

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F903184

FRANCES E. CRAWFORD,  
EMPLOYEE

CLAIMANT

FRED'S, INC.,  
EMPLOYER

RESPONDENT

INDEMNITY INSURANCE CO.  
OF NORTH AMERICA,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 19, 2010

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney  
at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE WILLIAM C. FRYE,  
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed January 20, 2010. The administrative law  
judge found that the claimant did not prove she sustained a  
compensable injury. After reviewing the entire record *de*  
*novo*, the Full Commission reverses the administrative law  
judge's opinion. The Full Commission finds that the  
claimant proved she sustained a compensable injury, and that

the claimant proved she was entitled to reasonably necessary medical treatment and temporary total disability benefits.

I. HISTORY

The testimony of Frances Ann Crawford, age 68, indicated that she began working for Fred's Inc. in about March 2007. Ms. Crawford testified that she worked as a cashier and that she stocked shelves. The parties stipulated that an employment relationship existed on March 30, 2009. The claimant testified on direct examination:

Q. Now, Ms. Crawford, tell us, please, specifically, what happened to you on March the 30<sup>th</sup> of 2009....

A. Well, I clocked out - you clock in and clock out on the registers....

Q. Your shift was up?

A. Yes, sir....Walked through the store to the back, which is the stock room. And then on the right of the stock room, there is our break room, which is a little building right there on the - a little room right on the right. I went in there. I opened my locker, got my purse out, closed my locker, locked it, and turned around to walk out of the door to leave. And when I walked out of the door back into the stock room, you just turn to the left, you know. It's just two foot. Turned to the left and I felt something right across my right foot. It was like a band across my right foot. And I tripped.

Q. What did this turn out to be that you had tripped over?

A. It turned out to be one of those - it's wide plastic - wide plastic strips that go around boxes, big boxes....And it had evidently gotten loose from - but it was a truck day so, you know, there was merchandise everywhere.

Q. All right. Let me ask you now, you clock out at the register, you go to the back of the store to the stock room area. You say you take a right to go into the break room, get your valuables out of your locker. You're walking out of the break room. You're taking a left. Now, let me ask you, is it your intention to go out through the front of the store?

A. Yes, you have to....

Q. Now, how do you know that? Why can't you go out the back of the store?

A. We don't have openings in the back of the store for anything except loading and unloading merchandise. And that's where you have to - that's how you have to go.

Q. All right. Now, do you have some instructions on your checkout procedures?

A. Yes, sir.

Q. How - where do these instructions come from?

A. Well, I saw films before I went to work and we have a little handbook.

Q. And from the films and from the handbook, do you learn this procedure of clocking out at your register, going to the back of the store, going to the break room, and exiting from the break room to leave the store?

A. Yes, sir. In other words, you do - clock out and then you go get your purse and then you leave....

Q. So when you're leaving from the break room, are you following the procedures?

A. Well, yes, sir.

Q. Okay. And these are procedures that are provided to you by your employer?

A. Yes, sir.

It was reported at White County Medical Center on March 30, 2009 that the claimant had tripped, fallen, and injured her right shoulder. The claimant had slight bruising and edema to the right eye and an abrasion to the right knee. An x-ray of the claimant's right humerus was done on March 30, 2009, with the conclusion, "Humeral neck fracture involving the greater tuberosity." An x-ray of the claimant's right shoulder was done on March 30, 2009, with the findings, "Fracture of the greater tuberosity of the humerus is seen. Humeral head overlies the glenoid. CONCLUSION: Fracture of the greater tuberosity of the right humerus."

The claimant was discharged from the medical center on March 30, 2009, with the diagnosis, "Humerus fracture - proximal, closed."

Dr. John H. Yocum examined the claimant on April 2, 2009:

Ms. Crawford is a 67-year-old, white female in today for evaluation of her right shoulder. She works at Fred's and was on her way out, had clocked out for the day, and tripped over some packing tape in the floor injuring her right shoulder. She had the immediate onset of pain. This happened on March 30. She reports that the shoulder remains quite painful....

Exam of the shoulder shows mild to moderate swelling with faint developing ecchymoses. She has pain with any motion. She has full hand and finger motion. She has already developed some mild swelling in the hand and fingers....

X-rays of the shoulder brought with the patient today show proximal humeral fracture at the surgical neck in satisfactory position and alignment. There is a nondisplaced fracture across the greater tuberosity as well.

I have put her into a collar and cuff. I have instructed in an upper extremity isometric program for the arm, as well as active motion for the hand and fingers. We will see her back in 10-14 days. We will take AP, AP glenohumeral and Y views of the shoulder and likely begin a therapy program. I have discussed with her that, on occasion, displacement may occur requiring ORIF.

The claimant participated in follow-up visits with Dr. Yocum. The last treatment of record from Dr. Yocum took place on June 22, 2009:

Ms. Crawford returns today in followup of her March 30 right proximal humeral fracture. On return she reports that she has made continuing improvement. She still has continued aches and pains. She is continuing a program of therapy.

On examination she has pretty much full elevation, external rotation is symmetrical to about 35, internal rotation is to the SI joint.

X-rays showed radiographic union.

I have discussed with her the importance of continued ROM and strengthening program. I will see her back in followup in about six weeks.

A pre-hearing order was filed on August 17, 2009. The claimant contended that she sustained compensable injuries on March 30, 2009. The claimant contended that she was entitled to temporary total disability benefits from March 30, 2009 and continuing through a date yet to be determined. The respondents contended that the claimant was not performing employment services at the time of the alleged incident.

The parties agreed to litigate the following issues:

1. Whether the claimant sustained compensable injuries to her torso and right shoulder.
2. Reasonably necessary medical treatment.
3. Temporary total disability benefits.
4. Fees for legal services.

A hearing was held on October 27, 2009. The claimant testified that her medical treatment had consisted of physical therapy and injections. The claimant testified that her employment the respondents had been terminated.

An administrative law judge filed an opinion on January 20, 2010. The administrative law judge found that the claimant did not prove she sustained a compensable injury. The claimant appeals to the Full Commission.

II. ADJUDICATIONA. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

...

(B) "Compensable injury" does not include:

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated[.]

An employee is performing employment services when she is doing something that is generally required by her employer. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). The test for determining whether an employee is performing employment services 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. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002).

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "5. Claimant's right shoulder injuries are not compensable because she has not proven by a preponderance of the evidence that she was performing employment services at the time of her fall, and that her injuries occurred during the scope and course of her employment." The Full Commission does not affirm the administrative law judge's finding that the claimant was not performing employment services at the time she fell at work on March 30, 2009. The claimant testified that she operated the cash register for the respondent-employer and that she stocked shelves. The parties stipulated that the employment relationship existed on March 30, 2009. The claimant testified that her

shift had ended and that she had clocked out for the day. The claimant testified that she walked to the back of the store, as she was required to do by company policy, and that she got her purse out of a locker in the breakroom. As the claimant proceeded to leave the breakroom and exit the respondent-employer's premises through the front of the store, she tripped over a wide plastic strip and fell. The claimant sustained acute physical injuries as a result of the fall.

As we have noted *supra*, whether an employer requires an employee to do something has been dispositive of whether the activity constituted employment services. *Barrett v. C.L. Swanson Corp.*, 2010 Ark. App. 91, \_\_\_ S.W.3d \_\_\_ (2010), citing *Ray v. University of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In the present matter, the claimant credibly testified that the respondent-employer required her to retrieve her personal items from a locker in the break room and then proceed out of the front of the store after the claimant's shift ended. The claimant's actions were required by her employer and therefore at least indirectly carried out the employer's purpose and advanced the employer's interest. See *Pifer, supra*. The Full Commission

therefore finds that the claimant proved she was performing employment services at the time she fell on March 30, 2009.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's findings. The Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on March 30, 2009. The claimant proved she sustained an accidental injury which caused physical harm to her right eye, right shoulder, and right knee. The claimant proved that the accidental injury arose out of and in the course of employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident, identifiable by time and place of occurrence on March 30, 2009. The claimant established a compensable injury by medical evidence, supported by objective findings not within the claimant's voluntary control. These objective medical findings included bruising and edema to the claimant's right eye, an abrasion to the claimant's right knee, and swelling and fracture to the claimant's right shoulder.

The claimant proved that the medical treatment of record following the compensable injury was reasonably necessary in accordance with Ark. Code Ann. §11-9-

508(a) (Repl. 2002). With regard to the unscheduled injury to her right shoulder, the claimant proved that she remained within a healing period and was totally incapacitated to earn wages beginning March 31, 2009 until a date yet to be determined. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs.

CONCURRING OPINION

In light of the Court of Appeals opinions in Barrett v. C.L. Swanson Corp., 2010 Ark. App. 91, \_\_\_ S.W.3d \_\_\_ reversing our decision upon which the Administrative Law Judge relied in denying benefits, as well as their reversal

of our opinion in Wood v. Wendy's, 2010 Ark. App. 307, \_\_\_ S.W.3d \_\_\_, I must reluctantly concur in the majority finding. In both Barrett v. C.L. Swanson Corp., supra., and Wood v. Wendy's, supra., the claimants had clocked out, retrieved their personal belongings and were leaving work when they tripped and fell sustaining injuries. The court reasoned in Barrett v. C.L. Swanson Corp., supra., that even though the claimant had clocked out, she was in the process of performing her job duties as she was checking on messages and faxes on her way out the door and thus performing employment services. In reaching this finding the court ignored the fact that the claimant in Barrett had concluded her duty of checking on the messages and faxes, had said good-bye to a co-worker and was turning to walk down the hall and out the door when she fell. Thus, although she had completed her task of checking on messages, the court held that she was performing employment services when she fell. In Wood v. Wendy's, supra., the court reasoned that an employee who is required to exit through a specific door is performing employment services when walking to that door even though she had clocked out and ceased all of her employment duties. As in Barrett v. C.L. Swanson Corp., the court again downplayed the fact that the claimant had

actually deviated from her departure to stop, turn, and hug the assistant manager who was her close friend when she sustained an injury to her knee. While I recognize these precedents from the Court, I write separately to express my belief that these decisions have impermissibly broadened the scope of the workers' compensation law, as in my opinion all work related duties had ceased and the actions of the employees were no longer benefitting the employer. Act 796 specifically states that a compensable injury does not include an injury "inflicted upon the employee at a time when employment services were not being performed...."

A.C.A. § 11-9-102(4)(B)(iii). I simply do not believe that the General Assembly intended to include within the scope of employment services the act of leaving one's employment after an employee had clocked out and was no longer performing any duties associated with their employment. Nevertheless, in light of the court's recent holdings, I am constrained to concur with the majority decision finding that the claimant was performing employment services when she tripped and fell as she was leaving work on March 29, 2009.

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KAREN H. MCKINNEY, Commissioner