

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204080

BEVERLY HERVEY, EMPLOYEE

CLAIMANT

**LITTLE ROCK SCHOOL DISTRICT,
SELF-INSURED EMPLOYER**

RESPONDENT

MUNICIPAL LEAGUE WC TRUST, TPA

RESPONDENT

OPINION FILED MARCH 8, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 10, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SHEILA F. CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On October 14, 2003, a prehearing conference was conducted in this claim from which a prehearing order of the same date was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission Exhibit No. 1.

The testimony of Beverly Hervey, the claimant, Gail Moore, and John Blaylock, coupled with the medical reports and other documents comprise the record in this claim.

DISCUSSION

Beverly Ann Hervey, the claimant, with a date of birth of June 8, 1960, is a high school

graduate. The claimant commenced her employment with respondent on September 27, 2001, in the custodian department. The claimant worked as a floater, and, as a consequence, performed custodial duties at the various schools of respondent.

During the pertinent time period in February, 2002, the claimant was assigned to Central High School. The claimant's shift commenced at 3:00 p.m. and ceased at 11:00 p.m. Respondent has in place a system for documenting time that employees in the custodial department worked. The testimony of John Blaylock, manager of the custodial department, reflects:

We have a procedure for the employee, they are to sign in at the time they arrive. If they leave the school during the shift they sign out. In other words, anytime they are in or out of their activity at school or they are off campus, they sign in and out. From that then we log it from the sign-in sheet to their time sheet and that's what is sent to our office then to enter into payroll to pay that employee. (T. 70)

In February 2002, Ronald Smith was the head custodian at Central High School, and, accordingly, the claimant's immediate supervisor. Mr. Smith died prior to the hearing in this claim. Mr. John Blaylock, the manager of the custodial department for respondent-employer, was a supervisor of Mr. Ron Smith. Mr. Blaylock testified regarding the responsibilities of the head custodian at a given school:

. . .The head custodian's responsibilities are basically to see that the school is cleaned, to make sure that schedules are changed for absenteeism, etcetera, to make sure that we've got coverage for the school, to report time records, any activity, any incidents that occurred at the school, which would include injury to an employee. (T. 70)

The claimant asserts that on February 4, 2002, she suffered an injury to her left knee while discharging employment duties for respondent. Specifically, the claimant maintains that while lifting

a chair onto a table she injured her knee when the chair hit the inside of her knee as she lost her grip on it while lifting it to put it on the table. The claimant maintains that the injury occurred between 10:30 and 11:00 p.m. The claimant further maintains that the accident was witnessed by two co-workers:

Well, I was working with Avery Board and Britt – Britt Nash at the time. And when I did – when the accident occurred, they came over to see was I okay and everything. They helped me, you know, get back upstairs because we was at the bottom in the area where they call the pit at the bottom of the school. (T. 8)

The claimant maintains as a result of the injury, she experienced an immediate onset of pain in the left knee, and that approximately thirty minutes later there was swelling in the knee. (T. 8)

The claimant asserts that following the accident of February 4, 2002, she did not discharge any further employment duties. Claimant noted that the accident occurred near the conclusion of the shift. With respect to her activities following the accident the claimant testified:

One of the guys asked me was I okay, and I told them no I was in pain so they walked me back up the stairs and talked to the supervisor and told him that I had injured my leg. He asked me to go in the break room and just sit down because it was so close to time to getting off. (T. 9)

At this juncture it is noted that February 4, 2002, was on a Monday. Additionally, the record reflects a Form N completed by the claimant on March 12, 2002 relative to her claimed February 4, 2002 left knee injury. The document reflects the time of the accident at between 8:00 and 9:00 p.m. and that the employer was notified between 8:00 and 9:00 p.m. Further, the document reflects as witnesses “Mrs. Nash and Mrs. Smith”. (JX2, p. 14)

As previously noted at the time of the hearing, the claimant's supervisor, Mr. Ronald Smith, had died. The claimant testified regarding her conversation with her supervisor or the reporting of the injury on February 4, 2002:

He said that I would have to get a injury form which would have to come from the office, the principal's office.

* * *

Well, like I said, it was time – close to time to get off, so he – he suggested that I get one the next day, which I was – I didn't come in back to work the next day because I was in pain. (T. 9)

After maintaining that she failed to secure the form to report the injury the following day, February 5, 2002, because she was in severe pain and unable to work, the claimant's testimony regarding when she next reported for work at respondent, when viewed in its entirety along with documentary evidence, is at times confusing, convoluted, and conflicting. The claimant was questioned by her attorney:

Q. Okay. When did you come back to work?

A. I think it was – I think I only – I was told that – that there wasn't any light duties on the job.

* * *

A. (Witness continuing:) I was released to go back to work on the – I want to say like the 23rd, but I didn't.

Q. The 23rd of what month?

A. It may have been in May.

Q. In May?

A. The fourth month, I'm going to say the fourth month. (T. 10)

During cross-examination, being questioned about the failure of her supervisor, Mr. Ronald Smith, to provide her with the accident report on the night of February 4, 2002 after she had reported the injury to him, the claimant was testified:

Q. So you would have to go back another day to get those forms, right?

A. Yes, sir.

Q. You didn't do that though, did you?

A. No, I didn't go to work the next day.

Q. Well, you didn't go back and get the forms either, did you?

A. No. (T. 18)

Yet, at another juncture, the claimant responded regarding her actions subsequent to February 4, 2002:

When you left – when you left the school at 11:00 on the fourth – I mean on February 4, did you go directly home?

A. Yes, sir I did.

How did you get to work, by the way?

A. I drove.

* * *

The following day, February 5, you did not report for work?

A. No, sir.

Did you telephone your supervisor that day or anyone saying that you would not be reporting for work on February 5?

A. Yes, sir, I did.

Who did you talk to?

A. Ron Smith.

* * *

Okay. What did you tell Mr. Smith?

A. I told him that my leg was giving me a lot of pain and I wouldn't be able to come in. (T. 35-36)

At yet another point, the claimant's testimony reflects that she last worked for the school district on February 4, 2002 and that in either August, November or December 2002 she began working at Fun Wash. The claimant testified that she commenced working at Employment Security Division in April 2003 where she is currently employed. (T. 41-42)

The testimony of the claimant reflects that when she contacted office personnel of respondent at the Facility Service Building she was informed that she could not go to just any doctor for her work-related injury but had to go to respondent's designated provider. The claimant maintains that she waited for directions or an appointment to the respondent's physician, and after receiving no response, finally contacted the Plant Service Department. The claimant asserts that she was seen by the physicians at St. Vincent Family Clinic on March 11, 2002 pursuant to the direction of respondent-employer. The claimant further testified that she had been seen by her primary care physician, Dr. Rose Bullock, on at least one occasion after her February 4, 2002 injury for

complaints associated with same, and prior to the March 11, 2002 visit to the physicians at St. Vincent Clinic. The claimant maintains that treatment provided by Dr. Bullock included a recommendation for over-the-counter medication for her pain complaint.

The claimant asserts that at the time she was seen by Dr. Steve Simpson at St. Vincent Family Clinic on March 11, 2002, her left knee was swollen and discolored (blue and purple), as a result of the accident. The claimant also maintains that the afore was the status of her knee when seen on a second occasion at St. Vincent Family Clinic on March 12, 2002, as well as when she was seen by Dr. Scott Bowen, a Little Rock orthopedic physician, pursuant to a referral of the physicians at St. Vincent Family Clinic.

The testimony of the claimant reflects that she was provided a light duty release following her initial visit to Dr. Steve Simpson at St. Vincent Family Clinic on March 11, 2002. The claimant returned to the Facility Service department of respondent and provided the limited duty release to the secretary, Gail Moore, who made a copy of the release and returned the original to the claimant. Claimant testified that the respondent did not have light duty work available for her. Indeed the testimony of the claimant reflects that when she was released to regular duty on April 5, 2002 by the physicians at St. Vincent Family Clinic she was physically unable to perform her regular job duties as a custodian in the employment of respondent. The claimant noted that she could not climb the stairs.

The claimant acknowledged that she was involved in a motor vehicle accident in March 2002, however denies that she suffered an injury to her left knee in the accident. The evidence in the record does reflect that a prescription for Hydrocodone was prescribed for the claimant by Dr. William Hefly, a Little Rock orthopedic physician. (JX2, p. 233)

The evidence in the record reflects that the claimant was seen by Dr. W. Scott Bowen, a Little Rock orthopedic physician on April 17, 2002 for complaints of pain in her left knee attributable to a February 4, 2002 injury at Central High School. Dr. Bowen's report reflects that during the examination of the claimant relative to her left knee the presence of a 1-1/2 to 2 centimeter mobile mass along the medial compartment of the claimant's knee. Dr. Bowen's impression of the claimant's complaint was that of possible meniscus cyst versus extra-articular lipoma. An MRI scan of the claimant's left knee was ordered by Dr. Bowen. (JX1, p. 6) The MRI of the claimant's left knee was had on April 23, 2002. (JX1, p. 7) The claimant was seen in follow-up by Dr. Bowen on May 7, 2002. Dr. Bowen noted, during his examination of the claimant's left knee that the same was stable. Dr. Bowen's impression of the claimant's left knee complaint following the MRI and examination, as reflected in the May 7, 2002 report, was that of ganglion cyst along pes anserine of left knee and left knee synovitis. (JX1, p. 8)

The testimony of Gail Moore, facility secretary for Facility Services of respondent-employer testified regarding the role of Facility Service in the Little Rock School District:

Our department handles all the maintenance, custodial, electrical, plumbing and such as that for the School District. (T. 54)

Ms. Moore further testified regarding the reporting of injuries by custodians:

If they are injured on the job, they should let their supervisor know. And in turn either they or the supervisor will call me and then I will instruct them to come by and get workmen's comp forms and send them to the workmen's comp doctor, which is the St. Vincent's Clinic. (T. 55)

Ms. Moore noted that while she provided the employee with information regarding respondent's

designated medical provider and the necessary paperwork, she does not, as a part of her duties schedule the appointment for the employee to be seen by the physicians at St. Vincent's Family Clinic.

The testimony of Ms. Moore reflects that when she first learned that the claimant was asserting that she had suffered an injury at work, the information was obtained from the claimant and was had approximately three weeks following the date that the claimant had asserted she suffered the injury. (T. 57) Ms. Moore's testimony reflects that at the time disclosure of an injury was made by the claimant to her it was during a telephone call she received from the claimant advising that she would not be in for work. Ms. Moore testified:

Yeah, she called in that day. She called to not come to work that day. And then she told me she had hurt herself. And I said, when did you hurt yourself? She said, February 4. I said, February 4? I said to her, that's three weeks. Why didn't you just report it? (T. 64-65)

Ms. Moore's testimony reflects that the claimant didn't really give a direct response to her question about why she had taken so long to report the injury. (T. 66)

The testimony of Ms. Moore reflects that prior to the telephone call a conversation she had with the claimant wherein the claimant reported the injury, she had heard from the claimant's supervisor, Ronald Smith:

Yeah, he was always calling saying that she didn't report or something of that nature, looking for Mr. Cyrus so that he could let him know that she wasn't there.

* * *

He would call to see if we had heard from Ms. Hervey

because the procedure in our office is, if they're not going to report to work, you need to call the facility services office at least two hours before, prior to your shift time, to report your absences and then we, in turn, log it into the book. So, the supervisors call us, custodians call us, to find out if employees have called us, have they called in. (T. 57-58)

The testimony of Mr. John Blaylock reflects that in his official capacity, he had been alerted to problems with the claimant by her supervisors. Specifically, Mr. Blaylock testified that there were problems with excessive absenteeism as well as excessive tardiness on the part of the claimant. Further, Mr. Blaylock noted that there was accusations of falsification of time records by the claimant, which have been documented by her supervisor.

As noted earlier, claimant's assertion of when she last discharged employment duties for respondent relative to her compensable injury, when coupled with the documentary evidence in the record, is both confusing and conflicting. The claimant testified that she had not worked for the respondent following her February 4, 2002 injury. Nonetheless, the record reflects a February 22, 2002, memorandum to the claimant from Bill Cyrus, custodial supervisor, documenting twenty-two excessive tardiness. Included in the dates identified were three subsequent to the claimant's asserted injury of February 4, 2002. Indeed, the document reflects that the claimant was tardy on February 4, 2002. (JX2, p. 2) The record also reflects a February 18, 2002 memorandum to the claimant from Bill Cyrus regarding verbal warning for excessive absenteeism.

The document reflects that from September 22, 2001 through February 18, 2002 the claimant had been absent 180 hours. The document further noted that while the claimant earned 4 hours of sick leave per pay period she had exceeded her accumulated sick hours by 140 hours. (JX2, 1) The records of respondent further reflect that the claimant was at work each day between February 25,

2002 and February 28, 2002, although she arrived late on each day. The claimant also worked March 4 and 5, 2002 and March 8, 2002. (JX2, p. 9)

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, medical reports, and other documents, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 4, 2002 the relationship of employee-employer existed between the parties.
3. On February 4, 2002 the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$167.00 for temporary total disability benefits.
4. On February 4, 2002 the claimant did not sustain an injury arising out of and in the course of her employment.

CONCLUSIONS

Beverly Ann Hervey, the claimant, was employed by respondent from September 27, 2001 through May 1, 2002. The claimant asserts she suffered an injury within the course and scope of her employment with respondent on February 4, 2002, which required medical treatment and resulted in a period of temporary total disability. Respondents deny the compensability of this claim in its entirety.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as the result of an injury having been sustained subsequent to the effective date of the afore provision. At the time of the hearing, the claimant amended her contentions to include in the alternative having suffered an aggravation of a preexisting

condition as a result of the work-related accident.

The claimant maintains that she suffered an injury on February 4, 2002, between 10:30 p.m. and 11:00 p.m. which happened when her left knee was struck by a chair that she was lifting. The claimant also asserts that there were two co-workers present at the time of the accident who witnessed same and assisted her in getting up the stairs. Additionally, the claimant maintains that one of the co-workers was present at the time the injury was reported to her supervisor, Ronald Smith, who died prior to the hearing in this claim.

While the claimant asserts that as far as she knows both witnesses to her February 4, 2002, accident are still employed by respondent, claimant did not present the testimony of either witness during the course of the hearing to support her claim. The claimant has the burden of proving a compensable injury by a preponderance of the evidence. As a part of that burden of proof the same may entail compelling the presence of witnesses to a hearing in the claim, via subpoena.

The claimant asserts that she suffered an injury on February 4, 2002, however was not able to report for work on February 5, 2002 in order to secure the forms to report the injury per the direction of her supervisor. The evidence reflects that custodial employees of respondent are directed to contact the Facility Service Department when they will not be reporting for work at least two hours prior to the time they are to report to work. There is no evidence in the record to reflect that the claimant did not discharge employment duties on February 5, 2002. The evidence clearly reflects that the claimant discharged employment duties for respondent on numerous occasions subsequent to February 4, 2002, nevertheless there is no evidence that the claimant reported an injury to her knee or having complaints relative to her knee during any of the afore numerous occasions. The claimant's supervisor documented the claimant's tardiness during those subsequent occasions.

The first instance of the claimant relaying to personnel of respondent that she had suffered an injury on February 4, 2002 occurred during a telephone call to the secretary for Facility Services wherein the claimant was reporting that she would not be at work. The credible testimony of the Facility Secretary, Ms. Gail Moore, reflects that the claimant was directed to come in and secure appropriate documents at the time of the conversation. The evidence discloses that the claimant did not pick up the documents until on or about March 11, 2002.

On March 11, 2002, the claimant was seen at St. Vincent Family Clinic by Dr. Steve Simpson and reported having sustained a work-related injury to her knee on February 4, 2002. While claimant asserts that her left knee was swollen and discolored, (purple and blue), as a result of the compensable injury at the time of her visit of March 11, 2003, the medical records are devoid of such findings. The claimant was again seen at St. Vincent Family Clinic on March 12, 2002. The physician during the March 12, 2002, visit reported that the claimant had “very minimal swelling of the knee.” (JX1, p. 3)

The Arkansas Appellate courts have held that in order to establish a compensable aggravation of a preexisting condition the same standards are required as to establish the compensability of an injury. To prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence the claimant must establish by a preponderance of the evidence an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i)(Repl. 2002). If the claimant fails to establish by a

preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineer Specialty Plastics, 56 Ark. App. 126, 837 S.W.2d 876 (1997).

In the instant claim, the claimant has failed to sustain her burden of proof by a preponderance of the evidence that she suffered an injury arising out of and in the course of her employment with respondent on February 4, 2002. As previously noted, while the claimant asserted that the injury or accident was witnessed by at least two co-workers, there is no supporting testimony from the individuals. Further, the claimant maintains she experienced severe debilitating pain in the knee subsequent to February 4, 2002, such that she was unable to work after that date. Nonetheless, the evidence in the record reflects that the claimant worked on numerous occasions for respondent subsequent to February 4, 2002. Additionally, there is no evidence in the record to reflect that at the time the claimant reported for work for respondent subsequent to February 4, 2002, and prior to March 11, 2002, that she related complaints relative to her knee to supervisory personnel of respondent. The claimant denied that she had experienced complaints with her knee prior to February 4, 2002 or that she had experienced a need for medical treatment relative to the left knee prior to February 4, 2002.

It is therefore my opinion, after a thorough consideration of all the evidence in this record, that the claimant has failed to sustain her burden of proof by a preponderance of the credible evidence that she sustained an injury arising out of and in the course of her employment with respondent on February 4, 2002. This claim is respectfully denied and dismissed.

IT IS SO ORDERED

ANDREW L. BLOOD
Administrative Law Judge