

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610069

DORIS DAVIS, EMPLOYEE

CLAIMANT

SONIC DRIVE-IN, EMPLOYER

RESPONDENT

HARTFORD UNDERWRITERS INS. CO., CARRIER

RESPONDENT

OPINION FILED APRIL 16, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on March 16, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to workers' compensation benefits.

On January 30, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. The testimony of Doris Davis, the claimant, Rachel Faulkner, and Terry Burnside, coupled with medical reports and other documents comprise the record in this

claim.

DISCUSSION

Doris Earline Davis, the claimant, with a date of birth of November 19, 1964, has an Associate's Degree in business. Claimant commenced her employment with respondent on August 29, 2006, as an assistant manager. The claimant had been employed by respondent-employer approximately five (5) days at the time of the claimed injury which is the subject of the present claim.

The testimony of the claimant reflects that while she did not have prior experience in restaurant management, she did have prior other management experience. Claimant denies that she went through any orientation regarding her job duties at the time of her employment by respondent, and maintains that she was only given some booklets to study.

Regarding the job duties that she performed in the employment of respondent prior to her claimed injury, claimant testified that the only tasks that she performed was to fill the ice bucket and stay on the soda machine the five days that she was there. Claimant described what an average day consisted of in her employment with respondent:

Well, basically I stayed at the soda fountain the whole five days I was there. There was a little bit of filling the sacks with the food orders, but apparently I wasn't fast enough and I was kicked off of that. I pretty much filled the ice bucket, filled the ice, and tried to make the sodas during happy hour. It was pretty tough because it was really, really fast paced. I also went into the cooler to get some of the condiments to fill them back up, strawberries, ice cream that had to be put into the ice cream machine. (T. 9-10).

The claimant maintains that she suffered an injury within the course and scope of her employment with respondent on September 1, 2006. In describing the events surrounding her injury, the testimony of the claimant reflects:

I was working the fountain machine, getting ice. It was approximately 10 to 5:00. We had been having some problems with the ice cream machine freezing up, and I had noticed that it was low. Before I left, I wanted to refill it, so I asked one of the other employees if they would like for me to go back and do that, so I went back to the cooler to get the ice cream to refill it before I left.

They have two [walk-in-freezers]. I wasn't really clear on that. I think one's a lot colder temperature, and then the one that I went into, I believe it is a freezer, but it stays - - it's less of a temperature. (T. 10).

The claimant continued:

I went back and opened up the box and pulled it out of the box and lifted it up. I'm not real sure how heavy it is, but it's liquid ice cream, and it was pretty heavy, and I turned around to carry it out, and at the same time, you've got to push on the door, and it was a kind of suction to it, and I was trying to balance myself and push on the door, and when I did, I lost my footing and my feet went up in the air and I slammed down on my tail bone. (T. 11).

The claimant also testified regarding the presence of a co-worker who provided assistance to her following the accident:

When I got out of the cooler, there was a young man getting ready to go on the grill cook, and since she's given me th names, I'm thinking his name was Eric, but I was hurting at the time and I really didn't even pay attention. I just wanted somebody to help me. He came over to the door and he got the ice cream out of my hand and held it, so I kind of pulled myself together, and I don't remember precisely what happened, but I told him that I had fallen down. I was hurting. Could he hold on to that for just a few minutes. He handed it back to me, and I went up to the front where Rachel Faulkner was at the ice cream machine, and she was the employee that I asked did she want me to go back and get a bag of the ice cream to put in there. She said, yes she did. I went to hand it to her, and I told her, I said, "I cannot pour the - - I fell in the walk-in, and I'm really hurting. Could you pour it"? She said, yes she would. She took it from there. (T. 12-13).

The testimony of the claimant reflects that her shift ended at 5:00 p.m. September 1, 2006, was a Friday.

The testimony of the claimant reflects that she first sought and obtained medical treatment attributable to the September 1, 2006, accident on Monday evening, September 4, 2006, at the emergency room. Claimant noted that she had a hard time all weekend, was unable to sleep and could not lay down on her side. Claimant testified that she kept standing up and moving.

Claimant maintains that on Monday, September 4, 2006, she had an opportunity to report her injury to Terry Burnside. Claimant's testimony reflects:

First thing after I came in Monday morning I put my purse up, and Terry was sitting in his office. I went over and told him. I said, "Terry, I fell in the walk-in on Friday. I didn't realize that it was as bad as it was, " and I remember asking him - - I guess I was kind of nervous, if he had ever fallen in the walk-in. He said he'd fallen in there before, and that was the end of the conversation. He didn't offer to go - - send me to the doctor. He didn't offer - - he didn't ask any details. He didn't even respond to me. In fact, he pretty much didn't talk to me for the rest of the day before he left. (T. 13-14).

Claimant asserts that to her knowledge a written report of accident was not completed by Mr. Burnside.

The claimant was seen at the emergency room of Lawrence County Hospital on the evening of September 4, 2006. The testimony of the claimant reflects that x-rays were obtained of her back during the emergency room visit and she was referred to another physician. Claimant followed up with Dr. Joseph, an orthopedic surgeon. Claimant testified that she in fact was seen by Dr. Joseph, who ordered a MRI scan of her back, however she was unable to obtain it because the respondent declined to acknowledge liability for the cost of same.

Claimant testified that it is her understanding that after reviewing the x-rays Dr. Joseph diagnosed a fracture of her coccyx/tail bone. Claimant's testimony reflects that her medical

treatment ended with the recommendation of Dr. Joseph regarding the lumbar MRI scan. In describing her continuing symptoms attributable to the September 1, 2006, accident, claimant testified:

As far now as sitting down like I am right now in a soft chair, I'm not having the stinging and the burning like I was in the beginning, so I'm assuming that has healed some. Mainly my problems are as I described when I had the deposition, and I hate to say it because it's embarrassing.

I've had pressure, and it hurts. When I sit down on hard surfaces such as a bench. I'm not saying that I'm going to keel over from the pain. I'm just saying that's it still there, and it's uncomfortable.

The only other problem I've had is some problems with my left hip, and I don't know if that's from before because I think we all know I've had issues before sensory neuropathy. (T. 16-17).

The claimant is presently employed at Cracker Barrel, where she has been for a year.

Claimant works in the retail shop and the cash register.

During cross-examination claimant acknowledged that she had other medical problems in addition to her coccyx, to include fibromyalgia, high blood pressure, hyper thyroid, and sensory neuropathy from her waist down. Claimant continues to be followed at Morris Health Services, her primary care physician. Further, the claimant acknowledged that in 2002 began having neck, low back, and left leg problems. The testimony of the claimant reflects that the afore difficulties had their onset when she was in her mid-twenties. Further, the testimony of the claimant reflects that her symptoms as a result of the afore difficulties cause her the cry and experience difficulty concentrating at work. Finally, claimant testified that she was aware that her medical records reflect the presence of degenerative joint disease and depression in addition to the fibromyalgia.

The testimony of the claimant reflects that she was treated by her primary care physician

with Flexeril, a muscle relaxer, for almost two years for the fibromyalgia. Claimant's testimony reflects that Effexor, an antidepressant, for her anxiety. In July 2003, claimant returned to her primary care physician after having undergone a lumbar MRI which disclosed degenerative disk disease. In October 2003, claimant acknowledged receiving medical treatment under the care of a rheumatologist for multiple somatic complaints of swelling in her joints including her fingers, toes, left wrist and left ankle.

The testimony of the claimant reflects that in 2004, after experiencing symptoms of throbbing in her left foot and numbness in the right foot, she was diagnosed with B-12 deficiency, which was treated with injections for two years. In 2005, claimant relayed to medical providers at the Hoxie Clinic, complaints of bilateral feet numbness, pain sensation in the legs, low back, legs, and feet pain with walking. Claimant maintains that with treatment by a neurologist, Dr. Behrens, she received some relief from her symptoms. Claimant noted that prior to her treatment by Dr. Behrens and the relief gained by same she sought social security disability income due to her numerous medical conditions.

Regarding injuries sustained in a January 2005, motor vehicle accident, the testimony of the claimant reflects:

Well, it wasn't so much an injury, but it flared up the fibromyalgia pretty bad. I was rear-ended. I went to the hospital. I saw Dr. Surratt at the Hoxie Clinic, and he wanted to continue with rehab, and I think I went to rehab a couple of times, and told him I felt better, and that pretty much ended everything. (T. 23).

The testimony of the claimant reflects that with the symptoms of loss of balance, walking into doorways and blurred vision she was ultimately diagnosed with the sensory neuropathy in early 2006. Claimant testified that the numbness and neuropathy has never "really went away". The

testimony of the claimant reflects, in pertinent part:

. . . After they treated me with the B-12 for two years, because of - - what they told me is the nerve damaged is caused because B-12 was too low and that they did not catch it in time. That was my understanding.

So when they treated me with the B-12 for two years, it brought my B-12 level back up, and I felt better. (T. 24).

Regarding a March 3, 2006, correspondence from Dr. Surratt of Lawrence Health Services reflecting that he would be ending the working relationship because of non-compliance, claimant testified:

Yes, I have had some different opinions with him over some issues, and we had misunderstandings, and we weren't going to be treated by him any more. (T. 25).

Claimant maintains that her complaints in June 2006, of legs hurting, dragging the left leg, and memory problems were the result of her thyroid disorder rather than the neuropathy. With respect to improvements in her condition, claimant noted that she has not had to take her thyroid medicine in six (6) months, and that she has been off of her B-12 shots for over a year.

Claimant agrees that it was approximately 5:19 p.m. on September 4, 2006, when she went to the doctor for complaints that she attributes to the September 1, 2006, work-related accident. The emergency room records relative to the September 4, 2006, visit of the claimant reflects that the claimant was seen at 21:19 hrs (7:19 p.m.), identified Cracker Barrel as her employer, rather than respondent-employer Sonic. Prior to her August 29, 2006, employment by respondent-employer, claimant was employed by Cracker Barrel.

The claimant left the employment of Cracker Barrel on August 18, 2006, due to a family problem involving her brother. Claimant returned from Montana on or about August 27, 2006.

While claimant testified that she gave her two week's notice to Cracker Barrel, she changed her mind, and the circumstances worked out such that she never left the employment of Cracker Barrel. Claimant explained:

I called them from Montana and had my check sent over to Mizzoula, Montana, and talked to my retail manager at that time, and she said, "You know, you might want to think about staying on part-time so you can keep your discount. You can stay - - you can work for Cracker Barrel one day a month and still keep your employment." (T. 27).

Claimant testified that when she returned to Cracker Barrel she worked 17 hours per week because that was all available for her having lost her status when she went to work for respondent. (T. 28).

The dimensions of the area where the claimant reported that the fall occurred on September 1, 2006, was approximately 4 ½ ' x 5'. Claimant asserts that the employees of respondent-employer that would have known that she had fallen on September 1, 2006, were Rachel Faulkner and Sherry Burnside. Claimant also identified another employee, a young man, who assisted her with the ice cream mixture following the incident/accident. On September 4, 2006, claimant worked with Janet Morris at respondent-employer.

Claimant acknowledged that when she walked out of work on September 4, 2006, she told Ms Morris that it was because of her and she was not going to deal with her attitude any more. Claimant explained that Ms. Morris was making derogatory remarks to her. The testimony of the claimant reflects, regarding her reasoning for leaving work on September 4, 2006:

That was not completely the reason why I left. I was in an extreme amount of pain. My brother had just committed suicide two weeks prior to that, and I was just not really myself. I think that's

pretty - - was pretty obvious. (T. 29).

Claimant acknowledged that she did not personnel of respondent-employer at the time she left on September 4, 2006, that she was going to the doctor or that she had hurt herself and could no longer work. Claimant testified:

No, I told her exactly what I told - - she said, "why are you leaving?" And I said, "Because I can't deal with your attitude," and that's exactly what I did. (T. 29-30).

Claimant acknowledged that the attending emergency room physician did not take her off work, but rather recommended that she follow-up with another as soon as possible. The claimant followed up with Dr. Joseph, an orthopedic physician. Regarding the absence of off-work slips by any of her doctor subsequent to September 1, 2006, claimant's testimony reflects:

No, I didn't ask him for one. I had to continue to work. I think I was in conversation with him and I talked about - - this was after I went to Montana, and I used all the savings I had, and when I got back, I was broke. I didn't have much of a choice. (T. 30).

The evidence in the record reflects that the claimant had never been diagnosed with coccygeal fracture prior to the September 2006 fall. Claimant testified that she was off work for a couple of weeks before she returned to work for Cracker Barrel.

Terry Burnside testified that he is employed as a working partner of respondent-employer. Mr. Burnside's testimony reflects that while his work hours fluctuates usually most days he start working at 7:30 a.m. and work until 5:00 p.m. Mr. Burnside testified regarding the equipment/fixtures at the Sonic location where the claimant was employed:

Well, actually it's a walk-in cooler, the one that we're talking about. It has a temperature, and it has to stay somewhere between 34 and 38 degrees temperature. It can never be below freezing or down to freezing because produce and things like that are stored in there also, and it would

- - of course, freezing would damage those. (T. 35).

With the required temperature setting Mr. Burnside testified that there is never a problem with ice melting in the cooler.

Mr. Burnside testified that new employees are furnished an employee handbook, which covers work-related injuries. The Burnside maintains that the handbook states what steps to take to report an injury. Mr. Burnside denies that he has ever fallen in the walk-in-cooler.

The testimony of Burnside reflects that he was present at respondent-employer on September 1, 2006. Mr. Burnside testified that had the claimant reported an injury on September 1, 2006, he would have completed an incident report. Mr. Burnside's testimony reflects that two other associates were present on September 1, 2006, and an injury report could have been made to either of them.

Mr. Burnside maintains that the first time he learned that the claimant was asserting that she had fallen and hurt herself was when he was contacted by the third party administrator for respondent-carrier around September 12, 2006. (T. 37). Mr. Burnside testified regarding a conversation he had with claimant about her quitting:

I spoke to her probably two days after she had left the job. Now, my conversation with her was, you know, what had happened, what was going on, what took place there that caused her to walk out at that time, and she kind of got upset during the conversation, and we just kind of ended it there.

Well, I mean, she had some type of disagreement with the person that was there with her at the time. (T. 38).

Mr. Burnside testified that he talked with the claimant when she came to work on the morning of September 4, 2006, however not about an injury. Further, Mr. Burnside denies that the claimant

indicated that she was going for medical treatment.

Ms. Rachel Faulkner is a senior at Walnut Ridge High School who is employed by respondent. Ms. Faulkner's testimony reflects that she was working on September 1, 2006. Ms. Faulkner testified:

I was coming in to be at fountain. When I first get there sometimes I have to do that as well. (T. 40).

Ms. Faulkner testified that she did not recall anything unusual occurring on the afternoon of September 1, 2006. Further, the testimony of Ms. Faulkner reflects that the claimant did not tell her that she had fallen and hurt herself. Ms. Faulkner testified that if the afore had occurred she would have told either Mr. or Mrs. Burnside.

Ms. Faulkner acknowledged that the claimant did bring a large bag of ice cream mix back from the cooler. Also, Ms. Faulkner testified that the restaurant/drive-in was very busy. The parties stipulated that other witnesses available to testify, to include co-manager/co-owner Sherry Burnside and Janet Morris, would provide testimony corroborate of that of Mr. Burnside and Ms. Faulkner.

The medical in the record reflects that the claimant was seen at the emergency room of Lawrence Memorial Hospital on September 4, 2006. The report reflects a history of the claimant having slipped at work four days earlier and landed on her coccyx with increasing pain since. The physical examination during the emergency room visit reflects pain over coccyx with palpation. The report reflects a discharge diagnosis of contusion-coccyx. Claimant was provided Vicoden in the emergency room. (RX. #1, p. 39). The radiologist report relative to the claimant's September 4, 2006, emergency room visit reflects that the SI joints are symmetrical and

unremarkable, the sacrum was free of any apparent fractures and that the coccyx was not deformed. (RX. #1, p. 43). The claimant was provide a prescription for Ultram for pain. (RX. #1, p. 42).

On September 12, 2006, the claimant was seen by Dr. Thomas Joseph, a Pocahontas orthopedic physician. The report relative to the visit reflects, in pertinent part:

History of Present Illness: This forty-one year old lady sustained injury to her lower back when she fell on 8-01-06. She was seen in the Emergency Room at Lawrence Memorial on 8-04-06. She was told that she has a fracture of her coccyx area, so she is brought in for further management. At the moment, she has pain of about 9 out of 10 severity, which is sharp, throbbing, and aching. It is constant. Sitting down increased the discomfort. Lying in bed also increases the discomfort. Rest decreases it. She is on Ultram for the discomfort.

* * *

Examination fo the spine: There is tenderness in the spine, especially in the lower aspect of the spine in the sacral coccyx area. There is no tenderness in the lower lumbar area. There is no paravertebral spasm. Movements of the lumbar spine, forward flexion and side bending are not uncomfortable.

* * *

X-rays shows that she has a dorsal fracture of the sacral coccyx region.

Plan: is to have a MRI of the sacral coccyx region and review back after the MRI scan. (CX. #1).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On September 1, 2006, the relationship of employee-employer-carrier existed among the parties.

3. On September 1, 2006, earned wages sufficient to entitle her to weekly compensation benefits at the rate of \$198.00, for temporary total disability.

4. On September 1, 2006, the claimant did not sustained an injury to her coccyx arising out of and in the course of her employment.

DISCUSSION

The claimant asserts that while discharging employment duties for respondent on September 1, 2006, she sustained a fall which resulted in a fracture to her coccyx. Claimant asserts entitlement to corresponding medical and indemnity benefits workers' compensation benefits as well as controverted attorney fees. Respondents deny that the claimant sustained a compensable injury while within the employment of same.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

In order to prove a compensable 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; and injury arising out of and in the course of employment, that the injury caused internal or external harm to the body which required medical services or resulted in disability or death, medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i). If the

claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.w.2d 876 (1997).

In the instance claim, it is undisputed that the claimant suffered from health problem which required medical treatment prior to September 1, 2006. The evidence reflects that the claimant discharged employment duties for respondent on Friday, September 1, 2006. Prior to the conclusion of her shift on Friday, September 1, 2006, the claimant retrieved ice cream mixture from one of the cooler for the ice cream machine. Rachel Faulkner, who was assigned to job duties at the fountain, confirmed that the claimant the container of ice cream mixture to the ice cream machine. The credible testimony in the record reflects that respondent-employer was quite busy at the time of the claimant's departure on September 1, 2006, after having completed her shift. Nevertheless, while the claimant provided specific details of informing Ms. Faulkner that she was unable to pour the mixture in the machine because she had fallen and was hurting, Ms. Faulkner credibly testified that nothing unusual occurred involving the claimant. Further, Ms. Faulkner, who was not a supervisor, testified that had the claimant relayed a fall and injury she [Ms. Faulkner] would have told one of the owner.

Regardless of the reporting procedure relative to work-related injuries in place by respondent on September 1, 2006, whether through training or in the employee handbook, the claimant did not report a work-related incident or accident to supervisory personnel prior to departing the business. The claimant provides detailed testimony regarding the mechanics of the September 1, 2006, accident which serves as the basis for the current claim. (T. 11). Likewise claimant asserts that the residual pain of the injury from the accident was such that over the

weekend she was unable to obtain relief. I find incredible that the claimant could recite that she was unable to sleep and “kept standing up and moving”, however at the time reporting the accident to Mr. Terry Burnside on the morning of September 4, 2006, she did not request medical treatment after presumably receiving confirmation from Mr. Burnside that he had also fallen in the walk-in cooler in the past.

It is noted that the claimant has an associate’s degree in business, and a work history which includes manager of the cell phone company. It is clear that at the time claimant left respondent-employer on September 4, 2006, she attributed same to a dispute with another employee, and not with any residuals of an injury. While the claimant asserts that there was another employee of respondent in close proximity to her at the time of her fall, and who in fact assisted her with the container of ice cream mixture, the individual was not called as a witness during the course of the hearing.

At the time she sought medical treatment on September 4, 2007, at 7:19 p.m. claimant relayed a history of a September 1, 2006, fall at work as the cause of her injury. Diagnostic studies reflect evidence of a fracture of the coccyx.

The evidence adduced in the record is inconsistent with the occurrence of an injury arising out of and in the course of the employment as asserted by the claimant. Specifically, the absence of the testimony of a corroborating to the occurrence that the claimant identified as being present on September 1, 2006; the testimony of Ms. Faulkner which contradicts that of the claimant with respect to the reporting and unusual event on the afternoon of September 1, 2006; claimant’s assertion of severe symptoms over the weekend, yet failure to seek or obtain medical treatment; the failure of the claimant to request medical treatment after presumably confirming

that her supervisor had suffered a similar fall in one of the walk-in coolers, coupled with the severe symptoms claimant had encountered over the weekend; that the fact that when the claimant walked off of the job on September 4, 2006, she attributed same to the attitude of a co-worker and not to any symptoms of a work-related injury. According, the claimant has failed sustain her burden of proof by a preponderance of the credible evidence that she suffered an injury arising out of and in the course of her employment on September 1, 2006. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE