

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403985

JENNIFER MILLS, EMPLOYEE	CLAIMANT
CAMDEN-FAIRVIEW SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED DECEMBER 28, 2004

Hearing before Administrative Law Judge J. Mark White on November 18, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Betty Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 18, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on September 27, 2004, and a Prehearing Order was entered that same day. A copy of the September 27, 2004, Prehearing 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 Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including April 12, 2004; and that the respondents have controverted this claim in its entirety.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury on April 12, 2004; and controversion and attorney's fees.

The claimant contends that she sustained compensable injuries as a result of a job-related automobile accident on April 12, 2004; that this matter has been controverted for purposes of attorney's fees; and that she reserves the right to pursue other benefits to which she may become entitled in the future.

Respondents contend that the claimant did not sustain an injury arising out of and in the course and scope of her employment on April 12, 2004; and that the claimant was not performing employment services at the time of her motor vehicle accident which occurred on April 12, 2004.

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 witnesses and to observe their 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 she sustained an injury caused by a specific incident and identifiable by time and place of occurrence; that the existence and extent of her injury is established by medical evidence supported by objective findings; and that her injury caused internal and external physical harm to the body requiring medical services.
4. The claimant has proven by a preponderance of the evidence that she was engaged in employment services at the time of her injury, and that she sustained an injury arising out of and in the course of her employment.
5. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury on April 12, 2004.
6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant was employed by the Camden-Fairview School District as a home-based educator for the HIPPY pre-school program. In the course of her employment she worked primarily with parents of pre-school children, but she was also expected to work with several "practice children." Two of her designated practice children were Takenzia Morgan and Kayla Bigby. The claimant and her husband have one daughter, a student at Fairview Elementary School. The claimant's husband is a patrol supervisor with the Ouachita County Sheriff's Office. The claimant and her husband are related through their daughter to Kayla.

On April 12, 2004, the claimant was injured in a motor vehicle accident sometime in mid-afternoon. Kayla was a passenger in the car at the time and was injured as well. The claimant's husband was off-duty that day but was in his patrol car a few miles north of the accident site at a video store. He testified that the Sheriff's Office notified him of the accident at about 2:45 p.m. He testified that he first went to the hospital, and then to the accident site where he found his wife still in her car. After she was extracted from the car by emergency personnel, the claimant was transported to the hospital by ambulance. According to the hospital's records she arrived sometime between 3:30 and 3:39 p.m. (the last digit is illegible

in the records) and was first seen by a doctor at 3:45. Her husband left the accident scene to pick up their daughter at Fairview Elementary School. The next day, the claimant was released from the hospital having sustained an ankle sprain.

The claimant testified that after lunch the day of the accident she had returned to her office at Whiteside Elementary School and then traveled to the home of Kayla's grandmother, intending to work with Kayla there from 1 p.m. to 2 p.m. The claimant testified that Kayla was not at the home and that the grandmother told her she was at Whiteside. The claimant testified that she returned to Whiteside and worked with Kayla and Takenzia together. She had been scheduled to work with Takenzia separately at 2 p.m., but she worked with the children together because of the delay caused by the moot trip to the grandmother's house.

The claimant testified that she had a 3 p.m. appointment to work with another parent, Ms. Hargraves, in the Hargraves' home. The claimant's supervisor, Mary Sue Porchia-Wilburn, testified that in past weeks this appointment had regularly been at 4 p.m., but the claimant testified that Ms. Hargraves asked that the appointment for this week be changed to 3 p.m.

The claimant left Whiteside and took Takenzia home. She testified that she chose not to take Kayla home because she did not have time. She intended to keep Kayla with her through the 3 p.m. appointment and then return Kayla home

afterward. She thought this would not be a problem since she knew Kayla's family well.

The claimant testified that after taking Takenzia home, she proceeded towards the Hargraves home to keep her 3 p.m. appointment. Along the way, she lost control of her car on a rain-slicked road.

Porchia-Wilburn testified that she went to the hospital when she found out about the accident that afternoon. She testified that she visited with the claimant, and that the claimant admitted she had instead been on her way to pick up her own daughter from Fairview Elementary School at the time of the accident. The claimant testified she does not remember talking to Porchia-Wilburn, but the claimant testified she was medicated at the time and remembers little. The hospital records establish the claimant was given Demerol at 4:05 p.m.

II. Adjudication

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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). 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. *Id.*

Given the claimant's testimony, together with the medical records submitted into evidence, I find that the claimant has proven by a preponderance of the evidence that she sustained an injury caused by a specific incident and identifiable by time and place of occurrence; that the existence and extent of her injury is established by medical evidence supported by objective findings; and that her injury

caused internal and external physical harm to the body requiring medical services. The only remaining question is whether the claimant's injury was related to her job.

The claimant bears the burden of proving that her injury occurred while she was engaged in employment services. *Morales v. Hector Martinez, et al*, No. CA 04-92 (Ark. App. filed Nov. 10, 2004). An employee is performing "employment services" when she is doing something that is generally required by her employer. *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 key question herein is whether at the time of her injury the claimant was traveling to Fairview Elementary School intending to pick up her own daughter, or whether the claimant was traveling to the Hargraves home for her next work appointment. If the former, the claimant clearly was not engaged in employment services. If the latter, the claimant clearly was. I note that much of the testimony centered on whether Kayla should have been in the car, but I find Kayla's presence to be irrelevant. Either the claimant was performing a personal task at the time of her injury, or she was performing a work task. Kayla's presence in the car matters not in determining the nature of the claimant's trip.

It is undisputed that the claimant left Whiteside Elementary and dropped off Takenzia in the Highland Park area before her accident. If the claimant had intended to next pick up her daughter at Fairview Elementary, the shortest route would have been to turn right onto Highway 7 and then onto Mount Holly Road, leading directly to the school. This she did not do.

If, on the other hand, she had intended to travel to the Hargraves home, located at 745 Lucas Street, the shortest route would have been to go north from Highland Park on Highway 7 to the interstate, Highway 79/278, and travel east to Country Club Road. This, likewise, she did not do. The claimant testified she chose not to take this route because she wanted to avoid heavy traffic.

Instead, the claimant traveled east on Olive Street, parallel to the interstate, and turned left on California (Highway 79), heading south. Her accident occurred on California midway between the interstate and Cash Road. Had the accident not occurred, once the claimant reached Cash Road she could have turned right to go to the Hargraves home on Lucas, or she could have turned left to go to her child's school. Either way, it is undisputed that the claimant took an indirect route.

The claimant's supervisor, Porchia-Wilburn, quoted the claimant as admitting she had been traveling to Fairview Elementary School to pick up her own child at the time of the accident. I do not give this hearsay statement great weight, because

the claimant was medicated at the time and because she had just been involved in a serious car accident.

The supervisor also testified that the prior appointments at the Hargraves home had been at 4 p.m. But the written log maintained by the claimant *before* her accident identified this appointment as being at 3 p.m., and the respondents introduced no evidence to show otherwise. For me to conclude that this particular appointment was actually at 4 p.m. instead of 3 p.m., in opposition to the log record and the claimant's testimony, would require speculation and conjecture, and such can never substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). I find that the claimant's appointment that day at the Hargraves home was for 3 p.m.

I note that the respondents' counsel implied in cross-examination that the "3 p.m." notation on the log was a reference to when the claimant left Whiteside rather than the time of her next appointment. There is no evidence in the record to support this speculation. Moreover, the claimant's husband testified he was notified of the accident at 2:45 p.m., which would mean the claimant left Whiteside well before 3 p.m. Porchia-Wilburn implied in her testimony that the accident could not have happened before 3 p.m., but she later admitted that she had no personal knowledge of when the accident took place or when the claimant left Whiteside. I find that the

accident occurred at or before 2:45 p.m. Finally, I find it significant that the notation of "3 p.m." was not placed at the beginning of the line entitled "End of Day" on the log. If 3 p.m. were a reference to when the claimant left, I would expect it to be listed first, followed by her destinations: "Highland Park" and "745 Lucas". Instead, 3 p.m. is listed after "Highland Park" and before "745 Lucas". The only reasonable interpretation of this log notation is that 3 p.m. was the time of the claimant's appointment at 745 Lucas, not the time she left Whiteside Elementary.

Both the claimant and her husband testified that the husband, not the claimant, was to pick up their daughter that day. I found their testimony to be credible, in that it was internally consistent, consistent with each other, and consistent with the documentary evidence. I also find it significant that the claimant's husband was in town and on the road leading to his daughter's school even though he was off-duty that day, a fact supporting the idea that the husband was to have picked up the daughter. Finally, given the fact that the claimant had a 3 p.m. appointment at a home considerably distant from her daughter's elementary school, and given the fact that her accident occurred around 2:45 p.m., I do not find it plausible that the claimant could have continued south to Fairview Elementary School, picked up her daughter, and then returned to the north end of Camden in time for the 3 p.m. appointment at 745 Lucas. It is far more plausible to think that

the claimant was going directly to the Hargraves home without a diversion to Fairview Elementary School.

Given these facts, I find it more credible to believe that the claimant was not traveling to her daughter's school at the time of the accident, but that she was instead traveling to the Hargraves home for her next work appointment, travel inherently necessary to the performance of her job duties. I find that the claimant has proven by a preponderance of the evidence that she was engaged in employment services at the time of her injury, and that she sustained an injury arising out of and in the course of her employment. Because the claimant has proven every element of a compensable injury, I conclude she has proven by a preponderance of the evidence that she sustained a compensable injury.

AWARD

The claimant has proven by a preponderance of the evidence that she sustained a compensable 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. Gary Davis, 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