

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403985

JENNIFER MILLS,
EMPLOYEE

CLAIMANT

CAMDEN FAIRVIEW SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 26, 2005

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

Claimant represented by the HONORABLE GARY DAVIS,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY DEMORY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed December 28, 2004.

In said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 28, 2004, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and

adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding, in relevant part, that the claimant has proven by a preponderance of the evidence that she sustained a specific incident injury in the course and scope of her employment with the respondent employer.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove that injuries she sustained in an automobile accident on April 12, 2004, were in the course and scope of her employment. Therefore, the compensability of this claim should be denied.

At the time of her automobile accident (MVA) of April 12, 2004, the claimant was employed as a HIPPY pre-school program worker for the Camden-Fairview School District. As such, the claimant provided home-based curriculum to parents of pre-school aged children. The claimant also tutored certain children, called "practice children," in their homes. One such child was a three-year-old named Kayla Bigby, who was riding with the claimant at the time of her MVA. The claimant had dropped another practice child off at the child's Highland Park home shortly before the accident. The claimant testified that she was traveling to another appointment when the MVA occurred. The claimant further

testified that the time of her MVA was approximately 2:45 p.m.

Whereas the claimant contends that she was en route to another appointment at the time of her MVA, the respondents contend that the claimant was driving to her daughter's elementary school to pick her up after school. The claimant's husband's testimony corroborated the claimant's testimony regarding this issue. During the hearing, Mr. Mills testified that he was the designated parent to pick-up the couple's daughter after school that day, and that he was just moments away from his daughter's school at a video store when the claimant's accident occurred. However, the claimant's supervisor, Ms. Mary Porchia-Wilburn, testified that the claimant made statements to her shortly after the MVA indicating that she was on her way to her daughter's elementary school at the time of her accident. The Administrative Law Judge gave Ms. Porchia-Wilburn's testimony "little weight" due to the fact that the claimant was allegedly under the influence of medications that she had been given at the emergency room when she spoke to this witness. However, emergency room records reveal that the claimant had not been rendered unconscious as a result of her accident, and

that she was described as being "alert" at the time of her examination.

The claimant stated that she was on her way to a 3:00 appointment when the accident occurred at 2:45. The claimant further contends that the entry she made on the Daily Sign-In Log for April 12, 2004, supports this contention. When signing out for the day, the claimant wrote "Highland Park" then "3:00" followed by "745 Lucas." The claimant testified that she wrote down Highland Park because that is where the practice student that she planned to take home lives. The 3:00 entry allegedly represented the time of the claimant's next appointment, with 745 Lucas being the location. Ms. Porchia-Wilburn confirmed that the claimant's next scheduled appointment for that afternoon was at the Lucas address, but she stated that the Lucas appointment had been scheduled for 4:00 that afternoon, rather than 3:00. Moreover, Ms. Porchia-Wilburn stated that changes in scheduling are, by Hippy rule, supposed to be reflected on the regular schedule, and that this alleged change was not.

Q. Would you agree with me that the schedule that is made or that these logs that are filled out on the day of, the very circumstance is taking place, are more accurate

than schedules that would be made a week before?

A. Well, our rule at Hippy is that if your schedule changes, you make a new schedule. If it doesn't, then we maintain the same one.

The claimant testified that she had known about the change in her schedule for the afternoon of the 12th for one week prior, but that she had failed to make the change on the regular schedule. Moreover, whereas the claimant testified that the 3:00 entry reflected the time of her next appointment, Ms. Porchia-Wilburn testified that it reflected the time that the claimant clocked out for the day. Finally, the claimant's ER report indicates that the time of the claimant's accident was at 15:00 hours, or 3:00.

The transcript reflects that there was a great deal of discussion during the hearing concerning the claimant's location in proximity to her daughter's school and to the Lucas address at the time of her MVA. A review of the area maps contained within the record fails to conclusively establish the claimant's intended destination at the time of her accident. On the contrary, the maps indicate that the claimant could have conceivably been en route to either destination at the time of her accident. Ms. Porchia-Wilburn testified, and

the maps confirm, however, that the route that the claimant had taken that afternoon provided a more direct route to the claimant's daughter's elementary school than to Lucas Street.

As previously mentioned, the claimant had a practice child with her at the time of her MVA, who was also injured in that accident. The claimant testified that she had chosen to keep this child with her during her last appointment and then drop her off at her grandmother's home because she felt at liberty to do so based upon her personal relationship with the child's family. Whereas the claimant had written authority to take another practice child home when necessary, the testimony of Ms. Porchia-Wilburn reflects that transporting HIPPY pre-school participants is generally against program policy. Moreover, Ms. Porchia-Wilburn denied knowing that the claimant had Kayla Bigby with her at the time of her accident. Ms. Porchia-Wilburn testified as to this matter as follows:

Q. Going back to April 12th 2004, after she was to take the child home to Highland Park or close to Highland Park, what was she supposed to do according to your instructions to her and your knowledge of her activities?

A. My instructions that when she take the Morgan child home, I thought she was coming back into

the office and I knew she had a four o'clock appointment, according to what had been done in the past with Ms. Hargraves at West Camden High and that's on Lucas off of 278 West.

Q. Did Ms. Mills talk to you about changing that schedule in any way?

A. No, she did not discuss that with me about changing Ms. Hargraves' schedule.

Q. Did you know that she had Kayla in the car with her when she went to Highland Park?

A. No. I did not know that.

Although it is apparent from the record that HIPPY employees, such as the claimant, were not stationary in their duties, it is also apparent that they had a fairly well established system of reporting their activities and their whereabouts at any given time. HIPPY employees would check into their base school each morning, which happened to be Whiteside Elementary School located on the north end of town, and they would then check in and out on the Daily Log with each activity that took them off campus. The last entry on the Daily Log reflected the time of day that an employee would leave for the day.

Arkansas Code Annotated §11-9-102(4)(A) defines a compensable injury as an accidental injury

causing internal or external harm to the body ... arising out of and in the course of employment. Section 11-9-102(4)(B)(iii) provides that the term "compensable injury" does not include an injury which was inflicted upon the employee at a time when employment services were not being performed. See also, Swearengin v. Evergreen Lawns, 85 Ark. App. 61, 145 S.W.3d 830 (2004). Although the relevant statute does not define the phrases "in the course of employment" or "employment services", our Supreme Court has held that we are to use the same test to determine whether an employee was performing "employment services" as is used when determining whether an employee was acting within the "course and scope of employment" at the time of his accident. Swearengin, supra; citing from Collins v. Excel Specialty Prods., 347 Ark. 811, 69 S.W.3d 14 (2002). The test we use 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. Id.; Citing from Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002). An employee generally has been found not to be acting within the course of employment when he or she is traveling to or from the workplace. Id.; Citing from Olsten v. Kimberly

Quality Care v. Pattey, 328 Ark. 381, 944 S.W.2d 524 (1997). Thus, the going-and-coming rule ordinarily precludes recovery from an injury sustained while the employee is going to or returning from work. *Id.*; Citing from Woodard v. White Spot Café, 30 Ark. App. 221, 785 S.W.2d 54 (1990).

Although, as outlined in Jane Traylor, Inc., v. Cooksey, 31 Ark. App. 245, 247, 792 S.W.2d 351, 352 (1990), there are exceptions to the going-and-coming rule, this claim does not fall within these exceptions. The preponderance of the evidence in this case indicates that the claimant was traveling to her daughter's elementary school at the time of her MVA, and therefore, strictly on personal business. The claimant said that her 4:00 appointment had been changed to 3:00, but contrary to program policy and regardless of the fact that she admitted having known about this change for a week, the claimant neither reported this schedule change to her supervisor nor was this change reflected on the regular schedule. Furthermore, the claimant was transporting a child at the time of her MVA without the knowledge, authorization, or approval of her supervisor. Although the Administrative Law Judge found the claimant to be credible, certainly the fact that she failed to follow the guidelines of her employment by not reporting

a change in her schedule and not seeking authorization to transport a child diminishes the claimant's credibility. And although the claimant's husband's testimony was consistent with the claimant's testimony, he stands to benefit personally from a decision in the claimant's favor. On the other hand, Ms. Porchia-Wilburn, who could be considered an unbiased witness, appears to be a credible witness. Moreover, the testimony of Ms. Porchia-Wilburn conflicts with the claimant's testimony. 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. Because she does not have a personal stake in the outcome of this claim, I find the testimony of Ms. Porchia-Wilburn to be more persuasive than that of the claimant and her husband. Finally, the credible evidence shows that the accident

occurred at 3:00 rather than 2:45 as alleged by the claimant. The time of the accident combined with other factors such as the claimant's chosen route and statements she made to Ms. Porchia-Wilburn, indicates that the claimant was, more likely than not, on her way to pick up her daughter from school before going to Lucas Street for her 4:00 appointment.

Based upon the above and foregoing, I find that the claimant has failed to prove by preponderance of the evidence that she was performing employment services at the time of her MVA. As the respondent has correctly stated on appeal, to find that the claimant was performing employment services at the time of her accident would require the evidence to be viewed in the light most favorable to the claimant, which is contrary to worker's compensation law.

Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner