

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G706791

JESSIE HAWKINS, Employee	CLAIMANT
WALMART ASSOCIATES, INC., Employer	RESPONDENT #1
WALMART CLAIMS SERVICES, Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 17, 2021

Before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Sebastian County, Arkansas.

Claimant represented by KENNETH A. OLSEN, Attorney, Little Rock, Arkansas.

Respondent #1 represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case comes before the Commission based upon Joint Stipulations submitted by the parties. A pre-hearing conference was conducted on June 23, 2021 and a pre-hearing order was filed on June 29, 2021. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the blue-backed 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 relationship existed between claimant and respondent #1 on September 26, 2017.

3. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$275.00 for total disability benefits and \$206.00 for permanent partial disability benefits.

4. Respondent #1 controverts this claim in its entirety.

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

1. Compensability of injury to claimant's hip on September 26, 2017.

2. Medical.

3. Temporary total disability benefits.

4. Impairment rating.

5. Attorney's fee.

The claimant contends she sustained a compensable hip injury on or about September 26, 2017, for which she is entitled to medical treatment, temporary total disability benefits, an impairment rating, and a controverted attorney's fee.

Respondent #1 contends that the claimant did not sustain a compensable injury as that term is defined by Act 796.

Respondent #2 defers to litigation on all issues except the issue of whether the statute of limitations bars the receipt of the specific benefit of permanent total disability benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, 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 June 23, 2021 and contained in a pre-hearing order filed June 29, 2021, are hereby accepted as fact.

2. Joint Stipulations submitted by the parties and considered a part of the record in this case are also hereby accepted as fact.

3. Claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury while working for respondent on September 26, 2017. Specifically, claimant was not performing employment services at the time of her accident.

FACTUAL BACKGROUND

The claimant is an 84-year-old woman with a 12th grade education. Claimant previously worked in a drugstore from 1956 until 2007. At the drugstore claimant ran a cash register, stocked merchandise, operated a soda fountain and delivered medicine. After her job at the drugstore ended, claimant became employed by respondent in its deli where she worked almost eleven years.

Claimant testified that on September 26, 2017, she arrived at work and began performing her job in the deli. She further testified that at approximately 10:00 a.m. she was instructed to go to lunch. Claimant then testified:

And I was sitting there on the chair resting a minute. I had already clocked out. And when I got up I caught my foot in the chair leg and down I went. *** I was going to get some-

thing to eat. I was still right in the breakroom when it happened.

Claimant was taken by ambulance to North Arkansas Medical Center in Harrison where she was diagnosed with a displaced right femoral neck fracture. Claimant has undergone three separate surgical procedures as a result of her right hip injury.

Respondent #1 has controverted this claim in its entirety and has not paid any compensation benefits. Claimant has filed this claim contending that she suffered a compensable injury to her hip on September 26, 2017. Following a pre-hearing conference on June 23, 2021, the parties chose, in lieu of a hearing, to submit this case on stipulations. The record in this case consists of the pre-hearing order as well as the Joint Stipulations and three joint exhibits which are attached to the Joint Stipulations.

ADJUDICATION

A compensable injury does not include an injury 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). The test for determining whether an employee was acting within the “course of employment” at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer’s purpose or advancing the employer’s interest, directly or indirectly. *Pilgrim’s Pride Corp. v. Calderera*, 54 Ark. App. 92, 923 S.W. 2d 290 (1996). The issue of whether an employee was performing employment services at the time of the injury depends on the particular facts and circumstances of each case. *Texarkana School District v. Conner*, 373 Ark. 372, 284 S.W. 3d 57 (2008).

An employee is performing employment services when she is doing something that is generally required by her employer. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W. 3d 1 (2002). We use the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W. 3d 281 (2007). 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.*

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant was not performing employment services at the time she tripped on a chair and fell, fracturing her hip on September 26, 2017.

Claimant testified at her deposition that at the time of her injury she had already clocked out and was sitting down in a chair in the breakroom deciding what she wanted for lunch. Claimant did not testify that she was performing any job duties for respondent or that she was expected to perform any job duties for respondent during her lunch break. Indeed, respondent has a written policy which the parties have submitted into evidence which prohibits off the clock work. Specifically, employees are prohibited from performing any work during the time they are clocked out for their meal periods.

In summary, based upon the evidence presented, I find that claimant was not performing employment services at the time of her fall and hip fracture on September 26, 2017. Claimant had clocked out for her lunch break and was not performing any job duties for the respondent and was not expected to perform any job duties during her lunch break. In fact, claimant was specifically prohibited from performing any job duties during

her lunch break per the respondent's policy.

Because claimant was not performing employment services at the time of her injury on September 26, 2017, I find that she has failed to prove by a preponderance of the evidence that she suffered a compensable injury on that date.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury on September 26, 2017. Specifically, claimant was not performing employment services at the time of her accident. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE