BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F310829

BECKY BOERNSON, EMPLOYEE **CLAIMANT**

ZAC BAC APPAREL,
UNINSURED EMPLOYER **RESPONDENT**

OPINION FILED FEBRUARY 24, 2005

A hearing in this case was conducted on October 7, 2004 and continued on December 2, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Jason Hatfield, Attorney at Law, Fayetteville, Arkansas.

Respondent was represented by Jerry D. Patterson, Attorney at Law, Marshall, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on July 27, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations. The first stipulation is set forth in the Prehearing Order and was confirmed by the parties at the hearing; the remaining two stipulations were agreed to at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on October 1, 2003, and at all other relevant times.

2. Claimant's average weekly wage was $280.00.

3. Respondent controverts this claim in its entirety.

At the October 7, 2004 hearing, the parties discussed the issues set forth in the

Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury on October 1, 2003.

2. Whether Claimant is entitled to reasonably necessary medical treatment.

3. Whether Claimant is entitled to temporary total disability benefits from October 1, 2003 to a date to be determined.

4. Whether Claimant is entitled to an attorney's fee for controversion.

Claimant contends that she sustained a compensable injury on October 1, 2003 involving her neck, low back, and right knee. She argues that she is entitled to medical treatment and temporary total disability benefits, as well as an attorney's fee. Respondent contends that Claimant's injury did not arise out of and in the course of her employment.

THE RECORD

At the October 7, 2004 hearing, Respondent offered a series of statements for admission into the record, marked collectively as Respondent's Exhibit #3. Claimant objected. Respondent was allowed to proffer the statements, with the understanding that a ruling would be made on their admissibility at a later time. At the December 2, 2004 hearing, I ruled that Respondent's Exhibit #3 is not admissible. Respondent then offered to withdraw these statements, which was permitted. The Court Reporter indicated that her preference was to not keep exhibits that had been withdrawn.

Contrary to the foregoing, a review of the record indicates that the statements of Bonnie Treat, dated November 5, 2003; Kim Oliver, dated October 20, 2003; Betty Branscum, dated October 20, 2003; and Michael R. Jorgensen, dated October 20, 2003, are included in the record. These statements were not admitted into evidence, are not

considered to be a part of the record, and were not considered in the preparation of this opinion.

DISCUSSION

A. Compensability of the Claim

Claimant began working for Respondent on April 29, 2002. Her job primarily consisted of sewing "center fronts," the strip of cloth where button holes are located, on to shirt fronts. She would retrieve bundles of shirt fronts, take them to her work station, match them to the correct strips, sew the strips to the shirt fronts, and then retrieve additional bundles while another employee took her finished products. Claimant testified that the distance between her work station and the location of the shirt front bundles was about ten steps; another employee testified that the distance is five feet four inches. No testimony mentioned any heights, steps, sharp corners, or similar conditions along this route.

A bundle of shirt fronts similar to the type handled by Claimant was introduced as Respondent's Exhibit #4. Claimant did not know exactly how much a bundle weighed, but she explained: "[T]hey're just half of a shirt. They're not heavy. I'd say maybe ten, fifteen, twenty pounds. I don't know."

On September 27, 2003, Claimant injured herself at home.

> On Saturday, my husband and my son were outside, and I was cleaning house. And I reached over to pick the trash out of the trash can. And we're talking a ten to thirteen gallon trash bag. And I set it down for my son to come get it and take it out. Well, I had a -- just, I don't know, a twinge. It didn't really hurt that bad right then, and it was like a -- I don't know. I'm not a doctor. It just hurt. But it progressed to hurting, hurting worse.

Claimant mentioned this incident to a number of her fellow employees the following Monday. Despite the incident, Claimant worked on Monday, Tuesday, and Wednesday

(October 1, 2003). She testified that her condition had improved by October 1, 2003.

> Because it was getting better by Wednesday. I mean, actually, it was getting better by Tuesday afternoon. I mean, it didn't hurt except for when I'd get up. You know, it would take me a little while to move around and get up. But, other than that, I wasn't in severe pain all the time, no.

Claimant did not seek any medical treatment between her incident at home on September 27, 2003 and her incident at work on October 1, 2003. For that matter, she confirmed that she had not sought medical treatment for her back or knee, during the course of her employment with Respondent, prior to her work incident on October 1, 2003.

Claimant sustained an injury at work on October 1, 2003. After retrieving additional bundles, she started back to her work station. She recalled that her left foot got caught on "a yellow plastic tie that we have the bundles tied up in on the floor," so that her "leg went out from under me. I went down on my knee." Claimant's right knee hit the floor; two other employees helped her up. Claimant recalled that her low back and knee were in pain and that her knee began bruising. Claimant went home for the day.

The next morning, Claimant began a course of medical treatment that has included surgeries on her lower back and neck. Surgery on her right knee is anticipated. Claimant testified that she has been released as far as her back problems are concerned, but that she is still under a doctor's care for her right knee and neck. She still has pain in those two areas.

A number of Respondent's witnesses testified to Claimant's statements concerning her September 27, 2003 incident; her physical incapacity prior to October 1, 2003; and her statements concerning the cause for her work incident. Eric DePriest, a co-owner of Respondent, testified that in a phone conversation with Claimant after her October 1, 2003

work incident, Claimant stated "[t]hat she hurt her back at home, and she would sign anything that I wanted to saying that she hurt her back at home...." DePriest admitted that Respondent did not carry workmen's compensation insurance at the time of this incident. He testified that Claimant was a good employee.

Judy McCracken, one of Claimant's fellow employees, worked at a station close to Claimant's work station. She did not see Claimant fall, but turned when Claimant called to McCracken asking for help to get up. McCracken and another employee helped Claimant to sit up in a chair. McCracken recalled that, prior to this incident, "on Monday, [Claimant] said she was down in her back. She had said that she had lifted a trash bag full of trash to give to her son and kind of threw her back out." On the following Tuesday Claimant "was still stooped over and hurting." McCracken recalled that, on Wednesday, October 1, 2003, Claimant was still complaining about her back. McCracken confirmed that Claimant "was a good worker." She did not notice any problems with Claimant's work between her incident at home and her incident at work. As to the possibility of debris on the floor, McCracken testified that they tried to keep debris picked up but that, at times, there would be trash on the floor. She did not recall seeing any trash or debris on the floor around the area where Claimant fell, but she did not discount that possibility.

Greta Oliver, one of Claimant's supervisors, testified that on Monday - between the home incident and the work incident - Claimant "was limping, couldn't hardly walk." Claimant was still limping on Tuesday and complaining that "her back hurt." Oliver recalled that Claimant "complained all that week." Oliver arrived at Claimant's work station after Claimant fell.

I think they did have her sitting in a chair, and she said she couldn't get up.

> And me and the mechanic took her to the break room and asked her -- well, I asked her if she wanted to file a report, and she said, no, I hurt myself at home. Which she'd done told me that the first of the week. And I asked her two or three different times, said, we really -- you know, you really need to fill out an accident report.

Oliver waited with Claimant while Claimant's mother came to get her. She testified that while they were talking, Claimant "said her husband had pushed her around the night before, and that probably didn't help her back, you know."

On cross-examination, Oliver confirmed that Claimant was a good worker. Even though Claimant was limping prior to her work incident, Oliver guessed that Claimant hurt worse after she fell. Oliver was questioned concerning the cause for Claimant's fall.

> Q. You didn't go back to the station and look on the floor to see if she tripped or anything like that?
>
> A. Well, she had told me she just -- her back just give is what she had told me.
>
> Q. And where did she say that her back gave?
>
> A. She said just got a catch when she was picking up the bundle, is what she told me. That she just got a catch, and it made her go down. She didn't say she tripped over anything. She just said she -- her back got a catch and she went down.

Oliver reiterated that she did not check the floor in the area "[b]ecause she told me she just got a catch in her back. She didn't say she tripped."

Donna Hensley, Respondent's office manager, testified that she spoke to Claimant after the incident, before she went home.

> I asked her if she wanted to file a report, an incident report, and she said, no, that she'd hurt her back at home lifting a trash can, or a bag of trash. And her mother was coming to pick her up and take her to the doctor.

Hensley also testified to a subsequent phone conversation with Claimant.

> Then, in later phone conversations with her, a couple of days later, she told me that the -- when she went to the doctor, that they asked her if she filled out a Workers' Comp claim, and she said, no, that she hadn't hurt her back at work. That she wouldn't lie -- wouldn't tell the doctor -- lie and tell the doctor that she'd hurt her back at work, when she knew that she had hurt it at home.

On cross-examination, Hensley testified: "[S]he told me she knew that, when she threw the trash can or picked up the trash bag and handed it to her son, she knew that she had hurt her back then."

Claimant presented to Dr. Brian Blair on October 2, 2003, the day after her work incident. At his deposition on September 15, 2004, Dr. Blair testified about this visit.

> Q. Did she give you a history of that pain?
>
> A. Yes. She had said that the pain had initially started Saturday prior to her coming in to see me when she had lifted some trash, and then it had become worse when she had fallen at work.
>
> Q. What sort of complaints did she have?
>
> A. She just was reporting pain in the lower and mid-back. She did not have any numbness or tingling at that time, but she was having lots of muscle cramps there in the mid and lower back.

Dr. Blair did not remember discussing with Claimant why she fell at work. Dr. Blair quoted from his October 2, 2003 note, to confirm that Claimant was complaining of pain in her legs at that time.

> Q. Would you agree that on this report from October the 2nd, 2003, there is nothing there that says anything about having left leg pain?
>
> A. Well, it says, "pain goes down both legs."
>
> Q. Okay. In your written report there?
>
> A. Right, I've got, "Patient reports pain in lumbar area in mid-back. Patient reports pain started on Saturday. Patient reports pain bad yesterday and leg went out from under and that is why she fell. Patient lifted trash bag when

back started hurting on 9-27-03. Pain goes down both legs. No numbness, no tingling. Lots of muscle cramps."

As to causation, Dr. Blair testified: "I know you're asking me to tell you when she herniated her disk and I'm sure she did hurt it some on Saturday, and then her falling - in my summarization then her falling on Wednesday probably went ahead and herniated the disk."

Claimant must prove that she sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, Claimant must prove that her injury is one "arising out of and in the course of employment...." Id. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, ___ (1985); see Miller v. Bargo Engineering, Inc., Full Workers' Compensation Commission Opinion filed August 10, 2004 (F303457 and F303458). Claimant must sustain her burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, __ (1947).

I find that Claimant did not sustain her burden of proving that her injuries arose out of her employment. The evidence of greater convincing force establishes that the origin or cause of Claimant's injuries is the incident that occurred at her home on September 27, 2003, when she was lifting a bag of trash. Claimant's testimony, verified by other

witnesses, is that this incident continued to affect her prior to her October 1, 2003 work incident. Then, on October 1, 2003, Claimant did not tell Oliver that she tripped; "[s]he just said she -- her back got a catch and she went down." Further, Dr. Blair recorded a history that relates Claimant's October 1, 2003 work incident to her September 27, 2003 home incident: "Patient reports pain started on Saturday. Patient reports pain bad yesterday and leg went out from under and that is why she fell." This history does not mention that Claimant tripped on anything; it relates Claimant's work incident to her injury at home.

This proof establishes that Claimant's October 1, 2003 fall was idiopathic in nature.

> An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. Because an idiopathic fall is not related to employment, it is generally not compensable unless conditions related to employment contribute to the risk by placing the employee in a position which increases the dangerous effect of the fall.

ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 71, 977 S.W.2d 212, ___ (1998) (citations omitted). Employment conditions can contribute to the risk or aggravate the injury by, for example, placing the employee in a position which increases the dangerous effect of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Crawford v. Single Source Transportation, ___ Ark. App. ___, ___ S.W.3d ___ (June 30, 2004). Claimant's fall was personal in nature, or peculiar to her, because of her September 27, 2003 incident at home. The record does not reflect any conditions related to her employment that contributed to the risks or aggravated her injuries: there was a short distance between her work station and the shirt front bundles; no heights, steps, sharp corners, or similar conditions were involved; and the evidence of greater convincing force establishes that Claimant did not trip on any debris or trash, but fell from the effect of her incident at home.

Based upon the evidence in the record, it is simply not possible to relate Claimant's right knee, low back, and neck pain to an incident arising out of her employment. Rather, Claimant's October 1, 2003 fall and injuries originated in, or were caused by, her accident at home on September 27, 2003. Her fall at work was thus idiopathic in nature, and nothing in Claimant's employment contributed to the risk of a fall or aggravated her injuries. Therefore, Claimant has not sustained her burden of proving a compensable injury on October 1, 2003.

B. Remaining Issues

It is not necessary to discuss Claimant's request for medical benefits, temporary total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of the injury alleged, she failed to establish the compensability of her claim, and compensation must be denied. See Reed v. Con Agra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744). Without an initial finding of compensability, Claimant cannot be awarded temporary total disability benefits or medical treatment. Cross v. Magnolia Hosp. Reciprocal Group, 82 Ark. App. 406, 109 S.W.3d 145 (2003); see Ark. Code Ann. § 11-9-102(4)(F)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.

2. The employee-employer relationship existed on October 1, 2003, and at all other relevant times.

3. Claimant's average weekly wage was $280.00.

4. Respondent controverts this claim in its entirety.

5. Claimant did not sustain her burden of proving that her injury arose out of her employment. Her October 1, 2003 incident at work originated out of, or was caused by, her September 27, 2003 incident at home. This incident at home continued to affect Claimant until the time of her incident at work; Claimant did not initially report tripping on anything, but attributed her incident at work to "a catch in her back" stemming from her incident at home.

6. Claimant's fall was idiopathic in nature. Because of her September 27, 2003 incident at home, the fall was personal to Claimant. The record does not reflect that her employment conditions contributed to the risk or aggravated her injuries.

7. Because Claimant failed to prove a compensable injury, it is not necessary to discuss her request for medical benefits, temporary total disability benefits, or an attorney's fee.

ORDER

Claimant failed to sustain her burden of proving that she suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml