

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F905634

SHERYL HAYNES, EMPLOYEE	CLAIMANT
OZARK GUIDANCE CENTER, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 13, 2010

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

Claimant represented by HONORABLE JAMES EVANS, JR., Attorney at Law, Springdale, Arkansas.

Respondent represented by HONORABLE LEE WARDEN, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Specifically, the Administrative Law Judge found that the claimant was performing employment services at the time she sustained an injury to her knee. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we find that the claimant was not performing employment services at the time she was injured.

The claimant was employed by the respondent employer taking phone calls and interviewing clients in order to determine which therapist or programs would best serve these clients. On June 6, 2008, the claimant was going outside to the designated smoking area furthest away from her office. There was a smoking area close to the claimant's office but she chose to go to the other smoking area with a deck that was in the sun. As the claimant was walking down the hallway, Brenda K. Hodges, Director of Recovery Services, was sitting in her office and noticed the claimant in the hallway. Ms. Hodges caught the claimant's attention, telling her that she wanted to talk to her about some Saturday court-ordered DWI classes that the claimant was going to lead the next few weeks for an employee who was out on sick leave. The claimant invited Ms. Hodges to join her in going outside to the break area. While stepping down onto a wooden smoking deck, the claimant injured her right knee. Ms. Hodges was not there when the claimant hurt herself, nor did she see the incident. The claimant and Ms. Hodges did not end up having a conversation about anything regarding the DWI classes. The claimant admitted that but for her desire to smoke, the conversation would probably have taken

place inside the building. The claimant also testified that after she was injured, she did not go to smoke and, therefore, did not have any conversation with Ms. Hodges regarding the DWI classes.

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 Court of Appeals and the Supreme Court have found injuries compensable when the employee was required to stay on his or her employer's premises and perform duties, if the need arises, during their break. See, Ray v.

University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999); Wallace v. West Fraser South, 365 Ark. 68, 225 S.W.3d 361 (2006). In these cases, the Courts found that the employee's presence and availability advanced the employer's interest. Injuries have been found not to be compensable when the employer receives no benefit from the activity being performed during the break or when the activity is not inherently necessary for the performance of the employee's job, even though his or her presence or action benefits the employer. E.g., McKinney v. Trane Co., 84 Ark. App. 424, 429, 143 S.W.3d 581, 585 (2004); Smith v. City of Fort Smith, 84 Ark. App. 430, 435, 143 S.W.3d 593, 596-97 (2004).

The Courts have also found that an injury suffered by an employee while on a break is compensable if the employer has imposed some duty or requirement to be fulfilled by the employee during the break. E.g., Moncus v. Billingsley Logging and American Ins. Co., 366 Ark. 383, 235, S.W.3d, 877 (2006). In Moncus, although the employee was not engaged in the activity for which he was primarily employed when he was fatally injured, he was carrying out the express directions of his employer by following the employer to a job site to begin working. Similarly, in Wal-

Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the claimant suffered a compensable injury when she was returning her purse to her locker on her way back from a scheduled break. For security reasons, the respondent required employees to place their belongings in their locker before returning to work. In Wallace v. West Fraser South, the Supreme Court held that an employee suffered a compensable injury when he fell while walking over a board that was placed by his employer across a ditch for employees to use as a bridge when returning from a break. The claimant was advancing his employer's interest during the break because he remained on the clock, was not allowed to leave the premises, and could be called back to work.

The Supreme Court drew a bright-line rule for "residential employees" in Jivan v. Economy Inn, 370 Ark. 44,260 S.W.3d 260 (2007). In this case, the claimant was a hotel manager who lived on the premises and was "on-call" twenty-four hours a day. She suffered a compensable injury while she was changing clothes in her bathroom to go to the gym. The Court found that the claimant was at an increased risk and held that "[Jivan's] presence on the premises during the fire exposed her to a greater degree of risk than

someone who did not live on the premises. ... Thus, [she] indirectly advanced her employer's interests, even while remaining on the premises during the fire." The Courts have additionally found that an injury suffered by a non-residential employee is not compensable where the employee is performing an activity merely for the purpose of attending to his personal needs. In Cook v. ABF Freight Systems, Inc., 88 Ark. App. 86, 194 S.W.3d 794 (2004), a truck driver who was "off the clock" but "on-call" in a motel room provided by his employer was injured while turning on the lights in the bathroom. The Court found that the claimant was not performing employment services because there was no evidence that his going into the bathroom was for any reason other than to attend to his own personal needs.

In Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004), the Court affirmed the Commission's denial of benefits for an injury that occurred within normal working hours, on the employer's premises, and while the claimant was advancing the employer's interest because the activity the claimant was engaged in was not inherently necessary for the claimant's job. The claimant was a truck

driver at the city dump and the city allowed employees to remove debris from the dump for their own personal use. The claimant was injured removing gravel for his own personal use. The claimant's injuries were found not to be compensable because the gravel loading activity was not inherently necessary for the performance of his job as a dump-truck driver.

The evidence demonstrates that the claimant was not performing employment services at the time that she was injured. The claimant failed to present any evidence that she was required to be available to perform work duties during her break. This case is specifically distinguishable from the White and Ray cases in that regard. Further, the discussion between the claimant and Ms. Hodges that was expected to occur during this smoking break never came to fruition.

Further, the claimant traveled to the south side of the respondent employer premises to take her smoke break even though there was another break area closer to her office. The claimant did not produce any evidence showing she was required to answer phones during her break, nor did she dispute the fact that nothing about the conversation

with Ms. Hodges was required to take place outside.

This case is analogous to the case of McKinney v. Trane Co., supra. In the McKinney case, the claimant was not performing employment services when he was injured during a union contract designated break. The claimant in the McKinney case was on his way to a smoke break when he was injured. In the case before us, the claimant was injured on her way to take her smoke break. There was nothing required by her employer about where she had to take the break. She traveled to a further location than was necessary to take her break. The claimant was not engaged in a work-related conversation with Ms. Hodges at the time she was injured. That conversation had not begun nor did it ever take place before she was injured. There is nothing about the claimant's job duties that required her to be on call during her break. Further, it is simply speculation and conjecture to conclude that an anticipated work-related conversation was going to take place and, therefore, the injury would be compensable. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979);

Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Simply put, we cannot find that the claimant was performing employment services at the time she was injured. Accordingly, we hereby reverse the decision of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant was performing employment services at the time of her injury, and I would award benefits accordingly.

On June 6, 2008, the claimant decided to take her break, smoke a cigarette, and sit in the sun. She left her assigned area and was proceeding to one of the designated

break or smoking areas. In order to reach this destination, she was required to enter and pass through the main building that housed most of the respondent's operation. While going to her intended destination, she passed the office of Brenda Hodges, one of the directors or supervisors for the respondent. As she walked by Ms. Hodges' office, Ms. Hodges called out to her and told her that she wanted to discuss the claimant's handling of the upcoming Saturday DWI course. She responded to Ms. Hodges that she was on her way to take her break. She suggested that Ms. Hodges accompany her and discuss the matter in the break area, to which Ms. Hodges agreed. As she was proceeding to the break area, accompanied by Ms. Hodges, she stepped down from a concrete sidewalk to a wood deck, with her right foot, and immediately felt a sudden pain and heard a pop in her right knee. She staggered over to a nearby chair and sat down. She informed Ms. Hodges that she was in too much pain to carry out their planned discussion and needed to have her knee seen about by a doctor. She then went back to her assigned work area and reported the incident and her difficulties to her immediate supervisor. At that time, she also completed the initial incident reports, left the

facility, and went to Dr. Al Gordon's office for evaluation and treatment.

This description of the events surrounding this incident, given by the claimant, coincides with the testimony of Ms. Hodges. In her testimony, Ms. Hodges stated that, on June 6, 2008, she observed the claimant going down the hallway of the main building in front of her office. She called out to the claimant and advised the claimant that they needed to talk about the upcoming DWI counseling session. She stated that the claimant invited her to accompany the claimant outside to the break area, so the claimant could smoke, while they were discussing this matter. Ms. Hodges agreed to do so, and followed the claimant out to the break area. It was also Ms. Hodges' testimony that it was necessary for her to find out whether the claimant was prepared for the Saturday DWI program and that she needed to talk to the claimant about this as soon as possible. After they got outside in the break area, Ms. Hodges noticed that the claimant appeared to be in significant pain. She inquired if the claimant was okay and that the claimant advised her that she was not. The claimant then left the break area and Ms. Hodges returned to

her office. It was Ms. Hodges' testimony that, had the claimant not been hurting or had nothing else happened, they would have discussed the DWI course at that particular time, regardless of whether or not the claimant was on break.

The factual circumstances and events surrounding this specific incident show that it occurred on the employer's premises and during the claimant's regular working hours. Although, at the time of this incident, the claimant may have been proceeding to the break area to smoke a cigarette, she was also obviously intending to discuss the planning and preparation of an upcoming DWI class with one of her supervisors. The fact that this discussion may not have taken place, due to the occurrence of the claimant's accidental injury, is immaterial. The evidence undisputedly shows that the claimant was going to be expected to perform services that benefitted the respondent-employer during this particular time. Thus, the facts in this case are not only similar, but are in fact stronger, than those in the case of White v. Georgia Pacific Corporation, 339 Ark. 474, 6 S.W.3d 98 (1999), and Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999). In these cases, the evidence only showed that the claimant was generally expected to

perform employment services during break and not that they were actually expected to do so during the particular break, during which the accident and injury occurred. As did the Administrative Law Judge, I find White and Ray to be controlling. The claimant was performing employment services at the time her injury occurred.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner