

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304985

NIMISHA JIVAN (DEC'D),
EMPLOYEE

CLAIMANT

ECONOMY INN & SUITES,
EMPLOYER

RESPONDENT

CYPRESS INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 27, 2005

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

Claimant represented by the HONORABLE GREG GILES,
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE MICHAEL RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed August 1, 2005. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this claim.
2. The stipulations agreed to by the
parties are reasonable and are hereby
accepted as fact.
3. The claimant's estate has proven by

a preponderance of the evidence that the claimant was engaged in employment services at the time of her fatal injury, and that her injury arose out of and in the course of her employment.

4. The claimant's estate has proven by a preponderance of the evidence that the claimant sustained an injury caused by a specific incident identifiable by time and place of occurrence; that the existence and extent of her injury is established by medical evidence supported by objective findings; and that her injury caused internal or external physical harm to the body resulting in her death.

5. The claimant's estate has therefore proven by a preponderance of the evidence that the claimant sustained a compensable injury.

6. The claimant's estate has proven by a preponderance of the evidence that her surviving family members, Jack, Tejash, and Kushbu Jivan, were wholly and actually dependent upon the claimant at the time of her fatal injury.

7. The claimant's estate has therefore proven by a preponderance of the evidence that Jack Jivan, as widower, and the two minor children Tejash and Kushbu, are entitled to death benefits per Ark. Code Ann. § 11-9-527.

8. The respondents have controverted this claim in its entirety.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 1, 2005, decision 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 on appeal.

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 must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that the claimant sustained an injury in the course and scope of her employment. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant was employed as an assistant manager for the respondent employer. Her husband was employed by the respondent employer as the hotel manager. The claimant and her husband were provided a room in the hotel in which to live. On February 17,

2003, a fire broke out in the claimant's room at the hotel causing the claimant's death. The claimant was off duty and in the bathroom of her hotel room provided by the respondent employer changing her clothes to go to a gym to exercise when the fire occurred. The claimant was unable to escape the fire and died as a result of smoke inhalation.

The widower and children are claiming that the fatal accident occurred while the claimant was performing employment services and while she was in the course and scope of her employment. The respondents denied the claim contending that the claimant was not performing employment services and was not in the course and scope of employment at the time of the fatal injuries. I must agree with the respondents that the claimant was not performing employment services at the time of her fatal injuries.

Arkansas Code Ann. § 11-9-102(4) (B) (iii) (Repl. 2002) 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.

Whether the claimant is performing employment services depends on the particular facts and circumstances of each case. The following factors are to be considered in determining whether the claimant's conduct falls within the meaning of "employment services":

(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 unexpected 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 stop or return from permitted non-work activity in order to advance some employment objective.

Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). See; Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Olsten Kimberly Quality Care v. Pettey, 328 Ark.

381, 944 S.W.2d 524 (1997); Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); White v. Georgia-Pacific Corporation, 66 Ark. App. 337, 989 S.W.2d 942 (1999); Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998); Beaver v. Benton County, 66 Ark. App. 153, 991 S.W.2d 618 (1999); Hightower v. Newark Public School System, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

A review of the facts of this case demonstrates that the claimant was off duty at the time of the fire. Both parties stipulated to that fact. The claimant was in the bathroom changing clothes to go work out at the gym. Although the claimant was on-call, she was not on-call when she was off duty and changing clothes. The parties stipulated that the claimant was on-call at all times. However, at the time of the fatal fire, the claimant's husband was in the room and could have handled anything that happened at the front desk. The claimant's husband was available for that purpose. Significantly, she was not dressed appropriately to handle calls at the front desk and was in the process of changing her clothes in the bathroom so she could leave the premises.

Although the claimant and her husband were provided a room to live in on the premises of the respondent employer, I cannot find that employment services encompasses anytime that the claimant was in that room. Specifically, the claimant, like any other person, who was at home, would not be allowed to recover for an incident that happened in their home even if they were on-call at any give time for their specific job. This case is very similar to the case of Kinebrew v. Little John's Truck, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999). In the Kinebrew case, a truck driver was at a rest stop for an eight-hour rest. The claimant was taking a shower while he was off duty when he slipped and fell. The Court held that the claimant was not performing employment services while taking a shower while he was off duty. In the case presently before us, the deceased employee was off duty. Therefore, she was not performing employment services.

This case is also similar to the case of Cook v. ABF Freight Systems, _____ Ark. App. _____, _____ S.W.3d _____ (2004). In the Cook case, the claimant was a truck driver that was taking a required rest break in a motel room in Dallas, Texas. When the claimant got up the next morning, he went into the bathroom and reached

for the light switch. The claimant stepped in a puddle of water at the same time and suffered an electrical shock. Although the truck driver was not on the clock during his rest break, he was not being paid, but he was on-call at the motel. The Court held that the claimant was not entitled to compensation because there was no evidence that his entrance into the bathroom was for any other reason than to attend to his own personal needs. The Court also stated that there was no suggestion in the record that the use of the bathroom was in any respect different from the normal routine of the claimant whether he was on the road or not.

In the present case, the claimant was performing a routine activity that was taking place in her home. Her home just happened to be a room in the hotel. The claimant was in the bathroom to change clothes and not for any other reason than to leave the premises to go exercise. She was not in the bathroom changing to go help a guest or to attend to motel business. The claimant was not doing anything at the time of the fatal fire that had anything to do with her employment.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's

opinion finding that the claimant was performing
employment services at the time of her death.
Accordingly, I dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner