

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200737

IRENE C. TIDWELL CLAIMANT

SOUTHWEST ARKANSAS
DEVELOPMENT COUNCIL, EMPLOYER RESPONDENT

SELF-INSURED
INSURANCE CARRIER RESPONDENT

OPINION FILED SEPTEMBER 13, 2005

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

Claimant represented by the HONORABLE SCOTT A. SCHOLL,
Attorney at Law, Jacksonville, Arkansas.

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

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

This matter is before us because of an appeal by the claimant of an adverse decision of an Administrative Law Judge. Our de novo review of the record and application of the relevant decisions of the Arkansas Supreme Court and Court of Appeals convinces us that the claimant has met her burden of establishing a compensable injury and the Administrative Law Judge's decision is hereby reversed.

There is no material dispute as to the facts of this case. On the date of her injury, the claimant was

employed by the respondent to provide in-home nursing services to individuals with difficulties caring for themselves. On January 9, 2004, the claimant had provided services to one of the respondent's clients and was in transit to another location to perform similar duties. While traveling, the claimant pulled into a convenience store and bought a soft drink. While she was attempting to return to the highway and continue her journey, she was struck by a truck.

The respondent controverted this claim contending that the claimant was not performing an employment service at the time of her injury. Their position is that the claimant deviated from her job duties and had not yet returned to her employment at the time of her accident.

The claimant contends that, in stopping for a soft drink, she did not deviate from her job duties in that satisfying her thirst by purchasing a soft drink was no different than taking care of other personal needs in a fixed workplace setting. Further, the claimant also notes that the injury occurred while she was returning to the roadway and any deviation she might have made to obtain a soft drink had ended by the time of her accident.

Both sides have cited case which they contend support their position. The respondent relies primarily upon **McKinney v. Trane Company**, 84 Ark. App. 424, 143 S.W. 3d 581 (2004). In that case, the claimant was on a break when he returned to the break room to retrieve a soda from a table. The claimant leaped over some metal tubing and injured himself in his landing. In finding that the claim was not compensable, the Court of Appeals held that the claimant was not involved in any activity generally required by his employer and was doing nothing to carry out his employer's purpose.

Another case relied upon by the respondent is **Smith v. City of Fort Smith**, 84 Ark. App. 430, 143 S.W. 3d 593 (2004). In **Smith**, the claimant was loading gravel from a refuse pile into his personal vehicle. His employer was permitting him to remove the gravel from their premises for his own personal use. While attempting to remove a concrete block which was in the back of his truck, the claimant fell and was injured. In considering the merits of this case, the Court noted that while the employer might have benefitted indirectly from the claimant removing the material, there was no doubt that the removal was for the claimant's own benefit and was not

inherently necessary to his job. On that basis, the Commission's denial of the claim was affirmed.

In addition to those cases, the Administrative Law Judge cited **Clardy v. Medi-Homes, LPC Services, LLC**, 75 Ark. App. 156, 55 S.W. 3d 791 (2001). In that case, the claimant was found to be deviating from her employment when she was attempting to walk approximately 10 feet across a paved driveway to speak to an off-duty coworker. While walking, she slipped and fell and injured herself. In affirming the Commission's denial of benefits, the Court held that while her deviation was a minor one, it nonetheless was a deviation from her employment services and she was not entitled to benefits for the injury.

In considering the facts of each of the above cited cases, we note that they all involve conduct substantially different than that engaged in by the claimant in the present case. In **McKinney**, the claimant was actually on a break and was injured while attempting to retrieve a can of soda. In **Smith**, the injury occurred while the claimant was loading gravel in his personal vehicle for his own use. In **Clardy**, the claimant was injured while she was approaching an acquaintance to carry on a personal conversation. In each of those cases, the

claimants were clearly engaging in activities outside the scope of their respective employment and were not doing anything which furthered their employer's interest.

The claimant also cites some cases supporting her contention. In **Olsten Kimberly Quality Care v. Petty**, 328 Ark. 381, 944 S.W. 2d 524 (1997), the claimant was employed in a job very similar to this claimant. In the **Olsten** case, the claimant was traveling from the respondent's office to one of the respondent's clients to provide in-home nursing service. The claimant had admittedly done some window shopping at a mall and had spoken with a friend before leaving for the client's home. Prior to reaching the home, the claimant was injured in an automobile accident. The Arkansas Supreme Court held that the claimant was entitled to benefits in this case since she was carrying out the employer's purpose in traveling to the client's home. The Court noted that whatever deviation the claimant might have been engaged in prior to traveling had ended when the claimant left the mall and began proceeding toward the client's home.

The claimant also cites **Matlock v. Blue Cross and Blue Shield**, 74 Ark. App. 322, 49 S.W. 3d 126 (2001). In that case, the claimant had left her work station to

visit the restroom. While returning to work, she tripped, fell, and was injured. The respondent had controverted that case arguing that the claimant was not performing an employment service at the time of her injury. In analyzing the issues, the Court of Appeals set out a number of criteria to be used in determining when an employee was engaging in an employment service. Based upon their analysis, the Court concluded that restroom breaks were a necessary part of the job function and, accordingly, the claimant was engaged in employment services at the time of her injury and the Court reversed the Commission and found the claim to be compensable.

The Supreme Court revisited the employment services issue in **Collins v. Excel Specialty Products**, 347 Ark. 811, 69 S.W. 3d 14 (2002). That case also dealt with a claimant who was injured while on a restroom break. While the Supreme Court declined to follow the reasoning set out by the Court of Appeals in **Matlock**, it reached the same result. In **Collins**, the Supreme Court held that restroom breaks were a necessary function which directly or indirectly advanced the interest of an employer and that consequently, the injury was not excluded from the definition of a compensable injury. In further explaining

the decision, the Court held that the test for determining whether an employee was performing an employment service was the same test for determining whether the claimant was acting in the course of their employment. That is, the test is whether the injury occurred within the time and space boundaries of the employment when an employee was carrying out the employers purpose or advancing the employer's interest directly or indirectly. The Court also noted that in making use of the restroom facilities, the claimant was "engaged in conduct permitted by the employer, if not specifically authorized by the employer if the employer provided restroom facilities on its premises."

Two other cases from the Court of Appeals are particularly relevant to the present claim. The first of these cases is *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W. 3d 93 (2002). In that case, the claimant was a cashier at a Wal-Mart Store. The claimant, when she went on break, secured her cash drawer and went to her locker to retrieve certain personal items to use during her break. On the way back to her locker after her break, she was struck by a cart and injured. The respondent in that case contended that the claimant was still on her

break and was therefore not performing an employment service and was not entitled to benefits. In affirming the Commission, the Court of Appeals noted that even though the claimant was still clocked out at the time of her injury, she was preparing to return to work from a break. The Court also concluded that the claimant was performing a required act in returning her personal items to a locker and that returning to work clearly benefitted her employer. The Court then held that the Commission was not in error in finding the claimant in this case was performing an employment service.

The case which we find to be most in point with the present claim, and which could be said to be controlling, is **Wallace v. West Fraizer South**, ___ Ark. App. ___, ___ S.W. 3d ___ (February 16, 2005). In this case, the claimant was a forklift driver who had been on a break. In returning to his forklift, he walked across a wooden plank which had been put in place to avoid some muddy ground. While walking across the plank, the claimant slipped and fell, injuring himself. The Commission denied the claim holding that the claimant had not yet returned from his break and therefore was not performing an employment service at the time of his

injury. After considering the Collins and Sands, the Court concluded that, in returning to his job, the claimant was "coming off break" and was therefore advancing his employer's interest in returning to work. On that basis, the Court held that the return to work was an employment service and that injuries sustained while doing so were compensable. Accordingly, the Commission's decision was reversed and the claim was remanded for an award of benefits.

We find the holding of the Supreme Court in Collins, as applied by the Court of Appeals in Sands and Wallace require us to find the present claim compensable. The claimant's act in stopping for a soft drink was something permitted by her employer and one that did not detract or conflict with her purpose of traveling to the employer's client to perform employment services. As noted by the Supreme Court in Collins, an act which the employer contemplates and permits is part of an employee's employment services. Further, even if it were true that obtaining the soft drink was a deviation from the claimant's employment so as to remove her from the realm of employment service, under the holding of Wallace, the claimant had returned to her employment duties in

attempting to pull back onto the roadway. At that point her break had ended and she was once again attempting to carry out the employer's purpose in traveling to provide services to their client.

The holdings of the Arkansas Supreme Court and the Arkansas Court of Appeals compels us to find that the claimant was engaged in employment services at the time of her injury. The criteria set out by those appellate courts clearly bring the claimant's conduct into the realm of employment service and their holdings are binding upon this Commission. The Administrative Law Judge's decision must be reversed

All accrued benefits shall be paid in a lump sum without discount and 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**. The claimant's attorney is also awarded the maximum attorney's fee as provided by **Ark. Code Ann. §11-9-715**. Further, for prevailing upon this appeal, the claimant's attorney is hereby awarded an additional fee in the amount of \$500.00 also in accordance with that statute. The respondent is directed to pay all benefits in accordance with the findings of fact set forth herein.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant was performing employment services at the time of her injury. 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 affirm the decision of the Administrative Law Judge.

The majority has found that the claimant was performing employment services when she was involved in an automobile accident after she had deviated from her route to get a soda pop. The majority has very succinctly stated the cases that both the respondents and claimant relied on in their arguments before the Commission. The majority has interpreted the holdings of these case to find that the claimant was engaged in employment services at the time of her injury. However, my interpretation of these cases does

not compel me to find that the claimant was engaged in employment services at the time of her injury. Further, the case cited by the majority as being the most on point with the present claim is Wallace v. West Fraizer South, ___ Ark. App. ___, ___ S.W.3d. ___ (February 16, 2005). In that case a fork lift driver had been on a break and was walking across a wooden plank returning to his fork lift when he was injured. I would note that this case is presently on review before the Supreme Court. Until the Supreme Court has made a ruling, the decision relied upon by the majority is not a final binding decision. I would also note that the Court of Appeals concluded that the claimant was returning to his job and was coming off break and this was advancing the claimant's employer's interest by him returning to work. In Collins, Sands, as well as, in Wallace the injuries happened while the respective claimants were on the employer's premises. The claimant in the case presently before the Commission was not on the respondent employer's premises at the time of her injuries. Moreover, I note that the claimant in the present case had not yet returned to the highway, but was injured as she was pulling out of the store parking lot. Clearly the sole purpose of being in the store parking lot

was personal in nature and did not amount to employment services.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion finding that the claimant was performing employment services at the time she sustained her injuries.

KAREN H. McKINNEY, Commissioner