Not designated for publication

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA 08-1467

WILLA DEAN SMITH APPELLANT V. WAL-MART ASSOCIATES, INC., ET AL. APPELLEES	**Opinion Delivered** April 29, 2009 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F706255] AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Willa Dean Smith appeals the decision of the Arkansas Workers' Compensation Commission finding that she was not performing employment services at the time of her injury. For reversal, appellant contends that the Commission's findings are not supported by substantial evidence and that the Commission erred in its interpretation of the employment-services doctrine. We affirm the Commission's decision.

In November of 2004, appellant began working in the delicatessen at Wal-Mart in Clinton. On January 16, 2007, appellant, then age sixty-seven, left the store for an eye doctor appointment during her lunch break. On her way back to work, she purchased a sandwich, which she planned to eat in the store before clocking in and resuming her duties. The main entrance to the store lay on the east side of the building. When appellant returned to the store, she parked her vehicle in the lot on the north side of the building. The Clinton area

had experienced an ice storm the previous evening, and when appellant alighted from her vehicle, she slipped on the ice and fell onto the pavement. As a result, appellant severely injured her left shoulder.

At the emergency room, a doctor performed a closed reduction as treatment for her dislocated left shoulder. Ultimately, Dr. David Collins, an orthopedic surgeon, diagnosed appellant with a full-thickness, rotator-cuff tear of the left shoulder and axillary nerve palsy. Dr. Collins performed surgery to repair the rotator-cuff tear on April 27, 2007. In her testimony, appellant stated that Dr. Collins had not released her from his care and that Dr. Collins contemplated additional surgery. Appellant filed a claim for benefits associated with the treatment of her left shoulder. In making this claim, appellant contended that she sustained the fall during the course and scope of her employment because Wal-Mart's policy required employees to park in the north lot in order to reserve parking for its customers closer to the entrance of the store. Wal-Mart resisted appellant's claim with the argument that appellant was "off the clock" and not performing employment services at the time of the accident.

At the hearing before the administrative law judge (ALJ), appellant testified that, given a choice, she would not have parked in the north lot. Appellant said, however, that she participated in an orientation program when she was hired and that the program leader advised her that employees were required to park on the north end of the building so that customers would have better access to the store. Appellant said that she understood that any employee who received three write-ups for violating this policy was subject to termination.

Appellant testified that parking spaces for employees in the north lot were painted with white lines and that parking spaces for customers were lined with yellow paint. Appellant introduced into evidence a photograph of the north parking lot, and she marked with a pen the space in which she parked her car on the day of the accident. Appellant designated a space with yellow lines. She testified that the photograph was taken months after the accident, and she believed that the white-lined spaces were painted yellow since the accident.

Andrea White, a former Wal-Mart employee and co-worker of appellant, testified that she also learned of the parking policy during orientation. White said that Wal-Mart required employees to park in the north parking lot to save spaces near the main entrance for customers. She testified that she was told that employees who repeatedly violated this policy could be terminated. Through White's testimony, appellant introduced into evidence the handwritten notes that White took during the orientation program, on which White wrote that employee parking was in the north lot.

Appellant also presented the testimony of Candy Vanholk, another co-worker, who testified that she received newsletters regarding the parking policy, which stated that employee parking was on the north side of the store to allow parking spaces for customers at the front of the store. Vanholk had also heard of employees being asked to move their vehicles to the north lot, but she was not aware of any employee being disciplined for violating the policy.

Chuck Huddleston, the manager of the Clinton store, testified on behalf of Wal-Mart. He said that employee parking was on the north side of the building and that the area had parking spaces marked with both white and yellow lines. Huddleston testified that employees

were asked to park in the white-lined spaces, while the yellow-lined spaces were reserved for customers. He said, however, that he did not strictly enforce this policy, whereas the previous manager had disciplined two employees for violating the policy, including one who was terminated for the violation. Huddleston admitted that he routinely parked in the north lot in a white-lined space.

Huddleston further testified that another Wal-Mart policy expressly forbids employees from engaging in any work-related activities while they are "off the clock." He said that this policy was strictly enforced and that he, as a manager, would be terminated if he had knowledge of an employee working while off the clock. Huddleston testified that appellant would not have been allowed to eat lunch while on the clock and that parking in the north lot had no relationship to her job in the delicatessen.

Arlene Janet Wells worked at Wal-Mart for twenty-two years and held the position of personnel manager at the Clinton store. She testified that she leads orientation programs and that new employees are told to park in the north lot. Wells stated, however, that she never tells employees that they could be disciplined for violating the parking policy. She also said that some employees regularly park in other areas. Additionally, Wells testified that the north parking lot has always had spaces lined in both yellow and white paint and that, to her knowledge, none of the white-lined spaces were recently painted yellow.

Laura Murphree, an employee at the store, testified that employee parking was on the north side of the building. She said that the north lot had yellow and white-lined spaces and that employees were to park in the white-lined spaces.

Tracy Roth, another employee, testified that employees were supposed to park on the north side of the building but that no one had ever discussed with her what would happen if an employee did not park there. She said that she parked in other places on occasion and was not disciplined for doing so. Roth recalled one instance when a member of management questioned her about why she had not parked in the north lot. She said that she explained to the manager that she was getting off work late at night, and she said that the manager did not require her to move her vehicle.

Appellant introduced into evidence a copy of Wal-Mart's national parking policy. The policy stated that it reserved parking closest to the store for customers and that facility managers were to designate areas for employee parking. The policy further stated that an employee who violated the policy would be subject to discipline, including termination.

After hearing the evidence, the ALJ found that the store maintained a policy that required employees to park in the north parking lot in white-lined spaces. The ALJ also found that the policy advanced Wal-Mart's interests because requiring employees to park in a remote location allowed spaces for customer parking close to the main entrance of the store. Based on these findings, the ALJ concluded that employees were performing employment services when parking in the north lot in white-lined spaces. However, the ALJ found that appellant did not park in a white-lined space at the time of the accident, and thus the ALJ concluded that appellant was not performing employment services when the accident occurred. Consequently, the ALJ denied the compensability of appellant's claim. The Commission subsequently affirmed and adopted the ALJ's decision.

For reversal of the Commission's decision, appellant contends that substantial evidence does not support the finding that the parking policy included the requirement of parking in white-lined spaces or the finding that she did not park in one of those spaces. Appellant further argues that the Commission erred by applying the requirement of performing employment services too narrowly in the context of this case.[1]

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2007). A compensable injury does not include an injury which is inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when she is doing something that is generally required by the employer. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). 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. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, ___ S.W.3d ___ (2008). The test is whether the injury occurred within the time and space boundaries of

[1] In its brief, Wal-Mart takes issue with the Commission's determination that the requirement of parking in a designated area constitutes the performance of employment services. Wal-Mart insists that appellant was not performing employment services because she was off the clock and still on lunch break at the time of the accident. If we accepted that argument, the result would nonetheless require us to affirm the Commission's denial of benefits. However, we are in no position to express an opinion on this matter because we do not make our own findings of fact in workers' compensation cases. *See Sonic Drive-In v. Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991). Nor are we at liberty to affirm on the ground that the Commission reached the right result for the wrong reason, as we do in appeals from trial courts. *Cook v. Alcoa*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

the employment when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Parker v. Comcast Cable Corp.*, 100 Ark. App. 400, 269 S.W.3d 391 (2007). As the claimant, appellant bore the burden of proving a compensable injury by a preponderance of the credible evidence. *See* Ark. Code Ann. § 11-9-102(4)(E)(i).

The going-and-coming rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from her place of employment because an employee is generally not acting within the course of employment when traveling to and from the workplace. *CV's Family Foods v. Caverly*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 25, 2009). Prior to Act 796 of 1993, the premises exception to the going-and-coming rule provided that, although an employee at the time of injury had not reached the place where her job duties were discharged, her injury was considered to be within the course and scope of the employment, if the employee was injured while on the employer's premises. *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997). In *Hightower*, however, we held that the statutory requirement of the 1993 Act that an employee must be performing employment services at the time of the injury eliminated the premises exception to the going-and-coming rule.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Foster v. Express Personnel Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006). Substantial

evidence exists if reasonable minds could reach the Commission's conclusion. *Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). When a claim is denied because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Whitlach v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004).

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *Cedar Chem. Co. v. Knight*, 372 Ark. 233, 273 S.W.3d 473 (2008). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Id.* The Commission is not required to believe the testimony of the claimant or any other witness, but it may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

We first address appellant's argument that substantial evidence does not support the Commission's finding that the parking policy included the requirement of parking in white-lined spaces. She contends that the greater weight of the evidence established that the policy required employees to park in the north lot without limitation as to the color of the lines on the parking spaces. The evidence on this subject was contradictory, and the Commission

resolved the conflicts in the evidence and found that the policy required employees to park in white-lined spaces. Considering the standard of review, we are unable to say that the Commission's decision is not supported by substantial evidence.

Appellant further contends that the evidence does not support the Commission's finding that she did not park in a white-lined space. Again, the Commission made this determination by resolving conflicts in the evidence. The parking space that appellant pointed out in the photograph as being the one in which she parked that day is clearly marked with yellow lines. The Commission found credible the testimony that the color of the lines was not altered after the accident. We must conclude that substantial evidence supports this finding as well.

The primary focus of appellant's appeal is her contention that the Commission interpreted the requirement of performing employment services too narrowly. Appellant bases this argument on the broad statement of law that employment services are being performed when the employee is doing something she is *generally* required to do. *See Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006) (emphasis supplied). Appellant asserts that it is irrelevant what color lined her parking space as long as she parked in the north parking area, which advanced the general purpose of Wal-Mart's parking policy to reserve spaces for customers near the main entrance of the store. We find no merit in this argument. Appellant contended that she was performing employment services when the accident occurred because she was complying with Wal-Mart's directive to park in the north lot. The evidence revealed that the north lot had both yellow and white-lined spaces, and we have

affirmed the Commission's determination that the policy included the requirement for employees to park in white-lined spaces. We have also upheld the Commission's finding that appellant parked in a yellow-lined space, which the evidence showed was closer to the building than the white-lined spaces in the north parking lot. The Commission's decision that appellant did not comply with the parking policy is consistent with the evidence found credible by the Commission. Thus, the Commission rendered its decision in keeping with the evidence before it. As the Commission's decision displays a substantial basis for the denial of relief, we affirm that decision.

Affirmed.

GLOVER and BROWN, JJ., agree.