

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712627

SUE O'SHEA, EMPLOYEE	CLAIMANT
SOUTH CONWAY COUNTY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
ARKANSAS SCHOOL BOARDS ASSOCIATION WCT RISK MANAGEMENT RESOURCES,	RESPONDENT

OPINION FILED FEBRUARY 25, 2009

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed April 25, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed at all relevant times.
3. This claim has been controverted in its entirety.

4. The parties will stipulate to compensation rates if this claim is found to be compensable.

5. The date of the incident was December 3, 2007.

6. The claimant failed to prove by a preponderance of the credible evidence that she was acting within the course and scope of her employment at the time of her right knee injury on December 3, 2007.

The claimant alleges that he 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 that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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.

Thus, we affirm and adopt the 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

_____ I must respectfully dissent from the majority opinion. I find that the claimant sustained a compensable injury on December 3, 2006, and therefore, I must respectfully dissent.

At the time of her injury, the claimant was employed as a custodian at the junior high school in Morrilton. Her normal duties included cleaning the floors,

removing trash, and other general janitorial duties. In addition, the claimant also would clean the school's gymnasium after basketball games. The claimant was paid an extra stipend to perform this task. The claimant testified when she would work at the gym, she was assisted by her husband and daughter. According to the claimant's description of her job duties, she would arrive at the location after the game had started, and would inspect the restrooms to see that they were clean and stocked with supplies, empty trash cans, and similar duties during the course of a game. After the game was over, she, with the assistance of her husband and daughter, would sweep up the floor, clean up any spills, remove trash from beneath the bleacher area, and perform other general clean-up duties. She also stated that when leaving the facility, she would quickly police the parking lot to remove any trash or other discarded items.

On the evening of December 3, 2007, the claimant stated after she, her daughter, and husband had finished cleaning the gym, she had set the alarm system, and was proceeding to her automobile. While walking down a ramp from the gym to the parking lot, she stepped in a gap between the

concrete where the ramp ended and the asphalt of the parking lot began. The claimant fell heavily, striking her kneecap on the asphalt. She was taken to a hospital emergency room where she was diagnosed as having a broken kneecap. She later underwent surgery to repair the damage, which included the insertion of metal rods and wire. By the time of the hearing, the claimant had still not recovered from her injury and stated that she was suffering from a chronic infection problem.

The majority, by affirming and adopting the Administrative Law Judge, deny this claim because the claimant frankly and credibly testified she had completed her work at the gym and she, her daughter, and husband were exiting the building for the purpose of getting into her car and going home. While she stated she would have picked up any trash or other discarded items in the parking lot, she was not in the area for that purpose. I find that the majority, by affirming and adopting the Administrative Law Judge, has taken too narrow a view of what is an employment service and, accordingly, has reached an erroneous decision.

The applicable provision relied upon by the respondent is set out in Ark. Code Ann. §11-9-102

(4) (B) (iii). That section specifically excludes from the definition of a compensable injury, an injury, "which was inflicted upon the employee at a time when employment services are not being performed. . .". This Commission and the Arkansas Appellate Courts have considered the effect that provision has upon workers' compensation cases on many occasions. One of the more recent decisions is Texarkana School District v. Conner, ___ Ark. ___, ___ S.W.3d ___ (May 8, 2008). While reviewing numerous other decisions dealing with the employment service doctrine, the Supreme Court held the test for determining a compensable injury was 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 either directly or indirectly." (Emphasis added).

The highlighted portion of the above quotation from the Conner decision is of critical importance in determining the compensability of the present claim. I find the claimant was clearly within the "time and space boundaries" of her employment when the injury occurred. Specifically, she was still on the employer's premises, in

an area where she still potentially would have had to carry out her employment duties. As the claimant has testified, even though she was still in the parking lot, she would have been expected to remove any trash or other debris within her sight, or provide assistance to any persons who were still on the school's premises. I also find it is significant that the claimant's injury occurred because of a dangerous condition in the parking lot. That is, there was a gap between the end of the walkway the claimant was proceeding down after leaving the gymnasium and the beginning of the asphalt parking lot.

In reviewing other cases which have dealt with the employment services question, it appears to me a common thread of injuries found to be compensable in situations similar to that here is the nature of the injury itself. For example, in Wallace v. West Fraser South, 365 Ark. 68, 225 S.W.3d 361 (2006), the claimant had been on a break while awaiting a piece of machinery to be repaired. After having inquired as to the status of the disabled machinery, he was returning to the break area by way of a plank which had been placed across a muddy ditch. The claimant slipped and fell

and was injured. The Supreme Court concluded his injury was compensable.

In Wal-Mart Stores, Inc. v. Sam's, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the claimant was returning from a break, but had not yet resumed her duties, when she was run over by an employee pushing a hand cart. In finding the injury compensable, the Court noted the claimant was injured on the employer's premises at a place her employment caused her to be. This was found to be an injury which occurred within the time and space boundaries of the employment. Likewise, in Foster v. Express Personnel Services, 93 Ark. App. 496, 222 S.W.3d 218 (2006), the claimant was injured shortly after arriving at her employer's premises. While going to her duty station, she slipped on a wet floor just inside the building. Once again, this injury was also found to be compensable.

Another case involving an on-the-premises injury while the claimant was not clearly performing job duties was Jivan v. Economy Inn Suites, 370 Ark. 414, ___, S.W.3d ___ (June 28, 2007). The claimant was a live-in employee at the respondent's motel. While changing clothes, she was killed in a fire. The respondent denied the claim, contending

Mrs. Jivan was not performing an employment service at the time of the injury. But, the Supreme Court held the claimant was in the time and space and constraints of her employment and was performing employment services and was, therefore, entitled to workers' compensation benefits.

A common factor in all of the above-cited cases, as well as several others which reached a similar result, is that the claimants were all injured on their employer's premises at a time when they were not actually performing any employment duties. But, all of them were in an area their employment duties required them to be, and they were all injured while in an area under the exclusive control of the employer.

Those factors are present here. The claimant was just leaving the gymnasium, which she had been cleaning, and was crossing into the parking lot adjacent to it. Not only was this clearly on the employer's premises, but her injuries arose as the result of a risk inherently dangerous in the situation. That is, she was in a dimly lit parking lot and stepped in a gap left when the employer had the parking lot resurfaced. As in the cases cited above, the injury occurred because of a condition intrinsically within

the control of the employer and the injured worker was in an area her employment caused and required her to be in. I find that the claimant has fully satisfied the requirement set out by the Supreme Court in the Conner decision, in that, her injury was in the time and space boundaries of her employment. Further, since it was in an area she was required to be in to complete her duties, which included policing the parking lot before leaving the premises, I find she has fully satisfied the requirement that an injury occurred while performing an employment service.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner