

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E804869

TRUDY K. BOREN, EMPLOYEE

CLAIMANT

**ST. ANTHONY'S HEALTHCARE
CENTER, EMPLOYER**

RESPONDENT

**ALTERNATIVE INSURANCE MANAGEMENT
SERVICES, CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 16, 2004

The hearing was conducted on June 25, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Russellville, Pope County, Arkansas.

Claimant was represented by Laura J. McKinnon, Attorney at Law, Fayetteville, Arkansas.

Respondent was represented by Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 25, 2004, the above-captioned claim came on for hearing at Russellville, Arkansas. A prehearing conference was held on February 10, 2004, and a Prehearing Order was filed on February 11, 2004.

The parties agreed to one stipulation, which was set forth in the Prehearing Order and confirmed at the hearing. That stipulation follows, and is hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.

At the June 25, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. As modified at the start of the hearing, and as agreed upon by the parties, the issues to be litigated and resolved are limited to the following:

1. Did Claimant sustain a compensable back injury on April 1, 1998?
2. Is Claimant entitled to medical benefits?
3. Is Claimant entitled to temporary total disability from September 21, 1998 to August 31, 2000?
4. Is Claimant entitled to an attorney's fee?

All other issues are reserved.

Claimant contends that she suffered a compensable injury to her back on April 1, 1998. Claimant seeks reasonably necessary medical benefits and temporary total disability benefits as compensation, in addition to an attorney's fee. Respondents contend that Claimant did not suffer a compensable injury.

CLAIMANT'S EXHIBIT NUMBER THREE

At the hearing, Claimant proffered Claimant's Exhibit #3, containing certain medical records of Dr. Charles Wells. Respondents objected. Respondents confirmed that they had attempted to depose Dr. Wells for several months; that Administrative Law Judge Don N. Curdie directed Claimant's counsel to make an effort to present Dr. Wells for deposition; and that nonetheless, Dr. Wells was never deposed. In offering Claimant's Exhibit #3, Claimant's attorney stated:

[Dr. Wells] has retired and could have been subpoenaed, but he indicated that he was going to be so angry at being deposed that we wouldn't want to ask him any questions; and he actually was refusing the subpoena at that point.

So based upon that, we are not going to be presenting him. We were not able to present him for deposition purposes, but we are attempting to submit his medical records into evidence as a separate exhibit from the other medical.

Respondent's attorney conceded that he did not specifically say "I want him at the hearing,"

but that he did want to depose Dr. Wells.

The right to cross-examine adverse witnesses extends to parties appearing before the Arkansas Workers' Compensation Commission. Cyphers v. United Parcel Service, 68 Ark. App. 62, 69, 3 S.W.3d 698, ___ (1999). Ark. Code Ann. § 11-9-705(c)(2)(A) sets forth the procedure by which a party can introduce medical reports of a physician. The statute further provides:

If the opposing party desires to cross-examine the physician, he or she should notify the party who submits a medical report to him or her as soon as practicable, in order that he or she may make every effort to have the physician present for the hearing.

Ark. Code Ann. § 11-9-705(c)(2)(B). By rule, the Commission has provided as follows:

A. In the event a written report of a physician ... is offered in evidence and the right of cross-examination is requested, it will be granted.

B. The party offering the report must produce the author of the report for cross-examination, but the attendance fee or charge of the witness is the liability of the party requesting cross-examination.

Arkansas Workers' Compensation Commission Rule 20.4.

As Respondents note, the Commission interpreted Ark. Code Ann. § 11-9-705(c)(2)(B) in Brake v. The Kroger Company, Full Workers' Compensation Commission Opinion filed August 25, 1999 (E702191). In that case, Claimant announced his intent to offer a certain medical record on October 27, 1998, prior to the November 13, 1998 hearing; Respondent objected on October 28, 1998, noting among other things an insufficient opportunity to cross-examine the doctor. The Full Commission affirmed the Administrative Law Judge's decision to not consider Claimant's proffered medical record. The Full Commission noted:

However, claimant did not meet the requirements of the next subsection, Ark.

Code Ann. Sec. 11-9-705(c)(2)(B). The statute requires the respondent to notify the claimant as to his desire to cross-examine so that the claimant can obtain the doctor's presence at the hearing.

.....

The record indicates that respondent was clear in its desire to cross-examine [the doctor]. However, it is not clear that respondent was aware that the statute gave it the ability to compel claimant to obtain [the doctor's] appearance at the hearing. Nonetheless, claimant did not fulfill his duty under the statute to obtain [the doctor's] presence at the hearing, upon notice of respondent's desire to cross-examine him. The statute states that the hearing officer has the discretion to refuse the introduction of reports which do not meet the requirements of the subsection, which includes Section 705(c)(2)(B).

Brake, supra.

I find that Claimant's proffered Exhibit #3 should not be admitted into evidence. Under the Commission's interpretation of Section 11-9-705(c)(2)(B), found in Brake, supra, Respondents gave Claimant adequate notice of their desire to cross-examine Dr. Wells. Under the statute, Claimant was then required to "make every effort to have the physician present for the hearing." I respectfully find that Claimant has not made every effort, in light of the admission at the hearing that Dr. Wells "has retired and could have been subpoenaed." Specifically, Dr. Wells' disposition notwithstanding, the record fails to reflect that Claimant sought a subpoena from the Commission to compel Dr. Wells' appearance as permitted under Ark. Code Ann. § 11-9-706(a). Therefore, Claimant's proffered Exhibit #3 shall not be admitted into evidence, and it will not be considered in preparing this opinion. See Ark. Code Ann. § 11-9-705(c)(3).

DISCUSSION

On April 1, 1998, Respondent/Employer St. Anthony's Healthcare Center employed Claimant as a home health care worker. While lifting a patient on that date, Claimant tried to turn to her right when "something started pulling" her; the patient had apparently held

onto her bed rail, and Claimant experienced “awful pain running down my side and my back.” Claimant explained that she was engaged in a twisting motion at the time she felt this pain. Claimant testified that she had never had any serious back problems prior to this date, but that “I’ve hurt ever since my injury.”

Claimant reported her injury and initially received medical benefits from Respondents. After obtaining a doctor’s note prohibiting any lifting over a maximum of thirty pounds, Claimant attempted to return to work. However, Claimant testified that she was not allowed to return to work if she was not able to “pull my full weight of lifting.” Claimant has not returned to work since April 1, 1998.

Claimant’s husband, James Douglas Boren, testified that he recalled Claimant returning home after having been injured. He did not recall her having any prior back problems, and he testified that she appeared to be in pain from that date forward. He confirmed that Claimant did not do anything around the house that would have caused her injury. Similarly, Claimant’s former brother-in-law testified that he maintained contact with Claimant. He remembered Claimant experiencing an injury in April 1998; he did not know of any back problems Claimant experienced prior to that date, but he confirmed that she appeared to be in pain after that date.

Claimant has been treated by a number of physicians and has been the subject of numerous studies. An MRI of Claimant’s lumbar and thoracic spine, dated May 11, 1998, records the following impression with regard to Claimant’s thoracic spine: “Degenerative disc and vertebral end-plate changes of moderate severity. No focal disc herniation otherwise. No nerve root or spinal canal impingement.” With regard to Claimant’s lumbar spine, the MRI records the following impression: “Negative lumbar MRI study.”

Claimant underwent a nerve conduction study on June 26, 1998. Based upon the study, Dr. Gordon Gibson recorded the following impression:

Normal motor nerve conduction studies of the bilateral peroneal nerves.
Normal sensory conduction studies of the bilateral sural nerves.
Electromyography of selected muscles of both lower extremities and the bilateral L3-S1 paraspinal muscles revealed no definite evidence of motor nerve root compression, neuropathy, or myopathy.

Dr. Charles Nix began treating Claimant in June, 1998. One clinic note dated August 4, 1998 records the following:

The patient's electrodiagnostic studies were normal and a previous MRI was normal.

The physical exam shows no nerve root tension signs.

X-rays today of the lumbar spine look normal except for a calcific density that appears to be in the T12-L1 disc.

X-rays of the hip look good.

I have recommended CT evaluation of this, thin cut. She is allergic to radioactive dye. I will see her in a couple of days, in my next CCH clinic, to discuss test results. I think this is not likely related to her current symptoms.

Claimant underwent a CT scan of the thoracolumbar junction on August 10, 1998. The following impression was recorded: "1. No evidence of fracture or disc herniation. 2. Degenerative calcifications of the disc nucleus at T12-L1. 3. Incidental Schmorl's nodes are noted in several vertebral end-plates. However, no definite acute abnormalities are seen."

Claimant reported to Dr. Nix on August 17, 1998 complaining of "persistent symptoms with subjective sciatica of aching in the low back, left buttock, thigh and calf, with rare symptoms in the dorsum of the foot." Dr. Nix examined Claimant and noted "no impressive nerve root tension signs." After consulting with Dr. Philip Johnson, Dr. Nix

referred Claimant to Dr. Johnson on that same date to address a concern regarding joint inflammation. On August 17, 1998, Dr. Johnson noted: "Physical examination is fairly negative except for tight hamstrings bilaterally worse on the left side." Dr. Johnson recommended a bone scan.

Claimant underwent a bone scan on August 19, 1998. The report noted that "[w]hole body scan is normal, with no area of uptake in the spine to suggest arthritis, degenerative disease, or other abnormality." An impression of "normal bone scan" was recorded.

In a clinic note dated September 14, 1998, Dr. Nix summarized Claimant's studies: "All tests to date have been normal." Upon physical exam Claimant "shows no nerve root tension signs." In a chart note dated September 21, 1998 Dr. Nix wrote:

This patient had laboratory studies which were basically normal. There was minimal elevation of sed. rate which I do not feel is really remarkable and I have tested this patient extensively and see no indication for restrictions. I will see her p.r.n.

Dr. William Blankenship examined Claimant on December 21, 1998. He recorded that "[t]his lady has also complained of having some intermittent aches in her back 1 to 3 months prior to this onset, but did not seek any medical care." He observed that "[t]oday in examining this lady's lumbar spine, there is no list, scoliosis or paraspinal muscle spasm." He added:

In addition today AP and lateral and spotlight of the lumbar spine were made and on the AP view, there is normal alignment and the SI joints are open with no fracture noted. On the lateral of the lumbar spine, integrity of the intervertebral disc space appears to be well maintained at all levels. No fractures, spondylolysis or spondylolisthesis were noted. There is also a spot lateral of the lumbar spine for review and there was no additional abnormalities seen.

Dr. Blankenship's impression noted "evidence of degenerative disc disease at T12-L1" and "Lumbosacral strain, chronic."

Dr. Mark Valley noted similar assessment findings in a report dated August 31, 2000. Upon examination, he reported low back pain and tenderness in Claimant's lumbar spine. In his December 6, 2000 letter, Dr. Valley observed:

Although historically, her CAT scan shows degenerative disc disease, it is fully possible that the work related injury that she claims exacerbated a pre-existing condition. Likewise, such a work related injury may have had nothing to do with her symptomatology.

Claimant reported to Dr. Valley on September 9, 2003 for an evaluation, complaining of pain in her upper and lower back. The evaluation notes "mild spasms" upon examination.

On September 10, 2003, Claimant underwent an "MR of the thoracic spine without contrast." Among its findings, the study noted no evidence of discitis, herniated discs, or central spinal canal stenosis. The study did record an impression of "degenerative disc disease ... in an intervertebral disc of the lower thoracic spine, approximately T9-10 level."

The employee has the burden of proving a compensable injury. Wentz v. Service Master, 75 Ark. App. 296, 300, 57 S.W.3d 753, ___ (2001). To be compensable, an injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Claimant must sustain her burden of proving the elements of a compensable injury by a preponderance of the evidence. See Ark. Code Ann. §§ 11-9-102(4)(E) and 11-9-704(c)(2).

I find that Claimant has not sustained her burden of establishing a compensable injury by objective findings. While I do not doubt Claimant's complaints of pain, the record

does not reflect any objective findings in support of an injury to Claimant's back. Repeated physical examinations failed to reveal objective findings, as did an extensive variety of studies. As Dr. Nix noted on September 14, 1998, more than five months after Claimant's incident, "[a]ll tests to date have been normal."

It is appropriate to note the September 9, 2003 observation of "mild spasms"; this finding occurred almost five and one-half years after Claimant's incident. Given this distance in time, I find that it is not possible to relate that finding to Claimant's incident. Indeed, in his December 21, 1998 examination of Claimant's lumbar spine (which was closer in time to Claimant's incident), Dr. Blankenship noted the absence of "paraspinal muscle spasm."

Therefore, it is not necessary to discuss Claimant's request for medical benefits, temporary total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of the injury alleged, she failed to establish the compensability of her claim, and compensation must be denied. See Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulation agreed upon by the parties is reasonable and is approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back on April 1, 1998. Specifically, I find that the record is devoid of any proof of objective findings as required by Ark. Code Ann. § 11-9-102(4)(D).

4. Because Claimant failed to prove a compensable injury, it is not necessary to discuss her requests for medical benefits, temporary total disability benefits, and an attorney's fee.

5. Claimant's Exhibit #3 shall not be admitted into evidence. I specifically find that Respondents informed Claimant of their desire to cross-examine Dr. Charles Wells; Claimant did not then make every effort to have Dr. Wells present for the hearing. Therefore, Claimant's Exhibit #3 consisting of Dr. Wells' medical records will not be considered in preparing this Opinion.

ORDER

Claimant failed to sustain her burden of proving that she suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml