

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503532

KATHY SPENCER, Employee

CLAIMANT

CARGILL, Employer

RESPONDENT

AIG CLAIM SERVICES, INC., Carrier

RESPONDENT

OPINION FILED AUGUST 2, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by STEPHEN L. TAYLOR, Attorney, Springdale, Arkansas.

Respondents represented by J. LESLIE EVITTS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On July 12, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 28, 2005, and a pre-hearing order was filed on that same date. 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-carrier relationship existed among the parties on all relevant dates.

Subsequent to the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$380.36 which would entitle her to compensation at the rate of \$254.00 for temporary total disability benefits and \$191.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back.

2. Temporary total disability benefits from February 14, 2005 through a date yet to be determined.

3. Medical benefits.

4. Attorney fee.

At the time of the hearing the claimant modified her request for temporary total disability benefits to begin on March 3, 2005 and to continue through a date yet to be determined.

The claimant contends she sustained a compensable injury and that she is entitled to temporary total disability benefits from March 3, 2005 through a date yet to be determined, related medical, and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury during the course and scope of her employment with the respondents while she was performing employment-related services and, therefore, the claimant is not entitled to any benefits. Additionally, the respondents state that no compensable event is the major cause of the claimant's current disability or need for medical treatment. Additionally, the respondents state that any additional medical treatment sought by the claimant is not reasonable or necessary as a result of a compensable injury. The respondents further contend that the medical treatment sought by the claimant is not authorized, reasonable, or necessary as a result of a work-related injury.

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 28, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$380.36 which would entitle her to compensation at the rate of \$254.00 for temporary total disability benefits and \$191.00 for permanent partial disability benefits is also accepted as fact.

3. 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 55-year-old woman who has worked for the respondent or its predecessor company for approximately 36 years. Claimant primarily performed janitorial duties for the respondent. Those duties included the filling of approximately 17 paper towel machines with paper towels before a work shift began. Towels were required to be in dispensers pursuant to U.S.D.A. rules.

While some boxes of paper towels were contained in a supply room inside the plant, the bulk of the paper towels were stored in a trailer parked outside the respondent's plant building. The trailer sat several feet off the ground and as a result wooden steps were built in order to allow individuals to climb up into the trailer. Claimant also testified that the door of the trailer was heavy, water soaked, and very heavy to lift. Testimony was also presented indicating that the forklift which loaded pallets of supplies into the trailer would occasionally strike the stairs and move them away from the trailer.

Claimant testified that on February 14, 2005 she arrived at work for her shift which began at 6:00 a.m. Claimant testified that at approximately 6:00 a.m. she went to the storage closet to get towels and noticed that there were not enough to fill the 17 towel machines. As a result, she went out to the trailer to get more boxes of towels. After unlocking the trailer and pushing the trailer door part way up, she climbed the stairs and

bent over to use both hands to finishing lifting the door. Claimant testified that there was a gap between the top step and the trailer and as she attempted to step onto the trailer she began falling. As a result, claimant grabbed the trailer door and fell into the trailer with the trailer door itself falling and striking her in the back. The claimant testified that she laid in the trailer hollering for help for several minutes before an individual came along and raised the door off of her. Respondent's plant nurse subsequently arrived with a wheelchair and claimant was taken to the nurse's station.

The respondent's nurse eventually took claimant to Dr. Haws for medical treatment and she was diagnosed as suffering from musculoskeletal low back pain. Claimant was evaluated by Dr. Haws on one other occasion before she sought medical treatment from Dr. Burt, her family physician. In addition to Dr. Burt, the claimant has also seen Dr. Hamilton, Dr. Cannon and Dr. Danks.

Claimant has filed this claim contending that she suffered a compensable injury to her low back while employed by the respondent on February 14, 2005. She seeks payment of medical benefits, temporary total disability benefits from March 3, 2005 through a date yet to be determined, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her back on February 14, 2005, when she was struck in the back by a trailer door as she fell on that date. Claimant's claim is for an injury caused by a specific incident 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 an injury which arose out of and in the course of her employment with the respondent.

Although claimant has consistently given the same history of injury to the respondent and to her medical providers, I note that there were no witnesses to the incident itself where the trailer door allegedly struck the claimant. The trailer door was supposedly lifted by another employee of the respondent; however, that employee was not called as a witness. In short, a finding that the injury occurred as claimant contends is entirely dependent upon her own testimony and her credibility as a witness. I do not find claimant's testimony credible because of untruthful statements made on direct and cross examination.

Claimant originally testified that after the door fell onto her back she was unable to get the door off of her back. Claimant testified that she had to lay in the trailer with the door on her back for several minutes hollering for someone to help her.

Q. Were you able to get up?

A. That's what - - I was going to try to crawl in the trailer so I could get my feet up out of there, but I couldn't crawl in, I couldn't crawl backwards. I tried to holler for somebody. Wasn't nobody there. "Man, they're going to find me like this," and I sat there about five minutes and nobody come and I

thought, "This is so embarrassing," and it hurt.

Q. Now, you said that you - - in the deposition, I believe, you told me that you laid out there for five or 10 minutes and yelled and screamed, trying to get somebody to come get you out.

A. Yeah.

Q. Is that right?

A. Yeah. I thought maybe Gary might come out there, but he never did. I heard a truck coming up and I think it was the guy that helped me out.

Q. And until Jose came, you're just out there yelling and trying to see if you can get out on your own?

A. Yeah. I said, "Is anybody out there? Anybody can help me get this door off my back? Anybody out there?" Nobody was out there and I thought, "Oh, my God. Somebody will probably be here in a minute, surely."

Subsequent testimony revealed that claimant did not lay in the trailer hollering and screaming for help for some five to ten minutes before someone came along. Instead, subsequent testimony indicated that the claimant had a cell phone with her and called a co-employee.

Testifying at the hearing was Terri Fischer, a supply clerk for the respondent. Fischer testified that she was in the supply room on the morning of February 14, 2005 when the phone rang. Fischer testified that it was the claimant informing her that she needed help with the trailer door. Fischer testified that she assumed that the claimant meant she could not lift the door up. Fischer testified that she went looking for someone in maintenance but no one in that department was at work. As a result, she informed claimant that she would have to wait until maintenance came in. At that point claimant did indicate that the door had fallen on her. However, Fischer testified that the claimant did not indicate that she was hurt or in any pain. Fischer also testified that the claimant did

not sound distressed in any way.

On cross-examination following her rebuttal testimony claimant admitted that she did have a cell phone with her and that she had called Fischer in the plant. Claimant testified that she did not want to inform Fischer that she was hurt because she was afraid of losing her job. While claimant may have been hesitant to report an injury to Fischer, claimant offered no explanation for her untruthful testimony on direct examination wherein she testified that she had to lay in the trailer for some five to ten minutes hollering for help until someone came along. It was not until claimant was confronted with Fischer's testimony that she offered this explanation.

I also believe it is important to note that claimant admitted that either before she went to receive medical treatment or as she was waiting to receive medical treatment she contacted her attorney to determine whether he would be willing to take her workers' compensation case. This occurred shortly after the alleged incident at which time there was no indication that the respondent was denying compensability. To the contrary, respondent offered claimant medical attention from its plant nurse and subsequently took claimant to Dr. Haws for medical treatment.

In connection with claimant calling her attorney shortly after this incident, I note that claimant also took photographs of the trailer where the incident allegedly occurred that same day. When asked why she took photographs of the trailer on February 14, claimant indicated that people take pictures of wrecked cars.

Finally, I note that the medical evidence does not support a finding that claimant suffered a compensable injury on February 14. Testifying on behalf of the claimant was Gary Licher, a maintenance mechanic. Licher testified that he saw claimant on the morning of February 14 and that he saw claimant's back which was red and scraped and looked as if it was going to turn black and blue. Testifying on behalf of respondent was Patricia Martin, who has been employed by the respondent as an LPN for eight years.

Martin testified that she examined the claimant's back and did not see any bruising or marks where the door had allegedly struck her. Martin also testified that she saw no scratches or scrapes on the claimant's leg. That same day claimant was taken by the respondent to Dr. Haws for medical treatment. Dr. Haws' medical report of that date notes that there was no inflammation, edema, or ecchymosis present in the area where claimant contended she was struck. "Ecchymosis" is defined by *Webster's Medical Dictionary* as: "a discoloring of the skin caused by the seepage of blood beneath skin." Dr. Haws' medical report went on to indicate that x-rays revealed only mild degenerative changes which were consistent with claimant's age.

Claimant was next evaluated by Dr. Haws on February 21, 2005 and his report again notes that no inflammation, edema, or ecchymosis was present. Subsequent to that evaluation by Dr. Haws claimant sought medical treatment from her family physician, Dr. Burt. A review of Dr. Burt's medical reports revealed no objective findings of injury. Dr. Burt ordered an MRI scan which again revealed only degenerative changes. Significantly, Dr. Burt in his report of March 28, 2005 indicated:

Patient complains of dizziness and pain in neck and head with low back pain. No radicular symptoms.
Symptoms are not physiologically consistent.
(Emphasis added.)

It was not until claimant sought medical treatment from a chiropractic physician, Dr. Hamilton, on May 9, 2005 that any muscle spasm was noted. Muscle spasm had not been noted by Nurse Martin, Dr. Haws, nor Dr. Burt. Claimant's evaluation with Dr. Hamilton did not occur until almost three months after this alleged incident.

Based upon the foregoing evidence, I simply 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 low back while employed by the respondent. For reasons previously discussed, I do not find the claimant's testimony to be credible. More

importantly, I note that all initial medical findings failed to reveal any objective evidence of injury. Dr. Haws found no evidence of inflammation, swelling, or bruising. X-rays taken by Dr. Haws were negative, revealing only degenerative changes consistent with claimant's age. Likewise, claimant was evaluated by Dr. Burt, her family physician, and no objective findings of injury were noted. Dr. Burt ordered an MRI scan which revealed only degenerative changes. No objective evidence of an injury was present until muscle spasms were noted by Dr. Hamilton on May 9, 2005, almost three months after February 14, 2005.

Based upon the foregoing evidence, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

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