

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706255

WILLA DEAN SMITH, EMPLOYEE	CLAIMANT
WAL MART ASSOCIATES, INC., EMPLOYER	RESPONDENT NO. 1
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 17, 2008

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE SUSAN M. FOWLER, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed May 20, 2008. 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 over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.

3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury on January 16, 2007 because she was not performing employment services at the time of her fall.

4. Because of the above finding, the balance of the issues-whether Claimant is entitled to reasonable and necessary medical treatment, temporary total disability benefits and a controverted attorney's fee-are moot and will not be addressed.

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 May 20, 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The majority is affirming and adopting an Administrative Law Judge's decision finding the claimant was not performing an employment service at the time of her injury. After a de novo review of the record, I find that the not only was the Administrative Law Judge's decision incorrect, the majority has compounded the error by affirming and adopting his decision. Therefore, I must respectfully dissent from the majority's opinion.

There is no real dispute of the facts of this case. The claimant was working at the Wal-Mart store in Clinton, Arkansas, when she slipped on some ice and fell in the parking lot on January 16, 2007. In this fall,

the claimant sustained injuries to her head, knee, and left shoulder. The left shoulder injury was the most serious and eventually resulted in her undergoing surgery.

In denying this claim, the majority relies upon Ark. Code Ann. §11-9-102 (4) (B) (iii). That section provides, in essence, that injuries which occur at a time when employment services are not being performed are not considered a compensable injury. At the time the claimant's fall occurred, she was returning from her lunch break. According to the claimant's testimony, she had purchased a meal at a nearby Sonic Drive In and was returning to the store to finish her lunch there. The evidence also establishes an ice storm the previous evening had caused much of the store's parking lot to be covered in ice. The claimant's fall occurred when she slipped on the ice. The respondent did not deny the fall occurred in their parking lot; rather, they contended the claimant was injured while still on her lunch break, at a time when she was not performing any employment service or any conduct which benefitted her employer.

The claimant, on the other hand, concedes her injury did not occur while she was performing her

regular job duties. Her argument for compensability is based upon the company's policy requiring her to park in the area in which the fall occurred. Specifically, the claimant was parking in an area designated as employee parking. She argues the employer benefitted by having her and her fellow employees park in this area and leaving nearer, more convenient parking places for customers.

Testimony provided at the hearing indicates the portion of the store's parking lot designated for employee parking was on one end of the store near the receiving area. That is, the area in which delivery trucks dropped off loads of merchandise. Also, testimony from the claimant and both her and the respondents' witnesses was that parking places painted in white were for employees, and parking places painted in yellow were for customers. Photographs showing the area in which the claimant fell indicate the parking area was well away from the store's front entrance, and a delivery truck can be seen in the background. One of the witnesses described the employee parking area as being "in the boonies."

The claimant and two witnesses, Andrea White and Candie Vanholk, testified when they went through

employee orientation, they were told to park in the designated employee parking area and not near the front of the store. All three of the witnesses testified they were advised areas near the store entrances were reserved for customers and for their convenience, and that employees parking in those areas could face disciplinary actions, including termination. The claimant and her witnesses did not testify that they had been disciplined for improperly parking, but the claimant did state on one occasion, Arlene Wells, the store's personnel manager, had cautioned her on one occasion about parking in customer parking areas. The witnesses also believed other employees had, from time-to-time, been given similar verbal warnings.

The respondent also called three witnesses to testify about the store's parking policy. These witnesses were Chuck Huddleston, store's Manager, Arlene Wells, store's Personnel Manager, and Tracie Roth, a store employee. Mr. Huddleston stated the parking rules were not a particularly high disciplinary priority for him, and while employees were directed to park in the designated areas, he was not concerned about disciplining employees who did not. However, he also testified his review of past disciplinary actions at the

store reflected on two occasions, prior to his becoming store manager, employees had been formally disciplined and given written reprimands for improperly parking.

Ms. Wells testified that she either gave, or was present at, employee orientations, including some of those provided to the claimant and her witnesses. She stated during these orientation programs, new employees were told to park in the designated parking area which was nearest the receiving end of the store. She also confirmed the testimony of the parties concerning the white spaces being for employees and yellow spaces for customers. Both she and Mr. Huddleston acknowledged the company's corporate policy was to require employees to park well away from the main entrances so that customers would have access to closer, more convenient parking.

There was also some testimony as to whether the claimant was parked in a space painted yellow or white when her fall occurred. According to the claimant and her witnesses, the claimant was parked in an area painted white when she fell. Photos offered by the claimant showing the area where the fall occurred, are now painted yellow. The claimant and her witnesses testified the parking lot had been repainted subsequent to her injury and the areas that had been white were now

yellow. The respondent's witnesses all testified that they were unaware of any repainting which would have changed the designated areas.

The majority, in adopting the Administrative Law Judge's rationale, is denying the claim because the claimant could not conclusively establish the lines where she was parked at were white on the day of her fall. The implication of this finding seems to be that the claimant would have prevailed had she been able to show she had, in fact, parked in a white lined parking place. In my opinion, this rationale is far too narrowly drawn and is contrary to established Supreme Court and Court of Appeals precedents.

In Texarkana School District v. Conner, ___ Ark. ___, ___ S. W. 3d ___ (May 8, 2008), the Arkansas Supreme Court considered a case where a school district employee was returning from his lunch break when he was injured while attempting to open a gate allowing access into the school's parking lot. In finding the claimant sustained a compensable injury, the Court affirmed numerous prior decisions which held the test to determine whether an employee was performing employment services 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. In the case then before them, the Supreme Court held the claimant was advancing the employer's interest by opening the gate and allowing access to the parking lot, not only for himself but for other interested parties as well.

In the present claim, it does not appear there is any dispute the employer required its employees to park in the area of the parking lot where the claimant was at. This section of the parking lot is well removed from the store's entrances and, to use phrase of one of the witnesses was, "in the boonies." While the store management may not have considered parking elsewhere a serious violation, nonetheless, there was no dispute that employees were specifically told to park in that area. Also, the basis of this order was a companywide directive based on the obvious conclusion that convenient, close parking spaces were to be reserved for customers so that they would have ready access to the store's primary entrances. On that basis, the claimant was not only carrying out a job requirement but was advancing the employer's interest in parking where she did.

The case which is most in point with the present one is Foster v. Express Personnel Services, 93 Ark. App. 496, 222 S. W. 3d 218 (2006). In this case, the claimant was working at a car dealership and was injured while going to work. The claimant was employed in the dealership's credit department, but her injury occurred while passing through the service department. The Commission denied the claim because the claimant was not in the area where her specific job duties were performed. The Court reversed, holding the claimant was following an employer's directive to employees to enter the dealership through the area where she entered and was indirectly advancing their interest in so doing.

A similar decision was reached in Caffey v. Sanyo Manufacturing Corporation, 85 Ark. App. 342, 154 S. W. 3d 274 (2004). There, the claimant had entered the employer's premises and was proceeding to the time clock when she fell and was injured. The Court held the claimant was proceeding in a manner required by her employer at the time of the injury, and she was therefore entitled to benefits.

The same result has been reached in cases where employees were injured while returning from a break, or where the employer required them to go to a

specific area or perform certain tasks before returning to work. See Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S. W. 3d 93 (2002); Wallace v. West Frasier South, Inc., 365 Ark. 68, 225 S. W. 3d 361 (2006).

The focus of the majority's decision is too narrowly drawn. Regardless as to whether the lines surrounding the claimant's parking space were yellow or white, the evidence clearly establishes that the claimant's injury occurred while parked in the area designated for employee parking by her employer. Further, the evidence also established much of this area was covered in ice and was slick because of the previous evening's ice storm. As noted by the claimant and other witnesses, areas in the front of the store had been de-iced for the safety of the customers.

But for the respondent's directive in regard to parking, the claimant would not have been in this area. Further, the claimant tried to find a parking space without ice but was unable to do so. In my opinion, the evidence unquestionably establishes the claimant's injury would not have occurred but for the respondent's requirement. While that requirement is understandable, nonetheless, it required the claimant to be in the area she was in when the fall occurred. The

record in this case establishes beyond any reasonable doubt the claimant was following the requirements of her employer when her injury occurred. That criteria is what the Arkansas Supreme Court and the Arkansas Court of Appeals have held is necessary to establish the claimant was performing an employment service at the time of her injury.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner