

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308772

CHARLESIA Y. NALLS, EMPLOYEE	CLAIMANT
GEORGIA PACIFIC CORPORATION, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, CARRIER	RESPONDENT

OPINION FILED OCTOBER 6, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on July 9, 2004 at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ANDREW IVEY, 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, anatomical impairment 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.

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 does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on July 30, 2003, at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$440.00/\$330.00, in the event this claim is found to be compensable. The respondents paid some medical expenses before the claim was controverted on August 20, 2003. Other expenses have been paid by the claimant's group insurance carrier, Blue Cross/Blue Shield.

The claimant contends she injured her back in a specific lifting incident on July 30, 2003. Dr. Adametz performed surgery for a herniated disc at L5-S1 on November 14, 2003. The claimant seeks payment of medical expenses, temporary total disability benefits from July 31, 2003 to February 5, 2004, an 8% rating and attorney's fees.

The respondents contend the claimant cannot meet her burden of proof under Ark. Code Ann. §11-9-102.

The following were submitted without objection and comprise the evidence of record: the prehearing questionnaires and exhibits including the deposition of Dr. James Adametz taken May 24, 2004, contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant, who seemed slow to answer questions, supervisors, Jean Murphy, Pauline Lowery and Thad Douglas, union representative, Brad Burchfield and co-worker, Lisa Terrell Guin. Supervisors, Murphy and Douglas and union steward, Burchfield all agree the claimant has a combative, belligerent attitude. Documentation was provided showing the claimant was cautioned or reprimanded a dozen times between 1999 and 2003.

The claimant, age 36 (D.O.B. May 4, 1968), sustained a work-related back injury with leg pain in 1993 and continued to receive treatment for it until 2001. Dr. P. B. Simpson treated her conservatively with medication. She applied for Social Security Disability due to the injury but was denied.

The claimant began work for the respondent-employer in 1999 as a utility operator, floor sweeper, and relief truck driver on the 2:30 p.m. - 10:30 p.m. shift.

On July 30, 2003 about 9:30 p.m., supervisor Jean Murphy instructed the claimant to work in the "stacks" with Lisa Terrell Guin. The claimant complained that she had other tasks to complete

before the end of her shift and did not want to work in the “stacks.”

Nevertheless, the claimant reported to the “stacks” and began lifting cases of toilet paper five layers high when she felt a pop in her lower back. She did not tell her co-worker, Lisa Guin that she injured herself.

The claimant’s testimony about the chronology of events was confusing and some of her answers were inconsistent.

After the argument with Supervisor Murphy, the claimant was called to the office either to discuss her job performance or insubordination. She either did not report an injury or she mentioned she was hurt but Supervisor Murphy did not take her complaints seriously (compare Tr. p. 11-12 with p. 24-25).

An accident report was completed (Tr. p. 28-29) but the claimant declined medical attention. In subsequent testimony, the claimant indicated she asked her supervisor to send her to a doctor (compare Tr. p. 12/15/19). Supervisor Murphy asked the claimant to let her know if she changed her mind. Instead, the claimant went to see Dr. Malloy on her own. The claimant left a message on the answering machine at work telling them she had seen a doctor and received treatment.

The claimant returned to work on August 2, 2003 and was told in a meeting that she should have received permission before going to the doctor.

After she returned to work, she was observed by a supervisor carrying a box on her shoulder, which the claimant denied. She stated she worked in pain. The claim was controverted as of August 20, 2003.

The claimant returned to Dr. Malloy for physical therapy which did not relieve her symptoms. He referred her to Dr. Adametz who performed surgery on November 14, 2003. He released her for

light duty on January 5, 2004 but none was available. While exercising, her leg pain returned and she sought treatment from Dr. Garcia for pain management. She remains symptomatic with both back and leg pain.

Supervisor Murphy explained that all employees sign a paper acknowledging receipt of the safety rules when they are hired. Employees are instructed to report injuries immediately after they occur. On July 30, 2003 the claimant argued with Ms. Murphy about her job duties and Ms. Murphy charged her with insubordination. After the reprimand, the claimant reported a back injury. Ms. Murphy interviewed Lisa Guin and completed an accident report form. The claimant declined medical attention. A second meeting was held on August 2, 2003 because the claimant did not seek permission before she saw Dr. Malloy.

Supervisor Lowery (26 year employee) testified she saw the claimant lifting boxes and carrying them on her shoulder on August 2, 2003, which the claimant denies.

Co-worker, Lisa Guin (6 year employee) testified that the claimant wore a back brace after her maternity leave in 1999. On the day in question she was moving boxes with the claimant when she groaned. Ms Guin thought she inadvertently hurt the claimant's hand and apologized to her. She acknowledged the claimant was able to finish the job. Supervisor Murphy testified Ms. Guin was surprised when asked if the claimant hurt herself. She knew nothing about any injury (Tr. p. 44) on July 30, 2003 when Ms. Murphy was investigating the injury.

MEDICAL EVIDENCE

The claimant's health history shows back pain beginning in January, 1987 which she attributed to her job duties at a shirt factory. She was advised to use a heating pad and Tylenol.

The claimant experienced back pain again in April, 1993 which she attributed to lifting

bundles at work. A CT scan showed minimal disc protrusion at L5-S1, but she did not complain of radicular symptoms. Dr. Simpson also noted a 1992 back injury which the claimant did not report.

The claimant returned to Dr. Simpson in May, 1993 complaining of low back and bilateral leg pain which he could not correlate with her diagnostic testing. He prescribed exercises and time off (2 weeks) from work.

The claimant returned to Dr. Simpson in June, 1993 with complaints of numbness in her right leg. An MRI scan was negative. The claimant requested a second opinion, stating, “something is wrong with her and that she can’t work because she has to use her right leg to work the pedal on the machine where she is employed. Her problem has been going on for about three months. She does not feel that she is able to return to work. I find no evidence of any focal neurological deficit.

The claimant underwent a Functional Capacity Evaluation in July 1993, revealing “marked inconsistencies indicating there is probably some functional component to her pain pattern.” Dr. Simpson released the claimant to return to work.

The claimant returned to Dr. Simpson in December, 1993. Her physical exam and a bone scan were negative.

Dr. Simpson’s Reports of 12-15-93 & 12-22-93:

She states she worked three weeks after I released her to go back to work in August and has been off since that time. She has seen other doctors.

I can’t find anything wrong with this lady.

Mrs. Nalls studies and physical examination have failed really to reproduce any objective findings. In fact the only thing one sees on her is subjective complaints of pain but no overt objective findings on any of the test or any of the physical examination.

I think this lady needs to return to work.

In April 1994, the claimant saw Dr. Garcia for arm, hand, back and bilateral leg pain.

The claimant returned to Dr. Malloy on June 21, 2001 with a history of back and right leg pain after moving boxes at home one month earlier. Dr. Malloy noted the claimant's symptoms were unchanged from her visits with Dr. Simpson. He prescribed medication for a lumbo-sacral joint sprain.

The claimant saw general practitioner, Dr. Malloy on July 31, 2003, reporting she was "hurt @ work last pm, felt sudden pop when leaning over, has pain in low back and into R buttock." He prescribed medication for "tender paraspinals R L4-5." In August, 2003, he prescribed physical therapy. He signed Georgia Pacific's health forms noting no objective findings with symptom magnification.

An MRI scan conducted September 2, 1993 revealed "moderate left paracentral herniation of the degenerating L5-S1 disc with accompanying multilevel posterior facet synovitis."

The claimant saw neurosurgeon, Dr. Adametz on October 3, 2003 for low back and bilateral leg pain, but she declined surgical intervention. She returned on October 27, 2003 requesting surgery for a disc herniation at L5-S1 on the left "consistent with her symptoms." Surgery was performed on November 14, 2003, and in his deposition (p. 21), he assessed her rating at 8% to the body as a whole. The claimant was released to return to work on January 5, 2004. The claimant did not return to work, applying for Social Security Disability instead.

Dr. Adametz testified the claimant did not tell him about her back treatment and MRI with Dr. Simpson. He did not have her medical records and was not aware of her ten year history of treatment. Dr. Adametz admitted that his assessment of causation is based on the claimant's history. The claimant testified that she did tell the doctor about her health history (Tr. p. 29-30).

In his deposition, Dr. Adametz opined that the 1993 MRI scan showed a bulge while the 2003 MRI scan showed a herniation. Attorney Wren also emphasized Dr. Simpson's note that the claimant had no radicular pain, however, a review of the medical records show the claimant has complained of bilateral leg pain off and on for years.

DR. ADAMETZ:

If she had a lifting injury in which she started developing pain in her back that then began to radiate down her leg, then, yes, that would be the most likely time in which she ruptured the disc.

(Depo. p. 20-21)

ATTORNEY WREN:

...Assuming that Ms. Nalls is telling you the truth about when she began experiencing these symptoms, would it be your opinion that the major cause of that impairment rating would be the work incident?

DR. ADAMETZ:

...yall are asking me to speculate... Assuming there was a work incident in which she was lifting, developed pain in her back that then began to radiate down the leg and previously she had not had significant left leg symptoms, then I would say that that was the cause of it.

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.

Compensation must be denied if the claimant fails to prove any one of these requirements.

Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The credibility of witnesses and the weight to be given to their testimony are matters solely within the province of the Commission. Ringier America v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

In summary, the evidence shows that the claimant reported a back injury only after a disciplinary proceeding. This injury could not be confirmed by her co-worker.

Neither the claimant nor Ms. Guin are credible witnesses. The timing of her report of an injury after the disciplinary action, her behavior at the meeting which she does not remember, her decision not to follow procedure before seeking medical treatment and her failure to disclose her medical history to her doctor reflect negatively on the claimant. Ms. Guin's memory of events has changed markedly between the time of the investigation and the hearing.

Because of my assessment of the claimant's credibility, I find she failed to prove 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 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. Pilgrims Pride Corp. v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

I find the claimant’s condition necessitating surgery, is not causally related to any incident at work. The evidence shows the claimant has a long standing history of back problems and bilateral radiating leg pain which gradually progressed from a bulge to a herniation as part of the degenerative process.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 30, 2003.
2. The claimant has failed to prove 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.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge