

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F509171

TREIGE HUSSEY, EMPLOYEE	CLAIMANT
LITTLE ROCK CONVENTION CENTER, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 17, 2007

Hearing before Administrative Law Judge Barbara W. Webb on October 18, 2006, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Ms. Sheila F. Campbell, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Ms. Betty J. Demory, Attorney at Law, Friday, Eldredge & Clark, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on October 18, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on August 1, 2006. 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. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

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

2. The employee/employer/carrier relationship existed at all relevant times, including July 15, 2005, at which time claimant contends she sustained an injury to her left arm, left shoulder, and neck.
3. In the event the claim is found compensable, the claimant earned an average weekly wage of \$317.00, resulting in a temporary total disability rate of \$211.00 and a permanent partial disability rate of \$159.00.

By agreement of the parties, the issues to be litigated are:

1. Whether the claimant sustained a compensable injury during the course and scope of her employment.
2. Whether claimant is entitled to temporary total disability benefits from October 28, 2005 to a date yet to be determined.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the October 18, 2006 hearing, consisting of the testimony of Valerie Young, Treige Hussey, Jonique Powell, Janet Charles, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (medical index and records); and Respondents' Exhibit No. 2 (employment records).

FACTUAL BACKGROUND

The claimant testified at the hearing that she was employed by the City of Little Rock ("the City") at the Convention Center in April or May of 2004, after working

as a temp for approximately six months. Her job duties included data entry, delivering mail, making bank runs, and other duties as assigned. She explained that her responsibilities with the mail became an every day thing even though originally she had agreed to handle the mail for another coworker every other Friday. She explained that delivering the mail would include handling 1000 to 3500 pieces and involved lifting heavy boxes between 50 to 60 pounds. She testified she injured her shoulder, neck, and arm, when her arm was jerked as she was trying to un-jam the mail stuck in the mail machine. She stated "it was like a cracking noise in the bend of my arm". She testified that she went to the doctor and received steroid pills. After two weeks, her condition had worsened such that she missed work. She recalled that she returned to work the next morning and reported the incident to Janet Charles. She said Charles waited a week and subsequently referred her to a workmen's comp doctor, Dr. Brenda Covington. On October 28, 2005, she met with the CEO who told her that her job was being terminated and offered her a job in the garage. She explained that she knew she would be terminated since she had an earlier confrontation with her supervisor, Janet Charles, and had gone to City Hall and filed a grievance about her failure to address her earlier complaints. She testified that she left her job with the City because she was in a lot of pain and could not work in the cold. She explained that her condition worsened until she received treatment from her current doctor who gave her injections in her left shoulder and burned the nerves for the disc in her neck. She explained that she was now able to use her arm without pain, but was told by the doctor not to do anything at this time. She testified that she had been previously injured in a car wreck while working for

the city, but did not file a claim. She testified that she had previously sought medical treatment for pain in her upper back in 1985 while lifting trays at Baptist Hospital. She also injured her left hand when she fell down stairs in 1987. She was involved in a car wreck in 1988 when she hit a pole. She was injured in the face during an altercation. She was assaulted in 1997 in a domestic situation, hit in the face with a telephone, scratched and held down. She also recalled being assaulted in 1987 when she suffered a cracked rib.

On cross-examination, Hussey testified that she was injured at approximately 4:15 on Friday afternoon. She testified that she was alone at the time and was running 10-by-13 envelopes through the mail machine with postage amounts of \$3.97 or \$3.98 when the mail got jammed. She felt a cracking in her left elbow. She didn't report the injury at that time because she believed it would get better. She finished running the mail and went home for the weekend. She saw a doctor on July 18, 2005, the following Monday, at the Christ Health Primary Care Clinic. She reported to the clinic that she had been hurt at work and was having problems with her left arm and muscle spasms in her shoulder. She told the doctor that she had the problems for about nine months. She also sought treatment for a yeast infection. Her next visit to the doctor was August 8, 2005, when she saw Dr. Covington. After the incident, she continued to work. She was offered another position at the same rate of pay with the City when her job was eliminated which she declined to accept. She received a severance package which paid her regular salary through December 31, 2005.

She received unemployment benefits from November 12, 2005 until May 30, 2006. In her application for benefits, she denied that she had refused any jobs although she had declined the job as a cashier for the City. She also responded "no" to a question asking her whether she was entitled to severance pay. She responded that she was able to work full-time and did not have any disabilities that limited her ability to perform normal job duties. She also lied on her application on November 1, 2005, at Sam's Club about a prior felony conviction. She explained that she lied because she was trying to keep her kids. She worked some assignments for Staffmark and lied about her felony conviction in April of 2006 because she had to have income to take care of her kids. She also lied to Staffmark about prior employment because she believed the City would give her a bad reference from the City.

On cross-examination, Hussey addressed her extensive medical history. She sought medical treatment for her neck, left shoulder and left knee after an automobile accident on November 4, 1985. She sought treatment for pain in both upper arms, right knee, and left elbow after an altercation on March 19, 1987. She sought treatment on November 12, 1987, when she fell down the stairs. She had another automobile wreck and went to the emergency room on June 15, 1988, with complaints of right hand and neck pain. On August 28, 1988, she sought treatment with complaints of pain in her neck and left shoulder after an assault. She went to the emergency room in April of 1991 for injuries to her left fake fingernail after a motor vehicle accident. On February 18, 1993, she complained of pain in her left arm and neck after an altercation. She was hospitalized in March of 1994, for

depression after her mother became ill. On November 15, 1994, she sought treatment at the emergency room after being hit in the back of the head with a gun. On March 14, 1995, she sought treatment after being hit on the left side of the face. She sought treatment on August 24, 1998, for a lifting incident after lifting boxes and diagnosed with a lower cervical and upper thoracic spine problem. She recalled a visit to Dr. Lewis in May of 2000 for treatment to her left shoulder. She was still seeing Dr. Lewis in 2002 and was taking hydrocodone and Celebrex. She sought treatment for left-sided migraines in 2003.

In September of 2004, she sought treatment with complaints of shoulder pain, secondary to being hit with a stick. She explained that she had separated from her abusive spouse four years earlier, but that he come in on her while she was sleeping on that occasion. She testified that her husband was a drug dealer that put the drugs and gun in her car. She explained that she was a good parent and a good wife. She said he was trying to get her kids because he didn't want to pay child support. She said he had contacted the police as recently as two weeks prior with false allegations of child abuse. She explained that she was a Christian woman and that he was doing everything to try to bring her down. She explained that she loved her job at the convention center and had performed over and beyond her expected duties until she was injured in June of 2005. She admitted that as of December of 2003, her husband was coming to the house to visit the kids even though they were separated. She also admitted that she declined steroid injections from Dr. Covington on at least two occasions and specifically requested Lortab, a pain medication, instead. She also admitted she had been arrested on more than one occasion due

to altercations with her first husband after abuse, another man she stabbed to stop him from abusing her, and the altercation when the girls jumped her in Conway.

The claimant also offered the testimony of Valerie Young, her sister, and Jonique Powell, her niece. Young testified that she helped care for Hussey after she was hurt. She observed that Hussey's back was inflamed but could not testify that the Hussey had hurt her back at work, although her sister had told her that she hurt herself when she was lifting something at work. She did not recall Hussey having problems with her neck, back, or shoulder before July of 2005.

Powell testified that she was out partying and received an unusual phone call at 2:00 in the morning on Saturday from the Hussey's twin girls saying that their mom was crying and was hurting. She went to the house and saw Hussey laying on the bed swollen and hurting. Hussey was swollen on her left side from the neck to the shoulder. On cross-examination, Powell testified that she did not take her to the doctor but had taken her to the emergency room on several occasions. She testified that she was a CNA, certified nursing aide. She recalled that Hussey had told her that she had pulled her arm while lifting a machine at work. Powell explained that she had picked up the Hussey's children from day care and saw Hussey at her house at 5:30 that afternoon. Hussey appeared tired but did not indicate she had hurt herself at work.

Janet Charles, chief fiscal officer for the Little Rock Convention and Visitors Bureau, testified for the respondents. The claimant worked in her division as a distribution clerk. She first learned of a claim of injury by Hussey about three weeks after July 15, 2005. She explained that she was passing through her area and

Hussey said she was in pain and told her that she was hurt on the job. Charles contacted the human resources department and ultimately talked with the personnel who handled workers comp cases. Charles met with the company nurse and Hussey to arrange medical attention for Hussey. Hussey told her that on July 15, 2005, she was processing mail through the mail machine and that she injured her elbow, neck, and arm when she tried to pull the mail out after it jammed. Charles explained that the machine was a tabletop postage meter that was about three to four feet long. She explained that at each of the stations where mail might jam in the machine, there are rollers and flaps to open to free a jam. She denied putting off the report of injury by Hussey. She explained that the City had followed all work restrictions and that Hussey did not continue lifting boxes or performing any heavy parts of her job under the direction of anyone at the bureau. She explained that Hussey's position was eliminated due to outsourcing as a part of the budget process. Hussey was offered a garage cashier position inside of a booth. It was a sitting position that did not require lifting. She was alternatively offered severance pay, which included salary and two months premium for her COBRA until the end of the year. Charles explained that they did not hear from Hussey until January of 2006 when she chose the severance package of approximately \$4,000.00. She explained that Hussey filed a grievance a day or two before she told Charles about the incident with the mail machine. She explained that the City investigated it by interviewing Hussey and other possible witnesses. The grievance was ultimately dismissed with no findings. Charles testified that the grievance was not about a work-related injury.

The medical records in the case reflect a long history of medical problems, including complaints of left arm, neck, and shoulder pain. The clinic notes on July 18, 2005, reflect that claimant sought treatment for complaints of pain relating to her left arm, neck and shoulder, stating "Has been hurting for a while. Woke her up at 3 a.m. Thinks she hurt her L arm lifting at work." She was subsequently evaluated by Dr. Covington on August 12, 2005. She was treated conservatively with a therapeutic exercise program, Celebrex, and pain medication. On August 25, 2005, she sought treatment at the emergency room at Baptist Health Center. Notes of the patient's history reflect that she "has a several month history of left neck and shoulder pain". She was scheduled for an MRI of the cervical spine. On September 22, 2005, she was evaluated by Dr. Mason. He noted that his impression was "Chronic left shoulder pain with negative MRI." Hussey underwent electrodiagnostic testing on her left arm on October 14, 2005. Dr. Rutherford notes that the results of the nerve conduction study and needle examination were normal. She was evaluated by Dr. Blankenship, an orthopedist, on May 5, 2006. Hussey underwent an MRI of the left shoulder on May 12, 2006. The MRI revealed "Moderate acromioclavicular degenerative changes; otherwise, negative MR of left shoulder." The claimant continued to treat at Baptist Health Center. Another MRI of the left shoulder performed on August 15, 2006, revealed "Moderate osteoarthritic changes of the AC joint". An MRI of the cervical spine also performed on August 15, 2006, revealed no disk bulge or herniation with a final impression of "Mild disk degeneration at C5-C6". On August 24, 2006, Hussey was evaluated by Dr. Shahim, a neurological surgeon, who concurred with prior treatment and determined that

Hussey was not a surgical candidate but should be treated with trigger point injections and conservative management. He administered a trigger point injection and scheduled a left cervical medial branch block without steroids.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee/employer/carrier relationship existed at all relevant times, including July 15, 2005.
3. Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable injury on July 15, 2005, during the course and scope of her employment.
4. Respondent has fully controverted the payment of all additional benefits.

DISCUSSION

The claimant contends that she was injured during the course and scope of her employment; and that she is entitled to temporary total disability benefits from October 28, 2005 to a date yet to be determined.

The respondents contend that claimant cannot meet her burden of proof that she is entitled to any additional workers' compensation benefits; that the claim was initially accepted as a compensable medical only claim and later denied due to no objective findings; and that the complaints of claimant are due to a preexisting condition and not causally related to her employment with respondent employer.

I. 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, he 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 demonstrates that claimant has suffered from arm, shoulder, and neck pain. The claimant has obviously been a victim of domestic abuse for an extended period of time. She has also been injured in several motor vehicle accidents and altercations over the past several years. The medical records in this case reflect that claimant had been experiencing problems for several months when she sought treatment in July and August of 2005 for the injuries to her arm, shoulder, and neck allegedly caused at work. However, the preponderance of the evidence does not demonstrate that claimant's injuries were caused while Hussey was performing employment services.

The only evidence offered by claimant to corroborate the on-the-job incident was the testimony of her niece, Jonique Powell. However, Powell testified that she had seen the claimant at 5:30 on the same afternoon and that her aunt did not mention an accident which allegedly had just occurred. It was not until 2:00 a.m. when she received a phone call from the claimant's twin daughters for help that she was told by the claimant that she had been hurt at work earlier that day. The notes from the clinic where claimant first sought treatment do not recite any specific events leading up to the complaints of pain by the claimant other than the statement that she "thinks" she might have hurt her arm lifting at work. There is no mention of a mail machine or any other specific incident. The testimony of Janet Charles indicates that the claimant did not report a work-related injury until three weeks after

the alleged date of the incident and after she had filed a grievance with the City without reference to a work-related injury. The claimant testified that she had suffered injuries to her shoulder and arm when she was attacked in her sleep by her estranged spouse as recently as September of 2004. Based on my review of the credible evidence in this case, I do not find that the testimony of the claimant that her injuries happened at work to be credible or compelling.

II. AGGRAVATION/RECURRENCE

In the instant case, it is disputed that a specific incident occurred at work. Respondents contend the her complaints should be considered a continuation and/or recurrence of the claimant's problems from her preexisting conditions which were not work related.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury.

Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000).

In the instant case, the claimant contends that the current problems were not related to her past injuries. While the evidence demonstrates that claimant was able to perform her job duties without complaint prior to July of 2005, there is simply no credible evidence offered to establish an incident at work or medical evidence offered to substantiate a new injury. In fact, the claimant's actions and history suggest that claimant had suffered from similar symptoms for an extended period of time prior to July 15, 2005. Based on my review of the entire record, I find that

the preponderance of the evidence demonstrates that claimant's condition was a recurrence of the pre-existing condition and not the result of a specific incident injury or intervening cause. Alternatively, in light of the claimant's medical history and lack of credibility, I find that claimant has failed to prove that she was injured as a result of a specific work-related incident. Claimant did not immediately report a specific incident at work. Claimant continued to perform her regular job duties after the alleged incident. Claimant did not tell her niece of any injury on the job when she arrived at her home with the twins that afternoon. On the following Monday, clinic notes reflect that claimant told the clinic that she "thinks" she hurt her left arm while lifting on the job and did not mention the mail machine. Moreover, the description of the mail machine given by Charles suggests that it is highly unlikely that the claimant would have been jerked or pulled into the machine. 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. OBJECTIVE FINDINGS

Respondent contends that there are no "objective findings" as required in order to support compensability of the alleged 2005 injury. The claimant bears the burden of proving a compensable injury by a preponderance of the evidence. Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004). In addition to proving her injury by a preponderance of the evidence, the claimant must establish the existence of the injury by medical evidence and supported by "objective

findings.” See Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those that cannot come under the voluntary control of the patient. See Ark. Code Ann. § 11-9-102(16)(A)(i). 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).

In the present case, the claimant has not presented any objective medical findings supporting a change of or the existence of a compensable injury as a result of any work performed by the claimant on July 15, 2005. Since July of 2005, the claimant underwent three MRIs and electrodiagnostic testing, which all resulted in negative or normal findings. None of the subsequent MRIs or other diagnostic tests have resulted in any objective findings of new injury other than degenerative changes. Without such proof, the claim against respondents must fail.

ORDER

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

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IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge