

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F404651**

**MARY L. PORTER**

**CLAIMANT**

**HOSPICE HOME CARE, INC.**

**RESPONDENT EMPLOYER**

**COMMERCE & INDUSTRY INSURANCE CO.**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED DECEMBER 8, 2004**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on October 22, 2004. A prehearing conference was held on September 14, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulation:

1. There was an employer-employee relationship on April 28, 2004.

The claimant contends that she had a work-related compensable injury on April 28, 2004, in a motor vehicle accident where she sustained injuries to her right knee, neck and back. The claimant contends she is entitled to medical benefits and temporary total disability benefits from April 29, 2004, through August 15, 2004, and

attorney's fees. The issues of permanency and end of the healing period will be reserved.

The respondents contend the claimant was on her way home at the time of the injury and was not performing employment services. The respondents assert the claimant's problems are pre-existing and there are no objective findings to support a compensable injury. Further, respondents contend the medical evidence does not support a causal connection between the claimant's need for medical treatment and her alleged injuries.

Issues to be litigated:

1. Compensability;
2. Medical benefits;
3. Temporary total disability benefits;
4. Compensation rate;
5. Attorney's fee.

From a review of 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 made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on April 28, 2004.

2. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 28, 2004, when she was performing employment services.

3. The respondents are responsible for reasonable and necessary medical benefits the claimant has pursued.

4. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from April 29, 2004 through August 15, 2004.

5. The temporary total disability rate is \$302, based on an average weekly wage of \$454.

### **DISCUSSION**

The claimant, 47 years old, began her employment with the respondent on February 19, 2001, and was paid \$8.50 per hour with extra pay for overtime work. The claimant worked as much as 20 hours overtime a week and also was paid \$.35 per mile. Mileage began at the office and continued until she returned to the office at the end of the day. The claimant also had to take the pager about every 11 weeks and, if she was called out on continuous care, mileage began from her home and continued until she returned home.

According to the claimant, on the week of April 28, 2004, she was on continuous care call and was paid mileage from the time she left home until she returned back home. According to the claimant, on April 28, 2004, she was returning home from work when she was involved in a one-car accident. The claimant sought immediate emergency room treatment. The claimant's back was x-rayed and she was sent home

to seek treatment with her family doctor. The claimant remained off work from the date of the accident until August 16, 2004. The claimant contends that she has numbness in her shoulder, her knees hurt and she has muscle spasms in her back with pain going down into her feet.

Under cross examination, the claimant verified that when she is on call with the pager, she gets an extra \$20 for the Saturday and Sunday. The claimant does not remember if she got paid the extra money, since she got the pager on Monday and had to give it to someone else on Wednesday after the accident. The claimant verified that at the time of her accident, she was returning home after finishing her continuous care for that day and this was about 40 minutes after leaving work. The claimant verified that she was performing her continuous care responsibilities as a result of being on call on April 28, 2004.

The claimant testified to having back problems and treatment before her April 28, 2004, car accident and she had previously undergone a cervical fusion.

A compensable injury is defined, in part, as an accidental injury arising out of and in the course of employment. Ark. Code Ann. §11-9-102(4)(A)(i) (Supp. 2003). A compensable injury does not include an injury “inflicted upon the employee at a time when employment services were not being performed.” Ark. Code Ann. §11-9-102(4)(B)(iii). The test for determining whether an employee was acting within the “course of employment” at the time of the injury requires that the injury occur within the time and space boundaries of the employment, when the employee is carrying out the employer’s purpose or advancing the employer’s interests directly or indirectly. *Pilgrim’s Pride Corp. v. Cadlarera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

The Supreme Court affirmed the Commission's finding that a traveling nursing assistant's injury in an automobile accident was compensable when she was traveling to care for her patients. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997). The Court held that the claimant was required by the very nature of her job description to submit herself to the hazards of travel in her own vehicle back and forth to the homes of her patients. As such, the claimant was acting within the course of her employment with her employer at the time her injuries were sustained. The Court found that the travel was clearly for the benefit of the employer since its business livelihood depended upon the in-home care of patients provided by the nursing assistants. The Court held it was persuaded by the reasoning offered by the Court of Appeals:

Although we recognize that the appellee was not directly compensated for driving to patients' homes, the pay of compensation is not conclusive to the question of whether employment services are being performed. For example, many workers, such as salesmen, are paid on the basis of commissions, but it is abundantly clear that a salesman who is attempting to make a sale is performing an employment service without regard to whether his attempt is successful.

It is likewise clear that delivering nursing services to patients at their home is the *raison d'être* of the appellant's business and that traveling to patients' homes is an essential component of that service. *Id.* quoting *Olsten Kimberly Quality Care*, 55 Ark. App. at 346, 934 S.W.2d at 958.

In the present case, respondents contend the claimant was on her way home at the time of the accident and was not performing employment services. The claimant testified that at the time of her accident, she was on call and was subject to being summoned to care for a patient during the last 72 hours of their life. The claimant was

paid mileage from her home to the patient's home while being subject to the call. On April 28, 2004, the claimant was not working her usual and customary hours but was assigned to her on-call responsibilities of caring for a patient in the last hours of their life. Her shift on April 28, 2004, was 12:00 midnight until 8:00 a.m. As the claimant was returning to her home, she was involved in a one-car accident. As in *Petty, supra*, the claimant's job duties required travel and the travel was an inherent and necessary incident of a required employment activity. When the ordinary and usually accepted meaning of the term "employment services" is considered, the employee is performing employment services when she is engaging in an activity which carries out the employer's purpose or advances the employer's interests. As in *Petty*, the claimant was carrying out the primary activity she was hired to perform when she was traveling to and from the patient's homes. After considering all the credible evidence, I find the claimant was performing employment services at the time of her motor vehicle accident on April 28, 2004. The claimant was on call and was paid for mileage during her travels and traveling was an intricate part of her job. I find the circumstances of this case are very akin to the decision rendered by the Arkansas Supreme Court in *Petty, supra*. I find the claimant has proven by a preponderance of the evidence that she was performing employment services.

The respondents next contend there were no objective findings to support a compensable injury in light of the claimant's pre-existing problems. According to the claimant, she immediately had pain in her knees, tailbone, left shoulder and back. The claimant has undergone a number of diagnostic tests and, on May 24, 2004, the MRI of the lumbar spine does reveal "focal edema at the sacral coccygeal junction which may

represent either focal bone bruising or micro fracture.” Cl. Exh. No. 1, p. 17. This finding does satisfy the “objective finding” requirement of Ark. Code Ann. §11-9-102(16) for a compensable injury.

The parties were unable to stipulate to a compensation rate but wage records were made an exhibit. The claimant’s regular weekly wage at the time of the accident was \$340 per week; however, she also regularly received overtime pay, amounting to an average of \$114 per week, making her average weekly wage \$454 with a temporary total disability rate of \$302. See, Ark. Code Ann. §11-9-518.

The claimant contends she is entitled to temporary total disability benefits from April 29, 2004 until August 15, 2004. The medical records indicate the claimant underwent a number of diagnostic tests following the accident and, on May 28, 2004, Dr. Robert Daniel opined the claimant remained unable to work and was subsequently released to return to work on August 16, 2004. After hearing the claimant’s testimony and considering the medical evidence, I find the claimant did remain in her healing period and was totally unable to work from April 29, 2004 through August 15, 2004.

### **ORDER**

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury on April 28, 2004, when she was performing employment services. The respondents are responsible for reasonable and necessary medical benefits the claimant has pursued. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from April 29, 2004 through August 15, 2004. The temporary total disability rate is \$302, based on an average weekly wage of \$454.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**