

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H201208

JEFFERY HARVEY, Employee	CLAIMANT
UNIVERSITY OF ARKANSAS, Employer	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, Carrier/TPA	RESPONDENT

OPINION FILED AUGUST 3, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by DAVID L. SCHNEIDER., Attorney, Fayetteville, Arkansas.

Respondent represented by CHARLES MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 20, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 18, 2022 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on February 3, 2022.

At the time of the hearing the parties agreed to stipulate that claimant earned an

average weekly wage of \$699.00 which would entitle him to compensation at the rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's back on February 3, 2022.
2. Medical.
3. Temporary total disability benefits from February 3, 2022 through May 11, 2022.
4. Attorney's fee.

The claimant contends he sustained a compensable injury while working for respondent on February 3, 2022. At that time, he was at the University of Arkansas staying overnight that night due to inclement weather at the request of the respondent. This overnight stay was to ensure that he would be able to be at work in the morning and so as to carry out essential activities of the respondent and was specifically for its benefit. Accordingly, claimant was acting in the course and scope of his employment when he slipped and fell while coming out of the shower, injuring himself. He went to the Mercy ER and was found to have sustained a compression fracture of the L3 vertebra. The treating physician took claimant off work. The claimant was later seen by Dr. Jones at Mercy Orthopedics who directed claimant to remain off work until he is medically released to do so. The respondents have controverted this claim in its entirety.

The respondents contend that the claimant did not sustain a compensable work-related injury on February 3, 2022. The respondents contend that any injury the claimant might have sustained on that date was sustained at a time when employment services were not being provided.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 18, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. The parties' stipulation that claimant earned an average weekly wage of \$699.00 which would entitle him to compensation at the rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits is also hereby accepted as fact.
3. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back on February 3, 2022. Specifically, claimant was not performing "employment services" at the time of his injury.

FACTUAL BACKGROUND

The claimant is a 67-year-old man who began working for the respondent as a Generalist in August 2018. As a generalist, claimant was responsible for general maintenance in the dorm buildings of Futrall, Holcombe, and Gatewood A. He was also responsible for general maintenance at the Housing Office.

In early February 2022 inclement weather was expected for Northwest Arkansas.

Claimant, along with other individuals on the maintenance team, received an e-mail indicating that if they wanted they could stay in empty dorm rooms on campus since travel might be treacherous. Claimant had done this before and he again chose to stay in a dorm room on campus. On the morning of February 3, 2022, after spending the night in a dorm room claimant took a shower and as he was stepping out of the shower, slipped and fell. Claimant landed on his buttocks and his back.

Claimant was taken by ambulance to Washington Regional Medical Center where he was diagnosed with a mild compression fracture of the L3 vertebra. Claimant came under the care of Dr. Charles Jones III, orthopedic surgeon. His treatment included medication, the use of a brace, physical therapy, and work restrictions. Claimant was released from Dr. Jones' care on June 27, 2022 and is currently performing his regular duties with respondent.

Claimant has filed this claim contending that he suffered a compensable injury to his back as a result of the fall on February 3, 2022.

ADJUDICATION

A compensable injury is one that (1) arises out of and in the course of employment; (2) causes internal or external harm to the body that requires medical services or results in disability or death; and (3) is caused by a specific incident identifiable by time and place of occurrence. A.C.A. §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.” A.C.A. §11-9-102(4)(B)(iii). An employee is performing employment services when he is doing

something generally required by his employer. *White v. Georgia Pacific Corporation*, 339 Ark. 474, 6 S.W. 3d 98 (1999). An employee is performing employment services if his injury occurred within the time and space boundaries of the employment when he was carrying out his employer's purposes or advancing its interest directly or indirectly. *Wayne Holden & Company, Inc. v. Waggoner*, 2016 Ark. App. 309, 497 S.W. 3d 210.

Claimant contends that during inclement weather he and other generalists are considered essential personnel who help shovel snow, move personnel, and salt sidewalks. Claimant testified that he chose to stay in the dorm because he would not have been able to get to work the next day from his home in Bella Vista. Accordingly, claimant contends that staying in the dorm provided a benefit to respondent by ensuring that he was present for work on February 3.

I find that the decision in *Lopez v. James Divito Racing Stable*, 2021 Ark. App. 257, 65 S.W. 3d 742 is controlling in this claim. In *Lopez*, the claimant was employed as a "hot walker" whose job was to walk the horses around the barn after they came off the track at Oaklawn. During racing season Oaklawn provided complimentary rooms to some race teams, including Lopez's team. On the morning of March 6, 2017, while claimant was sleeping, a fire broke out and claimant jumped out of a second-story window to escape, injuring himself. Lopez filed a workers' compensation claim contending that he suffered a compensable injury.

The Court of Appeals noted that Lopez's claim turned on whether he was performing employment services when he was injured. The Court noted that the Arkansas Supreme Court had adopted a bright-line rule that employees who are "on call" on premises day and night are within the course of their employment when performing

personal and incidental activities. The Court then noted that Arkansas case laws holds that overnight injuries suffered by non-resident employees are not compensable when the employee is merely attending to his own personal needs. Finally, the Court noted that there were no prior Arkansas cases involving an employee who is injured while residing on the employer's premises when the employee's residence on the premises was permitted but not required. The Court noted that Lopez had fixed hours of work and was not required to be "on call" 24-7. It also noted that Lopez was not required to live on the grounds as a condition of employment. The Court held that Lopez was not within the time and space boundaries of his employment when he was injured. His set work hours did not begin until later that morning and his sleeping was not inherently necessary for the performance of his job. He was merely attending to his own personal needs. Lopez was free to do as he pleased and had no employment obligation as he slept in a room provided for his own convenience. Therefore, Lopez was not performing employment services at the time of his injury.

I find that the facts in this claim are similar to the facts in *Lopez*. Claimant was not required to stay in a dorm room on campus on the night of February 2. He was given the option to stay if he so desired and claimant chose to stay. In fact, claimant testified that staying on campus personally benefited him because he was paid double time and a half for working during inclement weather.

Q Did staying there benefit you personally?

A Yes.

Q In what way?

A Well, we are offered double time and a half for staying

there for inclement weather day.

Claimant testified that he did not believe that he was required to stay on campus and acknowledged that he could have stayed at his home and attempted to drive in to work the next day. He further acknowledged that none of his supervisors told him that he needed to stay on campus.

Testifying at the hearing on behalf of respondent was William Green, the Assistant Director of Operations and Maintenance within respondent's Housing Department. Green testified that the e-mail regarding staying in dorms was sent to the entire maintenance team which consisted of 36-38 employees. Of that number, 5-6 chose to stay in dorm rooms. Green testified that on February 3 in addition to the 5-6 who stayed in the dorm, another 12-15 employees were present who had not stayed in the dorm. Green specifically testified that employees such as claimant were not required to stay on campus, but that staying was voluntary and optional on the employee's part.

In support of his contention, claimant also states that by being on campus he could have been called out to help in emergency situations and therefore was "on call" by his presence on campus. However, the evidence indicates that the claimant was not on call and would not have been contacted in emergency situations.

Green testified that emergency maintenance is maintenance that occurs between the hours of 4:30 p.m. and 8:00 a.m. the next morning. Because there are 6000 students on campus, things break after hours. According to Green, everyone on the maintenance team is in Emergency Maintenance rotation unless they have a medical reason not to be on it. Everyone on the list is on call for one week at a time and takes an on-call bag that

has a phone and tools. That person is responsible for getting any maintenance issues taken care of after hours.

Claimant admitted that he was not part of the on-call list because he had a medical release. In fact, claimant admitted that he had never been called out in the middle of the night for emergency maintenance. Further, even though claimant was on campus on the night of February 2, Green testified that claimant would not have been called for an emergency because the on call list even applies to inclement weather situations.

Q So I was asking him and maybe I didn't ask it very clearly, but if Mr. Harvey is not on the on-call emergency list as of the night of February 2nd, early morning of February 3rd of 2022, had there been an emergency on campus or in the dorm he was staying in, do you know one way or the other, would he have been one of the personnel called?

A Not after hours, no.

Q Because he wasn't on the list?

A Because he is not on the list to even call.

Finally, also as in *Lopez*, claimant's set work hours did not begin until 8:00 a.m. the next morning. Claimant acknowledged that his work start time would have been 8:00 a.m. on the morning of February 3.

In short, as in *Lopez*, claimant was not required to stay on premises on the night of February 2. Staying on the premises was permitted but not required. Claimant had fixed hours of work which were from 8:00 to 4:30 each day. Claimant acknowledged that his work start time would have been 8:00 a.m. on the morning of February 3. Although claimant was on the premises on the night of February 2, he was not on call. In fact,

because of a medical release claimant was not on the on-call list. Claimant admitted that he had never been called out for an emergency. Further, according to the testimony of Green, respondent followed the same on call procedures during inclement weather as during normal weather. Green testified that claimant would not have been called during an emergency on the night of February 2.

At the time of claimant's slip and fall when he stepped out of the shower on February 3, claimant was merely attending to his own personal needs. Claimant was free to do as he pleased and had no employment obligation as he slept in a dorm room provided for his own convenience. Therefore, claimant was not performing employment services at the time of his injury and therefore has failed to prove by a preponderance of the evidence that he suffered a compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back on February 3, 2022. Claimant was not performing employment services at the time of his injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$484.90.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE