

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F500539

ROSE BIGGERS, Employee	CLAIMANT
SOUTHER PERSONNEL MANAGEMENT, INC., Employer	RESPONDENT
WAUSAU INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 28, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JAMES R. FILYAW, Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On June 13, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 23, 2005, and a pre-hearing order was filed on March 24, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed among the parties on April 30, 2004.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$218.30 which would entitle her to compensation at the rate of \$146.00 for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to neck and back.
2. Related medical.

3. Temporary total disability benefits from September 2, 2004 through a date yet to be determined.

4. Attorney fee.

5. Notice.

The claimant contends that the injury to her neck and back were incurred in the course of her employment and that she is entitled to related medical, temporary total disability benefits, and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury which arose out of and in the course of her employment with Charleston Super Stop/Southern Personnel Management, Inc. As an affirmative defense, the respondents will contend that if the claimant sustained a compensable injury on or about April 30, 2004, she failed to give notice until September 8, 2004 and is barred from receiving any benefits prior to giving notice.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 23, 2005 and contained in a pre-hearing order filed March 24, 2005, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$218.30 which would entitle her to compensation at the rate of \$146.00 for temporary total disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that she

suffered a compensable injury to her neck and/or back.

FACTUAL BACKGROUND

The claimant is a 49-year-old woman who was apparently sent by the respondent to work at the Charleston Super Stop on or about January 13, 2004. The Charleston Super Stop is a convenience store with a gas station. It also has a cold deli, hot deli, taco bar, pizza, and salads. Claimant's job duties for the Super Stop included running the cash register, preparing food, stocking ice, setting up tables for lunch, and stocking the cooler.

According to the testimony of the claimant and other witnesses, a number of people stop at the Super Stop to eat lunch. In order to accommodate these individuals three additional tables are set up with four chairs each on a daily basis. According to Joyce Cloven, one of the co-owners of the Super Stop, these tables are a typical table one would set up at a church function.

Claimant testified that she began noticing problems with pain in her right arm at the end of April 2004 and that she sought medical treatment on approximately May 2, 2004. The medical reports reflect that claimant was seen at Sparks Preferred Medical on April 19, 2004 complaining of pain in the right shoulder and right elbow. Claimant gave a history of the pain having existed for approximately two months with no history of injury.

Claimant testified that she mentioned her arm problem and her doctor's appointment to Joyce Cloven, but she did not indicate that it might be work related until a later date such as late August or early September 2004. The medical reports indicate that claimant was eventually referred to Dr. Arthur Johnson, neurosurgeon. Dr. Johnson's medical report of September 7, 2004 indicates that claimant's MRI scan of the cervical spine reveals a herniated disc at the C5-6 level. Dr. Johnson ordered physical therapy and medication.

Claimant testified that she last worked for the respondent on approximately September 1, 2004.

Claimant has filed this claim contending that she suffered a compensable injury to her neck and back as a result of her employment at the Charleston Super Stop. She seeks payment of medical treatment as well as temporary total disability benefits and a controverted attorney fee.

ADJUDICATION

_____ Claimant testified that she did not suffer a specific injury to her cervical spine while employed by the respondent. Instead, claimant admitted that her injury was a gradual onset injury which she attributes to the setting up and taking down of tables for the respondent's lunch business. The Supreme Court of Arkansas concluded in *Hapney v. Rheem Manufacturing Company*, 342 Ark. 11, 26 S.W. 3d 777 (2000) that the neck is not part of the back for purposes of determining the elements of establishing a gradual onset injury. Therefore, in order to establish a compensable gradual onset injury, claimant has the burden of proving by a preponderance of the evidence that she suffered an injury (1) which arose out of and in the course of her employment, (2) which caused internal or external physical harm to the body requiring medical services or resulting in disability, (3) which was caused by rapid repetitive motion, and (4) which was the major cause of her disability or need for medical treatment. In addition, claimant must offer medical evidence supported by objective findings establishing an injury. *Hapney, supra*.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that her injury was caused by rapid repetitive motion. Here, claimant attributes her neck problems to her job duties of setting up tables and chairs for the respondent's lunch business. The evidence presented indicates that the respondent sets up three tables with four chairs to a table for its lunch business. These tables are set up only once each day and are taken down only once each day. While

claimant testified that there were some weeks when she set up the tables every day - five days a week, claimant also testified that there were other weeks when she would set the tables up only 4, 3, or even 0 times per week. Testifying on behalf of respondent was Joyce Cloven, the co-owner of the Charleston Super Stop. Cloven testified that she was present every day when the tables and chairs were set out. According to Cloven's testimony, claimant did not set up the tables and chairs any more than the other employees.

The medical records indicate that claimant gave a history to Dr. Johnson of setting up the tables "frequently" and to the physical therapist as lifting "tables constantly." I do not find based upon the evidence presented that claimant frequently set up tables or that she constantly lifted tables. Instead, the evidence does indicate that claimant's job duties required her to set up three tables with four chairs some days. While this may have occurred up to five times in some weeks, by claimant's own testimony it also occurred zero times in some weeks. Nevertheless, I do not find from my review of the evidence that claimant's job duties with the respondent including the setting up of the three tables and four chairs to a table involved rapid repetitive motion. Furthermore, even if claimant's other job duties were considered in conjunction with the setting up of the tables, I do not find that claimant's job duties required rapid repetitive motion.

Even if one were to interpret claimant's job activities as involving rapid repetitive motion, I still find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered an injury which arose out of and in the course of her employment with the respondent. Claimant testified that while she mentioned an arm problem to Joyce Cloven, she did not indicate that her condition might be work related until late August or early September. In fact, claimant testified that it was only after she was diagnosed with a herniated disc that she informed Joe Cloven, the other co-owner of the Charleston Super Stop, that she had injured her neck lifting tables and

needed to file a workers' compensation claim. According to the testimony of Joyce Cloven, claimant did not request any workers' compensation benefits until she discovered surgery was necessary. Finally, I believe it is important to note that according to claimant's testimony, her cervical problems worsened even after she quit setting up tables at the Super Stop.

In summary, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine while employed by the respondent. First, I find that claimant has failed to prove by a preponderance of the evidence that her injury was caused by rapid repetitive motion. Second, I find that claimant has failed to prove by a preponderance of the evidence that her injury arose out of and in the course of her employment with the respondent. Accordingly, I find that claimant has failed to meet her burden of proof.

With respect to the claimant's cervical injury, I believe it is important to note that the General Assembly during its most recent session changed the law with respect to cervical spine injuries such that it will no longer be necessary to prove rapid repetitive motion. However, that law is not yet in effect. The date a statute becomes effective was discussed in *Stroud v. Cagle*, ____ Ark. App. ____, ____ S.W. 3d ____ (June 23, 2004) wherein the Court stated:

Pursuant to Amendment 7 of the Arkansas Constitution, Acts of the General Assembly that do not contain an emergency clause or a specified effective date become effective on the ninety-first day after the legislature adjourns. *Kate v. Bennett*, 341 Ark. 829, 20 S.W. 3d 370 (2000).

The General Assembly's changing of the law with regard to cervical spine injuries was adopted as Act 1250. Act 1250 does not contain an emergency clause or a specified effective date. Therefore, it does not become effective until the 91st day after the legislature adjourns. The Arkansas legislature adjourned on May 13, 2005. Accordingly,

Act 1250 is not yet effective.

Finally, I also note that claimant contended that she suffered a compensable injury to her back as a result of her employment with the respondent. While the September 7, 2004 medical report of Dr. Johnson does indicate complaints of mid-back pain, there are no objective findings with regard to any back complaints. Absent objective findings of an injury to the claimant's mid-back, claimant cannot prove a compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her cervical spine and/or back while employed by the respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE