

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302985

CYNTHIA L. BAILEY,
EMPLOYEE

CLAIMANT

CARE MANOR OF BAXTER COUNTY,
EMPLOYER

RESPONDENT

HCF TRUST,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 17, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 2, 2005 in Mountain Home, Arkansas. A prehearing order was entered in this case on September 10, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the hearing and are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's average weekly wage was \$266.90 yielding a total disability rate of \$178.00 per week and a permanent partial disability rate of \$154.00 per week.

By agreement of the parties in the prehearing conference, the issues to be litigated at the present time were limited to the following:

1. Did claimant sustain a compensable right knee injury on March 5, 2003?
2. Is claimant entitled to temporary total disability from March 11, 2003 to a date yet to be determined?
3. Is claimant entitled to medical benefits?
4. Is claimant entitled an attorney's fee?
5. Respondent alleges that any medical benefits provided prior to notice should not be the responsibility of the respondents.

The record consists of the March 2, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION**A. Evidentiary Objections**

On page 49 of the hearing transcript, Ms. Worley objected to Ms. Bailey's testimony regarding comments allegedly made by co-workers when she asked for assistance with the resident, Pearl, with whom the claimant was working at the time she alleges she sustained a work-related injury. I find that the comments of the co-workers as testified to by Ms. Bailey are hearsay, as Ms. Worley asserts, and the testimony regarding those comments on page 48 of the hearing transcript will not be considered in rendering a decision in this case.

On page 62 of the hearing transcript, Ms. Worley objected to Mr. Spencer's proffer of Ms. Bailey's July 14, 2003 deposition testimony being offered into the record. I note that Ms. Worley questioned Ms. Bailey out of that deposition. I further note that Melissa Wheatley represented the respondents and cross-examined Ms. Bailey during the course of that deposition, and I note that the deposition testimony was taken much more contemporaneous to the events at issue than was the hearing conducted on March 2, 2005. Under these circumstances, I find that the

deposition testimony should be accepted into evidence, and Claimant's Proffered Exhibit No. 2 will be considered in rendering a decision in this case.

B. Compensability

The claimant contends that she sustained an injury to her knee while moving Pearl, a resident of Care Manor of Baxter County, at work on March 5, 2003. To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, there is no dispute that Ms. Bailey has experienced internal harm to the body, a medial

meniscus tear, which required medical services and resulted in disability. The medial meniscus tear is established by medical evidence and supported by objective findings, including Dr. McBride's March 27, 2003 surgical observations. The threshold issue in the present case is whether the medial meniscus tear arose out of and in the course and scope of Ms. Bailey's employment. Stated another way, the threshold issue is whether Ms. Bailey's knee injury was caused by an incident in Pearl's room, or was instead sustained away from work.

In this regard, the record establishes that Ms. Bailey worked second shift at Care Manor on March 5, 2003, the day on which she asserts that she sustained her injury in Pearl's room. Ms. Bailey was off work March 6, 2003, then worked the third shift at Care Manor on March 7, 2003. Ms. Bailey testified that on the day the injury occurred, her knee popped while she was moving the resident, Pearl. Ms. Bailey testified that she was hit with pain, that her pain continued, and that night, after she had slept a couple of hours, she got up and her knee "was really on fire".

According to Ms. Bailey, she told the people at the nurses' station at work on March 5, 2003 that her knee had

popped and was hurting, and according to Ms. Bailey, she was told to go sit down, prop up her knee, take a break, and see what she could do. Ms. Bailey testified in her deposition that when she worked the third shift on Friday, her co-workers let her do a lot of sit-down work because she was hurt. According to Ms. Bailey, she was ready to go home by 2:00 a.m. on the 10 - 6 shift, and all she could do was answer the phone and try to keep up with the "easies".

There is no dispute that Ms. Bailey, Ms. Linda Malone (the care plan coordinator in March 2003), Fran Guptell (Ms. Bailey's supervisor), and apparently others drove to Tunica on March 9, 2003 and returned home that same day.

Notwithstanding Ms. Bailey's testimony regarding a knee pop and continuous knee pain at work identified for co-workers prior to going to Tunica, I note that the Emergency Room report from Baxter Regional Medical Center for March 10, 2003 contains a history on Page 2 of Respondent's Exhibit No. 1 indicating that Ms. Bailey twisted her right knee in Tunica yesterday (the day before presentation) and makes no reference to any alleged work-related injury or any alleged knee symptoms prior to twisting her knee in Tunica. Likewise, I note that another history performed that same

day contained on Page 1 on Respondent's Exhibit No. 1 likewise indicates that Ms. Bailey's right knee pain started yesterday (the day before presentation) and that she was experiencing severe pain. Therefore, the initial contemporaneous medical report contains two recordings of a history inconsistent with Ms. Bailey's testimony that her knee problems actually began with an incident in Pearl's room some five days earlier at work rather than the previous day in Tunica.

In assessing the weight to accord Ms. Bailey's testimony, I note that Ms. Bailey was aware of the procedures for reporting a work-related injury, and I note that Ms. Bailey did not report a work-related injury in this case until March 12, 2003. I also observe that Ms. Bailey was informed at the Emergency Room on March 10, 2003 that she had a knee condition which required treatment by an orthopedic specialist, and I note that, coincidentally, the first report of any alleged work-related injury to a physician, as recorded in the medical record, occurred in a history taken in Dr. McBride's office on March 11, 2003. Therefore, I note that the history contained in the medical reports between March 10, 2003 and March 11, 2003 changed

after Ms. Bailey was informed by a doctor that her knee injury was sufficiently severe to require treatment by a specialist.

When questioned by Ms. Worley regarding the March 10, 2003 notation of a knee twist in Tunica, I do not find credible Ms. Bailey's explanation that the doctors simply recorded an inaccurate history in the Emergency Room because "they're so busy."

Linda Malone, the care plan coordinator at Care Manor in March of 2003 testified at the hearing held on March 2, 2005. Ms. Malone testified that she worked different shifts from Ms. Bailey, had the following recollection regarding Ms. Bailey and an injury:

Q. Okay. Tell me this, if you will, please, ma'am. Did Ms. Bailey, the day after the accident or did you know about the injury, though you didn't witness it, did you know about her having an injury on the job lifting a patient?

A. Yes.

Q. Was there in fact a patient there named Pearl who weighted approximately 260 pounds?

A. Yes.

Q. And did you observe Cynthia after the injury in terms of her limitations, her problems?

A. Yes.

Q. Tell the Judge what you observed and what Cynthia told you about her knee.

A. Well, it was obvious that she was in pain. My husband went with us to Tunica, and he would have to go get the car 'cause she wasn't able to walk. Like we'd go from one casino to the other, and it was, she couldn't walk back to the parking lot, so he would just go get the car so it wouldn't hurt her so bad.

Q. Okay. Did she tell you about the injury with Pearl?

A. Yeah, she - - yeah.

On this record, I am simply unable to ascertain when Ms. Bailey may have first indicated to Ms. Malone that she in fact experienced an alleged injury working with Pearl, and I note that when Mr. Spencer asked Ms. Malone to testify to what Ms. Bailey told her about her knee, Ms. Malone's response in the quoted testimony above initially related only to her observations in Tunica. Frankly, Ms. Malone's testimony regarding her observations of Ms. Bailey in Tunica appear to me to be more consistent with the history recorded by the Emergency Room physician on March 10, 2003 than with the history recorded by medical personnel on March 11, 2003. In addition, I feel compelled to note that Ms. Malone was terminated by Care Manor approximately two months before the hearing held in this case.

I accord greater weight to the histories contained in the Emergency Room reports from March 10, 2003 than the weight I accord the testimony of Ms. Bailey and Ms. Malone on when Ms. Bailey's knee injury occurred which sent her to the Emergency Room on March 10, 2003. Therefore, the greater weight of the credible evidence persuades me that Ms. Bailey's knee injury occurred in Tunica on March 10, 2003, and she therefore failed to prove by a preponderance of the evidence that she sustained a compensable knee injury which rose out of and in the course of her employment with Care Manor or which was caused by a specific incident on March 5, 2003 as she asserts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.

2. The claimant's average weekly wage was \$266.90 yielding a total disability rate of \$178.00 per week and a permanent partial disability rate of \$154.00 per week.

3. The claimant has failed by a preponderance of credible evidence that she sustained a compensable knee injury. Specifically, a preponderance of the credible evidence establishes that the claimant's knee injury

occurred on March 9, 2003 in Tunica and not on March 5, 2003 at work as she asserts.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge