

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309992

LATOYA NESBITT, EMPLOYEE	CLAIMANT
OUACHITA COUNTY MED. CTR., EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED SEPTEMBER 8, 2004

Hearing before Administrative Law Judge J. Mark White on July 29, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Robert L. Depper, Jr., Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 29, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on May 10, 2004, and a Prehearing Order was entered that same day. A copy of the May 10, 2004, 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; that the employee-employer-carrier

relationship existed at all relevant times, including August 28, 2003; and that the claimant earned an average weekly wage of \$209.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury on August 28, 2003; whether the claimant is entitled to additional temporary total disability benefits; and controversion and attorney's fees.

The claimant contends that on or about August 28, 2003, she sustained a compensable injury; that she is entitled to full benefits under the workers' compensation law to include temporary total disability, medical expenses and attorney's fees; and that all other issues will be reserved until after determination of compensability.

Respondents contend that although they initially paid some benefits, the claimant did not sustain a compensable injury; and that even if the claimant sustained a compensable injury, she is not entitled to any indemnity benefits since she was released to return to work, work was made available, and the claimant failed and/or refused to return.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports,

documents, the deposition of Dr. Stephen T. Tabe, 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 was not a credible witness.
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 failed to prove by a preponderance of the evidence that her injury is established by medical evidence supported by objective findings.
6. The claimant has therefore failed to prove by a preponderance of the evidence that she sustained a compensable injury.
7. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.
8. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant was employed as a home health nurse for the respondent-employer. She testified that on August 28, 2003, she was giving a patient a bath when the patient slipped and fell on the claimant's left hand, hyperextending her fingers. The claimant testified that when she removed her gloves, she noticed swelling in her fingers. After reporting her injury, she sought treatment at Ouachita County Medical Center, where she was seen by Dr. Stephen Tabe.

The claimant testified that when she went to the hospital, her fingers were swollen, but that she was still able to move and extend them. Dr. Tabe, however, testified in his deposition that he observed no swelling, and that the claimant complained of being unable to extend or straighten out her ring finger and middle finger. He testified that her fingers and hand were "flexed with tension on the whole arm." The hospital records corroborate Dr. Tabe's testimony, and they also reflect that Dr. Tabe was of the opinion that the "mechanism of injury" described by the claimant – that is, her accident – was not consistent with her alleged injury. Dr. Tabe was suspicious enough that he followed the claimant to the parking lot, where he watched as she drove off, driving the car and holding the steering wheel with both her right hand and her allegedly injured left hand.

Dr. Tabe saw the claimant several more times and treated her conservatively. He later referred her to Dr. Dwayne Daniels, who first saw her on September 4. Dr. Daniels noted, "She is unable to demonstrate active flexion at the DIP joint of the long finger. I can see some trace of flexion at the DIP joint of the ring finger. She has active flexion at the PIP joints of the ring and long finger." When the claimant saw a physical therapist five days later, he too noted that the claimant was unable to extend or straighten her fingers.

Dr. Daniels referred the claimant to Dr. Thomas Frazier. Dr. Frazier recommended an MRI of the brain to rule out a central nervous system condition as the cause of the claimant's injury. Respondents then controverted the claim.

The claimant testified at the hearing that she is unable to extend or straighten the ring finger or long (middle) finger of her left hand. Throughout the hearing, she held her left hand under her breast, with her lower arm bent inward 90 degrees at the elbow. Her left arm appeared to be in the same position as it might be if it were in a cast. The fingers of her left hand were in a tightly-clinched fist. She was asked to attempt to extend her ring finger and long finger; when she attempted to do so, her arm shook severely. Likewise, when she attempted to extend her full left arm, her arm shook and she was apparently unable to extend it.

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.*

I did not find the claimant to be a credible witness, because her testimony significantly conflicted with the medical records submitted into evidence and with the testimony of the other witnesses. The claimant testified that immediately after her accident, before she sought medical treatment, her fingers were already swollen. But Dr. Thomas Frazier records the claimant as telling him that she experienced “no

obvious swelling or deformity” at the time of the injury. Likewise, Dr. Tabe testified, and the medical records corroborate, that the claimant had no swelling in her fingers. Dr. Tabe testified that he even had his nurse measure the circumference of the claimant’s fingers to be certain there was no swelling.

The claimant testified that when she first went to the emergency room on August 28, she was still able to extend and straighten her fingers, and that her inability to extend/straighten her fingers did not arise until after Dr. Tabe “jerked” her fingers back and put them in splints. But Dr. Tabe testified in his deposition, and the medical records corroborate, that when the claimant first arrived at the ER she claimed she was unable to extend/straighten her fingers. Likewise, a physical therapist who saw the claimant on September 9 quoted her as saying her inability to straighten or extend her fingers began “immediately” after the accident.

The medical records reflect that when the claimant went to the emergency room on August 30, she “demanded” to be discharged and left before a drug screen could be given. At the hearing, the claimant denied having done so.

Most significantly, the claimant testified at the hearing that she is unable to extend or straighten her left arm and ring and middle fingers and has been unable to do so since Dr. Tabe placed splints on those fingers. But three witnesses testified they saw the claimant, well after these visits with Dr. Tabe, in a hospital lobby

bouncing a baby on her knee, using both arms. Donna Jeffus specifically testified that the claimant was moving her fingers and arms, including the fingers and arm that the claimant now claims she cannot move. The claimant denied bouncing a baby and said the three witnesses were lying.

As outlined above, there are numerous significant conflicts between the testimony of the claimant and the other evidence of record. These conflicts are not trivial, for they concern the very heart of the nature and scope of the claimant's alleged injury and symptoms. Either she can extend and flex her fingers and left arm, or she cannot. Multiple witnesses testified they saw her doing what she claims she is physically unable to do as a result of her alleged injury – extend and flex her left arm and ring and middle fingers. Given these conflicts, I must find that the claimant is not a credible witness.

The only evidence establishing the claimant's account of how her injury occurred is her own testimony. Because I find her not to be a credible witness, and because there is no other direct evidence corroborating her account of her accident, I must 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 also failed to introduce evidence of objective findings verifying the existence and extent of her injury. Dr. Tabe testified that he observed

no objective findings of injury whatsoever, and the record fails to reveal any other objective findings. The only mention of swelling is from Dr. Daniel, who wrote on September 11, "There is minimal edema, if any, in her hand. I think she has improved with regard to her swelling and the overall appearance of her hand." The mention of "edema" is insufficient to prove the claimant's case, given Dr. Daniel's use of the qualifier "if any." It is not clear that he actually observed any edema. Likewise, though he implies that there was swelling prior to this visit – by noting improvement – none of Dr. Daniel's prior treatment notes make any mention whatsoever of swelling. I cannot ascertain whether Dr. Daniel's statement of improvement is based on his own prior observation of swelling, or on the claimant's subjective reports of swelling.

There is simply no persuasive evidence, other than her own testimony, that the claimant exhibited swelling in her hand. One x-ray mentioned a "possible" fracture, but later x-rays ruled out this diagnosis. I can find nothing else in the way of objective findings in the record herein. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that her injury is established by medical evidence supported by objective findings.

The claimant has failed to prove by a preponderance of the evidence two elements of a compensable injury – that the injury arose out of and in the course of

her employment, and that her injury is established by medical evidence supported by objective findings. Because the claimant has failed to prove these elements of compensability, I therefore conclude that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury.

Finally, even if I were to find the claimant's alleged injury to be compensable – a finding which I do not make – I would find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits. For most of the time since her injury, the claimant's doctors have released her to light or sedentary duty, and the respondents offered her work within these restrictions. The only time a doctor took her off of work was when Dr. Daniels took her off from September 4 through September 11. He specifically released her to return to sedentary work on September 11. Entitlement to temporary total disability benefits does not commence until the ninth day of disability. ARK. CODE ANN. § 11-9-501(a)(2). The evidence herein shows that the claimant was totally incapacitated from earning wages for no more than eight days – from September 4 through September 11.

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