ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION IV

CA08-1244

April 15, 2009

MARTHA FINCH APPELLANT	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F707535]
V.	
SPRINGHILL SURGERY CENTER, LLC & TRAVELER'S CASUALTY & SURETY COMPANY APPELLEES	REVERSED

This is a workers' compensation case. Appellant, Martha Finch, was employed as a nurse by appellee, Springhill Surgery Center. On April 3, 2007, she sustained a shoulder injury when she tripped and fell while returning to a conference room at the center. Appellee denied her claim for benefits, contending that she was not performing employment services at the time of her fall. Following a hearing, the ALJ concluded that she was performing employment services and awarded her benefits. The Commission reversed the ALJ, and this appeal followed. Appellant challenges the Commission's decision that she was not performing employment services at the time of her fall. We find merit in her argument and reverse the Commission's decision and remand this case for the entry of orders consistent with this opinion.

When a workers' compensation claim is denied, the substantial evidence standard of review requires us to affirm the Commission if its opinion displays a substantial basis for denial of the relief sought by the worker. *Whitten v. Edward Trucking/Corporate Solutions*, 87 Ark. App. 112, 189 S.W.3d 82 (2004). In determining the sufficiency of the evidence to sustain the findings of the Commission, we review the evidence in the light most favorable to the Commission's findings and affirm if they are supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Id.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; there may be substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact or heard the case de novo. *Id.* In making our review, we recognize that it is the Commission's function to determine the credibility of witnesses and the weight to be given their testimony. *Id.*

Hearing Testimony

Appellant worked for appellee exclusively in the GI lab from 6:30 a.m. until 3:00 p.m. On April 3, 2007, she testified she was working in the conference room doing what was called pre-op calls, which involved calling patients who were coming in the next day to get them pre-admitted. She was scheduled to leave early to go to a funeral and stated

that she felt as if she needed to eat something first because she was a diabetic. According to appellant, she left the conference room briefly, picked up her Tupperware container, and returned. She fell as she was entering the conference room. She described it as a hard fall; that she felt pain immediately; and that she knew there was something wrong with her arm.

Appellant explained that she was working on the pre-admission charts in the conference room; that at the time of the accident, though she was preparing to leave, she was still trying to get some phone calls made; that she had work she wanted to finish; and that it was not quite time to leave for the funeral. She testified that she would have had to return to the conference room even if she had left for a reason other than getting her lunch because her charts were still there. She testified that she did not have scheduled lunch breaks in her job; that she rarely left for lunch; and that she and the other GI lab employees normally worked through lunch. By her explanation, if she had not fallen on the day in question, her normal practice would have been to make a phone call while her lunch was heating; then, after her lunch was ready, she would have taken a bite while filling out preliminary paperwork; next, she would have called a patient and talked with him or her on the phone; and, finally, she would have then taken another bite before telephoning the next patient. She emphasized that she was never required to clock out either prior to preparing her meal or eating it while working; instead, she stated that she was on the clock and paid for that time.

When she recovered from her fall and got up, according to appellant, she gathered her charts with her right arm because her left arm was numb, went to the dictation room because the doctor had left by that time, and there made some more phone calls. She testified that she stopped trying to eat at that point, put her charts up, gathered her things, and clocked out.

She explained work during lunch as follows. There is always the chance that she could be called away from lunch to perform work duty; that they "all do that"; that if other people are working and need you for anything, you go help no matter what you are doing; and that you are expected to drop everything and respond.

On cross-examination, appellant confirmed that the incident report's timing of her accident as 11:00 a.m. was correct and further that she clocked out for the day at 11:16 a.m., some sixteen minutes later. She again stated that she called patients, pre-admitting them for their next-day procedures, while she was eating her lunch. She explained that if she speaks to a patient, she indicates on the form that she made contact and that if she does not get an answer, gets a busy signal, or gets an invalid number, she documents that information as well. She did not have any idea how many calls she would have made that day while eating her lunch; but she testified that she could have made several, or just one, or she might have only put charts together. She admitted that she could not remember if she was able to make contact with any of the patients on that day, but that if she had, she would have indicated it on the form. After she fell, she said she had difficulty eating her lunch and making marks on the paper; and that was why she decided to go ahead and

leave. She acknowledged that from the time she fell at 11:00 a.m. until she left at 11:16 a.m., she would not have had time to call too many patients; however, she said that it seemed as if she had tried to call at least one.

On re-direct examination, appellant reiterated that she was certain that whatever she was doing, she was doing the work that was available to be done and needed to be done; that had she not fallen, she would have made calls while her lunch was heating and while she was eating; that the lunch break is not a scheduled, fixed-time break; and that she was just eating and working while she ate.

Upon questioning from the ALJ, appellant explained that she went to the emergency room on the day of her fall and did not go to the funeral. By the time she reached her sister's apartment, she testified her arm was blue and both her arm and hand were swollen; that her sister accompanied her to the emergency room; and that she checked in before noon. Again, she repeated that she was either doing paperwork or making phone calls in the conference room; that prior to making final calls, she has to go through the sheets that have been printed, pin them together, and add the doctor's order sheets to them. She said that there are no policies at the center requiring the employees to take a lunch; that the employees are charged for thirty minutes of lunch, but that with the way they work, there was no way to schedule a set lunch period. She said that her own hours for that day were 6:00 a.m. until 2:30 p.m. and that, normally, procedures are not finished until after noon, but that they just happened to finish early that day.

Laura Gusewelle, the surgery center's clinic manager, also testified at the hearing. She explained that nurses at the center are not paid for the time that they take off for lunch; but that thirty minutes are deducted from their pay unless they fill out a form stating that they took no lunch that day. According to the clinic manager, the nurses are not expected or required to perform any work for the center while on lunch break; that in extreme situations, nurses are indeed subject to having their lunch interrupted and being called back to work during their lunch break; and that it would be very rare for someone to be called away from their lunch.

The clinic manager also testified about the clinic's lunch policy and her observations of its daily usage. She testified that the clinic did not track how much time employees spend on their lunches; that the clinic just automatically deducts thirty minutes from each day's pay period, unless the nurses either clock out and back in or submit a form indicating that they ate lunch while working; that employees are not prohibited from working while they eat; that she had observed employees working while they eat; that if an employee was at his/her work station eating and a doctor asked for help, it would not be acceptable behavior for the employee to refuse to leave his/her lunch; and that she would expect appellant to help a doctor if asked for help while she was eating.

The clinic manager stated that she had examined twenty-six or twenty-seven charts for patients who had scheduled procedures for April 4, the day after appellant's fall, and

that appellant's signature did not appear on any of those forms indicating that she had completed a call to the patient.[1]

Upon examination by the ALJ, Gusewelle testified that in her six years' experience as clinic manager, the common practice, particularly in the GI area, was for nurses to complete all of their patients for the day, go back to the patient's room, clean it up, and then take a lunch break. She said that the conference room was the common place for the nurses to take their lunches because it was nicer than the lounge; that they take their lunches and then start making pre-op calls; that if a nurse decides not to eat, she makes her pre-op calls, clocks out, and goes home with no lunch; that it was pretty common for someone who did not take a lunch to fill out a form because, otherwise, there is an automatic thirty-minute deduction if the nurses worked after noon. While the clinic manager acknowledged that it was common for employees to eat their lunches in the conference room, she testified that it was not common for them to handle paperwork or make phone calls while they were eating. She acknowledged that they did make pre-op

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[1] The following post-hearing stipulation was submitted by the parties and allowed by the ALJ:

> Of the 26 pre-operative call sheets (also described at the hearing as pre-admission forms) identified by the respondent-employer as belonging to patients scheduled for surgery on April 4, 2007, none of them contain the claimant's signature or initials. Three of these pre-operative call sheets contain marks or notations that may have been written by someone other than the nurse who signed the document.
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> The three such pre-operative call sheets I've [Mark White [appellant's counsel]] identified include two from Dr. Wofford's patient files that contain a symbol that appears to be an "R" or "J" and one pre-operative sheet from Dr. Barton's patient files that had a notation about a wrong number.

phone calls in the conference room, but that she had never seen someone making pre-op phone calls in the conference room while eating her lunch.

On re-cross examination, the clinic manager acknowledged that if an employee wanted to leave work early, it would take less time to work while eating than to stop, eat, and then work. She testified, however, that was not the practice at the surgery center. She said that her employees did not eat to get out early; that they did their work (finishing their patients, cleaning up their rooms, getting their paperwork and pre-op phone calls done, and then leaving and eating lunch). She stated that if a nurse wanted or needed to eat lunch before 2:30, she could either eat while working or take a specific break and eat and leave later. She stated that in the two weeks prior to appellant leaving, she never inspected the conference room to see who was making phone calls or eating lunch in there. She did acknowledge that the patient charts appellant was working with "would need to have been returned to where they were put together with the chart."

Discussion

In challenging the Commission's conclusion that she was not performing employment services at the time of her fall, appellant asks three questions: 1) if an employee is injured while on a lunch break, is she nonetheless performing employment services if she is expected to immediately interrupt her break at any time that she is called back to her duties; 2) if an employee is injured while returning from a personal diversion is she nonetheless performing employment services if she is returning to her work area at the time of the injury; 3) is there substantial evidence to support the Commission's

findings of fact regarding appellant's work activities on the day of her injury? All of these questions are contained within the overall question raised by this appeal, *i.e.*, whether appellant was performing "employment services" at the time of her injury.

In *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 72-73, 225 S.W.3d 361, 365-66 (2006), our supreme court explained the analytical framework within which we must examine such a question:

> Act 796 defines 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) (Repl. 2002). 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) (emphasis added). However, Act 796 does not define the phrase "in the course of employment" or the term "employment services." *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope of Act 796 of 1993. *Pifer*, 347 Ark. at 856.
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> Since 1993, this court has held several times that an employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer. . . ." *Pifer*, 347 Ark. at 857; *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 816, 69 S.W.3d 14, 18 (2002); *White v. Georgia-Pacific Corp.*, 339 Ark. at 478, 6 S.W.3d at 100; *Olsten Kimberly*, 328 Ark. 381, 384, 944 S.W.2d 524, 526 (1997). 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." *Pifer, supra; White v. Georgia-Pacific Corp., supra; Olsten Kimberley, supra.* 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." *White v. Georgia-Pacific Corp.*, 339 Ark. at 478, 6 S.W.3d at 100. *See also Wal-Mart Stores, Inc. v. King*, 93 Ark. App. 101, 216 S.W.3d 648 (2005); *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 205 S.W.3d 848 (2005). The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. *Collins*, 347 Ark. at 818; *see also Matlock v. Arkansas Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

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> The court in *Matlock* further noted that "[t]he strict construction requirement of Act 796 does not . . . require that we review workers' compensation claims and appeals as simply a matter of determining whether the worker was performing a job task when the accident occurred." *Matlock*, 74 Ark. App. at 342, 49 S.W.3d 126.

In denying appellant's claim, the Commission explained:

> A review of the evidence demonstrates that the claimant was not performing employment services at the time she was injured. There is no evidence, other than the claimant's own self-serving testimony, that she was working on files either before or after she was injured. The files inspected by Ms. Gusewelle failed to have any notations made by the claimant. There was no evidence of a single call to a patient having been completed or even attempted. There is absolutely no evidence that the claimant was doing anything other than preparing to eat her lunch for which she was not compensated for. Accordingly, we find that the claimant was not performing employment services at the time she was injured. Therefore, the decision of the Administrative Law Judge should and is hereby reversed.

The two majority Commissioners clearly did not find appellant's testimony to be credible, and we defer to the Commission on matters of credibility. The Commission's denial of appellant's claim was based entirely upon its determination that appellant was not telling the truth about working while she was eating. But the decision does not address the undisputed testimony that appellant would be expected to respond to any call for help whether she was eating her lunch or not, a fact corroborated by the clinic manager's testimony (even though she described such a situation as extremely rare). Likewise, no one disputed appellant's testimony that her files were in the conference room when she left to get her Tupperware container, and that she had to retrieve and put away those files before leaving. Retrieval of the files required her re-entry to the conference room anyway regardless of whether or not she was eating her lunch while working. Finally, it

was undisputed that appellee automatically deducts thirty minutes from a nurse employee's pay for lunch, unless the nurse submits a form, stating that she did not take a lunch, or clock in and out, in which case the actual time that the nurse is gone is deducted. It was also undisputed that the automatic, thirty-minute deduction does not involve a set time period.

Viewing the evidence in the light most favorable to the Commission's decision, as we must do in determining whether it demonstrated a substantial basis for its denial of this claim, we have concluded that the Commission did not do so. Under the facts of this case, we do not believe that reasonable minds would accept the relevant evidence that was presented as adequate to support the Commission's conclusion that appellant was not advancing her employer's interests when she remained on the premises while eating her lunch. The undisputed facts of this case concerning appellant being subject to call for work duties while eating her lunch, although rarely enforced, line up more clearly with the facts presented in *Ray v. University of Arkansas*, 66 Ark. 177, 990 S.W.2d 558 (1999) (employee, while retrieving an apple for herself, was injured on her paid break, during which she was required to be available to help students), and *Texarkana School District v. Conner*, 373 Ark. 372, ____ S.W.3d ____ (2008) (employee, returning from a personal errand, was injured unlocking a school parking-lot gate when he was heading to the school cafeteria for lunch, during which he was subject to performing any work duties that might arise).

Reversed.

GRUBER and MARSHALL, JJ., agree.