

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601574

BOBBIE BARNES

CLAIMANT

RIVERSIDE FURNITURE CORPORATION
SELF INSURED

RESPONDENT

RESPONDENT

OPINION FILED SEPTEMBER 21, 2006

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

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 27, 2006, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on April 6, 2006. 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. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On September 19, 2005, the relationship of employee-self insured employer existed between the parties.
2. The appropriate weekly compensation benefits are \$217.00 for total disability and \$163.00 for permanent partial disability.
3. The claim is controverted in its entirety.
4. The respondent is entitled to a "set off" under Ark. Code Ann. §11-9-411 for benefits paid under group medical and

disability policies.

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 low back on September 19, 2005.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from September 20, 2005 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"On or about September 19, 2005, claimant suffered an accidental injury to her lumbar spine arising out of and in the course of her employment with respondent. Claimant is entitled to medical benefits, temporary total disability benefits and attorney's fees."

In regard to these issues, the respondents contend:

"Respondent denies that claimant sustained a compensable injury in its employ on September 19, 2005. Claimant did not report any such injury to her employer on September 19, 2005. Respondent contends that claimant's back condition is preexisting and she has no objective findings to support a compensable injury. Further, claimant received short term disability benefits from Riverside for 13 weeks from September 26, 2005 through December 23, 2005 and has applied for long term disability benefits through her employer. Her group health insurance through Riverside has paid medical bills. Riverside is entitled to a credit for these benefits paid should her alleged injury be ultimately determined compensable."

DISCUSSION

_____The central issue in this case is whether the claimant sustained a "compensable injury" to her low back, as the result of

a specific incident on September 19, 2005. The burden rests upon the claimant to prove all of the facts necessary to establish this alleged compensable injury.

These necessary facts can be found in the provisions of Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(D). The former subdivision requires that the claimant prove by the greater weight of the credible evidence:

- (1) That the injury arose out of and occurred in the course of the employment;
- (2) That the injury was caused by a specific incident;
- (3) That the injury is identifiable by time and place of occurrence;
- (4) That the injury caused internal or external physical harm to the claimant's body;
- (5) That the injury required medical services or resulted in disability.

Ark. Code Ann. §11-9-102(4)(D) requires that the claimant prove by medical evidence the actual existence of the physical injury alleged to be compensable and that the actual existence of this physical injury is supported by "objective findings," as defined in Ark. Code Ann. §11-9-102(16)(A)(i).

In order to prove the first three facts, that are necessary for a "compensable injury" under Ark. Code Ann. §11-9-102(4)(A)(i), the claimant must show the existence of a causal relationship between her lower back or lumbar difficulties and a specific employment related incident or accident on September 19, 2005. The

claimant need not prove the existence of this causal relationship to an absolute or mathematical certainty. She need only prove that the existence of this relationship is likely or probable. Further, it is not necessary that she prove that a specific employment related incident or accident was the sole or even "major cause" of her ultimate injury.

In the present case, the only direct evidence presented by the claimant to establish the existence of this necessary causal relationship is her own testimony. Although the testimony of a party is never to be 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 that it is legally competent to address.

The claimant testified that at approximately 4:50 a.m. on the morning of September 19, 2005, she attempted to pick up two boards weighing approximately two to three pounds a piece. She was going to stack these boards in preparation for the performance of her regular employment duties, once her shift actually began. She stated that she was well aware that it was company policy for employees not to perform any employment activities prior to "clocking in," or the beginning of their shift. She was not due to "clock in" and her regular shift did not begin until 6:00 a.m. However, it was her testimony that she regularly performed employment activities to prepare for her work day, prior to clocking in, and that no actions or sanctions had been taken against her as a result of this preparatory work.

It was her testimony that, when she attempted to pick up these two boards, her back “went out” or “popped out” and “a big knot swelled up on the right side close to the middle of her back.” She also described additional symptoms in the form of legs hurting, an inability to move, and an inability to breathe. She testified that she dropped the boards and grabbed onto a nearby table, where she remained for some 10 to 15 minutes. She conceded that all of this was unwitnessed.

The claimant testified that she then attempted to reach her husband on her cell phone and left repeated messages for him on his boss’s answering machine. Ultimately, she was successful, and her husband came and took her home.

Some time after she had contacted her husband, Robert Mulkey (a co-employee), a co-employee, arrived on the scene and asked her if she was okay. She stated that she told him that she “didn’t think so.” She stated that she asked him to help her outside because she thought this would improve her breathing and that he did so.

The time records for the claimant’s husband show that he clocked out at 5:24 a.m. and clocked back in at 6:26 a.m. During this period, he apparently picked the claimant up from work and took her home. The claimant testified that once she arrived home, she attempted to contact her family physician, Dr. Trevor Hodge. According to the claimant’s testimony, her cell phone records indicate that the calls to Dr. Hodge’s office were placed at 7:23 a.m., 8:25 a.m., 8:35 a.m., and 8:42 a.m.

The claimant testified that she also called the Plant 2 secretary, Tanya Watkins, and told her about all that had happened. She stated that Ms. Watkins advised her that Robert Mulkey had already reported it. It was the claimant's further testimony that at approximately that same time she also talked with her immediate supervisor, Mary King, and also informed her about all that had happened. However, on cross examination, the claimant indicated that she had only told Ms. Watkins and Ms. King that she couldn't work that day.

It was also the claimant's testimony that, on either September 19, 2005 or September 20, 2005, she called the secretary at the main office, someone named Susan, and reported her injury and her back difficulties to her. At the hearing, the claimant acknowledged that she did not mention reporting anything to this person in her discovery deposition.

The claimant acknowledged that she was familiar with the policies and procedures of the respondent, in regard to work related or on the job injuries. She also acknowledged that she had received such injuries on seven occasions during her employment with the respondent. The claimant further acknowledged that she was well aware that the company physician for all employment related injuries was Dr. Terry Clark. It was her testimony that she sought the services of Dr. Hodge (her family physician) rather than Dr. Clark, because she had been repeatedly told by Mary King (her supervisor) and Bobby Martin (the plant supervisor or manager) that any injuries sustained before work would not be covered under the

respondent's workers' compensation program. She subsequently testified that Mr. Evan Breedlove, the Human Resource Director, or someone else in the main office also told her this same thing, after she had reported her back injury to him. She also acknowledged that she had applied for and had received benefits for her back difficulties, on and after September 19, 2005, under a group policy of the medical insurance and a short and long term disability policy maintained through the respondent. It was her testimony that in signing the application for these group benefits, she simply filled out and signed what the respondent provided her.

Finally, the claimant testified that her back wasn't hurting her prior to the incident on September 19, 2005, but subsequently conceded that it was "sore" prior to the incident. The claimant also denied experiencing any radicular difficulties with her legs prior to this incident, but subsequently acknowledged that she would experience some problems with her legs "every now and then."

The claimant's testimony concerning the occurrence of an employment related accident and injury is not particularly corroborated by that of Robert Mulkey. Mr. Mulkey was the co-employee that according to the claimant's testimony, was the first person to arrive after the accident and injury had occurred. Mr. Mulkey testified that when he arrived, the claimant appeared to be having problems with her back and complained of difficulties with her back prior to the start of their shift on September 19, 2005. However, he also testified that he did not observe the claimant working "off the clock" on that or any other morning. He further

stated that the claimant did not tell him the cause of her low back difficulties on that date and did not tell him of any precipitating employment related accident or incident. He testified that he went with the claimant outside the plant that morning, but that the purpose for this was for her to check or feed a fox or foxes that lived within the vicinity of the plant. He stated that this was an activity that the claimant customarily or routinely did before the start of her shift. He testified that he had offered to go get the claimant's husband, but that she declined this offer. Mr. Mulkey stated that the claimant told him that she hoped she could make it though the day, but that if not she had a cell phone and could contact her husband to come and get her. Finally, Mr. Mulkey stated that he left the claimant sitting on a chair and went to his own work area in another area of the plant. Curiously, neither party inquired if he had conveyed any information on the claimant's condition to Tanya Watkins or Mary King.

Next, is the somewhat conflicting testimony of Linda Fore and Calvin Garrison. These individuals are two other co-employees of the claimant.

Ms. Fore testified that she had observed the claimant on frequent occasions doing preparatory work before the shift began or before the claimant had "clocked in." She further testified that she had observed other employees also doing this, and that she herself did it on rare occasions. Finally, it was her testimony that the claimant never complained to her of any difficulties with her back and that she never saw the claimant having any

difficulties with her back at work. Ms. Fore conceded that she was not present during the time in question on September 19, 2005.

Mr. Garrison testified that he was usually present approximately 45 minutes prior to the start of the shift and that he never saw the claimant performing any employment related activities while she was "off the clock" or before her shift began. He testified that company policy prohibited working "off the clock" (either before or after an employee clocked in). Finally, he testified that he had heard the claimant complain of difficulties with her back prior to September 19, 2005.

The last witness to testify was Evan Breedlove. Mr. Breedlove is the respondent's Human Resource Director. It was his testimony that, several weeks after September 19, 2005, the claimant and her husband came into the plant to discuss the claimant's short and long term group disability benefits. He testified that after the discussion of these group disability benefits, the claimant told him that she thought she might have hurt her back at work lifting boards before her shift began. He testified that the claimant further advised him that she would continue to see her own doctor because he had been treating her for back complaints for years. He stated that this was the first knowledge or notice that he had received of any employment related injury as the cause of the claimant's back difficulties. He testified that he had personally investigated the claimant's contentions that she sustained a work related injury before the start of her shift on September 19, 2005, but that he was unable to find anyone that would corroborate or

confirm that the claimant had previously reported such an employment related injury, including Mary King and Susan in the main office. Finally, he confirmed that it was against established company policy for an employee to "work off the clock."

The medical evidence presented shows that the claimant had for some time, prior to September 19, 2005, experienced substantial difficulties with her lower back and radicular like symptoms involving her lower extremities. In fact, Dr. Hodge had began treating the claimant for such difficulties, as early as May 28, 2003. He appears to have continuously treated the claimant for these difficulties through at least August of 2003, with a CT scan of the lumbar spine being performed on August 21, 2003. Again, on April 12, 2005, he noted that the claimant was again complaining of difficulties involving pain in her back and that it hurt her to work. It appears from the records of Dr. Hodge that the claimant had scheduled an appointment for August 31, 2005, for some reason, but did not keep this appointment.

The claimant was not seen by Dr. Hodge until September 21, 2005. At that time, it was noted that she was complaining of low back pain of approximately one week duration. However, these initial records of Dr. Hodge do record a history of increased difficulties while attempting to pick up a couple of boards:

"Sudden intensive low back pain when lifting a couple of boards at work. Now in pain with right greater than left leg discomfort."

"Monday at work she bent over to pick up a couple of boards and pain started. She was unable to stand up."

In this office notation, Dr. Hodge stated that his physical examination of the claimant showed her to be in a good deal of distress, that she had an abnormal gait and station, that she had a tender lower back with spasms, and that she exhibited a positive straight leg raising on the left. Dr. Hodge made no diagnosis in this report, but recommended further testing into the possibility of a herniated disc as the source of the claimant's symptoms.

A lumbar MRI (requested by Dr. Hodge) was conducted two days later, on September 23, 2005. This test was interpreted as showing no evidence of any bulging or protruding discs in the lumbar spine. Curiously, it also showed a normal lordic curve of the lumbar spine, which would be inconsistent with the presence of lumbar muscle spasms. The only abnormality noted involved the superior endplate of the L4 vertebra. This abnormality was interpreted to indicate either a subtle avulsion injury or simply a normal variant. Plain x-rays were recommended to "better define this area."

The claimant appears to have been hospitalized by Dr. Hodge at St. Edwards Mercy Medical Center on September 26, 2005. The tentative diagnosis was of a fractured vertebra. During this hospitalization, the previously recommended plain x-rays were taken in order to either confirm or eliminate the presence of a vertebral fracture. These x-rays showed only slight degenerative arthritic spurring of the vertebra at the L3-4 level that was not out of proportion with the claimant's stated age. No vertebral fracture was observed. This study further noted normal vertebral alignment,

which would be inconsistent with the presence of lumbar muscle spasms.

The records of the September 26, 2005 hospitalization show that, on September 26, 2005, a neurosurgery consultation was conducted. The records further show that the consulting neurosurgeon felt that the claimant's complaints were consistent with at most a lumbar strain and that there was no surgical lesion or defect.

However, when the claimant was again seen for follow up by Dr. Hodge, on October 7, 2005, he again appeared to diagnose the claimant's difficulties with her back and legs as being attributable to a vertebral fracture. At that time, Dr. Hodge requested an orthopaedic evaluation.

On November 4, 2005, the claimant was evaluated, at Dr. Hodge's request, by Dr. Joe Paul Alberty (an orthopaedic surgeon). Dr. Alberty recorded a history of the claimant's difficulties that is somewhat inconsistent with the claimant's testimony and the history previously recorded by Dr. Hodge. In his initial evaluation, Dr. Alberty stated:

"This is patient referred by her physician Dr. Hodge concerning a chronic back pain which she has had for about a year. She denies any particular injury related to the onset. Says the pain is constant."

"She reports a gradual onset of back pain. She said in September she picked up two boards and she has had acute pain since but actually her back pain dates prior to that. She has had some physical therapy but that did not give her significant relief. Her back popped when she was having the therapy, some of the exercises and she kind of I think lost

confidence in the therapy related to that and hasn't gotten a lot of benefit. She has been off work since September. Has persistent symptoms. Says her legs go numb. She can't sleep. Sounds to me that there is a good possibility that she also is depressed. On her history form she circles many symptoms suggesting clinical depression, severe and frequent headaches, neck tension, dizziness, paralysis of limbs, constant numbness, lapse of memory, tingling parts of the body, excessive worry, depression and tension, nervous exhaustion, constant unhappiness, to name a few."

On his physical examination of the claimant's lumbar spine and lower extremities, Dr. Alberty noted no objective findings, particularly muscle spasms. The claimant's neurological examination showed no motor deficits and only a slight hyperthesia of the lateral aspect of the right foot and leg, which Dr. Alberty opined to be "old by history." The claimant's reflexes were all noted to be symmetrical, active, and appropriate. Straight leg raising tests were found to be normal. Other than the hyperthesia, the only abnormalities recorded were acute tenderness in the mid line at L4 and L5, with surprisingly acute tenderness over the right iliac crest.

After review of the MRI study, Dr. Alberty opined that any abnormalities indicated in this study were not related to the claimant's back and lower extremity difficulties. Based upon his testing and review, Dr. Alberty made a diagnosis of a chronic lumbar syndrome with clinical depression. For these complaints he recommended only conservative treatment in the form of medication and repeat physical therapy. He stated that the claimant should respond to these conservative measures.

The claimant returned to treatment by Dr. Hodge. On November 9, 2005, Dr. Hodge noted that she was experiencing a good deal of low back pain with occasional muscle spasms in the low back and really painful legs that were so numb that they hurt. It is apparent that he continued to hold the belief that the claimant's difficulties were due to a vertebral fracture and he ordered a bone scan of the lumbar spine, which would unequivocally confirm or eliminate the presence of such an injury. This bone scan was performed on November 18, 2005, and was totally negative. Thus, the possibility of a recent fracture of the endplate of the L4 vertebral body or any of the other lumbar vertebra was totally eliminated. This test would also eliminate any recent or ongoing irritation or inflammatory processes involving any components of the lumbar spine, bony or otherwise.

Undaunted, Dr. Hodge ordered a lumbar myelogram and an enhanced CT scan of the claimant's lumbar spine with contrast. These tests were performed on December 2, 2005. The only unusual finding noted on the myelogram was that the claimant had only four lumbar type vertebra, which is a hereditary or congenital variant. No other abnormality was identified. The follow up CT scan with contrast was interpreted as showing only degenerative changes, in the form of slight broad based disc bulges at L2-3 through L4-S1 levels with no focal disc herniations or stenosis of either the central canal or any of the exiting nerve roots.

The claimant ultimately came under the care of Dr. John Swicegood, a chronic pain management specialist. Dr. Swicegood's

various physical examinations failed to note any objective findings to support the claimant's continued subjective complaints. In fact, his physical examinations reveal even a paucity of subjective findings. No neurological abnormalities are noted. The claimant's lumbar spine is observed to be in normal symmetrical alignment with no instability. Muscle strength, sensation, and range of motion are all indicated as normal. The only subjective findings indicated are a positive straight leg raising involving the right lower extremity and a tenderness in the lower lumbar spine. Dr. Swicegood's diagnosis is that of lumbosacral pain, lumbar strain, and a possible L4 vertebral avulsion fracture (obviously Dr. Swicegood had not reviewed the prior radiographic studies, particularly the bone scan). The claimant's testimony and the records of Dr. Swicegood also show that his recommended treatment modalities were of no benefit in resolving or even reducing the claimant's extensive subjective symptoms and complaints.

On January 3, 2006, the claimant returned to Dr. Hodge with continuing low back pain and muscle spasm. On February 21, 2006, the claimant saw Dr. Hodge with complaints of her right arm going numb, pain when turning her head to the right, pain shooting all over her back, with a good deal of low back pain, and her right leg continuing to be numb. On April 4, 2006, the claimant again saw Dr. Hodge for allergy or sinus difficulties and continuing back pain with her leg going numb.

Finally, on April 25, 2006, the claimant returned to Dr. Swicegood for lumbosacral pain and sciatica and was given an

epidural injection into the lumbar spine. Apparently, from the claimant's testimony, this injection again failed to alleviate or reduce her continued subjective complaints of continuous severe low back pain and both her legs going numb.

After consideration of all the evidence presented, I find that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between any difficulties that she may have experienced with her back or lumbar spine and her lower extremities, on and after September 19, 2005, and a specific incident arising out of and occurring in the course of her employment on September 19, 2005. I simply do not find the claimant's testimony to be sufficiently credible to prove a causal relationship between a specifically employment related incident on September 19, 2005, and her lower back and leg difficulties. Thus, she has failed to satisfy the requirements for a "compensable injury" as defined by Ark. Code Ann. §11-9-102(4)(A)(i).

Although the claimant described her lower back and leg difficulties, on and after September 19, 2005, as being significantly different from those which she had previously experienced, the medical evidence shows otherwise. The symptoms described by the claimant on and after September 19, 2005, appear identical with those for she had previously been treated. The objective findings on the radiographic studies performed after September 19, 2005, appear to be strikingly similar to those noted on studies performed prior to that date.

with the possible exception of muscle spasms (noted only by Dr. Hodge), the objective findings after September 5, 2005 show only minimal degenerative changes that are consistent with a person of the claimant's age. There are also no other objective findings to support an acute or recent traumatic injury.

The claimant's testimony concerning the immediate reporting of the alleged employment related incident and injury is contradicted by other more credible evidence presented. The claimant's testimony concerning the occurrence of the alleged employment related accident and injury would be inconsistent with her failure to immediately report such an accident and injury on September 19, 2005, in the appropriate manner, particularly in light of the fact that the evidence shows the claimant's unquestionable familiarity with the appropriate procedure.

The claimant's application for and acceptance of group medical and disability benefits would also be inconsistent with her difficulties being the result of a job related accident and injury. Her explanation that she merely signed what she was sent is simply not logical.

Finally, the claimant's credibility is also damaged by the fact that her continuing subjective symptoms and complaints far outweigh any objective findings. The same is true for her failure to respond or improve with prolonged rest and every form of appropriate medical treatment.

Even if the claimant had proven the existence of a causal relationship between the described accident or incident, on

September 19, 2005, and a physical injury to her back or lumbar spine, there would still be a substantial question as to whether such an injury “arose out of and occurred in the course of her employment.” Although this incident or accident would have occurred on her employer’s premises, it would not have occurred during her regularly scheduled working hours. While the activities supposedly being performed could arguably be in furtherance of the employer’s interests, either directly or indirectly, they would also be activities that had been expressly forbidden by the employer. While it is an interesting question whether an employee that knowingly performs expressly forbidden activities is acting in the course and scope of his employment, merely because such activities may directly or indirectly benefit his employer, it is not necessary to address that question at the present time.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On September 19, 2005, the relationship of employee-self insured employer existed between the parties.
3. On September 19, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$217.00 for total disability and \$163.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove that she sustained a “compensable injury” to her low back or lumbar spine, on

September 19, 2005. Specifically, she has failed to prove by the greater weight of the credible evidence that she sustained a physical injury to her low back or lumbar spine, on that date, 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 a compensable injury to the claimant's low back on September 19, 2005, and have controverted this claim in its entirety.

ORDER

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge