

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F811200

RONNA WOODS,
EMPLOYEE

CLAIMANT

JONESBORO CARE & REHAB CENTER,
EMPLOYER

RESPONDENT

CANNON COCHRAN MANAGEMENT SERVICES,
INC., TPA

RESPONDENT

OPINION FILED JULY 28, 2009

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, 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

Respondents appeal an opinion and order of the
Administrative Law Judge filed March 2, 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. On October 24, 2008, the employment relationship existed between the parties, at a time that the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$327.00/\$245.00, for temporary total/permanent partial disability.

3. On October 24, 2008, the claimant sustained an injury arising out of and in the course of her employment at a point in time in which employment services were being performed.

4. The claimant was temporarily totally disabled for the period commencing October 25, 2008, and continuing through the end of her healing period, or until such time that she is released to return to appropriate work by her treating physician, a date to be determined.

5. The respondent shall pay all reasonable hospital and medical expenses arising out of and in connection with the treatment of the October 24, 2008, compensable injury.

6. The respondent has controverted this claim in its entirety.

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 March 2, 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 respectfully dissent from the majority's finding that the claimant was performing employment

services when she fell on October 24, 2008. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant worked for the respondent employer as a Certified Nursing Assistant. Her regular working hours were Sunday through Thursday 10:00 p.m. till 6:00 p.m. On October 24, 2008, which was a Friday, the claimant was attending an in-service training in the respondent employers dining room. In-service training was held every two weeks and employees were required to clock in and then were given their paychecks at the end of the training session.

On October 24, 2008, after the training was over, the employees were told to pick up their paychecks. Instead of getting in line to get her paycheck, the claimant instead opted to go outside and smoke a cigarette. There were several other employees out in the smoking area just off the dining room when the claimant got there. The claimant testified that she first lit a cigarette and then went to throw her chewing gum away while the cigarette was still in her hand. She turned around from the place she was throwing her gum away and fell injuring her shoulder. The claimant testified at the hearing that she had decided it was too

cold to be outside smoking so she was in the process of going to the place where she was going to put out her cigarette when she fell. The claimant was taken to the hospital where she was diagnosed with a fracture of the left humerus. The respondents denied the claim because the claimant was not performing employment services. The majority has opined that the claimant was performing employment services at the time she fell. I do not agree with this determination.

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).

The evidence demonstrates that the claimant was outside in a designated smoking area still smoking a cigarette when she fell. The claimant admitted that she had to leave the building where her employment duties normally took place to go outside. She stated that the only purpose that someone would be in the smoking area was to smoke a cigarette and that there was no reason to leave the building at all unless she wanted to smoke. Further, the claimant was not on-call.

The evidence demonstrates that the claimant was on a break in an area where she had no job responsibilities whatsoever. The claimant was not standing in line to get her paycheck nor was she listening to the in-service presentation. Her sole purpose in going outside was to smoke a cigarette. She was not on her way back into the building at the time she fell. In fact, she still had a lit cigarette in her hand when she fell down. The claimant was not advancing the employer's interest by smoking a cigarette. Simply put, I cannot find that the claimant was performing employment services at the time she fell. Accordingly, I must dissent from the majority's finding.

KAREN H. MCKINNEY, COMMISSIONER