

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214299

GLEND A BROTHERTON,  
EMPLOYEE

CLAIMANT

WHITE RIVER AREA AGENCY ON AGING,  
EMPLOYER

RESPONDENT

AGING SERVICES FUND,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED JUNE 10, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE RICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on April 21, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on or about January 22, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The employer/employee/carrier relationship existed at all relevant times.
2. The claimant's average weekly wage was \$266.00 per week.
3. This claim has been controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable neck injury on July 16, 2002.
2. Whether the claimant is entitled to TTD benefits from July 16, 2002 to a date yet to be determined.
3. Whether the claimant is entitled to medical treatment.
4. Whether the claimant was performing employment services on July 16, 2002.
5. Whether the claimant is entitled to an attorney's fee.

The record consists of the transcript of the April 21, 2004 hearing, with exhibits contained therein, as no briefs or additional evidence was offered for consideration into the record after the April 21, 2004 hearing.

**DISCUSSION**

Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). In addition, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in Arkansas Code Annotated § 11-9-102(16). The Arkansas

Supreme Court uses the same test to determine whether an employee is performing "employment services" as the court uses when determining whether the employee was acting within "the course of employment." See generally Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

In the present case, I find that a preponderance of the evidence establishes that Glenda Brotherton sustained a neck injury while working in the home of Mary Foster on July 16, 2002. In this regard, I note that Mary Foster has corroborated the claimant making complaints of pain on July 16, 2002 after coming out of the bedroom of resident Maxie Raines. Although Ms. Foster does not recall the claimant specifically making any neck complaints on that occasion, I note that new neck complaints are corroborated by Dr. Foster's July 17, 2002 office note (where he immediately ordered an MRI of the claimant's cervical spine) and by the form AR-N prepared by the claimant on July 29, 2002. Based on Dr. Foster's August 22, 2002 opinion, which I find highly credible, I find that the claimant's neck complaints at issue in this claim after July 16, 2002 are in fact causally related to the incident that occurred in Mary Foster's home, as she asserts and as Dr. Foster opined. In light of the abnormalities indicated on MRI, as well as the disc

fragments which Dr. Foster removed during surgery on November 19, 2002, I likewise find that the claimant has established that her cervical injury is established by objective medical findings, and she has established that the injury sustained in the home of Mary Foster required medical treatment and caused disability.

The respondents also assert, however, that the injury alleged by the claimant did not occur during the time and space boundaries of her employment with White River Area Agency on Aging, i.e. at a time when employment services were being performed for White River Area Agency on Aging. Instead, the respondents assert that the claimant sustained her injury while she was performing employment services for Mary Foster, who paid the claimant an \$1100.00 a month salary to perform work in the home during periods when she was not being paid by White River Area Agency on Aging to work in Mary Foster's home.

In her hearing testimony, the claimant testified that the incident with Maxie Raines which caused her neck injury occurred sometime in the afternoon, at a point in time when she was working for White River Area Agency on Aging "because I had Flora Shinier to do." For my part, however, after hearing the live testimony and observing the demeanor

of the witnesses, as well as reviewing the deposition transcripts, the form AR-N offered into the record, and all other evidence properly before the Commission, I find that a preponderance of the evidence instead establishes that the neck injury occurred at approximately 9:00 a.m. while the claimant was attempting to assist Maxie Raines to use the toilet in her bedroom. The evidence which I find most credible on this point includes the nearly contemporaneous form AR-N prepared on July 29, 2002, and Ms. Foster's March 24, 2004 deposition testimony, wherein she seems to have had a much greater clarity of recollection than that which she exhibited in her live testimony at the April 21, 2004 hearing.

In light of my conclusions in the previous paragraph, I do not find credible the documentation of Glenda Brotherton in respondents' Exhibit No. 3 to the effect that she in fact worked in the home of Mary Foster on July 16, 2002 from 10:00 a.m. to 1:00 p.m. To the contrary, I find more credible the deposition testimony of Ms. Foster that, after becoming injured at approximately 9:00 a.m. on July 16, 2002, the claimant laid on the couch for approximately one hour then left for the day. However, I do find based on the chronology reflected in respondents' Exhibit No. 3 that the

claimant was scheduled to work with Maxie Raines in the home of Mary Foster for White River Area Agency on Aging between 10:00 a.m. and 1:00 p.m. on July 16, 2002. The question then arises: Did the claimant's injury at 9:00 a.m. occur within the time and space boundaries of the claimant's employment with White River Area Agency on Aging under circumstances where she was "scheduled" to work for White River Area Agency on Aging from 10:00 a.m. until 1:00 p.m.?

In considering this legal question, I find credible and potentially relevant Ms. Foster's deposition testimony that, notwithstanding the "schedules" provided by White River Area Agency on Aging, Ms. Foster and Ms. Brotherton as a matter of course would begin work at Ms. Foster's home at approximately eight in the morning and would continue to work until the two were "caught up". I note that Ms. Foster was also a part-time employee of White River Area Agency on Aging who had her own assigned clients inside the home. I find credible Ms. Foster's deposition testimony that bathing the residents was part of the job with White River, that this work usually occurred during the first two hours of the morning, and that bathing the patients was part of the job assignment of White River Area Agency on Aging.

Furthermore, while I find many portions of the claimant's hearing testimony suspect, I note that Ms. Kronnister, who testified for the respondents, conceded that the arrangement in this case was a "unique" situation, and I note that the claimant has testified that White River Area Agency on Aging knew how the work was being performed in Ms. Foster's home. I also note that, although Ms. Kronnister testified that she "would think" that White River Area Agency on Aging employees are required to stick to their schedules and care plans notwithstanding the unique situation in Ms. Foster's home, Ms. Kronnister worked in Batesville and appears to have no personal knowledge as to the situation that occurred in Ms. Foster's home on and before July 16, 2002. In fact, the respondents offered no evidence whatsoever which suggests to me that the respondents lacked knowledge of precisely the nature and timing of the various functions performed by Ms. Foster and Ms. Brotherton on White River Area Agency on Aging's behalf in Ms. Foster's home on or before July 16, 2002. In other words, I conclude from Ms. Brotherton's testimony and the lack of any evidence presented by the respondents to the contrary, that White River Area Agency on Aging either knew, or should have known, that Ms. Brotherton and Ms. Foster had a set routine

in Ms. Foster's home and did not on July 16, 2002 (and probably not at other times) follow the precise schedule provided to them by White River Area Agency on Aging which White River Area Agency on Aging apparently turned in to Medicaid for reimbursement purposes. Therefore, if for example, Ms. Brotherton had become injured while bathing Ms. Raines, at 9:00 a.m., she might have presented circumstances sufficient to show that she was performing employment services for White River Area Agency on Aging when the injury occurred, notwithstanding her "schedule" to work with Ms. Raines from 10:00 a.m. to 1:00 p.m.

However, I find that the claimant has failed to establish by a preponderance of the evidence that her injury at approximately 9:00 a.m. while assisting Ms. Raines to use the toilet occurred within the time boundaries of her employment with White River Area Agency on Aging, when the documentation offered into the record clearly indicates that the claimant knew her prescribed period of employment for the respondent on the day in question was to begin at 10:00 a.m. In reaching this conclusion, I note from Ms. Foster's deposition testimony, that, if the claimant had called in sick on July 16, 2002, White River Area Agency on Aging would have sent a replacement employee to perform the

claimant's prescribed functions at the prescribed time, and the employee would not necessarily have appeared at 8:00 a.m. as the claimant would do in light of her employment agreement specifically with Ms. Foster. Further, there is no dispute that Ms. Raines routinely and quite often requested assistance to the toilet throughout the day. While assisting Ms. Raines to the toilet between 10:00 a.m. and 1:00 p.m. would almost surely would have been an employment service performed for the White River Area Agency on Aging, I find that assisting Ms. Raines to the toilet at 9:00 a.m. was an employment service for Ms. Foster, not an employment service for White River Area Agency on Aging. Because I find that the claimant has failed to establish by a preponderance of the credible evidence that her injury occurred while performing an employment service for White River Area Agency on Aging, I find that the present claim for benefits must be, and hereby is, denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employer/employee/carrier relationship existed at all relevant times.
2. The claimant's average weekly wage was \$266.00 per week.
3. This claim has been controverted in its entirety.

4. Glenda Brotherton sustained a neck injury while working with resident, Maxie Raines, in the home of Mary Foster at approximately 9:00 a.m. on July 16, 2002.
5. The neck injury was caused by a specific incident, was established by medical evidence supported by objective findings, required medical treatment and caused disability.
6. At the time of the injury, Glenda Brotherton was assisting Maxie Raines with toileting.
7. From approximately 8:00 a.m. until approximately 10:00 a.m., Ms. Raines and Ms. Foster were generally engaged in bathing residents, a function performed as a work duty for White River Area Agency on Aging.
8. However, the precise toileting duties which Ms. Brotherton was performing with Ms. Raines when she became injured at approximately 9:00 a.m. occurred throughout the course of the day, and therefore could be performed either as employment duties for White River Area Agency on Aging or as employment duties in her alternative employment agreement with Ms. Foster.

9. Glenda Brotherton's injury at approximately 9 a.m. was outside her scheduled period of employment for White River Area Agency on Aging with Ms. Maxie Raines, which was from 10:00 a.m. to 1:00 p.m.
10. Glenda Brotherton has failed to establish by a preponderance of the evidence that her injury occurred while performing an employment service for White River Area Agency on Aging.

**ORDER**

This claim for workers' compensation benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge