NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H104889

RUTH ESCOBEDO, EMPLOYEE	CLAIMANT
JAKE'S JANITORIAL SERVICES, UNINSURED EMPLOYER	RESPONDENT NO. 1
UNIVERSITY OF ARKANSAS, EMPLOYER	RESPONDENT NO. 2
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER/TPA	RESPONDENT NO. 2
ABSOLUTE JANITORIAL, UNINSURED EMPLOYER	RESPONDENT NO. 3

OPINION FILED APRIL 18, 2024

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

Claimant represented by the HONORABLE EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 appearing *Pro Se*.

Respondents No. 2 represented by the HONORABLE ROBERT H. MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 3 represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed June 5,

2023. Respondent No. 2 and Respondent No. 3 cross-appeal. The administrative law judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 6, 2022, and contained in a Pre-hearing Order filed April 6, 2022, are hereby accepted as fact.

2. The claimant proved by a preponderance of the evidence that Respondent No. 1, Jake's Janitorial Services, and the claimant had an employee/employer relationship on November 12, 2019.

3. The claimant failed to prove by a preponderance of the evidence that Respondent No. 2, the University of Arkansas, and the claimant had an employee/employer relationship.

4. The claimant failed to prove by a preponderance of the evidence that Respondent No. 3, Absolute Janitorial, and the claimant had an employee/employment relationship.

5. The claimant proved by a preponderance of the evidence that Respondent No. 3, Absolute Janitorial, has liability for any and all compensation awarded to the claimant through her employee/employer relationship with Respondent No. 1, Jake's Janitorial Services, for her November 12, 2019, compensable left knee injury under ACA §11-9-402.

6. The claimant proved by a preponderance of the evidence that she sustained a compensable injury to her left knee on November 12, 2019, while an employee of Respondent No. 1, Jake's Janitorial Services.

7. The claimant proved by a preponderance of the evidence that medical treatment admitted into evidence by the parties is reasonable and necessary medical treatment for the claimant's compensable left knee injury. The claimant also proved by a preponderance of the evidence that the medical treatment recommended by Dr. Arnold, including surgical intervention, is reasonable and necessary treatment.

8. The claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from January 10, 2021, to a date yet to be determined.

9. The issue of attorney's fees and compensation rates are moot.

10. The defense of Notice raised by Respondent No. 2, the University of Arkansas, and Respondent No. 3, Absolute Janitorial, are moot.

After reviewing the entire record *de novo*, it is our opinion that the administrative law judge's June 5, 2023 decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed. The Full Commission notes the correct citation of two cases cited in the administrative law judge's opinion: *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996); and *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982). We otherwise find that the administrative law judge's findings of fact and conclusions of law are correct and are therefore adopted by the Full Commission.

Therefore, we affirm and adopt the decision of the administrative law judge, including all findings and conclusions therein, as the opinion of the Full Commission on appeal. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars ($500) in accordance with Ark. Code Ann. §11-9-715(b)(1)(Repl. 2012). Respondent No. 3, Absolute Janitorial, shall be liable for said fee.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the credible evidence that she was performing employment services and suffered a compensable left knee injury resulting from a fall outside of her vehicle while working for Jake's Janitorial Services on November 12, 2019.

Our rules define a compensable injury as "[a]n accidental injury . . . arising out of and in the course of employment." 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). The Act, however, fails to define the phrase "in

the course of employment" or the term "employment services." *Wood v. Wendy's Old Fashioned Hamburgers*, 2010 Ark. App. 307, 374 S.W.3d 785 (2010).

Our Supreme Court has held that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer." *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008).

The Commission uses 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. *Id*. Specifically, it has been held that 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." *Id*. 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. *Id*. The issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id*.

In short, an employee is performing employment services when engaged in the primary activity that he or she was hired to perform, or in incidental activities that are inherently necessary for the performance of the primary activity, or when

an employee is performing employment services when he or she is engaging in an activity that carries out the employer's purpose or advances the employer's interests. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997); *Hightower v. Newark Pub. Sch. Sys*., 57 Ark. App. 159, 943 S.W.2d 608 (1997).

An employee is generally not said to be acting within the course of employment when he is traveling to or from the workplace, and thus, the "going and coming rule" ordinarily precludes compensation for injuries sustained while an employee is going to or returning from his place of employment. *Linton v. Ark. Dep't of Corr.*, 87 Ark. App. 263,190 S.W.3d 275 (2004). However, there are exceptions to the "going and coming rule" where the journey itself is part of the employment service, such as traveling men on a business trip and employees who must travel from job site to job site. *Id*. Whether an employer requires an employee to do something has been dispositive of whether that activity constituted employment services. *Campbell v. Randal Tyler Ford Mercury, Inc*., 70 Ark. App. 35, 13 S.W.3d 916 (2000).

In the present case, the claimant’s time sheets in the record reflect that her work began inside the Pike house at 7:00 a.m. and mention nothing about the Duncan Street Apartments. The going and coming rule clearly applies. (Resp. Ex. 1, Pp. 2-9; Hrng. Tr., Pp. 40-41). Although the claimant asserted at the

hearing that “sometimes we went outside to clean or pick up trash,” her supervisor, Lena Phillips, stated, unequivocally, that “[w]e did not do anything outside of the building” and that “[w]e do not clean the outside of the buildings at all.” (Hrng. Tr, Pp. 35, 51). Their work was strictly inside of the campus buildings. (Hrng. Tr., P. 51). Regardless, the claimant was not scheduled to do any exterior work. (Hrng. Tr., P. 35).

At the time of her injury, the claimant was merely getting out of her car when she fell in the parking lot on her way to begin her work day at 7:00 a.m. inside the PKA House. The tools for her job were inside of the building and all of the work to be done was inside of the building. The record reflects the claimant had not begun her work day at the Pike House prior to her injury. For these reasons, I find that the claimant was not performing employment services at the time of her injury and, therefore, her claim is not compensable.

Accordingly, for the reasons set forth above, I must dissent.

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MICHAEL R. MAYTON, Commissioner