

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410203

SUSIE CORDOVA

CLAIMANT

WINTON, INC. DBA JET AWAY

RESPONDENT

COMMERCE & INDUSTRY,  
INSURANCE CARRIER

RESPONDENT

AIG, THIRD PARTY ADMINISTRATOR

OPINION FILED JULY 26, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 3, 2005, in Fort Smith, Arkansas. A pre-hearing order was previously entered in this case on November 24, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, certain changes were made in regard to these stipulations and issues. The first change was to reflect that the claimant was now contending that she sustained a compensable injury on May 23, 2004, rather than May 15, 2004. The parties agreed that the appropriate weekly compensation rates would be \$207.00 for total disability and \$156.00 for permanent partial disability. The parties also entered into the additional stipulation that the claimant filed for and received unemployment benefits for 26 weeks, beginning on August 18, 2004, at the weekly rate of \$204.00. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On May 23, 2004, the relationship of employee-employer-third party administrator existed between the parties.
2. On May 23, 2004, the appropriate weekly compensation rates are \$207.00 for total disability and \$156.00 for permanent partial disability.
3. The claim has been controverted in its entirety.
4. The claimant filed for and received unemployment benefits for 26 weeks from August 18, 2004 at the weekly rate of \$204.00.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to her left wrist on May 23, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from August 18, 2004 through a date yet to be determined, and appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that she sustained a compensable injury to her left wrist on May 15, 2004 (subsequently changed to May 23, 2004)."

In regard to these issues, the respondents contend:

"Respondents contend they have no medical documentation supporting a compensable injury on or about May 15, 2004 (subsequently changed to May 23, 2004). Respondents also contend they have no documentation indicating the claimant is entitled to TTD benefits associated with a compensable injury."

### DISCUSSION

The central issue in this claim is whether the claimant sustained a "compensable injury" to her left wrist, on or about May 23, 2004. Although not specifically identified in the pre-hearing order, it appeared during the hearing that the claimant was also contending the occurrence of an employment related aggravation or second

injury to her left wrist on or about August 18, 2004. For the purpose of resolving the issue of "compensability" both of these two alleged employment related incidents will be addressed. The burden rests upon the claimant to prove all of the necessary elements for a "compensable injury" that are required by the Act.

The first of these essential elements are contained in the definition of a "compensable injury" found at Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The alleged injury must arise out of and occur in the course of the employment.
- (2) The alleged injury must be caused by a "specific incident."
- (3) The alleged injury must be identifiable by time and place of occurrence.
- (4) The alleged injury must result in internal or external physical harm to the claimant's body.
- (5) The alleged injury must require medical treatment or result in disability.

The claimant must prove that her alleged left wrist injury satisfies all of the foregoing requirements. Should she fail to prove even one, then she has failed to prove the occurrence of a "compensable injury" to her left wrist.

As is generally the case, the claimant's own testimony is the only direct evidence presented to prove that her alleged left wrist injury satisfies the first three of these definitional requirements. Her testimony is the only direct evidence to show the actual occurrence of an employment related "specific" incident or incidents and to prove the existence of a causal relationship between this incident or incidents and the occurrence of a physical injury to her left wrist. Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific

employment related incident or incidents and the existence of a close temporal relationship between such an incident and the onset of symptoms indicative of a physical injury to her left wrist.

At the hearing, the claimant initially testified that shortly after she came into work on the morning of May 23, 2004, she was moving cases of beer to restock the beer in the cooler. While she was pulling a 30 pack container of beer off the top of a stack of cases that extended above her head, the case of beer "came back on my hand and pulled my hand back." She testified that she experienced a sudden and immediate onset of pain and throbbing in her left hand and wrist. She also testified that Sabrina Sutton, her supervisor, was also working at the same time and witnessed the incident. The claimant testified that, in fact, she and Ms. Sutton were the only individuals present at the time of the incident. She testified that she wrapped her wrist in a store towel and continued to work until she completed her shift. However, she does not recall when the shift ended.

The claimant then testified that the following day she was present when Ms. Sutton reported the incident and the injury to the claimant's wrist to Noble Winton, the manager and/or owner of the store where the claimant was employed. She testified that Mr. Winton merely told her to "take care of her wrist," but further told her that he "didn't offer any kind of insurance."

The claimant testified that she initially sought medical treatment for her left wrist difficulties, in May, at the emergency room of St. Edwards Mercy Medical Center. She stated that on the date of this treatment she had advised Ms. Sutton of increased difficulties with her wrist and that Ms. Sutton had taken her to the hospital. She testified that, at the emergency room, her wrist was x-rayed, she was given a shot, and a "half-cast" was placed on her wrist with "an ace bandage over it" (the claimant's subsequent testimony and the medical records themselves, would

indicate that this was a "splint" that could be taken off and on, rather than a plaster cast). The claimant testified that she continued to perform her regularly assigned employment duties. Although she testified that she continued to experience pain and swelling with her hand and wrist and occasionally wore her splint, she sought no further medical treatment until August 18, 2004.

The claimant testified that on August 18, 2004, she was checking out a customer "toward the end of the day." She stated that she picked up a six-pack of beer and was putting it into a bag, and:

"My hand twisted and I hurt my wrist again."

She further stated that she completed her shift on that date, and went to the doctor at the emergency room of the St. Edwards Mercy Medical Center after her shift was completed. She testified that her hand was again x-rayed, an ace bandage was applied to her wrist and hand, and she was given medication.

The claimant testified that the following day, she went back into work and told Mr. Winton that she had again hurt her wrist and needed to seek medical attention. It was her testimony that he again told her that he did not "offer any insurance." The claimant testified that she specifically asked him, at that time, if he offered workers' comp and again told him that she needed to see a medical doctor. She stated that he replied that "he didn't offer anything like that" and "walked away and went into his office."

The claimant testified that a couple of days after she went to the emergency room on August 18, 2004, she went into the office to pick up her pay check and was told by Mr. Winton that she was terminated. She stated that she believed her termination was on a Thursday, and that she had last worked the preceding Tuesday.

The initial testimony of Sabrina Sutton, supports the claimant's initial

testimony. Ms. Sutton initially testified that she witnessed the claimant injure her wrist. She described the incident as follows:

"She (the claimant) was reaching for a 30-pack on the top-on the shelf up there or on the stack and brought it down and bent her wrist."

When asked where she was at when the claimant's accident occurred, Ms. Sutton testified:

"I was somewhere in the front of the store, the register, stocking the pop cooler, somewhere up there, but I had a view of it."

She further testified that the claimant immediately complained of pain and symptoms involving her left wrist. She testified that immediately following this incident, the claimant stated:

"Sabrina, come here. My wrist, I did something to my wrist."

Ms. Sutton further testified that this incident occurred during the morning hours, when only she and the claimant were working in the store. She initially testified that she recalled this incident being on a Monday and believed it to be May 23, 2004.

Ms. Sutton further testified that the following day she reported this incident and injury to Mr. Winton and that the claimant was present at that time. She stated that Mr. Winton told her he would talk to the claimant, and he apparently did. However, she is unaware of what took place during this conversation.

Ms. Sutton further testified that "a couple of days" following the incident, she actually drove the claimant to the emergency room of St. Edwards Mercy Medical Center. She stated that she was asked by the hospital personnel to sign the claimant's "release papers", which she did. Finally, she testified that the claimant continued to complain with wrist pain, following this initial emergency room visit, and would wear a splint while she was at work. It was her testimony that this continued until Ms.

Sutton was terminated by the respondent in early August of 2004.

After consideration of all the evidence presented, it is my opinion that the afore cited testimony of the claimant and her witness, Ms. Sutton, is not sufficiently credible to prove the occurrence of either a specific employment related incident on May 23, 2004, August 18, 2004, or any other date during the claimant's employment with the respondent. The testimony of these two witnesses is also insufficient to prove the existence of a causal relationship between any specific employment related incident and any physical injury to the claimant's left wrist/hand.

The record shows that the claimant has a rather sporadic work history in that her actual period of employment for this respondent was brief. In one of her prior employments (with IBP) the claimant was terminated for falsifying her employment application. During her employment with this respondent, she also had a workers' compensation claim that she ultimately settled for \$14,000.00. In another employment, the claimant was terminated based upon allegations of theft.

It must be noted, that in the present claim, the claimant filed no claim with this Commission or took any action to enforce her right to workers' compensation benefits, until after her termination by the respondent. The credibility of Ms. Sutton is not enhanced by the fact that she candidly admits some animosity for the respondent, due to her own termination by the respondent. She further concedes, at least at the time of the alleged injury, she and the claimant were close acquaintances and "hung out" together at the local casinos or clubs.

Both the claimant and Ms. Sutton initially identified the date of the claimant's employment related accident and injury as May 23, 2004. However, on cross examination, both of these witnesses subsequently conceded that they had no direct recollection of the particular date on which this alleged accident and injury occurred. The claimant stated to the best of her recollection, she believed the incident

occurred during the middle of the week, perhaps a Wednesday, during the month of May. May 15, 2004, was a Saturday and May 23, 2004, was a Sunday. Ms. Sutton stated on cross examination that the only time frame she could directly recall was that the alleged incident and injury happened some time between the middle and end of May.

However, both the claimant and Ms. Sutton continued to be emphatic that the alleged accident and injury occurred in the morning hours, shortly after the claimant commenced work and when they were the only two employees present at the time. The time sheets for the respondent show that both the claimant and Ms. Sutton were scheduled to work and did, in fact, work on Saturday, May 15, 2004. However, Ms. Sutton was scheduled to work and did, in fact, work on that date from 6:00 a.m. to 12:00 p.m. while the claimant did not report to work until 12:00 p.m and worked until 4:30 p.m. On May 23, 2004, the claimant was not scheduled to work, but did, in fact, work from 6:00 a.m. until 7:00 a.m., apparently filling in for an employee named Chad. Ms. Sutton was not scheduled to work any on May 23, 2004, and the time sheets show that she did not log in any time on that date. I find Ms. Sutton's testimony that she often came into work when she was not scheduled and worked without signing in or receiving pay to be unworthy of belief.

The testimony of the claimant and Ms. Sutton that they reported in each other's presence, the alleged employment related incident to Noble Winton (the overall manager) the day after its occurrence, is expressly denied by Mr. Winton. The claimant's testimony that Mr. Winton informed her that he had no insurance is totally illogical. Obviously, Mr. Winton was well aware that he did in fact have workers' compensation insurance coverage. Although Ms. Sutton testified that Mr. Winton never followed up with her on the reported employment related accident and injury, it is also clear that Ms. Sutton took no further action to assist her friend, the

claimant, in pursuing this claim, prior to her termination by the respondent.

Most importantly, the emergency room records of St. Edwards Mercy Medical Center failed to record any employment related accident or injury as the source of the claimant's left wrist complaints. On the initial admission form there is no indication that the claimant's difficulties are the result of W/C (workers compensation). The initial triage records only note:

"Left wrist pain, onset X three days."

The secondary assessment records:

"Complaints of swelling to left hand/wrist with pain."

In response to a question concerning the onset and duration of the claimant's pain, it is merely noted:

"Worse today."

The narrative emergency room report records the following history:

"This is a 46-year old white female who comes in today with pain in the left wrist. She turned it the wrong way. No history of injury or fall."

It is also worthy to note that, at the time of this initial evaluation, the claimant's physical examination was apparently entirely normal with no mention of swelling, bruising, discoloration, etc. X-rays performed on the claimant's wrists at that time also failed to note any indications of swelling, and were interpreted as revealing no significant abnormality. It is also important to note that the claimant was advised by the personnel at the St. Edwards Mercy Medical Center emergency room to seek follow up care, if her difficulties did not resolve within 3 to 5 days. The claimant was also given a number to call for a follow up appointment. However, no follow up appointment was scheduled.

I would also note that the respondent's times sheets indicate that the claimant was scheduled for work and did, in fact, work from 6:00 a.m. to 3:30 p.m. on

Wednesday, May 26, 2004. Ms. Sutton was not scheduled to work and there is no indication from the time sheets that she did work on that date. However, Ms. Sutton apparently did take the claimant to the emergency room of St. Edward Mercy Medical Center at approximately 6:15 p.m.

The claimant indicated in her testimony that she experienced continuous significant problems with her left wrist following the alleged employment related incident in May of 2004. This testimony is also corroborated by the testimony of Ms. Sutton. However, it is undeniable that the claimant sought no medical treatment for any difficulties with her left wrist until the date of her termination on August 18, 2004. The evidence also unquestionably shows that between May 28, 2004 and the date of her termination on August 18, 2004, the claimant continued to perform her regularly assigned employment duties and work her regularly scheduled hours.

In regard to the alleged employment related incident and increased left wrist symptoms in August of 2004, the claimant's testimony is also contradictory and in conflict with the other evidence presented. In her testimony, the claimant stated that this incident occurred on August 18, 2004, while she was performing her regularly assigned employment duties, which involved the checking out of a customer. She stated that she completed her shift, on that date, and then went back to the emergency room of St. Edwards Mercy Medical Center. She stated that the following morning she told Mr. Winton about this new incident, her increased complaints, and her desire for medical treatment. She stated that he again told her that he didn't have any insurance and walked away.

However, the claimant subsequently testified that she last worked on a Tuesday, (August 18, 2004 is a Thursday), that she was scheduled to be off Wednesday and Thursday, but went into to pick up her pay check on Thursday. She testified that at that time she was told by Mr. Winton that her employment was

terminated.

There is no doubt that the claimant was seen at the emergency room of St. Edwards Mercy Medical Center at 9:45 a.m. on the morning of August 18, 2004. At that time, the initial triage records indicate a history of an injury to the claimant's left wrist, elbow, and shoulder. The secondary assessment notes that the claimant is having sharp pain from her wrist extending up her entire arm. This secondary assessment also includes a rather cryptic notation:

"? Injury ulnar side of wrist."

The narrative report from this emergency room visit contains the first mention in the medical evidence of any employment related cause or contribution of the claimant's left wrist difficulties. This report states:

"The patient is a 46-year old who has had problems with her left wrist in the past. She said that she was seen initially in the emergency room department and had no fracture. It got better on its own and then a couple of days ago at work she hyperextended the wrist and she now has pain in the wrist. She did not have a fall or any significant trauma."

Curiously, this history does not record that the claimant's previous left wrist problems were in any way work related. It must also be noted that the "hyperextended" injury mentioned in this report would more closely resemble the incident described by the claimant and Ms. Sutton back in May, rather than the incident described by the claimant in August of simply picking up a six pack of beer and putting it into a sack.

It is also obvious that the claimant's visit to the emergency room, on August 18, 2004, did not occur the same day as the alleged second incident. The claimant's testimony and the testimony of Mr. Winton reflect that the claimant did not work at any time on August 18, 2004, and was in fact, terminated on that date (most likely immediately prior to her visit to the emergency room).

It is also curious to note that no mention of any August injury or incident was made, when the claimant filed the initial AR-C in this case. The claimant offers no reasonable explanation for her failure to do so.

Clearly, the medical evidence establishes the existence of physical defects involving the claimant's left wrist. These defects were in the form of a ganglion cyst and some type of defect involving the triangular fibrocartilage complex (TFCC). The exact nature of this TFCC defect is unclear, primarily because neither party has seen fit to introduce the February 2005 operative report of Dr. Moore or any reports specifically identifying this defect. There is also no medical evidence presented that directly links either the ganglion cyst or the TFCC defect to either the alleged employment related trauma or even a specific incident of trauma in general.

Although medical evidence on causation is not always absolutely necessary, the objectively demonstrated defects, in the present case, are not of a type and nature that the cause would clearly be apparent with the use of commonly knowledge and logic. Ganglion cysts are not particularly known to be associated with any type of specific trauma. Without any idea of the nature of the claimant's TFCC defect, it is impossible to determine whether it would be logically attributable to a specific episode of trauma, would be degenerative in nature, the result of systemic changes or even congenital abnormalities.

It is also relevant to note that the claimant appeared to have been physically able to perform regular employment services and work essentially a full hour work week without the necessity of any medical treatment until her termination by the respondent on August 18, 2004. However, after that date, she states that her severe, continuous, and extensive difficulties, which now appear to involve the majority of her left upper extremity prevented her from performing any type of

regular gainful employment. The medical evidence presented has continuously indicated a paucity of objective findings to support the severe and debilitating symptoms described by the claimant, a fact specifically noted by Dr. Moore. He also notes that BTE validity testing performed on the claimant (suggested a borderline effort).

Obviously, the claimant has experienced the medically described defects involving her left wrist joint. It would further appear that the claimant likely experienced some degree of symptoms (albeit probably not of the magnitude and degree she describes) with her left wrist approximately three days prior to the emergency room visit, on May 26, 2004. However, her testimony is not convincing that these difficulties were due to this specific employment related incident she and Ms. Sutton described. The claimant may also well have continued to experience some degree of symptoms with her left wrist, after May 26, 2004. However, her testimony concerning the occurrence of a second employment related incident on August 18, 2004, as significantly exacerbating the symptoms is also not convincing. It would appear from the evidence presented that both of these employment related incidents only appeared after the respondent's terminated the claimant's employment and were likely the result of this termination.

As the claimant has failed to prove that her difficulties with her left wrist represent a physical injury that arose out of and occurred in the course of her employment with this respondent, that were caused by a specific incident, and that are identifiable by time and place of occurrence, she has failed to prove that her left wrist difficulties constitute a "compensable injury" as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). This failure requires the denial or dismissal of her claim in its entirety.

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including May 23, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$207.00 for total disability and \$156.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a "compensable injury" to her left wrist on May 23, 2004, or any other date. Specifically, she has failed to prove the occurrence of a physical injury to this body that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
5. The respondents have denied the occurrence of any a compensable injury and have controverted this claim in its entirety.

### ORDER

Based upon my foregoing findings and conclusions, I have no alter native but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge

