

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F604212

LISA CRUCE, EMPLOYEE

CLAIMANT

TEAM WARD, INC., EMPLOYER

RESPONDENT

**CINCINNATI INDEMNITY COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 28, 2007

Hearing before Administrative Law Judge Barbara Webb on March 29, 2007, in Monticello, Drew County, Arkansas.

The claimant appeared *pro se*.

The respondents were represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

A hearing was held on the above-styled claim on March 29, 2007, before Administrative Law Judge Barbara Webb. The claimant was advised that she has the right to an attorney, that the law limits what fee an attorney may charge for representing a claimant, and that she had the right to postpone this hearing in order to obtain representation. Being fully advised of her rights and responsibilities, the claimant nonetheless elected to represent herself.

A Pre-hearing Order was filed on January 16, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed in October 2005 and February 2006, and at all pertinent times.
3. The respondents have controverted this claim in its entirety under A.C.A. § 11-9-102.
4. The claimant's average weekly wage was \$304.10, which would entitle her to compensation rates of \$203.00 for temporary total disability and \$152.00 for permanent partial disability.
5. The claimant has returned to work as of January 16, 2007.
6. In lieu of testimony, the parties agree that Joan Hill, the claimant's mother, would testify that she does not recall statements from Dr. Lytle in which he highly recommended that the claimant should not have surgery.

By agreement of the parties, the issue to be litigated at the hearing was compensability.

The records consists of a one volume transcript, consisting of the March 29, 2007 hearing, containing the testimony of Lisa Cruce, Gwen Craig, Donna Brigham, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (Rehab bill); Claimant's Exhibit No. 2 (CD and Videotape of surgical procedures); Claimant's Proffered Exhibit No. 3 (Audiotape); Respondents' Exhibit No. 1 (Medical Exhibit) and Respondents' Exhibit

No. 2 (Non-Medical Evidence); and Respondent's Exhibit No. 3 (Report of Chuck Jackson).

FACTUAL BACKGROUND

_____ Lisa Cruce is forty-five years old (bd. October 15, 1961). She is currently employed by Drew Central Schools as a school bus driver. She also works part-time for Q & Y Restaurant working in food preparation. She previously worked for Team Ward d/b/a War Eagle Boats in the finishing department. She explained that she rigged boats out – installing the wiring, the seats, the consoles, etc. She worked for Team Ward from 2000 until she was terminated on June 21, 2006. She testified that during her employment with Team Ward she injured both knees while working on the boats:

When you put a console in, you don't' – you're not familiar with it – your legs are at different angle, because you've got your foot holding up while you put pipe – hoses on pipes, and you're at all different angles, you're on your knees, you're squatting a lot. I think it was just the physical labor.

Cruce explained that she first noticed her knee problems when they began popping in 2005. She reported her knee problems to the safety man, Chuck Jackson, and her supervisor, Donna Brigham. She explained that she went to a doctor on her own since Chuck told her that Mike Ward denied that it was work-related. She sought treatment with her family physician, Dr. McKiever, in October of 2005. He ordered MRI's on both knees and referred her to Doctor Lytle, an orthopedic specialist. She was examined by Dr. Lytle in December of 2005. She went to physical therapy but her knees continued to get worse. She continued to work until the pain, popping, and locking of her knees became so bad that she left

her job at the end of January of 2006. She changed doctors and sought a second opinion with Dr. Kenneth Martin, another orthopedic specialist on February 6, 2006. She underwent surgery on her right knee on February 9, 2006. She continued to have problems with her left knee and underwent surgery on her left knee in May of 2006. She testified that after the surgery, both of her knees were "a hundred percent now". Following her knee surgeries, she was released to return to work on June 21, 2006. She tried to go back to work and learned that she was terminated.

Cruce testified that she did not recall having knee problems before she worked at War Eagle. She could not recall a medical visit to Dr. Reinhart in February of 2005 complaining of problems in her right knee which was diagnosed as arthritis. On cross-examination, Cruce admitted that she had several worker's compensation claims while working for Team Ward which had been either settled or paid. She denied talking with Jackson on February 6, 2006, as reflected in his statement, since she was no longer working at War Eagle and was at home. She testified that she had reported the knee problems to Jackson in October of 2005. She denied telling Jackson that she could not pinpoint a specific incident either at work or away from work that caused her knee problems. She denied he told her to go to a doctor. She admitted that she did not tell anyone at Team Ward that she was seeing a doctor in February of 2005 for knee problems. She testified that she sought medical treatment in August of 2005 after a fall at home on her doorstep. She explained that her knees were bothering her at that time. She admitted that she sought medical treatment from Dr. Lytle on December 6, 2005, and reported

that she had bilateral knee pain for several months which was diagnosed as “degenerative”. She explained that her left knee was not as bad as her right knee when she sought treatment with Dr. Martin. She admitted that group health insurance paid for a portion of her knee surgery. She returned on April 10, 2006, to Dr. Martin reporting pain, swelling, and difficulty in her left knee but acknowledged that she did not work between her surgery on February 6, 2006, and April 10, 2006. She admitted that she had told her supervisor that she was in a wreck where her knees hit the dash while riding with her boyfriend, but contended that the wreck occurred after her first knee surgery and not in January of 2006. She explained that she hit her right knee and therefore any left knee problems were not related to the wreck. She received short term disability during the time she missed work due to her surgery. She explained that at the time she was injured, her job entailed doing different things to rig out the boats throughout the day. She explained that she gave the statement to Jackson in October right before she saw Dr. McKiever. She did not recall any conversations in February of 2006 with Jackson. She testified that the wreck occurred on February 18, 2006, during Mardi Gras in Monroe, approximately nine days after her surgery on her right knee. She did not seek medical treatment after the wreck.

Gwen Craig, the claimant’s sister, testified for the claimant. She is a registered nurse. She lives in Hamburg and North Little Rock, but sees her sister in Monticello frequently. She explained that in October of 2005, she saw her sister at least two times a week. She accompanied Cruce to her visit to Dr. Martin and her

surgery on the right knee. She first noticed her symptoms with her knee in October. She was not aware that the claimant went to a doctor in February of 2005 complaining of knee problems. She explained that her sister used her left leg more after the right knee surgery. She explained that her sister's left knee became progressively worse after the right knee surgery. She was not aware her sister was in a motor vehicle accident.

Donna Brigham was called to testify on behalf of the respondents. Brigham was employed by Team Ward for nine years and was a supervisor over the Rigging Department for approximately five years. She supervised the claimant. She did not have a record of any conversation with the claimant about her knees in October of 2005. The only incident report related to the claimant's knee problem was dated February 6, 2005. She explained that the motor vehicle incident was not the one that occurred at Mardi Gras, but was one in which the claimant was "riding, drinking" with Kenny Lloyd when he said a few words and hit something causing both of her knees to hit the dash. She explained that the claimant told her about this accident in January or early February. In late January or early February of 2006, she observed the claimant standing next to a boat talking with a coworker when her knee buckled down. She suggested that Cruce to go home and observed Cruce was assisted by another rigger out to her vehicle. She testified Cruce came in the next morning and asked her to write up an incident report. She replied, "Lisa, I cannot do that, you did not do it at work." Cruce then spoke with Jackson. An incident report was generated at that time by Jackson. Brigham explained that

Cruce did not complain of knee problems nor did she observe Cruce having problems getting in or out of the boats prior to the conversation about the wreck. She explained that if Cruce had an earlier problem with her knees, an incident report would have been made.

On rebuttal, Cruce testified that the only accident with Lloyd had occurred several years earlier. She testified that the accident which she mentioned to her co-workers was the one involving her boyfriend, Joseph Parks, at Mardi Gras. She denied associating with Lloyd or drinking.

The medical records reflect that Cruce sought medical treatment with Dr. Charles Clark with the South Arkansas Orthopaedic Center for bilateral carpal tunnel syndrome in 2002 - 2003 and routine medical treatment with Dr. Reinhart. Clinic notes from Dr. Reinhart reflect that the claimant sought a refill of Xanax on February 11, 2005, due to her right knee popping when bending down which was diagnosed as arthritis in the right knee. She sought treatment for back pain in 2005 and injuries as a result of a fall down doorsteps on July 22, 2005. Records from Drew Memorial Hospital reflect that she was admitted for MRIs on both knees by Dr. McKiever on November 15, 2005, due to complaints of knee pain. The MRI report reflects that "Small joint effusion. Myxoid degenerative changes of both medial and lateral menisci. Probable free edge tear of the peripheral margin and body of the posterior horn of the lateral menisci." Notes from Dr. Lytle reflect that the claimant had complained of bilateral knee pain going on for several months increasing in severity. His impression was "Bilateral knee pain with effusion. I suspect that this

are degenerative type tears of her meniscus. If they are significant, it is not clearly evident to me at this time.” On February 6, 2006, she was evaluated by Dr. Kenneth Martin for her right knee. Notes reflect that “she states that she has had no injury to the knee but she has been having popping and locking in the knee...” He ordered x-rays and diagnosed her with a tear of the medial meniscus of the right knee. He scheduled her for right knee arthroscopy with partial lateral meniscectomy which was performed on February 9, 2006. On March 20, 2006, after a post-op evaluation, she was released to return to work on April 10, 2006, without any restrictions. On April 10, 2006 she returned to Dr. Martin complaining of left knee pain and swelling. She was scheduled for left knee surgery on May 2, 2006, with a note she would not be able to return to work for three weeks after surgery.

Incident reports reflect that the claimant reported a laceration to her right index finger on February 17, 2005, at 2:00 p.m. and a knee injury at the beginning of her shift on February 6, 2006 at 7:00 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed in October 2005 and February 2006, and at all pertinent times.
3. The respondents have controverted this claim in its entirety under A.C.A. § 11-9-102.

4. The claimant's average weekly wage was \$304.10, which would entitle her to compensation rates of \$203.00 for temporary total disability and \$152.00 for permanent partial disability.
5. The claimant has returned to work as of January 16, 2007.
6. Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable injury while performing employment services.

DISCUSSION

The claimant contends she sustained a compensable injury to both knees on or about October 2005, and is entitled to associated benefits.

The respondents contend that the claimant has failed to meet the requirements of A.C.A. § 11-9-102 to prove a compensable claim and further contend that the claimant's problems are related to her prior activities.

I. SUBMISSION OF AUDIO TAPE

At the hearing, the claimant offered into evidence an audio tape-recording of John Ward and Don Marter in a meeting with the claimant in which she claims it was stated that she was not going to be fired. Respondents objected to the introduction of the tape based on relevancy and surprise due to lack of notice. I find that the evidence should be properly excluded and not considered in reaching a decision in this case on the issues before the Commission at this time.

The Pre-hearing Order clearly sets out that the issue before the Commission is the compensability of the claim. Claimant did not raise an issue relating to her

termination or the employer's failure to return her to work until the hearing. Claimant did not make identify or provide a copy of the tape-recording to respondent's counsel of the Commission prior to the hearing. The Pre-hearing Order provides:

No documents, including medical reports, will be allowed into evidence unless exchanged by the parties at least **seven (7) days** prior to the scheduled hearing. Any evidence, whether documentary or testimonial, that is not disclosed or exchanged in compliance with this Order and applicable law shall not be considered at the hearing except with prior leave of the Commission and upon a showing of good cause.

Failure to comply with these directives may result in sanctions, including the exclusion of exhibits, medical or otherwise, from evidence. Evidence not disclosed through the prehearing questionnaire or as set forth within the terms of this Order shall not be considered as evidence except with prior leave of the Commission and upon a showing of good cause.

Therefore, the audio tape-recording which is proffered as Claimant's Exhibit No. 3 is hereby excluded from evidence in the case at this time. This does not preclude consideration of this evidence at such time as this issue becomes ripe before the Commission.

II. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. A compensable injury must be established by medical evidence supported by

objective findings. Ark. Code Ann. § 11-9-102(4)(D). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, the evidence offered by claimant that she was hurt while performing employment services is based on her own testimony. She admits that there was no specific incident or incident of trauma. She speculates that her knee problems were caused by the constant bending and squatting associated with getting in and out of the boats as well as the physical labor required in rigging out the boats as required in her job. She claims her symptoms began in October of 2005, near her birthday, and intensified where she could no longer work by the end

of January or early February of 2006. However, I find that after review of the credible evidence offered in this case, the claimant's version of what happened is simply not credible. Her supervisor testified that the claimant had not complained of any knee pain and was not observed having any difficulty with her knees at work prior to late January or early February of 2006. She testified that she recalled a conversation with the claimant which occurred in the end of January or early February of 2006 in which the claimant told her and another coworker that she had been involved in an automobile wreck in which she jammed her knees into the dashboard while riding and drinking with a boyfriend. She also noted the only report received was in February of 2006 from a doctor who stated that due to the popping of her knees and pending surgery, she was not to return to work. More importantly, Brigham was an eye witness to the incident in early 2006 in which the claimant was standing at the side of a boat with co-workers when her knee buckled and she caught herself before she fell down. Brigham sent her home and refused to write up a report the next day at the request of the claimant asserting that the knee problems occurred at work. She explained that the claimant then reported the incident to Chuck Jackson resulting in the incident report dated February 6, 2006.

Brigham's testimony is consistent with the statement of Chuck Jackson dated April 17, 2006. Jackson reports that the claimant reported knee problems that were painful such that she was unable to perform her work on February 6, 2006. When asked if the problem was work-related, the claimant could not pinpoint a specific incident either at work or away from work and stated that "she couldn't

say and all she knew was that when she stood up her knee popped and it hurt.” He indicated that he told her since she could not attribute her injury to a work related incident, she should file it on her insurance.

In addition, the medical evidence demonstrates that Cruce had previously sought medical treatment for knee problems in February and December of 2005 which she admittedly did not report to her employer as work-related and sought medical treatment on her own. In December of 2005, Dr. Lytle examined her knees and ordered MRI's. Based on the testing, he recommended conservative treatment and physical therapy and did not recommend knee surgery. On February 6, 2006, the same date as the reported incident, the claimant sought treatment with Dr. Martin and was immediately scheduled for surgery. In light of the evidence that claimant suffered from pre-existing degenerative knee problems and her statements to co-workers that she injured her knees in an automobile wreck in early 2006, it is reasonable to conclude that the need for knee surgery was the result of either the pre-existing degenerative knee condition or an independent intervening motor vehicle accident which was not work-related. Based on the credible evidence in this case, I find that the claimant has failed to establish by a preponderance of the evidence that she was hurt while performing employment services.

_____ The claimant must also prove that there is a causal connection between the work-related accident and the injury. Stevenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). With respect to this proof, the claimant must show that the “major cause” of the injury is the workplace. When making this determination,

the claimant does not receive the benefit of the doubt. Ark. Code Ann. § 11-9-704(c)(4)(Supp. 1995); Glencorp Polymer Products v. Landers, 36 Ark. App. 190, 820 S.W.2d 475 (1991). A claim for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. Arkansas Department of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

III. RAPID, REPETITIVE MOTION

I would further note that even if claimant could establish that there was no other explanation for her knee problems other than the nature of her work – a finding that I do not make in this case – the evidence fails to establish a compensable injury. Claimant has asserted that her knee injuries were brought on by gradual onset and were not due to a specific incident or trauma event on the job. The Supreme Court of Arkansas has established a two prong test to determine whether an injury constitutes a gradual onset injury caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1988). As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. Id.

In the instant case, the claimant testified that her job tasks included repetitive bending and heavy lifting, she offered no evidence that the repetitive action was rapid. There was no evidence offered that there were performance quotas or piece

per hour requirements. She also testified that the amount and type of work performed varied during a typical day.

In determining whether a worker's injury was the result of repetitive and rapid motion, the appellate courts have required some showing of how rapidly the repetitive actions were performed. See Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000) (benefits awarded where movements repeated every twenty seconds); Parker v. Atlantic Research Corp., ___ Ark. App. ___, ___ S.W.3d ___ (June 30, 2004) (benefits awarded where claimant was required to perform multiple tasks at high volume with quick and fast movements of a repetitive nature over the course of ten-to-twelve hour shift, six to seven days a week); Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998) (series of repetitive motions performed 115 to 120 times per day separated by periods of only 1.5 minutes constituted rapid motion); High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998) (movements repeated every fifteen seconds found to be sufficiently "rapid").

In the instant case, although Cruce's testimony establishes that a portion of her work activities were repetitive, there is no evidence in this record to indicate whether these activities were performed rapidly. While it is evident that the claimant's job included some bending and squatting and lifting of console equipment, the claimant has failed to prove by a preponderance of the evidence that her work was rapid. Jobe v. Wal-Mart Stores, Inc., 66 Ark. App. 114, 987 S.W.2d 764 (1999); Patterson v. Frito Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130 (1999).

While objective medical evidence clearly exists to show the claimant suffered from knee problems, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable gradual-onset injury caused by rapid repetitive motion in connection with her work activities.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge