

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F904217

JANICE C. TUCKER, EMPLOYEE	CLAIMANT
BANK OF AMERICA CORPORATION, EMPLOYER	RESPONDENT
GALLAGHER BASSETT, CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 11, 2011

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

Claimant represented by the HONORABLE GEORGE H. BAILEY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed August 23, 2010.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employee-employer-carrier relationship existed on May 6, 2009, at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$550.00/\$413.00 in the event this claim was found to be compensable. The claimant drew unemployment benefits

totaling \$5,016.00. Some expenses have been paid by the claimant's group carrier, Aetna. The claimant's employment was terminated June 15, 2009.

2. The claimant has failed to prove a compensable injury as she was not performing employment services at the time of the accident. 3. If they have not already done so, the respondents are directed to pay the court reporter, Linda Parker's, fees and expenses within thirty days of receipt of the bill.

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.

Thus, we affirm and adopt the 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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I would award medical and indemnity benefits to the claimant for her compensable injury.

The claimant was injured when she slipped in water on the stairs of her parking deck, on her way from her car into her building. Her use of the deck was required and paid for by the respondent employer. Her duties included a visual sweep of the exterior of the building, the drive-through area, the parking deck and access areas to the bank, and then the bank's floors and areas, as well.

I find that the claimant's testimony that she was on duty as a representative of the bank when she got out of her car wearing her nametag each morning, and that she was expected to do a visual sweep of the exterior of the bank, the drive-through area, and then the interior of the facility for security purposes, is credible.

I find that the testimony of the respondent's witness, Daryl Wiltshire, the claimant's supervisor, was not credible. He did not state that the claimant's behavior was inconsistent with bank policies for a bank officer entering the building alone, or inconsistent with bank security. The routine that the claimant

described, including the care with which she varied her parking and entry routines to avoid displaying an observable pattern and her visual sweeps of the areas, is a reasonable security plan. Wiltshire's suggestion that the claimant's routine was unnecessary due to the "different" nature of the main branch is insufficient to discredit the claimant. The claimant either carried out instructions explicit to the main branch or to her employment with the respondents in different locations, which were never changed, altered, or criticized by her superiors. Lastly, Wiltshire's testimony, while intended to contradict the claimant's, was often non-responsive to the questions and certainly counter-intuitive to bank security.

The claimant's testimony that her duties upon arrival at the facility also included a visual sweep for maintenance and housekeeping issues is also consistent with her position as bank manager and as the first person to enter the facility. In fact, she testified that she had already followed procedures to have water in the parking deck addressed, as was her responsibility.

The claimant also testified that she was expected to wear her nametag from the time that she left her vehicle, and that whenever she wore it, and whenever she was "onstage," meaning in an area where she could be observed by a customer, she was on duty, wearing her "game face," representing the bank. This is consistent with a business dependent on reputation and

customer service.

The majority, in adopting the opinion of the Administrative Law Judge, determined that the claimant was in a common area of the building in which the bank was located, on her way to her employer's office, and therefore, she was not performing employment services. I disagree, as this is too limited an application of the law on this issue.

The term "employment services" is not defined in the Arkansas Workers' Compensation Act, but the Supreme Court has stated that "an employee performs employment services when doing something that is generally required by the employer." CV'S Family Foods v. Caverly, 2009 Ark. App. 114, 2 (2009) (citing Wallace v. West Fraser South, Inc., 365 Ark. 68, 225 S.W.3d 361 (2006)); Texarkana v. Conner, 373 Ark. 372, 376 (2008). The test for "employment services" is "the same as that used to determine whether an employee was acting within the course of employment, i.e., 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." Id. The Supreme Court, in Texarkana v. Conner, supra, stated that the "critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury," and that the issue depends on the particular facts and circumstances of each

case. The Court of Appeals has also explained that "[w]hatever 'employment services' means must be determined within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions." Honeysuckle v. Stout, 2009 Ark. App. 696 (2009).

The courts have found that activities in which claimants were engaged outside of work hours or while on break were employment services. In CV'S Family Foods v. Caverly, 2009 Ark. App. 114 (2009), the claimant was the night manager of the appellant grocery store. He was injured escorting a sixteen-year-old employee to her vehicle in the store parking lot after dark and after the store had closed. The Court of Appeals held that he was performing employment services:

Watching the young employee to ensure her safety at night was more than gentlemanly and laudable: it was an activity that came within the scope of his oversight, and it benefitted the employer by ensuring the safety of a trained and valuable employee, and by helping establish a record of safety on the premises that would benefit the employer in its attempts to recruit future employees and to alleviate any fears that potential customers might have about the safety of the parking lot after dark.

In Texarkana v. Conner, 373 Ark. 372 (2008), the claimant was injured opening a locked gate to a parking lot. He was returning from a break in his vehicle, and the normal entrance to the parking lot was blocked. His intent was to park

and go to the cafeteria to eat lunch, where he would be on call to perform his job duties if necessary. By creating access to the parking lot, he was advancing his employer's interests, even if he was the only employee seeking access at that time. In that case, the Arkansas Supreme Court made a statement crucial to the current claim:

It is clear that in a case such as the present one, where an injury occurs outside the time and space boundaries of the employment, the critical inquiry is whether the employer's interests were being advanced, either directly or indirectly.

Conner, supra at 377 (emphasis added). The Court went on to say that the pertinent question was whether the employer's interests were advanced by the employee at the time he unlocked the gates and injured himself. Thus, according to the Arkansas Supreme Court, the fact that "an injury occurs outside the time and space boundaries of the employment" does not bar a finding that an employee was engaged in employment services.

In Witt v. Allen & Son, Inc., CA08-1302 (Ark. App. 9-2-2009), the claimant was engaged in employment services, where he was injured in a motor vehicle accident. He was not on the clock at the time of the accident, but he had already met with other employees to organize the work plan for the day. Another employee was driving him to one job site to pick up a tractor to take to another job site, at the time of the accident.

In a pair of cases which are very apposite to the current claim, the claimants were injured before they were officially "on the clock," but while they were performing employment services by serving the interests of the employer. In Caffey v. Sanyo Mfg. Corp., 85 Ark. App. 342, 154 S.W.3d 274 (2004), the claimant slipped and fell in her employer's manufacturing plant just minutes before she clocked in at the beginning of her shift. She arrived at the plant in plenty of time to get to her position on time, and as required by her employer, she showed her identification badge to a guard at the entrance of the parking lot. After parking her vehicle, she walked to a second guard shack where she displayed her identification badge to another guard. She then walked through double-doors into the plant and down the hallway to the clock-in station. She fell within five feet of the clock in some water on the floor and within 200 feet of her station. The claimant was not paid for the time before she clocked-in or after she clocked-out. Her behavior, for which she was not compensated, was required by the employer and advanced the employer's interests in security. She was performing employment services at the time of her fall. In that opinion, the court noted Shults v. Pulaski County Special School District, 63 Ark. App. 171, 976 S.W.2d 399 (1998), in which the claimant, a school custodian who had just arrived at work and had not clocked in, fell while entering the

school building to disarm the alarm. This court found the injury compensable because the claimant was on his way to check the alarm system, a duty that advanced his employer's interest.

The Court of Appeals, in Foster v. Express Personnel Ser., 93 Ark. App. 496, 222 S.W.3d 218 (2006), relied upon the Caffey and Shults decisions. The court reversed the Commission's finding that the claimant was not performing employment services when she was injured, because she was injured in an area in which employment services were expected of her and was furthering her employer's interests when she was injured. The claimant was employed by an auto sales company, processing different payment types. She had to collect papers from one desk to take to her own, to confer with other employees in different areas of the business, and to address questions from employees in the service area. She was injured inside the service bay area on her way to pick up the items to be processed when she fell and was injured.

The court reversed and remanded the claim to the Commission, because "regardless of the fact that Foster had not reached her desk or the cashier's desk or was outside of the building in which her office was located, she was unquestionably injured in an area in which employment services were expected of her." The issue was not whether she was "on the clock" or whether she was on her way to her desk or to the cashier's desk to pick up papers to process. "Rather, the issue is whether the

injury occurred within the time and space boundaries of the employment when Foster was carrying out the employer's purpose or advancing its interests directly or indirectly." The court found the facts in Foster even more compelling than the Caffey case, where the Foster claimant would have been required to perform duties as soon as she arrived at the facility, where the Caffey claimant would not be so required until at her station and at a prescribed time.

In the instant claim, the claimant was on her work premises at the time of her injury. Her morning routine, upon arrival at the work premises, was to visually sweep the exterior and interior areas of the facility in which the bank was housed, for security, maintenance and housekeeping issues. She noted that, as bank manager, she had responsibility for the security of the bank and the safety and comfort of the bank's customers. She was required to park in the facility's parking deck, at the employer's expense. She was required to use a key card to gain access to the facility, at several stages, including the entrance of the parking deck and the doors to access the building in which the bank was housed. These behaviors and the bank's requirements were quite clearly for the benefit of the employer, in that the claimant was taking care to assess the facility on a daily basis for breaches in security, and just as importantly for maintenance and housekeeping issues which would affect the comfort, safety

and impression of customers.

The claimant was also required to vary her routine of where she parked in the deck, to avoid a discernable pattern of behavior which would cause a security problem. Her possession of the ability to access both the facilities and the computer system justify a finding that the claimant's use of the parking deck and her care in varying her routine were for the benefit of the employer, in having a trusted employee capable of opening the bank for business each morning, with minimized risk of security compromise.

Similarly to the above-discussed cases, the claimant was serving her employer's interests by complying with security measures in the use of her key card and in the use of the parking deck and her practice of avoiding a pattern of behavior. She was serving her employer's interests by arriving in time to visually sweep the exterior of the building in which the bank was located, the drive-through area, and the access areas from the parking deck to the building, for security, maintenance and housekeeping issues. She served the employer's interest by wearing her nametag and being ready to address facility concerns, security concerns, and customer concerns, from the moment she left her car.

There is no question that the claimant was serving the employer's interest, directly and indirectly, when she was

injured on May 6. The claimant sustained a compensable injury.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner