NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801722

DANIELLE N. WOOD,
EMPLOYEE CLAIMANT

WENDY’S OLD FASHIONED HAMBURGERS,
EMPLOYER RESPONDENT

WAUSAU BUSINESS INS. COMPANY,
INSURANCE CARRIER RESPONDENT

OPINION FILED AUGUST 26, 2009

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

Claimant represented by the HONORABLE J. T. SKINNER, Attorney at Law, BATESVILLE, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, 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 27, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers’ Compensation Commission 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 29, 2008 because she was not

performing employment services at the time of her fall.

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 compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the January 27, 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 claimant was injured in a fall at work on January 29, 2008. The majority is affirming an Administrative Law Judge's decision denying the compensability of the claimant's injury, because they find the claimant was not performing an employment service at the time of the fall. After a de novo review of the record, I find that the claimant was performing employment services at the time of her injury. In my opinion, the majority incorrectly interpreted what was essentially unanimous testimony and improperly denied the claim. For that reason, I must respectfully dissent from the majority's decision.

The claimant was employed at a Wendy's restaurant in Batesville, Arkansas, when she sustained a fall on January 29, 2008. The fall occurred when she was attempting to leave the restaurant at the conclusion of her shift. According to the testimony of the

claimant and two other witnesses who testified at the hearing, the area behind the counter in the restaurant where the claimant and her co-employees worked was cramped, and the floor was almost always wet and greasy. The employer also had a policy requiring all workers to enter and exit from the building's back door.

Just before the injury, the claimant had been working near the drive-thru window. She stated she went to the cash register (which doubled as a time clock) to clock out, and then turned and proceeded to make her way to the building's back door. On the way, the claimant passed two employees. The first of these, Matthew Jackson, was operating the cash register and stepped back to allow the claimant access to it. According to the testimony of the claimant and Mr. Jackson, she took one or two steps after clocking out, and briefly paused to give a hug to a co-employee, Delilah Stroud. Immediately after saying good-bye to Ms. Stroud, the claimant attempted to take another step, and fell heavily to the floor. As a result of this fall, the claimant dislocated her knee cap, an injury for which she underwent surgery.

As a result of the fall, the claimant missed a considerable amount of work and underwent extensive

medical treatment. By the time of the hearing, she had substantially recovered from the fall, but was still having problems with her knee. At that time, she was no longer working for Wendy’s.

In addition to the claimant, two other witnesses testified regarding the claimant’s fall. Both were co-employees who were working at the time the claimant was injured, and they were still employed at Wendy’s. The first of these witnesses was Mr. Jackson, referred to above, and the other was Chelsea Cooper, who was the claimant’s sister. Ms. Cooper helped the claimant after her fall and arranged for transportation to an area hospital.

According to all three witnesses, the floor behind the counter in the Wendy’s restaurant was always slippery. They testified about a water-drainage problem which caused a frequent water leak from the ceiling onto the floor. They also testified about grease overflowing from cooking vats onto the floor and a stopped up drain which prevented the grease from being disposed of.

All three witnesses testified about the cramped area behind the counter and the path taken to the establishment’s back door. According to them, there was barely room enough for two people to pass by each

other in this area. Both Mr. Jackson and the claimant stated that, after Mr. Jackson had made room for the claimant to clock out at the cash register, she then had to pass directly by Ms. Stroud, who was standing next to the frosty machine. The claimant stated she was a close personal friend of Ms. Stroud and in pausing, she merely placed one of her arms around Ms. Stroud to give her a brief hug and to say good-bye. Immediately after doing so, she fell. Mr. Jackson's testimony was almost identical to the claimant's in this regard.

Ms. Cooper testified she did not see the fall. However, she went to the claimant's aid shortly thereafter. Ms. Cooper stated the claimant's pants and jacket were greasy from being on the floor. She also corroborated the testimony of the claimant and Mr. Jackson about the conditions of the floor.

The material facts in this case are not in dispute. The claimant clearly fell while on the premises, within seconds of having clocked out. Likewise, there is no question the fall was occasioned by the slippery floor behind the counter at the claimant's place of employment. In finding the claimant was not entitled to benefits, the only basis cited by the Administrative Law Judge was his conclusion the

claimant had deviated from her employment duties by slowing to momentarily hug her co-employee prior to leaving. In fact, the Administrative Law Judge states in his Opinion that, had the claimant not paused to hug Ms. Stroud, the claim would have been compensable. In my opinion, the Administrative Law Judge has placed far to much emphasis on the claimant saying good-bye to her friend and co-worker.

This issue of what constitutes an employment service and deviation therefrom has been dealt with on numerous occasions by the Courts of this state. It has been held employment services are performed when an employee does something that is generally required for his or her employer. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S. W. 3d 14 (2002). In particular, as held by the Arkansas Supreme Court, in Texarkana School District v. Conners, 373 Ark. 272, ___ S. W. 3d ___ (2008), an employee performs employment services when he or she is doing something generally required by his or her employer, and the test as to whether it was employment service is if the injury occurred in the time and space boundaries of the employment and was a natural and probable consequence or

incident of the employment and the natural result of one of its risks.

In the present case, the claimant's fall was proximately caused by the slippery conditions on the floor behind the counter. In denying the claim, the majority is emphasizing the brief hug the claimant gave to her coworker prior to exiting the restaurant. However, the testimony of all the available witnesses establishes the claimant did not deviate from her path to the door or in any other way change directions when she momentarily paused next to her friend. The majority is characterizing this injury as having happened during a "deviation" from her employment related duties. However, it is not clear how the claimant actually deviated. The testimony of the claimant and Mr. Jackson was to the effect that the only way for the claimant to exit the building was to pass directly by Ms. Stroud. Therefore, the claimant's activities do not constitute any physical deviation from leaving the building.

Of particular significance is the source of the injury itself. That is, the slick and greasy floor behind the counter caused the claimant to slip and fall. Her injury did not arise as the result of any horseplay or other non-job-related activity. Rather, the risk was

clearly one associated with the employment and one which arose out of it.

Many prior cases contain discussions about what constitutes a deviation from an employment service, so as to justify a denial of benefits to an injured worker. However, a common thread in those cases is that the claimants, during the time they were actually injured, had stopped performing their employment duties. Usually, the claimants were engaging in horseplay, had left the business's premises to attend a personal errand, or, while engaged in job-related travel, had deviated from a direct path to accomplish the employer's objective in order to carry out some purpose of the claimant. In the present case, none of those factors can be found. Specifically, this claimant did not physically leave the most direct path from the cash register to the restaurant's back door, nor did she perform any activity which was prohibited or in any way improper. Also, the proximate cause of her injury was not some outside force, but rather a risk inherent in her employment, that is, an ever present slick floor.

In reviewing the Administrative Law Judge's Opinion, I note even the Administrative Law Judge concedes the claimant had completed saying good-bye to

her friend when she fell. However, he was of the opinion that she had not resumed her passage out of the building. Cases finding claims not compensable from a deviation have always described the deviation as being "substantial." In this case, as explained above, a deviation can hardly be found, much less one which could be described as substantial.

The majority is simply not realistically assessing the facts in reaching their decision. The claimant was clearly following the employer's instructions in clocking out and leaving the building by the rear door. In doing so, she was following the most direct route possible. However, this prescribed route required her to pass over a slippery area of the floor. All of the witnesses agreed this was the case, and it is clear the claimant's injury was not the result of any activities on her part, but rather the unsafe condition allowed to exist by her employer. Finding this claim to be anything other than compensable is a miscarriage of justice and clear error. For that reason, I must respectfully dissent from the majority's Opinion.

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PHILIP A. HOOD, Commissioner