coordinator was to plan, execute and attend the offsite and its events so things would go as intended. Therefore, claimant's act of participating in the offsite and its scheduled activities, such as attending the meeting in the morning and jumping off of the cliff, were entirely consistent with advancing respondent-employer's interests in the purpose of the offsite and respondent-employer gleaned a benefit from the claimant's participation since the claimant's participation fulfilled her role as event coordinator, it encouraged the account service members to participate, bond, build and benefit from the activities and it was encouraged by the claimant's supervisor.

Secondly, the claimant's accident occurred when she was engaged in activity necessarily required in order to

perform work. As mentioned previously, the claimant's position of executive coordinator for the vice president of account service included the claimant providing general support for the entire account service department and to serve the role as event coordinator for any events that her supervisor, Mr. Anderson, was responsible. Thus, the claimant's duty as event coordinator for the offsite required the claimant to be at all activities of the offsite, and her participation was required since she was the contact person and she had scheduled the events of the offsite. Therefore, because the claimant's participation in the activities of the offsite was required by her position and role, the claimant's participation was expected and, in other words, required in order for the claimant to do her job.

Another reason why the claimant's accidental fall falls within the meaning of "employment services" is that the claimant's participation in the events of the offsite, including riding to Gaston's and jumping off of the cliff, was a predictable part of her employment. As the event

coordinator and contact person, the claimant was required and expected to be at all activities because she organized them and she was to make sure the activities went as planned. Additionally, it is predictable that the claimant would attempt to jump off of the cliff and into the water after the claimant's supervisor encouraged her to do so. Therefore, as in Collins, when the employee went to the restroom, the claimant was engaged in conduct permitted, authorized, and actually encouraged by her supervisor when the claimant suffered her injury from accidentally falling off of the cliff.

Next, the claimant's participation in the events of the offsite, and the activity resulting in her injury, do not constitute an interruption or departure from her work activities, since part of the claimant's job is to plan and participate in the offsite. However, if the activity were to constitute said departure, the departure and activity, as previously explained, was known and permitted by the respondent since the claimant's supervisor suggested the activity of jumping off the cliff at the offsite and he

listed it as an activity in the "Necessary for Account Managers Offsite" document that the supervisor prepared. Also, the claimant's supervisor, in fact, encouraged the claimant to jump before he jumped again. Furthermore, if jumping off of the cliff were to be categorized as a non-work activity, the respondent, would have expected the claimant to cease and return from the activity in order to advance the employment objective of carrying out her role as event coordinator for the offsite since her attendance was mandatory, she was the contact person and the claimant was responsible for her supervisor's schedule of activities to go smoothly.

An additional basis of reasoning why the claimant's injuries occurred while the claimant was engaged in "employment services," is the fact that the claimant was compensated by the respondent during the time that the activity and the injury occurred. The respondent's offsite was conducted on regular working days and the claimant was compensated. Therefore, as in Ray and Arkansas Methodist Hospital, the claimant's accident occurred at a time when

the claimant was "on the clock" and the respondent was receiving benefits. Furthermore, as in Ray, the respondent financed, furnished and prepared everything for the offsite so to induce and facilitate the claimant's duties of planning and conducting the offsite.

Therefore, unlike in the Clardy case in which an employee did not have sufficient evidence to prove that an injury arose while the employee was engaged in "employment services," here, the claimant has presented substantial evidence that she was performing employment services when she suffered an accidental injury arising out of and in the course of employment. The claimant's conduct was entirely consistent with her position as event coordinator, with the activities of the offsite. And with the respondent's interest in supporting the account service managers and the claimant's supervisor in building the team to improve in the future and to bond so that the respondent's future profits would improve. Furthermore, the claimant was compensated by the respondent during the time of the accident and was

engaged in conduct not only permitted by the respondent, but also initiated and encouraged by the claimant's supervisor.

Finally, just as the Supreme Court of New Jersey explained last year, the omission of any reference in the workers' compensation act to employer-compelled activities suggests that the legislature did not intend to exclude required activities from workers' compensation coverage as a matter of law, and thus, recreational activities that were compelled by the employer fall within coverage of the act. Lozano v. Frank DeLuca Constr., 178 N.J. 513 , 842 A.2d 156 (2004). Similarly, with Act 796 of 1993, the Arkansas legislature did not incorporate a provision excluding recreational activities that were compelled by the employer from being a compensable injury. Therefore, the omission of any such reference in the workers' compensation act suggests that the Arkansas legislature did not intend to exclude employer-required recreational activities from the act's coverage. In other words, if the Arkansas legislature had wanted to restrict coverage for and address employer-compelled activities, such as the respondent's offsite and

the activities it encompassed, the legislature would have done so in no uncertain terms.

The claimant's injuries are compensable since the claimant's injuries occurred within the time and space boundaries of her employment, that is, when the claimant was carrying out the respondent's purpose or advancing the respondent's interest, either directly or indirectly, by fulfilling her role and duties of event coordinator. Moreover, the claimant's accident occurred when the claimant was engaged in an activity, fulfilling the duties of event coordinator, which were required in order for the claimant to perform her work for the respondent. Additionally, the activity that the claimant was engaged in at the offsite when the accident occurred, attempting to jump off of the cliff, was an expected part of her employment since the claimant was expected to participate and attend all offsite activities and the claimant was being compensated by the respondent at the time of the accident.

Furthermore, through the claimant's supervisor, the respondent retained the power to expand the scope of

employment by directing the claimant to engage in tasks allegedly outside of the claimant's general job duties. However, these activities, which included organizing and participating in the activities of the respondent's offsite, were in effect required of the claimant by the respondent and thus, the respondent brought the offsite itself and its activities, including jumping off of a cliff into a lake, within the claimant's employment. Thus, there is a sufficient nexus between the claimant's injury and accidental fall and the claimant's employment with the respondent. Therefore, the claimant was performing "employment services" when she accidentally fell off of a cliff and suffered injuries.

For the foregoing reasons, I must respectfully dissent from the Majority opinion. It is my opinion that the claimant has met her burden of proving by a greater weight of the evidence that the injuries she sustained from the August 7, 2003 accidental fall would constitute "compensable injuries" with the meaning of the Act. I further find that

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the claimant's claim is not barred by Ark. Code Ann. §11-9-102(4)(B)(ii).

SHELBY W. TURNER, Commissioner