BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F500423/F513255/F513256

LINDA HATCHETT, Employee — CLAIMANT

TYSON FOODS, INC., Self-Insured Employer — RESPONDENT

OPINION FILED JUNE 29, 2006

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

Claimant appearing *pro se*.

Respondents represented by M. MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

On June 12, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 9, 2005, and a pre-hearing order was filed on November 14, 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. Respondent agrees that claimant was struck by a pallet jack on January 6, 2005.

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

1. Compensability of injuries in the form of three falls between December 8, 2004 and January 6, 2005.

2. Claimant's entitlement to medical treatment as a result of her compensable injuries.

3. Temporary total disability benefits from January 7, 2005 through a date yet to be determined.

At the time of the hearing the parties also agreed to litigate as an issue the claimant's correct compensation rate.

The claimant contends she suffered three compensable injuries when she fell on three occasions between December 8, 2004 and January 6, 2005. Claimant requests payment of medical benefits and temporary total disability from January 7, 2005 through a date yet to be determined.

The respondent contends that although claimant was struck by a pallet jack on January 6, 2005, it does not have sufficient medical evidence to determine the extent of claimant's injury on that date. Respondent denies any other injuries.

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 November 9, 2005, and contained in a pre-hearing order filed November 14, 2005, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head as a result of being struck by a pallet jack on January 6, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable head injury.

3. Claimant has failed to prove by a preponderance of the evidence that she

suffered any other compensable injuries while employed by the respondent.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any temporary total disability benefits as a result of her compensable head injury.

FACTUAL BACKGROUND

The claimant applied for employment with respondent on December 1, 2004 and was hired by the respondent. Claimant contends that she suffered compensable injuries when she fell while working for the respondent on three occasions between December 8, 2004 and January 6, 2005.

Claimant testified that the first of these falls occurred on or about December 8, 2004 when she fell while going out to her car to have a cigarette at lunch. Claimant testified that she injured her knee as a result of this fall. Claimant testified that her second fall occurred several days later sometime before Christmas when she slipped on a piece of chicken fat and fell, striking her knee. The final incident occurred on January 6, 2005 when claimant was struck by a pallet jack while working for the respondent.

The medical records indicate that claimant had a history of left knee pain prior to her employment with the respondent. In fact, claimant indicated on her application for employment with respondent that she suffered from left knee pain. Claimant also testified at the hearing that she had been involved in a motor vehicle accident in October 2005 at which time she struck her head and left knee. Claimant eventually settled a claim arising out of that motor vehicle accident for the sum of $5,000.00.

On December 7, 2004 claimant sought medical treatment from her family physician, Dr. Kriesel, for a refill of medication. Dr. Kriesel's medical report notes that claimant was to start a new job the next day. Dr. Kriesel also noted that claimant "has a lot of knee pain and some occasional chest pain." (Emphasis added.) Dr. Kriesel went on to note that claimant's gait was slow and that she suffered from knee pain bilaterally with a decreased

range of motion. Claimant was next evaluated by Dr. Kriesel on December 17, 2004, at which time she complained of her left knee "going out." Dr. Kriesel noted that the claimant had fallen a couple of times recently and that mild effusion was noted in her left knee. Dr. Kriesel's medical report makes no mention of any falls at work. As a result of claimant's complaints Dr. Kriesel ordered an MRI scan of the claimant's left knee. That MRI scan was eventually performed on December 21, 2004, and revealed a moderate to large joint effusion as well as a tearing and deformity of the posterior horn of the lateral meniscus.

Subsequent to that MRI scan the claimant had the incident with the pallet jack on January 6, 2005. Following that incident the claimant was evaluated by Dr. McAuley who diagnosed claimant as having a sore and tender area on the side of her head. Dr. McAuley recommended that claimant be evaluated by a neurologist and indicated that claimant should take Tylenol for her headaches. Claimant subsequently returned to Dr. Kriesel and also requested a change of physicians to him. Claimant was evaluated by Dr. Kriesel on January 12, 2005, at which time she was complaining of headaches and tailbone pain. Dr. Kriesel diagnosed claimant's condition as a post-concussive headache and coccygeal contusion. Dr. Kriesel also ordered a CT scan of the claimant's head. Claimant was again evaluated by Dr. Kriesel on January 17, 2005, and that is his last medical report which was submitted into evidence. The next medical record is a surgical report relating to surgery on her left knee which was performed by Dr. Allison on August 25, 2005.

ADJUDICATION

The claimant contends that she suffered various compensable injuries as a result of falls while employed by the respondent between December 8, 2004 and January 6, 2005. Claimant's claim for her injuries as a result of the falls are specific injuries 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 met her burden of proving by a preponderance of the evidence that she did suffer a compensable injury to her head as a result of being struck by a pallet jack or forklift on January 6, 2005. However, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered any other compensable injuries.

First, I do find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head as a result of the incident on January 6, 2005. Claimant testified that on that date she was struck by a pallet jack and knocked to the ground. A witness statement introduced into evidence from another employee of respondent confirms that this incident occurred. In addition, respondent has stipulated that claimant was struck that day by a pallet jack. As a result of this incident the claimant was taken by the respondent to Dr. McAuley at which time she complained of headaches after being hit in the side of the head. Dr. McAuley's examination revealed that claimant's head was slightly swollen and he diagnosed claimant's condition as a sore, tender area on the side of her head. As previously noted, he recommended that claimant

see a neurologist and that claimant take Tylenol for her headaches. Claimant was subsequently evaluated by her family physician, Dr. Kriesel, for her head injury and he diagnosed claimant as suffering from a post-concussive headache.

I find based upon the testimony of the claimant, the documentary evidence, and the medical records that claimant did suffer an injury to her head which arose out of and in the course of her employment with respondent and that it was the result of a specific incident identifiable by time and place of occurrence. I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. As previously noted, Dr. McAuley's evaluation revealed that claimant's head was swollen. This constitutes an objective finding.

Although the claimant had previously suffered from headaches, Dr. Kriesel, the claimant's family physician, stated in a letter dated January 20, 2005 that the headaches claimant was suffering after January 6 were different than the headaches she suffered prior to that date. Therefore, it was his opinion that these headaches were not pre-existing. I find that the opinion of Dr. Kriesel is credible and entitled to great weight.

In summary, claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head as a result of the injury on January 6, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable head injury.

I find that claimant has failed to prove by a preponderance of the evidence that she suffered any other compensable injuries while employed by the respondent. First, with respect to the claimant's left knee, I note that the claimant had a history of prior left knee pain which even she acknowledged on her employment application with the respondent. In fact, the day before claimant's first fall on December 8, 2004 the claimant had seen Dr. Kriesel complaining of knee pain. Significantly, Dr. Kriesel addressed this pre-existing

condition in his letter of January 20, 2005, stating:

> The left knee cartilage tear that I did describe has been present for some time now. This is definitely a pre-existing injury and she did not report that she injured this during this accident at all. (Emphasis added.)

Even though a pre-existing injury can be aggravated by a work-related injury. Dr. Kriesel has stated that claimant's injury was pre-existing and that claimant did not complain of a new injury while working for the respondent.

Furthermore, with respect to the incident on December 8, 2004 when claimant contends that she fell in the respondent's parking lot on the way to her vehicle to smoke a cigarette, I note that any injury resulting from that fall would not be compensable because claimant was not performing employment services. A compensable injury does not include injuries suffered at a time when employment services are not being performed. A.C.A. §11-9-102(4)(B)(iii). An employee is performing employment services when she is doing something that is generally required by her employer. *Piefer v. Single Source Transportation*, 347 Ark. 851, 69 S.W. 3d 1 (2002). The test used to determine whether an employee was acting in the course of employment is whether the injury occurred "within the time and space boundaries of employment, when the employee is carrying out the employer's purpose or advancing the employer's interest directly or indirectly." *White v. Georgia-Pacific Corporation*, 339 Ark. 474, 6 S.W. 3d 98 (1999). In this particular case, claimant was on her lunch break and was on her way to her vehicle to smoke a cigarette. There is no evidence that claimant was performing any employment services by engaging in any activity which was advancing her employer's interest either directly or indirectly at the time of her fall. Therefore, any injury suffered during the fall on December 8, 2004 would not be compensable.

In summary, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left knee in the form of a new injury

or an aggravation of a pre-existing condition.

Claimant's AR-C form also alleges compensable injuries to her neck and an aggravation of a pre-existing bulging disc as a result of her three falls. After my review of the evidence presented in this case, I find insufficient credible evidence indicating that claimant suffered a compensable injury or an aggravation of any pre-existing condition to her neck or to a bulging disc as a result of her employment with respondent.

Finally, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her tailbone. After the incident on January 6, 2005 Dr. Kriesel did indicate that claimant suffered from a coccygeal contusion. However, in order for an injury to be compensable there must be objective findings establishing an injury. In this particular case Dr. Kriesel reviewed an x-ray of the claimant's coccyx and stated: "Reveals possible fracture. Difficult to see." I do not find Dr. Kriesel's opinion that the x-ray revealed a "possible" fracture to constitute an objective finding. Absent objective evidence supporting an injury, claimant cannot meet her burden of proof.

The final issue for consideration involves claimant's request for temporary total disability benefits. The claimant's compensable injury to her head is an unscheduled injury. Therefore, in order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breashears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, while claimant may have remained within her healing period for her compensable head injury, I find insufficient evidence that claimant suffered a total incapacity to earn wages. As previously noted, claimant was initially evaluated by Dr. McAuley on January 10, 2005 following the incident with the pallet jack on January 6. Dr. McAuley completed a form indicating that claimant had no modifications to her job activities. Claimant subsequently was evaluated by Dr. Kriesel who completed a form

dated January 11, 2005 indicating that claimant should be on alternate or modified duty from January 11, 2005 until January 17, 2005. The medical records contain two additional forms completed by Dr. Kriesel. One indicates that claimant should continue her modified duties at work for an additional seven days beginning January 17, 2005. The second could be interpreted as releasing claimant to full duty as of January 18, 2005. Both would indicate that claimant did not suffer a total incapacity to earn wages.

Given the opinions of Dr. McAuley and Dr. Kriesel that claimant was at least capable of work at modified duty, I find that claimant did not suffer a total incapacity to earn wages and therefore find that she has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her compensable head injury.

Having found that claimant is not entitled to temporary total disability benefits, the issue with respect to claimant's compensation rate is moot.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head while employed by the respondent on January 6, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable head injury. Claimant has failed to prove by a preponderance of the evidence that she has suffered any other compensable injuries while employed by the respondent. Claimant has also failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as a result of her compensable head injury.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE