

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605284

BEVERLY J. PETERSON, EMPLOYEE	CLAIMANT
AMERICAN BEST INN, EMPLOYER	RESPONDENT
CRAWFORD & COMPANY, CARRIER	RESPONDENT

OPINION FILED JANUARY 18, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on October 20, 2006 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant on this workers' compensation claim. She does, however, have the option of pursuing a tort action against her employer, Van Wagoner v. Beverly Enterprises, 334 Ark. 12, 970 S.W.2d 810 (1998).

STATEMENT OF THE CASE

The parties have agreed to the following stipulations: An employer-employee- carrier relationship from February to May , 2006 at which time the claimant was earning sufficient wages

to entitle her to a compensation rate of \$72.00/\$72.00 in the event this claim is found to be compensable.

The claimant contends she injured both knees on May 9, 2006 when she was struck by a roll-away bed. She seeks payment of medical expenses, temporary total disability benefits from May 10, 2006 to a date yet to be determined and attorney's fees.

The respondents contend the claimant left their employ on May 7, 2006 and did not report any injury.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. The claimant attempted to introduce a letter from the insurance carrier to show that the employer did not report a claim. Respondents' objection to the letter from Crawford and Company was sustained and the letter proffered as it was not included in the claimant's exhibit packet. The issue of "Notice" was part of the prehearing order and the claimant made no effort to supplement the exhibit packet prior to the hearing.

The following witnesses testified at the hearing: the claimant; co-worker, Mary Hickman, and owner, T.N. Patel. I found the claimant to be a credible witness, offering satisfactory explanations for any discrepancies in the lay testimony, and describing details regarding the broken latch on the roll-a-way bed. Ms. Hickman and Mr. Patel seemed unsure and evasive in their testimony. It should be noted that Ms. Hickman's sister, Ruby Franklin, was the claimant's supervisor at the time of the accident.

The claimant, age 51 (D.O.B. December 13, 1954) worked for the respondent-employer as a motel housekeeper from February to May, 2006. Her health history includes a toe injury in 1999;

a right shoulder injury and workers' compensation claim; a September, 2002 left knee and back injury resulting in a total knee replacement in March, 2005; and a February, 2006 domestic violence altercation. Because of her left knee condition, the claimant was unable to climb stairs and only worked the ground floor of the motel.

The claimant arrived at the motel at 8:30 on May 9, 2006 , and reviewed the shift report, (Tr. p. 31-32). It was the employer's policy to require the employees to report to work everyday to get their assignments. (Tr. p. 8-11, 14, 22-23, 34-35, 48-49). Depending on the room count and workload, some employees might be sent home. The employees were not paid for showing up to see if work was available; they were paid only for the number of rooms they cleaned. The claimant was not given an assignment on the day of the accident.

Before she left the employer's premises, the claimant noticed some clothes hangers by the roll-a-way beds in the housekeeper's office. She asked Mary Hickman for permission to take the hangers home for her personal use. As she reached for the clothes hangers, a roll-a-way bed with a broken latch unfurled and struck her across both legs. The bed had been tied with a cord to hold it together. (Tr. p. 21-24, 37-38).

The claimant developed a red knot on the shin of her left leg and a bruise above the knee on her right leg. The claimant could raise her pant leg to show the redness on her left leg, but the right bruise was higher up on the leg and not easily visualized. A co-worker, Mary Hickman, helped the claimant secure the bed. The claimant reported the injury to her supervisor, Ruby Franklin, but she was told to talk to the owner about any workers' compensation claim.

The claimant returned to the motel that afternoon to talk with the owners, Mr. and Mrs. Patel. Mr. Patel refused to fill out an accident report and threatened to fire her if she filed a claim,

(Tr. p. 24-25, 27, 44).

The claimant filed a claim with the Workers' Compensation Commission the next day and sought treatment at the emergency room and with a chiropractor, Dr. Mike Courtney on May 15, 2006. She has been financially unable to pursue medical treatment. She stated she remains symptomatic with a wobbly, aching left knee, and difficulty sitting and walking. The knee pain also causes sleep disturbance. The claimant is treating herself with over-the-counter medications and a TENS unit left over from her prior surgery.

Mary Hickman, a five year employee with the motel, testified the claimant was not given a work assignment on the day in question. About 9:00 a.m., Ms. Hickman saw the claimant washing her personal clothing in the laundry room. The claimant told her a roll-a-way bed had hit her in the right shin. (Tr. p. 11-12, 15-16). But Ms. Hickman testified there were no clothes hangers in the room (Tr. p. 16-17).

The claimant denied that she was doing laundry at the time of the accident. She explained that she had a washer and dryer at home and the morning staff meetings were too short to even complete a load of laundry.

T.N. Patel has been the manager of the motel for four years. He stated he was unaware of a broken latch on a roll-a-way bed. He stated if something was broken, one of the employees would have to call that to his attention. It is obvious that he did not bother to inspect the beds even after he was informed of this claim, (Tr. p. 75-76).

The parties found it difficult to stipulate to the exact dates of the employment relationship because Mr. Patel maintains that the claimant's last day of work was Sunday, May 7, 2006 despite wage records showing she worked May 8, 2006, (Tr. p. 73-75). This is a mischaracterization of the

employment relationship. The claimant's employment was not terminated prior to the accident on May 9, 2006. She may not have been given a work assignment on the day of the accident, but her presence on May 9, 2006 was occasioned by the employer's policy requiring the employees to come to the premises to find out if work was available.

Mr. Patel testified he knew nothing about an injury until May 21, 2006 when the claimant came by to pick up her check, (Tr. p. 58-59). It was his understanding that the claimant hurt her left ankle. However, he did not complete an accident report for an ankle injury, (Tr. p. 72). He testified he sent in a report of injury to the carrier on May 21, 2006, but no physician contacted him about authorization for treatment and the claimant never brought him any medical records, (Tr. p. 60-62). Mr. Patel denied threatening the claimant with termination if she filed a claim, (Tr. p. 63).

DOCUMENTARY EVIDENCE

The wage records indicate the claimant was paid by the hour, not by the room. Prior to the accident at work, the claimant was working 19 to 50 hours a week. After the accident, the claimant only worked 3 hours. The last day of work is listed as May 8, 2006.

The claimant completed a Form AR-C on May 12, 2006, and filed the claim with the Commission on May 15, 2006. In other words, the Commission's file was not opened by the carrier but was established on the basis of the claimant's complaint.

MEDICAL EVIDENCE

The claimant sought treatment at the emergency room (ER) in Pine Bluff on May 10, 2006 and reported a work-related injury. Dr. Charles Smith observed bruising and swelling and recorded a hematoma of the right thigh and pain below the left knee. Dr. Smith was aware of the claimant's prior left knee surgery. The claimant was prescribed medication and both knees were x-rayed.

There was no evidence of fracture or dislocation and the claimant was returned to work at full duty.

The claimant also saw chiropractor, Dr. Michael Courtney, on May 15, 2006 for left leg and hip pain and low back pain. The claimant described a work-related injury and the doctor excused her from work indefinitely.

The claimant returned to the Pine Bluff ER on May 27, 2006 complaining of left knee pain. She was given a prescription and released.

The claimant was treated at the ER again in Louisiana on June 20, 2006 for left knee pain and swelling. She was advised to use over the counter medications, elevate her leg and use moist heat on the knee. This doctor advised her to follow-up with an orthopaedic surgeon.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993, which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. Under the Act, the claimant has the burden of proving the following requirements by a preponderance of the evidence of record:

1. An injury arising out of and in the course of employment
2. An injury causing internal or external harm to the body, requiring medical services or resulting in disability or death
3. An injury established by objective medical findings
4. (a) An injury caused by a specific event identifiable by time and place of occurrence

or
5. (b) A gradual injury, caused by rapid and repetitive motion, which is the major cause of the disability or need for medical treatment.

The respondents controverted this claim contending that the claimant gave no notice of injury before she “discontinued” her employment. I find this position to be without merit.

Because of the employer’s policies, there are no attendance records to show when the claimant was present and the employees did not clock in when they arrived. Likewise, the wage records are not determinative of her presence on the property since she was required to report to work without pay just to find out if she would receive a work assignment that day. Nevertheless, I found the claimant to be a credible witness. She offered sufficient details of the accident to establish a specific incident identifiable by time and place of occurrence. Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001). The lay testimony also shows she reported an incident to both a co-worker and her employer. Therefore, I find the claimant did give notice of her injury to her employer. It is also a mischaracterization of the evidence to contend that the accident happened after the claimant’s employment was “discontinued”. The claimant never resigned and was never terminated.

The issue of “employment services” was not raised in the respondents’ prehearing questionnaire but respondents’ counsel did question the witnesses on this topic. If the respondents defended this claim solely on the issue of “Notice,” I would find that the claimant gave notice of an aggravation of a preexisting condition to her left leg, Williams v. L & W Janitorial, 85 Ark. App. 1, 145 S.W.3d 383 (2004) and a new injury to her right leg. If however, the respondents’ contentions are expanded to include employment services, then I find that the claimant was not performing employment services at the time of injury.

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment...” Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2003). A compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed...” Ark. Code Ann. 11-9-102(4)(B)(iii)(Supp. 2003). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

The act of retrieving clothes hangers for personal use was not an employment service and is distinguishable from the case of Caffey v. Sanyo Manufacturing, 85 Ark. App. 342, 154 S.W.3d 274 (2004), where the claimant was injured on her way to clock in for work and from Ray v. University of Arkansas, 66 Ark. App. 177, 990 S.W.2d 558 (1999), where the claimant was required to be available to assist students. Although the claimant in this case was on the employer’s premises at the time of the accident, the lay testimony establishes that the shift report meeting was over, the claimant had not been given a work assignment and she was performing a personal task at the time of the injury. The mere fact that she was on the employer’s premises at the time of the accident is not determinative of a compensable injury.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during May, 2006.
2. The claimant injured both legs on May 9, 2006 and gave notice to her employer.

3. At the time of the injury, the claimant was not performing employment services.
4. The claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge