

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503691

MELISSA EDDY, EMPLOYEE	CLAIMANT
ST. MARY'S REGIONAL MEDICAL CENTER, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 4, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Russellville, Pope County, Arkansas.

The claimant was represented by HONORABLE LAURA J. MCKINNON, Attorney at Law, Fayetteville, Arkansas.

The respondents were represented by HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 13, 2006 in Russellville, Arkansas. A prehearing order was entered in this case on June 22, 2006. This prehearing 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 prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee relationship existed on or about March 30, 2005.
3. This claim has been controverted in its entirety.
4. Based on the claimant's average weekly wage of \$324.32, the claimant's compensation rate for temporary total disability is \$216 per week and her compensation rate for permanent partial disability is \$162 per week.

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

Claimant:

1. Compensability of specific incident/gradual onset work-related condition or back injury.
2. Reasonable and necessary medical benefits.
3. Claimant's entitlement to temporary total disability and/or temporary partial disability benefits from 3/30/2005 to date yet to be determined.
4. Controversion and attorney fees.

Respondent:

1. Whether claimant sustained a compensable injury in the course and scope of her employment.
2. If gradual onset, whether the "major cause" of the claimant's problems are a result of her work activities for the insured, a result of her pre-existing degenerative conditions, or a result of her other outside work activities or an independent intervening incident.
3. Whether the claimant's injury was idiopathic in nature and a result of her pre-existing degenerative condition.
4. In the alternative, whether the claimant merely sustained a temporary aggravation of her pre-existing condition for which she previously resumed her baseline condition.
5. Whether the claimant sustained an independent intervening event which ultimately led to her need for surgery.
6. Whether the respondents are entitled to an offset for any group health carrier and/or disability carrier benefits made to or on behalf of the claimant.

The record consists of the September 13, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

On page 20 of the hearing transcript, the respondents' attorney objected to the relevance of the claimant's attorney asking the claimant whether she had ever been written up by her employer before she got hurt. On page 51 of the hearing transcript, the respondents' attorney objected to the claimant testifying as to what part of her body hurt her the worst following an incident when she was run over by an automobile in 1991. The respondents' attorney objected to this question on the grounds that the claimant had previously testified that she did not even remember the occurrence of the incident.

As will become apparent below, resolution of this claim depends in large part on the accuracy of the recollection of the claimant, the credibility of the claimant, and resolving the highly inconsistent testimony of the claimant and her co-workers as to whether the claimant did or did not report an alleged injury to her co-workers in the manner and time frame that she now asserts. I find that the claimant's attorney's questions, and the claimant's answers objected to by the respondents, are sufficiently relevant to be admitted

for resolving the credibility issues present in this case. The respondents' objections are therefore both overruled.

The claimant contends that she sustained a compensable low back injury on March 30, 2005, as a result of pushing a gurney or stretcher at work that day near the end of her shift. To prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external 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; and (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (4) (A) (i) (Suppl. 2005). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Alternatively, a claimant seeking benefits for a gradual onset injury to the back must prove by a

preponderance of the evidence that: (1) the injury arose out of and in the course of her employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for medical treatment. Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001); Freeman v. Con-Agra Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). In addition, as with injuries caused by a specific incident identifiable by time and place of occurrence, objective medical evidence is necessary to establish the existence and extent of the compensable injury. Wal-Mart v. Leach, supra; Wal-Mart Stores v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

In the present case, the claimant contends that she sustained a work-related back injury on March 30, 2005, from helping push a patient on a stretcher from Same Day Surgery to the post-surgery unit, and then pushing the empty stretcher by herself back to her unit. The claimant described what occurred on the way back as follows at the hearing:

Q. Did anything happen on the way back?

A. On the way back, in pushing and maneuvering the bed around a corner, something happened and I

had excruciating pain. I had pain down my legs, and I'd never before had this kind of pain before.

Q. What was your body movement that caused that; what made this stick out in your mind?

A. Because I was twisting and pulling that bed at the same time.

Q. Was that pretty hard to do; did it take very much effort?

A. Yes, a lot of effort. It was an old bed, and it was very heavy. (T. 13-14)

There is no dispute that the claimant did not report an injury to a supervisor or co-worker on Wednesday, March 30, 2005. The claimant testified that the injury occurred close to 4:30, i.e. the end of her shift. (T. 14) The claimant explained why she did not report the injury that day as follows:

Q. Why did you not report it?

A. Well, for one thing, B.J. Meyers leaves at 3:00 o'clock, and I believe this was close to 4:30. The RN over me, Stephanie Keaton, wasn't around and I didn't know where she was. Susan Gray, who did the same type of work I did, was in a room drawing blood on a patient with the door shut. Rebecca Poski, the admission nurse, was in her room with the door shut, pre-oping a patient.

So with the pain I was in, I could not physically go running around looking for somebody. I was just ready to get out of there and get home where I could get in my bed. (T. 14)

The claimant was not scheduled to return to work until the following Monday. The claimant presented to her previously treating chiropractor on Friday and to the emergency room on Saturday. The claimant testified that she attempted to report a work-related injury when she reported to work on Monday. The claimant testified as follows regarding the exchange which took place on Monday:

Q. Who did you report the injury to when you went in that day? Did you clock in?

A. Yes. I clocked in at 8:00 o'clock, and I called my family physician and got an appointment. Then I called Lynn Yarbrough and asked her if I could take off to go to the doctor because I had hurt my back the prior week while taking a patient over to Post-Surgery.

She said, "Oh, my god. Did you fill out any paperwork?" I said no and asked her if I needed to. She said yes. I said, "Well, do I need to see B.J.?" She said, "Yes, but let me call B.J." She called B.J. and then called me back and told me that I needed to call B.J., who was the employee health nurse at the time.

. . .

Q. What did B.J. tell you?

A. B.J. told me that she worked with workers' comp, and they would not cover it because I had already been seen by a doctor.... She said there was nothing that she could do about it because I had already been to the ER. She said if I had notified her before I went to the ER, workers' comp would have paid for it. I told her I hadn't been to my family doctor yet, that I had just been

to the ER. She said, "I wish I could help you, but there's nothing I can do."

. . .

Q. When did you - when were you finally able to complete paperwork; when did they finally let you do it?

A. About two weeks after that. I was in the Human Resource office with Connie Gragg, and I told her that I wanted to see B.J. Meyers and I wanted my paperwork to fill out for workers' comp. She kinda gave me the run-around, but then told me to go on down to B.J.'s office after quite a bit of back and forth.

I just stayed there until I got the papers. She said, "It's not going to do any good." I said, "If it doesn't do any good, it doesn't do any good; but I want the papers to fill out." That was about two weeks afterward. (T. 16 - 18)

In addition to her own testimony, the claimant's allegation of a work-related back injury is also supported by the history - contained in essentially all of her physicians' reports - of a work-related injury. Further, her claim is supported by an opinion from her treating surgeon, Dr. Peek, that the claimant sustained a work-related injury on or about March 30, 2005 which was the major cause of the patient's need for medical treatment. (C. Exh. 1 p. 59)

After hearing the live testimony, and observing the demeanor of the witnesses, however, I find credible the

testimony of witnesses B.J. Meyers, Connie Gragg, Susan Gray, Stephanie Keaton, and Lynn Yarbrough, and I therefore do not find credible the claimant's alternative account of events quoted above.

Specifically, contrary to the claimant's testimony that she was in excruciating pain before she left work on March 30, 2005, and that Susan Gray was in a room with the door shut before the claimant left that day, Ms. Gray testified she in fact spoke with the claimant before the claimant left. Ms. Gray credibly testified that the claimant was not experiencing any problems when the claimant left that day, that the claimant made no mention of any possible work injury, and that the claimant advised Ms. Gray that the claimant was leaving and headed to Branson for the weekend. (T. 71 and 77)

Ms. Yarbrough confirmed the claimant's testimony that Ms. Yarbrough talked to the claimant the Monday after March 30, 2005, but Ms. Yarbrough also credibly testified that the claimant told Ms. Yarbrough that her problem was not work-related. (T. 87) Likewise, Ms. Gray credibly testified that she was standing next to the claimant while the claimant was on a telephone call after the weekend, that the call appeared to be with Lynn Yarbrough, and that the

claimant kept saying "It's not work-man's comp. I just want to go to the doctor." (T. 71) Ms. Yarbrough credibly testified that Ms. Yarbrough first found out that the claimant was reporting a work-related injury about a week later from another employee who had talked to the claimant, and that Ms. Yarbrough then told B.J. Meyers who then talked to the claimant. (T. 97) Ms. Yarbrough also credibly testified, contrary to the claimant's testimony regarding the effort necessary to move a stretcher, that all of the gurneys are fairly easy to push. (T. 91)

B.J. Meyers, who was retired at the time of the hearing, credibly testified that at the first of April she received a telephone call from Lynn Yarbrough advising Ms. Meyers that the claimant had hurt her back and that it was not work related. Ms. Meyers also testified that Ms. Meyers later spoke to the claimant, and the claimant told Ms. Meyers that the problem was not work related. (T. 56)

I also note that the claimant's testimony regarding excruciating pain before she left work on Wednesday is inconsistent with the detailed history which Dr. Sprinkle recorded on April 18, 2005. (C. Ex. 1 p. 16) According to this history, the claimant felt some pain in her low back an hour or two after pushing or pulling a patient on a

stretcher, i.e., after she left work that day. The claimant testified at the hearing that she probably did give that history to Dr. Sprinkle. (T. 32).

Finally, I also do not find credible the claimant's testimony suggesting that her chiropractic treatment before March 30, 2005 was for her shoulder, neck and "some back." The typewritten chiropractic reports in the record from 2004 and 2005 all make reference to either "lower back pain", "bilateral lower back pain", "lower back symptoms", "sacroiliac symptoms", "sacroiliac pain", or "bilateral lumbosacral symptoms". (R. Ex. 1 pgs. 25, 29-31 and 36) Three witnesses, Lynn Yarbrough, Stephanie Keaton, and Susan Gray, credibly testified that the claimant was leaving work early once or twice per week before March 30, 2005. (T. 94, 83, 76). Although Ms. Yarbrough testified that she did not question the claimant as to why the claimant was leaving early, Ms. Keaton and Ms. Gray were of the understanding that the claimant was leaving early to seek the services of a chiropractor. (T. 92-94, 83, 76)

Dr. Sprinkle's impression on May 24, 2005 was that the claimant's low back abnormalities were lumbar degenerative disk disease and degenerative spondylolisthesis at the L5-S1 level. (C. Exh. 1 p. 27) Dr. Peek concluded on July 28,

2005 that the claimant did have an injury to her back, that she probably had some spondylolisthesis before, but then developed increased slippage with nerve root compression. (C. Exh. 1 p. 35) However, Dr. Peek also recorded that same day that the claimant injured herself at work moving a patient and developed significant problems with her low back *at that point.* (Id.)

The Commission may not arbitrarily regard a medical opinion addressing causation. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). However, the Commission also has the duty of weighing the medical evidence as it does any other evidence. Roberson v. Waste Mgmt., 58 Ark. App. 11, 944 S.W.2d 858 (1997). The Commission has the authority to accept or reject medical opinions. Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

In the present case, the preponderance of the credible evidence persuades me that (1) the gurney which the claimant pushed on March 30, 2005 was easy to push, (2) the claimant was not experiencing a back problem when she left work on March 30, 2005, (2) the claimant had pre-existing spondylolisthesis before March 30, 2005, (3) the claimant had recurring back pain before March 30, 2005, and (4) the

claimant's back pain which sent her to the chiropractor the next day did not begin until at least an hour after she work on March 30, 2005. Because the claimant was not experiencing any back problems before she left work, I find that the claimant did not provide Dr. Peek an accurate history. I therefore find that Dr. Peek's medical opinions on causation are based on a material mistake of fact, and these opinions are therefore accorded no weight. On this record, I find that the claimant has failed to establish by a preponderance of the credible evidence that the back problems she experienced after leaving work on March 30, 2005 were causally related to her pushing a gurney at work on March 30, 2005 as she asserts. Consequently, I find that the claimant has failed to establish by a preponderance of the credible evidence that she sustained a compensable low back injury on March 30, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee relationship existed on or about March 30, 2005.
3. This claim has been controverted in its entirety.
4. Based on the claimant's average weekly wage of

\$324.32, the claimant's compensation rate for temporary total disability is \$216 per week and her compensation rate for permanent partial disability is \$162 per week.

5. The claimant has failed to establish by a preponderance of the credible evidence that she sustained a compensable low back injury on March 30, 2005.

6. Because the claimant has failed to establish that she sustained a compensable low back injury, her associated claim for benefits is hereby denied.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, denied in its entirety.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge