

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503059

JESSICA MCLENNAN, Employee	CLAIMANT
FIANNA HILLS NURSING REHAB CENTER, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED AUGUST 29, 2005

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 8, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 16, 2005, and a pre-hearing order was filed on May 17, 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 relationship existed between the parties at all relevant times.
3. The claimant was earning an average weekly wage of \$225.82.
4. The respondents have controverted this claim in its entirety.

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

1. Compensability of injury to claimant's back.
2. Medical.
3. Attorney fee.

The claimant contends that on January 28 or 29, 2005 she injured her back lifting a patient while employed by the respondent, and that she is entitled to reasonable and necessary medical treatment arising from the aforementioned injury.

The respondents contend the claimant never reported an injury to the respondent employer and, in fact, called in on January 27, 2005, stating that she would not be in that day due to a sick child. On February 2, 2005, the claimant called the respondent employer stating that her doctor advised her to seek other employment due to her scoliosis.

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 May 16, 2005, and contained in a pre-hearing order filed May 17, 2005, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her back while employed by the respondent.

FACTUAL BACKGROUND

The claimant is a 20-year-old woman who began working for the respondent as a certified nursing assistant in November 2004. Claimant contends that she suffered a compensable injury to her back on either January 28 or 29, 2005. Claimant testified that on one of those dates she was in the process of lifting a resident with another CNA that lost the weight of the patient so that claimant was forced to lift all of the patient's weight. Claimant testified that she felt a strain in her back but continued to work. Claimant did not

believe the injury was serious, but when she went home she could not sleep and her condition worsened.

Claimant testified that she reported this incident to a charge nurse, Wilma Dyer, and also to Darlene Cox, the respondent's director of nursing.

Claimant eventually sought treatment from the Absolute Chiropractic Clinic on February 2, 2005. After receiving medical treatment from the chiropractic clinic claimant terminated her employment with the respondent and approximately two months later sought treatment from Dr. Harmon on April 4, 2005.

Claimant has filed this claim contending that she suffered a compensable injury to her back while employed by the respondent. She seeks payment of medical benefits and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her back while working for respondent on either January 28 or January 29, 2005. Therefore, claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the

injury was caused by a specific incident and is identifiable by time and place of occurrence.

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 she suffered a compensable injury to her back.

Initially, I believe it is important to note that claimant has been unable to identify the date of her injury. While a claimant does not have to identify the precise time and numerical date upon which an accidental injury occurred, the claimant's inability to identify the date may be considered as a factor when weighing the evidence. *Edens v. Superior Marble and Glass*, 346 Ark. 487, 58 S.W. 3d 369 (2001).

In this particular case, claimant testified at the hearing that she injured herself while lifting a patient with another CNA named Emily on either January 28 or January 29, 2005. However, the documentary evidence indicates that Emily did not work on January 28, 2005. Furthermore, claimant completed an AR-C form on March 11, 2005 indicating that the date of injury was January 26, 2005. Claimant admits that the employment records indicate that she did not work on that date.

Claimant first sought medical treatment from the Absolute Chiropractic Clinic on February 2, 2005. Claimant completed a patient history form on that date indicating that the onset of her back problems had occurred some 10 days earlier. If claimant's injury had actually occurred on January 29 as she now contends, it is difficult to understand why she gave an onset of 10 days earlier as opposed to 4 days. Finally, with respect to the claimant's date of injury, I note that on direct examination claimant testified that she injured her back on either January 28 or January 29 while lifting a resident. However, when claimant sought medical treatment from Dr. Harmon on April 4, 2005, claimant gave a history of two injuries with the first occurring on January 26 and the second occurring on January 29. As previously noted, claimant did not work on January 26. When claimant

was asked about the history of two injuries reflected in Dr. Harmon's records, she testified that she had injured herself on two occasions. When asked why she did not inform anyone that she had injured herself twice, claimant responded, "Nobody asked me."

I also believe it is important to note that claimant testified on direct examination that she had not had any prior back problems other than a potential diagnosis of scoliosis by Dr. Kannout some three or four years earlier. However, on the patient history questionnaire for Absolute Chiropractic on February 2, 2005, claimant indicated that she had had similar symptoms three years ago. This history is not consistent with claimant's current testimony that she had no prior back problems.

Claimant testified that she reported the back injury to Wilma Dyer, a charge nurse. However, Dyer testified that she was not the claimant's supervisor but instead was a supervisor over another hall area. Dyer testified that claimant did not report having injured her back while lifting a patient. Dyer did acknowledge that claimant stated at one point that she had gone to a doctor and he had told her that she was going to have to look for another type of work because of scoliosis. However, claimant did not attribute any back problems to a work-related injury.

Finally, claimant testified that the day after her injury she reported to Darlene Cox, the respondent's director of nursing, that she had injured her back and did not know whether she could lift patients. The claimant was then asked whether she informed Cox how she had injured her back.

Q. Did you tell her [Darlene Cox] how you hurt your back?

A. I can't remember.

Cox testified at the hearing that she does not recall the claimant ever reporting a work-related injury to her. Cox did acknowledge as did Dyer that at some point the claimant indicated that she had been to the doctor and had been informed that she should

seek other type of employment which did not require as much lifting. Claimant did not mention a work-related injury, but did mention scoliosis.

In summary, in order to prove a compensable injury a claimant has the burden of proving by a preponderance of the evidence that they suffered a compensable injury which arose out of and in the course of their employment with the respondent. Here, I find that claimant has failed to meet her burden of proof. There are numerous discrepancies in claimant's testimony and the medical records regarding the date of her alleged injury. Furthermore, while claimant testified on direct examination with respect to only one injury, claimant in a history given to a medical provider reported two separate injuries and when confronted with that history testified that she had indeed suffered two injuries. When asked why she had not informed anyone that she had injured herself twice, claimant responded, "Nobody asked me." Furthermore, claimant testified that she reported this injury to Dyer, a charge nurse for the respondent. However, Dyer testified that claimant did not report a work-related injury to her. Finally, while claimant testified that she informed Darlene Cox, the respondent's director of nursing, that she had injured her back and did not know if she could lift patients, she admitted that she did not know whether she informed Cox how she had injured her back.

Accordingly, for the foregoing reasons, I find that claimant has simply failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by the respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her 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