

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404665

DEMETRIUS L. PRICE

CLAIMANT

HESTER'S FAMILY RESTAURANT

RESPONDENT EMPLOYER

TRAVELERS

RESPONDENT CARRIER

ORDER AND OPINION FILED DECEMBER 1, 2004

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JAMES S. STREET, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on September 24, 2004. A prehearing conference was held on July 14, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

The parties agreed to the following stipulations:

1. There was an employer/employee relationship on about May 13, 2004.
2. The claimant's average weekly wage was \$280.

The claimant contends he sustained a compensable injury on May 13, 2004 and is entitled to medical benefits and temporary total disability benefits from May 14, 2004 until July 5, 2004 and attorney's fees.

The respondents contend the claimant did not sustain a compensable injury on the alleged date and the claim has been controverted in its entirety.

Issues to be litigated:

1. Compensability
2. Medical benefits
3. Temporary total disability benefits
4. Attorney's fees

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. There was an employer/employee relationship on about May 13, 2004.
2. The claimant's average weekly wage was \$280.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on or about May 12, 2004.
4. The respondents are responsible for the two emergency room visits and the prescribed medication resulting from the visits.

5. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from May 14, 2004 through a date to be determined.

DISCUSSION

The claimant, 36 years old, was working as a cook on May 13, 2004 and was breaking down the salad bar and washing the pots and pans. While the claimant was washing the pots and pans bent over, as he raised up, he felt a sharp pain across his back but he continued to work. The last task he had to finish that shift was to pick up a container of frozen catfish to place in the refrigerator. The claimant was unable to pick up the container of catfish and had to have assistance. According to the claimant, he reported his back problem to Mr. Atkerson and advised he might not be able to come in the next day. According to the claimant, his wife, Carrie, was there with Mr. Atkerson and heard him tell Mr. Atkerson he had hurt his back. The claimant began working at the restaurant in February 2004 and was paid in cash either daily or weekly.

The claimant testified that he was not able to walk the three blocks home the night of the injury; he had a co-worker, James, take him home and afterwards he took a hot bath. The claimant's wife had to help him out of the tub and help him get out of bed the next day. According to the claimant, he went by bus to the emergency room the next day and received a steroid shot and some pain pills. The claimant returned to his employer and was told to take a few days off and come back in on Sunday to check the schedule. When the claimant returned to work on Sunday, the employer had replaced him. The claimant returned to the emergency room on Wednesday after experiencing sharp pains and muscle spasms, as well as pains down his leg, and received another

prescription of medication. By the third week of June, the claimant's back was improving.

According to the claimant, he began looking for work and began working at Lucky's restaurant on July 5, 2004, and worked there two months and left because of disagreements with the manager. The claimant has been working day labor since then. The claimant stated that his back had improved and occasionally feels stiff and he might get a spasm on occasion. The claimant would like a follow-up visit with a doctor to determine if any additional treatment is needed.

Carrie Price, wife of the claimant, testified that she was talking to Mr. Chuck on May 13, when her husband came out bent over and he told her and Mr. Chuck that he had hurt his back picking up something to put in the refrigerator. According to Ms. Price, Mr. Chuck told him that if he could not work the next day, he would get James to work in his place.

Chuck Atkerson, owner of Hester's Restaurant, testified that his ledger showed the last day the claimant worked was Wednesday, May 12, 2004. Mr. Atkerson testified that the claimant did not tell him at the end of a work day that he had hurt his back. The claimant did come to the restaurant using a cane at some point. Mr. Atkerson recalled that he and his wife worked on Thursday, May 13, 2004, and his ledger of hours people worked did not reflect any hours for the claimant on May 13, 2004. Mr. Atkerson attempted to explain how his ledger sheet worked and the initials of the employees receiving cash; however, the procedure was confusing, since he was attempting to explain the procedure of his wife who was the actual bookkeeper. While

the ledger showed initials of the employees, the claimant testified that he did not ever initial the ledger sheet, he would sign a restaurant ticket when he was paid cash.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The medical evidence corroborates the claimant's account that he first sought medical treatment on Friday, May 14, 2004, with back pain. The history in the medical reveals that the claimant first began having back pain on Wednesday evening while washing dishes. The claimant sought additional medical treatment on May 20, 2004 and the physical examination revealed paraspinal spasms and pain medication was prescribed, as well as a recommendation to seek an evaluation by a neurosurgeon.

After considering the credible evidence, I find the claimant has proven by a preponderance of the evidence that he sustained a compensable injury in May 2004, while in the course and scope of his employment. The claimant presented a plausible

account of reporting a back injury to his employer at the end of his evening shift and the claimant's wife was present when the report was made. There was some discussion whether this happened on Wednesday, May 12, 2004, or Thursday, May 13, 2004. The employer's records indicate that the claimant last worked on May 12, 2004 and the first medical report documents that the claimant reported the onset of problems on Wednesday evening, May 12, 2004. The medical records document muscle spasms, which satisfy the objective findings criteria of Ark. Code Ann. §11-9-102(16). The claimant took some medication and remained off work for a period of time and his testimony indicated that his back had improved and he was experiencing minor problems at the time of the hearing. I find respondents are responsible for the two emergency room visits and the medication prescribed at these visits. I find additional medical is not reasonable or necessary.

The claimant also contends that he remained in his healing period and was unable to work from May 14, 2004, to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant did seek medical attention following his work injury; however, the medical evidence does not indicate that the claimant had been advised to remain off work. In fact, the claimant presented testimony that he returned to his employer on Sunday, May 16, 2004, to see what hours he was supposed to work. The employer had filled his position at that time so the claimant did not return to work for the respondent employer. I find the claimant has failed to prove by a preponderance

of the evidence that he remained in his healing period and was totally unable to work from May 15, 2004 to a date to be determined.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on or about May 12, 2004. The respondents are responsible for the two emergency room visits and the prescribed medication resulting from the visits. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from May 14, 2004, through a date to be determined.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**