

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F300068**

<b>BETTY J. BREWER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>HEALTHCARE SERVICES GROUP, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>ZURICH AMERICAN INS. CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 23, 2004**

Hearing before Administrative Law Judge J. Mark White on December 11, 2003, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Michael Mayton, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On December 11, 2003, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on August 11, 2003, and a Prehearing Conference Order was entered that same day. A copy of the August 11, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed between the parties on November 6, 2002; that the claimant earned an average weekly wage of \$222, which would entitle her to a weekly temporary total disability rate of \$148; that the respondents initially accepted this claim as a medical-only claim; that medical expenses were paid by the respondents until they received the medical records; and that upon receipt of the medical records, the respondents terminated additional benefits and have now controverted the claim in its entirety.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury while employed by the respondents for which she is entitled to medical and indemnity benefits; and controversion and attorney's fees.

The claimant contends that she sustained a compensable injury to her back on November 6, 2002; that she is entitled to appropriate medical treatment including the recommended evaluation by a neurosurgeon; that she is entitled to temporary total disability benefits from November 8, 2002, through a date yet to be determined; and that her attorney's fee should be paid as permitted by law.

Respondents contend that the claimant did not sustain a compensable injury and is not entitled to any benefits; that the claimant's physical problems, if any, did not arise out of her employment with the respondent-employer but arose out of activities she performed at home; in the alternative, if it is determined this case is

compensable, that the claimant's first day off work was November 8, 2002, and she was released to light-duty employment on November 12, 2002; that the respondents made light-duty work available within the claimant's restrictions but she failed and refused to perform these activities; and that the claimant was eventually terminated for not calling in and not returning to work even though work was made available.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with ARK.

CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment on November 6, 2002.

4. The claimant has failed to prove by a preponderance of the evidence that she sustained an injury caused by a specific incident identifiable by time and place of occurrence.
5. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back on November 6, 2002.
6. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant worked as a housekeeper in a nursing home owned by the respondent-employer. The claimant testified that around noon on November 6, 2002, she “caught a pain” in her back while emptying a mop bucket into a sink. She testified the pain was in her lower back, below the beltline, in the center of her back. She did not immediately report the injury, and she finished her shift without incident. She testified that her back continued to hurt the next day, but she completed her shift that day as well.

On the third day after the accident, she was off work. She testified that she developed “tremendous pain” in her back that day. She called the respondent-employer and arranged to see a doctor, Dr. Russell Mayo, on November 8. Dr. Mayo

diagnosed “lumbar sacral strain” and recommended physical therapy. The claimant was off work until November 12, at which point she returned to work light duty. When she returned, she completed an accident report with her supervisor.

The claimant returned to the doctor again on November 18, this time to Dr. Brian Oge, her regular physician. Dr. Oge released the claimant to work light duty. She was off work that day, and she was not scheduled to work again until November 21. She went to work on the 21<sup>st</sup>, but she testified that she “got to hurting real bad” during her shift and was unable to complete it, and a co-worker drove her home. She was scheduled to return to the doctor on November 25, and she did not return to work. On November 25, the respondent-employer terminated her because of her refusal to return to work.

The claimant saw Dr. Oge on November 25, and again on December 9. She underwent an MRI on December 3, which revealed degenerative changes at L3-4 and L4-5, specifically mild to moderate canal stenosis at L3-4, compromise of the left lateral recess at L3-4, and compromise of the right lateral recess at L4-5. Based on the MRI results, Dr. Oge referred the claimant to a neurosurgeon, Dr. Ron Williams, for evaluation. The respondents then controverted the claim in its entirety, and the claimant never saw Dr. Williams. She has continued since that time to treat with Dr. Oge.

Notably, the claimant had an extensive history of back pain prior to this alleged incident. The claimant testified that she first experienced back problems after a car accident in 1995. The record establishes that she sought medical treatment for pain in the area of her lower back as early as January 11, 2000, through August 2, 2001. She admitted on cross-examination that she was taken off work on January 11, 2000, as a result of this back pain. Her back pain was severe enough to require a consultation with an orthopaedic specialist, Dr. Dickson, on August 28, 2000.

## **II. Adjudication**

For a claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) 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 findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of 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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

While the claimant's account of a work injury sustained while lifting a mop bucket is plausible, I cannot find that it is established by a preponderance of the evidence. The initial treating physician, Dr. Mayo, recorded the claimant as saying she incurred her back injury while "painting and doing a lot of lifting." Likewise, Dorothy Jenkins testified that the claimant admitted to hurting her back while moving furniture, an activity that could conceivably accompany a household painting project. The claimant admitted in her testimony that she had been doing some painting around her house, including the painting of baseboards inside the house.

It is true that the notes of the claimant's physical therapist corroborate the claimant's account of an accident with a mop bucket. Those same notes, however, reflect that the claimant denied any history of prior back problems – a claim flatly contradicted by the medical evidence in the record. The notes of Dr. Mayo from that same day reflect the same inaccurate history given by the claimant. Since the record clearly establishes that the claimant gave her medical providers an inaccurate history in regards to her prior back problems, the notes from those providers are of

little probative value in corroborating the claimant's testimony. Since part of the history she gave to her medical providers is demonstrably false, none of the history she gave – including the account of the accident – can necessarily be taken at face value.

Little else in the record corroborates the claimant's testimony. The claimant testified that immediately after the alleged accident, she told a co-worker, Eula Lambert, of the accident. But the claimant did not call Lambert to testify. The claimant also testified that she asked another co-worker, Shirley Nipper, for some medication for her back, but the claimant likewise failed to call Nipper to testify.

I find that the claimant was not a credible witness. As noted above, her statements as recorded by her medical providers were inconsistent with each other, inconsistent with her testimony, and inconsistent with the other medical evidence of record. The claimant's testimony was internally inconsistent -- at one point she denied having ever missed work for back pain prior to this incident, but she later admitted that she had been taken off work for back pain in January of 2000. She was notably hesitant in answering questions on cross-examination regarding this prior history of back pain. The claimant's testimony also conflicted with that of her supervisor, Vira Ford; I found Ford's testimony, in contrast, to be credible, in that she had a credible demeanor and her testimony was plausible and internally

consistent.

Because I find that the claimant was not a credible witness, and because the record lacks sufficient credible evidence to corroborate her account of her alleged accident, I must find that the claimant has failed to prove by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, or that she sustained an injury caused by a specific incident identifiable by time and place of occurrence. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back on November 6, 2002.

#### **AWARD**

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back on November 6, 2002. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge