

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603947

NECOLE HARPER

CLAIMANT

**CINGULAR WIRELESS
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED AUGUST 25, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law,
Conway, Arkansas.

Respondents represented by the HONORABLE SUSAN M. FOWLER, Attorney at Law,
Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on July 24, 2008, in Little Rock, Arkansas. A prehearing conference was held and a prehearing order was filed on June 3, 2008. A copy of the prehearing order was introduced as Commission Exhibit No. 1 and made a part of the record without objection.

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

1. There was an employer-employee relationship on March 23, 2006.
2. The compensation rate is \$457/343.

The claimant contends that she sustained a compensable injury and was specifically performing employment services on March 23, 2006. The claimant contends she is entitled to medical benefits and temporary total disability benefits from March 24, 2006 through May 2, 2006, and attorney's fees.

Respondents contend the claimant did not sustain an injury supported by

objective findings nor did she sustain an injury arising out of her employment.

Respondents further contend it is entitled to a credit for group benefits paid during the period of the temporary total disability request.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Credit for group benefits paid.
5. Attorney's fees.

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 March 23, 2006.
2. The compensation rate is \$457/343.
3. The claimant has proven by a preponderance of the evidence that she did sustain a compensable injury arising out of and in the course of her employment on March 23, 2006, at a time when she was performing employment services.
4. Respondents are responsible for the reasonable and necessary medical the

claimant has pursued.

5. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from March 24, 2006 through May 2, 2006.

6. Respondents are entitled to an offset for group benefits paid in this matter pursuant to Ark. Code Ann. §11-9-411.

7. No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

DISCUSSION

The claimant, 39 years old, works as a customer service manager for the respondent employer. The claimant works at a call center and supervises 13 employees and assists them in difficult calls and administers all the personnel related matters with these employees. She also assists other employees at the call center and this could be as many as 100 employees. The claimant arrived at work her normal time on March 23, 2006, and was at her desk working and was up assisting employees with calls when she remembered she had brought her lunch and needed to place it in the refrigerator. The break room was less than 100 feet from the claimant's desk. The claimant walked to the break room, placed her lunch in the refrigerator and was walking back when she slipped and fell in a puddle of water from the ice maker. The claimant hit the floor, striking her head on the tile and the left side of her body hit, causing pain in her back and neck.

The claimant was taken to the emergency room by ambulance. Various

managers came to the claimant for assistance when she fell. The claimant next sought treatment with her personal doctor and received some conservative care with medication and physical therapy. The claimant also saw a chiropractor.

ADJUDICATION

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2005). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A compensable injury does not include injuries “inflicted upon the employee at a time when employment services were not being performed.” Ark. Code Ann. §11-9-102(4)(b)(iii). Employment services are the activities and services actually inherently necessary for the performance of the job for which the employee was hired. These activities must also either directly or indirectly advance the interest of the employer.

An employee is performing “employment services” when he or she is “doing

something that is generally required by his or her employer.” *Pifer v. Single Source Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee was performing “employment services” as we do when determining whether an employee was acting within “the course of employment.” *Id.* The test is whether the injury occurred “within the time and space boundaries of employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest either directly or indirectly.” *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

In the present case, I find the claimant was performing employment services at the time she sustained her fall at work. The claimant was not on break and simply walked to the refrigerator to place her lunch, since she had gotten busy with work upon walking in. The claimant was indirectly furthering the interests of her employer by remaining available to take calls and assist the employees at the call center.

The claimant was a very credible witness who explained how her slip and fall occurred and about her problems and care and treatment following the incident. The slip and fall was not disputed and an ambulance was called by management to take the claimant to the emergency room for observation. The claimant was seen at Baptist Hospital emergency room and was diagnosed with a “scalp contusion.” The treating doctor later stated that there was no swelling but there was tenderness. The claimant was released back to work the following day. The claimant sought treatment with her family doctor who treated her for a time and his notes provide that the claimant had neck sprain with muscle spasm. He treated her for back pain and hip pain, as well. Dr.

Elwyn Perser's cervical x-rays on March 24, 2006, reveal that while there was no evidence of fractures or dislocations, there was some slight straightening of the normal curvature. On June 17, 2008, Dr. Perser responded to the respondent's attorney that he did not actually palpate muscle spasms; however, she did have trigger point tenderness, which is consistent with muscle spasms. Dr. Perser prescribed muscle relaxants and anti-inflammatories and physical therapy. The medical evidence also provides a visit form signed by M. Conrad on March 29, 2006, which identifies muscle spasms upon physical examination. Under the Complaint section, muscle spasms is also noted and further identified as C4, LS. (Resp. Exh. No. 1, p. 35.)

After reviewing the medical evidence and hearing the credible testimony of the claimant, I find the claimant has proven by a preponderance of the evidence that she did sustain a compensable injury when she fell in the course and scope of her employment on March 23, 2006. She has also provided the necessary "objective findings" required by Ark. Code Ann. §11-9-102(4)(D). The Breckenridge Family Practice Clinic's notes provide that a physical examination noted "muscle spasms." Muscle spasms can constitute objective medical findings to support compensability. See, *Continental Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 S.W.2d 538 (1999); *University of Arkansas for Medical Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Muscle spasms detected by someone other than a physician, such as a physical therapist, can be sufficient, as well, since this is a perception by someone other than the claimant. See, *Continental Express, supra*. Further, the Supreme Court in *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000), held that a doctor

prescribing medication directed to be taken “as needed for muscle spasm” would not prescribe such if he did not believe muscle spasms were existent. In the present case, Dr. Perser prescribed Flexeril for muscle spasms.

Respondents are responsible for the reasonable and necessary medical the claimant has pursued for her compensable injury associated with the fall. Ark. Code Ann. §11-9-508.

The claimant next contends she is entitled to temporary total disability benefits from March 24, 2006 through May 2, 2006. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, while the claimant testified that she remained off work and pursued some conservative medical treatment, the medical evidence did not specifically state that she was to remain off work. The claimant apparently was involved in physical therapy several times a week for a period; however, the medical was not specific about the claimant’s inability to work. The claimant was able to draw some group disability benefits and she used some of her accrued paid leave while she was away from work. I find the claimant has failed to prove that she remained in her healing period and totally unable to work from March 24, 2006 through May 2, 2006.

Respondents request an offset for group benefits that were paid. The claimant did use her group health insurance to pay some of her medical expenses.

Respondents are entitled to an offset pursuant to Ark. Code Ann. §11-9-411.

ORDER

The claimant has proven by a preponderance of the evidence that she did sustain a compensable injury arising out of and in the course of her employment on March 23, 2006, at a time when she was performing employment services.

Respondents are responsible for the reasonable and necessary medical the claimant has pursued. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from March 24, 2006 through May 2, 2006. Respondents are entitled to an offset for group benefits paid in this matter pursuant to Ark. Code Ann. §11-9-411.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**