

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800239

MARY C. HUDAK-LEE,
EMPLOYEE

CLAIMANT

BAXTER COUNTY REGIONAL HOSPITAL,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 8, 2009

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE WALTER A.
MURRAY, 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 January 20, 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 set forth above are reasonable and are hereby accepted. (sic)
3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury on January 1, 2008 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 January 20, 2009 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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The majority is affirming and adopting an Administrative Law Judge's decision denying this claim. The basis of this denial is that the claimant's injury did not occur while she was performing an employment service. I believe the majority is adopting an incorrect rationale for this decision and the claimant should have been awarded benefits. For that reason, I respectfully dissent from the majority's Opinion.

The material facts of this claim are not in dispute. The claimant was employed at the respondent's hospital in a primarily clerical capacity. Her job title was Unit Secretary and her duties involved preparing the paperwork necessary for the nurses on staff. However, the claimant was, from time to time,

called upon to perform certain nursing duties because of shortages or other emergencies. On the afternoon of December 31, 2007, the claimant was called and asked to come to the hospital to work from the 7:00 pm to 7:00 am shift. The claimant complied.

At approximately 11:30 pm, she was asked to observe a patient on a suicide watch. This required the claimant to remain stationed in the patient's room to observe him to ensure that he did not attempt to commit suicide. At approximately 2:30 am, a relief nurse entered the room and asked the claimant if she wanted a break.

The claimant testified she was becoming sleepy when the relief nurse arrived. She stated she had not had an opportunity to sleep before going on this shift and she had been awake in excess of 20 hours. She decided to take a short walk to revive herself.

The claimant's duty station was on the second floor of the hospital. According to the claimant's testimony, she took an elevator to the first floor and exited the hospital from the main entrance. Her apparent intent was to follow a sidewalk around and re-enter the hospital from a side entrance near the emergency room. From there, she could take an elevator

back to the second floor, and return to her job duties. Unfortunately, while walking on the sidewalk, she fell and broke her hip.

In denying the compensability of this claim, the majority is adopting the Administrative Law Judge's rationale. In my opinion, the rationale is flawed, in that, it focuses almost entirely on whether the claimant was required to clock out when she briefly left the building. Some testimony was offered by supervisory personnel suggesting the hospital's policy required the claimant to clock out, even though she was only going to be momentarily outside the hospital's building, while transiting from one entrance to another. According to the Administrative Law Judge, the claimant's actions in stepping outside the door of the building "essentially placed her on her lunch break."

I believe the focus of the majority's decision is wrong. The question presented for determination is whether the claimant was performing an employment service at the time of her injury. Whether she did, or did not, clock out, is irrelevant to that determination.

In a number of decisions, the Appellate Courts of this state have found claimant's were entitled to benefits at times when they were, or should have been,

clocked out. In Shults v. Pulaski County School District, 63 Ark. App. 171, 976 S. W. 2d 399 (1998), the claimant was a building custodian who was entering a school building, but was injured prior to clocking in. Foster v. Express Personnel Services, 93 Ark. App. 496, 222 S. W. 3d 218 (2006), was another case where a claimant was injured while entering her place of employment prior to clocking in. In both of those cases, the Courts concluded the injured workers were performing an employment service, regardless of the employer's requirements about clocking in or taking other action upon their arrival.

The Administrative Law Judge's comment about being on a lunch break is, likewise, irrelevant to the present situation. The Supreme Court held in Texarkana School District v. Conner, ___ Ark. ___, ___ S. W. 3d ___ (2008), a claimant who was injured while opening a gate during his return from a lunch break was entitled to benefits. The Court reasoned the claimant was performing an employment service while opening the gate and, therefore, his injury was compensable. The Court of Appeals reached the same decision in their recent decision of North Little Rock School District v. Lybarger, ___ Ark. App. ___, ___ S. W. 3d ___ (April 29,

2009). There, they affirmed a Commission finding of a compensable injury occurring while a claimant was walking to her car during a lunch break.

It would be possible to continue citing cases with a similar fact pattern. The Courts of this state explicitly, and frequently, have held claimants are entitled to benefits when they are performing employment services, regardless of whether the action occurred during a time period defined as being "on break" or before or after a claimant was required to clock in. As the Arkansas Supreme Court has clearly stated, when determining whether a claimant was in the course of their employment, 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. Jivan v. Economy Inn, 370 Ark. 414, ___ S. W. 3d ___ (2007).

In the present case, the claimant was performing a critical duty required by her employer. That is, she was involved in a suicide watch over a mentally ill patient. This job required her to stay in a dimly lit room with no television or other distractions, observing the subject. Further, the

claimant had been called into work on an emergency basis and, at the time the injury occurred, she had been awake for over 20 hours. Obviously, the respondent-employer wanted the claimant to stay alert and aware of her surroundings. In fact, one of the respondent's witnesses, who testified she was in a supervisory position, stated a staff member going to sleep was a "big no-no." Presumably, if the claimant had fallen asleep during the suicide watch, she would have been terminated.

In order to avoid this eventuality, the claimant was provided a short break by a relief nurse. The purpose of this break was to allow the claimant to refresh herself so that she could remain awake and alert during the balance of her shift. It is not surprising the claimant chose to take a short walk, take in some fresh air, and return to work. Obviously, the employer benefitted from the claimant's actions to rejuvenate herself. The Administrative Law Judge criticized the claimant for not going to a snack bar or other area within the building to obtain coffee or other caffeinated drinks. The implication is that the claimant would have received benefits had she fallen while so doing. However, I do not see the distinction

between the claimant going a short distance to a vending machine or briefly stepping outside the building in order to take in some fresh air and exercise to reach the same end. I also note neither of the witnesses called by the respondent who testified about the requirements of clocking in and out, indicated the claimant's actions were in any way inappropriate. Apparently, even if the claimant's oversight in not clocking out had been noted, she would have received, at worse, a verbal warning that she should have clocked out. Even the respondent's witnesses did not consider the claimant's failure to clock out as any significant breach of the hospital's rules.

In focusing on the respondent's requirement to clock out because the claimant briefly stepped outside the building doors, I believe the Administrative Law Judge is drawing a distinction which makes no difference. I gather from the Administrative Law Judge's Opinion, had the claimant either not been required to clock out before spending one to two minutes outside the building, or had gone to a snack bar vending machine, she would have been entitled to benefits. But, the question is whether the claimant was performing an employment service when the accident occurred. If she

would have been performing an employment service while walking from the main entrance to the emergency room entrance of the hospital, I do not see how spending a few seconds clocking out would have made any difference. Significantly, neither of the respondent's witnesses testified the claimant acted improperly or in contravention of any hospital policies or rules in stepping outside during her break. They merely stated she should have clocked out before she did so. I fail to see why clocking out would have any relevance on the issue of the compensability of this claim. Either the claimant was performing an employment service when she fell, or she was not.

Obviously, the hospital has a strong interest in the claimant remaining fully awake and alert. Had the claimant been performing her normal clerical duties, she most likely would not have felt the need to step into the January weather in order to refresh herself. Clearly, the respondent benefitted from the claimant's actions. Having the compensability of this case turn on whether the claimant was or was not required to have clocked out or whether she could have obtained similar relief by going to a snack bar is irrelevant. As stated above, the question is, did the employer benefit from

the claimant's conduct. I think the facts of this case clearly establish that it did. I, therefore, conclude this claim was compensable and the claimant should have been awarded all requested benefits. The majority is misapplying the law and using the wrong standard to decide this case. It is most unfortunate this claimant will have to rely on the Court of Appeals to correct an obvious error. For that reason, I respectfully dissent from the majority's opinion.

PHILIP A. HOOD, Commissioner