

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206182

CHERIKA WILLIAMS,  
EMPLOYEE

CLAIMANT

CINGULAR WIRELESS,  
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 7, 2005

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

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

Respondents represented by the HONORABLE JOSEPH H. PURVIS,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed April 14, 2004. The administrative law judge  
found that the claimant was not performing employment  
services at the time she fell on May 17, 2002. After  
reviewing the entire record *de novo*, the Full Commission  
finds that the claimant did not prove she sustained a  
compensable injury on May 17, 2002. The Full Commission

therefore affirms the administrative law judge's denial of the claim.

I. HISTORY

The parties stipulated that the employment relationship existed on May 17, 2002. The claimant testified, "I was at work going to the bathroom, and I was walking down the stairs and I slipped and fell down the stairs....There were two co-workers that were walking down the same stairs, and that was Dorothy Ghant and Tonya Campbell at the time." The claimant testified, "Because of my fall, I injured my right neck around here (indicating) and like right in my back here (indicating) and my right knee, but my whole body hurt. I mostly had a problem with my right knee....When I injured myself, I had like bruises, my knee was bruised and swollen, I had scrapes and cuts from the stairs or whatever, my back was bruised, I had strains, muscle spasms all the time. I struck my head, I had headaches."

The claimant was treated at Baptist Health on May 17, 2002. According to the Record at Baptist, the claimant complained of falling at work, slipping down stairs, "L leg injured on ankle & bruised, R leg/knee throbbing." The

claimant further reported "blacking out," and she complained of tenderness to her right wrist. The findings from an x-ray of the claimant's right foot on May 17, 2002 were "bony density, architecture and alignment are normal. Impression: Negative right foot." An emergency physician reported on May 17, 2002:

Ms. Williams is a 21-year-old black female who was walking down some steps today at work when she slipped and fell down several stairs. She now complains of left leg pain, right foot and ankle pain, left hip pain and mid back pain. She has no complaint of neck pain....She has had no abdominal pain. She does state that she has had some mild dysuria for the last several days. She has had no nausea or vomiting or headache. She had no loss of consciousness. She states she had no syncopal episode causing the fall....

There is mild tenderness over the mid left anterior leg region with a small ecchymotic region approximately 2 cm in diameter....Because of the patient's fall, a left tib-fib was obtained which was negative. Right foot and ankle x-rays were negative. Left hip x-ray was negative. Pelvic x-ray was negative. Thoracic spine was negative....

The physician's assessment was "1. Multiple contusions. 2. Urinary tract infection." The claimant was treated with medication and was advised to contact her primary physician if there was no improvement in two to three days.

The claimant presented to a family practitioner, Dr. A. Jack Somers, Jr., on May 20, 2002:

Cherika was at work four days ago when she had an apparent syncopal episode according to a friend while walking on some stairs and fell. Her fall was partially broken by her friend but apparently she did hit her side and her neck as she fell. She was seen in the ER and had multiple x-rays (not including lower back and neck) and now she complains of severe pain in her R neck and her lower back as well as in her chest. She feels somewhat SOB but it does hurt to take a deep breath. There are multiple palpable discomfort areas all over her body but much worse in the R neck and the mid lower lumbar spine. X-ray of the chest, c-spine, and lumbar spine show no bony abnormalities.

Dr. Somers assessed "Multiple soft tissue injury related to fall at work." Dr. Somers prescribed medication and physical therapy.

The record contains a First Report Of Injury Or Illness, prepared by a manager for the respondent-employer on May 20, 2002. The Report indicated, "EE has a contusion to left foot. EE was walkign (sic) down stairs, stepped on another employees foot, tripped and fell."

The claimant began receiving physical therapy at HealthSouth on May 24, 2002. According to the notes of Zachary S. Hunt at HealthSouth, the claimant informed him,

"I hurt all over. Both of my whole legs hurt. My whole neck hurts with the right hurting more than the left. Both shoulders hurt with my left being worse than my right. My back hurts when I turn my head to the right." It was observed that the claimant ambulated "with a festinating gait. The gait cycle is more shuffling than decreased weightbearing secondary to pain. Pt was wearing high heeled shoes during initial evaluation." Mr. Hunt's assessment stated, "Inconsistencies noted during testing is c/o back and neck pain with axial loading in supine with hand resting on pt's head. Also, c/o back pain with rotation of hips and knees in standing. Pt has superficial tenderness, and whole leg pain." A HealthSouth clinician noted on June 1, 2002, "Pt complained with minimal exercises including chin tucks and pelvic tilts. She screamed with the initiation of every exercise."

Dr. Somers assessed "cervical and thoracic strain" on June 3, 2002.

It was noted at HealthSouth on June 13, 2002, "Continued exaggerated pain behaviors with activities and gait patterns."

On June 25, 2002, Dr. Somers assessed "1. Thoracic and lumbar strain. 2. Possible cartilage damage to the R knee."

Dr. Somers informed the claimant's attorney on September 15, 2003, "This letter is in response to a recent letter you sent in inquiry of Cherika Williams. The Flexeril prescribed on May 20<sup>th</sup> was for muscle spasms directly related to her fall. The injury was not known to aggravate any pre-existing condition. The condition concerning her knee also was related to her fall and although she is much improved from the knee, it is still within the realm of possibility that she could have trouble with the knee in the future, although it is very difficult to predict."

The parties deposed Dr. Somers on January 13, 2004. Dr. Somers agreed that when he first saw the claimant on May 20, 2002, she complained of pain in her lower back, neck, and chest. Dr. Somers agreed that his physical evaluation of the claimant had shown no "bruising, swelling, abnormal redness." The respondents' attorney questioned Dr. Somers:

Q. It's my understanding that Cherika Williams came to see you three days after she had had this alleged fall down the stairs at work?

A. Right.

Q. You made an evaluation of her, but you took no x-rays, you found no abnormalities on the emergency room report, so you evaluated her and concluded that she had some soft tissue injury based on her representations to you regarding her pain?

A. That's right.

The parties deposed Dorothy M. Ghant on January 21, 2004. The respondents' attorney questioned Ms. Ghant:

Q. Okay and do you remember Ms. Williams having an accident on or about May 17<sup>th</sup>, of 2002?

A. Yes....She slipped on the stairs....I personally saw her fall down the stairs....

Q. And isn't it true that you know what time the accident occurred because you were going on break at that time?

A. I was going on break....

Q. Isn't it true that you saw Ms. Williams' eyes roll back in her head as she was falling backwards?

A. Right, it appeared that her eyes were rolling back a little bit....I walked on to the break room to get some ice, because that's where I was headed, to get some ice.

Q. Well, that's where I was headed next, and you have already stated that you were on break, are you aware of whether or not Ms. Williams was on break at the time?

A. No, I'm not....

Q. Did you notice any slick substance or any obstruction on the stairs, as you were walking down, that might cause someone to trip?

A. No....

Q. Did Ms. Williams complain of any pain immediately following her fall?

A. Yes, she did, the first thing she done was grabbed her leg. And her leg, and I saw it with my own eyes, had bruises, her right leg was really bruised bad and her knee.

The claimant's attorney questioned Ms. Ghant:

Q. You don't know if she was going for a bathroom break or just going to some other kind of break, do you?

A. We don't have a bathroom break, you just go use the bathroom. Now I don't know if she was on break.

The parties deposed Tonya Campbell Gillespie on January 29, 2004. The respondents' attorney questioned Ms.

Gillespie:

Q. Do you know if Cherika Williams was going on break at the time that the two of you were walking down the stairs?

A. No, I don't know if she was on break....

Q. And why were you going down the stairs at the time?

A. Okay, I was going downstairs to the front break room to get the ice, they have crushed ice....

Q. Do you know if at the time that you were about to go down the stairs if Cherika said that she needed to use the restroom?

A. I don't remember actually hearing her say she needed to use the restroom, we were, me, her and Dorothy were actually walking together and talking....

Q. And so you were able to see Cherika as she was falling back or did you see her after she had already fallen back?

A. When I looked back it was like her head just kind of like her eyes just rolled, but she was, you know, she was standing, she didn't fall or anything and she just said, I mean she was still talking, she said, "What, Dorothy" - ...

Q. And do you have any idea why Cherika fell, did she ever tell you?

A. No.

The parties deposed Zachary S. Hunt on February 5, 2004. Mr. Hunt testified that he had previously worked as a physical therapist at HealthSouth, and that he had evaluated

the claimant. The respondents' attorney questioned Mr.

Hunt:

Q. Upon your evaluation of Ms. Williams, did you find any objective evidence, such as bruising, swelling, or abnormal redness with her condition?

A. No, no. It was mostly subjective complaints of superficial tenderness according to this - and I just glanced over this last night, so I apologize - no significant injuries, like lacerations or anything like that.

A pre-hearing order was filed on February 9, 2004. The claimant contended that she sustained a compensable injury on May 17, 2002. The claimant contended that she was entitled to reasonably necessary medical treatment, and temporary total disability compensation from May 17, 2002 through December 11, 2002. The respondents controverted the claim and contended that the claimant did not sustain a compensable injury on May 17, 2002. The respondents contended that the claimant "was not performing employment services at the time of her accident of May 17, 2002."

A hearing was held on March 18, 2004. The claimant testified, "I'm still having problems with my back, but my most problem is my knee. Walking is a problem, stooping, sitting down for long periods of time. A rubbing, kind of a

popping sensation in my knee or it gives out. If I'm walking, it will give out on me sometimes."

The administrative law judge examined the claimant:

Q. Ms. Williams, in reviewing this file here this morning to try to get myself sort of familiar with what's going on here before I could come in and do this hearing, do you recall talking to a legal advisor about a month after this episode would have happened? You called up here and were referred to a legal advisor up here?

A. Yes, sir....

Q. If the legal advisor, and they're required to fill out a little report and they do it in their own hand. I think maybe they don't have sufficient secretaries down there to type them up, and sometimes they're a little hard to read, but I can read this one. It says, "Injury occurred while going to break." Is that what you told the legal advisor?

A. I don't know.

MR. MCNEELY: Your honor -

JUDGE STILES: I can take administrative notice of this, Mr. McNeely, and I can ask about it.

MR. MCNEELY: Okay. I just ask that you note my objection to it.

JUDGE STILES: Note your objection, and I'll overrule it and note your exception to it, but I can take administrative notice of what's in this file, and I'm going to ask her about this, but I will note your objection.

THE WITNESS: No, sir, I can't remember if I stated that I was going on break or not.

JUDGE STILES: (Continuing)

Q. The next thing this legal advisor says is, "Blacked out/anxiety attack, fell down stairs." Do you know why that legal advisor would have written that?

A. No, sir, I don't.

Q. You don't think you told the legal advisor that?

A. Not in the words you're stating....

The administrative law judge found, "1. The claimant was not in the performance of employment services when she experienced an incident or accident on the stairs at her workplace on May 17, 2002. 2. The claimant was going on break at the time she experienced an incident or accident, therefore, the claim is barred." The administrative law judge denied and dismissed the claim, and the claimant appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-102(4)(A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i). The claimant must prove by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i).

Ark. Code Ann. §11-9-102(4)(B)(iii) excludes from the definition of "compensable injury" an injury "which was inflicted upon the employee at a time when employment services were not being performed". An employee is performing employment services when she "is doing something that is generally required by his or her employer." Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002), citing White v. Georgia-Pacific Corp., 339 Ark. 474, 6

S.W.3d 98 (1999). The activity of seeking toilet facilities, although personal in nature, has been generally recognized as a necessity such that accidents occurring while an employee is on the way to or from toilet facilities, or while she is engaged in relieving herself, arise within the course of employment. Pifer, *supra*.

In the present matter, the Full Commission finds that the claimant did not prove she was performing "employment services" when she fell on May 17, 2002. The claimant agreed on cross-examination that her work for the respondent-employer involved sitting at a desk, wearing a headset, and speaking to customers. At the time she fell on May 17, 2002, the claimant was walking down a stairway with Dorothy Ghand and Tonya Gillespie. Ms. Ghand and Ms. Gillespie both testified that they were proceeding to the respondent-employer's breakroom for ice. The claimant was walking down the stairs with Ms. Ghand and Ms. Gillespie, and there is no indication that the claimant was seeking restroom facilities at the time she fell. Ms. Ghand expressly testified that employees did not have a scheduled bathroom break. The record does not demonstrate that, at

the time of her fall on May 17, 2002, the claimant was performing work which was inherently necessary for the job she was hired to do. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S.W.2d 303 (1998). The Full Commission therefore affirms the administrative law judge's finding, "The claimant was not in the performance of employment services when she experienced an incident or accident on the stairs at her workplace on May 17, 2002."

In their reply brief, the respondents argue that the claimant sustained a non-compensable "idiopathic fall." The Full Commission recognizes the probative evidence of record indicating that the claimant may have "blacked out" immediately before her fall, in addition to the co-workers' testimony that the claimant's eyes appear to have "rolled back" contemporaneously with the fall. Nevertheless, the parties did not agree to litigate whether or not the May 17, 2002 fall was idiopathic in nature; nor was this issue litigated before the administrative law judge. The Full Commission affirms the administrative law judge and denies this claim because the evidence demonstrates that the claimant was not performing "employment services" at the

time of her fall on May 17, 2002. The question of whether the claimant's fall was "idiopathic" was not raised or litigated before the administrative law judge. All legal and factual issues should be developed at the hearing before the administrative law judge. American Trans. Co. v. Payne, 10 Ark. App. 56, 661 S.W.2d 418 (1982). The Full Commission therefore makes no findings on the newly-raised issue of whether or not the claimant's fall on May 17, 2002 was idiopathic in nature.

Finally, even if the Commission found that the claimant was performing employment services at the time of her fall on May 17, 2002, which we do not find, the record demonstrates that the only "physical harm" sustained by the claimant as a result of the fall was an "ecchymotic region approximately 2 cm in diameter" on the claimant's left leg. Webster's Third New International Dictionary defines "ecchymosis" as "the escape of blood into the tissues from ruptured blood vessels marked by a livid black-and-blue or purple spot or area[.]" There were no additional findings of "ecchymosis" following the emergency medical record on May 17, 2002. The evidence does not corroborate the claimant's

testimony that she sustained multiple bruises, swelling, scrapes, cuts, strains, muscle spasms, and headaches as a result of the fall. The record does not support the claimant's testimony that she suffered any head trauma as a result of the fall. We note that all of the diagnostic testing performed on May 17, 2002 was normal. The Full Commission recognizes the emergency physician's assessment of "multiple contusions," but again, the only true evidence of physical harm was the ecchymosis to the claimant's left leg.

The record does not support Dr. Somers' May 2002 assessment of "multiple soft tissue injury" or Dr. Somers' June 2002 assessment of "thoracic and lumbar strain." Dr. Somers admitted at deposition that his physical examination of the claimant did not show any bruising, swelling, or abnormal redness. Dr. Somers further acknowledged that all of the diagnostic testing had been normal. We recognize Dr. Somers' notation to the claimant's attorney in September 2003, that he had prescribed medication "for muscle spasms directly related to her fall." There is not a scintilla of evidence before the Commission demonstrating that the

claimant suffered from any muscle spasms. Dr. Somers agreed that his diagnosis of "soft tissue injury" was based on the history given to him by the claimant. We also note the various physical therapy observations, including exaggerated pain behavior, inconsistencies during testing, and actual "screaming" during various portions of physical therapy. Physical therapist Zachary Hunt credibly testified that he noted no objective evidence of bruising, swelling, or abnormal redness. Instead, Mr. Hunt noted "mostly subjective complaints of superficial tenderness."

The administrative law judge relied in part on a purported "administrative notice" to discuss a Commission legal advisor call-in sheet. We are unable to locate any provision or citation in the Arkansas Code, Arkansas case law, Arkansas Rules of Evidence, or Commission precedent to support the administrative law judge's evidentiary theory. Neither party sought to introduce this evidence. In adjudicating this claim, the Full Commission has relied in no part on the administrative law judge's improper, *sua sponte* attempt to admit into evidence a legal advisor's call-in sheet.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant was not performing employment services at the time of her fall on May 17, 2002, and that the claimant therefore did not prove by a preponderance of the evidence that she sustained a compensable injury. The Full Commission therefore affirms the administrative law judge's finding, "the claimant was not in the performance of employment services when she experienced an incident or accident on the stairs at her workplace on May 17, 2002." This claim is denied and dismissed.

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I agree with the Majority's finding that the Administrative Law Judge abused his discretion by relying on

the legal advisor's call notes and agree with the Majority's finding that the respondent improperly raised the issue of whether the claimant's fall was idiopathic in nature. However, I must dissent from the Majority's finding that the claimant was not performing employment services at the time of her injury and that her injury was not substantiated by objected findings related to her fall.

The claimant provided testimony that she was going to the restroom and, therefore, performing employment services. This testimony was corroborated by the claimant's coworker Dorothy Gbant, who testified the claimant made statements she was going to the bathroom and is further corroborated by Gbant and another coworker's testimony that they did not have knowledge that the claimant was on break. Furthermore, the claimant's coworkers' testimony that the claimant's leg was swollen, combined with Dr. Somers' testimony that he prescribed the claimant muscle relaxers, indicates the claimant had a compensable injury that was manifested by objective findings. For these reason, I respectfully dissent.

The claimant worked as a customer service representative for the employer. The claimant's job primarily consisted of her assisting customers over the telephone. The employer scheduled workers two breaks per day; however, those breaks deviated from the scheduled times if the worker was assisting a customer at the time of the scheduled break. The claimant worked on the second floor. There is a bathroom located on that floor; however, employees also used the bathroom downstairs on occasion.

On May 17, 2002, the claimant walked downstairs. Two coworkers, Tonya Gillespie and Dorothy Ghan, were going on break and were on their way to get ice from the break room. The claimant walked behind them on the stairs. The claimant mentioned to Ghan that she was going downstairs to use the bathroom. While walking down the stairs, the claimant asked Ghan a question regarding a customer, but did not tell Ghan or Gillespie whether she was going on break.

As the claimant was walking, she fell. Ghan, who was walking immediately in front of the claimant, felt the claimant hit her leg. She turned around and saw the

claimant falling backwards. Ghant noticed the claimant's eyes rolling backwards in her head and called her name. The claimant responded and told Ghant that she was okay. The claimant complained that her head and leg hurt and showed Ghant and Gillespie her leg.

Ghant took the claimant to the emergency room the same afternoon. The Emergency Room History and Physical indicates the claimant complained of pain in her foot and ankle, left hip, and mid back. It also notes the claimant had a, "leg region with a small ecchymotic region approximately 2 cm in diameter." It also notes the claimant had multiple contusions and a urinary tract infection. The claimant was prescribed Lortab and Bactrim.

On May 20, 2002, Dr. Jack Somers treated the claimant. He noted the claimant complained of pain in her right neck, lower back, and chest. He also indicated, "There are multiple palpable discomfort areas all over her body but much worse in the R neck and the mid lower lumbar spine." Dr. Somers prescribed Flexeril to treat muscle spasms. He also prescribed Ultracet, advised the claimant

to go to a physical therapist three times a week, and scheduled a return appointment.

On May 24, 2002 physical therapist Zachary Hunt treated the claimant. The claimant complained of pain in her neck, back, and legs. She also complained of numbness. Hunt performed various subjective tests and an axial loading test. Hunt described the test as, "It's tests where you essentially control one part of the body and look for a response elsewhere." He noted inconsistencies in the claimant's responses to the axial loading test. The claimant continued to receive treatment from the physical therapist until June 13, 2002.

On June 3, 2002 the claimant returned to Dr. Somers. Dr. Somers noted the claimant had, "modest improvement in her low back discomfort and cervical discomfort after about one week of PT." He advised the claimant to continue taking Flexeril and to continue with physical therapy. On June 25, 2002 the claimant saw Dr. Somers and reported she was having "locking and popping" in her right knee. The claimant was referred to an orthopedic surgeon. The claimant's physician completed two Attending

Physician Statements' providing the claimant was released from working as of May 20, 2002 and as of June 25, 2002.

The Majority finds the claimant was on break at the time she sustained her injury and therefore, was not performing employment services as required to receive benefits due to sustaining a compensable injury. Until recently, the courts have held that workers that injure themselves while on break are not deemed to have been injured while performing employment services. In Beaver v. Benton County, the Court of Appeals ruled the claimant was not performing employment services when the claimant was attending a work-related seminar and was injured during a lunch that the employer gave her an allowance for and where she was eating with coworkers, but where she was not required to attend lunch and was aware she could use lunch for her own purposes. Beaver v. Benton Co. Child Support Unit, 66 Ark. App. 153, 991 S.W.2d 618(1999). Similarly, the Court of Appeals has held that in instances where workers injure themselves on their way to break, workers are not deemed to be acting in the scope of employment because the act of going on break is in itself not enough to further

the employer's interests directly or indirectly. Harding v. City of Texarkana, 62 Ark. App. 137, 970 S. W. 2d 303 (1998), See also, McKinney v. Trane Co., 84 Ark. App. 424, 143 S.W.3d 581(2004).

However, when an employee is injured on the way to or from the bathroom during working hours, the injury is considered to be within the scope of employment. In Pifer v. Single Source Transportation the Arkansas Supreme Court held that a claimant that was returning from a bathroom break was acting in the scope of employment. Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W. 3d 1 (2002). Similarly the Court has also awarded benefits when the claimant is injured while on their way to the bathroom at work. Collins v. Excel Specialty Products and Crawford, 347 Ark. 811, 69 S.W.3d 14 (2002). In reaching its conclusion, the Court noted that emphasis should be placed on what was occurring at the time of the injury and indicated that if any employee is injured, "within the time and space boundaries of employment," and furthering the employer's interests at the time the injury occurred, the

claimant is providing employment services. Collins, supra, Pifer, supra.

Additionally, claimants have previously been determined to be acting in the course of employment despite being on break in situations where they further the employer's interests. In Wal-Mart Stores, Inc. v. Sands, a case where the respondent required workers to lock up personal items in lockers prior to working and the claimant injured herself while locking up personal items before returning from a break, the claimant was found to be performing employment services because she was furthering the employer's interests by fulfilling the requirements of a loss prevention policy required by the employer. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App.51; 91 S.W.3d 93 (2002).

Likewise, in Wallace v. West Fraser South, the claimant was deemed to be performing employment services when he was injured while crossing a board that was put in place to prevent workers from having to walk in a muddy ditch. At the time of the injury he was returning from break but had not yet reached his work area. Wallace v. West Fraser South, \_\_\_ Ark. App. (2005); \_\_\_ S.W.3d \_\_\_. In

Wallace the claimant, in advance of the hearing, gave a recorded statement to a claims adjustor. In that statement he reported he was returning from break at the time of the injury. However, during the hearing, he testified that he had already returned from break at the time the injury occurred. In reaching its conclusion, the Court of Appeals indicated that the inquiry of whether the claimant had returned from break at the time of the injury was irrelevant, but that it would defer to the Commission's finding that the claimant was returning from the break at the time of the injury. The Court also opined that by crossing the board in order to return to work, the claimant directly advanced the employer's interests, and was, therefore, acting within the scope of employment. Id.

In Wallace the claimant provided no testimony that he went to the bathroom during his break, that he was attempting to follow any mandatory requirements, or that he was required to perform any services for the employer during his break. As the dissent by Judge Sam Byrd indicates, the lack of testimony regarding those issues seems to indicate that Wallace stands for the proposition that a worker is

performing employment services so long as the injury occurs within the, "time and space boundaries of employment, when the employee [was] carrying out the employer's purpose and advancing the employer's interests directly or indirectly," Wallace (dissent), citing, Collins, Pifer, supra. This ruling is in sharp contrast to the previous cases holding that employment services are not being performed when the claimant is on break but not being required to perform work or follow rules of the employer and seems to indicate that now workers that are on break are deemed to be performing employment services so long as they are furthering the employer's interests directly or indirectly.

In the present case the Majority rejects the claimant's testimony that she was going to the bathroom and instead found that she was going on break. However, they fail to address whether the claimant was furthering the employer's interests if she was on break. Ghant and Gillespie both testified they did not know if the claimant was going on break and both testified the claimant was asking questions about a customer. Furthermore, Ghant testified that the claimant was going to the bathroom and

that she was aware of that because the claimant told her she was going to the bathroom.

The respondent argues the claimant's contention she was not on break because she did not go to the bathroom on the second floor and because other workers were on break at the same time as the claimant. Gkant and Gillespie testified that the claimant would be able to move around as she pleased if she needed to go to the bathroom, and said that while there were regularly scheduled breaks, employees' break times would vary if they were involved in a call that took too long. Gkant also testified that the claimant, Gillespie, and she were going down the stairs while they were retrieving ice, and that while following them, the claimant said she was going to the bathroom. This illustrates that the claimant was not going with them on break, as neither party said she was also getting ice or that she was accompanying them on break. Gkant's testimony that the claimant told her she was going to the bathroom also supports a finding that the claimant's reason for going downstairs was to use the bathroom.

With regards to the respondent's argument that the claimant had a bathroom on her own floor and, therefore, would not have been going downstairs in order to use the bathroom, the testimony of Ghant and Gillespie indicates that the claimant's actions would not be unusual and therefore refutes the employer's argument. Ghant testified it would be easy to walk past the bathroom on the second floor. This is corroborated by Gillespie's testimony that at times the bathroom on the second floor was closed due to being cleaned. Both of these statements imply that the claimant's preference to go downstairs would not be out of the ordinary.

Even if the claimant was going on break, the evidence indicates that she was acting in the furtherance of the employer's interests when she was en route. This in itself would be enough to satisfy the criteria established by Wallace. Ghant and Gillespie both testified the claimant was asking a question regarding how to handle a customer, indicating that at the time of the injury, the claimant was indeed attempting to further the employer's interest by making sure she had done her job correctly. In fact, Ghant

testified that the claimant followed her and was asking her a question about a customer, which implies that the claimant's decision to go to the bathroom downstairs might have been in order to have the question answered. As such, the claimant's injury occurred while performing employment services and was compensable.

The Majority finds the claimant's injuries were not evidenced by objective findings and points to the fact that the physical therapist was unable to show objective findings. This ignores the testimony and contemporaneous medical records that show the claimant had multiple contusions and an ecchymotic region the day of the injury and that she later received a prescription for medication to treat muscle spasms.

The Court of Appeals has held that muscle spasms constitute objective findings. University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W. 2d 546 (1997). Similarly the Court of Appeals has held that a muscle spasm or other objective finding can be stated within a medical degree of certainty regardless of whether the party observing the spasm has a medical degree. Continental

Express, Inc. v. Freeman, 66 Ark. App. 102 (1999), 989 S.W. 2d 538; See also Estridge v. Waste Management, 343 Ark. 276 (2000), 33 S.W. 3d 167. Furthermore, the Court has held that a prescription designed to treat muscle spasms in and of itself constitutes an objective finding, as a doctor would not prescribe medication to be taken to relieve muscle spasms if the condition did not exist. Id; See also, Fred's, Inc. v. Jefferson, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.2d \_\_\_ (December 15, 2004).

In the present case, Gillespie and Ghant both testified that the claimant complained of pain in her leg and that the claimant's leg was swollen or bruised. While the physical therapist and Dr. Somers' did not indicate the claimant's leg was swollen or bruised, they did not treat the claimant immediately after the incident and there is no reason to doubt the testimony of Ghant or Gillespie. Additionally, the diagnosis made at the emergency room indicates that the claimant had multiple contusions and an ecchymotic region on her leg and illustrates the existence of objective findings.

The Majority finds that there is no evidence the claimant suffered from muscle spasms. This is in direct contradiction to the medical records. Dr. Somers prescribed the claimant Flexeril in order to treat muscle spasms and pursuant to Fred's that in itself would be enough to establish the claimant did in fact, suffer from spasms. Furthermore, on September 15, 2003, Dr. Somers composed a letter providing that the Flexeril was prescribed to treat muscle spasms directly related to the claimant's fall. Therefore, pursuant to Estridge and Fred's, the claimant did in fact show that she had objective medical findings directly related to her fall at work.

The Majority's opinion relies heavily on the testimony of the claimant's physical therapist. While the physical therapist did not note the existence of objective findings and expressed the belief that the claimant was exhibiting "exaggerated pain behaviors," that does not adequately rebut Dr. Somers' findings. The physical therapist testified that pain was subjective and that each person has a varied tolerance for pain, indicating that what was perceived as "exaggerated pain behaviors" could in fact

be due to the claimant having a low pain tolerance. Hunt also testified that it was not uncommon for patients that get physical therapy to have complaints of general or "global" pain and that the existence of pain all over could result in patients describing pain all over, despite doing axial tests that should attribute pain to particular portions of the body. When that testimony is considered in conjunction with Dr. Somers' finding that the claimant needed muscle relaxants, pain medication and that her conditions were due to falling at work, it is clear that the claimant's injuries were in fact, illustrated by objective findings related to her injuries.

For these reasons, I respectfully dissent.

---

SHELBY W. TURNER, Commissioner