

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204406

SHEILA ROWLAND, EMPLOYEE	CLAIMANT
BEVERLY ENTERPRISES, EMPLOYER	RESPONDENT
AID CLAIMS SERVICES, CARRIER	RESPONDENT

OPINION FILED DECEMBER 30, 2003

Hearing before Administrative Law Judge J. Mark White on November 20, 2003, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Kenneth Olsen, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 20, 2003, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on September 16, 2003, and a Prehearing Conference Order was entered the next day. A copy of the September 17, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed between the parties on April 11, 2002; that the claimant earned sufficient wages to entitle her to a temporary total disability rate of \$425 and a permanent partial disability rate of \$319; that the respondents initially accepted a specific-incident injury and paid medical and temporary total disability benefits through August 9, 2002; and that the respondents have now controverted the claim.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant was performing employment services at the time of her accident; and if the claimant sustained a compensable injury, whether she is entitled to additional temporary total disability and medical benefits.

The claimant contends that she sustained a compensable back injury on April 11, 2002, for which she is entitled to payment of indemnity and medical benefits. Specifically, the claimant contends that she is entitled to temporary total disability from April 12, 2002, through July 11, 2002, and from August 8, 2002, through a date yet to be determined. The claimant further contends entitlement to an attorney's fee as permitted by law.

Respondents contend that the claimant was driving home at 2:00 in the morning on April 11, 2002, when she ran off the road to miss hitting a deer; that the

claimant was in a company-provided vehicle; that the claimant was not performing employment-related services at the time of the accident; and that the claimant was released by Dr. Scott Schlesinger on July 9, 2002, without impairment and no evidence of objective medical findings. The respondents contend that any disability or medical treatment is the result of a pre-existing condition and that any work-related incident is not the major cause of the claimant's disability or impairment. Finally, the respondents contend they are entitled to a credit for group insurance or group long-term disability benefits paid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK.

CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant has proven by a preponderance of the evidence that her injury is established by medical evidence supported by objective findings.
4. The claimant has proven by a preponderance of the evidence that her injury arose out of and in the course of her employment, and that she was engaged in employment services at the time of her injury.
5. This claim is not barred by the going-and-coming rule, and is specifically excepted from the rule by the dual-purpose doctrine.
6. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 11, 2002.
7. The claimant has proven by a preponderance of the evidence that her work injury combined with or aggravated her preexisting condition to bring about her need for treatment, and that she is therefore entitled to medical treatment for her compensable injury.
8. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning April 12, 2002, through July 11, 2002, and from August 8, 2002, until such time as she regains her capacity to earn wages or her healing period ends, whichever occurs first.
9. The respondents are entitled to a credit for all group disability insurance benefits and group health insurance benefits paid to the claimant for this

injury.

10. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a nurse consultant. The purpose of her job was to “consult, evaluate [and] train” the nurses working in the respondent-employer’s nursing homes. She divided her time primarily between three facilities, two in Magnolia and one in Camden, though she also worked at other locations. She defined her “office location” as being, “really wherever I was.” Her “primary tools” were “a laptop computer, a cell phone [and] car,” all provided by the respondent-employer. She had access to an office in the Camden facility, and she was allowed to schedule three days per month in that office. She testified that she “seldom” did work in that office. Most of her administrative work was done at home or in a hotel, depending on where she was at. In addition to the equipment provided at the other locations, the respondent-employer provided a fax machine and computer printer for use in her home. She did not have specific work hours and was considered to be on-call 24 hours per day, seven days per week.

On the day prior to her accident, April 10, the claimant first worked at one

of the facilities in Magnolia. Because of staffing changes, this facility was in a “crisis situation,” and the claimant was responsible for developing an action plan to address the situation. She arrived at Magnolia at 8 a.m. and left around 7 p.m. From there she traveled to her office at the Camden facility in her company car to continue work on the action plan. Part of this plan included the development of training materials to be used the next day. While at the Camden office, the claimant did some work on her computer and printed various documents. She testified that she would have gone directly home from Camden and worked at home instead, but the company-provided printer in her home was out of ink, requiring her to use the printer at the Camden facility.

The claimant left the Camden facility the following morning, at around 1:30 a.m. on April 11, to travel home. She testified that her work was not completed when she left the Camden facility, but that she intended to complete her work when she reached home. She testified that some of the materials needed to complete her work were at her home. During her trip home, she wrecked her car when she swerved off the road to avoid hitting a deer. She did not immediately seek medical attention, but instead went home and arrived after 3 a.m.

The next day, April 12, she sought medical treatment from Dr. William Daniels, followed by treatment with a series of physicians. She was diagnosed with

degenerative disk disease and a bulging disk at L5-S1. After conservative treatment failed, Dr. Edward Saer performed an anterior fusion at L5-S1 on January 22, 2003. The fusion “did not take,” and Dr. Saer continues to treat her.

II. Adjudication

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The medical records, combined with the claimant's testimony, are sufficient to conclusively establish the fourth element, that the claimant's injury was caused by a specific incident identifiable by time and place. The remaining elements will be discussed below.

Objective Findings

The respondents contend the claimant's injury is not established by medical evidence supported by objective findings. Though the claimant's MRI and other test results clearly indicate objective findings of injury, the respondents attribute these findings to the claimant's pre-existing back problems.

In 2000, the claimant sought treatment for low back pain and radicular pain into her left leg. An MRI performed prior to her work accident revealed, "a left L5-S1 foraminal bulge with questionable slight effacement of the left L5 root." An MRI performed on May 6, 2002, after her work injury, revealed, "advanced degenerative disk disease at L5-S1 ... and mild disk bulge result[ing] in mild *bilateral* foraminal stenosis" (emphasis added). The objective findings prior to the work injury revealed bulging on only the left side, while the objective findings after the work injury revealed stenosis on both sides of the disk. This objective change arising after the claimant's accident is sufficient to establish the existence of her injury by medical evidence supported by objective findings. Given these objective changes, and given

the claimant's credible testimony of intensified pain following her work accident, I find that the claimant has therefore proven by a preponderance of the evidence that her injury caused internal physical harm to the body requiring medical services and resulting in disability.

Employment Services

The final element to be considered is whether the claimant's injury arose out of and in the course of her employment, and whether it was sustained while the claimant was performing employment services. The respondents contend it was not.

In order for an injury to arise out of the employment, it must be a natural and probable consequent or incident of the employment and a natural result of one of its risks. *J. & G. Cabinets v. Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980). The same test is used to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within "the course of employment"; 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. *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). The concept of employment services encompasses the performance of incidental

activities that are inherently necessary for the performance of the primary activity. *Privett v. Excel Specialty Prod.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002). The claimant bears the burden of proving by a preponderance of the evidence that she was performing employment services at the time of her injury. *Clardy v. Medi Homes LTC Services LLC*, Workers' Compensation Commission E911499 (Oct. 27, 2000).

The claimant's testimony establishes by a preponderance of the evidence that her injury arose out of and in the course of her employment, and that she was performing employment services at the time she sustained her injury. The mere fact that she was in an automobile at the time of her accident does not change this conclusion, for an employee can be performing employment services while traveling in a car. *See, e.g., Bell v. Tri-Lakes Services*, 76 Ark. App. 42, 61 S.W.3d 867 (2001); *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Likewise, the mere fact that a claimant is traveling to her home at that time does not place her outside the realm of employment services. *See, e.g., Clark (Dec'd) v. Sbarro*, Workers' Compensation Commission E615644 (Dec. 1, 2000).

The claimant testified that she did most of her administrative work at her home. She kept "a lot of training materials, facility files, different things at home" as well as a fax machine and printer, and she performed "a significant amount of work at home." Her car was provided by the respondent-employer, as were her

laptop computer and cellular phone. On the day of the work accident, she had been working in the nursing home at Magnolia. She left the Magnolia facility for Camden, where she worked on an action plan for the Magnolia facility and planned for training sessions to be held the next day. She would have gone directly home to do this work, but the company-provided printer at her home was out of ink and she had to stop at Camden to use the printer in the office. At 1:30 a.m. she left the Camden facility to go home, but she testified that she was going home specifically to retrieve and assemble materials needed for the training sessions to be held the next day. She could not complete this task at the Camden facility, for the needed materials were at her home. She traveled directly home, en route to which she sustained her accident.

I found the claimant to be a credible witness, in that her testimony was plausible, internally consistent, and consistent with the documentary evidence. I note that the claimant was the only witness to testify. Clearly, the claimant was traveling home not only to engage in personal activities, but also to perform specific tasks required by her employment. She could have completed these tasks nowhere else. There would be no dispute she was performing employment services if she had been traveling to another work site owned by the respondent-employer, but clearly her home was as much a work site as the Camden office. Travel between

work sites, including her home, was an incidental activity necessary for performance of her primary job duties. Her employer's interests were furthered by her traveling to her home to retrieve the materials needed to do her job. Given the claimant's credible testimony, and the lack of contradictory evidence, I must find that the claimant has proven by a preponderance of the evidence that her injury arose out of and in the course of her employment, and that she was performing employment services at the time she sustained her injury.

In making this finding, I note two recent decisions by the Court of Appeals denying claims where the claimant was injured in an automobile accident, *Daniels v. Arkansas Dept. of Human Services*, 77 Ark. App. 99, 72 S.W.3d 128 (2002); and *Campbell v. Randal Tyler Ford Mercury*, 70 Ark. App. 35, 13 S.W.3d 916 (2000). The present claim is readily distinguishable from these two cases. The *Daniels* claimant was neither traveling between work sites nor engaged in her specific job duties at the time she was injured. *Daniels, supra*. She was merely returning to work from her lunch break. *Id.* The present claimant, in contrast, was traveling to home because she intended to complete work required by her employer, and indeed her work could not have been completed without her trip home. Likewise, the *Campbell* claimant was not engaged in activities inherently necessary for the completion of his job duties, while the present claimant was so engaged. *Campbell, supra*.

This case is more akin to the facts outlined in *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). Like the present claimant, Pettey was required to travel and had to have vehicular transportation to complete her job. *Id.* Like the present claimant, Pettey “was required by the very nature of her job description to submit herself to the hazards of day-to-day travel” in a vehicle. *Id.* Indeed, the only substantive difference between *Pettey* and the present claim is that Pettey was traveling from a personal destination to a work site, while the present claimant was traveling from one work site to what was effectively another work site – her home. It does not appear that the Arkansas courts have specifically considered whether a home office may constitute a work site, but the majority of jurisdictions hold in the affirmative. See 1 Arthur Larson, *Larson’s Worker’s Compensation Law*, § 16.10 (2002); cf. *American Red Cross et al v. Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975).

Going and Coming Rule

The respondents contend that this claim should be barred by the going-and-coming rule. Though this contention is most likely moot in light of the above discussion, I also find that this claim falls under several of the exceptions to the going-and-coming rule. This finding supplements my finding that the claimant was engaged in employment services at the time of her injury.

It has been held that an employee is generally not acting within the course

of her employment when she is traveling to and from the workplace; thus, the going-and-coming rule ordinarily precludes recovery for an injury sustained while the employee is going to or returning from work. *Daniels v. Arkansas Dept. of Human Services*, 77 Ark. App. 99, 72 S.W.3d 128 (2002). The rationale for this rule is that all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle. *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982). The courts, however, have recognized multiple exceptions to the going-and-coming rule.

One long-standing exception is that the going-and-coming rule does not apply where the employer furnishes the transportation involved in the accident. *See, e.g., Thornton v. Texarkana Cotton Oil Co.*, 219 Ark. 650, 243 S.W.2d 940 (1951); *Hunter v. Summerville*, 205 Ark. 463, 169 S.W.2d 579 (1943); *see generally* 1 Arthur Larson, *Larson's Worker's Compensation Law*, § 15.01 (2002). In the present case, the claimant was traveling in a vehicle furnished by the respondent-employer.

Another exception is that of "traveling men," where the employee's journey is considered part of the service or where travel is an integral part of the job. *Daniels v. Arkansas Dept. of Human Services*, 77 Ark. App. 99, 72 S.W.3d 128 (2002). Such employees are generally within the course of their employment from the time they leave home on a business trip until they return for the self-evident reason that the

travel itself is a large part of the job. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). In the present case, the claimant's credible testimony clearly establishes that travel was an integral part of her job.

The most persuasive exception, however, is that of the dual-purpose doctrine. This doctrine holds that injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer that would have caused the trip to be taken by someone even if it had not coincided with the personal journey. *Lytle v. Arkansas Trucking Servs.*, 54 Ark. App. 73, 923 S.W.2d 292 (1996); *see generally* 1 Arthur Larson, *Larson's Worker's Compensation Law*, §§ 16.01, 16.10 (2002). The decisive test for application of the "dual-purpose" trip doctrine must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils; service to the employer need not be the sole cause of the journey, but it must be at least a concurrent cause and sufficient within itself to occasion the journey. *Id.*

The present claimant's trip home clearly meets the criteria of the dual-purpose doctrine. The work to be done by the claimant at home could not have been done elsewhere. Aside from any personal motive she had for returning home that night, her job duties required her to go home and obtain needed materials. This

was a trip that she would have taken regardless of any personal motive. The business purpose of her trip home was at least a concurrent cause and sufficient within itself to occasion the journey. Therefore, I find that by virtue of the dual-purpose doctrine, this claim is not barred by the going-and-coming rule.

Compensability

The claimant has proven by a preponderance of the evidence that she sustained a specific-incident injury, identifiable by time and place of occurrence, arising out of and in the course of employment, causing internal physical harm to the body requiring medical services, and established by medical evidence supported by objective findings. She has proven by a preponderance of the evidence that she was engaged in employment services at the time of her injury, and that her claim is not barred by the going-and-coming rule. I therefore find that she has proven by a preponderance of the evidence that she sustained a compensable injury on April 11, 2002.

B. Medical Benefits

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The reasonableness and necessity of the treatment received by the claimant has not been contested by the respondents,

nor was it an issue at the hearing.

The respondents did contend, however, that the medical treatment received by the claimant is the result of a pre-existing condition and that any work-related incident is not the major cause of the claimant's disability or impairment. Whether the claimant had a pre-existing condition ultimately matters not, for even if it is demonstrated that a pre-existing condition is also a causal factor, the claimant has met her burden of proof so long as she proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998). The claimant's treating physician, Dr. Edward Saer, opined that the claimant's work injury "exacerbated" her pre-existing condition. Admittedly, Dr. Saer prefaced his opinion with "I think," but the use of that phrase does not place an opinion outside the bounds of a reasonable degree of medical certainty. *See, Howell v. Scroll Technologies*, 343 Ark. 297, 35 S.W.3d 800 (2001).

Given Dr. Saer's opinion, given the new objective findings observed after the claimant's injury, given her intensified complaints of pain after the injury, and given that her pre-existing problems never resulted in lost time, I find that the claimant has proven by a preponderance of the evidence that her work injury combined with or aggravated her preexisting condition to bring about her need for treatment. The

respondents remain liable for all reasonable and necessary medical treatment. The respondents are entitled to a credit for benefits paid by the claimant's group health insurance.

As for major cause, the major cause doctrine is irrelevant to the question of treatment for a specific-incident injury. The question of major cause arises only with regards to permanent impairment, which was not at issue in this hearing. ARK. CODE ANN. § 11-9-102 (4)(F)(ii).

C. Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant testified that she was unable to work after her accident, and that her doctors kept her off of work. She testified that Dr. William Daniel allowed her to return to work as of July 11, 2002, but that Dr. Daniel took her back off of work on August 1, 2002, when her back pain became unbearable. She testified that she has

not returned to work and that Dr. Saer continues to keep her off of work because her fusion “did not take” and Dr. Saer is pursuing other treatment options. Unfortunately, the record contains no medical evidence to corroborate the claimant’s testimony, and no records at all from Dr. Daniel. The only relevant evidence in the record is Dr. Saer’s statement of May 8, 2003, that the claimant was not at MMI.

Where a claimant’s testimony is found to be credible, such testimony can constitute substantial evidence to establish the events testified to. *Wal-Mart Stores, Inc. v. VanWagner*, 63 Ark. App. 235, 977 S.W.2d 487 (1998). The Commission may not arbitrarily disregard witness testimony or other evidence submitted in support of a claim. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). Even though there is no documentary evidence to support a claim for temporary total disability benefits, there is likewise no evidence to contradict the claimant’s credible testimony. I find that the claimant has proven by a preponderance of the evidence that she is totally incapacitated from earning wages, and that she remains in her healing period. I therefore find that the claimant is entitled to temporary total disability benefits beginning April 12, 2002, through July 11, 2002, and from August 8, 2002, until such time as she regains her capacity to earn wages or her healing period ends, whichever occurs first. The respondents are entitled to a credit for all

group disability insurance benefits already paid to the claimant.

AWARD

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 11, 2002, and that she is entitled to medical and indemnity benefits for her injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Kenneth A. Olsen, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to ARK. CODE ANN. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge