

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707535

MARTHA FINCH, EMPLOYEE	CLAIMANT
SPRINGHILL SURGERY CENTER, EMPLOYER	RESPONDENT
TRAVELER'S CASUALTY & SURETY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 17, 2008

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

Claimant represented by HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she was performing employment services at the time of her shoulder and upper extremity injury. After conducting a de novo review of the record, we find that the claimant has failed to meet her burden of proof. In our opinion, the claimant was not performing employment services at the time of her fall.

Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a licensed practical nurse. She mainly worked in the GI lab where her job duties included charting, monitoring sedated patients, preparing reports, transporting patients, admitting patients, and starting IV's. The claimant's normal working hours were 6:30 a.m. to 3:00 p.m. On April 3, 2007, the claimant was leaving early to attend a funeral. She testified that she had finished the procedures scheduled that day and decided to eat lunch before she left to go to the funeral. The claimant is diabetic and needed to maintain her blood sugar. The claimant testified that she was going to do the pre-admission for the next day's patients in the conference room while she ate her lunch. The claimant left the conference to get her lunch and upon reentering the conference room she tripped and fell. The claimant testified that the microwave to heat her lunch was in the conference room. After she fell, the claimant testified that she gathered up her paperwork and then went to the dictation room. She stated that her arm was numb and

weak so she put up all her charts and clocked out. The claimant went to her sister's to change for the funeral but ended up going to the emergency room instead. She was given a sling and referred to an orthopedic physician. On April 10, 2007, the claimant was seen by Dr. Pearce who sent her for an MRI. The MRI revealed a full thickness tear in the supraspinatus and infraspinatus tendons of the left shoulder. On April 23, 2007, the claimant underwent a left shoulder arthroscopy to repair a torn rotator cuff. The claimant was released to full duty on October 31, 2007. The claimant has not returned to work but it is due to other medical problems unrelated to her shoulder injury.

The claimant testified that she was paid for her lunch break. She also stated that she could be called away from lunch to perform work duties. The claimant stated on the day she fell she was eating lunch and calling patients. She testified that she would complete a form and sign or initial it after she spoke to a patient but if she was unable to reach them she would note that on the form as well. She was unable to recall the number of phone calls she made that day and how many patients she reached and how

many she was unable to reach. She stated that it seemed like she did try to call at least one patient.

The respondents offered the testimony of Laura Gusewelle, the clinical manager for the respondent employer. Ms. Gusewelle testified that employees were deducted 30 minutes from their time each day for lunch unless they completed a form stating that they had no lunch that day. She stated that employees are not expected to perform work during their lunch breaks and it was rare that anyone would be called away during lunch. She also testified that it was common for employees to eat lunch in the conference room but not common for them to handle paperwork or make calls during lunch. Ms. Gusewelle testified that pre-admitting patients involves calling a patient and requesting information. The form would be signed or initialed by the nurse that is completing the form. Only the next day's patients are contacted. Ms. Gusewelle examined the forms for the colonoscopy and EGD patients from the following day after the claimant's incident and found no initials and or signatures from the claimant on any forms.

Act 796 defines a compensable injury as a "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." Ark. Code Ann. §11-9-102(4)(A)(i). A compensable injury does not include an "[i]njury 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).

Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transport, 347 Ark. 851, 69 S.W.3d 1 (2002); White v. Georgia-Pacific Corp., 339 Ark 474, 6 S.W.3d 98 (1999). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." Smith v. City of Ft. Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004); Collins,

supra; Pifer, supra; White, supra; Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). 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, supra; Pifer, supra; White, supra; Olsten, supra. The critical issue is whether the interests of the employer were being carried out by the employee at the time of the injury. Collins, supra. In Collins and Pifer, the Arkansas Supreme Court specifically overruled "all prior decisions by the Arkansas Court of Appeals" to the extent that they were inconsistent with the holdings in those two cases. Wal-Mart Stores, Inc. v. King, 93 Ark. App. 101, 216 S.W.3d 648 (2005).

An employee is generally said not to be acting within the course and scope of employment when he is traveling to and from the workplace, the rationale being that an employee is not within the course and scope of his/her employment while traveling to and from his job. Pettey, supra.

Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test is whether the employee is engaged in the primary activity that he/she was hired to perform, or in incidental activities that are inherently necessary for the performance of the primary activity. Matlock v. Arkansas Blue Cross and Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001). In addition, the Arkansas Supreme Court in Pifer, supra, refused to narrow or broaden the requirements of Act 796 by automatically accepting or rejecting a personal-comfort activity as either providing or not providing employment services. In this regard, the Court stated:

Instead of following either extreme position, the critical issue is whether the employer's interests are being advanced, either directly or indirectly by the claimant at the time of the injury. In addressing this issue, we decline to adopt the factors identified by the Court of Appeals in Matlock v. Blue Cross Blue Shield, supra.

A review of the evidence demonstrates that the claimant was not performing employment services at the time she was injured. There is no evidence, other than the claimant's own self-serving testimony, that she was working on files either before or after she was injured. The files inspected by Ms. Gusewelle failed to have any notations made by the claimant. There was no evidence of a single call to a patient having been completed or even attempted. There is absolutely no evidence that the claimant was doing anything other than preparing to eat her lunch for which she was not compensated for. Accordingly, we find that the claimant was not performing employment services at the time she was injured. Therefore, the decision of the Administrative Law Judge should and is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, reversing the Administrative Law Judge, finds that the claimant was not performing employment services at the time of her fall. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant was performing employment services at the time of her fall, and therefore, I must respectfully dissent.

The Supreme Court of Arkansas has held several times that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer...." Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002); Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002). Specifically, the Court has held that 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." Wallace v. West Fraser South, Inc., 365 Ark. 68, 225 S.W. 3d 361 (2006). The

concept of employment services encompasses the performance of incidental activities that are inherently necessary for the performance of the primary activity. Privett v. Excel Specialty Prod., 76 Ark. App. 527, 69 S.W.3d 445 (2002).

In Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999), the Arkansas Court of Appeals stated that even if the claimant was on a lunch break at the time of her injury, she was, nonetheless, engaged in employment services because she could have been called away from her break at any time. In Texarkana School District v. Conner, ___ Ark. ___ (May 8, 2008), the Arkansas Supreme Court stated that the question of whether the claimant was going to work was less important than the fact that the claimant considered himself to be on call, even during his lunch break. Here, the claimant testified that she never had a scheduled lunch break. Instead, she typically ate lunch when she could, and often worked while she was eating. She testified there was always a possibility that she could be called away from her lunch to perform a work duty. This testimony was corroborated by the respondents' own witness, the respondent-employer's clinical

manager. She admitted that if a nurse like the claimant, while eating her lunch, was summoned by a doctor, the nurse would be expected to leave her lunch and immediately respond. She admitted that a nurse like the claimant would be expected to leave lunch and immediately respond in "extreme situations" involving medical emergencies. The respondent-employer's clinical manager testified that respondent did not track the actual time spent on lunch by employees; instead, respondent automatically deducted thirty minutes worth of pay each day to account for a lunch break, unless the employee manually clocked out for lunch. There is no evidence that the claimant manually clocked out until after her injury.

The testimony of the respondents' own witness, admitting the claimant could have been called away from her lunch at any time, in light of the Arkansas Court of Appeals holding in Ray and the Supreme Court holding in Conner, mandates a finding that the claimant was performing employment services at the time of her injury. The majority's conclusion otherwise is erroneous not only as a matter of fact, but as a matter of law.

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For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner