

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400107

SARA L. SYNNOTT, EMPLOYEE	CLAIMANT
FOX RIDGE ESTATES, EMPLOYER	RESPONDENT
WESTPORT INSURANCE CORPORATION, CARRIER	RESPONDENT

OPINION FILED JUNE 2, 2006

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

Claimant represented by HONORABLE RAY BAXTER, Attorney at Law, Benton, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

This case comes before the Commission on Remand from the Arkansas Court of Appeals. In its opinion delivered April 5, 2006, the Court of Appeals specifically stated:

While the Commission recited Ms. Synnott's testimony that the lot was full and entrance was impossible, the Commission neither credited nor discredited this assertion. Instead, it simply found that her decision to pass the cleaners' and proceed to Fred's to get a Coke was a deviation from her employment services. The issue of whether the lot was accessible is critical to this case, because if it was

blocked Ms. Synnott could not reasonably be expected to remain stopped on the highway, and the subsequent accident was within her employment services. Under such circumstances, she was advancing her employer's interests by attempting to drive to a nearby location and wait a few minutes so she might be able to enter the cleaners' lot and perform her job. To the extent that her decision to get a Coke might constitute a deviation for personal reasons, she never made it to Fred's so she would not have yet deviated from her employment services when the accident occurred.

In carrying out its duty to find the facts, the Commission is required to make findings of fact, and those findings must contain all the specific facts relevant to the contested issue or issues so that the reviewing court may determine whether the Commission has resolved these issues in conformity with the law. While we defer to the Commission's findings on what testimony it deems to be credible, the Commission in this case failed to specifically make a finding as to the credibility of a pivotal portion of Ms. Synnott's testimony. Therefore, we must reverse and remand for additional findings of fact.

Many relevant facts of this case are not in dispute. On August 21, 2003, the claimant was involved in a motor vehicle accident at the intersection of Highway 5 and

Springhill. The evidence reveals that on August 21, 2003, the claimant had made arrangement to pick up the dry cleaning for one of the nursing home residents. However, the issue regarding the claimant's activities at the time of her injury are disputed. According to the claimant when she arrived at the entrance to the cleaners' parking lot, it was full and there was no place to park. In this regard, the claimant testified:

But, like I said, there was traffic - - there was a publishing company that was next door to the Walker's Cleaners, and the parking lot, I don't think they were supposed to, but they would use it for the parking. So there was only like three or four parking spaces there at the Walker Cleaners. And that day, I mean, everything - - and there was people even backed up, and there was a lot of traffic behind me, so I thought, Ooh, I can't get in there, and I can't just sit here and wait for this, because the roads were wet, somebody is going to end up slamming into me, so I am going to go on. I said, Well, I will just drive down. And I thought, Well, I will drive down to Fred's. I will get me a Coke, circle around the parking lot, go back and pickup my dry cleaning. That will give the parking lot a little time to clear out. And maybe it will quit raining. And that is when I had the wreck.

Contrary to the claimant's testimony, Ms. Frankie Herring, an employee of Walker's Cleaners testified that the parking lot is "a pretty good size parking lot." When specifically asked if the parking lot was ever impossible to get in, Ms. Herring testified, "Not impossible to get in." On redirect examination, Ms. Herring admitted that the spaces immediately in front of the cleaners might be full, but the parking lot itself was never impossible to enter.

In addition, the evidence reflects that there were at least two entrances into the parking lot off of Highway 5.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co.,

14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the present case, we find the testimony of Ms. Herring to be more credible than that of the claimant. Ms. Herring is clearly a disinterested witness with nothing to gain or lose by her testimony. On the other hand, the claimant's entitlement to benefits rest solely upon her credibility. Ms. Herring credibly testified that while the parking spaces immediately in front of the cleaners might be full, the parking lot for the complex of store was a "pretty good size" and it was never impossible to get into the parking lot. We do not find credible the claimant's testimony that she was unable to enter the parking lot in front of Walker's Cleaners. Even assuming the claimant's testimony to be true that the cars were backed up, a finding we specifically do not make, the claimant did not make clear that the backed up cars were in the parking lot, and not just backed up on Highway 5. Moreover, the claimant never adequately explained why she was unable to pull into the second entrance of the parking lot. Accordingly, when we

consider all the evidence, we find that the claimant's testimony with regard to why she had passed the entrances to the cleaners' parking lot is entitled to little weight.

The claimant's injury 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) 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).

Since we are not persuaded by the claimant's argument that she was unable to pull into the cleaners' parking lot, and was therefore advancing her employer's interest by proceeding past the parking lot to avoid a wreck, we find that the claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her injury. Therefore, we find that the decision of the Administrative Law Judge should be affirmed and this claim for benefits denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that Claimant failed to prove by a preponderance of the evidence that she was performing employment services at the time of her motor vehicle accident on August 21, 2003. After conducting a de novo review of the entire record, I find that the Claimant sustained an injury arising out of and in the course of her employment. Therefore, I find that the Administrative Law Judge's opinion should be reversed.

The Claimant had been employed with the Respondent, an independent living center, for five years as

an activity director. Her job duties included taking clients to doctor appointments, picking up dry cleaning, running other errands for clients, as well as planning social activities. The Claimant used her personal vehicle for errands. On August 21, 2003, the Claimant was driving her personal vehicle to pick up dry cleaning for a client at Walker's Cleaners on Highway 5. It was raining that day and there was no parking available in the lot at the cleaner's. The Claimant decided to drive past the cleaners and go to Fred's to get a coke and to turn around and return to the parking lot to find a parking spot. As she was driving down Springhill Road, a vehicle ran a red light and hit the Claimant's vehicle at the intersection. The Claimant never made it to Fred's to get a coke or to turn around. The Claimant was taken by ambulance to Saline Memorial Hospital and remained off work the rest of the week. She followed up with her family doctor, Dr. Mark Martindale. Dr. Martindale prescribed physical therapy. The Claimant continued to work, but began to have problems requiring medical attention.

Based upon my de novo review of the record and my understanding of the Workers' Compensation Act as interpreted and applied by the Appellate Courts, I find that the Administrative Law Judge's decision was in error and should be 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 use her personal vehicle to run errands for clients. Frankie Herring, an employee of Walker's Cleaners, testified that on August 21, 2003, the Claimant called to see how much a particular cleaning bill was and advised that she would come in to pick up the clothes. Ms. Herring verified Claimant's statement that the parking places in front of the cleaners are often full. There is also no dispute that it was raining on that day. A former employee of Respondent, Kay Skaggs, testified that it was common policy for her to receive a check to run an errand and to use her own vehicle. Ms. Skaggs also stated that she personally knew that the Claimant ran errands and

used her own vehicle and that the gasoline was paid for by Respondent.

The Respondent controverted this claim contending that the Claimant was not performing employment services at the time of her injury. Their position is that the Claimant deviated from her normal job duties in buying a soft drink and that she was not advancing the interest of her employer. The Claimant contends that, in stopping for a soft drink, she had not deviated from her job duties. Even if Claimant had made it to Fred's to buy a soft drink, that would have been incidental to her personal comfort and would not have been a significant departure from her employment duties and obligations.

There are several cases that support Claimant's 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.

Similarly, in **Matlock v. Blue Cross and Blue Shield**, 74 Ark. App. 322, 49 S.W.3d 126 (2001), 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 employer's 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."

There are two cases from the Court of Appeals which 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's award of benefits, 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 I find to be most on point with the present claim, and which could be said to be controlling, is **Wallace v. West Frailer 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.

In my opinion, the holding of the Supreme Court in **Collins**, as applied by the Court of Appeals in **Sands** and **Wallace** requires us to find the present claim compensable. Likewise, 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 dry cleaner's 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, I find that the Claimant had not yet deviated from her

employment duties, since she would have had to turn around anyway as there were no parking spots available at her destination.

I find that the holdings of the Arkansas Supreme Court and the Arkansas Court of Appeals compel 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. I therefore find that the Administrative Law Judge's decision must be reversed.

SHELBY W. TURNER, Commissioner