

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F808354

PAMELA BRYAN, EMPLOYEE	CLAIMANT
EAST POINSETT COUNTY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 14, 2009

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

Claimant appeared *pro se*.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 3, 2009. 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 agreed to by the parties are hereby accepted as fact.
3. On August 14, 2008, the claimant sustained a compensable injury to her

right knee arising out of and during the course of her employment with East Poinsett County School District which was the result of a specific incident identifiable in time and place of occurrence, entitling her to all appropriate workers' compensation benefits.

4. At the time of claimant's admitted injury, she was performing employment-related services. Specifically, the claimant was coming off a called break and was returning to work during a mandatory, in-service training session when she tripped and fell, injuring her right knee.
5. Because the primary dispute concerns compensability of the injury and there are no other material facts in dispute, the extent of claimant's disability has been specifically reserved.
6. Respondents are responsible for payment of all reasonably necessary and related medical treatment, together with continued, reasonably necessary medical treatment. While respondents are entitled to a credit or offset for benefits previously paid pursuant to A.C.A. §11-9-411, respondents are to reimburse the appropriate health insurance providers for medical previously paid in accordance with Commission Rule 099.30.

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

We therefore affirm the April 3, 2009, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with 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 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a teacher. On August 14, 2008, the claimant was attending in-service training at the school in which she taught. School had not yet started. At approximately 10:15, the next speaker was setting up for his presentation. It was going to take a few minutes so the claimant and several other teachers went outside. The claimant spotted some cheerleaders that were former students of hers across the road and she walked over to

talk to them. While walking back, the claimant fell on the sidewalk injuring her right knee.

The claimant filed a claim alleging that her injuries are compensable. The respondents controverted the claimant's claim asserting that the claimant was not performing employment services at the time she fell. I agree with the respondents.

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

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 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 the case presently before us, the claimant was not doing anything required of her at the time she fell. She described the circumstances leading up to the fall as follows:

Then I got up and walked outside as many teachers did. And while I was outside there some young girls, eighth grade girls, that hollered across at me and was waving to me and I had not seen them in several months. I had taught them in the fifth grade. And they were just - there were there for cheerleading practice, so I decided just to walk across. There was a shallow ditch and I walked across the shallow ditch and walked over - the building was just opposite of the cafeteria, just to speak to them for a few moments as I hadn't seen them in a long time. We just carried on a conversation probably for about five

minutes or so, and I turned and was leaving, and as I was walking back along the sidewalk, the girls just hollered, "Bye, Ms. Bryan," and I kind of turned and waved to them.

The claimant fell on the sidewalk causing injury to her right knee as she turned to wave to her former students.

At the time the claimant fell, there were no students in school. The claimant was attending in-service training in the cafeteria. She was on a break at the time she fell. The speaker was setting up for the next presentation and she admitted that she was free to chose what she did during the break. She testified as follows:

Q. Could you have stayed in the room while the guy was setting up the equipment?

A. Yes, we could have.

Instead of staying in the room and waiting for the meeting to resume, the claimant made a decision to go outside. Once outside she made the decision to speak to her former students. This was confirmed by the testimony of Tabitha Burcham. Ms. Burcham testified that the teachers were on a break at the time the claimant fell.

This case is distinguishable from the recent Court of Appeals case of North Little Rock School Distric v. Lybarger, Ark. App. , S.W.3d (2009). In that case, the claimant was walking down a flight of stairs after attending training at another school when she fell. At that time, she was going to the parking lot to get in her car to leave the building. She was not on the premises of her own school as the claimant was in this case. Moreover, the claimant in Lybarger had to exit the campus in order to return to her own school.

This case is more akin to a recent case decided by the Commission. In Pauline Barrett v. C.L. Swanson Corporation, FC Opinion filed 5-20-09, Claim No. F807062, the claimant was not performing employment services when she fell after she had clocked out and was turning to leave the office after stopping by the office on her way out the door. The claimant in Barrett was merely on the respondent's premises when she fell. Similarly, the claimant in this case was merely on the respondent's premises when she fell. She was not required to go outside, nor was it her responsibility or duty to cross the street to chat with some former students.

My review of the evidence in this case demonstrates that the claimant was not advancing the respondent employer's interests nor was she doing anything required by the respondent employer. The claimant was merely on the respondent employer's premises taking a break. The claimant was not performing any of her duties as a teacher. She was not required by her employer to go across the street from where her meeting was being held to visit with the former students. She was not required to exit the premises at that time. In fact, she was not even required to leave the cafeteria during the break. Simply put, I cannot find that the claimant was performing employment services when she fell. Accordingly, I must dissent from the majority's finding that the claimant proved by preponderance of the evidence that she sustained a compensable injury.

KAREN H. MCKINNEY, Commissioner