

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806292

MARY PRITCHARD, EMPLOYEE	CLAIMANT
KOHLER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT
BROADSPIRE SERVICES (TPA), INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 4, 2009

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

Claimant appeared *pro se*.

Respondents represented by the HONORABLE ANDY L. CALDWELL, 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 June 16, 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 of this claim.
2. The employer/employee/carrier relationship existed on or about May 28, 2008, when the claimant contends she

sustained a compensable injury to both wrists.

3. The claimant did not have any lost time as a result of the alleged injury; therefore there are no temporary total disability benefits to the claimant.
4. Respondents have controverted this claim in its entirety.
5. Claimant has proven by a preponderance of the evidence that she was performing employment services at the time of her alleged incident.
6. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury as defined by the Arkansas Workers' Compensation Act.
7. The claimant is entitled to payment of all reasonable and necessary medical benefits in connection with her compensable injuries to her left and right wrists. Respondents are entitled to a credit pursuant to A.C.A. §11-9-411 for any medical payments paid by the claimant's group health insurance provided by the respondent employer.

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 June 16, 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 when she fell on May 28, 2008. Specifically, the majority found that the claimant was performing employment services at the time she sustained her injuries. After conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she was performing employment services at the time of her fall.

The claimant was employed by the respondent employer as an auditing supervisor. On May 28, 2008, she was returning from lunch and entered the shop floor to have a retirement card signed by her coworkers. The claimant ran into another coworker and she fell backwards and hit her head on the concrete. The claimant was able to stand with help and was put in a wheelchair and taken to the front office. The claimant testified that her primary injuries were to her left and right wrists and she was taken to the emergency room at Baptist Medical Center. The claimant was found to have a left broken wrist and a sprained right wrist.

This case entirely comes down to whether or not the claimant was performing services at the time she fell. 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 his/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 he/she was hired to perform, or in incidental activities that are inherently necessary for the performance of the primary activity.

In my opinion, a review of the evidence demonstrates that a claimant was not performing employment services at the time she fell. The claimant had gone to lunch and bought a retirement card for one of her coworkers. The claimant had left the premises and purchased the card while she was out. She returned to the respondent's place of business and could not even remember if she had even gone by her desk following her return.

After she fell, the claimant was told that she was going to have to go to her own doctor because it was not work related because she was getting a card signed on her lunch break at the time of the fall. She only kept talking about that she needed to find the retirement card that she was going to get signed. The claimant was fixated on the retirement card. The claimant claimed that she was also going to check on the auditors. However, the claimant failed to mention anything about checking on the auditors at the time she fell and she did not mention that she was no longer on her lunch break.

The respondents offered their testimony of Teresa Lazenby who works for the respondent employer in the human resources department. Ms. Lazenby stated that she told the claimant that she would have to be responsible for the medical treatment herself because she was not performing employment services. The claimant kept telling Ms. Lazenby that she was getting the card signed at the time of her fall, and the claimant even admitted that she did not mention checking on the auditors to Ms. Lazenby. Ms. Lazenby testified that she did not learn the claimant was contending she was going to check on the auditors until the claimant filled out a Form N on June 5, 2008.

It is significant, in my opinion, that the claimant did not mention going to check on her auditors when she was getting the card signed until she filed the Form N on June 5, 2008. The claimant was told at the time of the accident that she would be responsible for her medical bills and she did not say at that time that she was performing a job function. The only connection between the claimant and her injury is the claimant's presence on the respondent's premises at the time she fell. Further, the only evidence we have purporting that the claimant was going to check on the auditors is the claimant's own self-serving testimony. Questions

concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to

be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

Therefore, based upon by de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she was performing employment services. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER