

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F807062

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| PAULINE BARRETT, EMPLOYEE          | CLAIMANT   |
| C.L. SWANSON CORPORATION, EMPLOYER | RESPONDENT |
| CINCINNATI INSURANCE CO., CARRIER  | RESPONDENT |

**OPINION FILED MAY 29, 2009**

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

Claimant represented by HONORABLE JASON HATFIELD, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE WILLIAM ROBERT STILL, JR., Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed.

**OPINION AND ORDER**

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on July 11, 2008. Specifically, the Administrative Law Judge found that the claimant was performing employment services at the time she sustained her injuries. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of

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

The claimant was employed by the respondent employer as a commissary catering manager. The claimant had worked for the respondent employer for approximately nine years and the last seven she had been in her current position. The claimant's job duties included responsibility for production of food which was delivered by trucks on various sites. She was also responsible for a catering business. The claimant testified that she frequently used the respondent employer's fax machine to conduct her business. This fax machine was not located in her office but was located in the main office at the front of the building. The physical layout of the respondent's office is relevant to this case. When an individual enters the front door of the respondent's business there is a long linoleum floor hallway. That hallway leads to a door which opens into the respondent's warehouse. Before arriving at the warehouse door the respondent's main office is in an open area just off this hallway. The claimant's office is not in this main

office area. Instead, to get to the claimant's office one must continue down the linoleum hallway and go through the warehouse door. The claimant and other hourly employees are required to punch a time clock which is located in the back of the warehouse which the claimant estimated to be approximately two blocks away.

The claimant's normal working hours were from 3:00 to 3:30 a.m. until approximately 12:00 to 1:00 p.m. The claimant testified that her daily routine at the end of her work shift involved her walking to the time clock and clocking out. After she returned to her office to pick up her purse she would walk through the warehouse door and walk down the linoleum hallway until she reached the main office. Once she reached the main office she would go to the fax machine area to check her mail. If there were any last minute faxes which needed to be addressed the claimant would address them at that time. The claimant also testified that her normal routine required her to check with James, her supervisor, to see if there was any last minute business to which she needed to attend. Finally, the claimant testified

that she would also converse with Marjorie Plichta, the respondent's office manager, for any last minute items which needed to be addressed.

On July 11, 2008 the claimant clocked out and eventually went into the respondent employer's main office. The claimant walked across the office to check her mail box near the fax and there was no mail. The claimant also testified that James, her supervisor, was not present that day. The claimant next walked over to Ms. Plichta's desk and had a conversation with her. As the claimant turned to leave she tripped over a rug and fell striking her head against a wall and falling to the floor, landing on her upper left arm. The claimant was taken by ambulance to the emergency room where she was diagnosed as suffering from an acute fracture of the proximal humerus. The claimant was given an immobilizer, medication, and instructed to receive follow-up treatment from Dr. Powell. Since that time the claimant has remained under the care of Dr. Powell. Dr. Powell has treated the claimant conservatively with the use of the sling immobilizer, medication, and physical therapy.

Dr. Powell released the claimant to return to work with restrictions of no more than four hours of work per day. In addition, the claimant is not to lift, push or pull more than one pound with her left arm.

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. 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.

The cases regarding employment services point in different directions. The courts have held injuries compensable when the employee is required to stay on his or her employer's premises and perform duties, if the need arises, during the break. e.g., Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); Wallace v. West Fraser South, 365 Ark. 68, 225 S.W.3d 361 (2006). In these cases, the employee's presence and availability advanced the employer's interest. The courts have also held, as have we, injuries not compensable when the employer received no benefit from the activity being performed during the break or when the activity was not inherently necessary for the performance of the employee's job, even though his or her presence or action benefits the employer. E.g., McKinney v. Trane Co., 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004); Smith v.



City of Fort Smith, 84 Ark. App. 430, 435, 143 S.W.3d 593, 596-97 (2004).

The activity being performed at the time of the injury must also be inherently necessary for the performance of the employee's job. For example, in Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004), the Court of Appeals affirmed the Commission's denial of benefits for an injury that occurred within normal working hours, on the employer's premises, and while he was advancing the employer's interest because the activity was not inherently necessary for the claimant's job. He worked as a truck driver for Fort Smith at the city dump. The city allowed employees to remove debris from the dump for their own personal use, which, in turn benefitted the city. The claimant was injured removing gravel for his own use. The court found the claimant's injuries were not compensable because loading gravel for one's own use was not inherently necessary for the performance of Smith's job as a dump-truck driver. 84 Ark. App. at 435, 143 S.W.3d at 596-97.

The Administrative Law Judge cited the case of Foster v. Express Personnel Services, 93 Ark. App. 496, 222 S.W.3d 218 (2006) as controlling in this case. In Foster, the claimant was employed by an automobile dealer. On the date of her injury, the claimant was en route to her designated job site ten minutes before she was required to report to work. The claimant slipped and fell on some oil in the service bay area and sustained some injuries. The Administrative Law Judge and the Commission both found that the claimant was not performing employment services at the time. The Court of Appeals reversed and remanded the case finding that although,

Foster had not reached her desk or the cashier's desk or was outside of the building in which her office was located, she was unquestionably injured in an area in which employment services were expected of her. In short, workers' compensation law does not require the infinitesimal scrutiny of a claimant's conduct posited by the employer in this case. The real issue is not whether Foster was 'on the clock' when she was injured or whether she was on her way to the cashier's desk or her own desk. Rather, the issue is whether the injury occurred within the time and space

boundaries of the employment when Foster was carrying out the employer's purpose or advancing its interests directly or indirectly.

In our opinion, the Foster case is not on point with the case presently before us. In Foster, the claimant was coming to work and was picking up various things on her way to her desk when she fell. In this case presently before us, the claimant was merely leaving work. She had done all of her work that day and she was leaving to go out the door. This is clearly distinguishable from Foster.

This case is akin to Cole v. Price Gardner, Inc., Full Commission Opinion filed August 26, 1996 (Claim No. E408046). In Cole, the claimant worked as a leather cutter and had finished her shift and had clocked out. The claimant was headed to the parking lot to go home for the day when she spoke to someone. She turned to see who it was when she ran into a pole and struck her head. The Commission found that the claimant was not performing employment services. The Commission stated:

In the case at bar, the claimant was leaving her place of employment. She had already clocked out for the day and was not doing anything other than heading to her car on the parking lot. She was not engaged in any activity which may be said to be furthering her employer's interests. The claimant was therefore not engaged in employment services at the time of the incident. Since we must construe Act 796 strictly and since the employee's own admission she was leaving and had in fact already clocked out at the time of the incident, we must conclude that the claim is not compensable.

In the case presently before, the claimant had clocked out, collected her personal items, walked through a warehouse door, checked her mailbox and the fax machine, checked to see if her coworker was there, conversed with another coworker and then tripped and fell on her way out the door. Two co-workers also testified in this case. Marjorie Plichta stated that she did not remember the conversation she had with the claimant, but testified that since the claimant was walking away they were probably saying good-bye. She stated that she heard rather than saw the claimant fall and returned to her desk to call 911.

Mr. Larry Mounce also testified. He stated that he could not remember what the claimant said to him prior to her fall but that it was not business related. He also stated that he heard the claimant fall and he tried to catch her.

Simply put, we cannot find that the claimant proved by a preponderance of the evidence that she was performing employment services at the time she fell. She had completed her work day and had clocked out. She was on her way out the door when she fell. Further evidence that she was not engaged in any business-related conversation is that Ms. Plichta and Mr. Mounce both did not see the claimant fall. Had they been engaged in conversation with the claimant regarding some work-related matter, it would follow that they would be talking to each other face-to-face and not to the back of their heads. Therefore, when we consider all of the evidence, we cannot find that the claimant was performing employment services at the time she fell. Accordingly, reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. 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 she sustained her compensable injury on July 11, 2008, and therefore, I must respectfully dissent.

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

Corporation, 339 Ark. 474, 6 S.W.3d 98 (1999). The test used to determine whether an employee was performing "employment services" is the same test used when determining whether an employee was acting within "the course of employment". Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004); Collins, supra; Pifer, supra; White, supra. 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.

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 was 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 & Blue Shield, 72 Ark. App. 322, 49 S.W.3d 126 (2001).

There is no question that the claimant suffered an injury to her left upper extremity when she tripped and fell at the respondent's place of business on July 11, 2008. Controversy arises because the claimant had already clocked out at the time of her injury. However, the claimant testified that her daily routine after she clocked out was to go to the respondent's main office and check her mail box for any last-minute faxes or mail which might need to be addressed before she left the office that day. The claimant also normally checked with her supervisor and Plichta, the office manager, for any other last minute items which needed to be addressed. On this particular date, the claimant checked her mail box, and there was no mail. The claimant did not see her supervisor, because he was not present that day. However, the claimant did have a conversation with Plichta immediately before she tripped and suffered her injury. Both the claimant and Plichta admitted that, while they occasionally had conversations about things that were not business related, their conversations at the end of the day generally dealt with business-related items. The



claimant testified that she does not specifically remember what she talked to Plichta about on that date, and she does not specifically remember what she was talking to Plichta about at the exact moment of her fall. Likewise, Plichta testified that she does not remember exactly what their conversation was about at the moment of claimant's fall. However, Plichta did admit that she and the claimant had talked about business-related things after claimant came into the office and before her fall.

I find that the facts in Foster v. Express Personnel Services, 93 Ark. App. 496, 222 S.W.3d 218 (2006) are analagous to the facts in this case. In Foster, the claimant worked in the accounts receivable department for an auto dealership. Claimant's job duties required her to process credit card slips and e-checks. Claimant was also required to pick up warranty slips from a warranty clerk and confer with the auto service manager. Foster's office was located on the second floor of the dealership's used car building. However, the service manager's office and warranty clerk's office were located in a separate service building.

Between those two buildings was a service-bay area where customers brought their vehicles to be serviced. Foster's normal routine when she arrived at work was to walk into the service-bay area, go into the used car building, and go to a cashier's desk on the first floor to pick up credit card receipts before going to her own desk. On the date of Foster's injury, the claimant arrived at work and walked into the facility at the service-bay area. After she entered the service-bay area and was on her way to the cashier's desk to pick up the credit cards and e-checks, she slipped and fell. The claimant suffered an injury and filed a claim for compensation benefits. Both the Administrative Law Judge and the Full Commission found that claimant was not performing employment services at the time of her injury. In doing so, the Administrative Law Judge noted that, at the time of Foster's accident, it was not yet time for her to report to work, the claimant was in an area where she was not required to perform employment duties, and she was not performing any employment duties at the time of her injury.

The Court of Appeals reversed this decision and found that Foster was performing employment services. In doing so, the Court of Appeals noted:

Regardless of the fact that Foster had not reached her desk or the cashier's desk or was outside of the building in which her office was located, she was unquestionably injured in an area in which employment services were expected of her. In short, workers' compensation law does not require the infinitesimal scrutiny of a claimant's conduct posited by the employer in this case. The real issue is not whether Foster was 'on the clock' when she was injured, or whether she was on her way to the cashier's desk or her own desk. Rather, the issue is whether the injury occurred within the time and space boundaries of the employment when Foster was carrying out the employer's purpose or advancing its interest directly or indirectly.

The Court went on to note that the fact that Foster was not actually questioned by the service manager or the warranty clerk on the day she was injured was not dispositive. The Court noted that Foster was expected to advance her employer's interest away from her desk and that

she was specifically expected to advance her employer's interest in the area where she was injured.

Even though the claimant in Foster was arriving at work, while the claimant in this case was leaving work, I find the fact situations to be very similar. As in Foster, the claimant was expected to perform work-related services while not "on the clock". Likewise, as in Foster, this claimant was injured in an area where employment services were expected of her. Claimant, on a daily basis, went into the respondent's main office to check her mail box and the fax machine for any items which needed to be addressed before she left work for the day. On July 11, as on other days, the claimant also checked with Plichta to determine whether there were any last minute issues which needed to be addressed. As previously noted, the Court in Foster stated that the fact that the claimant was not specifically questioned by the service manager was not dispositive of the issue. Instead, the Court noted that Foster was expected to advance her employer's interest away from her desk, and was specifically expected to advance her employer's interest in

the area where she was injured. Likewise, the fact that claimant did not have to address any last-minute faxes or mail or any specific issues with Plichta on July 11, 2008, does not change the fact that claimant was expected to advance her employer's interest away from her desk, and she was specifically expected to advance her employer's interest in the area where she was working. The claimant was not in the main office, where she tripped and fell, for her own benefit. The claimant was in the main office checking her mail box, the fax machine, and checking with the office manager, for the benefit of her employer, to determine whether any last-minute items needed to be addressed before she left for the day. The fact that there were no items to address that day does not change the fact that the claimant was in the main office for the benefit of her employer, not for any personal reasons.

In conclusion, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury when she injured her left upper extremity on July 11, 2008. I find that claimant was

performing employment services at the time of her fall. The claimant was in an area in which employment services were expected of her, and she had gone into that area for the specific purpose of performing employment services before she left work for the day. For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner