

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F111222

JUDITH WRIGHT,
EMPLOYEE

CLAIMANT

TWIN LAKES NURSING & REHABILITATION CENTER,
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 1, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 7, 2006 in Mountain Home, Arkansas. A prehearing order was entered in this case on December 8, 2005. 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 during the course of the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about September 26, 2001.
3. The respondents accepted a compensable cervical strain injury and controverted additional benefits as of January 31, 2002.
4. If called to testify as a witness, the claimant's husband's testimony would corroborate the claimant's testimony.

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

1. The claimant's appropriate average weekly wage.
2. Compensability of the following alleged injuries in addition to the claimant's admittedly compensable cervical strain: left side carpal tunnel syndrome, psychological injury, organic brain injury, cervical spine and peripheral neuropathy.
3. Controverted attorney fees.

With regard to the claimant's alleged injuries, the respondents contend that the left carpal tunnel syndrome,

psychological injury, peripheral neuropathy, chronic insomnia, headaches and neck pain including a bulged disc at C6-7 and depression do not arise out of the compensable injury, and the respondents therefore controvert said claims.

The record consists of the three volume June 7, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

1. Background

Judith Wright worked in a family owned photography business with her husband in Illinois from 1978 until approximately 1999, when the couple retired and moved to Arkansas. After moving to Arkansas, Ms. Wright engaged in volunteer work, including taking her family dog, a wippet, to the Twin Lakes Nursing and Rehabilitation Center to spend time with patients. Wage reports offered into the record indicate that Ms. Wright first went to work at Twin Lakes Nursing and Rehabilitation Center in March or April of 2001. On September 26, 2001 Ms. Wright tripped over a buffer electrical cord and fell at work. Ms. Wright is convinced that co-worker Steve Hall pulled the cord tight intentionally in order to trip her.

Ms. Wright was taken by ambulance to the Baxter Regional Medical Center where she underwent diagnostic testing, and was treated for a laceration to the scalp and a neck strain and released the same day. Ms. Wright was 48 years old when the injury occurred.

Ms. Wright did not return to work for Twin Lakes Nursing and Rehabilitation Center. The respondents provided temporary disability benefits, and medical treatment, including extensive diagnostic testing, until January 31, 2002. As indicated above, the claimant contends that she sustained multiple medical problems arising out of the September 26, 2001 fall in addition to the cervical strain accepted by the respondents. In addition, the claimant contends that she was a full time employee, and that the respondents have therefore paid indemnity benefits at an incorrect compensation rate.

At the hearing held on June 7, 2006, the respondents objected to the admissibility of that portion of Dr. Bruton's written opinion and Dr. Bailey's written opinion referring to Vann Smith's neuropsychological testing as objective, as both hearsay and as not being a matter within the expertise of Dr. Bailey or Dr. Bruton. At Dr. Bruton's April 20, 2004 deposition, the claimant objected to Dr.

Bruton testifying as to whether or not it is unusual for a 48 year old person to have a bulging disc indicated on MRI regardless of whether the person had a traumatic injury to the cervical spine. The respondents also objected at the hearing to Christie Wallace testifying regarding Steve Hall's prior violence directed at Ms. Wallace.

I tend to agree that each piece of evidence objected to has minimal relevance on the precise issues presented in this case. Nevertheless, I have not excluded any evidence from the record on either relevance or hearsay grounds. I note that an expert opinion is not inadmissible because it is based at least in part on hearsay.

2. Average Weekly Wage

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40 hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993).

In the present case, Joint Exhibit 1 indicates that Ms. Wright received overtime earnings for the majority of the pay periods during her employment with Twin Lakes Nursing and Rehabilitation Center. Ms. Wright testified that when she was hired she was told that she would work 40 hours per week. Ms. Wright testified that she did not remember having the option to refuse work. Under these circumstances, a preponderance of the evidence establishes that Ms. Wright was bound to work 40 hours per week if the work was made available. I therefore find that Ms. Wright was a full time employee, so that her average weekly wage should have been computed on a 40 hour work week, plus overtime actually earned. Joint Exhibit 1 establishes that Ms. Wright earned \$5.60 per hour when her injury occurred, and Ms. Wright worked 72.5 hours of overtime during the 28 weeks and 3 days covered by the pay records in Joint Exhibit 1. I therefore find that the claimant's applicable average weekly wage on September 26, 2001 was:

$$(5.60 \times 40) + (1.5 \times 5.60 \times 72.50) / 28.43 = \$245.42$$

3. Compensability Of Claims For Left Side Carpal Tunnel Syndrome, Psychological Injury, Organic Brain Injury, Cervical Spine Injury, and Peripheral Neuropathy

To prove the occurrence of a compensable physical 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) that an injury occurred arising out of and in the scope 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) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In addition, to prove the occurrence of a compensable mental injury, Arkansas Code Annotated § 11-9-113(a) provides:

(a) (1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence...

(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licenced psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current

issue of the Diagnostic and Statistical Manual of Mental Disorders.

In the present case, I find that the claimant has failed to establish that she sustained a C6-C7 disc injury on September 26, 2001. In this regard, I note that a cervical x-ray performed on September 26, 2001 was interpreted as normal. Likewise, although an October 8, 2001 MRI of the cervical spine indicated very mild bulging of the C6-C7 disc, I note that Dr. Vowell, the claimant's orthopedic specialist, interpreted the MRI on October 10, 2001 as indicating "no significant abnormalities". I therefore find that the claimant has failed to establish that she injured the C6-C7 disc on September 26, 2001.

I also find that the claimant has failed to establish by a preponderance of the evidence that she established an organic brain injury which is established by medical evidence supported by objective medical findings. In this regard, I note that an x-ray of Ms. Wright's skull performed on September 26, 2001 indicated no depressed skull fractures. An MRI scan of Ms. Wright's head read by Dr. Bruce Robbins, a neurologist, on November 15, 2001 likewise indicated no specific abnormalities. I note that Vann Smith has diagnosed the claimant with organic brain damage based

on his neuropsychological testing. However, my understanding is that neuropsychological testing, without more, is not adequate to establish an organic brain injury by "objective findings" within the meaning of Ark. Code Ann. § 11-9-102(4)(D), where, as here, the test results depend on voluntary responses that can come within the control of the patient. See Watson v. Tayco, Inc. (McDonald's), 79 Ark. App. 250, 86 S.W.3d 18 (2002).

To the extent that the claimant contends in the alternative that she sustained a compensable depression as a result of her work related injury, I see no indication in the record that the claimant has been diagnosed with depression by a licensed psychiatrist or psychologist with a diagnosis that meets the criteria established in the Diagnostic and Statistical Manual of Mental Disorders. Again, I note that Vann Smith diagnosed the claimant with organic brain injury, not depression.

To the extent that the claimant contends that she sustained a polyneuropathy condition as a result of her fall on September 26, 2001, I fail to see where any polyneuropathy diagnosis is supported by objective medical findings in the record.

Finally, Dr. Bailey recorded a history on October 2, 2001 of the claimant reporting pain and radiation from her neck to both arms and her back. A report from the Baxter Regional Medical Center from October 8, 2001 likewise contains a diagnosis of neck pain with bilateral arm radiculopathy. Dr. Bailey concluded on October 19, 2001 that the claimant required a neurology consultation, and Dr. Bruce Robbins provided a neurological consultation on November 30, 2001 which he concluded was "pretty much within normal limits with the exception of a decreased knee jerk on the left side." Dr. Robbins sought and received permission to perform electrodiagnostic studies on the left side of the claimant's body to try to document any objective abnormalities. As a result of electrodiagnostic testing performed on November 9, 2001, Dr. Robbins concluded that nerve conduction studies of the left leg and of the ulnar nerve in the arm were within normal limits, but that the nerve conduction testing did show evidence for mild left carpal tunnel syndrome. Therefore, the claimant has established the presence of mild left carpal tunnel syndrome by medical evidence supported by objective findings.

In assessing whether or not this objective abnormality to the median nerve arose out of trauma sustained on

September 26, 2001, I note that the claimant testified on page 34 of her hearing testimony that she sustained trauma to both knees and both hands during the fall on September 26, 2001. In this regard, the claimant testified:

I remember hitting my knees badly and my hands badly. And I don't remember, I was dazed or everything was kind of like black, but I don't, I don't think I passed out or anything like that. I remember the pain in my head and my hands and my knees.

However, I find that the contemporaneous medical records do not corroborate the claimant's testimony in this regard. To the contrary, the contemporaneous Emergency Room report at Baxter Regional Medical Center from September 26, 2001 specifically indicates that the claimant's extremities were "atraumatic". See R. Ex. 1 pg. 17. Likewise, Dr. Bailey's September 28, 2001 report does not mention the claimant's hands or knees, nor does the Emergency Room report from September 29, 2001 mention the claimant's hands or knees. Notably, Dr. Vowell's October 10, 2001 report indicates that the claimant struck her head on the *wall*, and makes no reference to any portion of the claimant's body striking the floor at all. In light of these histories which make no reference of any documented trauma to the claimant's left hand or wrist on September 26, 2001, I find that the

claimant has failed to establish by a preponderance of the credible evidence any causal connection between Dr. Robbins' abnormal diagnostic test result for the median nerve in the left wrist and the September 26, 2001 incident where the claimant was tripped by a cord and struck her head. Accord Michael L. Veloria v. Zindahl Electric, Inc., Full Workers' Compensation Commission, Opinion filed June 28, 2006 (F201682) [Affirming ALJ's denial of benefits for left carpal tunnel syndrome where medical records did not corroborate claimant's testimony regarding landing on left wrist in accident].

For the reasons discussed herein, I find that the claimant has failed to establish by a preponderance of the evidence that she has sustained any degree of compensable injury in excess of the admittedly compensable cervical strain injury accepted by the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about September 26, 2001.
3. The respondents accepted a compensable cervical

strain injury and controverted additional benefits as of January 31, 2002.

4. If called to testify as a witness, the claimant's husband's testimony would corroborate the claimant's testimony.

5. I find that a preponderance of the evidence establishes that the claimant was a full time employee while employed by Twin Lakes Nursing and Rehabilitation Center, that she earned \$5.60 per hour on September 26, 2001 and that she worked 72.5 hours of overtime in 28 weeks and 3 days. I therefore find that the claimant's average weekly wage was \$245.42.

6. I find that the claimant has failed to establish by a preponderance of the credible evidence that she sustained any degree of compensable physical or mental injury in excess of the admittedly compensable cervical strain accepted by the respondents.

ORDER

The claimant's attorney will be entitled to a 25% attorney's fee on any additional indemnity benefits to which the claimant may become entitled as a result of the average weekly wage finding herein, one-half of said fee to be paid by the claimant and one-half to be paid by the respondents

WRIGHT - F111222

14

in accordance to Arkansas Code Annotated § 11-9-715 and
Death & Permanent Total Disability Trust Fund v. Brewer, 76
Ark. App. 348 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge