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ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-902

MARY HUDAK-LEE APPELLANT V. BAXTER COUNTY REGIONAL HOSPITAL and RISK MANAGEMENT SERVICES APPELLEES	**Opinion Delivered** February 11, 2010 APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [No. F800239] REVERSED and REMANDED

LARRY D. VAUGHT, Chief Judge

Mary Hudak-Lee appeals the decision of the Workers' Compensation Commission, finding that she failed to prove she suffered a compensable injury when she fell and broke her hip. She argues that there is a lack of substantial evidence supporting the Commission's conclusion that she was not performing employment services at the time of her fall. We reverse and remand.

Hudak-Lee is employed with appellee Baxter Regional Medical Center (Baxter Regional) as a unit secretary. While she primarily performed clerical work, she was also called upon to perform "one-on-one duty," where she was required to supervise patients with special needs.

On December 31, 2007, Hudak-Lee was on vacation. That afternoon, she received a call from her clinical coordinator, who asked Hudak-Lee to work a twelve-hour shift beginning that evening at 7:00 p.m. Hudak-Lee agreed. She began the shift at 7:00 p.m. performing clerical

work. At 11:30 p.m., she was asked to perform "one-on-one duty" and supervise a suicidal patient. Around 2:30 a.m., a coworker asked Hudak-Lee if she needed a break. Because she was sleepy, Hudak-Lee accepted the offer. In an effort to regain alertness, she exited the main entrance of the hospital for some fresh air. She did not clock out, and she testified that she was not required to do so for a break. As she walked the length of the hospital toward the emergency-room entrance, she missed a step and fell. She heard a pop in her right hip, which she later learned was fractured. The injury required surgery that day, which was performed by Dr. William Goodman. Dr. Goodman subsequently released Hudak-Lee to return to work on May 5, 2008, and she has been working for the hospital since that time.

Baxter Regional provided testimony from Donna Langevin, the workers' compensation coordinator, and Jessica Brauer, a nurse leader. Langevin testified that hospital policy requires employees to clock out when they leave the building. Brauer testified that hospital policy requires that employees clock out for any type of break or lunch and that they clock out if they leave the building. While Brauer stated that employees are not permitted to sleep on duty, she believed that stepping outside to get some air would be considered "personal business" and that Hudak-Lee should have clocked out when she exited the hospital. Brauer added that Hudak-Lee could have revived herself on the second floor because refreshments were available.

The administrative law judge found that Hudak-Lee did not sustain a compensable injury because she was not performing employment services at the time of the injury. Specifically, the ALJ found that Hudak-Lee "was unquestionably on break when she fell, she was not 'on call' or otherwise available to help patients or to perform any other aspect of her job at the time."

The ALJ further found that the credible testimony from Baxter Regional's representatives was that Hudak-Lee should have clocked out when she exited the hospital and that she was unable to perform any duties of benefit to the hospital while outside. The ALJ dismissed Hudak-Lee's argument that she was outside only to get fresh air so that she could stay awake for her "one-on-one duty," which was a benefit to the hospital. The ALJ found that this argument "ignores the fact Claimant could have engaged in other activities to accomplish this that would have kept her available to render aid during her break;" she could "have availed herself of free coffee or caffeinated drinks in the nearby vending machine in order to regain alertness." In sum, the ALJ found that Hudak-Lee was on a lunch break and not carrying out the hospital's purpose or advancing its interests, directly or indirectly, at the time of her fall. The Commission affirmed and adopted the ALJ's opinion, and Hudak-Lee filed this appeal.

The sole issue on appeal is whether Hudak-Lee was performing employment services at the time of her injury. In appeals involving claims for workers' compensation, we view the evidence in a light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence. *Texarkana School Dist. v. Conner*, 373 Ark. 372, 375, 284 S.W.3d 57, 60 (2008). Substantial evidence exists if reasonable minds could reach the Commission's conclusion. *Id.* at 375, 284 S.W.3d at 60. The issue is not whether the appellate court might have reached a different result from the Commission, but rather whether reasonable minds could reach the result found by the Commission. *Id.*, 284 S.W.3d at 60. If so, the appellate court must affirm the Commission's decision. *Id.*, 284 S.W.3d at 60.

A compensable injury is "[a]n accidental injury . . . arising out of and in the course of

employment." Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). 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 phrase "in the course of employment" or the term "employment services" are not defined in the Workers' Compensation Act. *Texarkana School Dist.*, 373 Ark. at 376, 84 S.W.3d at 61. Thus, it falls to the court to define these terms in a manner that neither broadens nor narrows the scope of the Act. *Id.*, 284 S.W.3d at 61.

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." *Id.*, 284 S.W.3d at 61 (citations omitted). 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. *Id.*, 284 S.W.3d at 61. 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.* at 376–77, 284 S.W.3d at 61. 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.* at 377, 284 S.W.3d at 61. Moreover, 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.*, 284 S.W.3d at 61.

Hudak-Lee contends that there is a lack of substantial evidence supporting the Commission's conclusion that Baxter Regional's interests were not advanced, directly or

indirectly, when she stepped outside to revive herself so she could complete her shift. We agree. The evidence established that Hudak-Lee was not scheduled to work the night shift on December 31 and was essentially sleep deprived when her shift began. Without sufficient sleep, she was asked by Baxter Regional to sit in a dark and quiet room for more than six hours and to observe a patient. She was not permitted to sleep if the patient was sleeping.

Hudak-Lee testified that she exited the building for the sole purpose of regaining alertness. This testimony is supported by all of the evidence. It was undisputed that she walked out the front entrance of the hospital and headed directly to the emergency-room entrance. There was no evidence that she stepped outside the hospital for any purpose related to her own personal comfort or convenience—she was not going to her car, she was not going to get something to eat or drink, she was not eating or drinking at the time, she was not smoking, and she was not visiting with anyone. This evidence is entirely contrary to the Commission's finding that she was on a lunch break at the time of her fall. Because the only evidence in the record demonstrates that Hudak-Lee was walking in the cold night air to try to refresh herself solely for the benefit of her employer, we hold that substantial evidence fails to support the Commission's conclusion to the contrary.[1]

[1]Interestingly, we note that there is one portion of the Commission's opinion where it actually conceded that Hudak-Lee was advancing Baxter Regional's interests when she stepped outside: "Claimant could have engaged in other activities to [revive herself] . . . . [She] could have availed herself of the free coffee or caffeinated drinks in the nearby vending machine in order to regain alertness." We infer from this conclusion that had Hudak-Lee suffered an injury while drinking a beverage in an effort to revive herself, the Commission would have found this to be a compensable incident. As such, the Commission conceded that Hudak-Lee's efforts to refresh herself advanced the hospital's interests and that she was performing employment services at the time of her fall; it was only the method of revival that

Instead of focusing on whether Baxter Regional's interests were advanced, directly or indirectly, when Hudak-Lee stepped outside to refresh herself so she could complete her shift, the Commission improperly focused its attention on whether Hudak-Lee was on a break and whether she clocked out. This was error. There are a number of cases where it has been held that an injury is compensable, despite the fact that the employee was on a break or not officially clocked in, because the employee was performing employment services at the time the injury occurred. *Texarkana Sch. Dist.*, 373 Ark. at 377–78, 284 S.W.3d at 61–62 (affirming the Commission's finding that an injury suffered by a janitor while opening a gate while returning from his lunch break was compensable because he was performing employment services at the time the injury occurred); *Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998) (reversing and remanding the Commission's decision that the custodian of a school was not performing employment services at the time of his injury because he was only entering the premises and had not yet clocked in; the evidence demonstrated that the custodian's job required him to check the alarm system when he entered the school, which is what he was doing when he fell); *Caffey v. Sanyo Mfg. Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004) (affirming the Commission's decision that the claimant, who fell minutes before clocking in to work but after she showed her badge to two security officers—a job requirement—was performing employment services at the time of her fall).

In sum, we hold that the Commission's decision that Hudak-Lee was not performing employment services at the time of her injury was not supported by substantial evidence.

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she utilized that it called into question.

Reversed and remanded.

PITTMAN and ROBBINS, JJ., agree.