

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210262

PEARLIE M. COLDING, EMPLOYEE	CLAIMANT
LITTLE ROCK SCHOOL DISTRICT, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE - WCT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 12, 2003

Hearing before Chief Administrative Law Judge David Greenbaum on October 20, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Sheila F. Campbell, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. J. Chris Bradley, Attorney-at-Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 20, 2003, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this case on October 1, 2003, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant

times, including April 3, 2002; that claimant's average weekly wage was sufficient to entitle her to a compensation rate of \$138.00 per week for temporary total disability, in the event the claim was found compensable; and that the claim had been controverted in its entirety.

By agreement of the parties, the primary issue to be presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that she sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on April 3, 2002; that she had been temporarily totally disabled from the date of the injury and continuing through the present, maintaining that her healing period had not ended; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. Alternatively, the claimant maintained that she sustained a gradual onset injury which arose out of and during the course of her employment and with culminated in her disability in April, 2002. At the conclusion of claimant's testimony on direct examination, claimant amended her contention, maintaining that the alleged incident occurred on April 4, 2002, to conform with the proof. As will be set out further below, there is no evidence whatsoever that a work-related incident occurred on any date. (Tr.31-

32)

The respondents contended that the claimant did not sustain a compensable injury as the result of a specific event which arose out of and during the course of her employment. If compensability was overcome, respondents maintained that the claimant did not give notice of any alleged injury until June, 2002, and that it would not be responsible for any benefits prior to notice. Finally, respondents asserted that the claimant's physical problems were gradual onset in nature and were unrelated to any work injury.

The claimant testified in her own behalf. Carolyn Robinson, claimant's supervisor, was called as a witness for the respondents. The record is composed solely of the transcript of the October 20, 2003, hearing containing numerous exhibits.

From a review of the record as a whole, to include 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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties, and contained in the Prehearing

Order are hereby accepted as fact.

3. The claimant has failed to prove, by a preponderance of the evidence, that she sustained an accidental injury arising out of and during the course of her employment with the Little Rock School District which was caused by a specific incident identifiable by time and place of occurrence.
4. The claimant has failed to prove, by a preponderance of the evidence, that her cervical problems, need for treatment, and disability, if any, are the result of a gradual onset injury which arose out of and during the course of her employment with the Little Rock School District.
5. The claimant's job activities with the Little Rock School District did not involve rapid repetitive motion.
6. A preponderance of the credible evidence reflects that the claimant's cervical problems, need for treatment and disability, if any, were the result of a pre-existing degenerative disc disease rather than any work-related injury.
7. The claimant has failed to prove, by a preponderance of the evidence, that her physical problems, need for treatment, and disability, if any, are in any way causally related to her employment with the respondent.
8. Respondents have controverted this claim in its entirety.

DISCUSSION

The record in this case is replete with inconsistencies and contradictions. In addition, the medical evidence reflects that the claimant had a history of physical problems involving her low back, cervical spine, and upper extremities which pre-dated her brief period of employment with the Little Rock School District. In addition, the credible medical evidence of record reflects that the major cause of claimant's physical problems and need for treatment was her pre-existing degenerative disc disease rather than any alleged work-related injury.

The claimant contended that she sustained a work-related injury as the result of a specific incident identifiable in time and place of occurrence on or about April 4, 2002. Alternatively, claimant maintained that she sustained a gradual onset, work-related injury. A review of the claimant's own testimony clearly reflects that she sustained neither a specific injury or gradual onset injury which arose out of and during the course of her employment.

A portion of the claimant's testimony on direct examination is set out below:

Q How long had you been employed with the Little Rock School District on April 30, 2002?

A Nine months.

Q And in what capacity were you employed with the Little Rock School District?

A Child Nutrition.

Q And what were your job duties and responsibilities as a child nutritionist?

A Cooking and serving and cleaning up, putting away groceries.

Q And did you perform that job at a certain location?

A Yes, I did, at Forrest Heights.

Q Junior High School?

A Junior High.

Q And were you working at Forrest Heights Junior High School on April 3, 2002?

A Yes, I was.

Q And can you tell the Judge what you were doing on April 3, 2002 that caused you some injury?

A Well, on that day, we cooked the first thing that morning and we served on that day. Also, well, I was using the slicer. I had to clean the slicer. I thought I moved it about in order to clean it because I'm thinking we may have had tomatoes on that day and it splashes all up against the wall when you are doing it.

Q When you moved the slicer, did that have any impact on your body?

A No, not that I could tell at that time.

Q What else did you do that day that you were claiming caused you injury?

A Well, I don't think we – I'm thinking that's all that I did on that particular day, but the day before we had to put away groceries.

Q Tell us about putting away the groceries.

A Okay. Well, we would have sugar in 25 pounds, and we would have six of those – boxes with vegetables with six cans in them that we had to put away. We had meats. Frozen meats were 30 pounds that we had to put away.

Q Okay. The boxes with the vegetables, how much did they weigh?

A The boxes with the vegetables, approximately 30 pounds or maybe more.

Q And when you were lifting those objects, did that affect your body in any way?

A No, I couldn't tell until the next morning that I got up, and I couldn't lift up my arm, and I went to the doctor. Okay, it was on a Friday morning that I went to the doctor, and it was on a Thursday – I've done got all confused on this now – on a Thursday when we always put away the groceries and all that, on a Thursday, and Friday morning I went to the doctor, and – well, I called in to my supervisor, and I told her that I was sick that day and I was going to go to the doctor, and when I got to the doctor – well, that morning I couldn't raise my arm up, and when I got to the doctor, I told her, you know, what I had done on that day and all that. She said, well, maybe – (Tr.12-14)

Other portions of the claimant's testimony which appeared self-contradicting, as well as inconsistent with her claim for benefits follow:

Q Ms. Colding, I've carefully listened to your testimony, but I want to make sure on a couple of points. Regardless of the days that you performed these various activities, the lifting that was required of your work and also moving the slicer, at none of these times did you experience any pain as a result of a specific event, is that right?

A Right.

Q And you had been performing this particular type of work for approximately nine months, is that right?

A Right. Well, yeah, nine months.

Q Your work duties didn't change any in April, did they?

A No, they didn't.

Q When you had gone to your family physician, Dr. Caruthers, several months earlier complaining that your medication wasn't helping, how long had you been taking the medication Vioxx?

A On, a month, about a month.

Q What did Dr. Caruthers do at that time?

A She changed my medication. She gave me – oh, she changed it to something else. I can't remember exactly what.

Q Did that help?

A No, it didn't. I went back and she changed my medicine again, and the last time – well, when I went back to her again, it was right after, I mean, when I called her and told her that I couldn't lift up my arm.

Q Okay. Am I correct that after performing your usual job duties in early April, you simply woke up one morning and had some shoulder problems, is that right?

A Right. It may have been coming on me during that time, you know, all that I was doing all through that period of time.

Q But immediately before waking up that morning and having – and I take it the problems that you were having on April 5th were significantly different than anything you had experienced before April 5th?

A Right, right, it was.

Q Is that right?

A That's right.

Q And when you say in response to questions from Mr. Bradley, you're attributing it to your work activities, is that right?

A Right.

Q Why do you feel that it's related to your work?

A Well, because of all of the heavy lifting and moving the slicer and all that.

Q But you had been doing that for a number of months.

A Yeah, I had been doing it for a number of months, but I feel that it just all come in on me at one time, you know, during the period of –

Q And I want to clarify another couple of points. You were off to go to New York?

A Right.

Q Is that right?

A Right.

Q Do I understand that you then came back and worked for the School District?

A Yes, I did.

Q And how long did you continue to work for the School District?

A After I come back from New York?

Q Yes, ma'am.

A On and off, I probably worked about three weeks, maybe three or four weeks.

Q Did you work until the end of the normal school year?

A I was off on the 23rd. I went to the doctor on the 23rd of May and then I didn't go back to work anymore.

Q Well, was the school year over by then?

A It was almost over. I don't remember the exact date that school was out, but on the 30th is when I spoke with my supervisor.

Q The 30th of May?

A Right.

Q What did you tell your supervisor?

A I told her that I had gotten hurt performing some of my duties in the school system, and that I was going to file for short-term disability.

Q Okay, you've told us that. When did you first report to your supervisor that you thought your problems were related to something that happened at work?

A On the 30th.

Q And what did you tell her happened at work to cause your problems?

A Well, that's all that I told her. I had gotten injured performing some of my duties. I didn't lay it out to her as to what I thought I had moved.

Q You didn't lay it out?

A No, I didn't tell her, you know, what I thought I had moved or picked up and I just told her some of my duties.

Q Okay.

JUDGE GREEMBAUM: That's all, thank you.

MR. BRADLEY: Your Honor, if I might have a follow-up unless Ms. Campbell has questions.

MS. CAMPBELL: No, Your Honor.

REXCROSS EXAMINATION

BY MR. BRADLEY:

Q Ms. Colding, your doctor related your problems with your shoulder to your neck, is that correct?

A Yes. (Tr.34-37)

The types of injuries recognized under our Workers' Compensation Act as Amended, as well as the burden of proof relative thereto are set out in Ark. Code. Ann. §11-9-102, set out, in part, below :

(4)(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence; or

(c) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(iii) Mental illness as set out in §11-9-113;

(iv) Heart or cardiovascular injury, accident, or disease as set out in §11-9-114; or

(v) A hernia as set out in §11-9-523.

* * * * *

(E) BURDEN OF PROOF. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision (4)(A)(i) of this section, the burden of proof shall be a preponderance of the evidence; or

(ii) For injuries falling within the definition or compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of employment;

2. proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or

resulted in disability or death;

3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,

4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. *Mikel vs. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Suffice it to say that from the claimant's own testimony, it is clear that the claimant did not sustain an injury as the result of a specific incident identifiable by time and place of occurrence. Accordingly, the claimant's claim for a specific incident injury fails.

Alternatively, claimant contends that she sustained a gradual onset injury which arose out of and during the course of her employment. Again, the claimant's alternative contention fails for two (2) reasons. First, it is undisputed that the claimant's physical problems and need for treatment are related to her cervical spine. Under A.C.A. §11-9-102(4)(A)(ii)(a) the claim fails because there is no credible evidence whatsoever that the claimant's injury was caused by rapid repetitive motion. *See, Hapney vs. Rheem Manufacturing*

Company, 342 Ark. 11, 26 S.W.3d 777 (2000).

In addition, a preponderance of the credible medical evidence reflects that the major cause of claimant's physical problems and need for treatment is the result of a pre-existing degenerative disc disease rather than a work-related injury. The claimant's primary treating physician has been her family physician, Dr. Sue Caruthers. As previously noted, Dr. Caruthers' notes reflect complaints which pre-dated the claimant's employment with the respondent herein. Dr. Caruthers has made referrals to various specialists, including Dr. Scott M. Schlesinger, a well respected neurosurgeon in Little Rock, Arkansas. A portion of Dr. Schlesinger's April 1, 2003, report is set out below:

I have read Ms. Colding's new MRI scan of the cervical spine. This study shows multilevel arthritic changes. There is probably some early ossification of the posterior longitudinal ligament seen on this study. However, there is no evidence of a surgical problem. The osteophytes and spurs at the worst level about the anterior surface of the spinal cord at C5-6, but there is no cord compression and no abnormal signal at the cord. She is almost certainly symptomatic from arthritis of the cervical spine.

I would recommend that she see a rheumatologist and be cared for with pain management. There is nothing surgical to do for her. I do not see any structural explanation for the numbness in her arms and I would recommend that she follow-up with a neurologist of your choice for this. Should she develop progressive dysfunction of the upper extremities over time, it could be related to progression of the C5-6 disc and in this case I would be happy to see her back again. (Cl. Ex. A, p.7)

Admittedly, there are references by other physicians relating the claimant's complaints to work-related activities; however, it is apparent that

any such references are by histories provided by the claimant and are mere conclusions reached by the claimant that are unsupported by the record as a whole.

The record contains no credible evidence of a specific incident which may have either caused or aggravated the claimant's pre-existing condition, unless it related to a sleep incident. The claimant testified that she awoke with physical problems different from those that pre-existed April 4, 2002. Clearly there was no work-related incident. Further, the claimant cannot satisfy the requirements for a gradual onset, cervical injury.

It would require sheer speculation and conjecture to attribute the claimant's physical problems to a work-related injury. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d

629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); Wade vs. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler vs. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that she sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge