

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306369

LINDA BOSS FOSTER, EMPLOYEE	CLAIMANT
EXPRESS PERSONNEL SERVICES, EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE, CARRIER	RESPONDENT

OPINION FILED APRIL 3, 2006

On remand from the Full Commission by Order filed February 22, 2006.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Ms. Carol Worley and Mr. Jerrod Parrish, Attorneys at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 22, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. An opinion denying benefits was filed by a prior administrative law judge on April 21, 2004, which opinion was affirmed and adopted by the Full Commission on April 22, 2005. In an opinion handed down January 4, 2006, the Arkansas Court of Appeals reversed and remanded this claim to the Commission for further proceedings. By order filed February 22, 2006, the Full Commission remanded this claim to the present administrative law judge for consideration.

At the original hearing the parties stipulated that the employer/employee/carrier relationship existed on June 6, 2003; that the respondents have controverted

this claim in its entirety; and that the claimant earned wages sufficient to entitle her to a compensation rate of \$240 for total disability benefits and \$180 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained an injury that is compensable under the Arkansas Workers' Compensation Law; whether the claimant was performing employment services at the time of her alleged injury; and whether the respondents are liable for any benefits prior to June 16, 2003, when the claimant gave notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she

sustained an injury arising out of and in the course of her employment, while she was performing employment services.

4. The claimant has proven by a preponderance of the evidence that she sustained an injury caused by a specific incident and identifiable by time and place of occurrence.
5. The claimant has proven by a preponderance of the evidence that she sustained back, neck and brain injuries causing internal physical harm to the body requiring medical services; and that the existence and extent of her injuries are established by medical evidence supported by objective findings.
6. The claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her back, neck and brain on June 6, 2003.
7. The respondents have failed to prove by a preponderance of the evidence that sufficient notice was not given.

DISCUSSION

The relevant facts and history of this claim are set forth in the prior opinions issued by the Commission and by the Court of Appeals and will not be repeated here. The Commission initially denied this claim on the grounds the claimant was not performing employment services at the time of her alleged injury. The Court of Appeals reversed, holding that reasonable minds could not have concluded that the claimant “was not performing employment services at the time she was injured.” *Foster v. Express Personnel Services*, __ Ark. App. __, __ S.W.3d __ (Jan. 4, 2006).

The parties were given the opportunity, without objection, to submit additional briefs. The claimant elected to rest on the brief submitted to the Court of Appeals, as did the respondents, though the respondents also provided a letter brief setting forth additional case authority. All of the arguments and case law set forth in the respondents’ letter and brief address the issue of employment services, but the Court of Appeals has already clearly and firmly decided that question.

Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of

and in the course of 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 existence and extent of the injury; and (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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

At the time of her injury, the claimant was on the employer's premises "in an area in which employment services were expected of her." *Foster v. Express Personnel Services, supra*. I find that the claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, while she was performing employment services. Given the testimony herein, I find that the claimant has proven by a preponderance of the evidence that she sustained an injury caused by a specific incident and identifiable by time and place of occurrence.

The medical records document that the claimant has sustained injuries to her

head, neck, and back. Dr. Charles Marrow has diagnosed the claimant with a “musculoligamentous injury” of the cervical and lumbo-sacral spines, and he specifically noted the presence of lumbar and cervical muscle spasms. The record contains multiple other objective findings of injury, including mild inflammatory changes of the brain; straightening of the lumbar spine; and lumbar and cervical disc bulges. Dr. Marrow expressly opined that the claimant’s symptoms are causally connected to her work injury, and there is no opposing medical opinion in the record. Given this evidence, I find that the claimant has proven by a preponderance of the evidence that she sustained back, neck and brain injuries causing internal physical harm to the body requiring medical services; and that the existence and extent of her injuries are established by medical evidence supported by objective findings.

The claimant has proven every element of a compensable injury; I therefore find that the claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her brain, neck and back on June 6, 2003. In making this finding, I note that the claimant did have prior back problems as recently as nine months prior to the work injury. Nonetheless, an employer takes an employee as he finds her, and the aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*,

68 Ark. App. 24, 3 S.W.3d 336 (1999). I specifically find that the compensable injuries incurred by the claimant on June 6, 2003, aggravated her pre-existing conditions.

Notice

Employees are required to promptly notify their employers of any injury, and employers are ordinarily not responsible for payment of indemnity or medical benefits accrued prior to the employee's report of injury. Ark. Code Ann. § 11-9-701 (a)(1). It is statutorily presumed that sufficient notice was given. Ark. Code Ann. § 11-9-707 (2). It is thus the respondents' burden to overcome the prima facie presumption by a preponderance of the evidence. *Cf. Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981) (application of different prima facie presumption in workers' compensation context).

Failure to notify the employer can be excused if the employer had knowledge of the injury, if the employee had no knowledge the injury arose out of and in the course of his employment, or if the employee had some other satisfactory reason for not giving notice. Ark. Code Ann. § 11-9-701 (b)(1). If an employee's failure to give notice is properly excused, the employer is liable for all benefits owed, regardless of whether they were accrued before or after the notice is given. *Weyerhaeuser Company v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

Janet Langdon, the president of the respondent-employer, admitted she was aware of the injury the day it happened. It is undisputed that the respondent-employer was immediately made aware of the injury, and lack of notice is excused when an employer "had knowledge of the injury." Ark. Code Ann. § 11-9-701 (b)(1). Therefore, I find that the respondents have failed to prove by a preponderance of the evidence that sufficient notice was not given.

AWARD

The claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her back, neck and brain on June 6, 2003. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge