

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308879

DEBRA PERROTTO

CLAIMANT

BEST WESTERN

RESPONDENT

COMMERCE & INDUSTRY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 8, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 10, 2004, in Fort Smith, Arkansas. A pre-hearing order was previously entered in this case on November 18, 2003. This pre-hearing set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they could not agree on the appropriate weekly compensation rates. Thus, this was made an additional issue for resolution. A copy of this pre-hearing order with that amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On June 21, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
2. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to her back on June 21, 2003.

2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from June 22, 2003 through a date yet to be determined, and attorney's fees.
3. The effect of Ark. Code Ann. §11-9-701 on all benefits accruing prior to August 25, 2003.
4. The appropriate weekly compensation rates.

In regard to these issues, the claimant contends:

"The claimant suffered an accidental injury to her low back arising out of and in the course of her employment on June 21, 2003. That claimant is entitled to temporary total disability payments from June 23, 2003 through a date yet to be determined. That claimant is entitled to reasonable and necessary medical care for her injury. That claimant is entitled to maximum statutory attorney's fee on all benefits awarded."

In regard to these issues, the respondents contend:

"Respondents contend the claimant did not suffer a compensable injury on or about June 21, 2003. Further, respondents contend the claimant failed to give notice of any alleged injury until filing a Form AR-C and that respondents should not be liable for payment of any benefits until they received actual notice in the event compensability is found in this matter."

### DISCUSSION

\_\_\_\_\_The central issue in this case is the question of whether the claimant sustained a "compensable injury" to her back or lumbar spine on June 21, 2003. The burden rests upon the claimant to prove the occurrence of such an injury.

In order to meet this burden, the claimant must first present sufficient evidence to satisfy Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injury or condition alleged to be compensable. Further, she must prove that the existence of this physical injury or condition is supported by "objective findings" as that term is defined in Ark. Code Ann. §11-9-102(16). In order to represent "objective" findings, the findings must be independently

observed and must be based upon factors beyond the claimant's voluntary control.

After consideration of all the evidence presented, it is my opinion that the claimant has satisfied the initial requirements of Ark. Code Ann. §11-9-102(4)(D). Specifically, she has proven by the medical evidence, which is supported by objective findings, the actual existence of a physical injury or condition involving the lumbar area of her back. The various medical reports and records of the Sparks Regional Medical Center emergency room and the Good Samaritan Clinic diagnosed the presence of a physical injury or condition involving the claimant's low back or lumbar spine. The diagnosis of the presence of this physical injury or condition is supported by objective findings, in the form of muscle spasms in the claimant's back, muscle atrophy of the claimant's right calf, a decrease in lumbar lordosis (indicative of muscle spasms or splinting), and most importantly, abnormalities shown on the MRI study of July 29, 2003.

Next, the claimant must prove that this medically established and objectively documented physical injury or condition satisfies the definitional requirements for a "compensable injury", contained as in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury or condition must have arose out of and occurred in the course of the claimant's employment.
- (2) The physical injury or condition must have been caused by a specific incident.
- (3) The physical injury or condition must be identifiable by time and place of occurrence.
- (4) The physical injury or condition must have resulted in internal or external physical harm to the claimant's body.
- (5) The physical injury or condition must have required medical services and/or resulted in disability.

The claimant's testimony is the only direct evidence presented to satisfy the first three of these foregoing definitional requirements. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If such

testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident or event and to show a close temporal relationship between this incident or event and the initial onset of symptoms, which would be indicative of the occurrence of the diagnosed physical injury or condition. Her testimony would also be legally competent to establish that she had not previously experienced any similar difficulties or symptoms, and that she had not been involved in any subsequent incidents or engaged in any subsequent activities that appeared to precipitate or aggravate her symptoms.

However, after consideration of all the evidence presented, it is my opinion that the claimant's testimony lacks sufficient credibility to prove these necessary facts. Her testimony is inconsistent and is in conflict with other more credible evidence presented.

In her testimony, the claimant initially denied that she had ever experienced any prior back injuries, that she had ever had any prior medical treatment for back difficulties, or that she had ever even felt the need for any treatment for back complaints. She also expressly denied that she had ever sustained a fracture of her "tailbone". She finally, denied any prior employment related injuries.

However, she subsequently conceded that she had fallen on at least three separate occasions (two at the Waffle House and one "outside" during an ice storm) and in each case had "knocked her tailbone out of place". She stated that she would simply go to the doctor and that the doctor would "put her tailbone back into place". She also conceded that she had fallen a fourth time, when she was pushed down in a bar, but only injured her head.

The medical evidence shows that on December 18, 2000, the claimant was seen at the emergency room of Sparks Regional Medical Center for complaints of back pain after a fall while dancing the previous day. X-rays performed, at that time, revealed the

presence of a non displaced sacral fracture, which that may or may not have been recent.

The record shows that following her alleged injury of June 21, 2003, the claimant did not seek any medical treatment until July 6, 2003. At that time, she was seen at the emergency room of Sparks Regional Medical Center. Although these records indicate that the claimant's complaints had been present for two weeks, none of these records give a specific date for the onset of her symptoms. Although these records also show that the claimant experienced a "recent injury" while "lifting" and "turning", they do not specifically describe any particular incident and do not indicate where this injury occurred (home, work, school or other).

Although the records for the claimant's visit on July 6, 2003, note that the claimant denied any history of back problems, these same records also relate that the claimant's current symptoms and pain are similar to prior back pain.

The subsequent records, from the claimant's visit on July 10, 2003, note a history of chronic back pain and a history of prior episodes of back pain. Again, there is no detailed description of any specific incident or injury or any indication that such an injury occurred while the claimant was at work. The records from the claimant's emergency room visit on July 22, 2003, contain a history of back pain of two weeks duration, but indicate no recent injury and a past history of episodes of back pain.

All of these records are clearly inconsistent with the claimant's testimony that she advised all the personnel she saw at Sparks Regional Medical Center of her employment related incident and the contemporaneous onset of her back complaints. I find it difficult to believe that all of the various personnel recording these histories, particularly the admission clerk, would have repeatedly failed to note such important information. It is also difficult to conceive that many of the individuals involved in the claimant's visits to Sparks Regional Medical Center would have repeatedly made the same error and noted a prior history of chronic and episodic back problems with similar symptoms.

The claimant subsequently sought medical services for her back and radicular complaints from physicians at the Good Samaritan (free) Medical Clinic. The claimant was initially seen at that facility on August 19, 2003. At the time of her initial visit, there was again no history recorded of any employment related incident or event as precipitating her back difficulties. It is difficult to conceive that this important information would again have been omitted by the personnel at this clinic.

The first history of an employment related incident, similar to that described in her testimony, is noted on the claimant's second visit to the Good Samaritan Clinic on September 11, 2003. This would have been her first visit after the filing of her workers' compensation claim.

The respondents called two witnesses to refute the claimant's testimony, in regard to her notifying the respondent of the occurrence of the alleged compensable injury. These witness were Marilyn K. Pennington, the comptroller for the respondent, and Sherica Miesha Ell, the respondent's front desk manager. Both of these witness testified that the claimant did not report any employment related incident or injury to them. Ms. Ell testified that she had the opportunity to observe the claimant, during her period of employment with the respondent, and that she did not observe the claimant exhibiting any visible signs of difficulties with her back, during her period of employment.

Neither party called Tammy Perkins (the motel manager at the time of the claimant's alleged employment related injury), Pat ? ( the housekeeping supervisor), and Sarah ? (a co-worker in housekeeping). The claimant had testified that these were the individuals she informed about her back difficulties and her employment related injury. Curiously, in her direct testimony, the description of the injury she subsequently describes that she gave to these individuals differs from that described in her testimony. In her direct testimony, the claimant states:

"I was talking to a new girl named Sarah and I told her, I said, 'boy, I should have done had my rooms done, but I've hurt my

back somehow so bad somewhere'. (Emphasis mine)

The evidence presented indicates that the claimant was terminated by the respondent, on June 25, 2003, for reasons unrelated to her alleged injury. Records maintained by the respondent, in regard to this termination bear the signatures of Pat McNamara and Tammy Perkins. The reasons given for this termination are listed as misconduct and insubordination. There is no mention in any of these forms of any reported employment related injury.

There is also testimony by the claimant about personnel at Sparks Regional Medical Center attempting to obtain authorization for her treatment from some representative of the respondent. All of the respondent's witnesses denied that they had any conversation with any personnel at Sparks Regional Medical Center concerning the claimant's receipt of medical services from that facility in July of 2003. A review of the medical records from this facility would indicate that such a conversation, as described by the claimant, would be highly unlikely. As previously noted, there is no mention in any of these records that the claimant had reported her back difficulties as being attributable to an employment related injury. In fact, the various cover sheets for these visits even show the claimant's occupation as "unemployed". There is no information on any of these records that would indicate that Sparks Regional Medical Center was in any way aware of the claimant's prior employment with the respondent. Based upon the information contained in the Sparks Regional Medical Center emergency room records there would simply be no reason for any personnel at that facility to seek authorization from the respondent for the services being provided the claimant.

Once again, it is difficult to conceive that the claimant ever reported to any of the personnel at the Sparks Regional Medical Center emergency room that her difficulties were work related. The admission clerks at that facility would have responsibility for obtain authorization for treatment and are also charged with obtaining from the patient the

“responsible party” and making a notation in this regard on the appropriate forms. The intake personnel at this facility have a well known reputation for making detailed inquiry in regard to insurance and method of payment, before any services are provided. I find it impossible to believe that they would have failed to note the claimant reporting these difficulties as being attributable to a work related injury or that the respondent was the possible “responsible party” or “payer” on every one of the admission sheets for the claimant’s three visits.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between an employment related “specific” incident on June 21, 2003, and any physical injury to her back or lumbar spine. Thus, she has failed to prove the first three essential requirements for a “compensable injury” contained in Ark. Code Ann. §11-9-102(4)(A)(i). Her failure to prove these three necessary requirements compels a finding that she has failed to prove that she sustained a “compensable injury” to her back or lumbar spine on June 21, 2003.

At this point, I would also address the issue of the appropriate compensation rates, should such benefits have been awarded. Although my decision concerning the issue of compensability has effectively made this issue moot, I feel that this matter also has a bearing on the claimant’s credibility.

The claimant testified that she was hired to work for more than a forty hour week at \$5.50 per hour. She further testified that during the period of her employment with the respondent she actually worked a significant amount of overtime, but was never paid for this overtime work.

This testimony, is expressly contradicted by the testimony of Ms. Pennington. Ms. Pennington testified that employees such as the claimant, were not guaranteed any specific number of hours per week, but usually worked between 30 and 35 hours per week. Most importantly, the payroll records of the respondent, covering the claimant’s brief period

of employment from mid May 2003 through June 23, 2003, show that the claimant never exceeded 68 hours for any two week period and averaged 65 hours per two week period. I find it inconceivable to believe that the claimant would actually worked an excess of 40 hours per week during any of these periods (as she testified) and make no complaint when she was never paid for more than 34 hours.

In regard to this issue, I find that the greater weight of the credible evidence establishes that the claimant's average weekly wage, during her period of employment with this respondent was \$178.98. This would yield an appropriate weekly compensation rate of \$119.00 for both total and permanent partial disability, should such benefits have been appropriate.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 21, 2003, the relationship of employee-employer-carrier existed between the parties.
3. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a compensable injury to her back or lumbar spine on June 21, 2003. Specifically, she has failed to prove by the greater weight of the credible evidence that on that date she sustained a physical injury to her back or lumbar spine that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
4. The respondents have denied the occurrence of any compensable injury to the claimant's back or lumbar spine and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge