

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H101867

THURN K. APPLE,
EMPLOYEE

CLAIMANT

WHITE RIVER AREA AGENCY ON AGING, INC.,
EMPLOYER

RESPONDENT

AGING SERVICES FUND,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED APRIL 28, 2022

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as Modified.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals an administrative law judge's opinion filed January 19, 2022. The administrative law judge found that the claimant proved she sustained a compensable injury. The administrative law judge awarded medical treatment but found that the claimant did not prove she was entitled to temporary total disability benefits.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. The Full Commission finds that the

medical treatment of record provided on and after February 8, 2021 was reasonably necessary in connection with Ark. Code Ann. §11-9-508(a)(Repl. 2012). We find that the claimant proved she was entitled to temporary total disability benefits beginning February 9, 2021 and continuing until April 1, 2022.

I. HISTORY

Thurn K. Apple, now age 67, testified that she sustained a traumatic injury to her hip and pelvis as the result of a motor vehicle accident in approximately 1973. Ms. Apple testified that she sustained a back injury in 2005 while working for a retirement home. The claimant testified that she underwent lumbar fusion surgery as a result of the 2005 injury.

The record indicates that the claimant became employed with the respondents, White River Area Agency on Aging, in December 2012. The claimant agreed on cross-examination that her job title with the respondents was "Personal Care Assistant."

The claimant treated with Dr. Eric G. Spann in July 2016 for symptoms which included bilateral hip pain. Dr. Spann's assessment at that time included "Bilateral sacroiliitis" and "Hip osteoarthritis."

An x-ray of the claimant's pelvis was taken in November 2020:

Hardware in the lower lumbar spine is noted.
Multiple metal clips in the pelvis prior surgery.
There is some right pubis deformity consistent with apparent old trauma.

I do not see a definite acute fracture nor hip joint narrowing in either hip.

If you strongly suspect an occult fracture obtain a CT or an MRI, of the pelvis and hips. I do not see a definite fracture.

The postoperative and degenerative changes in the lower lumbar spine may cause hip pain.

Impression: 1. No definite acute fracture pelvis nor hip.

The parties stipulated that the employer-employee relationship existed on February 8, 2021. The claimant testified on direct examination:

Q. What did your job duties entail with home health as an aide?

A. I was to go in the house of our client, do their housekeeping, do their personal assistance, feed them, just basically housekeeping and taking care of the client's needs....

Q. Now, walk us through February 8, 2021.

A. I got up, went to my first client's house, went in, clocked in, started taking care of her breakfast and cleaning her kitchen. She loves having her house too hot, so she wanted to go to the bathroom, I helped her, made sure she got in the bathroom, and told her that I was going to run out to the car and get me a drink, cause I didn't dare take anything in the house. So I went out and got my drink, or was gonna get my drink, and as I stepped off the first step of her porch, it had iced over while I was in the house, and I went from the top step all the way to the ground....

Q. Approximately what time did you arrive at her house?

A. I think it was 7:30.

Q. Okay. And when you say you clocked in, how do you clock in to work?

A. Using my cell phone.

Q. Okay, so do you have like an app that you use to clock in?

A. Yes. We had an app, and we had to be in a certain distance within her house to be able to clock in. And I always had to be on her porch at least to be able to clock in....

Q. And what was the status inside of her home?

A. Bad roaches and bedbugs. Never clean. It didn't matter how clean I got it one day, it was a mess the next....

Q. Did that mean that you had to take other precautionary measures before you entered her home?

A. I always made sure I didn't have anything on me that I couldn't put in my pocket....I didn't take anything in that I intended to take with me unless it was a cup that I could wash before I left to take with me. But normally I just took in something I could throw away....

Q. And so on that particular day did you have a cup that you would be taking home with you?

A. I did.

Q. And you left it in your vehicle?

A. I did....

Q. So you took her to the restroom, is that correct?

A. Correct.

Q. And you walked outside to get a drink when you slipped?

A. Right.

Q. Okay. Now, when you fell down those stairs, what part of your body was injured?

A. Well, it was my sacrum, but I didn't know that at the time. I didn't know if it was gonna be my tailbone or what, my back and my head. I hit, actually hit both my arms, my head and my back. My tailbone, I think it was what hit first, my tailbone. And when I went to get up, I believe I was on my right side, and my knee hurt, my ankle – I mean my left side – my knee hurt, my left ankle hurt, my shoulder, my neck, my head. I was dizzy. I almost passed out. Things kind of got blurry for a little while.

Q. Did you make it to your car to get a drink?

A. No.

Q. So what did you do?

A. When I got to where I felt like I could do anything I crawled back up her steps, and she had a chair at the top of her steps, so I got ahold of the railing and stood up and got in the chair....I worked my way into the house and sat down at her dining table, cause I didn't sit on her cloth furniture.

According to the record, the claimant treated at Stone County

Medical Center on February 8, 2021: "c/o falling from standing, fell on L

side of body, pain in L ankle, L hip tail bone L arm and hit head and neck.

Pt reports some nausea and dizziness.” A CT of the claimant’s pelvis was taken on February 8, 2021 with the impression, “Age-indeterminate, possibly acute nondisplaced fracture through the 4th sacral segment.” A CT of the claimant’s head was also taken on February 8, 2021 with the impression, “No acute intracranial finding.”

A physician’s impression on February 8, 2021 was “Sacral fracture, closed, Concussion.” The treatment instructions included “Rest, no work until cleared by her doctor next week. Return if symptoms worsen.”

A representative of the respondent-carrier interviewed the claimant on February 9, 2021:

Q. Let’s come down to this new injury here. It happened yesterday, February 8th, 2021, is that correct?

A. Yes ma’am.

Q. And about what time?

A. Between 8:45 and 9:00 I think. I was so sick at the time I done this. I couldn’t really say for sure.

Q. Okay, and you were at a client’s house, am I right?

A. Yes ma’am, I fell off her front porch.

Q. Okay.

A. Or off the steps, slid down them actually.

Q. Okay, so what were you doing? What happened?

A. I was, well she likes her house really hot, and I was getting real hot and I decided I would run to the car and get my drink out of the car, and so I stepped out to get my drink and when I did, I didn’t realize there was any ice on the porch, because – or on the steps, because there wasn’t when I went in. And when I made my step down for the second step, my feet slid out from under me and I went down....

Q. Could you feel pain anywhere immediately?

A. Yeah, I couldn’t even hardly get up because my, my tailbone, it’s just above my tailbone, is what they told me at the doctor’s office. But I was hurting so bad there that I

almost couldn't get up. I had to force myself to get up and get back in the house.

Q. Okay, so you injured your tailbone. Did you injure any other body parts?

A. Well I'm sore all over. I hit my head and my neck on the steps, bruised my left arm and my elbows and across the middle of my back. I'm sore from my neck all the way down, honestly, to my knees. And then my left ankle hurts a little bit, but I just kind of twisted it, is what I done to it.

Q. Okay. Okay after this happened, what did you do then? You were able to get back in the house?

A. Well when I finally was able to get myself up and get back in the house, I called the office and told the girl that answered the phone, which was Misty, that I had some bad news for her, that I had fell. I was hoping that it was just something to where I could, you know, get over the pain and go ahead and work, but when I got up, I was, well I was already immediately sick at my stomach, and then when I got up I got really lightheaded and it was like things were just spinning. So I made it to a chair that I could sit down in and I thought I was going to get sick at my stomach, so I tried to stand up to keep from vomiting in my client's floor, and when I went to try to stand up, I fell out on the floor.

The claimant testified that the respondents denied her claim following the February 9, 2021 recorded interview.

Dr. Spann examined the claimant on February 22, 2021 and reported, "Back: paraspinal muscle spasm in parasacral areas bilaterally; coccyx very tender; no radiculopathy." Dr. Spann's assessment included "2. Closed fracture of coccyx with routine healing, subsequent encounter."

Misty Glenn, Stone County Office Coordinator for the respondents, reported on February 23, 2021:

On February 08, 2021 at 0835 Thurn "Kay" Apple called the Stone County office and spoke to myself to report an injury.

Kay stated that she was stepping outside to get a drink of water from her car. She said that the steps of her client's home were not icy when she got there but had become icy since being there. She said she stepped onto the first step and slid down the remaining steps. She said that she was in a lot of pain in her buttocks due to hitting the steps on her way down. Kay said that she was calling someone to come pick her up from her client's house and then she would come to the office because she felt as if she needed to go to the doctor.

The claimant continued to follow up with Dr. Spann.

An MRI of the claimant's pelvis was taken on March 26, 2021 and was compared with an MRI taken February 8, 2021. The following impression resulted:

1. Bone marrow signal abnormality is seen in the midline of the sacrum at the S4-5 level extending towards the right of center compatible with nondisplaced sacral fracture. No involvement of the coccygeal segments is seen.
2. No definite impingement of the sacral nerve roots is identified.

The claimant treated at OrthoArkansas on August 11, 2021. Payton Ransom, PA reported at that time:

Ms. Apple is a 66 yo female presenting to clinic after a fall at work that occurred in February of 2021. Patient was walking when she slipped, fell, and slid down the flight of stairs. She landed directly on her buttocks. Patient had immediate pain in her sacrum. Patient is currently being managed by her primary care with medications. She has had continued, worsening pain in her sacrum, left greater than right. Around a month after her fall, she began to have pain that started radiating down her left leg. It starts in her low back and radiates down her anterior/lateral thigh and extends down to her lateral ankle. This is associated with numbness and tingling. Her sacral pain is worse than the leg pain....

AP and lateral x-ray of the lumbar spine ordered, obtained, and interpreted today reveals evidence of posterior instrumentation with evidence of bony fusion of L4-5. Mild disc degeneration of L5-S1. Mild joint space narrowing of bilateral hips, left greater than right. MRI of the pelvis reviewed thoroughly on disc today from 3/26/21 reveals bone marrow signal abnormality at S4-5 level.

CT of the pelvis reviewed thoroughly on disc today from 2/08/2021 reveals bilateral hip arthritic changes. Transverse fracture through the 4th sacral segment, indeterminate of age....

Reviewed imaging with patient and her friend. She has hx of a sacral fx that that occurred roughly 40 years ago. She had pain off and on throughout the years but it has worsened and exacerbated greatly with her fall in February of 2021. She has been unable to work due to the pain and is currently trying to get worker's comp. Additionally, she has never had pain in her left leg like she does now. We discussed obtaining a lumbar MRI to evaluate for lumbar radiculopathy, start gabapentin, and look for referral for chronic sacral fx....

Dr. Spann signed a form on September 14, 2021 which indicated that the claimant could return to work on October 14, 2021, "No restrictions."

An MRI of the claimant's lumbar spine was taken on September 20, 2021 with the following impression:

1. Possible small left foraminal to extraforaminal disc protrusion at L5-S1 without definite mass effect on the adjacent exiting left L5 nerve root. Left foraminal stenosis at L5-S1 is moderate.
2. Mild foraminal stenosis is as follows: Right L2-L3, right L3-L4, bilateral L4-L5, and right L5-S1.

Payton Ransom noted on September 20, 2021:

She has history of a right hip dislocation and pelvic fracture that occurred when

she was 18 due to MVA. Additionally during that accident and treatment, she had injury to her right peroneal nerve and has had subsequent right foot drop. On last visit, patient reported that she had had a history of sacral fracture 40 years ago, she now states that this was a right hip dislocation with right pelvic fracture. She states she was in traction for about 4 to 6 weeks....

The patient's MRI does reveal a disc protrusion. This is an objective finding of injury that matches the patient's subjective complaints of symptoms. The patient's symptoms began on and after the work injury. Therefore it is within a certain degree of medical certainty that at least 51% of the patient's current symptoms are directly related to their work injury. Patient does have history of having pain in her back prior to injury. She underwent [an] L4-5 TLIF/PSIF in the early 2000's. She has been pain-free in her back and lower extremities after her fusion. Additionally she does have history of a right hip dislocation with right pelvic fracture. She has been pain-free from this until her fall. It is likely that patient's fall is related to both injuries.

Reviewed imaging with Dr. Seale who additionally reviewed imaging with a trauma surgeon. As far as a sacral fracture, no surgical intervention recommended. Patient can try physical therapy and anti-inflammatories.

Patient does have [an] extraforaminal disc protrusion on the left at L5-S1. This is creating her left leg radiculopathy. Patient cannot have epidural steroid injections due to her medication allergy. We discussed at this time that she can try physical therapy, anti-inflammatories, gabapentin, or surgical intervention. We will initiate meloxicam as well as increased activity and core strengthening exercises and follow-up in 4 weeks. We may discuss a minimally invasive extraforaminal microdiscectomy on the left at L5-S1 at that time.

The claimant testified that she had not undergone low back surgery and that she was hesitant to undergo surgery.

A pre-hearing order was filed on October 12, 2021. The claimant contended, "On 2/8/2021, claimant was in the scope and course of her

employment with the Respondents and working at the home of a patient. Claimant slipped and fell, injuring her back, left knee, neck and head. Claimant sustained a fractured sacrum. Respondent denied the claim in its entirety. Claimant contends that she sustained a compensable injury in the scope and course of her employment and is entitled to medical benefits, TTD benefits, and that her attorney is entitled to an attorney fee. All other issues are reserved.” The respondents contended, “Respondents contend that Claimant did not sustain a compensable injury on 2/8/21. She was not in the course and scope of her employment when she fell on that date.”

The parties agreed to litigate the following issues:

1. Compensability of injuries to the claimant’s back, neck, head, and left knee.
2. Temporary total disability benefits.
3. Reasonably necessary medical treatment.
4. Fees for legal services.
5. All other issues are reserved.

Dr. Spann signed a form on November 15, 2021 which indicated, “Due to sacral fracture & permanent nerve damage she will not be able to return until April 2022.”

A hearing was held on December 15, 2021. The respondents’ attorney cross-examined the claimant with regard to the accidental injury:

- Q. You were scheduled on Monday, February 8, to work from 7:30 a.m. to 10:30 a.m., is that right?
A. Yes.
Q. When did the accident happen?
A. I think it was just a little before 9:00, but I’m not sure.

Q. Now on a typical day Ms. May would leave her door unlocked for you to come in, is that right?

A. That's correct.

Q. You told me in your deposition that you would go in, clean her kitchen, fix her breakfast, and get her up and help her to the shower usually?

A. If she wasn't up, yes.

Q. How much of that had you done that morning?

A. I had fixed her breakfast, had washed some of her dishes, and helped her to the bathroom before I went outside....

Q. You testified in your deposition that you always had at least one break during your three-hour shifts, is that correct?

A. That's correct.

Q. It was never at a certain time, though, was it?

A. Never.

Q. Just when you needed it?

A. Right, if I needed it.

Q. And it lasted about 10 minutes, is that correct?

A. Normally it was just to go get a drink or something out of the car and just sit down for a minute if she wanted to talk.

Q. Okay. Well, you had said in your deposition they usually lasted about 10 minutes, is that accurate?

A. Yeah. If I took a full break, that was what we were allowed.

Q. But you didn't have to clock in and out for these breaks, did you?

A. No....

Q. You had clocked in that morning?

A. I had....

Q. When you called Misty Glenn to tell her what had happened, you told her that you were going outside to get water, is that correct?

A. I told her I was going out to get a drink.

Q. And that's when you slipped and fell?

A. That's when I slipped and fell.

The claimant testified on re-direct examination:

Q. Now, was it important to you to go out to your car?

A. Yes. I am a very hot-natured person, and if I don't drink I'm going to be dehydrated real quickly, and I needed something to drink because of the temperature.

An administrative law judge filed an opinion on January 19, 2022. The administrative law judge found that the claimant proved she sustained a compensable injury. The administrative law judge awarded medical treatment but found that the claimant did not prove she was entitled to temporary total disability benefits. The respondents appeal to the Full Commission and the claimant cross-appeals.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4)(Repl. 2012) provides, in pertinent part:

(A) “Compensable injury” means:

(i) An 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[.]...

(B) “Compensable injury” does not include:

(iii) 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 her employer. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest, directly or indirectly. *Parker v.*

Comcast Cable Corp., 100 Ark. App. 400, 269 S.W.3d 391 (2007). The Commission is bound to examine the activity the claimant was engaged in *at the time of the accident* when determining whether or not she was performing employment-related services. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). The critical inquiry is whether the employer's interests were being directly or indirectly advanced by the employee at the time of the injury. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004). The issue of whether the claimant was performing employment services at the time of an accident depends on the particular facts and circumstances of each case. *Conner, supra*.

A compensable injury must also be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2012). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012). It is well-settled that a physician's observation of muscle spasm can constitute an objective finding establishing a compensable injury.

Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999).

The employee has the burden of proving by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. §11-9-102(4)(E)(i)(Repl. 2012). Preponderance of the evidence means the

evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003).

An administrative law judge found in the present matter, “3. That the claimant has satisfied the required burden of proof by a preponderance of the evidence that she suffered a compensable work-related injury to her sacrum, lower back, and left leg, on February 8, 2021, and that she is entitled to reasonable and necessary medical treatment for these injuries. 4. That the claimant has failed to satisfy the required burden of proof by a preponderance of the evidence that she suffered a compensable work-related injury to her head and neck.” The claimant does not appeal the administrative law judge’s finding that the claimant failed to prove she sustained a compensable injury to her head or neck.

It is the duty of the Full Commission to enter findings in accordance with the preponderance of the evidence and not on whether there is substantial evidence to support the administrative law judge’s findings. *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). The Full Commission enters its own findings in accordance with the preponderance of the evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990). The credibility of witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App.

274, 944 S.W.2d 138 (1997). 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 it deems worthy of belief. *Jackson v. Circle T. Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

In the present matter, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her sacrum and low back. As we have discussed, the claimant initially sustained a traumatic injury to her hip and pelvis as the result of a motor vehicle accident in approximately 1973. The claimant sustained a back injury while working for another employer in 2005 and underwent lumbar fusion surgery. The claimant credibly testified that she fully recovered from the surgery she underwent in 2005.

The claimant became employed as a Personal Care Assistant for the respondents, White River Area Agency on Aging, in December 2012. The parties stipulated that the employment relationship existed on February 8, 2021. The claimant testified that she arrived at her first client's home that morning, clocked in through an "App" on her mobile telephone, and began performing employment services. The claimant testified that she prepared breakfast for the client and began cleaning the kitchen. The claimant testified that the client's house was not clean and that insect pests were

prevalent. The claimant testified regarding the client, “She loves having her house too hot, so she wanted to go to the bathroom, I helped her, made sure she got in the bathroom, and told her that *I was going to run out to the car and get me a drink* [emphasis supplied].” The claimant’s testimony during direct and cross-examination, as well as the recorded statement taken February 9, 2021, show that the claimant slipped on ice and fell while stepping outside to get a drink from the claimant’s personal automobile.

The Full Commission finds that the claimant was performing “employment services” for the respondents when she slipped and fell while stepping outside to obtain a drink from the claimant’s car. The claimant agreed on cross-examination that she attempted to obtain a drink during an unscheduled break while the claimant remained “on the clock.” An injury may be compensable even when an employee is on break as long as the employee is performing employment services when the injury occurs.

Hudak-Lee v. Baxter County Reg. Hosp., 2011 Ark. 31, 378 S.W.3d 77.

The claimant credibly testified that, from her perspective, the client’s home was excessively hot and dirty. The claimant testified that she was walking to her car outside the client’s home in order to obtain a drink and refresh herself, so that she could better perform her work activities for the respondent-employer. The Full Commission finds in the present matter that although obtaining a drink was not a required activity, this action at least

indirectly benefitted the employer in that the claimant would be better able to perform her work duties. The claimant still had job duties to attend to at the time she slipped and fell. *See Wal-Mart Associates, Inc. v. Anderson*, 2022 Ark. App. 12. We find that, at the time of the accident, the claimant was doing something that was inherently necessary for the performance of the claimant's primary job. *See White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

The Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. The claimant proved that she sustained an accidental injury causing physical harm to the body. The injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific incident and was identifiable by time and place of occurrence on February 8, 2021. In addition, the claimant established a compensable injury by medical evidence supported by objective findings. The claimant proved that she sustained a compensable injury to her sacrum and low back. A CT of the claimant's pelvis on February 8, 2021 showed a "nondisplaced fracture through the 4th sacral segment." A physician's impression was "Sacral fracture, closed[.]" The Full Commission finds that the February 8, 2021 CT of the claimant's pelvis demonstrated a compensable injury to the claimant's sacrum by medical

evidence supported by objective findings. We find that the sacral fracture was not the result of a prior injury or pre-existing condition but was caused by the February 8, 2021 compensable accidental injury.

The claimant also established a compensable injury to her back with objective medical findings. Dr. Spann reported “paraspinal muscle spasm” on February 22, 2021 following the February 8, 2021 accidental injury. A physician’s observation of muscle spasm can constitute an objective finding establishing a compensable injury. *Freeman, supra*. An MRI of the claimant’s lumbar spine on September 14, 2021 showed a “disc protrusion at L5-S1.” The September 14, 2021 MRI was another objective medical finding establishing a compensable injury to the claimant’s low back. The Full Commission finds that the reports of muscle spasm and the September 14, 2021 MRI were caused by the February 8, 2021 accidental injury and were not the result of a prior injury or pre-existing condition.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a)(Repl. 2012). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). What

constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her sacrum and low back on February 8, 2021. The Full Commission finds that the claimant proved the medical treatment of record provided on and after February 8, 2021 was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). Payton Ransom noted on September 20, 2021 that a microdiscectomy at L5-S1 could be discussed. However, the claimant testified that she was hesitant to undergo surgery. There is currently not a recommendation in the record for surgery or additional medical treatment.

C. Temporary Disability

Finally, temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). “Healing period” means “that period for healing of an injury resulting from an accident.” Ark. Code Ann. §11-9-102(12)(Repl. 2012). The determination of when the healing period has ended is a question of fact for the Commission. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

In the present matter, the claimant proved that she sustained a compensable injury to her sacrum and low back on February 8, 2021. The initial treating physician reported on February 8, 2021, "Rest, no work until cleared by her doctor next week." The Full Commission finds that the claimant proved she remained within a healing period and was totally incapacitated from earning wages beginning February 9, 2021. The claimant's testimony indicated that Dr. Spann thereafter provided the claimant with a light-duty work slip. Nevertheless, Misty Glenn, the claimant's supervisor, expressly testified that light-duty work with the respondents was not available.

Dr. Spann indicated on September 14, 2021 that the claimant could return to work on October 14, 2021 with "No restrictions." However, an MRI on September 20, 2021 showed among other things an "extraforaminal disc protrusion at L5-S1." Dr. Spann subsequently revised his opinion on November 15, 2021 and stated, "Due to sacral fracture & permanent nerve damage she will not be able to return to work until April 2022." Whether or not the claimant remains within a healing period for her sacral and low back injury, Dr. Spann essentially opined that the claimant would no longer be incapacitated from earning wages as of April 2022. The Full Commission therefore finds that the claimant proved she was entitled to temporary total disability benefits until April 1, 2022.

After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her sacrum and low back on February 8, 2021. The claimant proved that the medical treatment of record provided to her on and after February 8, 2021 was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a)(Repl. 2012). There are currently no recommendations for additional medical treatment. The claimant proved that she was entitled to temporary total disability benefits beginning February 9, 2021 and continuing until April 1, 2022. Based on the current record before the Commission, the evidence does not demonstrate that the claimant was incapacitated from earning wages after April 1, 2022.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

I respectfully dissent with the majority finding that the claimant suffered a compensable injury on February 8, 2021 and is entitled to total temporary disability benefits beginning February 9, 2021 and continuing until April 1, 2022.

Part of Claimant's job responsibilities was to provide in-home assistance to elderly clients. On February 8, 2021, Claimant arrived at her first client's home. Her employment responsibilities consisted of cleaning the kitchen, cooking breakfast, washing dishes, doing laundry, and assisting the client (who was ambulatory) to the shower. After about an hour and a half of work, Claimant decided to take a break. Claimant testified that it was over 90 degrees in the client's home, so she left the client's home to go get a drink from her car. As she did, she slipped and fell on the icy steps.

Injuries sustained at a time when the employee is not performing employment services are specifically excluded from the definition of

“compensable injury.” Ark. Code Ann. § 11-9-102(4)(B)(iii). An employee is performing employment services when the employee is doing something that the employer generally requires. *Dairy Farmers of America, Inc. v. Coker*, 98 Ark. App. 400, 255 S.W.3d 905 (2007); *Cont’l Constr. Co. v. Nabors*, 2015 Ark. App. 60, at 3-4, 454 S.W.3d 762, 765-66. The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer’s purpose or advancing the employer’s interest, directly or indirectly. *Pifer v. Single Source Transp.*, 347 Ark. 851, 857, 69 S.W.3d 1, 4 (2002).

Generally, an employee is not performing employment services while on break from his or her regular employment activities. *McKinney v. Trane Co.*, 84 Ark. App. 424, 426, 143 S.W.3d 581, 583 (2004) (holding employee on way to smoke break was involved in “nothing generally required by his employer and was doing nothing to carry out the employer’s purpose.”). “[M]erely walking to and from one’s car, even on the employer’s premises, does not qualify as performing employment services.” *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 164, 943 S.W.2d 608, 610 (1997); *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 326, 49 S.W.3d 126, 129 (2001).

In *Harding v. City of Texarkana*, 62 Ark. App. 137, 138-39, 970 S.W.2d 303, 303-04 (1998), an employee took a break to go down to a

designated smoking area. As she exited the elevator, she tripped over a rolled-up carpet and was injured. The Commission found that she was not performing employment services at the time of her injury and thus, her injury was not compensable. The employee appealed and the Court of Appeals of Arkansas affirmed the Commission's findings. The following is the Court of Appeals' analysis in *Harding* – which is particularly useful here:

Appellant argues, on public policy grounds, that her break advanced her employer's interest by allowing her to relax, which in turn helped her to work more efficiently throughout the rest of her work shift. We are not unsympathetic to this argument. Under former law, the definition of compensable injury did not include a strict requirement that the injury occur while the worker was performing employment services, and a claimant's activities at the moment of injury were relevant only to the separate and broader question of whether the injury arose out of and in the course of the employment. It is clear that, under former law, appellant's injury while *en route* to the break area would have been in the course of her employment pursuant to the personal comfort doctrine. See *Lytle v. Arkansas Trucking Services*, 54 Ark. App. 73, 923 S.W.2d 292 (1996). It may be true that the interests of both workers and employers would be better served by a more uniform application of an administrative remedy than they would be by the uncertainty inherent in a tort claim based on premises liability. Nevertheless, the legislature, rather than the courts, is empowered to declare public policy, *Teague v. State*, 328 Ark. 724, 946 S.W.2d 670 (1997), and whether a law is good or bad, wise or unwise, is a question for the legislature, rather than the courts. *Longstreth v. Cook*, 215 Ark. 72, 220 S.W.2d 433 (1949). In the present case, Act 796 of 1993 applies and, although appellant's break may have indirectly advanced her employer's interests, it was not inherently necessary for the performance of the job she was hired to do. Consequently, we hold that the Commission did not err in finding that appellant was not performing employment services when she was injured.

Harding, 62 Ark. App. at 138-39, 970 S.W.2d at 303-04.

In *Fulbright v. St. Bernard's Med. Ctr. Risk Mgmt. Res.*, 2016 Ark. App. 417, 502 S.W.3d 540, the Arkansas Court of Appeals held that the claimant was not performing employment services when, returning from a smoke break, the claimant was heading to the cafeteria to get something to eat when she tripped over some carpet on her way back into the hospital. The court held that the claimant was injured while she was performing a personal errand unrelated to her employment and, thus, her injury was not compensable.

In *Hill v. LDA Leasing, Inc.*, 2010 Ark. App. 271 374 S.W.3d 268, the claimant was returning from the restroom when he stopped at a vending machine to buy a snack. The claimant was injured when he fell while pushing the vending-machine button. The court noted that, while at the snack machine, the claimant was incapable of carrying out his sole employment responsibility (watching his truck to ensure it was not damaged while being unloaded). The court held that the claimant's injury did not arise out of and in the course of his employment and, thus, his injury was not compensable. *Id.*

Claimant left the client's home (her workstation) and went outside to her vehicle. While outside the client's home, Claimant was incapable of performing any of the tasks her employer had hired her to do. Claimant was not advancing her employer's interest directly or indirectly while she

was outside. Because Claimant was not advancing her employer's interest directly or indirectly, she was not performing employment services. Under Ark. Code Ann. § 11-9-102(4)(B)(iii), injuries sustained while the employee is not performing employment services are specifically excluded from the definition of "compensable injury." Because Claimant was not performing employment services at the time of her injury, her injuries are not compensable.

Because Claimant's injuries are not compensable, as set out above, Claimant's arguments on appeal (that the ALJ erred in denying her TDD benefits and that the ALJ erred in finding that she failed to prove that she injured her neck and shoulder when she fell) is without merit. Accordingly, for the reasons set forth above, I must dissent from the majority opinion.

CHRISTOPHER L. PALMER, Commissioner