BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H004765

HOLLY MCCAULEY,
EMPLOYEE **CLAIMANT**

CHI ST. VINCENT INFIRMARY
MEDICAL CENTER,
EMPLOYER **RESPONDENT**

INDEMNITY INS. CO. OF NORTH AMERICA/
SEDGWICK CLAIMS SERVICES, INC.,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED DECEMBER 6, 2021

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on September 14, 2021, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Laura Beth York, Rainwater, Holt & Sexton, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Michael E. Ryburn, Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

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

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 June 9, 2020, when she alleges she sustained a compensable injury to her left hip and lower back.

3. The claimant's average weekly wage (AWW) is sufficient to entitle her to the 2020 maximum weekly compensation rates of $711.00 for temporary total disability (TTD), and $533.00 for permanent partial disability (PPD) benefits, *if* her claim is deemed compensable.

4. The claimant drew unemployment security benefits from June 20, 2020, through December 2020, at the rate of $700 per week.

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

6. 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). Pursuant to the parties mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant sustained a "compensable injury"(ies) within the meaning of the Arkansas' Workers' Compensation Act (the Act) to her left hip and lower back on June 9, 2020. Specifically, whether the claimant was performing "employment services" at the time of the alleged work incident.

2. If the claimant's injury(ies) is (are) 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. 5).

The claimant contends that on June 9, 2020, she was moving items from her vehicle into her office when she tripped on the sidewalk, which caused her to fall and injure her left hip and lumbar spine/lower back. She has treated with Dr. Ethan Schock, who performed hip reconstructive surgery, and with Dr. Kathryn McCarthy, who performed a fusion to her lumbar spine. The claimant contends she was performing "employment services" at the time of the subject fall and, therefore, her left hip and lower back injuries constitute "compensable injuries" within

the Act's meaning. She contends she is entitled to medical benefits, and TTD benefits from June 20, 2020, July 14, 2020; and from August 19, 2020, through January 2021. She contends further her attorney is entitled to a controverted fee. The claimant's attorney also is owed a fee for any TTD benefits awarded during the time she was drawing unemployment benefits. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 5).

The respondents contend the claimant admitted she was on her lunch break when she decided to remove some personal items, not necessary work items, from her personal vehicle to put in her office. The respondents contend the claimant was not performing "employment services" at the time she tripped and fell and, therefore, she cannot meet her burden of proof pursuant to the Act. The respondents also contend the claimant's alleged lumbar spine/lower back injury is simply the recurrence of a preexisting, longstanding, symptomatic problem for which she has undergone a prior surgery; and that the alleged work incident neither caused nor aggravated this lumbar spine/lower back condition. The respondents specifically reserve any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3; T. 5).

STATEMENT OF THE CASE

The claimant, Ms. Holly McCauley (the claimant), is a registered nurse (RN). She just turned 41 years-old less than a week before the hearing. She was 39 years-old at the time of the subject June 9, 2020, work incident. The claimant had just started to work at CHI St. Vincent Infirmary Hospital (St. Vincent) in Little Rock on June 1, 2020. St. Vincent hired her as a salaried nursing supervisor. This position did not require her to be involve in direct patient care, but rather to

supervise the registry, travel, and prn nurses. Her actual nursing supervisor job duties were administrative in nature. They required her to work on nursing schedules and payroll, and she was "learning to get involved in the disciplinary stuff." (T. 16). The claimant testified she also was involved in interviewing and orientation for the travel nurses. A large part of her job was "definitely credentialing – a lot of just credentialing the staff and keepin' up with their annual training and making sure they were meeting their – annual training requirements each year…." (T. 16-17).

The claimant testified her job at St. Vincent was a "lighter duty" job than her immediately preceding one at the Veterans Administration Hospital (VA). (T. 16). At the VA the claimant was a charge nurse and not only supervised other nurses, but also was involved in direct patient care which required her to do some "heavy lifting." (T. 15). She testified that among the reasons she changed jobs from the VA to St. Vincent was because she, "was looking for an opportunity that allowed me to not work evenings and weekends and not be the only nurse on the floor with thirty-five (35) patients at a time." (T. 14-15).

The claimant testified that on June 9, 2020 (which the ALJ takes judicial notice of the fact this date was on a Tuesday), the date of the alleged work incident, she was using her lunch break to move personal items into her new office at St. Vincent. She testified she was walking away from the hospital with her own personal rolling suitcase, which was empty, and heading to her car, which was parked in her designated parking area, the St. Vincent "H.R." (human resources) parking lot, to retrieve additional personal items to take to her office when she:

> …[S]tepped with my right foot and I thought I had I [sic] solid landing because like, my toe and my heel, you know, grasped something. When I picked up my left

> foot to make my next step my right ankle rolled, because there was a section of the sidewalk that was, like, sunk in, you know, significantly lower and it was – I had managed to – to straddle that sunken-in spot, that insert spot. Um, so when that right ankle rolled, my left leg, you know, kinda jumped in to catch me and I went into a kinda a half splits thing. Um, my left knee took the impact into that left hip.

(T. at 27-31; 60-61; 63-74) (Bracketed material added).

The claimant admitted on direct examination she did not notify anyone at St. Vincent concerning this alleged incident that day, nor did she request medical treatment. (T. 32-33). Specifically, the claimant testified as follows concerning the notification issue:

> Q. Okay. And did you notify anyone at your employer's that you had been injured that day.
>
> A. Um, I didn't see Phyllis the rest of that day. Um, I know that I had spoken about it with one of the education nurses who came in just to check in on me that afternoon. I talked to her about it a little bit, um, but I didn't see Phyllis the rest of that day.

(T. 31). The claimant could not recall the name of the "education nurse", nor did she present the testimony of any other witnesses(es) to corroborate any of her testimony concerning the alleged incident. (T. 31; T. 11-55; 66; 95-100).

The claimant testified further she worked the rest of the week following the alleged fall, then went home over the weekend and elevated, iced, and rested her ankle. She testified that on the following Monday after the alleged Tuesday, June 9, 2021, work incident (which the ALJ takes judicial notice was June 15, 2020), she stood on her feet for a couple of hours teaching a class which she testified caused her right ankle and right hip to hurt so badly she "started crying." She said she started crying soon after her supervisor, "Miss Phyllis" (Ms. Phyllis Phelps, who later testified at the hearing on the respondents' behalf) (Ms. Phelps) allegedly said "something derogatory" to her. (T. 32-33). She testified when Ms. Phelps saw her crying, Ms. Phelps

apologized for whatever was allegedly said. The claimant went on to testify it was not until the next day (which the ALJ takes judicial notice was Tuesday, June 16, 2020) that she told Ms. Phelps she was not crying because of what Ms. Phelps had allegedly said, but "'cause I was hurtin' so bad." (T. 33). The claimant testified Ms. Phelps had noticed her walking with an altered gait, and this is when she first told Ms. Phelps about the alleged fall of almost a week prior, Tuesday, June 9. 2020. The claimant testified Ms. Phelps did not offer her any workers' compensation paperwork or medical treatment, and that she – the claimant – did not request either of Ms. Phelps. (T.34-35).

After the respondents had rested their case, the claimant – who had not yet rested her case – was recalled. She testified Ms. Phelps had completed a "form" that reflected the claimant had reported the alleged June 9, 2020, incident on June 10, 2020; however, she said this was done the week after the injury as she and Ms. Phelps were looking back to try to determine the exact date of the claimant's alleged fall. On re-cross examination the claimant admitted she had typed-up the form in question. (T.96-99).

The claimant finally presented herself to the University of Arkansas for Medical Sciences (UAMS) emergency room (ER) for treatment on Saturday, June 20, 2020, some 11 days after the alleged injury date of June 9, 2020. (T. 35). The claimant stipulated she had applied for, been awarded, and drew unemployment compensation benefits in the amount of about $700 per week from August 2020 through December 2020. (Stipulation 2, *supra;* T. 75-76).

The claimant's medical diagnoses and treatment will be addressed, as relevant, in the "Discussion" section of this opinion and order, *infra*. (See, Claimant's Exhibit 1; Respondents' Exhibits 1 and 2.)

Ms. Phelps, the claimant's direct supervisor, works as St. Vincent's nurse manager over the staffing office, and she testified on the respondents' behalf. Ms. Phelps is responsible for managing the nursing float pools and the traveling nurses for all of St. Vincent's Arkansas hospitals. Ms. Phelps testified some employees do and some employees do not choose to decorate their offices with various personal items such as family pictures, and other things. She said the claimant was free to decorate her office however she chose. She said she had been in the claimant's St. Vincent office (which the claimant had testified had formerly been a patient room so it had a bathroom, including a shower, adjacent to it) (T. 65-67), and it was furnished with both a stand-up desk and cabinet so the claimant could either work standing or sitting. While the claimant referred to and intimated in her direct testimony that there was a shortage of office supplies, and perhaps COVID-19 personal protective equipment (PPE) at St. Vincent (e.g., T. 25-27; T. 71-72), Ms. Phelps directly disputed the claimant's testimony in this regard. (T. 81-88).

Ms. Phelps testified further that as a salaried, nursing administrative employee the claimant was expected to take a lunch break; she was free to take it anytime she wanted; and she could go anywhere she wanted, on or off the St. Vincent campus. Ms. Phelps testified the claimant had no job duties on the sidewalk between her office and the parking lot; and she agreed with the respondents' attorney that if the claimant was bringing hair supplies and other such items into the hospital for the shower adjacent to her office, that was the claimant's "personal choice" because – contrary to the claimant's testimony that she could be required to spend the night at the hospital as part of her job (T. 72-73) – Ms. Phelps again directly contradicted the claimant's testimony in this regard, as well:

Q. Did you ever require Miss [sic] McCauley to spend the night at her office?

A. Oh, no. No that would not be an expectation of that position.

(T. 84-85) (Bracketed material added). Finally, Ms. Phelps testified it is, "very unusual for an employee in Holly's position, or in my position, to be out at lunch and be called back for some type of emergency." (T. 93-94).

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 Repl.) requires 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) (2020 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, but 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).

Compensability

1. **The claimant has failed to meet her burden of proof in demonstrating she was performing "employment services" at the time of the alleged work incident in question, *if* the incident even occurred.**

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*." *White v. Georgia-Pacific Corp*., 339 Ark. 474,478, 6 S.W.3d 98, 100 (1999) (Emphasis added). The test our appellate courts have landed upon in determining whether an 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 and emphasis 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 she was performing employment services within the meaning of the Act at the time of the alleged subject June 9, 2020, incident.

"Employment Services" Law

Arkansas's "employment services" compensability exception has resulted in a fairly substantial body of case law since our legislature passed Act 796 in 1993. Our 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). 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, our appellate courts have not adopted a bright-line rule holding that an employee who is on a 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.*

In *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (Ark. App. 1998), the court held that *a city employee walking from her work area on the third floor to a designated smoking area on the first floor in order to smoke was not performing employment services when she tripped on a rolled-up carpet exiting the elevator*. The injured employee argued on appeal that her break advanced her employer's interests by allowing her to relax, which helped her to work more efficiently throughout the rest of her shift. The court concluded, however, that while the break may indirectly advance her employer's interests, it was not inherently necessary for

performance of the job that she was hired to do. Likewise, in *McKinney v. Trane Co*., 84 Ark. App. 424, 143 S.W.3d 581 (Ark. App. 2004), the court found that *the injured worker was not performing employment services on the way to a smoke break since he was at that time doing nothing to carry out the employer's purpose and was doing nothing generally required by his employer. See also*, *Haynes v. Ozark Guidance Center, Inc*., 2011 Ark. App. 396, 384 S.W.3d 570 (Ark. App. 2011) (using similar reasoning to *McKinney* and finding that an office worker was not performing employment services during a smoke break).

On the other hand, Arkansas appellate courts have recognized some circumstances where an employee's responsibilities or actions during a break or lunch sufficiently advanced the employer's interests such that an employee was deemed to be performing employment services even during a short break or lunch break. 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 that 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 a school secretary was performing employment services while she was returning a drinking glass to the school cafeteria in compliance with a specific school policy requiring all employees to return their drinking glasses to the cafeteria immediately after use.

In a relatively recent decision regarding the "employment services" issue delivered on December 4, 2019, *University of Arkansas for Medical Sciences (UAMS) v. Patricia Hines*, 2019 Ark. App. 557 (Ark. App. 2019), the court affirmed the Full Commission's decision and held the claimant (a surgical-services patient-unit coordinator who worked at the UAMS front desk) was 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 Full 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, the "employment services" exception did not prevent a finding of compensability. This job requirement was undisputed and true, since the claimant had in fact been required to return from her lunch break in order to do her part in handling an emergency situation in the past.

In summary, Arkansas's appellate courts have interpreted the term "employment services" as *performing a duty(ies) the employer generally requires, and that benefit the employer in a tangible way*. *Cook,* et al, *supra*. In other words, our appellate courts use the same test to determine whether an employee is engaged in "employment services" at the time of an alleged work incident as they do when determining whether an employee was acting "within the course and scope" of

their employment. *Id.* The test is *whether the claimant's alleged 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.*

Based on the applicable law as applied to the relevant, admitted, and essentially undisputed facts of her case, *even if* the alleged June 9, 2020, incident occurred, the claimant's own testimony and tacit admissions conclusively demonstrate she has failed to meet her burden of proof by a preponderance of the credible evidence of record in establishing she was engaged in "employment services" at the time of the subject alleged June 9, 2020, incident. My opinion is based on the following facts as applied to the applicable law.

Credibility of the Witnesses

I intentionally use the word "alleged" in the immediately preceding paragraph, and for the following reason: Based on the claimant's rather meandering, often conflicting and contradictory, self-serving, uncorroborated testimony, as well as the lack of other credible evidence supporting her claim, I find the claimant's testimony to be incredible. In carefully observing all aspects of her demeanor – especially her somewhat rambling, careful, and stilted manner of speaking as she testified on direct/re-direct/rebuttal, and cross and re-cross-examination – I was left with the distinct impression she was obviously a person of above-average intelligence and a number of preexisting and symptomatic physical problems who clearly had a basic understanding of the applicable law – and who was going out of her way, stretching her testimony's credulity the more she was questioned, to make the facts of her case fit within the law's definition of "employment services." While this may well be one of those "you-had-to-be-there" situations, I *was* there.

Moreover, the hearing transcript and documentary evidence support my impression in this regard.

On the other hand, I found the testimony of Ms. Phelps, the claimant's immediate supervisor, to be forthright, confident, calm, objective, and kind (despite the fact the claimant tried to cast aspersions on Ms. Phelps by testifying Ms. Phelps had spoken to her in an allegedly "derogatory" manner), and, therefore, highly credible.

Regardless of my impression concerning the claimant's lack of credibility as compared to Ms. Phelps's demonstrated high level of credibility, the claimant's own tacit admissions made during her sworn testimony as well as the relevant documentary evidence conclusively demonstrate she has failed to meet her burden of proof in establishing she was engaged in "employment services" at the time of the alleged June 9, 2021, incident.

First, while the parties stipulated the date of the alleged incident was June 9, 2020 (which was a Tuesday (Comms'n Ex. 1 at 1; T. 5), and the claimant herself initially testified on direct examination the alleged incident occurred on June 9, 2020 (T. 27), on cross-examination when the respondents' attorney confronted her with a statement concerning how the alleged injury occurred which the claimant herself admitted she had typed and given to the insurance adjuster around June 24, 2020, the claimant clearly stated the alleged incident had occurred on Wednesday, June 10, 2020, rather than Tuesday, June 9, 2020. (T. 70-71; RX2). The claimant admitted she had written this statement well after the date of the alleged incident, apparently around June 24, 2020, after she had been diagnosed with a stress fracture in her left hip. (T. 70).

On cross-examination concerning what she had written in the statement, the claimant testified:

Q. In that statement you say, "While I was on my break, I went to my car to get some stuff to put in my office."

A. Mm-hm.

Q. Is that right?

A. I believe it says I took a break to go out to the parkin' lot and get my stuff.

Q. Took a break.

A. But yes.

Q. Ok. So you were on a break?

A. Yes, sir.

Q. You weren't doing your normal job duties?

A. Didn't even know what my normal job duties were at that point, but to – to – to – [Laughing.]

Q. You weren't in your office.

A. I was not in my office.

Q. Were you –

A. I was done with anything I'd been assigned, so…

Q. Do you have any job duties out there on that sidewalk?

A. No, sir.

(T. 68-69). After admitting she "[d]idn't even know what [her] normal job duties were at that point," the claimant went on to add she could possibly "absolutely" have job duties on that sidewalk if "there was an emergency." (T. 69) (Bracketed material added). But Ms. Phelps credibly explained the claimant's job was essentially administrative in nature, and it would be "very

unusual" for an employee in the claimant's or even her own position to be called back from a lunch break for any type of emergency. (T. 93-94).

This case is clearly distinguishable from *UAMS v. Hines, supra*. In *Hines*, it was undisputed that one of the claimant's job duties required her to be available to respond in emergency situations. In fact, the evidence revealed she had done so on occasion. That is not the case here. The claimant herein is employed in the St. Vincent HR division, and her job duties do not involve direct patient care, but rather are administrative in nature, consisting of job duties such as orientation, training, and payroll. (T. 16-17). The claimant also admitted there was no emergency the day of the alleged fall. (T. 69). Significantly, she admitted her *sole purpose* for being on the sidewalk *outside the hospital at the time of her alleged fall as she was walking away from the hospital to her car pulling her personal rolling suitcase to her car* was to retrieve personal items from her car to put in her office. (T. 69-70). Undoubtedly, these admissions and her other testimony in this regard make it abundantly clear the claimant alleges she was on her lunch break, walking away from the hospital pulling her own empty personal suitcase to retrieve non-essential, nonwork-related personal items from her car to bring into her office – not for the benefit of her employer, *but for her own sole benefit and convenience*. (T. 27-31; 60-61; 63-74).

Second, the claimant tried to intimate without directly testifying that St. Vincent did not provide her adequate office supplies, or PPE, so she was having to bring them in herself; and that she was bringing items such as a hairdryer and shampoo, and other personal hygiene items into her office because her job duties (and remember, she testified she did not even know what all her job duties were) because her job would require her to spend the night at the office. (T. 25-27; 28-

31; 71-72) were directly contradicted by her supervisor/Ms. Phelps's calm, objective, credible testimony that St. Vincent provided her the office supplies the claimant's job required, and her job did not require her to spend the night in the office. (T. 81-88; 84-85). These obvious attempted embellishments on the claimant's behalf detracted from her credibility.

Third, it is significant to note there were no witnesses to the claimant's alleged non-work-related fall, and she failed to present the testimony of any other witness(es) to corroborate her self-serving testimony concerning the incident. The claimant admittedly did not report the alleged work incident, nor did she even mention it to her supervisor until almost a week later, at which time she never reported it as work-related, nor did she seek to file a workers' compensation claim or to request medical treatment. (T. 34-35).

Fourth, although the claimant was working in a hospital that had an ER and many physician's close at hand, she did not seek medical treatment until Saturday, June 20, 2020 – some 11 days after the alleged work incident. When she finally did seek treatment, the claimant mentioned rolling her ankle, falling, and doing "the splits", but she apparently did not give her providers a history of the incident having happened at work/St. Vincent. (CX1 at 1-19). Moreover, the claimant apparently did not allege the injury to be work-related until sometime after she had been diagnosed with a stress fracture of the neck of her left femur. (CX1 at 12; RX2). Stress fractures of the femoral neck are often caused by falls, but there are other causes of such fractures, including osteoporosis, increased weight-bearing, and repetitive-use activities. See, *e.g.*, ***The Merck Manual of Diagnosis and Therapy***, "Hip Fractures", pages 2992-94 (Merck, Sharp & Dohme, 20th Edition).

Fifth, the claimant has a long, well-documented history of various physical problems including, she testified, piriformis syndrome (the compression of the sciatic nerve by the piriformis muscle in the posterior pelvis, which causes pain in the buttocks, and occasionally sciatica, and hip pain. See, ***Id.***, "Piriformis Syndrome", page 3106), as well as fibromyalgia, arthritis, and chronic pain in her pelvis (including her right hip), and lumbar spine. She has had prior surgery on her lower back. Dr. Kathryn McCarthy, an orthopedic surgeon associated with OrthoArkansas, characterizes the current condition of the claimant's lumbar spine as "recurrent"; and relevant medical records reveal the claimant's lumbar stenosis is chronic and degenerative in nature, with no mention of any alleged acute injury. (RX1 at 18-19; 1-18; 7-8; T. 18-19; 20-23; 54-57; 58-65)., A September 23, 2019, report from the Conway Psychological Assessment Center contains a good summary of the claimant's "Medical & Mental Health History" at pages 7-8, and provides additional evidence of the claimant's long-standing arthritis and chronic pain problems in her lower back. (RX1 at 7-8; RX1, pages 6-15).

CONCLUSION

Whether the claimant's left hip injury occurred when she fell on the sidewalk on her lunch break, on the way to her car while she was pulling her own empty, rolling suitcase to retrieve personal items to bring into her new office, or she injured her left hip elsewhere, the preponderance of the credible evidence of record makes it abundantly clear she was not engaged in "employment services", as she was not acting within the course and scope of her employment, at the time of the incident. The evidence reveals the claimant was performing this activity solely for her own personal reasons, benefit, and convenience; and that the activity in question in no way conveyed

any benefit whatsoever, direct or indirect, on her employer, St. Vincent. The claimant was neither within the course and scope of her employment at the time of the alleged fall on the St. Vincent sidewalk (*if it occurred at all*), or where and whenever she injured her left hip; nor was she engaged in any activity that could reasonably be construed to benefit her employer in any way. If the claimant has any legal recourse whatsoever for the subject alleged incident and any physical injury(ies) arising out of it, the Act does not provide such a remedy.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.

2. The stipulations contained in the Prehearing Order filed June 29, 2021, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.

3. The claimant has failed to meet her burden of proof in demonstrating by a preponderance of the credible evidence of record that she was engaged in "employment services" when she allegedly fell *on her lunch break while walking on the sidewalk outside St. Vincent and away from her office in the hospital, pulling her own personal, empty, rolling suitcase to her car, moving personal items to be used for her own personal reasons and convenience*. The alleged work incident, assuming it even occurred at all on St. Vincent's sidewalk, most assuredly did not occur when the claimant was acting within the course and scope of her employment at St. Vincent, nor may it reasonably be deemed to convey any conceivable benefit, either directly or indirectly, on her new employer.

4. The claimant has failed to meet her burden of proof in demonstrating either her left hip or lumbar spine/lower back condition(s) constitute "compensable injury"(ies) within the Act's meaning.

5. The claimant's attorney is not entitled to a fee on these facts.

Wherefore, for all the aforementioned reasons, the Act compels me to deny and dismiss this claim in its entirety.

If they have not already done so, the respondents shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp