

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400429

SUSAN KITTLER MARTIN, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on July 23, 2004, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE KENNETH BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on January 5, 2004.

The claimant contends she injured her right knee at work on January 5, 2004. She seeks payment of medical expenses, temporary total disability benefits at a compensation rate of \$392.00 from January 6, 2004 to May 22, 2004 and attorney's fees. The claimant contends the correct compensation rate is \$392.00. (See Tr. p. 84-86 and Attorney Buckner's letter of July 26, 2004).

The respondents contend the claimant did not suffer an injury arising out of and in the course of her employment. Her symptoms are the result of a preexisting condition or a non job-related incident. Alternatively, in the event of an award, the respondents contend the compensation rate is

\$278.00/\$209.00, and they are entitled to an offset against benefits paid by third parties pursuant to Ark. Code Ann. §11-9-411.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant and her husband; co-workers, David Kimbrell and George Barnett; quality control supervisor, Roger Frye; supervisor Terry Kagebein and EMT Tim Brown.

The claimant, age 24 (D.O.B. June 21, 1980), began work for Lennox on January 6, 2003 one year prior to the accident on January 5, 2004. She injured her shoulder at Lennox in April, 2003 and was off work a month and a half. She was involved in an altercation with a police woman in April, 2003. Her health history also includes three left knee surgeries. The first was when she was in the second grade. The second surgery was in 1998 and hardware was installed. The third surgery was in July 2002. She injured her right knee on November 20, 2003 when she stepped off her porch at home. She continued to work with a brace after Dr. Elam diagnosed a strain. She worked at Sonic in December 2003 as a car-hop, while the Lennox plant was shut down for the Christmas holidays.

The claimant testified she had worked for Lennox about a year at the time of the accident. The plant makes heating and air conditioning units that are sitting atop rollers. The claimant reached for some screws to attach a skid plate on a unit, her foot slipped on the roller and dropped in between the rollers, she twisted her right knee, heard a pop, and fell backwards, to the floor. (Tr. p. 20-21/25-27, 26-37/41). She hit the ground before Rod Frye came to her assistance. Mr. Frye paged the supervisor, Mr. Kagebein. An MRI scan was performed on January 12, 2004 and she was referred to Dr. Hefley on January 19, 2004. She was released to return to work on May 21, 2004.

During the Christmas break, December 2003 to January 2004, the claimant worked as a car-hop at Sonic and had no difficulty with her knees.

In the summer of 2003 she sought a promotion as a material handler or fabricator at Lennox but she was not hired.

The claimant's husband, DeJuan Martin could not remember the claimant wearing a knee brace after the porch incident in November, 2003.

David Kimbrell, claimant's co-worker and 28 year employee with Lennox testified he saw the claimant's accident which happened on the day the plant re-opened after a Christmas break. He stated the claimant stepped over a roll and her foot went into a hole, causing her to fall. Mr. Kimbrell did not usually work on that line and although he knew the employees by sight, he did not know their names. It was his recollection that the claimant was standing on the rollers at the time of the accident but her foot did not go in between the rollers, but in a hole. The claimant began crying, and the supervisor, Terry, was called to the scene. He did not see anyone break her fall.

George Barnett works on the same line as the claimant. Shortly before the plant shut down for the Christmas holidays, he had a conversation with the claimant about her interest in changing jobs within the plant. The claimant told him if she didn't get the material handler job she was going to "get hurt" after they returned from the shutdown. The claimant denied this conversation. She stated she applied for the material handler job in the summer of 2003 and knew within the next two weeks that she didn't get the promotion. She explained that she did not know Mr. Barnett well and had no idea why he would make up this story.

Roger Frye, Quality Auditor on the claimant's assembly line #2, testified the claimant's accident happened shortly after the beginning of her shift at 3:00 p.m. He observed her conversing with co-workers and attaching skid plates. The claimant walked on the rollers, "relocating I guess with the gun in her hand to put another skid on" when she slipped and began to fall. Mr. Frye tried to break her fall by catching her, but the claimant fell to the floor. He did not notice if her foot was caught or hung, but it was not flailing. The claimant began crying.

Mr. Frye stated that "someone" notified the supervisor but he didn't stay around to hear about the claimant's symptoms. This testimony is in direct conflict with Mr. Kagebein's recollection of events.

Mr. Frye also described the work area as a manual roller system that has to be pushed to the end of the track so it can be taken to the yard. There are guards in between the rollers to prevent someone's foot from being caught. However, Mr. Frye stated that no one was supposed to stand or walk on the rollers, but he was sure if that instruction had been conveyed to the employees. He explained there was a stationary, flat surface for the employees to stand on while they were working on the units. Mr. Frye observed that the claimant had at least one foot on the rollers but he didn't know if her other foot was on the rollers or the stationary portion.

Mr. Frye stated there are portions of the track that do not have guards. The rollers are smaller and it would be impossible to catch your foot between them. He also indicated there are parts of the track with larger spaces between the rollers and no guards. However, Mr. Frye testified that the claimant was working on that part of the track that had guards at the time of the accident.

Terry Kagebein, supervisor for 2-1/2 years testified the claimant told him about an incident in November, 2003, when she stepped off the porch at her home and injured her right knee. She was seen by a physician for her limp and was told she needed surgery. Mr. Kagebein was the only witness to mention the claimant's limp prior to the incident at work.

The claimant explained that she told her supervisor in December, 2003 that she had pain in her left knee and thought one of her pins had come loose and she would possibly need surgery. However, the pain went away and she never received medical treatment for her left knee in 2003 or 2004.

The Lennox plant traditionally closes for the holidays from December 20th to January 5th. On the day of their return, just after the beginning of her shift at 3:00 p.m., Roger Frye notified him that the claimant was injured. Mr. Kagebein observed the claimant sitting at the end of the track of rollers, crying. He called Mr. Brown to bring a wheelchair. Mr. Frye remained there approximately 15 minutes until the claimant was taken to the nurses station.

The claimant returned to work in May, 2004 at her old job in the closeout department. At some point the claimant applied for a job as a material handler but was not hired. Mr. Kagebein did not remember the dates involved around the claimant's attempt to change jobs.

Tim Brown, EMT, works at the plant's nursing station. On January 5, 2004, he received a call about an injured employee and transported the claimant to his office in a wheelchair. The claimant told him she had fallen, twisted her knee and heard a pop. She complained of pain in her knee but he found no bruising or swelling. He treated her with Ibuprofen and a Icy Hot patch.

The claimant filled out an AR-N, a report of a work-related injury, describing an incident where she was putting a skid plate on a unit, reached for screws and slipped on a roller. She made no mention about a hole or getting stuck on the rollers. Curiously, the claimant also completed paperwork for short-term disability benefits, even though Mr. Brown testified these benefits were not available to employees injured on the job. The claimant then went to the emergency room for treatment.

MEDICAL EVIDENCE

The claimant's medical history includes a February 6, 1998 left knee strain, treated conservatively.

On September 14, 1998, she fell on a conveyor belt while working for a different employer, injuring her left knee. Dr. Mulhollan performed surgery on October 21, 1998, for a torn anterior cruciate ligament and a torn medial meniscus. The procedure is described in Dr. Mulhollan's letter of October 22, 1998, and she received a 10% impairment in his letter of July 30, 1999.

The claimant complained of numbness in her legs in March, 1999. Her examination and tests were normal. "When presented with the possibility of having a spinal tap she did have quick resolution of symptoms. I'm unsure of what exactly was the etiology of her problems."

The claimant's symptoms resumed in December, 2001 and she returned to Dr. Mulhollan. At the time, the claimant was pregnant with her second child and caring for a one-year old. Dr.

Mulhollan suggested analgesics. Dr. Mulhollan performed surgery on the left knee again on July 12, 2002, (see his report of February 27, 2002). This procedure used tendons from the right knee to stabilize the left knee.

In November, 2003, the claimant was diagnosed with a right knee strain after she “stepped off some steps, felt “pop” in her R knee.” She was treated conservatively after a negative x-ray.

The claimant returned for medical treatment for her right knee on January 5, 2004 after the work-related incident at Lennox. After a positive MRI scan, the claimant was referred to Dr. Hefley. He recorded the following history of injury:

Two weeks ago on January 5th she was at work when she injured her right knee. She stepped on a series of rollers and she slipped and her foot was thrust forward. It caught between the rollers and as she fell she twisted the right knee and she heard a loud pop in the knee.

Dr. Hefley performed surgery on February 13, 2004 for a rupture of the ACL and small tear of the posterior horn of the lateral meniscus in the right knee. He prescribed physical therapy and returned her to work on May 21, 2004.

The claimant’s medical records also mention treatment for depression and seem to suggest she is rather accident-prone. However, with the notable exception of the March, 1999 report regarding numbness in her legs, she does appear to have objective medical findings associated with these complaints.

COMPENSATION RATE

For reasons unknown, the computer printout in the transcript does not match the Form AR-W. There are no dates for comparison.

Using the AR-W, I see 21 weeks where the claimant worked 40 hours or more. The amount on week seven is difficult to read, and I’ll assume it is \$505.86.

By my calculations, those weeks total $\$9,303.79 \div 21$ or \$443.03 with \$3.85 OT rounding off, the AWW is $\$447 \times 66\text{-}2/3 = \298.00 .

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must

be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Failure to prove any one of these elements defeats the claim.

The respondents have controverted this claim based on the first element of proof. “Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

The test for the course of employment requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer’s purpose or advancing the employer’s interests. Pilgrim’s Pride Corp. v. Calderera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

Testimony from one witness indicates the claimant planned to stage an accident at work. This is a serious allegation subjecting the claimant to possible criminal penalties for insurance fraud.

However, I have a difficult time correlating this conversation with the timetable of events. The co-worker stated the conversation with the claimant took place before Christmas where she threatened to stage an accident when they returned from the holiday break if she didn't get a promotion. The claimant testified she had applied for the job in the summer and knew within a couple of weeks that she didn't get the job.

Also, if Lennox felt the accident was staged, why didn't her supervisor look into the job promotion details? He testified he didn't remember the date she applied for a job and the date she was turned down.

Furthermore, none of the eye witnesses to the injury indicated the injury appeared to be staged. One person tried to break her fall, the supervisor was called to the scene and she was transported in a wheelchair to the nurses office.

Additionally there are some discrepancies in the testimony concerning some of the details of the accident but the witnesses appeared credible to me. I attribute these discrepancies to the suddenness of accidents in general and the passage of time.

Accordingly, I find the claimant sustained a compensable injury arising out of and in the course of her employment.

The respondents' second defense is the claimant had a preexisting condition. However, that factor alone would not disqualify the claim. The employer "takes the employee as he finds him" and employment circumstances that aggravate preexisting conditions are compensable. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996), St. Vincent Infirmary v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996) and Public Employee Claims Division v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

The evidence shows that the claimant was diagnosed with a sprain of the right knee and worked as a waitress during the plant's Christmas break. She was able to return to work and do her

job until the incident with the rollers.

Accordingly, I find the incident on January 5, 2004 was a new injury and not an aggravation of a preexisting condition.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on January 5, 2004.
2. The claimant was earning sufficient wages to be entitled to a compensation rate of \$392.00, based on an average weekly wage of \$588.00.
3. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102. The accident was witnessed by several co-workers.
4. Respondents are directed to pay all reasonable and necessary medical expenses within thirty days subject to Rule 30 and the lien filed by Blue Cross/Blue Shield.
5. Met Life was provided notice of these proceedings, but did not contact the Commission or the parties, nor file a lien, nor appear at the hearing, nor request a continuance. Accordingly, they are deemed to have waived their right of reimbursement.
6. Respondents are entitled to an offset against benefits paid by third parties pursuant to Ark. Code Ann. §11-9-411.
7. The claimant is entitled to temporary total disability benefits from January 6, 2004 to May 22, 2004 as she remained in her healing period and had not returned to work.
8. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries,

(March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

9. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge