

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F209687**

**KIMBERLY K. CLINE, EMPLOYEE**

**CLAIMANT**

**SAM BROWN and JEANETTE BROWN,  
D/B/A SAMBODEANS, UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED MARCH 10, 2005**

A hearing in this case was conducted on December 13, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Terry J. Lynn, Attorney at Law, Heber Springs, Arkansas, and Kenneth Olsen, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held on this claim on October 19, 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 four stipulations; three of these stipulations are set forth in the Prehearing Order and were confirmed at the hearing, while the parties agreed to the fourth stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on February 20, 2002 and at all other relevant times.
2. Respondent is an uninsured employer.
3. Respondent has controverted this claim in its entirety.
4. Claimant's average weekly wage is \$311.00; her temporary total disability

benefits rate is \$207.00.

At the December 13, 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 to her back on February 20, 2002.
2. Whether Claimant is entitled to temporary total disability benefits.
3. Whether Claimant is entitled to medical benefits.
4. Whether Claimant is entitled to an attorney's fee.

All other issues are reserved, including the question of a permanent impairment rating.

Claimant contends that she sustained a compensable specific incident injury to her back on February 20, 2002, as she lifted a tub of dishes. She seeks medical and temporary total disability benefits, as well as an attorney's fee. Respondents generally contend that Claimant cannot sustain her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

### **DISCUSSION**

In December of 1996 Claimant was involved in a motor vehicle accident. On December 26, 2002, approximately one week after the accident, she presented to the Baptist Medical Center-Heber Springs emergency room; the attending physician recorded the following history.

Ms. Cline presents to the emergency room complaining of right-sided low back pain with some pain and spasm radiating around to her right anterior thigh. The patient admits this pain in her lower back has been chronic on and off for years and she has had trouble with back muscle spasms in this same spot with the same sensation in her right thigh. The patient

coincidentally was involved in an motor vehicle accident and seen in White County one week ago. The patient states she had midline more back pain than strain from this accident from being rear ended, but that type of pain has completely resolved and she thinks this is unrelated.

Upon examination, the physician found “some spasm and tenderness in the right paraspinous muscle groups and sacroiliac joint region.” He assessed “lumbar muscle spasm with exacerbation of chronic etiology,” and prescribed rest and medications.

Claimant again presented to the emergency room on April 25, 1997 complaining of low back pain. A medical record notes “recurrent low back pain” and a diagnosis of “lumbar strain.”

Claimant began working for Respondents as a cook in June or July of 2001. She alleges that she sustained an injury to her back on February 20, 2002.

Q. All right. Did you sustain an injury in the course and scope of your employment on that date?

A. On February 7, I was lifting some - we barbecued pork and ribs and stuff, and I was lifting a box and wrenched my back; and I could feel it and it hurt. So I spoke - I told them, but nobody cared.

Then the next week I was doing it again because I was the only person working in the kitchen. I told Sam that I'd hurt my back and asked him what doctor he wanted me to go to, and he said it didn't matter.

Q. Well, I'm asking you about February the 20th of 2002. Did you hurt your back on that date?

A. Yeah. That was the day it put me on the ground.

Q. What happened?

A. I went in because it was just me working, and Sam was working in the mornings. I'd go in about noon or something. When I'd go in, he hadn't done any of the dishes or anything. I went in there and grabbed a bus tub and picked it up; and when I did it was full, and it just threw me on the ground because my back was already messed up. I couldn't even move hardly. It hurt so bad I couldn't

Claimant went to the emergency room in Heber Springs immediately after this incident.

A record of her emergency room visit records her complaint of pain in her low back and radiating to her right leg. The attending physician diagnosed lumbar strain and right sacroilitis. Among other medications, Claimant was prescribed Flexiril "for spasm."

Claimant subsequently received treatment from Dr. Lee Vaughan and Dr. Ron Williams. An MRI of Claimant's lumbar spine taken February 26, 2002, produced the following impression:

1. Spondylotic or degenerative change in the lower lumbar spine at the L3-4, L4-5 and L5-S1 levels.
2. Disc bulges, without focal disc herniation identified at L3-4, L4-5 and L5-S1 levels, along with posterior spondylotic change of the facets. There is secondary compromise of the spinal canal and lateral recesses at these levels, though findings appear most prominent at the L4-5 level where mild to moderate spinal stenosis is noted.

Claimant's treatment history includes medication, physical therapy, and a microdisectomy at L4-5 on April 29, 2002. On June 11, 2002, Claimant reported to Dr. Williams that she was "still having a fair amount of pain" following her surgery. She testified at the hearing that she has been unable to work since February 20, 2002.

On March 12, 2002, Dr. Williams recorded Claimant's statement that she "has never had any difficulty with her back until she injured it lifting at work on February 20, 2002." Similarly, in the course of a neurosurgical IME conducted by Dr. Jim Moore on March 24, 2004, Dr. Moore recorded: "The patient denies any prior history of injury." Claimant was questioned concerning this upon cross-examination.

Q. Have you ever in your life seen a doctor for back pain or been in a hospital for back pain?

A. I've pulled muscles, but that's it.

Q. Have you ever in your life been treated for muscle spasms or pain

radiating down into your leg?

A. I have that now.

Q. Have you had that prior to February of 2002?

A. Not that I can recall.

Q. Have you ever been to the Baptist Emergency Room in Heber Springs complaining of back pain?

A. I'm not sure.

...

Q. Ms. Cline, I want to show you a document that's dated December 20th of 1996. It has Baptist Medical Center, Heber Springs, and it says Kimberly K. Cline. Is that you?

A. Yes, sir.

Q. And it says - Subjective Complaints say, "The patient presents with right-sided low back pain, with pain and spasm radiating to her right anterior thigh." Do you remember that?

A. No. It's been awhile.

Claimant confirmed that Dr. Williams inquired about any prior back pain; when asked if she told him about her December 1996 emergency room visit, she replied: "I don't think I did." She was also "not sure" whether she told Dr. Moore about her prior back pain. On redirect examination, Claimant testified that her 1996 complaint "was nothing compared to" her 2002 injury.

The testimony indicates that Respondents initially agreed to pay for Claimant's medical treatment. Claimant testified that Respondents did pay some of her medical expenses but quit paying in August of 2002. Samuel Dean Brown confirmed that he agreed to pay some of Claimant's medical bills, and that he did pay her some money for the time she was off work. He confirmed that he now contends that Claimant's injury did

not occur at his place of employment. He testified that Claimant discussed her back problems with him prior to February of 2002. He recalled that Claimant “had told me a week or two prior to the accident that she’d hurt her back moving her kids.” It should be noted that Claimant denied injuring her back in this fashion.

Lee Morgan testified that she had worked with Claimant at Respondents’ place of business.

Q. Had you worked with her the entire period of time that she worked at Sambodeans?

A. I believe so.

Q. Do you have any knowledge or information as to whether she took pain medication during that entire period of time she worked there?

A. Yes.

Q. What is your information or knowledge?

A. Well, just that Kim had injured herself previously and was on medicine. She had shown it to me outside on break or whatever and had complained about being in pain from things. I know she complained a lot about pains from her back coming down into her leg. I recall that because of a situation with my mother. She still goes through the same thing.

...

Q. Okay. How long - when you say Ms. Cline told you that she took pain medication, was that once or twice or was that a pattern over the entire six or eight months that you knew her?

A. It was a pattern.

Q. When did you first become aware that she was taking pain medication?

A. I would say really from the very beginning.

Q. Did she ever indicate specifically back pain?

A. Yeah, and leg pain.

Morgan apparently did not reveal Claimant's prior complaints of back pain when she discussed the matter with Claimant's counsel prior to the hearing.

**A. Compensability of the Claim**

Claimant must prove that she sustained a compensable injury.

"Compensable injury" means: ... an accidental injury causing internal or external physical harm to the body... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (September 8, 2004). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

"Arising out of the employment" refers to the origin or cause of the accident; there must be affirmative proof of a distinctive employment risk as the cause of the injury. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, \_\_\_ (1985). Thus, in order to prove a compensable injury Claimant must prove, among other things, a causal relationship between her employment and the injury. McMillan v. U.S. Motors, 59 Ark. App. 85, 90, 953 S.W.2d 907, \_\_\_ (1997). The connection with the employment cannot be supplied by speculation. Gerber Products, 15 Ark. App. at 229, 691 S.W.2d at \_\_\_.

The employee 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 prove by a preponderance of the evidence that she sustained a compensable injury on February 20, 2002. Given Claimant's preexisting complaints of pain in her low back and radiating into her right leg, it would be speculation to causally connect her February 20, 2002 incident with her injury. Claimant complained of low back and right leg pain as early as December of 1996; even then, Claimant told the emergency room physician that "this pain in her lower back has been chronic on and off for years and she has had trouble with back muscle spasms in this same spot with the same sensation in her right thigh." Morgan testified that Claimant complained of "pains from her back coming down into her leg" for some time prior to February 2002. In light of this credible testimony and the medical record, the evidence does not establish that Claimant's injury arose out of her employment by Respondents.

I acknowledge the presence of objective findings following Claimant's February 20, 2002 incident, in the form of muscle spasms and (as reflected in her February 26, 2002 study) disc bulges. However, muscle spasms were noted in Claimant's December 1996 emergency records. As to the disc bulges, there is no credible evidence, medical or otherwise, that connects these findings to Claimant's February 20, 2002 incident by a preponderance of the evidence. The cited objective findings could just as easily support the conclusion that Claimant's preexisting problems continued after February 20, 2002.

I also find that Claimant did not sustain an aggravation of her preexisting condition by a later compensable injury. An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 267, 977 S.W.2d 5, \_\_\_ (1998). This includes proving a causal

relationship between the employment and the injury. McMillan, 59 Ark. App. at 90, 953 S.W.2d at \_\_\_\_\_. As noted above, Claimant failed to sustain her burden of proving this causal relationship between her employment and her injury.

**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 additional medical treatment. Cross v. Magnolia Hosp. Reciprical Group, 82 Ark. App. 406, 109 S.W.2d 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 February 20, 2002 and at all other relevant times.
3. Respondent is an uninsured employer.
4. Respondent has controverted this claim in its entirety.
5. Claimant's average weekly wage is \$311.00; her temporary total disability benefits rate is \$207.00.
6. Claimant did not prove by a preponderance of the evidence that she sustained a compensable injury on February 20, 2002. Her December 1996 emergency room

records demonstrate that her complaints of pain in her low back and radiating into her right leg preexisted her February 20, 2002 incident. Likewise, the testimony of Lee Morgan establishes that Claimant complained of low back and leg pain for some time prior to February 20, 2002. Thus, the evidence does not establish a causal relationship between Claimant's employment and her injury.

7. Claimant did not sustain an aggravation of her preexisting condition by a later compensable injury. As noted, the record fails to demonstrate a causal relationship between Claimant's employment and her injury.

8. 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