BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305741

RICHARD KIMBELL, EMPLOYEE CLAIMANT

ASSOCIATION OF REHAB.
INDUSTRY & BUSINESS, EMPLOYER RESPONDENT

COMPANION PROPERTY & CASUALTY, CARRIER RESPONDENT

OPINION FILED NOVEMBER 19, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE MICHAEL R. LANDERS, Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by the respondents from an opinion filed herein by an Administrative Law Judge on February 2, 2004. The Administrative Law Judge found that the claimant proved by a preponderance of the evidence that the he sustained a compensable injury on May 27, 2003, from having fallen off a porch at work after an altercation with a client. The Administrative Law Judge further found that the claimant is entitled to all medical treatment reasonably necessary in connection with the claimant’s compensable

injury. The claimant failed to prove however, his entitlement to temporary total disability benefits from July 16, 2003, until October 22, 2003.

After a carefully conducted de novo review of this claim in its entirety, we find the claimant has failed to prove by a preponderance of the evidence that his injury of March 27, 2003, is compensable. Therefore, we find the opinion of the Administrative Law Judge finding compensability must be, and hereby is reversed.

The claimant is an “employment specialist” for the respondent employer, with whom he has been employed for several years. On the morning of March 27, 2003, the claimant stepped out onto the south porch of his office building, the Ross Center, for his morning break. While on the porch, the claimant testified that he was approached by a man named Stanley Minor. Apparently, Mr. Minor was seeking assistance from someone at the facility regarding his social security disability benefits and a “ticket to work” card that he had received. Mr. Minor had just exited the east entrance of the building and was walking on the sidewalk towards the south porch when he saw the claimant standing outside. Mr. Minor approached the claimant in order to ask

him some questions regarding his disability benefits. According to the claimant, when he first saw Mr. Minor, he was "toting a bunch of papers" and he appeared agitated. It also appeared to the claimant that Mr. Minor was holding a business card of a co-worker, Mr. Robin Rue, with whom he frequently worked. Therefore, the claimant supposedly assumed that Mr. Rue had referred or "assigned" Mr. Minor to him for consultation. Upon speaking with Mr. Minor, the claimant testified that Mr. Minor became increasingly irritated, and he described Mr. Minor's behavior as somewhat threatening. Specifically, the claimant testified concerning their encounter as follows:

> Well, he would step away from me and come back. ... He stepped back and he fumed a little bit, you know. Then he come back to me still flapping them papers. I don't remember exactly what he said, but the man was mad. I'm a pretty good size, people don't pick on me. But here's this guy – I didn't know who this guy was. Nobody even told me he was coming down there to see me. I didn't know exactly what to expect from this man, you know, and I was afraid I was going to get stabbed. ... On the third time for him coming up in my face, I stepped back and right into that darn hole.

The “hole” that the claimant referred to was a washed out area of dirt measuring approximately three-feet long and one-foot deep. The claimant testified that he stepped backwards into the hole with his right foot from a height of approximately five-and-a-half inches. He further testified to this incident as follows:

> I stepped right down in that hole with my right foot. I knew that I was going to fall and I twisted my body to the right and I landed on my right side. And I hit my head real hard. This grass [referring to a photograph] wasn’t here then. That ain’t nothing but red mud and hard as a rock. I hit my head and my shoulder and my hip and my knee on my right side.

The claimant stated that Mr. Minor was still standing over him after his fall. Shortly thereafter, Mr. Minor walked away and returned minutes later. At the claimant’s request, Mr. Minor assisted the claimant in sitting up, supposedly by “dragging” the claimant to the wall of the building near the front entrance. According to the claimant, Mr. Minor then entered the building and got the claimant a chair. Someone (the claimant assumed Mr. Minor), then assisted him from behind into the chair.

A co-worker called an ambulance and the claimant was transported to the Quachita County Medical Center.

In contradiction to the claimant’s testimony, Mr. Minor testified that on the morning of the claimant’s accident, he was on his way to the unemployment office when he saw the claimant standing on the porch of the Ross Center. Apparently, the unemployment office is located in the same building as Rehab Services(respondent employer). Minor stated that he approached the claimant with questions regarding his disability benefits, then he proceeded to walk around a corner and out to his car to retrieve some papers for the unemployment office. On his walk back to the unemployment office, Mr. Minor stated that he saw the claimant lying on the ground, and he assisted him into a chair. Mr. Minor contends that he did not witness the claimant fall, but that he “heard the weight of [claimant’s] body hit the ground.” Mr. Minor flatly denied allegations of him having essentially backed the claimant off of the porch. There were no eyewitnesses to the claimant’s accident.

A co-worker, Ms. Robin Heard, testified that after she learned of the accident, she and another employee first saw the claimant lying on the ground with his head toward

the concrete porch slab. According to Ms. Heard, the claimant was attempting to "pull himself up" onto the concrete slab porch when she and another co-worker assisted him into a chair. Ms. Heard testified that the claimant's speech was slurred and that he was hard to understand. Another witness and co-worker, Ms. Paige Davis, also stated that the claimant's speech was slurred immediately after his accident, but that he was communicating more clearly after the ambulance arrived. Ms. Davis further testified that just prior to him having stepped outside, the claimant had told her and a co-worker that he was going outside for a smoke break.

Upon his arrival at the emergency room, the claimant's admitting diagnosis was TIA/syncopy. In his examination notes, Dr. Dan Martin wrote that the claimant reported having become "quite dizzy" prior to his fall. The doctor also noted that the claimant has symptoms of sleep apnea, "i.e, he falls asleep easily at work." Doctor Martin commented further as follows:

> He [the claimant] has to chew ice to stay awake while driving from Magnolia to Camden. He awakens in the morning feeling quite fatigued and falls to sleep during meetings and talking to

> people. ...His past history is remarkable for high blood pressure, hyperthyroidism. He does not take his medications regularly. He does visit a Dr. Griffin and Dr. Antoon for sedatives and analgesics which he also takes irregularly.

Finally, the doctor noted that the claimant "landed against the wall and fell on the ground" after becoming dizzy. Based upon his examination of the claimant and radiology reports, Dr. Martin assessed the claimant with "fall, possible TIA, possible sleep apnea," a right inferior pubic ramus fracture, high blood pressure, and hyperthyroidism by history. Doctor Martin admitted the claimant into the hospital for monitoring and pain control. The claimant remained hospitalized until May 31, 2003. In his discharge summary report, Dr. Martin made the following comments:

> This is a 53-year-old white male who presents after a fall while he was working at the Ross Center. He became lightheaded but no true vertigo. He fell against the wall into the ground. Stated having pain in his right pelvic area thereafter. He was seen in the emergency room where CT scan was unremarkable but x-rays did show a right-sided pelvic fracture. Medical problems include high blood pressure and hypothyroidism and poor compliance.

Doctor Martin discharged the claimant with medications and instructions to follow-up with his regular physician in six weeks. His medical opinion of the cause of the claimant's accident remained unchanged.

Dr. Patrick Antoon saw the claimant in a follow-up examination on June 10, 2003. Dr. Antoon assessed the claimant with sleep apnea and restricted him from driving. At that time, the claimant used a walker to help him ambulate. Upon a review of the emergency room radiology reports, Dr. Antoon saw no evidence of ischial fracture, but that of a nondisplaced fracture through the claimant's acetabulum. The doctor ordered a CT scan which confirmed a central fracture of the acetabulum with fracture of the anterior lip. In his physician's report dated June 19, 2003, Dr. Antoon stated that the claimant would require several months to fully recover from his right hip fracture. He also stated that the claimant's fall was not caused by TIA or fainting. Specifically, he stated as follows:

> This fall was [an] accident and not induced from a TIA or syncopy. He had no syncopy symptoms or signs[.] This man tripped and fell.

Doctor Antoon proceeded with “closed treatment without manipulation,” and scheduled the claimant back in five weeks for additional x-rays. In the meantime, physical therapy notes indicated that the claimant was making good progress towards his recovery. The claimant continued to improve and his follow-up x-ray confirmed proper healing of the claimant’s acetabulum fracture. This x-ray also confirmed the existence of a right inferior pubic ramus fracture. In his radiology report of July 30, 2003, Dr. Larry M. Peeples stated, “There is a fracture through the inferior pubic ramus on the right that demonstrates what appears to be early healing.” Doctor Peebles further stated, “The inferior pubic ramus fracture is visible,” thus suggesting that Dr. Antoon had overlooked this fracture in his earlier review of the emergency room x-rays.

On December 10, 2003, Larry E. Horn of the Acupuncture and Chiropractic Clinic of El Dorado wrote the following comments regarding the claimant’s condition:

> The [claimant] entered this office on October 20, 2003 for examination and treatment of an on job injury sustained May 27, 2003. ... Patient is still under my care with complaints of both knees, low back, right hip, and headaches with head pain.

Based upon *his* examination of the claimant, Mr. Horn diagnosed the claimant with "lumbar strain/sprain, radiculitis, sacroiliitis," and knee and leg strain/sprain. Mr. Horn commented that the claimant's symptoms would be "recurrent," and that he could expect "intermittent exacerbations of pain and stiffness." Horn recommended that the claimant seek further medical treatment.

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).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W. 2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c)(2)(repl. 2002). In determining whether a claimant has sustained his or her

burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704; Wade v. Mr. C Cavenaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The claimant's injury occurred after July 1, 1993, therefore, this claim is governed by Act 796 of 1993. Ark. Code Ann. §11-9-102(4)(B)(iii) states:

> An injury is not compensable if it was inflicted upon an employee at a time when employment services were not being performed, or before the employee was hired or after the employment relationship was terminated.

Act 796 further requires that the provisions of the worker's compensation statutes be strictly construed. Ark. Code Ann. §11-9-704(c)(3) In Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d (2001), the Arkansas Supreme Court summarized the law concerning "employment services, as follows:

> 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," Olsten

Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). It, therefore, falls to this court to define these terms in a manner that neither broadens nor narrows the scope of Act 796 of 1993. Ark. Code Ann. §11-9-1001 (Repl. 1996) When the meaning of a statutory term is ambiguous, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject. Stephens v. Arkansas Sch. for the Blind, 341 Ark. Ark. 939, 20 S.W.3d 397 (2000). Although the statute does not define the term 'employment services," the Commission as well as the Arkansas appellate courts have previously held that an employee is performing employment services when he is engaging in an activity which carries out the employer's purpose or advances the employers interest directly or indirectly. Cheri Pettey v. Olsten Kimberly Qaulity Care, Full Commission Opinion filed Sept. 13, 1995 (E405037); 328 Ark. 381, 944 S.W.2d 381 (1997). An employee carries out the employer's purpose or advances the employer's interest when he engages in the primary activity which he was hired to perform. Id.; Kenneth Behr v. Universal Antenna, Full Commission Opinion filed Dec. 6, 1995 (E408376). When an employee engages in incidental activities which are inherently necessary for the performance of the primary employment activity, the employee carries out the employer's purpose or advances the employer's interest. Id.

The Arkansas Supreme Court has held that the same test used to determine whether an employee was acting within "the course of employment" is to be used to determine whether the employee was performing "employment services." Collins v. Excel Specialty Prod., 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer, supra. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee [was] carrying out the employer's interests directly or indirectly." Id. This test has also been previously stated as whether the employee is "engaged in the primary activities that are inherently necessary for the performance of the primary activity." Olsten Kimberly Care, supra. Moreover, employment services are performed when the employee does something that is generally required by his or her employer.

In Patricia McCool v. Disabled American Veterans, Full Commission Opinion filed June 3, 1996 (E410491), the Full Commission found that the claimant was not engaged in any activity that carried out the employer's interest when she deviated from her duties to go outside and smoke in anticipation of becoming "real busy." Likewise, in a more recent decision by our Court of Appeals, it was found that

an employee was not performing employment services at the time he chose to jump over some tube sheeting in order to retrieve his soda so that he could go on a smoke break. McKinney v. Trane & Travelers Indemnity, __ Ark. App. __, ___ S.W. ____ (Opinion delivered January 28, 2004). Whether an employee is performing employment services at the time of his accident depends on the particular facts in each case.

__________The facts in this case do not support a finding that the claimant's injury occurred while he was performing employment services. It is evident that the claimant sustained an injury from a fall while on a break at work on March 27, 2003. Moreover, the claimant received medical treatment for the injuries he sustained from his fall. However, the claimant was not engaged in an activity that carried out the employer's interest when he chose to step outside and away from his desk for a smoke break. Although testimony indicates that Mr. Minor approached the claimant with questions during his smoke break, Mr. Minor had neither a scheduled appointment with the claimant that morning, nor was he one of the claimant's authorized clients. The claimant admitted that he had no idea who Mr. Minor was or what the nature of his business was at the Ross Center that

morning prior to their encounter on the porch. Furthermore, the evidence establishes that on the morning of the claimant’s accident, Mr. Minor imposed himself on the claimant during his smoke break, and the claimant responded by placating Mr. Minor, possibly out of fear. For whatever reason, the claimant chose to address Mr. Minor’s issues while on his break, then, according to Mr. Minor, continued with his smoke break after the two had concluded their conversation. Also according to Mr. Minor, he was not on the porch with the claimant at the time of the claimant’s accident.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission’s province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

Although Mr. Minor's testimony was somewhat difficult to follow, he consistently denied being on the porch with the claimant at the time of his fall. Furthermore, the claimant was admittedly dazed from his injuries and witness testimony reveals that he was confused and disoriented after his fall. Moreover, although while awaiting the ambulance the claimant mentioned to witnesses having spoken to a man on the porch, he did not indicate that the man with whom he had spoken caused his accident.

It is evident from the record that Mr. Minor was an animated witness, and he was, at best, a poor communicator. However, Mr. Minor consistently denied being on the porch with the claimant at the time of his accident. Although Mr. Minor's account contradicts that of the claimant's, it is consistent, with accounts contained in medical evidence. Specifically, the claimant reported to emergency room physician, Dr. Dan Martin, that he became "quite dizzy," he landed against the wall, and he then fell to the ground. The claimant never mentioned to Dr. Martin speaking to Mr. Minor at the time of his fall, nor did he suggest that he was frightened off of the porch by anyone. Moreover, the claimant admitted to Dr. Martin that he had a

history of, among other things, sleep apnea. The claimant remained in the hospital for five days, during which time his account of the accident did not change. It is true that other witnesses credibly testified that Mr. Minor appeared to them agitated and angry on the morning of the claimant's fall. In addition, there is no question that the claimant had been speaking with Mr. Minor at some time prior to his fall from the porch. Furthermore, a co-worker, Ms. Robin Heard, testified that the claimant told her before the ambulance arrived that he had been outside "talking to a man," and that she had "realized" he meant that he was talking to someone at the time of his fall. However, Ms. Heard did not witness the claimant speaking to this unidentified man, nor did she witness the claimant's fall. Therefore, the opinion offered by Ms. Heard is based upon speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. Of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Furthermore, another witness, Ms. Paige Davis, testified that after the ambulance arrived, the claimant mentioned to her that he was talking to someone and fell. Ms. Davis admitted, however, that she learned of the claimant's accident from Ms. Heard,

and that likewise, she had not witnessed the accident or any events leading up to the accident. Therefore, all that these two witnesses offer in terms of factual information is that the claimant was apparently speaking to someone at some point prior to his fall from the porch, which is precisely what Mr. Minor admits. Therefore, although it is true that the testimony of Ms. Heard and Ms. Davis is consistent with each other, their testimony is of little probative value and should be afforded little weight. More weight should be attributed to the impressions and opinions offered by the claimant's treating physician, Dr. Martin, who was given a contemporaneous report by the claimant that he had become dizzy and fallen. In contradiction to Dr. Martin's assessment and to his own initial assessment, however, Dr. Antoon stated in his physician's report dated June 19, 2003, that the claimant's fall was not related to TIA or syncopy. However, no objective medical evidence was presented in this claim to support Dr. Antoon's opinion that the claimant's fall was purely accidental as opposed to idiopathic. Therefore, the weight of the credible evidence supports a finding that the claimant's fall was idiopathic in nature and origin.

Second, in failing to prove that he was actually speaking to Mr. Minor at the time of his fall, the claimant failed to prove that his accident was work related. It is undisputed that the claimant was outside on a smoke break when he fell. Moreover, he did not carry with him any documents, work related equipment, or anything that would indicate that he was on a “working” break. Furthermore, although it is evident that the claimant had spoken to Mr. Minor at some point during his break, it is questionable that he was speaking to Mr. Minor about work related matters, or even at all, at the time of his fall. Clearly, the claimant’s account of the details surrounding his accident has changed over the course of time, suggesting a self-serving purpose in the testimony that he now presents. In order to conclude that the claimant was speaking to Mr. Minor at the time of his fall about work related matters, we would have to assume facts which were not presented into evidence. Simply put, although the claimant must only prove his case by a preponderance of the evidence, we are asked here to fill in the missing pieces, and thus required to assume too much in order to find in the

claimant's favor. Therefore, as stated earlier, the compensability of this claim should be denied.

Finally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900(2000). Moreover, an idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998). Because an idiopathic fall is not related to employment, it is generally not compensable unless conditions related to employment contribute to the risk by placing the employee in a position which increases the dangerous effect of the fall. Id.

In his hospital reports from the week following the claimant's accident, Dr. Martin consistently noted that the claimant's fall was caused by TIA/syncopy, possibly from sleep apnea. Three months after the claimant's accident, however, Dr. Antoon stated emphatically that TIA/syncopy was not the cause of the claimant's fall. The Commission is entitled to review the basis for a doctor's opinion in

deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). There is no objective medical presented in this claim to support Dr. Antoon's opinion that the claimant's fall was not caused by TIA/syncopy or sleep apnea. Doctor Martin's opinion, however, was formulated immediately after the claimant's accident, and was based upon his immediate observations and examinations of the claimant at that time and for a week thereafter. Therefore, we find Dr. Martin's opinion that the claimant's accident was due to TIA/syncopy, possibly caused by sleep apnea to be more persuasive in this matter. The totality of the evidence shows that the claimant's accident was personal in nature, or idiopathic, and is therefore not compensable.

For those reasons set forth above, we find that the claimant has failed to prove by a preponderance of the evidence that he was performing employment services at the time of his accident, or that his injury was other than idiopathic. Therefore, we find that the claimant has failed

to prove by a preponderance of the evidence that he sustained a compensable injury. Accordingly, we find that the decision of the Administrative Law Judge is hereby reversed.

IT IS SO ORDERED.

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KAREN H. McKINNEY, Commissioner

Chairman Reeves concurs.

CONCURRING OPINION

I concur with the majority opinion's determination that the claimant was not performing employment services on May 27, 2003, and that the claimant's fall on that date was idiopathic. I write separately to address the Dissenting Opinion's assertion that the majority has relied on "suspect testimony from an unstable and incompetent witness."

The claimant testified that he was an employment specialist who "helped people with disabilities find jobs." On May 27, 2003, the claimant testified, he sat in his office for about an hour, then went outside to smoke a cigarette. The claimant testified that Stanley Minor

approached him, and that Minor was "madder than hell" and "flapping papers in my face." The claimant essentially testified that Minor "flapped papers" at him, that he thought Minor "was going to stab me," and that as a result the claimant fell backwards off a porch and sustained multiple injuries. Based on my de novo review of the entire record, the preponderance of evidence clearly demonstrates that the claimant was not a credible witness. Other than the claimant's incredible testimony at hearing, there is simply no evidence in the record that the alleged incident with Stanley Minor occurred.

I note co-worker Robin Heard's testimony that another individual told her the claimant had fallen outside on May 27, 2003. Ms. Heard testified that she went outside and saw the claimant on the ground, trying to pull himself up. Robin Heard testified that the claimant's head was "closer to the slab." This testimony corroborates Stanley Minor's testimony that the claimant's head was closer to the sidewalk after he fell. Robin Heard did not testify to seeing Stanley Minor "standing over the claimant," as the claimant implausibly testified. Paige Davis testified that the claimant had told her he was going outside to smoke a

cigarette. Ms. Davis then discovered that the claimant had fallen, but like Robin Heard, she did not see Stanley Minor "in the claimant's face" or otherwise involved in the claimant's fall in any way.

The medical evidence does not corroborate the claimant's testimony. None of the medical records mention any individual making the claimant fall. The May 27, 2003, ambulance report simply noted that the claimant had stepped backwards and fallen. The hospital emergency report indicated that the claimant "was a little dizzy prior to fall." The initial treating physician diagnosed "TIA (transient ischemic attack)" and "syncopy." Dr. Martin reported on May 27, 2003 that the claimant "became quite dizzy but no true vertigo. He landed against the wall and fell on the ground." Dr. Martin diagnosed "Fall, possible TIA, possible sleep apnea." Dr. Martin's discharge summary explained, "He became lightheaded but no true vertigo. He fell against the wall into the ground." The final diagnosis was "Pelvic fracture. Probable sleep apnea. Hypothyroidism. High blood pressure." Each of the medical records from May 27-31, 2003, show that the claimant became dizzy and fell. None of these records indicate that the claimant was

trying to avoid an enraged client when he fell. I also note the chiropractor's report from October 2003, which reported that the claimant had "landed in an un-covered hole causing - traumatic results to his body." Even in this report, there is no reference to Stanley Minor or any other person "flapping papers" at the claimant. Additionally, although the claimant testified that he "was conscious the whole time," the claimant told his chiropractor in October 2003 that he had been unconscious for a time. The chiropractor's report that the claimant indeed had been briefly "unconscious" in fact corroborates Stanley Minor's testimony.

Finally, I agree that Stanley Minor was not a fluent or polished witness. But there is no evidence before the Commission supporting the dissent's characterization of Stanley Minor as "unstable and incompetent." In considering the prevailing weight of evidence before the Full Commission, Stanley Minor was in fact a credible witness. Minor's testimony indicated that he indeed spoke with the claimant on the back porch on May 27, 2003. However, Minor credibly and consistently testified that the claimant fell *after* the two had spoken. Whether Minor accurately described

the position of the claimant’s body after the claimant fell is simply irrelevant to the question before the Commission, that is, whether the claimant was performing employment services or whether the claimant’s fall was idiopathic. Minor actually helped the claimant into a chair after the claimant fell, which testimony the claimant corroborated. The preponderance of evidence before the Commission does not indicate that Minor threatened the claimant in any way. Nor was the claimant helping Minor find a job. The two had finished their conversation, even assuming *arguendo* that the prior conversation arose out of the claimant’s employment. An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998). Because an idiopathic fall is not related to employment, it is generally not compensable unless conditions related to employment contribute to the risk by placing the employee in a position which increases the dangerous effect of the fall. The preponderance of evidence before the Commission shows that the claimant became dizzy during his smoke break, fell, and fractured his right hip. The claimant’s fall did not result from an altercation with Stanley Minor. The

claimant’s fall was idiopathic, and the claimant’s employment did not contribute to the claimant’s risk of falling. Further, because the respondent-employer gleaned no benefit from the claimant’s activities while he was on smoke break, the claimant was not performing employment services at the time of his fall. See, Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

Based on the record before the Full Commission, I concur with the majority opinion that the claimant did not sustain a compensable injury.

____
OLAN W. REEVES, Chairman

Commissioner Turner dissents.

DISSENTING OPINION

The principal and concurring opinions have rejected the credible testimony of disinterested witnesses and chosen to rely on suspect testimony from an unstable and incompetent witness. They also rely on readily distinguishable case law. The preponderance of credible evidence establishes that Claimant incurred compensable

injuries and was performing employment services at the time of the fall. I, therefore, dissent.

I. CREDIBILITY

A cursory review of the record reveals that not only is Minor's testimony "somewhat difficult to follow," but it is internally inconsistent and contradictory to the testimony of disinterested witnesses. Besides the fact that Minor's testimony is not logical or coherent, it is expected that someone who displayed behavior as aggressive and offensive as his would not own up to it in court or before a judge. In essence, the principal opinion relies on his self serving denial of this erratic behavior. For these reasons, and those explained below, I find that Minor's testimony is not reliable or credible.

The principal opinion incorrectly states that Minor "consistently denied being on the porch with the claimant at the time of the fall." Apparently they have chosen to ignore the fact that Minor first testified that he was near his car and walking toward Claimant when Claimant fell off of the porch but later Minor admitted that he was standing on the porch when Claimant fell. (R. 11, 23).

Moreover, the Administrative Law Judge, who observed Minor during his testimony at the hearing, described Minor’s demeanor as not credible: “in the course of his testimony he gestured wildly and generally acted in a manner suggesting an unstable personality. Minor’s testimony was confused and evasive. Some of his testimony was implausible.” For example, Minor described Claimant’s position on the ground after the fall as Claimant’s head being near the porch and his feet pointed away from the porch. I also find it virtually impossible for someone to have fallen off of a concrete slab porch, which appears to be about 6 inches tall, and to have landed with his head near the porch and his legs and feet stretched out away from the porch. Minor’s testimony is not credible.

Furthermore, Minor’s testimony is inconsistent with the testimonies of two competent and disinterested witnesses, Paige Davis and Robin Heard, whose testimonies are consistent with each others. Minor testified that he put Claimant into a chair following Claimant’s fall and that he was not agitated on the day of Claimant’s fall. Robin Heard, a former receptionist for Respondent, however, gave a different account of the incident, which is consistent with

Paige Davis' testimony. Heard testified that Minor came into the office prior to Claimant's fall. She described Minor as being "very agitated" and angry. Minor threw papers on her desk while asking about his disability benefits. Heard also testified that later that day Jason McClendon came to her office and told her that he saw a man outside on the ground in need of help. Contrary to Minor's testimony that he aided Claimant, Heard testified that she and McClendon went outside to the porch area and helped Claimant off of the ground and into a chair.

Paige Davis testified that on the day of the accident that Claimant did not appear dizzy or have any other health complaints. She testified that Heard told her that Claimant had been injured, that Heard and another person had helped him into a chair, and requested her assistance with Claimant. Davis also testified that "after the ambulance got there...[Claimant] did say something about he was talking to somebody and fell." (R. 38). The principal opinion is critical of the testimony that Claimant stated after the fall that he has been "talking to a man." I find that this testimony supports Claimant's testimony that he had been talking to a man that he had never met before and

did not know the name of, Stanley Minor. This statement is reasonable in light of Claimant's testimony that he hit his "head really, really hard," thought he had "cracked his skull" and was disoriented due to the trauma and pain from the fall.

Claimant's testimony is also credible. Claimant credibly testified that while he was outside on a concrete porch during his smoke break, he was confronted by Stanley Minor who was very angry and agitated. Minor began discussing a "ticket to work" card and disability benefits with Claimant. Claimant stated that Minor had a bunch of papers in his hand and one of which was the business card of Robin Rue. Claimant testified that he could not help clients find employment until they had first been referred to him by Rue, who worked in the rehabilitation office. (R. 59). Claimant further stated that he did not always get a call or paperwork from Rue prior to a client coming to see him. He, therefore, rationally concluded that Rue sent Minor to see him because Minor had Rue's business card in his hand and was discussing a "ticket to work." Minor became increasingly agitated as he talked to Claimant. In response to Minor's angry demeanor, Claimant made several attempts to step back

away from Minor, which ultimately lead to Claimant's fall from the porch.

I find that Claimant credibly testified that he was discussing the "ticket to return to work" with Stanley Minor at the time of his fall. Robin Heard and Paige Davis, both employees of Respondent at the time of Claimant's fall, testified that Minor had been in and out of Respondent's building demanding assistance prior to the incident in question and that Minor appeared highly agitated and angry. Minor himself admits that he had a discussion with Claimant regarding disability benefits. Minor's explanation, however, for his presence at the time of Claimant's fall is implausible, inconsistent, vague and contradictory to the testimony of Heard and Paige whose testimonies are consistent with each other. (R. 9-12, 20, 25).

The principal and concurring opinions have discounted and rejected the testimonies of Claimant, Davis and Heard in favor of one unstable and inconsistent witness. Such analysis is neither reasonable nor persuasive.

II. CLAIMANT WAS ACTING WITHIN THE COURSE AND SCOPE OF EMPLOYMENT AND FURTHERING HIS EMPLOYER'S INTEREST

The principal opinion holds that Claimant's fall would not have been compensable even if they found that Claimant was being confronted by Minor at the time of his fall because Claimant "chose" to talk to Minor about work related issue during his smoke break. This standard is not supported by case law. Instead, the courts simply look to whether the claimant was advancing the employer's interest at the time of the injury. In determining whether an employee is acting "within the course of employment," the court looks to whether the injury occurred "within time and space boundaries of employment, when the employee is carrying out the employer's purpose or advancing the employer's interests directly or indirectly." Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). See also, Collins v. Excel Specialty Products, 347 Ark. 811 at 817 (2002); Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002). A claimant is performing employment services while on break when he or she is directly furthering the employer's interest. See, Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558

(1999); White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999).

Claimant was acting within the course and scope of his employment and directly furthering his employer's interest at the time of his fall because he was acting within his job responsibilities by discussing disability benefit issues with Minor at the time of the fall. The fact that Claimant was outside on a smoke break at the time Minor approached him is of no consequence because Claimant returned to duty at the moment he furthered Respondent's interests by giving Minor disability benefit information. Claimant was employed as an employment specialist and aided Minor under that authority. Minor admitted that he discussed the ticket to work and disability benefits with Claimant on the porch. Minor also admits that he was on the porch when Claimant fell. (R. 23). I find that at the moment Claimant began discussing work related issues and attempting to aid Minor with his return to work and disability questions, Claimant was performing employment services and no longer on break. Accordingly, Claimant was performing employment services at the time that Minor aggressively confronted Claimant and caused him to stumble off of the porch.

The principal opinion relies on Patricia McCook v. Disabled American Veterans and McKinney v. Trane & Travelers Indemnity. These cases are clearly distinguishable. The claimants there were not furthering their employers interest, but were merely traveling to and from their smoke breaks. Here, the preponderance of the credible evidence shows that Claimant was injured while talking to Minor, in Claimant’s capacity as an employment specialist for Respondent, about Minor’s return to work ticket and disability benefits. These activities were squarely within Claimant’s realm of responsibility and clearly furthered Respondent’s interest.

For these reasons, I find that though Claimant initially went out on the porch for personal reasons, he was performing employment duties and furthering the employer’s interest at the time of the fall by providing information, which was specifically within his job duties, to Minor. As a result of Minor’s erratic and aggressive behavior during this conversation, which Minor also displayed at the hearing, Claimant fell off of the porch. As such, I find that Claimant was acting within the course and scope of his employment at the time of the fall.

III. CLAIMANT INCURRED A COMPENSABLE INJURY

The preponderance of the credible evidence shows that Claimant's fall and related injuries were the result of a confrontation with Stanley Minor and were not personal in nature to Claimant.

Claimant testified that he has never had any episodes of dizziness and has never passed out. The ambulance report supports Claimant's account of the event and states "man at work stepped backwards fell." While the ER report states "became quite dizzy before falling," I find that there is no other credible evidence to support this statement and it is not repeated in the medical records. In any event, it is important to note that while the admitting diagnosis was "fall, *possible* TIA, *possible* sleep apnea," both conditions were absent from the discharge diagnosis. (emphasis added).

On the day of the injury, May 27, 2003, an x-ray revealed a fracture to Claimant's right hip. (Joint Ex. 1, at 11). A CT scan on June 19, 2003, confirmed that Claimant had a right hip fracture. (Id. at 25-27). Dr. Antoon specifically opined that Claimant's fall was not the result of a medical condition and opined that Claimant "had not TIA

or syncopy signs. This man tripped and fell." Dr. Antoon's opinion is not contradicted by any other medical opinion.

Based on the foregoing, I find that Claimant incurred a compensable injury supported by objective findings and that he is entitled to all medical treatment reasonably related to the compensable injury.

In conclusion, the preponderance of credible evidence establishes that Claimant sustained a compensable injury arising out of and in the course of his employment with Respondent for which he is entitled to necessary and related medical treatment. I, therefore, find that reasonable minds would find that Claimant's injury is compensable. Accordingly, I dissent.

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SHELBY W. TURNER, Commissioner