

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306441/F306442/F311754

JANICE OSBORNE, EMPLOYEE

CLAIMANT

BAPTIST MEDICAL CENTER, EMPLOYER

RESPONDENT

**CROCKETT ADJUSTMENT,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED MAY 20, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on April 12, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Lewis E. Ritchey, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Gail K. Ponder Gaines, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 12, 2004, to determine various issues set out further below.

A prehearing conference was conducted on these multiple claims on March 3, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the March 3, 2004, Prehearing Order, except, concerning liability for a surgery performed during September, 2003, which both parties agreed should be amended to reflect shoulder surgery rather than a back surgery during September, 2003. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without

objection.

It was stipulated that the employment relationship existed between the parties at all relevant times, including August 13, 2002, April 14, 2003, and June 5, 2003; that the claimant sustained an admitted, compensable back injury on August 13, 2002, which was initially accepted as a medical only claim; that the claimant earned sufficient wages to entitle her to compensation rates of \$255.00 per week for temporary total disability and \$191.00 per week for permanent partial disability; that the respondent paid various medical and related expenses through July 8, 2003, as well as a three percent (3%) whole body impairment assessed by Dr. Barry Baskin; and that the respondent had controverted compensability of the alleged injuries on April 14, 2003, and June 5, 2003, in their entirety.

By agreement of the parties, the primary issue presented for determination was whether, in addition to the admitted injury, claimant sustained compensable injuries identifiable by time and place of occurrence on either April 14, 2003, and/or June 5, 2003. If overcome, claimant's entitlement to associated benefits must be addressed. Another issue concerned whether the claimant's physical problems and need for medical treatment were related to the admitted injury.

Claimant contended, in summary, that she sustained injuries to her back, leg, and shoulder on April 14, 2003, as well as June 5, 2003, which arose out

of and during the course of her employment with Baptist Health; that she was entitled to temporary total disability benefits beginning on or about September or October, 2003, and continuing through the present (the exact dates to be identified at the hearing); that respondent should be held responsible for all medical and related expenses, including, but not limited to shoulder surgery performed during September, 2003, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

The respondent contended that the claimant could not prove a compensable injury within the meaning of the workers' compensation laws on either April 14 or June 5, 2003, and controverted both claims in their entirety. Respondent further maintained that the claimant's subsequent course of medical treatment was totally unrelated to the August 13, 2002, admitted injury and that the claimant was not entitled to any benefits beyond those previously paid.

In addition to the claimant, she called Adina Jones as a corroborating witness. Gayle Snow McArthur and Rebecca Hollis were called as witnesses for the respondent. The record is composed solely of the transcript of the April 12, 2004, hearing containing numerous exhibits.

From a review of the record as a whole, to include medical reports, documents 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 made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. On August 13, 2002, claimant sustained a compensable back injury which arose out of and during the course of her employment with Baptist Health, at which time she earned sufficient wages to entitle her to compensation rates of \$255.00 per week for temporary total disability and \$191.00 per week for permanent partial disability.
3. Respondent has paid all appropriate benefits to which the claimant is entitled as the result of her August 13, 2002, admitted injury.
4. The claimant has failed to establish, by a preponderance of the credible evidence, that she sustained any injury as the result of a specific incident identifiable by time and place of occurrence on either April 14, 2003, or June 5, 2003, which arose out of and during the course of her employment with the respondent herein. Further, the claimant has failed to prove that she sustained a gradual onset injury to her back, leg or shoulder within the meaning of the Arkansas Workers' Compensation Laws.

5. The claimant has failed to prove, by a preponderance of the evidence, that her physical problems, need for treatment, and surgery beginning September, 2003, are in any way directly and causally related to the August 13, 2002, admitted injury or any subsequent work-related injuries and/or aggravations.
6. Respondent has controverted all benefits beyond those previously paid.

DISCUSSION

The record in this case is replete with inconsistencies and contradictions. I found the claimant's credibility to be extremely suspect, at best. Her testimony was uncorroborated by the lay witnesses or the medical evidence. Further, the claimant's course of conduct and failure to fully and adequately report her alleged complaints to supervisors and medical providers raises substantial doubt concerning whether her physical problems and need for treatment beginning on or about September, 2003, were in any way causally related to a work-related injury. A claimant's testimony is never considered uncontroverted. The testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The claimant, Janice Osborne, began working for the Baptist Medical

System in April, 1996. She last worked for the respondent on August 12, 2003. The claimant was employed as a nurse assistant. As will be discussed further below, the claimant requested that the employer terminate her employment in August, 2003. At the time of the within hearing, the claimant was working part-time at a Wendy's restaurant, approximately twenty-five (25) hours per week. The claimant stated that she had been working at Wendy's for approximately five (5) months. She maintained that she was only working part-time because of economic reasons and her physical limitations, although there was no evidence offered to corroborate this assertion. It is undisputed that the claimant sustained an injury on August 13, 2002, while working for the respondent. The record reflects that the claimant strained her back on August 13, 2002, while lifting a patient. At the time of the admitted injury, the claimant was working with Adina Jones, an RN Shift Supervisor. The claimant was initially seen by the hospital's clinic nurse who helped her fill out an accident report and promptly provided treatment, including medications and physical therapy at the hospital's clinic. The claimant was subsequently referred to Dr. Barry Baskin, an in-house physician. The claim was initially treated as a medical only claim and the claimant continued working while receiving as-needed treatment through the employer. The respondent exercised good faith in meeting its obligations under our workers' compensation laws by continuing to provide the claimant follow-up treatment.

The record reflects that the claimant's follow-up medical treatment was managed by Becky Hollis, its medical case manager. In fact, the claimant was seen by Dr. Frank H. Ma on April 14, 2003, for follow-up of her August, 2002, injury. As reflected by the claimant's contentions, she maintained that she sustained another injury on April 14, 2003, to her back, leg and shoulder, again while assisting Adina Jones in lifting a patient. The claimant maintained that she promptly reported the injury to both Ms. Jones and Becky Hollis; that she was initially seen in the emergency room on the day of the injury and that a follow-up appointment was made with Dr. Baskin. (Tr.16-19)

The hospital records reflect that the claimant's only complaint concerned her prior, low back strain and that continued, conservative treatment was recommended. The claimant was next examined and evaluated by Dr. Baskin on June 2, 2003, by referral of Ms. Hollis. Once again, Dr. Baskin's narrative report fails to reflect any additional injury, save the August 13, 2002, back injury. Nevertheless, Dr. Baskin recommended an MRI because that test had not previously been run to rule out herniated or bulging disc. Following an MRI, the claimant returned to Dr. Baskin on June 10, 2003, and received medication. Dr. Baskin saw the claimant on follow-up on July 8, 2003, at which time he opined that the claimant had reached maximum medical improvement related to the August, 2002, injury and assessed a three percent (3%) whole body impairment based on a very minimum disc bulge at L4-5. (Resp. Ex. A, pp.13-

16, 19, 22)

As reflected by the stipulations, aforementioned, respondent did not dispute the impairment rating assigned by Dr. Baskin and paid the claimant appropriate impairment benefits based upon Dr. Baskin's opinion while at the same time, disputing compensability of any subsequent injuries, specifically, April 14, 2003, and June 5, 2003.

The claimant maintained that she reported a second injury involving her right upper extremity to Adina Jones, Becky Hollis, as well as the emergency room clinic which was specifically disputed by Ms. Hollis, and is not contained in the ER report. The claimant pointed out that Ms. Hollis made an appointment for her to see Dr. Baskin and that she specifically complained to Dr. Baskin that she was having physical problems involving her upper extremity, but that Dr. Baskin advised her that he only treated back injuries, which I find to be extremely unlikely since Dr. Baskin, by reputation, treats the entire body and not just back injuries. The claimant further stated that she was advised by Ms. Hollis to follow-up with her family physician concerning the complaints with her arm and leg.

The claimant first saw her family physician, Dr. Wijewardane, on June 12, 2003. Dr. Wijewardane subsequently referred the claimant to Dr. Leo Gilliam who performed surgery on the claimant's right shoulder on September 11, 2003. (Tr.19-22)

Adina Jones was called as a corroborating witness for the claimant. Although I found Ms. Jones to be a credible witness, suffice it to say that her memory of any alleged incidents or injuries at the workplace was extremely poor. Ms. Jones did acknowledge that she issued a handwritten statement indicating that the claimant reported a work-related injury to her, describing that the claimant felt her shoulder pop while lifting a patient which Ms. Jones could not specifically recall. Ms. Jones admitted that she wrote the statement at the specific request of the claimant in September, 2003, rather than at any time, contemporaneous with the alleged event, in order to assist the claimant with her claim. However, Ms. Jones candidly admitted that she did not recall the alleged incident. In fact, she stated that she was first aware that the claimant was making a claim for a shoulder injury on or about September 22, 2003, when the claimant needed a statement. However, Ms. Jones specifically denied ever personally taking the claimant to the emergency room at any time, which was inconsistent with the claimant's testimony that Ms. Jones escorted her to the emergency room following the alleged injury.

Gayle Snow McArthur, a witness called by the respondent, is a RN for the respondent and one of the claimant's immediate supervisors. Ms. McArthur stated that the claimant never reported a work-related injury to her and that the only injury she was aware of concerned the August 13, 2002, back injury. Ms. McArthur stated that the claimant came to her and advised her that she was

going to require shoulder surgery while requesting that she be terminated for reasons which were not clearly explained. Ms. McArthur assisted the claimant in securing her termination papers. During her conversations with the claimant, the claimant never reported any work-related injuries involving her upper extremities.

Rebecca Hollis was also called as a witness for the respondent. Ms. Hollis is the medical case coordinator. She began coordinating the claimant's medical treatment following the August 13, 2002, admitted injury. Ms. Hollis stated that the only injury that the claimant ever reported was the August 13, 2002, back injury. Ms. Hollis pointed out that she frequently went with the claimant for medical examinations, including claimant's evaluations by Dr. Baskin and that the only complaints the claimant voiced concerned her back. She stated that the claimant did not complain about her upper extremity. Ms. Hollis related that she first learned that the claimant was claiming an upper extremity injury when she was contacted by the employer's third-party administrator. She further pointed out that all of the claimant's medical treatment involving the upper extremity problems was paid by the employer's health insurance provider, Heath Advantage.

The medical evidence, likewise, does not support a work-related shoulder injury. As previously pointed out, the claimant was primarily treated for her compensable back injury by Dr. Barry Baskin. The medical records reflect that

Dr. Baskin continued to treat the claimant following her alleged injuries of her April 14, 2003, and June 5, 2003, and that his medical records failed to reflect any additional complaints or injuries. Further, the company nurse failed to document any upper extremity injuries.

The claimant was subsequently examined by her family physician, Dr. Wijewardane, beginning June 12, 2003. Even Dr. Wijewardane's off-work certificates are self-contracting and confusing. On June 18, 2003, Dr. Wijewardane issued an off-work slip for the period beginning June 14, 2003, until June 22, 2003, noting the nature of the injury as back pain. However, in a subsequent return to work slip, dated September 23, 2003, Dr. Wijewardane took the claimant off-work from June 12 through June 18, 2003, with a return to work on June 19, 2003, for arm and shoulder pain while commenting that the patient was being referred to Dr. Gilliam for surgery. (Cl. Ex. A, p.2)

The aforementioned work slips appear self-contradicting. Clearly, the September 23, 2003, slip was issued at some time after Dr. Gilliam recommended surgery for a shoulder complaint, inconsistent with the initial complaint made to claimant's family physician of back pain.

I feel compelled to further point out that Gayle McArthur testified that during a period of time that the claimant was off-work on medical leave, she personally observed the claimant working at a Church's Chicken which further reflects on the claimant's credibility. The claimant did not deny this assertion.

Ms. McArthur stated that the claimant was frequently counseled because of her attendance problems. (Tr.66-67)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. *Arkansas Code Annotated §11-9-704(c)(4)*; *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Based upon a thorough review of the entire record, and, in view of the numerous inconsistencies and contradictions, I find that the claimant has simply failed to prove, by a preponderance of the credible evidence, that she sustained a compensable shoulder or upper extremity injury which arose out of and during the course of her employment. Further, the claimant has failed

to prove that her medical problems, need for treatment and disability were in any way causally related to the August 13, 2002, admitted injury. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge