

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H300753**

LAUREN E. KELLEY, Employee	CLAIMANT
DENTAL HEALTH ASSOCIATES OF ARKANSAS P.A., Employer	RESPONDENT
TRAVELERS INDEMNITY COMPANY, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 21, 2023

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by AMY C. MARKHAM, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 29, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 27, 2023, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on February 1, 2023.
3. The respondents have controverted the claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable injury on February 1, 2023.
2. If compensable, compensation rate.

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3. If compensable, whether claimant is entitled to medical benefits and temporary total disability benefits.

4. Attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "on February 1, 2023, while following directions of her employer, she fell and sustained injury to her back and buttocks. The claimant contends that she is entitled to temporary total disability benefits from February 2, 2023, through March 19, 2023, and reasonably necessary medical treatment. The claimant contends that she has sustained a fracture in her thoracic spine; however, since she has not reached maximum medical improvement, she reserves the right to litigate entitlement to permanent disability benefits. The claimant contends that her attorney is entitled to an appropriate attorney's fee."

The respondents contend that "Claimant was not in the course and scope of her employment when the accident occurred. Claimant was coming and going when she sustained the alleged injury."

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on April 27, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury on February 1, 2023.

HEARING TESTIMONY

Claimant testified that on February 1, 2023, she was employed at Pointer Family Dental in Van Buren, Arkansas. On that date, she was involved in an accident when she was going into the building where she works and slipped on ice on the stairs leading into the building. The weather that morning was cold, icy, and wet; her manager had sent a text message to the employees that the office would open late. When she arrived, the parking lot appeared to be dry, but the stairs looked wet. Claimant did not realize it was ice on them until after she fell. She said both of her feet came out from under her, and she slipped all the way down to the bottom of the stairs.

Claimant stated she was going to the employee entrance at the back of the building, as that is the normal entrance for employees. She had never used the front door of the business when reporting to work because when she started working there, she was told by a previous manager to use the back door. Her attorney then asked this question:

Question (By Mr. Eddie H. Walker) Did you have any reason to be on those stairs other than following the directions of your employer as far as how you were supposed to enter the building? In other words, if you had not been instructed to go into that back entrance, would you have been on that stairwell.  
Answer (By Claimant) No.

Q: And did you have any reason to be there other than that?  
A: No.

Claimant said she suffered a compressed fracture at T8 in her back and was off work from February 1 through March 18, 2023. As of the date of the hearing, claimant said she has been released from active treatment and did not have any pain in her back at that point.

On cross-examination, claimant was asked to read the text that she had received on the morning of February 1, 2023, which was as follows:

“Plan was to open this morning at 11:00. Take your time to leave your house in plenty of time to make your way to the office. Some bridges may still have some ice on them, so just be very careful driving in and be very cautious. I

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will see everyone in a little while.”

Claimant admitted that nowhere in the text message did the manager at Pointer Family Dental, P. J. Sharp, instruct her to use the back entrance when she came to work. Claimant said she was mistaken in her answer during her deposition that she had been told to use the employee entrance when coming in.

Claimant agreed that when she fell, she had not begun her workday, but rather had just exited her car and was on her way to enter the building. She said that she clocked in inside the building through a computer; on the morning of the fall, she did not clock in. She agreed that she had not performed any work duties before she fell.

On redirect-examination, claimant said she used the steps to the back entrance because she had been directed to do so. She did not have any reason to believe the steps were icy. Claimant stated that she was not using the back entrance on her own discretion and had never entered the building by any entrance other than the back entrance.

On recross-examination, claimant did not believe she would have been reprimanded if she had used the front entrance. The day before the fall and the morning of the fall, claimant conceded she had not been told to use the back entrance.

On redirect-examination, claimant said that she would not have been in violation of company policy if she had used any entrance other than the back entrance. When questioned further, she agreed that if someone in a managerial position tells her to do something, she is supposed to do it, but she was not aware of any consequences if she acted in violation of what the supervisor told her to do.

After claimant rested, respondent called Patsy Jeannette Sharp, who goes by the initials P.J. She is the practicing manager at Pointer Family Dental and had been since September 19, 2022. She knew claimant from being an employee at the clinic.

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On the morning of February 1, 2023, Ms. Sharp said that she arrived at work about 9:00 a.m., and the clinic was to open at 11:00 a.m. She had notified the employees via a text message about the delayed opening. After Ms. Kelley fell, she sent another text message that instructed employees to not come down the stairs to the back but rather go around because claimant had fallen and was still on the steps while awaiting the ambulance. Ms. Sharp said that she had not discussed in any fashion with claimant of how to enter the building and that there will be no repercussions or disciplinary actions taken against an employee if they opted to come through the front door on February 1, 2023, rather than the back door. She had never instructed any employee that it was required to use the back door to enter the building.

After claimant fell, she called Ms. Sharp who came to claimant's assistance and called 911. Ms. Sharp was unaware if claimant had entered the building before she had fallen but believed that she would have known who had arrived and who hadn't. Claimant was required to clock in at the beginning of her workday and had not yet done so before her fall. Ms. Sharp said that claimant had not begun any work as a dental assistant on February 1, 2023, before she fell.

On cross-examination, Ms. Sharp said that a person could walk across the lawn to enter the employee's entrance rather than using the stairs. Ms. Sharp conceded that she had no way of knowing what claimant had been told regarding the use of the employee entrance before she became the manager. Ms. Sharp had used the stairs when she came into the building, and she was not aware of any ice on them. She knew there was some ice on the sidewalk because the EMT's slipped on it when they were coming to help her. She said the steps were not treated until after claimant fell. There was no warning or notice of any kind that the sidewalks might be icy.

When asked about the text that said "Do not come down the stairs to the back. Go around" Ms. Sharp said that was sent to let others know to go around because the ambulance had not arrived.

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Without that text, she expected others to come down the same stairs because that's the way the employees always enter.

In questioning from the Court, Ms. Sharp said that the sign on the back door was to tell the public not to use that door.

I found both witnesses to be credible. Claimant corrected herself on a couple of points that she attributed to nervousness, and I do not believe that she was trying to be deceptive when she misspoke.

#### REVIEW OF THE MEDICAL RECORDS

As the issue in this case is the compensability of claimant's injury rather than the existence of it, an exhaustive review of the medical records is unnecessary. The records from the February 1, 2023, visit to Mercy Hospital in Fort Smith provide objective evidence of an injury consistent with what claimant said in her testimony; she suffered a fracture at T8 vertebral body. Claimant also provided ample documentation to support her claim that she would be entitled to temporary total disability benefits from February 1 through March 16, 2023, if I determined she suffered a compensable injury.

#### NON-MEDICAL DOCUMENTS REVIEW

Both claimant and respondents submitted the text messages from Ms. P. J. Sharp on the morning of February 1, 2023, regarding first the delayed opening of the dental office and then the warning to employees to not to come down the stairs to the back door. Claimant also submitted the EMS bill in the total amount of \$1,246.42, less Blue Cross of Arkansas payments of \$830.90, leaving her with a bill in the amount of \$415.52.

Respondents submitted excerpts from claimant's deposition, none of which are germane to the issue of compensability. Respondents also submitted a transcript of a recorded statement claimant gave on February 22, 2023, but again, nothing of value to the issue of compensability was contained

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therein. The remaining non-medical exhibits were a photograph of the building which showed the steps and the parking lot, wage records and the previously mentioned texts from Ms. Sharp to claimant and other employees on February 1, 2023.

#### ADJUDICATION

In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury on February 1, 2023.

The material facts as they relate to the slip and fall are not in dispute. On a day when the respondent employer opened late due to icy road conditions, claimant slipped on the steps leading to the employee's entrance to the dental office where she worked. Respondent's witness attended to claimant as she laid on the cold steps/sidewalk until the ambulance arrived. The medical records from the facility where claimant was taken after the fall amply provide objective proof of an injury from that fall. The only question for me to decide is if claimant was engaged in employment activity at the time of her fall. I find she failed to prove that she was so engaged.

I find the facts of this matter are indistinguishable from *Webster v. Ark. Dep't of Corr.*, 2017 Ark. App. 558, 537 S.W.3d 731. In that case, Webster appealed an adverse decision from the Full Commission that she had failed to prove entitlement to workers' compensation benefits as the result

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of falling on “black ice” in the parking lot of her employer; at the time of the fall, she was not performing any work-related duties. In the case at bar, claimant slipped before she had entered the building where she works, and thus had not clocked in or begun providing employment services to her employer at the time of her fall.

In closing remarks, claimant urged that she could collect benefits under the “positional risk” doctrine, a theory of recovery not advanced in *Webster*. However, I disagree that doctrine would allow claimant to collect under these facts. The back entrance was marked “for employees only,” but that sign was to prevent the public from using that door. Claimant conceded that she would not have violated company policy had she entered some way other than the back door to the building; it was apparent from the testimony and the photograph of the building that using that entry was simply more convenient for the employees than going around to the front door.

As claimant failed to prove by a preponderance of the evidence that her injury arose out of and in the course of her employment, the other issues raised in this matter are moot.

ORDER

Claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her thoracic spine on or about February 1, 2023. Therefore, her claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript.

**IT IS SO ORDERED.**

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE