BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC FILE № H401770

MARCELENE LUMPKINS, EMPLOYEE **CLAIMANT**

BIRCH TREE COMMUNITIES, INC., EMPLOYER **RESPONDENT**

ATA WORKERS' COMP SI TRUST, CARRIER/
RISK MANAGEMENT SERVICES, TPA **RESPONDENT**

OPINION FILED 19 NOVEMBER 2024

Heard before Arkansas Workers' Compensation Commission (AWCC) Administrative Law Judge JayO. Howe on 21 August 2024 in Little Rock, Arkansas.

Mr. Mark Alan Peoples appeared for the claimant.

Ms. Melissa Wood, of Worley, Wood & Parish, PA, appeared for the respondents.

I. STATEMENT OF THE CASE

The above-captioned case was heard on 21 August 2024 in Little Rock, Arkansas, after the parties participated in a prehearing telephone conference on 30 July 2024. A Prehearing Order, admitted to the record without objection as Commission's Exhibit № 1, was entered on the day of the conference.

That Order set forth the following STIPULATIONS:

1. The AWCC has jurisdiction over this claim.

2. An employee/employer/TPA relationship existed at all relevant times, including on 19 December 2023.

3. The claimant's average weekly wage at the time of the injury was $958.10, which would entitle her to TTD/PPD rates of $639/$479 per week.

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

The Order stated the following ISSUES TO BE LITIGATED:

1. Whether the claimant sustained a compensable injury to both of her elbows by specific incident on 19 December 2023.

2. Whether the claimant is entitled to medical and indemnity benefits associated with a compensable injury, including TTD benefits between the date of the injury and 13 June 2024.[1]

3. Whether the claimant is entitled to an attorney's fee.

The parties' CONTENTIONS, as set forth in their prehearing questionnaire responses, were incorporated into the Prehearing Order by reference. The claimant contends, as amended without objection at the beginning of the hearing:

1. That she sustained compensable work injuries to both elbows by specific incident on 19 December 2023.

2. That she is entitled to TTD from the date of injury to 13 June 2024.

3. That she is entitled to reasonable and necessary medical benefits related to her compensable work injuries.

4. That she is entitled to the maximum statutory fees associated with her claim being controverted by the respondents.

The respondents contend:

1. That the claimant did not sustain a compensable injury on 19 December 2023.

2. That she was not in the course and scope of her employment at the time of her fall and resulting injuries.

The following WITNESSES testified at the hearing: Ms. Lori Smith, an employee of the respondent-employer, was called by the claimant, and the claimant testified on her own behalf; the respondents called Mr. Blake Smith (no apparent relation to Ms. Lori Smith) and Mr. Todd Henderson, both employees of the respondent-employer.

[1] The Prehearing Order noted the claimant sought TTD benefits from the date of the injury to a date yet to be determined. At the outset of the hearing, she amended her contentions to allege that she was entitled to TTD benefits from the date of the injury through 13 June 2024. Whether she was entitled to TTD benefits after 13 June 2024 was reserved.

The EVIDENCE considered in this claim consisted of the hearing testimony along with the following EXHIBITS: Commission's Exhibit № 1 (the Prehearing Order), Claimant's Exhibit № 1 (an index page and 23 subsequent pages of medical records), and Claimant's Exhibit № 2 (an index page and three subsequent pages of non-medical records).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record as a whole and having heard testimony from the witnesses, observing their demeanor, I make the following findings of fact and conclusions of law under ACA § 11-9-704:

1. The AWCC has jurisdiction over this claim.
2. The previously-noted stipulations are accepted as fact.
3. The claimant proved by a preponderance of the evidence that she suffered compensable injuries to both elbows by specific incident.
4. The claimant proved by a preponderance of the evidence that she is entitled to reasonable and necessary medical benefits associated with the treatment of her compensable injuries.
5. The claimant proved by a preponderance of the evidence that she is entitled to TTD benefits between the date of injury and 13 June 2024, subject to any applicable offset associated with her receipt of short-term and/or long-term disability payments.[2]
6. The claimant proved by a preponderance of the evidence that she is entitled to an attorney's fee.

III. HEARING TESTIMONY

Witness Ms. Lori Smith

[2] At the beginning of the hearing, the parties discussed that in the event the claimant was found to be entitled to TTD benefits, they would handle applying appropriate offset amounts from other disability benefits already provided to the claimant. See TR at 10. Testimony was not offered as to those potential offset amounts, and the issue was reserved should the matter not be amicably resolved by the parties.

Ms. Smith testified that she worked for the respondent-employer for twenty-eight years and that she works with the claimant. Regarding the day of the claimant's fall, she stated, "We were going out to her car. I was going to ride with her to the team meeting and we went out the back door and we were stepping off some steps and I stepped off the step and I heard her scream and I looked over and she was in the air falling, and I heard her hit the pavement really hard and she started crying, and I could tell she was injured really bad." [TR at 14-15.]

She explained that attending the quarterly off-site lunch meeting was "part of the job… you're pretty much expected to go to it." [TR at 16.] She did not clock out during for the time in or around those lunch meetings and was not aware of anyone else not being on the clock at those times.

Ms. Smith was asked on cross examination whether she considered the meetings to be mandatory. She responded, "I mean, yeah… I felt like I was expected to be at those meetings." [TR at 18.] She went on to answer that the employees got a free meal and talked about work and enjoyed each other's company. "[I]t's kind of a benefit of our team, you know." [TR at 19.] She testified further that the finance team also has regular Zoom meetings at 10:00 AM on Tuesdays.

Claimant Marcelene Lumpkins

The claimant testified that she has worked for the respondent-employer for ten years. She did not recall exactly what caused her fall while leaving on the day of her injuries, but recalled "hitting the pavement" and breaking both of her elbows, with the "left being the worst [sic]." [TR at 22.] She testified that she has not returned to work since the day of her fall.

As for whether attending the lunch meeting was mandatory, she said that it was not indicated explicitly that employees must attend, but she felt she was ordinarily expected to be present.

> Q: If you had something pressing that you had to do, like for instance, a family issue that you had – that took precedence over this, --
> A: Uh-huh.
> Q: -- would you clock out?
> A: Yes.
> Q: Okay. To go to the quarterly luncheon meeting, would you clock out?
> A: No.
> . . .
> Q: You've been to several of these meetings?
> A: Yes, I have.
> Q: Okay. Off-site?
> A: Yes.
> Q: Have you ever clocked out?
> A: No.
> Q: To go to one of these meetings off-site?
> A: No, not ever.
> Q: So you were on the clock?
> A: That's correct.

[TR at 24-25.] The claimant confirmed that she was not salaried, and that she accounted for her time on and off "the clock."

The claimant testified that she had not had problems with her elbows prior to the fall, but that she had undergone multiple surgeries on her left elbow since the accident. She stated that her injuries prevented her from completing basic daily tasks and that she would not have been able to perform her job functions if she had returned to work. The claimant further testified that company policy prevented her from returning to work with any restrictions in place.

On cross examination the claimant testified that she was one of seven employees who reported to the Chief Financial Officer (CFO). Performing administrative and clerical functions for the CFO and training new employees were within the scope of her job duties. As for the lunch meetings, she said that new facility residents, their care needs, and rent

amounts could be among the work-related things discussed over lunch. Answering a question from the bench, the claimant clarified that Birch Tree is a residential care facility for clients with mental health-related needs.

Witness Mr. Blake Smith

After the close of the claimant's case, the respondents called Chief Financial Officer Blake Smith to the witness stand. Mr. Smith started his position with the respondent-employer in March of 2022. He provided the following testimony about the off-site lunch meetings:

> Q: … you guys were going to Colton's, is that right?
> A: Yes.
> Q: Was it for a mandatory meeting?
> A: No.
> Q: Were they forced to go there?
> A: No.
> Q: Was there an agenda?
> A: No.
> Q: Did the employees take their own vehicles?
> A: Yes.
> Q: Was anyone taking minutes?
> A: No.
> Q: Is it a social event?
> A: Yes.

[TR at 38-39.] His direct examination concluded with the question of whether the claimant was performing job duties when she fell. He responded that she was not.

Mr. Smith testified on cross examination that he was aware that having meetings off-site required hourly employees to be outside of their assigned work areas.

> Q: And were they required to clock out?
> A: No.
> Q: Okay. So they're still on the clock, when they're going to the luncheon?
> A: Yes.
> Q: You are aware, aren't you, that it's a Birch Tree policy that hourly employees leaving their assigned work locations for any reason must clock out of time keeping; you're aware of that, aren't you?
> A: Well, this was a team building exercise.
> Q: Okay.
> A: Yes.

> Q: Okay. What's a team building exercise?
> A: So we have—like I said before, we've got some folks that work remotely, and then, we have folks that work at the office and when I started at Birch Tree, I discovered that not everybody was always, you know, working together; and so this was an effort to bring people together, so that we did get to know each other. So that when we are in the office, we could, you know, work better together.

[TR at 41-42.] Mr. Smith then confirmed again that he was aware that employees were required to clock out when leaving their work areas for personal reasons and that they did not clock out for the lunch meetings.

Witness Todd Henderson

Mr. Henderson testified that he works as a senior accountant at the respondent-employer and that he was working on the day of the claimant's accident. He stated that he had missed all or part of some lunch meetings before and that he did not consider them to be mandatory.

> Q: If you miss, are you reprimanded in any way?
> A: I have never been.
> Q: Are you forced to attend?
> A: I don't think so. Like I said, I got up and left before with permission.
> Q: Is there any type of agenda that's followed at these luncheons?
> A: I would say it's more social interaction, kind of.

[TR at 45.]

Mr. Henderson stated on cross examination that he felt like attending the meetings was encouraged and that he did not clock out to attend them.

Medical and Documentary Evidence

The records from the claimant's emergency department visit show that she suffered a left arm "comminuted fracture of the olecranon" with "dislocation of the capitellar joint with the radius displaced anteriorly." [Cl. Exhibit № 1 at 5.] She underwent surgery on 21 December 2023. A preoperative X-ray of her right arm revealed a "small incomplete radial neck fracture" of the right arm. *Id.* at 9. A surgical revision was required on 9 January 2024 due to hardware fixation failure of the left arm. *Id.* at 15.

Additional clinic notes indicate that she remained under a physician's care with orders for physical therapy and light duty restrictions through at least May of 2024. *Id.* at 20, 22.

The claimant also provided records from email threads related to the scheduling of the finance team luncheon. [Cl. Exhibit № 2.] The emails begin with Blake Smith sending a message on December 5th that he would "like to schedule a team luncheon." In a later reply to a calendar appointment titled "Finance Team Luncheon" for Monday, December 18th, Smith asks about moving the meeting from that Monday, December 18th, to Wednesday. Todd Henderson suggested moving it to Tuesday, December 19th, "in place of our team meeting at 10." Smith responded on the morning of the 19th, saying that they would meet at Colton's for lunch that day. "BTW, we'll still have our weekly meeting this morning. I'll cancel the meeting for next week," he concluded.

IV. ADJUDICATION

The stipulated facts, as agreed during the prehearing conference, are outlined above and accepted. It is settled that the Commission, with the benefit of being in the presence of the witness and observing his or her demeanor, determines a witness' credibility and the appropriate weight to accord his or her statements. See *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 448, 990 S.W.2d 522 (1999).

A. The Claimant Sustained a Compensable Injury.

Under Arkansas' Workers' Compensation laws, a worker has the burden of proving by a preponderance of the evidence that she sustained a compensable injury as the result of a workplace incident. Ark. Code Ann. § 11-9-102(4)(E)(i). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Objective medical findings are those findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Causation does not

need to be established by objective findings when the objective medical evidence establishes that an injury exists and other nonmedical evidence shows that it is more likely than not that the injury was caused by an incident in the workplace. *Bean v. Reynolds Consumer Prods*., 2022 Ark. App 276, 646 S.W.3d 655, 2022 Ark. App. LEXIS 276, citing *Wal-Mart Stores, Inc. v. VanWagner*, *supra.*

The claimant alleges that his injury occurred by specific incident. The claimant must establish four (4) factors by a preponderance of the evidence to prove a specific incident injury: (1) that the injury arose during the course of employment; (2) that the injury caused an actual harm that required medical attention; (3) that objective findings support the medical evidence; and (4) that the injury was caused by a particular incident, identifiable in time and place. See *Cossey v. G. A. Thomas Racing Stable*, 2009 Ark. App. 666,5, 344 S.W.3d 684, 689.

There is no question that the claimant fell on 19 December 2023 and that she suffered significant injuries to both elbows as a result of that fall. Those injuries required medical attention, including surgical treatment and physical therapy. Factors (2), (3), and (4), noted above, are not at issue in this claim. It is on Factor (1)—whether the claimant was in the course of her employment when she fell walking to her car to attend an off-site lunch meeting—that this claim turns. Based on the record before me, I find that the claimant met her burden on this factor and that her work injuries are, therefore, compensable.

In *Hudak-Lee v. Baxter County Reg. Hosp*., 2011 Ark. 31, 378 S.W.3d 77, the Arkansas Supreme Court stated:

> In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury does not include an injury that is inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. §

> 11-9-102(4)(B)(iii) (Supp. 2009). The phrase "in the course of employment" and the term "employment services" are not defined in the Workers' Compensation Act. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). Thus, it falls to the court to define these terms in a manner that neither broadens nor narrows the scope of the Act. *Id.*
>
> An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Id.; Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (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. *Id.* In *Conner*, 373 Ark. 372, 284 S.W.3d 57, we stated that where it was clear that the injury occurred outside the time and space boundaries of employment, the critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id.*

The testimony differs on exactly whether attending the off-site lunch meetings was *explicitly* mandatory. Attendance was certainly encouraged. While Mr. Blake Smith did not characterize the luncheon as mandatory, he described it as a team building exercise in which he placed importance as an opportunity “to bring people together” and to “work better together.”

Even if there was no formal agenda for the luncheons, it was an opportunity for the team to meet outside of the office to discuss current or upcoming business needs associated with facility residents and generally get to know each other better. The respondent-employer benefitted both directly and indirectly from these meetings. On the day of the accident, the claimant and Ms. Lori Smith were walking out to ride to the restaurant together. This is consistent with Mr. Smith’s aim to bring people together more, outside of even the meeting itself. And while the meeting was not held in lieu of that week’s regular

10:00 AM finance meeting, the evidence shows that it's scheduling did provide for the following week's regularly scheduled finance meeting to be canceled.

There is no question from the testimony, however, that company policy requires hourly employees to clock out for personal matters and that the claimant and others did not clock out to attend the lunch meeting. Nor is there a question that Mr. Smith was aware of both of these facts. His efforts to arrange a lunchtime meeting during his employee's normal working hours cuts in favor of the meeting's attendance being an employer-endorsed work activity. And his support for the meetings was clearly geared towards advancing the interests of the employer, both directly and indirectly.

The evidence shows that the claimant's attending the luncheon was both advancing the interests of the employer and within the time and space boundaries of her employment. The claimant's accident occurred while she was on the clock and while she was attempting to attend a meeting for her employer's benefit. Her workplace injuries arose out of and in the course of her employment and are, therefore, compensable.

B. The Claimant is Entitled to Reasonable and Necessary Medical Benefits Associated with the Treatment of her Compensable Injuries.

Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown*, supra; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical

treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

The claimant has met her burden in proving that she suffered compensable injuries to both elbows. The treatment reflected in the medical records appears reasonable and necessary, and no testimony or evidence contrary to the same was presented. She is, thus, entitled to reasonable and necessary medical benefits associated with those injuries.

C. The Claimant is Entitled to Temporary Total Disability Benefits from the Date of Injury to 13 June 2024.

The claimant has proven compensable scheduled injuies in this claim. She is, thus, entitled to temporary total disability (TTD) benefits during her healing period or until she returns to work, whichever happens first. Ark. Code Ann. § 11-9-521. The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. *Id*. Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). The claimant must prove her entitlement to TTD benefits by a preponderance of the evidence. Ark. Code Ann. § 11-9-705(a)(3).

It is not disputed that the claimant did not work between the date of her injury and 13 June 2024, the date through which she claims entitlement to TTD benefits. Her treatment records available at the time of the hearing show that she remained under a physician's care and in a healing period at least one month beyond the 15 April 2024 clinic visit that continued her physical therapy and anticipated further follow-up in a month's

time. No evidence was presented to support a finding that her healing period had ended before 13 June 2024.

I, therefore, find that the claimant is entitled to TTD benefits from the date of her injury to 13 June 2024.[3]

D. The Claimant Proved by a Preponderance of the Evidence that She is Entitled to an Attorney's Fee.

The respondents controverted this claim in its entirety. The claimant is, accordingly, entitled to a controverted attorney's fee consistent with the indemnity benefits associated with these findings and Ark. Code Ann. § 11-9-715.

V. ORDER

The respondents are directed to pay all benefits awarded under these Findings of Fact and Conclusions of Law. The accrued sums are owed in a lump sum without discount, and this award shall earn interest at the legal rate until paid. Ark. Code Ann. § 11-9-809. The claimant's attorney is entitled to a fee of twenty-five (25%) percent of the indemnity benefits awarded, with one-half (1/2) to be paid by the claimant and one-half (1/2) to be paid by the respondents. Ark. Code Ann. § 11-9-715.

SO ORDERED.

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JAYO. HOWE
ADMINISTRATIVE LAW JUDGE

[3] See FN 2.