

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F707535

MARTHA FINCH, EMPLOYEE

CLAIMANT

SPRINGHILL SURGERY CENTER, EMPLOYER

RESPONDENT

**TRAVELERS CASUALTY & SURETY COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 28, 2008

Hearing before Administrative Law Judge Barbara Webb on January 29, 2008, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. J. Mark White, Attorney at Law, Bryant, Arkansas.

Respondents represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on January 29, 2008. A Pre-hearing Order was entered in this case on December 12, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. In addition, the parties announced at the hearing that they had reached an additional stipulation as to the applicable compensation rate or average weekly wage. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as stated on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed at all relevant times, including April 3, 2007.
3. If found compensable, the claimant would be entitled to the maximum compensation rates, i.e. \$504.00 for TTD; \$378.00 for PPD.
4. The claimant was paid disability benefits from July 3, 2007, through September 2, 2007, in the amount of \$3,320.53. The claimant was paid disability benefits from September 3, 2007, until October 2, 2007, in the amount of \$1,660.27.
5. The respondents have controverted this claim in its entirety.

By agreement of the parties, the issues to be determined are as follows:

1. The compensability of claimant's injuries.
2. If found compensable, claimant's entitlement to medical benefits and temporary indemnity benefits.
3. Controversion and attorney's fees.
4. All other issues, including rehabilitation and permanent benefits, are expressly reserved.

_____The record consists of a one volume transcript of the January 29, 2008 hearing, consisting of the testimony of Martha Finch and Laura Gusewelle and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (Deposition Transcript of Martha Finch); and Joint Exhibit No. 1 (Deposition Transcript of Charles E. Pearce). In addition, I have blue-backed and incorporate

by reference into the record of this proceeding a copy of the claimant's post-hearing brief filed on February 13, 2008, and the respondents' post-hearing brief filed on February 21, 2008.

DISCUSSION

The claimant contends that she was an employee of the respondent employer on or about April 3, 2007, on which date she sustained compensable injuries to her shoulder and upper extremity when she fell; that the medical treatment she has received to date has been reasonably necessary in connection with her compensable injuries; that she is entitled to temporary total disability benefits from April 4, 2007, through October 31, 2007; and that she is entitled to attorney's fees as provided by law.

The respondents contend that the claimant did not suffer a compensable injury in that she was not performing an employment service at the time of the alleged injury. The respondents further assert a credit for all disability benefits received by the claimant, if the claim is found compensable.

FACTUAL BACKGROUND

Martha Finch testified that she had been an employee of the Springhill Surgery Center since November 1, 1999. She worked as a licensed practical nurse in the GI lab assisting Dr. Clift and other doctors. Her job duties include charting, medications, monitoring sedated patients, preparing reports, transporting patients, admitting patients, starting IV's, etc. She testified that she had worked with Dr. Clift for 14 years at Baptist Memorial Hospital in their GI lab prior to the construction of

the surgery center. Her normal hours were from 6:30 a.m. until 3:00 p.m. She explained that her job included lifting materials and supplies as well as lifting sedated patients.

On April 3, 2007, after completing the daily procedures, she was working on paperwork in the conference room. The charge nurse advised her she could leave early to attend a funeral. Because she was diabetic, she decided to eat lunch before leaving for the funeral. She left the conference room to retrieve her lunch. As she returned to the conference room to heat her lunch and continue to work, she fell and severed the rotator cuff in her left shoulder. She testified that after the fall, she gathered her paperwork and returned to the dictation room. Due to numbness and weakness in her left arm, she put up her charts and clocked out. She went to her sister's home to change clothes for the funeral. However, due to continuing problems with her arm, she requested that her sister drive her to the emergency room instead of the funeral. She testified that she was referred to Dr. Pearce, an orthopedic surgeon, and underwent surgery on her left shoulder for rotator cuff repair. She testified that she was never told that light duty would be available to her. She was eventually released to return to full duty on October 31, 2007. She did not return to work due to other medical problems which were not related to her shoulder injury.

The medical records reflect that she was released by the emergency room with a sling and referred to an orthopedic specialist. On April 10, 2007, she was evaluated by Dr. Pearce, an orthopedic surgeon. He referred her for an MRI. The

MRI revealed a full thickness tear in the supraspinatus and infraspinatus tendons of the left shoulder. On April 23, 2007, she underwent left shoulder arthroscopy for repair to the rotator cuff tear. On May 1, 2007, she returned for post-surgical evaluation. At that time, she was doing well. On May 29, 2007, she returned for a follow-up evaluation and was ordered to proceed into therapy. On July 25, 2007, she returned for a follow-up evaluation and reported that she was doing well but not attending therapy due to a motor vehicle accident. She reported that she was scheduled to begin therapy. On October 31, 2007, she returned for a follow-up evaluation. She reported other medical problems including a bulging disc in her back and diabetes. Her shoulder was doing well and she had regained strength and excellent motion. Dr. Pearce released her to regular duties as it pertained to her shoulder only. He noted that from April 23, 2007 until October 31, 2007, she could have done light duty.

Laura Gusewelle testified that she was the clinical manager for Springhill Surgery Center. She testified that the nurses are not paid for their lunch time unless they turn in a form that they had no lunch to their supervisor. She testified that the nurses were rarely called away from their lunch to perform any work duties. She testified that the claimant was working with Dr. Murphy on April 3, 2007. She explained that the claimant clocked out at 11:16 a.m. She testified that the pre-admission forms were signed or initialed by the nurse performing the pre-admission screening. She explained that she had reviewed all of the pre-admission forms for

all of the doctors who saw patients on April 4, 2007, and that none of the forms contained the claimant's signature or initials.

On cross-examination, she testified that she did not prohibit the employees from working while they eat lunch and was familiar with the fact that employees work while they eat. She testified that the claimant would have been expected to assist a doctor during her lunch break if requested to do so by the doctor. She testified that it wasn't the practice of the nurses to make phone calls or do chart work while eating their lunch. She testified that she had not personally observed either the claimant during her lunch time or inspected the conference room to determine if nurses were making phone calls or eating lunch. She testified that the claimant would have been expected to return the patient charts from the conference room to the proper place to be put with the patient's charts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including April 3, 2007.
3. Claimant has proven by a preponderance of the evidence that she was performing employment services at the time of her alleged incident.

4. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury as defined by the Arkansas Workers' Compensation Act.
5. The claimant is entitled to the maximum compensation rates, i.e. \$504.00 for TTD; \$378.00 for PPD.
6. The claimant was paid disability benefits from July 3, 2007, through September 2, 2007, in the amount of \$3,320.53. The claimant was paid disability benefits from September 3, 2007, until October 2, 2007, in the amount of \$1,660.27. Respondents are entitled to an offset pursuant to A.C.A §11-9-411 for any disability payments received by claimant.
7. The claimant is entitled to payment of all reasonable and necessary medical benefits in connection with her left shoulder compensable injury.
8. The claimant is entitled to temporary indemnity benefits from April 3, 2007, until October 31, 2007.
9. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

DISCUSSION

Compensability

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2002), 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 (4)(D), establishing 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. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). In *Edens v. Superior Marble & Glass*, 346 Ark. 487 (2001), the Arkansas Supreme Court held that “identifiable by time and place” meant subject to identification and did not require the claimant to specify the exact time of the occurrence.

The critical issue in this case is whether the claimant was performing “employment services” at the time of her injury. Act 796 defines a compensable injury as “[a]n accidental injury . . . arising out of and in the course of employment

. . . .” Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002). 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). However, Act 796 does not define the phrase “in the course of employment” or the term “employment services”. *Wallace v. West Fraser South, Inc.*, ___ Ark. ____ (No. 05-254, January 26, 2006). In *Wallace*, the Arkansas Supreme Court noted that those terms should be defined “in a manner that neither broadens nor narrows the scope of Act 796 of 1993”, citing *Pifer v. Single Source Transportation*, 247 Ark. 851, 60 S.W.3d 1 (2002). The Court has held that employment services are being performed when the employee is doing something that is generally required by his or her employer, *Pifer*, 347 Ark. at 857; *Collins v. Excel Specialty Prods.*, 347 Ark. 811, 816, 69 S.W.3d 14,18 (2002), or is engaged in an activity that carries out the employer’s purpose or directly advances the employer’s interests. *Schultz v. Pulaski County Special School District*, 63 Ark. App. 171, 976 S.W.2d 399 (1998); *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999). If the activity in which the employee is engaged only indirectly advances the employer’s interest and is not inherently necessary for the performance of the job for which the employee was hired to perform, the activity is not sufficient to constitute “employment services” under the statute. *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998). One’s mere presence at his place of employment does not equate to the performance of employment services. *Hoyt v. Discovery, Inc.*, 1997 AWCC 414 (E602380). In *Wallace*, the

Court noted that the same test is used to determine whether an employee was performing “employment services” as used in 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. The critical issue is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury.

Recent cases have addressed the issue of whether an employee was performing employment services during a break period. In *White v. Georgia Pacific*, 339 Ark. 474, 6 S.W.3d 98 (1999), the employee’s injuries were deemed compensable because he was required to monitor his work while he was taking a smoke break. In *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1999), the Court of Appeals held that an employee’s injury was compensable even though it was sustained during a break because the employee was required to stop what she was doing and assist students if required, even during a paid break period. In *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002), the Court of Appeals held that an employee was performing employment services when she was injured at the end of a break returning her personal belongings to a locker, because she was required by her handbook to keep her personal items in a locker. In *Wallace v. West Fraser South, Inc.*, the employee was injured returning from an authorized rest period. The Court found the claim compensable, noting that the

employee was on the business property, on call while on his break, and not able to leave his workplace during his break. The Court noted that they were not adopting a bright-line rule that an employee who is on a break is *per se* performing employment services. The Court noted that Wallace's actions were permitted and specifically authorized by his employer and were not demonstrated to be inconsistent with the employer's interests in advancing the work. Similarly in *Matlock*, the case relied upon by the claimant herein, the Court held that the determination must be made on a factual case-by-case basis and is not dictated by a single feature of the employment relationship but rather a combination of factors relevant to a determination of whether the activity advances the employer's interest.

In *Hightower v. Newark Public School System*, 57 Ark. App. 159, 943 S.W.2d 608 (1997), the claimant, a pre-school day-care teacher, was injured when she slipped on ice in the parking lot of the day care on her way into work. The Court of Appeals held that under a strict construction of the Act, merely walking to and from one's car, even on the employer's premises, does not qualify as performing employment services. *Id.*

In *Robinson v. St. Vincent Infirmary Med. Ctr.*, ____ Ark, App. ____ (CA 04-165, October 27, 2004), the Court of Appeals found the claimant was not performing employment services when she slipped in a puddle of spilled coffee as she was stepping off the elevator on the 4th floor of the hospital to get her coin purse and lunch while on her way to her lunch break in the cafeteria. In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W. 2d 303 (1998), the Court of Appeals held

that the claim was not compensable because employment services were not being performed when Harding tripped over a piece of carpet on her way to a designated smoking area in the work place. In *Beaver v. Benton County*, 66 Ark. App. 153, 991 S.W.2d 618 (1999), the injured worker was denied benefits when she slipped on a wet floor as she approached the buffet table at a training seminar on the basis that she was not required to eat at a certain location or with her group, although she was allowed an allowance for the meal. In *McKinney v. Trane*, 84 Ark. App. 424 (2004), the Court of Appeals found that the claimant was not performing employment services when he chose to jump over tube sheeting to retrieve his soda on his way to his smoke break. The Court noted that McKinney was on his way to his smoke break and was doing nothing to carry out the employer's purpose and rejected his argument that his injury was compensable because it occurred during a paid break.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Brotherton v. White River Area Agency*, ___ Ark. App. ___, Dec.14, 2005); *Morelock v. Kearney Company*, 48 Ark. App. 227, 894 S.W.2d 603 (1995). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. *Id.* It is important to note that the claimant's testimony is never considered uncontroverted. *Lambert v. Gerber*

Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Respondents contend that the claimant in this case is not credible in that the business records do not corroborate her testimony that she was making pre-admission calls to patients scheduled for surgery while she ate after she fell. The respondents contend that the claimant had clearly finished her employment duties for the day and was going to eat and leave and that she was not paid for lunch. The claimant acknowledges that her signature is not on any of the pre-operative forms but contends that she was working with patient files and had the intention to return to work while her lunch was heating and she ate when she was injured. She contends that she could have been called away to attend other work duties and was “on the clock” and being paid at the time of her injury. She further contends that she had already retrieved her lunch and was returning to her work area at the time of the injury.

Based on my review of the credible evidence in this case, I find that this case is distinguishable from *Hightower*, *Robinson*, *McKinney*, *Harding*, and *Beaver*, and more akin to the facts in *Wallace*, *Matlock*, *White*, *Ray*, and *Sands*. In the instant case, the evidence demonstrates that claimant was returning to the patient files she had placed in the conference room with the intention of working while she ate her lunch. The testimony of Laura Gusewelle demonstrates that the nurses were permitted to perform work during lunch and were expected to perform other duties during their lunch break if requested to do so by appropriate personnel. While the

pre-admission forms do not contain the claimant's signature, the claimant testified that she had taken the files into the conference room prior to her injury, had taken them with her to the dictation room after the injury and returned them to their proper place with the charts before leaving the center. Further, the evidence demonstrates that the claimant is left-handed and testified that she was unable to complete her paperwork after the fall due to weakness in her left arm and hand. I therefore find that the claimant has proven by a preponderance of the evidence that she was performing employment services at the time of her injury.

Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that respondents have fully controverted compensability of the claimant's shoulder injury in April of 2007, medical treatment, and temporary total disability benefits from April 3, 2007 until October 31, 2007. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

AWARD

Respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein. 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. See, *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge