

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F403904**

**PAULA KUETTLE, EMPLOYEE**

**CLAIMANT**

**I C CORPORATION,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED DECEMBER 21, 2004**

A hearing in this case was conducted on September 29, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondent was represented by J. Matthew Mauldin, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held in this claim on August 17, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

At the September 29, 2004 hearing, the parties confirmed the stipulation found in the Prehearing Order and agreed to two additional stipulations. The stipulations that follow are hereby accepted:

1. The employee-employer relationship existed on June 30, 2003, and at all other relevant times.
2. Claimant's average weekly wage was \$607.60, resulting in a compensation rate for temporary total disability of \$405.00, and a compensation rate for permanent partial

disability of \$304.00.

3. Respondent has controverted this claim in its entirety.

At the September 29, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether pages 38 through 44 and 46 through 49 of Claimant's Exhibit #1, proffered at the September 29, 2004 hearing, should be admitted into evidence.
2. Whether Claimant sustained a compensable injury on June 30, 2003.
3. Whether Claimant is entitled to reasonably necessary medical benefits.
4. Whether Claimant is entitled to temporary total disability benefits from January 23, 2004 to a date to be determined.
5. Whether Claimant is entitled to an attorney's fee.

Claimant contends that she sustained a compensable specific incident injury on June 30, 2003, so that she is entitled to medical benefits, temporary total disability benefits, and an attorney's fee. Claimant reserves all arguments relating to permanent disability. Respondent contends that Claimant cannot prove a compensable injury; specifically, it questions the existence of a causal relationship between Claimant's employment and her condition. If compensability is found, Respondent contends that Claimant is not entitled to temporary total disability benefits for the period claimed.

## **DISCUSSION**

### **A. Admissibility of Certain Documentary Evidence**

At the start of the hearing, Respondent challenged the admissibility of pages 38

through 44 and 46 through 49 of Claimant's Exhibit #1. These documents were proffered, with the understanding that their admissibility would be addressed in this opinion. Respondent argues that these documents should not be admitted, because they do not comply with the terms of the Prehearing Order. Claimant's counsel stated that he delivered these documents to Respondent's counsel and the Commission promptly upon receiving them; he argued that the documents are relevant, addressing the reasonableness of Claimant's medical treatment and her need for temporary total disability benefits. Respondent's counsel acknowledged receipt of these documents on or about September 15, 2004, exactly two weeks prior to the hearing; he did not argue prejudice.

The Prehearing Order filed August 17, 2004, states in part:

No documents will be allowed into evidence unless exchanged by the parties at least thirty (30) days prior to the scheduled hearing. Any evidence, whether documentary or testimonial, that is not disclosed or exchanged in compliance with this Order and applicable law shall not be considered at the hearing except with prior leave of the Commission and upon a showing of good cause.

In addition, Ark. Code Ann. § 11-9-705(c)(2)(A) states: "Any party proposing to introduce medical reports ... at the hearing of a controverted claim shall ... furnish to the opposing party and to the commission copies of the written reports ... at least seven (7) days prior to the date of the hearing."

I find that the challenged documents, proffered at the hearing and marked as such in the record, should be admitted into evidence. Claimant's counsel certainly complied with Ark. Code Ann. § 11-9-705(c)(2)(A). Further, the record reflects that Claimant's counsel demonstrated good cause for the timing of his delivery of these documents; there is no indication of prejudice to Respondent stemming from the timing of this delivery.

## **B. Compensability of this Claim**

Claimant prepared buses for painting by using paper and tape to cover areas to be left unpainted. On June 30, 2003, she and her fellow employees were cleaning up their work areas prior to a plant shut-down.

I was told to climb up on the ladder and pull all the excessive tape - when you're taping a bus, sometimes you have a little piece of tape you stick to the top of the ladder, you know, so that it don't stick on anything else. And I was told to get up there and pull all the tape off the ladders, which I did. And then I was coming down, and I don't know, I just fell.

Claimant's co-worker, Angela White, witnessed Claimant's fall from the ladder: "she lost her balance on it, and she fell over backwards and hit the concrete floor." White recalled that Claimant "hit it hard, and she was in and out, you know, she wasn't all to herself."

Upon direct examination, Claimant testified that she had not had any prior problems with her low or mid-back. Claimant did have prior neck problems, resulting in a fusion at C5-6 in August of 2001. However, she returned to work six weeks after that surgery and did not have any problems from that point until June 30, 2003. Claimant testified that after the fall, she had problems with her neck, arms, and back; she confirmed that her current symptoms are basically the same symptoms that began on June 30, 2003.

Upon cross-examination, Claimant testified that, as a result of her accident, she injured her right ankle, head, neck, mid-back, and low back. She acknowledged that her ankle problem had resolved just over a week after the incident, and that she did not have any problems with her head. She further confirmed that her mid- and low back injuries have been her most severe, and that she seeks treatment for these injuries. Contrary to her testimony on direct examination, Claimant did acknowledge a sprain or pull in her low back during previous employment. She also acknowledged recurrent spasms in her neck

and shoulders prior to her June 30, 2003 incident.

Claimant has not yet been returned to work. She testified to a number of activities no longer permitted by her medical condition. Her co-worker, White, testified to Claimant's ability to perform her job prior to the injury, and her inability afterwards. Claimant's husband also testified to Claimant's restricted abilities and activities following the incident.

A chart note dated June 30, 2003, records Claimant's complaint of right ankle pain. The history of Claimant's incident is presented as follows: "Climbing [down] ladder chock under ladder stepped on fell, [right] foot ankle bent inside buttocks to ground, hit head slightly no pain or trauma noted to head...." This chart note assessed "[s]prained [right] ankle."

A Morrilton Medical Clinic progress note dated July 2, 2003 is the next chronological medical record. It notes that Claimant fell "off a ladder striking her right heel and apparently fell backwards landing on her back and neck." Objectively, the note recorded:

She has a little limited motion of the neck with decreased rotation side to side. Mild stiffness in the SCM and spasm in the SCM and trapezius bilaterally.... Lower extremities have diffuse bruising below the medial and lateral malleoli and some 1-2+ swelling in the right foot and ankle. The heel is diffusely tender. X-ray of the neck and heel appear to be normal, no evidence of displacement or fracture.

Claimant was assessed "[d]iffuse contusion...."

The next medical record is dated August 14, 2003; Respondent's name appears printed on the form. The clinic note records:

S- several weeks to months of recurrent upper back muscle spasm and burning sensation, no known precipitating factor - was present prior to last visit in June. Had cx fusion 2 y ago for HNP; these sx did not start until over a year post-op.

This clinic note assessed Claimant with "thoracic muscle strain primarily mid to lower

trapezius and paraspinous.” The next clinic note, dated August 28, 2003, records “continued thoracic back pain, radiate[?] into neck”; “muscle strain trapezius” was assessed.

Dr. Bruce Safman examined Claimant on September 2, 2003, determining that “[a]t the present time, [her] diagnosis is cervical, thoracic and lumbar strain.” Dr. Safman referred Claimant for further studies. A CT scan of Claimant’s cervical spine on September 5, 2003 resulted in an impression of “[s]tatus post C5-6 arthrodesis.” An X-ray of her thoracic spine taken that same date resulted in an impression of “[d]egenerative disc calcification at T7-8”; an X-ray of Claimant’s lumbar spine resulted in an impression of “[n]ormal lumbar spine.” When Dr. Safman examined Claimant again on September 30, 2003, he noted “[h]er CT scan did not demonstrate any significant cervical or lumbar pathology. Today she reports her major pain is in the midline and midthoracic region.”

Despite conservative treatment, Claimant’s condition did not improve. An MRI study taken October 21, 2003 noted Claimant’s prior fusion, but “[o]therwise negative MR cervical spine. ... Extruded disc at T7-8, deforming the left anterior thoracic cord at that level.”

Claimant then came under the care of Dr. Zachary Mason. Claimant underwent a complete myelogram, followed by post-myelogram CTs, of her cervical, thoracic, and lumbar spine, all on January 23, 2004. On February 2, 2004, Dr. Mason wrote:

We have reviewed the studies with findings of a solid fusion in her neck without problems. She has a small calcified disc bulge at T7-8 that is non-surgical and in her lumbar region she displays a lateral recessed L4-5 disc herniation with nerve root compromise. Options were discussed and she wishes to proceed with surgical intervention of a lumbar laminotomy and discectomy, right, L4-5.

Claimant underwent this procedure on February 27, 2004; she testified to some relief

following this procedure. Nonetheless, the medical records reflect that post-surgery, Claimant began to experience some pain to the left side of her low back and in her left leg.

A compensable injury is one “arising out of and in the course of employment.” Ark. Code Ann. § 11-9-102(4)(A)(i). In order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between her employment and the injury. McMillan v. U.S. Motors, 59 Ark. App. 85, 90, 953 S.W.2d 907, \_\_\_ (1997). It is not essential that the causal relationship between the accident and the disability be established by medical evidence. Wal-Mart Stores, Inc. v. Stotts, 74 Ark. App. 428, 432, 49 S.W.3d 667, \_\_\_ (2001).

If the claimant’s disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee’s condition, we may say without hesitation that there is no substantial evidence to sustain the commission’s refusal to make an award. But if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission’s conclusion is controlling.

Hall v. Pittman Constr. Co., 235 Ark. 104, 105-6, 357 S.W.2d 263, \_\_\_ (1962) (citations omitted).

Claimant must sustain her burden of proving a compensable specific incident injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant has not sustained her burden of proving a compensable injury by a preponderance of the evidence. Based upon the record, it appears that Claimant

seeks treatment and compensation for her cervical, thoracic, and lumbar conditions. Her head and ankle complaints appear to have resolved, and do not appear to be at issue. Therefore, this opinion will address Claimant's back problems.

With regard to Claimant's cervical and thoracic complaints, the record does not reflect a causal connection between her June 30, 2003 accident and her disabilities. In short, the evidence of greater convincing force demonstrates that her condition preexisted the incident. The August 14, 2003 medical entry records "[s]everal weeks to months of recurrent upper back muscle spasms and burning sensation, no known precipitating factor - was present prior to last visit in June." At the hearing, Claimant confirmed that she had occasionally experienced recurrent spasms in her neck and shoulders prior to the June 30, 2003 accident. It is interesting to note that the medical entry for June 30, 2003 does not record complaints related to Claimant's cervical and thoracic spine. The July 2, 2003 Morrilton Medical Clinic note records "[m]ild stiffness in the SCM and spasm in the SCM and trapezius bilaterally"; this observation is consistent with Claimant's preexisting condition. Thus, there does not appear to be a causal relationship between the accident and Claimant's cervical and thoracic conditions.

With regard to Claimant's lumbar complaints, the medical records reflect that, from her June 30, 2003 accident until September 2, 2003, Claimant apparently did not complain of "lumbar pain." At the hearing, Claimant was unable to recall when she first reported low back pain to Respondent. Thus, there is an absence of any complaint of lumbar pain for two months after June 30, 2003, "so that reasonable men might disagree about the existence of a causal connection between the accident and the disability...." See Hall, 235 Ark. at 106, 357 S.W.2d at \_\_\_\_\_. Claimant did not explain why it took this long for her

lumbar condition to surface; the medical records do not contain an explanation.

To summarize, I find that Claimant has not established by a preponderance of the evidence that there was a causal connection between her accident and her back complaints. Her cervical and thoracic conditions preexisted her accident; her lumbar pain was not reported until two months after the accident. The evidence of greater convincing force simply does not sustain the compensability of her accident.

Based upon the foregoing, 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). Without an initial finding of compensability, Claimant cannot be awarded temporary total disability benefits or additional medical treatment. Cross v. Magnolia Hosp. Reciprocal Group, 82 Ark. App. 406, 109 S.W.3d 145 (2003); see Ark. Code Ann. § 11-9-102(4)(F)(i).

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

- \_\_\_\_\_ 1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on June 30, 2003, and at all other relevant times.
3. Claimant's average weekly wage was \$607.60, resulting in a compensation rate for temporary total disability of \$405.00, and a compensation rate for permanent partial disability of \$304.00.

4. Respondent has controverted this claim in its entirety.

5. Pages 38 through 44 and 46 through 49 of Claimant's Exhibit #1 should be, and hereby are, admitted into evidence.

6. Claimant did not sustain her burden of proving by a preponderance of the evidence the existence of a causal relationship between her employment and the injury. Her cervical and thoracic conditions preexisted the June 30, 2003 incident; her lumbar complaints did not arise until two months after the accident. Thus, the record fails to reflect the required causal connection.

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

**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.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

DFA/ml