NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712311

ROSA V. HERNANDEZ, EMPLOYEE	CLAIMANT
TEC, THE EMPLOYMENT CO., INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 9, 2008

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

Claimant represented by the HONORABLE STEPHEN M. SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JAMES A. ARNOLD, II, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed July 29, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

> 1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 6, 2008, and contained in a pre-hearing order filed March 7, 2008, are hereby accepted as fact.

2. That the claimant was not performing employment services at the time of her injury.

3. The claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury.

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

The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the July 29, 2008 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. After a de novo review of the record, I find that the claimant has proved that she was performing employment services at the time of her injury. The Arkansas Supreme Court has held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer." Kimbell v. Association of Rehab Indus., 366 Ark. 297, 301, 235 S.W.3d 499, 503 (2006). In Kimbell, the Court went on stated that the injury must occur "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." Id. Here, the majority has clearly erred, as the claimant's injury occurred as a result of being "within the time and space boundaries of the employment" at the respondent's facility. The

claimant and her co-workers worked on a production line processing poultry and were assigned specific areas along the processing line to work. At the respondent's facility the workers do not clock-in or clock-out for scheduled group breaks. While the claimant had been talking to other workers before the accident, the claimant credibly testified that she was heading back to her specified workstation when the accident happened:

> I had worked [at the workstation], and I was sure that I was going to be able to get back there in time. When I went back - when I was going back was when the accident happened....

The claimant's co-worker, Adela Rivera, bolstered this testimony with the following:

> A: When I saw the line is -- start working, when I start walk here (indicating) the line working, so I walk. And then when she fell down, the line is working –
> Q: Okay.
> A: - at that time.
> JUDGE WELLS: The Court has a question. When you say "the line is working," did you mean birds were coming down the line?
> THE WITNESS: Yes. Yes, it is. It's - that - that's for me work the line.
> JUDGE WELLS: Okay.

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> JUDGE WELLS: And [the claimant] fell
> on the same side of the line that
> she worked on?
> A: Yes.

Later, Ms. Rivera states the circumstances around the fall even more clearly:

> [the claimant] go that way when –
> when – when she fell down because
> she trying to get in her place
> because the line is working.

I find it to be clear from the witness' testimony that the claimant was on her way back to her assigned workstation when the injury occurred. In a case directly on point, the Arkansas Supreme Court has stated that returning to an assigned workstation after the end of a work break furthers the respondent's interest. Pifer v. Single Source Transportation, 347 Ark. 851 (2002). Based on the Arkansas Supreme Court's interpretation in Pifer, when an employee is returning to her assigned workstation after a break, the employee is advancing the employer's interest, and thus the employee is engaged in employment services.

In concluding otherwise, the majority arbitrarily disregards not only Pifer, but also the testimony of both the claimant and her co-worker, who both credibly testified that the claimant was returning

to her work station when the injury occurred. The majority, by affirming and adopting the Administrative Law Judge, focuses on the fact that there was "private, non-work related, conversation with another employee" during the break, an analysis which is clearly beside the point, as the injury did not occur during the break, but during the return from the break to the claimant's workstation. The majority cannot reconcile the testimony of two witnesses who clearly stated that the break was over when the injury occurred. As such, the majority has clearly erred and should be reversed.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner