

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005923

LAVERNE IRWIN,
DECEASED EMPLOYEE

CLAIMANT

AREA AGENCY ON AGING,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 24, 2005

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

Claimant represented by the HONORABLE SCOTT ADAMS, Attorney
at Law, Morrilton, Arkansas.

Respondents represented by the HONORABLE BETTY DEMORY,
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed April 2, 2004. The administrative law judge
found, among other things, that the statute of limitations
barred the claim. After reviewing the entire record *de*
novo, the Full Commission affirms the opinion of the
administrative law judge. The Full Commission finds that
the claim is barred pursuant to Ark. Code Ann. §11-9-
702(a)(1). We also find that the claimant was not

performing employment services at the time of her alleged compensable injury.

I. HISTORY

The parties stipulated that an employee-employer relationship existed in January 2000.

Laverne Irwin testified that she was employed as a home aide with Area Agency on Aging. Ms. Irwin testified that she was injured on January 24, 2000. The claimant testified that she was injured as the result of a motor vehicle accident, which she said occurred while driving to Piggly Wiggly to purchase snuff for Zeptha Taylor, a client. The claimant testified that she drove to the store after the accident, purchased the snuff, and brought it back to Zeptha Taylor the same day. Ms. Taylor agreed that she "sent her to town to get me some snuff," but that the claimant "didn't get back that day."

A physician noted on January 31, 2000 that the claimant complained of back and left hip pain following the motor vehicle accident. Dr. Reginald J. Rutherford reported on March 31, 2000, "Ms. Irwin complains of musculoskeletal pattern pain involving her neck and low back in the aftermath of recent motor vehicle accident. There is no

evidence on clinical examination to suggest serious injury." After reviewing MRI studies, Dr. Rutherford noted on April 14, 2000, "There is no evidence of frank disc herniation, spinal cord compression or lumbar nerve root compression. There is nothing in the present study which would warrant surgical consideration."

The claimant signed a Form AR-C, Claim For Compensation, on May 26, 2000. The reported Date of Accident was January 24, 2000, and the following cause of injury was written in the Accident Information section: "Mrs. Irwin was driving from one client's home to another's when a car ran a stop sign & broadsided a vehicle. She injured her back and hips." The respondents controverted the claim and have paid no benefits.

Dr. Thomas S. Roberts reported on August 2, 2000, "She apparently had a fracture of her proximal fibula on the right and had x-rays taken about six weeks ago and this was identified....X-rays, AP and lateral of her right knee show early degenerative arthritis of the right knee, especially the medial compartment with a healing proximal fibula fracture and osteopenia."

Harold Roger Irwin, II, the claimant's husband, testified that the claimant passed away on or about May 5, 2002. Mr. Irwin testified that he understood the cause of the claimant's death to be congestive heart failure.

A pre-hearing order was filed on November 13, 2003. The claimant contended that she sustained "a disabling injury in an automobile accident in January, 2000, which was the proximate cause of total disability until the date of her death on June 5, 2002."

The respondents contended that the statute of limitations barred the claim. The respondents contended that "On May 26, 2000, the claimant completed the Form AR-C indicating a date of injury of January 24, 2000. The Form C was filed with the Arkansas Workers' Compensation Commission by cover letter dated June 5, 2000. Compensability of the claim was denied in its entirety by the respondents. The respondents deposed the claimant on June 5, 2001 and there was no further activity on the file. Therefore, an Order of Dismissal was entered on April 30, 2002. There was again no further activity on the file until respondents received a letter dated May 5, 2003 notifying respondents that a Prehearing Questionnaire was due on May 27, 2003 from the

claimant and June 3, 2003 from the respondents. The case was returned to general files on June 11, 2003 after claimant failed to file responses to Prehearing Questionnaire. Again, there was no further activity on the file until respondents filed a Second Motion to Dismiss dated August 13, 2003. Thereafter, the claimant's attorney filed responses to Prehearing Questionnaire and the Second Motion to Dismiss was denied. The respondents assert that the claimant's claim for workers' compensation benefits is barred as it was filed more than two years from the date of injury." The respondents also contended that if the statute of limitations did not bar the claim, then the claimant did not sustain a compensable injury. The respondents contended that the claimant was not performing employment services, and that the claimant did not establish a compensable injury by medical evidence supported by objective findings.

The parties agreed to litigate the following issues:

- (1) Compensability and whether the statute of limitations barred the claim; and
- (2) Attorney's fees.

Hearing before the Commission was held on January 21, 2004. Misti Thompson, an adjuster for the respondent-

carrier, testified that she recorded a statement from the claimant in July 2000. Ms. Thompson testified that, with regard to the January 24, 2000 accident, "Ms. Irwin indicated to me that she had left one client's home and was going straight to the next client's home, scheduled to be there at 10:15."

Deanna Taber Massingill testified that she had been previously employed with Area Agency on Aging as a provider coordinator, and that she had been the claimant's supervisor. Ms. Massingill testified that the claimant "was scheduled on certain days to go into clients' homes and she did housekeeping, laundry, shopping, just whatever she was scheduled to do." Ms. Massingill testified with regard to Respondents' Exhibit 3, which contained copies of "Aide Time Sheets":

Q. What - what activities she did. Was there a specific day that she was scheduled to do shopping for clients?

A. For Ms. Taylor, she was scheduled on Thursdays to do shopping.

Q. Okay. Was this something that was a requirement for the agency that you have a certain day set aside for shopping for clients, for each different client?

A. Well, they were allowed so many hours per day to go into the home and - like on one day, maybe they had an extra hour and they would - we would go shopping on that day. And it was based on what the clients wanted, if they wanted shopping on that day. And Ms. Taylor's shopping day was Thursday.

Q. Okay. What about if Ms. Irwin were to shop on a different day? Was that authorized or approved or -

A. If - if there was any day that they were going to deviate off their schedule, they were to call the office and let us know so we would know where they were at. And we received no phone call from Ms. Irwin on Monday that she was leaving to do shopping.

Q. Okay. It looks like then Ms. Taylor completed one of these daily activities for - I'm sorry. Ms. Irwin completed one of these daily activities for Ms. Taylor for the week of January 17th through the 21st, and then again January 24th through the 27th?

A. Yes, ma'am.

Q. Okay. What activities did she indicate that she did for Ms. Taylor on January 24th of 2000?

A. She did grooming, bathing, dressing, meal prep, and housework....

Q. Does page 12 of Respondent's Exhibit No. 3 also indicate what day that she did shopping for Ms. Taylor during the week of January 24, 2000 through January 27, 2000?

A. Yes, ma'am. She was supposed to do shopping on Thursday, January 27th.

Q. And did - is that the day that she indicated on the form that she did shopping?

A. Yes, ma'am.

Q. Okay. Going back to January 24th of 2000, what time period was she at Ms. Taylor's home?

A. From 8:00 to 10:00.

Q. Flipping on over to page 18, are these the daily notes for Ms. Hervey, another client that Ms. Irwin would see during January of 2000?

A. For January 25th? I'm sorry.

Q. Yes.

A. Yes, ma'am.

Q. Okay. What time would she go to Ms. Hervey's home?

A. She was scheduled from 10:15 to 12:15 on Tuesdays and Wednesdays....

Q. Looking then over to page 26 of Respondents' Exhibit No. 3, did she go to Ms. Bentley's home on January 24, 2000?

A. Yes, ma'am.

Q. What time did she arrive there?

A. She was scheduled to be there at 12:15 to 3:45.

Q. Okay. Did she indicate on that date that she did any shopping for Ms. Bentley?

A. No, ma'am.

The administrative law judge found, among other things, that "the claim filed in June of 2000 became time barred under the provisions of Ark. Code Ann. §11-9-702(a)(1) when the claimant received no disability compensation or medical benefits from the respondents during the two year period following the claim filing in June 2000." The administrative law judge found that "Because this claim is barred by the applicable statute of limitations, the compensability and attorney's fee issues are moot." The administrative law judge denied and dismissed the claim, and the claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4)(A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

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. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

Conversely, an employee is generally said not to be acting within the course of employment when she is traveling to and from the workplace. This "going and coming" rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from her place of employment. Lepard v. West Memphis Mach. & Welding, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

There are exceptions to the going and coming rule. One recognized exception is where the journey itself is part of the service. An additional factor determinative of whether an employee's travel is within the course of employment is whether the employee is required to furnish her own conveyance. Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). If the claimant is required by the very nature of her job to submit to the hazards of day-to-day travel in her own vehicle, back and forth to the homes of patients, an employee may be acting

within the course of her employment at the time of an accidental injury. Pettey, *supra*.

Finally, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

In the present matter, the Full Commission finds that the claimant was not performing employment services at the time of the January 24, 2000 motor vehicle accident. The claimant testified that she was in an accident while driving to Piggly Wiggly to purchase snuff for Zeptha Taylor. Buying store products would sometimes be considered part of the claimant's work for her home health clients in the present case. Nevertheless, the prevailing weight of evidence demonstrates that the claimant was not performing employment services at the time of the January 24, 2000 motor vehicle accident. The Commission notes the credible testimony of Misti Thompson for the respondents, who stated, "Ms. Irwin indicated to me that she had left one client's home and was going straight to the next client's home, scheduled to be there at 10:15." If the claimant was in

fact going to another client's home at the time of the accident, that circumstance might indicate that the claimant was performing employment services. The claimant testified, however, that she was not going to another client's home, but was going to the store for Zeptha Taylor. The claimant had written on her Form AR-C, "Mrs. Irwin was driving from one client's home to another's when a car ran a stop sign & broadsided a vehicle." This contention differs from the claimant's testimony that she was injured while driving to the store.

The Full Commission also notes the credible testimony of Deanna Massingill for the respondents. Ms. Massingill testified that the claimant was not scheduled to be traveling to the store on Monday, January 24, 2000. Corroborating time sheets showed that the claimant was not to drive to the store until the following Thursday, January 27th. Nor do these sheets show that the claimant was scheduled to be at another client's home immediately after leaving Zephtha Taylor's home. We also note the credible testimony of Diane Bennett, who stated that the respondents did not learn of an alleged work-related accident until the following March. At that time, the claimant's husband

attempted to report a work-related injury. We also note that the claimant initially filed a claim with her husband's private insurance carrier, not the workers' compensation carrier. Based on the preponderance of evidence before us, the Full Commission finds the claimant was not performing employment services at the time of the January 24, 2000 motor vehicle accident. The record demonstrates that the claimant was not on her way to the store for a client at the time of the accident, nor was the claimant driving to another client's home. The claimant did not prove by a preponderance of the evidence that she sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4).

B. Statute of limitations

Ark. Code Ann. §11-9-702 provides: (a) TIME FOR FILING.

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

In the present matter, the administrative law judge found in pertinent part, "the claim filed in June of 2000

became time barred under the provisions of Ark. Code Ann. §11-9-702(a)(1) when the claimant received no disability compensation or medical benefits from the respondents during the two year period following the claim filing in June 2000." The Full Commission affirms this finding. The claimant contended she sustained an accidental injury on January 24, 2000. On several dates from January 31, 2000 through April 14, 2000, the claimant treated with Dr. Roberts and Dr. Rutherford for neck, back and hip pain following the motor vehicle accident. The claimant signed a Form AR-C, Claim For Compensation, on May 26, 2000. The respondents controverted the claim in its entirety and contend that the Form AR-C was filed on June 5, 2000. The claimant does not contend that she filed the Form AR-C on another date.

The Full Commission notes the relevant language of Ark. Code Ann. §11-9-702(a)(1), "If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter." The present claimant received no weekly benefit compensation following her claim filing on

June 5, 2000. If the claimant had received medical treatment resulting from the alleged injury within two years of filing the claim, the claim would not be barred pursuant to Ark. Code Ann. §11-9-702(a)(1). See, Booker v. Rose Care, Inc., Workers' Compensation Commission E115581 (May 17, 1996); Brand v. Wayne Poultry, Workers' Compensation Commission D916770 (June 22, 1994). However, the Full Commission finds that the treatment sought by the claimant after June 5, 2000 did not result from her alleged injury. The Full Commission specifically finds that the treatment rendered to the claimant from Dr. Roberts beginning August 2, 2000 and following did not result from the alleged injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant was not performing employment services at the time of the January 24, 2000 motor vehicle accident. The Full Commission therefore finds that the claimant did not prove she sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4). The Full Commission also finds that the claim is barred pursuant to Ark. Code Ann. §11-9-702(a)(1). We therefore affirm the

finding of the administrative law judge, and this claim is denied and dismissed.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.