BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H006189

KAREN L. BAILEY,
EMPLOYEE **CLAIMANT**

FORDYCE SCHOOL DISTRICT,
EMPLOYER **RESPONDENT**

ARKANSAS SCHOOL BOARDS ASS'N
WORKERS' COMPENSATION TRUST,
INS CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED MAY 4, 2022

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on Wednesday, February 2, 2022, in Fordyce, Dallas County, Arkansas.

The claimant was represented by the Honorable Tiffany P. Nutt, Nutt Law Firm, PLLC, Fordyce, Dallas County, Arkansas.

The respondents were represented by the Honorable Guy Alton Wade, Friday, Eldredge & Clark, LLP, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Prehearing Order filed September 29, 2021, the parties agreed to the following stipulations, which were modified and affirmed on the record at the hearing:

The parties have agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including August 24, 2020, when the claimant alleges she sustained a work-related injury to her lumbar spine/lower back.
3. The claimant's average weekly wage (AWW) is $1,117.85 entitling her to weekly compensation rates of $711.00 for temporary total disability (TTD) and $533.00 for permanent partial disability (PPD) benefits, if her alleged injury is deemed compensable.

4. The respondents have controverted this claim in its entirety.

5. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 5). The parties mutually agreed the issues litigated were:

1. Whether the claimant sustained a "compensable injury" to her lumbar spine/lower back within the meaning of the Arkansas' Workers' Compensation Act (the Act) on August 24, 2020. Specifically, whether the claimant was performing "employment services" at the time of her alleged lumbar spine/lower back injury.

2. If the claimant's alleged lumbar spine/lower back injury is deemed compensable, the extent to which she is entitled to medical and TTD benefits.

3. Whether the claimant's attorney is entitled to a controverted fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. at 5).

CONTENTIONS

The claimant contends that on August 24, 2020, she was performing her normal and expected job duties by supervising children, and directing and escorting them to the cafeteria at the time she slipped, fell, and injured her lower back/lumbar spine. The claimant contends she was performing "employment services" at the time of this slip-and-fall incident. She contends she is entitled to payment of her out-of-pocket medical and related expenses, and to TTD benefits for a period to be determined based on the specific facts of this case. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2; T. at 7-8; 73-74; 69-73).

The respondents contend the claimant was not performing "employment services" within the Act's meaning at the time of the subject August 24, 2020, slip-and-fall incident, so she was not "within the course and scope of her employment" and did not sustain a "compensable injury" pursuant to the Act and, therefore, is not entitled to any medical or TTD benefits. In support of their position, the respondents cited another ALJ's opinion in the case of *Bron Bell v. Mineral Springs School Dist.*, AWCC No. G806592 (December 30, 2021), noting the facts therein are similar to those in the instant claim. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. at 5; 8-9; 74; 69-73).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto, including but not limited to the evidentiary deposition of Dr. Brad Thomas.

STATEMENT OF THE CASE

The claimant's first witness was Ms. Rhonda Lawson (Ms. Lawson), the Fordyce School District's (the school district) Pre-Kindergarten (Pre-K) to sixth (6th)-grade principal at the time of the subject slip-and-fall incident, August 24, 2020. Ms. Lawson testified she has been employed with the school district for 28 years. She said Ms. Karen L. Bailey (the claimant) was a fifth (5th)-grade teacher, and that she, Ms. Lawson, was familiar with the slip-and-fall incident in question. (T. at 10).

Ms. Lawson testified that on August 24, 2020, the claimant came to her and told her she had fallen. There was a camera in the hallway where the claimant fell, so Ms. Lawson and her assistant located and viewed the camera footage of the slip-and-fall incident in question. Ms. Lawson explained that all the elementary teachers are required to walk their students to the door

of the cafeteria, to make sure the children are all in the cafeteria and seated, and then the teachers are free to go to their lunch. She went on to explain what she saw on the videotape. She said the claimant, "was coming back down the hall [after she had dropped-off her students in the cafeteria} and her feet just went out from under her by the water fountain." (T. 11) (Bracketed material added).

Concerning the claimant's job duties and responsibilities, Ms. Lawson testified the claimant is required to be at work each day at 7:30 a.m., and they are free to leave work at 3:30 p.m.. She said if a teacher chooses to leave the school at any time during the day, they must come by the principal's office and sign-out on a clipboard sheet, or little notebook advising, "where they have to go…so in case someone needs them" Ms. Lawson can look at the sign-out sheet and see where the teacher has gone. (T. 12). Ms. Lawson testified it was "common, very common" for somebody whether a parent or someone else, to call during a teacher's lunch break, which is from 11:40 a.m. to 12:20 p.m., but that this time period was, "a gray area." (T. 12). She went on to explain that since the children in question are so young [Pre-K to 5th grade] the teachers are required to physically walk with their children from their classroom to the cafeteria which is located in another building adjacent to the hallway where the claimant slipped and fell; to make sure all the children are seated, and then the teachers are, "allowed to come back and go to lunch then." (T. 12-13) (Bracketed material added).

When asked if, to Ms. Lawson's knowledge, the claimant performed work duties while she was on her lunch break, she responded: "All the time, yes." (T. 13). Ms. Lawson then went on to explain that since the 2020 school year was during the COVID-19 pandemic, the teachers had

more work duties than usual, and that while she was on her lunch break the claimant was, "in there making, talking to parents, calling parents." (T. 13). She testified, "we were out on Mondays, so Tuesday through Friday we had to hit it hard with the kids and the parents were calling." (T. 13). Ms. Lawson explained some of the children – including the claimant's students – were not present at school, as they were learning virtually, and the teachers (including the claimant) had students who were learning virtually, "so last year was a very unique year where most teachers probably did not get an adequate lunch break." (T. 13).

Ms. Lawson also testified the claimant had not signed out on the day of her slip-and-fall incident, 8/24/2020, and that the claimant, rarely leaves the school grounds during her lunch break, she "rarely signs out", and she "rarely leaves" her room during her lunch break, although Ms. Lawson, "would frequently see her in the break room, or in the copy room as we call it, making copies or either on the phone talking to parents and things like that." (T.14). Ms. Lawson then further testified concerning some other of the claimant's job duties which she may have to perform on her lunch break. (T. 15-17). One of these responsibilities was to be available to assist the two (2) duty teachers whose job it is to monitor the kids in the cafeteria and, "making sure they have all they need", and that it was also common for other teachers including the claimant to assist the duty teachers, and she has seen the claimant do this, "all the time." (T.15).

Finally, Ms. Lawson testified that it is "just the culture in our building" that if a parent calls or drops by the school to see a teacher during the lunch break time period, that the teachers make themselves available to talk to or visit with the parent(s), and that responsibility is one the teachers are, "used to, they don't complain." I mean, when a parent comes, I mean, that's why we have

our jobs, because of the kids, and so they don't mind coming during their lunch period" to talk to or visit with parents as needed. (T.15-16). Ms. Lawson agreed the claimant's slip-and-fall of 8/24/2020 was only the second week of school and, because of the COVID-19 pandemic she and her teachers were making a lot of adjustments, "…and we were really trying to feel our way around because, you know, it was the mask thing, you know, we were wearing masks, it was just a very weird time last year. It was hard, and it was hard on the teachers." (T. 16-17).

In response to a questions from the ALJ, Ms. Lawson testified the water fountain adjacent to where the claimant fell leaks and the janitor could not keep the area cleaned-up all the time; the claimant slipped on water on the floor from the water fountain; the claimant was on her way back to her classroom at the time she slipped and fell in the water puddle; and that, in her opinion, a teacher's lunch break was not start until she gets back to her classroom or leaves the school campus since it is the teacher's job duty and responsibility to escort the children from class to the cafeteria and the fact the teacher must walk from the cafeteria either back to her room or leaves the school building is a part of the teacher's required job. (T. 28-30).

On cross-examination, Ms. Lawson testified that once the teachers take their students to the cafeteria, and the duty teacher(s) is (are) present to monitor the children, the teachers are free to leave the school campus as long as they sign out in her office, but that most teachers stay on the school campus during their lunch break. The school does not have a formal requirement that teachers are required to stay at school during their lunch break; they just must be back by the time their lunch break is over, which is 11:40 a.m. for 5th grade teachers such as the claimant. Ms. Lawson said the claimant had already dropped off her children in the cafeteria, turned their

supervision over to the duty teacher(s), and she was heading back to her classroom at the time of her slip-and-fall in the hallway. The school does not require teachers to eat their lunch in their classrooms, and it was the claimant's decision as to where she wanted to eat, and whether or not she left campus during her lunch break. (T. 18-24; 31-32).

On re-direct, Ms. Lawson testified that she did, "remember vaguely" asking the teachers to be available on their lunch breaks during the first couple of weeks of school, "because it was crazy" due to teaching both virtually and in person, and the teachers, "did have a lot of extra duties" and had to fill in for one another due to the educational challenges related to the COVID-19 pandemic. (T. 24-28).

The claimant, Ms. Karen L. Bailey, was the next and final witness to testify. She has been a teacher for some 25 years. (T. 37-38). She confirmed the slip-and-fall incident occurred on August 24, 2020, noting that this was the first day of the 2020 school year. She confirmed Ms. Lawson's testimony relating to her job duties in escorting the children in her classroom to the cafeteria, turning their supervision over to the duty teacher(s), and said she also had to make sure the children were in the correct one (1) of two (lines) before she left the cafeteria. The claimant testified she had left the cafeteria and was walking back through the hallway of the school building when she slipped-and-fell in a puddle of water on the floor next to where some water fountains were located. She said both her feet "went right out from under" her, she landed, "I mean, I landed hard", on her behind, and she rolled around on the floor for a minute, then got up rather quickly walked to her classroom, where she ate her lunch and, "got ready for the rest of the day." (T. 34; 33-35). She testified that while she ate her lunch, she also worked, "preparing for the rest of the

school day with her other classes, as well as we had this virtual component and we – I was checking my emails… ." (T. 35). The claimant candidly admitted she could not recall exactly what job duties she was performing as she ate her lunch, but said she was, "probably answering my emails, answering Google classroom questions, answering texts or a parent call, or looking at notes somebody had given me, you know, those types of things of the day." (T. 35-36). She said she did not perform any personal errands, and that she had never signed out to leave the school campus that day. (T. 36). She said at the time she fell she had not made it back to her classroom yet, and estimated she, "was about halfway back" to her classroom at the time she slipped and fell in water puddle on the hallway floor. (T. 36).

The claimant testified that she fell on a Monday, and that she "was struggling" on Tuesday and Wednesday", and that while she didn't remember if she called the doctor on Tuesday or Wednesday, she did call her doctor, told her it was the first week of school and she did not feel she had time to leave to see her doctor in person, so her doctor called her in a Medrol Dose Pack, and she also began taking over-the-counter (OTC) pain relievers like "Ibuprofen, B.C., Tylenol for the rest of the school week." (T. 37-38). The claimant testified that on Saturday she called Ms. Lawson and told her she had, "a major problem, I can't even get upright." I cannot stand upright." (T. 38). On Monday she went to see her primary care physician (PCP), who gave her a steroid shot and some Toradol, and referred her to OrthoArkansas for additional evaluation and treatment. The claimant said that by the time she saw the doctor at OrthoArkansas, she was experiencing sciatica down her left leg, from the back of her thigh down into her calf and into her ankle. She said, "I literally was 100% disabled, not 90, not 80, a lot. I couldn't walk. I couldn't sit. I couldn't

walk and couldn't sit", and she did not return to work at that time. (T. 39; 38-39). The claimant, who was 47 years old at the time of the injury, testified she had no other recent injuries, either before or after the subject 8/24/2020 work incident. (T. 40-41).

An MRI revealed the claimant had a left-sided L5-S1 herniated disc with S1 nerve root compression. The claimant was referred and "presented emergently" to Dr. Bradley A. Thomas, a neurosurgeon associated with the Little Rock Neurosurgery Clinic. The claimant's medical records consistently reflect a history of the subject slip-and-fall incident at school as precipitating her symptoms, and Dr. Thomas opined the herniated disc was, "directly related" to the slip-and-fall incident at school on 8/24/2020. (Joint Exhibit 1; JX 1 at Ex. 1; JX1 at 1-29). The claimant underwent two (2) surgeries for this condition. The first surgery on September 10, 2020, was a "Left-sided L5-S1 decompression discectomy"; and the second, conducted on December 7, 2020, was a laminotomy and facetectomy to correct a, "Left-sided L5-S1 recurrent herniated disc with severe nerve root compression." (JX1 Ex. 1 at 2-5; JX1 Ex. 1 at 12, 12-13; T. 38-44).

The respondents denied this claim in its entirety. (Comms'n Ex. 1 at 2; T. 5). Therefore, the claimant used her state teacher health insurance to pay the medical bills related to her lower back injury and related treatment, and she paid any required co-pays and other associated expenses out of her own pocket. The claimant testified she though she got 10 or 11 sick days of sick leave per year [which apparently may be carried over to the next year if they are unused], and she used 20 sick days of sick leave for her first surgery and recovery period. Since she had sick leave available to use, the school district paid her full salary when she was off work after her first surgery. She testified that after her second surgery she missed 25 school days, but she only had to use four (4)

days of sick leave because all her students were attending school virtually due to the COVID-19 pandemic, and she was able to teach virtually from her home. In other words, the school district paid her full salary for the 21 days she was at home healing but was still able to teach her students virtually. The claimant testified she lost a total of 24 days of sick leave, all of which was paid leave. Dr. Thomas released the claimant to return to work on January 25, 2021. She said she has not had to return to a doctor for medical treatment since her release, that she is able to perform her job duties, but is careful to not lift anything heavier than a gallon of milk. She agreed with her prior deposition testimony that her lower back condition now is "very close" to being back to normal, although she still has some residual pain from time to time. (T. 41-44; 53-56) (Bracketed material added).

On cross-examination the claimant explained that in order to walk from her classroom to the cafeteria she must walk out of the school building, and through a breezeway to the cafeteria which is a separate building. The claimant said her job duties for the 2020-2021 school year was teaching social studies and science to three (3) classes of 5th graders, and she did not have any additional responsibilities other than her teaching job, although she did teach summer school in 2020. (T. 45-47).

The claimant testified she had already dropped-off her students at the cafeteria and was walking back through the hallway in the school building with some of the 6th grade teachers headed back to her classroom at the time of the subject incident. The claimant testified that the large majority of the time she brought her own lunch; but she admitted that during her lunch break she could eat in the cafeteria, her classroom alone or with other teachers, or she was free to leave

the school campus and pick-up something to eat, to run errands, and to do whatever she needed to do so long as she was back at the school and available to pick-up her students after their lunch recess at 12:20 p.m. She said she did not have anything in her hands like books or her lunch at the time she slipped and fell. (T. 48-52).

After she fell the claimant went back to her classroom, then realized she needed to report the fall so she went to the principal's, Ms. Lawson's, office and reported the slip-and-fall incident to her. The claimant worked the rest of the week, but her lower back and left leg pain became progressively worse throughout the week and the weekend to the point she presented herself to her PCP for evaluation and treatment the Monday following the work incident. (T. 48-59). The claimant reiterated, as Ms. Lawson the school principal had testified, that the time constraints during her lunch break are such that while she is eating she could, "almost 100% tell you" that she was performing work duties as she was eating on the day of the subject slip-and-fall incident, "because everyday is like that." She also testified that she arrived at school around 6 a.m. on August 24, 2020, the day of the slip-and-fall, in order to prepare for the school day, as it was the first day of school and she would be teaching students both in the classroom and virtually due to the COVID-19 pandemic protocols. She testified primary reason she almost always does some work as she eats her lunch in her classroom is so that she can be available if her students or Ms. Lawson need her for any reason. (T.61; 57-68).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the

record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2021 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.*** Section 11-9-704(c)(3) (2021 Lexis Supp.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**.** ***Ark. Code Ann***. § 11-9-704(c)(4) (2021 Lexis Repl.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover,* 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees***,** 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, and may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc*., 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

1. On the specific facts of this particular case, the claimant has met her burden of proof in demonstrating she was performing, "employment services" at the time she slipped and fell on water in the school building hallway and injured her lumbar spine/lower back on August 24, 2020, since her injury, "occurred within the time and space boundaries of the employment, when…" she was, "carrying out the employer's purpose or advancing the employer's interest directly or indirectly."

Ark. Code Ann. Section 11-9-102(4)(B)(iii) (2021 Lexis Repl.) specifically 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 he or she "is doing something that is generally required by her employer." *Texarkana School District v.* Conner, 373 Ark. 372, 284 S.W.3d 57 (2008); *White v. Georgia-Pacific Corp*., 339 Ark. 474,478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment- related services at the time of an injury 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 Trans*., 347 Ark. 851, 69 S.W.3d 1 (2002) (Bracketed material added); and *Curtis v. Lemna*, 2013 Ark. App. 646, 430 S.W.3d 180 (Ark. App. 2013). Therefore, the threshold issue to be determined here is whether the claimant has met her burden of proof in

demonstrating that she was performing employment services within the meaning of the Act at the time of the August 24, 2022, slip-and-fall incident.

Arkansas's appellate courts and the Arkansas Workers' Compensation Commission (the Full Commission) have identified employee activities that advance the employer's interests during the course of a short break or lunch period. For example, our supreme court has held that a trip to use the bathroom on the employer's premises is a necessary function and directly or indirectly advances the employer's interests. *Collins v. Excel Specialty Products*, 347 Ark. 811, 69 S.W.3d 14 (2002); *Jivan v. Economy Inn & Suites,* 370 Ark. 414, 260 S.W.3d 281 (2007). The court also has held that an employee is performing employment services while returning from a scheduled break on the employer's property where he was not allowed to leave the property while on break, was not required to clock-out for the break, and was on call while on break. *Wallace v. West Fraser South, Inc*., 365 Ark. 68, 225 S.W.3d 361 (2006). However, the Arkansas Supreme Court has not adopted a bright-line rule that an employee who is on break is per se performing employment services. *Wallace v. West Fraser South, Inc*. *supra*.

For example, in *Shelton v. QualServ & American Cas. Co*., 2013 Ark. App. 469 (Ark. App. 2013), the court found that an employee taking his lunch box to his car midway through his lunch break was not advancing his employer's interest where he was not required to stay on his employer's premises during lunch; he was not compensated for his lunch time; and he was not expected to perform any job-related duties during his lunch. In *Robinson v. St. Vincent Infirmary Medical Center*, 88 Ark. App. 168, 196 S.W.3d 508 (Ark. App. 2004), the court concluded that an employee walking from the second floor to the fourth floor to get her lunch during her lunch break

was not performing employment services when stepping off the fourth floor elevator, where the facts indicated that the action of getting her lunch was totally personal in nature, and the employer gleaned no benefit from the employee going to the fourth floor to get her lunch.

On the other hand, Arkansas appellate courts have recognized some circumstances where an employee's responsibilities or actions during a break or lunch period sufficiently advanced the employer's interests such that an employee was deemed to be performing employment services even during a short break or lunch period. For example, where an employee is required to take his smoke break within sight of the equipment that he operates, and must end his break early if required for the sake of the equipment, he is performing employment services even during the smoke break. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1998). Similarly, where the employer provides its food service workers with food for lunch, but the food service workers are required to interrupt their breaks if needed to assist students even during their break, the food service workers are performing employment services during break. *Ray v. University of Arkansas*, 66 Ark. App. 177, 990 S.W.2d 558 (1990).

Where an agency client walks up to a rehabilitation employee already on smoke break, and the two begin to discuss the client's release to work, the employee on smoke break was deemed to be performing employment services. *Kimbell v. Association of Rehab Industry*, 366 Ark. 297, 235 S.W.3d 499 (2006). Where an entire lumber production facility shuts down for breaks, and all the employees were required to take breaks at the same time, our Court of Appeals has held that the simultaneous breaks directly advance the employer's interests so that employees are performing employment services even while on break. *Dearman v. Deltic Timber Corp.*, 2010 Ark. App. 87,

377 S.W.3d 301 (Ark. App. 2010).

The court of appeals has held that actions of a retail employee returning her purse to an employer-supplied locker at the end of her break advances her employer's interest by preventing employee theft at the registers. *Wal-Mart Stores, Inc. v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002); that the actions of an ICU nurse getting breakfast not only for herself, but also for all of the ICU nurses, benefitted her employer by reducing the number of times the ICU was not fully staffed. *Arkansas Methodist Hospital v. Hampton*, 90 Ark. App. 288, 205 S.W.3d 848 (2005); and that an employee injured while walking to the employee lounge for a break is performing employment services in doing so if the employer generally requires its employees to go to the employee lounge for their breaks. *Wal-Mart Stores, Inc. v. King*, 93 Ark. App. 101, 216 S.W.3d 648 (2005).

Likewise, in *Sweeten v. GGNSC Administrative Services*, Commission File No. G202777 (April 22, 2013), the Full Commission found that an office worker who went from the fifth floor to the first floor to use the restroom, then to buy lunch, was performing employment services when she tripped on a rug getting back into the elevator to return to do some work on the fifth floor before eating her lunch. Citing *Wallace v. West Fraser South*, *supra*., the Commission noted in its majority opinion that the Arkansas Supreme Court has held that an employee who is injured while walking back to his work site after a break is performing employment services. Finally, in *McGhee v. Alma School District*, Commission File No. G209098 (September 19, 2013), the Full Commission found that a school secretary performs employment services while returning a drinking glass to the school cafeteria pursuant to a school policy that all employees return their

drinking glasses to the cafeteria immediately after use.

In a decision regarding the "employment services" issued on December 4, 2019, *University of Arkansas for Medical Sciences (UAMS) v. Patricia Hines*, 2019 Ark. App. 557, 590 S.W.3d 183 (Ark. App. 2019), the court affirmed the Full Commission's decision that the claimant – a surgical-services patient-unit coordinator who worked at the UAMS front desk – was in fact advancing her employer's interest when she slipped and fell after exiting an elevator on the way to take her lunch break. In reaching this conclusion, both the Commission and the court relied primarily on *Ray*, *supra*, finding that since the claimant was required to leave her break and return to work if she was needed to assist with an emergency or trauma case, this benefitted her employer. This job requirement was undisputed and true, since the claimant had in fact been required to return from her lunch break in the past in order to do her part in handling an emergency situation.

Both attorneys did an excellent job presenting their respective cases. Honestly, I found this case to present a rather unique factual scenario so as to make this decision a very "close call" concerning the threshold issue of whether the "employment services" exception to the Act's definition of "compensable injury" renders the claimant's injury compensable or non-compensable. The claimant's injury most certainly occurred, "within the course" of her employment, as it occurred inside the school building. However, did the injury occur "within…the scope" of the claimant's job duties and responsibilities? In this particular case, based on the specific facts and circumstances of this claim, I find the claimant has met her burden of proof in demonstrating her injury is in fact "compensable", for the following reasons.

The respondents cite the ALJ's decision in *Bron Bell v. Mineral Springs School District*,

AWCC No. G806592 (December 30, 2021), in support of its contention against compensability in the instant case; however, their reliance on this case is misplaced. First, since this is an ALJ's decision on which the Full Commission has not yet ruled, it has no precedential value. Second, the facts in *Bell*, as well as some issues regarding the *Bell* claimant's credibility, distinguish *Bell* from the case at bar. More significantly, in a very recent decision, *Holly McCauley v. CHI St. Vincent Infirmary*, AWCC No. H004765 (Full Commission, filed April 27, 2022), the Full Commission found that a new, salaried employee who was using her lunch break to move personal items from her car in the parking lot to her new office when she fell and injured her hip was in fact performing "employment services" at the time of her injury. The Full Commission's reasoning in *McCauley* bears some similarities to the facts of this case, and requires a finding of compensability on the specific facts of this particular case.

First, having had the opportunity to personally observe the witnesses as they testified, to observe their demeanor, and to hear their testimony, I found both the claimant and the school principal, Ms. Lawson, to be very credible, sincere witnesses, both of whom are dedicated to their jobs as educators.

Second, it is important to note based on the specific facts of this case that, because of all the extra duties teachers were being required to perform during the time period in question as a result of the COVID-19 pandemic; that they would be required to teach both virtually and in person; the fact the claimant's injury occurred during the first week of school when the claimant and her colleagues were having to adjust to and perform extra duties due to the pandemic; and that Ms. Lawson had advised the teachers they should be available on their lunch breaks for at least the first

couple of weeks of school due to all the unknown, new issues with which the teachers would be required to handle as a result of the pandemic; and the fact that, especially where younger children are involved, not only the school district, but also the students and their parents benefitted from having the teachers available and "on call" during their lunch break. In addition, specifically in the case of the claimant, Ms. Lawson testified the claimant did work on her lunch period, "all the time". (T. 11-15).

Third, as in *McCauley* the claimant herein was a salaried employee who generally ate her lunch in her classroom so she could perform various work duties as she ate her lunch; but even if she did have time to leave the campus at lunch, she was always subject to being called back to work.

Finally, educators like the claimant and Ms. Lawson are to be especially commended for rising above and beyond the call of duty during the unique and difficult challenges with which they had to deal because of the COVID-19 pandemic. Again, *McCauley* compels me to find the claimant has met her burden of proof on the specific facts of this particular claim.

2. **The claimant has met her burden of proof in demonstrating she is entitled to TTD benefits for the number of days she was required to take personal leave while receiving treatment for and recovering from her lumbar spine injury.**

The Act defines "temporary total disability" as the period of time within the healing period when the claimant is totally incapacitated from earning wages. ***Ark. Code Ann.*** Section 11-9**-???** (2021 Lexis Repl.); *Ark. State Highway Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The Act defines the "healing period" as, "that period for healing of an injury resulting from an accident." ***Ark. Code Ann.*** Section 11-9-102(2) (2021 Lexis Repl.). Whether the healing period

has ended is a question of fact for the Commission to determine based on the evidence of record in each particular case. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (Ark. App. 1995). An employee who has sustained a compensable injury is not required to offer objective medical evidence in order to prove entitlement to TTD benefits. *Ark. Health Ctr. V. Burnett*, 2018 Ark. App. 427, 558 S.W.3d 408 (Ark. App. 2018).

Here, the claimant was able to work from home following her surgeries, since she could still teach students virtually. Still, she was required to take a total of 24 days of sick leave while she was recovering from her surgeries and was unable to work. Therefore, she is entitled to TTD benefits for those 24 days. The claimant, of course, was paid her full salary when she was teaching students virtually from her home, and she is not entitled to TTD benefits during the time she was drawing her full salary.

Therefore, for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the Prehearing Order filed September 29, 2021, which the ALJ corrected and the parties affirmed as corrected on the record at the hearing, hereby are accepted as facts.

2. The claimant has met her burden of proof in demonstrating she was "within the course and scope of her employment" and was in fact performing "employment services" within the Act's meaning on August 24, 2020, when she slipped in a puddle of water in a hall inside the school building and injured her lower back/lumbar spine.

3. The claimant has met her burden of proof in demonstrating she is entitled to reimbursement of her out-of-pocket medical expenses, including but not limited to her health insurance deductible(s), mileage, and any and all other expenses related to and reasonably necessary for treatment of her compensable lumbar

spine/lower back injury. This award of medical benefits and associated expenses, of course, includes any and all such benefits and expenses from both of the lower spine surgeries Dr. Thomas performed on her which he has directly related to the subject compensable injury, both in his medical records and his evidentiary deposition.

4. The claimant has met her burden of proof in demonstrating she is entitled to TTD benefits based on the 24 days of sick leave days she was required to take during her healing period. She is not entitled to TTD benefits for the 21 days she was at home healing, but was able to teach her students virtually and was paid her full salary.

5. The claimant's attorney is entitled to a fee on all controverted TTD benefits (i.e., the 24 days of sick leave) during the time period the claimant was within her healing period but not working.

6. The respondents shall remain responsible for any and all additional reasonably necessary medical expenses related to her August 24, 2020, compensable injury.

WHEREFORE, for all the aforementioned reasons, I make the following award:

AWARD

The respondents are hereby directed to pay benefits in accordance with the "Findings of Fact and Conclusions of Law" set forth above. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ***Ark. Code Ann.*** Section 11-9-809 (2021 Lexis Repl.), and *Couch v. First State Bank of Newport,* 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett,* 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer,* 358 Ark. 89, 186 S.W.3d 229 (2004).

IT IS SO ORDERED.

____
Mike Pickens
Administrative Law Judge