

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306513

SHEILA L. DAVIS, EMPLOYEE	CLAIMANT
FLEET TIRE SERVICE OF NLR, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT

OPINION FILED MARCH 26, 2004

Hearing before Administrative Law Judge J. Mark White on February 24, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Garland Q. Ridenour, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 24, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on November 10, 2003, and a Prehearing Order was entered that same day. A copy of the November 10, 2003, Prehearing 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 Order.

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

relationship existed at all relevant times, including June 6, 2003. At the hearing, the claimant withdrew her agreement to an earlier stipulation as to her average weekly wage and compensation rate.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury, verified by objective findings, on June 6, 2003; whether additional medical treatment is reasonably necessary; whether the claimant is entitled to additional temporary total disability benefits; and controversion and attorney's fees. Prior to the hearing, the parties also agreed, with the Commission's concurrence, to add the issue of whether the employer without reasonable cause refused to return the claimant to work and related penalties under Ark. Code Ann. § 11-9-505. At the hearing, the parties further agreed to add as an issue the computation of the claimant's average weekly wage and corresponding compensation rate.

The claimant contends that the claim which was initially accepted as compensable by the respondents and was later denied is a fully compensable claim; that her healing period has not ended, and she is currently entitled to temporary total disability benefits; and that additional medical treatment is reasonable and necessary with regard to the claimant's injury.

Respondents contend that the claim was initially accepted as compensable,

but the respondents denied compensability because of the lack of any objective findings; that additional medical treatment is not reasonable and necessary with regard to the claimant's injury; and that the claimant was released to return to work on July 10, 2003, and that her entitlement to temporary total disability benefits ended on that date.

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 the existence and extent of her injury is established by medical evidence supported by objective findings.

4. 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.
5. The claimant has therefore failed to prove by a preponderance of the evidence that she sustained a compensable injury on June 6, 2003.
6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant went to work for the respondent-employer on September 20, 2002, first doing administrative work and then overseeing the “recap shop,” which built truck tires. The claimant acknowledged she has a history of problems with her back, including scoliosis. The claimant testified that she was personally hired by the respondent-employer’s owner, Gerald Akin, and that Akin agreed to pay her certain amounts in addition to her regular salary “under the table” in cash and checks. She was the only employee other than certain salesmen to receive these extra payments. She testified that Akin gave her these payments secretly because the salary he had wanted to pay her “threw up a stink” and he was afraid the company’s controller would find out about it. No documentation of these alleged payments was introduced into evidence by either party, though both parties indicated they have

such documentation in their possession.

The claimant testified that on June 6, 2003, her co-worker Troy Biggs asked her to assist him in unloading tires from a truck outside. She testified that she injured her back while handling tires from the truck. After reporting the injury, she sought treatment from the company doctor, Dr. Cynthia Almond. Dr. Almond assessed a lumbar strain, prescribed medication, and released her to work light duty. The claimant testified that she called in sick the next day because she “could not move” and her husband was going to take her to the emergency room. Dr. Scott Archer saw the claimant at Southwest Regional Medical Center and diagnosed “acute back pain.” He prescribed medication and released her.

The following week, the claimant attempted to return to work but was told she could not work until she had been released by a doctor to work without restriction. She continued to treat with Dr. Almond, with her personal physician, Dr. Kelli Sanders, and with Dr. Michael Weber. The claimant testified she also saw Dr. Barry Sorrells on her own initiative, but his records do not appear to have been introduced into evidence.

Caroline Biggs, the controller for the respondent-employer and the husband of witness Troy Biggs, corroborated the claimant’s testimony that she was paid certain monies “under the table” aside from her regular salary. She could not

explain why the claimant was paid these bonuses and other employees were not. She testified that the claimant would be welcome to return to work if there was an opening, but that there is no opening available. She corroborated the claimant's testimony that she was not allowed to return to work without a full release from the doctor.

Employees Troy Biggs and John Liebhardt testified they were present when the truck was unloaded on June 6. They testified that the claimant only marked the tires with chalk, and that she never lifted or handled any of the tires. They denied seeing the claimant sustain any injury.

On August 12, 2003, the claimant saw Dr. Earl Peeples for an independent medical evaluation. In his report, Dr. Peeples noted:

She describes constant pain on a scale of 1 to 10 with 1 representing a barely perceptible pain and 10 the most severe pain any human has ever experienced at 6 to 7 on a 10 scale. She indicates that it is an 8 at the time of interviews and smiled. She displayed no pain behavior despite consistently rating her pain as an 8. She equated her current level of discomfort with the 8 level of pain she experienced at the time of vaginal delivery.

Dr. Peeples reviewed the claimant's MRI and noted "changes consistent with degenerative disc disease. No disc extrusion or other nerve root compression is noted on the right side on the MRI." Dr. Peeples opined that the claimant sustained "a lumbar strain superimposed on a preexisting lumbar scoliosis with degenerative

disc disease. The prognosis is good.” He added, “There is a discrepancy between my observation of no pain behavior and her rating of consistent, very severe pain. I am unable to identify a clinical finding which would correlate with the high level of pain she describes as constant.” On November 4, 2003, Dr. Sanders released the claimant to work without restriction.

II. Adjudication

For the 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.*

The record reveals only two objective findings potentially sufficient to satisfy the claimant's burden of proof: the observation of muscle spasms by her doctors, and an MRI performed June 10, 2003. The muscle spasms cannot qualify as objective findings to prove this compensable injury, for the claimant was suffering from muscle spasms before her compensable injury. Her personal physician, Dr. Sanders, testified that the claimant experienced muscle spasms due to her pre-existing scoliosis, and that the claimant was even taking medication to alleviate the spasms. Muscle spasms could have been expected in the claimant's back before the alleged compensable injury; therefore, the observation of spasms after the alleged injury is of no probative value and is insufficient to meet the claimant's burden of proof, because there is no evidence to establish a causal connection between the spasms and the alleged compensable injury.

As for the MRI results: although the MRI did note abnormalities in the claimant's spine, Dr. Almond described the MRI results as "negative." The only finding she considered significant was that at L4-L5, and she testified that she could not say whether that finding was due to an injury or to degenerative changes. Similarly, Dr. Peoples opined that the MRI results were consistent with the claimant's pre-existing degenerative disc disease. A letter from Dr. L.C. Ault dated

January 31, 2000, documents that the claimant had degenerative disc disease in her cervical, thoracic and lumbar spine as well as lumbar spondylosis in 2000, years before the alleged compensable injury. Given this history, there is simply no evidence to establish that the condition of the claimant's spine, as demonstrated on the 2003 MRI, was any different after the alleged injury than it was before the alleged injury. Dr. Peebles has specifically linked the abnormal MRI findings to degenerative changes, and none of the claimant's physicians have offered a contradictory opinion. Therefore, the presence of degenerative changes on her 2003 MRI are of no probative value and are insufficient to meet the claimant's burden of proof.

Given this lack of any substantial proof of a causal connection between these objective findings and the claimant's alleged injury, and given the lack of any other objective findings, I must find that the claimant has failed to prove by a preponderance of the evidence that the existence and extent of her injury is established by medical evidence supported by objective findings.

I also 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. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place

and circumstances under which the injury occurred. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). The test of whether an employee was acting within "the course of employment" 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 Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002).

The only evidence supporting the claimant's account – that she injured her back handling a tire while unloading her employer's truck – is her own testimony. Her testimony is specifically contradicted by the testimony of Troy Biggs and John Liebhardt. Biggs, whom the claimant identified as a potential witness to the alleged injury, testified he asked the claimant to assist him in unloading the tires off of the truck, but only to mark the tires with chalk. He testified that the claimant never lifted a tire, nor did any tire hit, fall on, or otherwise injure the claimant. John Liebhardt testified that he watched the unloading from the beginning, and that he never saw the claimant lift or otherwise handle a tire, nor did he see any tire hit, fall on, or otherwise injure the claimant.

The claimant's account of the accident – that she injured her back while lifting a tire – is inconsistent with the testimony of these other witnesses. Her account is internally inconsistent – at one point she testified she injured herself catching a tire,

while at another point she testified she was throwing the tires down for someone else to catch. Her account is inconsistent with the medical records, specifically the notes of Dr. Weber – in his July 1, 2003, note Dr. Weber quoted the claimant as saying she hurt her back when a tire “came rolling towards her [and] knocked her down.” The claimant denied this account on cross-examination. Because of these inconsistencies, and because the claimant was evasive and uncooperative on cross-examination, I find that the claimant was not a credible witness. Therefore, because I find her account of the alleged accident to lack credibility, because her account of the accident is contradicted by other evidence of record, and because nothing other than her own statements supports her account of the alleged accident, I 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.

The claimant has failed to prove that the existence and extent of her injury is established by medical evidence supported by objective findings, or that she sustained an injury arising out of and in the course of her employment. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on June 6, 2003. Because I so find, the remaining issues are moot and need not be addressed.

AWARD

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

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge