

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611860 and F601642

**DELIAH QUINNEY,
EMPLOYEE**

CLAIMANT

**FEDERAL EXPRESS, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

**SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC.,
CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JULY 20, 2007

Hearing before Administrative Law Judge Dale Douthit in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Honorable Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Honorable Judy Robinson Wilber, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 25, 2007, the above-captioned claim came on for a full hearing at Little Rock, Arkansas to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Law. A prehearing conference was conducted in this matter on February 8, 2007, and a Prehearing Order was filed on February 13, 2007. A copy of the Prehearing Order was introduced into the record, without objection, as Commission Exhibit No. 3, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

1. The Arkansas Workers' Compensation Commission has jurisdiction over both of these claims.
2. The employee/employer/carrier relationship existed at all relevant times, including June 11, 2005 and February 2, 2006.
3. The parties agreed claimant's applicable TTD rate would be \$372.00 per week regarding both claims.
4. The parties agree that all issues not outlined herein are reserved.
5. The parties agree that if benefits are awarded, respondents would be entitled to an offset pursuant to Ark. Code Ann. § 11-9-411 in accordance with Respondents' Exhibit No. 1.

At the hearing, the parties agreed to litigate the following issues:

1. Whether claimant sustained a specific incident back injury on June 11, 2005.
2. Whether the claimant sustained an aggravation or recurrence injury to her back on February 2, 2006.
3. Alternatively, whether claimant sustained a compensable gradual onset back injury that manifested itself between June 11, 2005 and February 2, 2006.
4. If compensability is overcome, whether claimant is entitled to TTD benefits from May 15, 2006 to November 8, 2006, all associated medical expenses, and attorney's fees.
5. Notice defense.

6. Subrogation lien.

At the full hearing, claimant contended, in summary, that she sustained a compensable back injury by specific incident on June 11, 2005 and/or a compensable aggravation or recurrence back injury on February 2, 2006. In the alternative, claimant contended she sustained a gradual onset compensable back injury that manifested itself between June 11, 2005 and February 2, 2006. As a result of her alleged compensable injuries, claimant contended entitlement to temporary total disability benefits from May 15, 2006 through November 8, 2006, all associated medical expenses, and attorney's fees. Claimant reserved all issues not outlined herein.

At the full hearing, Respondents No. 1 contended, in summary, that claimant has received all benefits to which she is entitled. Respondents No. 1 contended claimant did not sustained a compensable injury on either June 11, 2005 or February 2, 2006.

DISCUSSION

The claimant, age 36, worked for Federal Express as a delivery driver. Claimant testified that her work duties required her to load and unload her truck with packages that would weigh up to 75 pounds and would then, of course, deliver those packages to various customers. The claimant contends that she sustained specific incident back injuries on either June 11, 2005 or February 2, 2006 or both. In the alternative, claimant contends she sustained a compensable gradual onset back injury that manifested itself between June 11, 2005 and February 2, 2006.

To prove a compensable injury as a result of a specific incident, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services, or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective finds, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. C. Mickel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The first specific incident back injury the claimant alleges to have occurred was on June 11, 2005. The claimant testified that on June 11, 2005, she was loading and unloading freight when she felt a “twinge” in her back. (T. 26, L. 10-14) Claimant testified that after she felt the twinge in her back, she continued to work and finished her work day. Claimant testified she never reported a back injury on June 11, 2005 to her employer. June 11, 2005 was a Saturday, and the claimant testified that the next day she stayed at home and felt fine.

Q When you had this twinge on Saturday, you finished out your workday?

A Uh-huh.

Q And what did you do after that?

A Went home.

Q And the next day being a Sunday, what would you have done on a Sunday?

A Nothing. Study. Stay around the house, study.

Q How were you feeling on Sunday?

A Good.

Q Feeling okay?

A Uh-huh.

On Monday, June 13, 2005, claimant testified she was at home walking to a "building" on her property and then "just couldn't move." (Transcript page 28, Lines 17-23) The claimant testified that she then called her supervisor "Matt" and told him she was "outside," had pain in her back, and had to go to the doctor. The claimant then testified she told Matt "there was a twinge in my back at work" the prior Saturday. (Transcript p. 29, Lines 8-23) However, Matt Erwin testified at the full hearing that he was claimant's supervisor in June of 2005, but that Ms. Quinney never told him she had a twinge or any other type of injury at work in June of 2005.

A It was a Monday morning during my insort. She called and told me that she is -- was at home, was not scheduled to work that day, and was walking outside to get something and had severe back pain, said that she was -- already made an appointment to go to the doctor. And I asked her if she would give me a call when she got out of the doctor. I asked, you know, "What happened?" She said, "I don't know. I was going outside and felt a pain in my back." And I asked her to call me when she got out of the doctor.

Q And do you remember if she discussed having any type of pain at work the last time she worked, which would have been that Saturday?

A No, ma'am, I don't recall that.

Q And did you ask her whether she had hurt her back at work?

A No, ma'am. I asked her -- I asked her if she knew how she hurt it, and she just said that she was just walking outside and -- and felt a pain, but didn't mention that it had happened at work.

Q And did she ever, even after that conversation, come back to you and say, "Hey, I hurt my back at work. I need to file a workers' compensation claim"?

A No, ma'am.

Q Did she ever come back to you and say, "I want the company to pay for my going to the doctor since I hurt my back at work"?

A No, ma'am.

Q And did she ever even inquire about seeing one of FedEx's so-called company doctors?

A No, ma'am.

To further cast doubt on whether any compensable event took place on June 11, 2005, the claimant's own written narrative about back problems also leaves out a mention of any twinge or pain occurring on June 11, 2005. The claimant's own written account of what happened on June 11, 2005 simply says, "On Saturday 6/11/05 I worked at Fedex in Conway the whole day. I unloaded freight from a can onto a belt, then sorted the freight, ran a route, loaded my truck with outbound freight and delivered it to the Little Rock Station." (See Exhibit B to Respondents' Exhibit No. 4) The claimant went on to write, "I thought I hurt my back that Saturday but was not for sure. I had not done anything physical since Sat. 6/11/05." The claimant never mentions a "twinge" and seems to speculate that since she worked on June 11, 2005 and not on June 12, 2005 or June 13, 2005, that she must have hurt her back at work. Speculation and conjecture does not substitute for proof.

I find the claimant has failed to prove by a preponderance of the evidence that an injury occurred arising out of and in the scope of employment on June 11, 2005. Further, the only medical report in June of 2005 is dated June 14, 2005 from Dr. Barrow, which basically says lumbar strain. (Claimant's Exhibit 2, Page 1) The claimant testified she never told Dr. Barrow she had a work-related problem. No other medical report contained in the record shows any evidence of objective findings to support the contention that the claimant sustained a compensable injury for over five months after the alleged June 11, 2005 incident. The claimant testified she stayed off work for about a week after the June 14, 2005 doctor visit and then worked continuously in her regular capacity for several months thereafter.

Mr. Matt Erwin testified the claimant only mentioned to him that she had suffered "severe back pain" while walking outside her home on June 13, 2005. Based on the credible evidence contained in the record, I find the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable specific incident back injury while working for Federal Express on June 11, 2005. I find claimant has failed to prove any of the elements of compensability as outlined herein by a preponderance of the evidence with regard to her contention of a June 11, 2005 specific incident back injury.

The claimant's next argument is that she sustained a compensable aggravation or a new compensable injury by specific incident on February 2, 2006. The parties agreed that on February 2, 2006, the claimant twisted her back while

carrying a computer to someone's door. The claimant testified as follows regarding the February 2, 2006 incident:

Q What happened on February the 6th of 2006?

A I was running a route in North Little Rock. It was raining. I was carrying a Dell computer up to someone's door. The slips were wet -- the steps were wet. I slipped and the computer went this way, and my body went that way and just twisted.

Q You twisted your back. Did you fall?

A No.

The claimant testified that when she "twisted" her back, she did not fall or strike anything. Subsequently, the claimant went to the doctor and underwent back surgery on May 15, 2006. The claimant argues that the twisting event on February 2, 2006 either caused a new compensable injury or was a compensable aggravation. To properly analyze claimant's contention, it is necessary to go back to November of 2005.

The claimant testified that in November of 2005, she started having back pain "come and go." (Transcript Page 35, Lines 1-11) By December 27, 2005, the claimant testified her back pain was so severe that she sought chiropractic treatment. The claimant testified that she told her supervisor in December of 2005 that she was going to the doctor, but that she never told her supervisor she felt her need for treatment was work related. On December 29, 2005, the claimant came under the care of Dr. Blankenship, who gave her steroid injections. On December 30, 2005, an MRI report of the claimant's lumbar spine revealed "L5-S1 broad

based leftward disc displacement effacing both the exiting and descending L5 and S1 nerve rootlets, respectively.” (Respondents’ Exhibit 2, Pages 8, 9)

After the MRI, the claimant underwent another steroid injection. On January 10, 2006, Dr. Blankenship reported “I think she is probably going to need surgical intervention,” (Respondents’ Exhibit 2, Page 14) and Dr. Blankenship referred the claimant to Dr. John Wilson. The claimant told Dr. Wilson she wanted to return to work even though she was still having back problems. On January 19, 2006, Dr. Wilson reported, “She wants to attempt to return to work. ... I have advised her that if she does have recurrence of her problems, then I will probably be rather quick to recommend decompressing the nerve root that is in a bind.” (Respondents Exhibit 2, Page 18)

The claimant did return to work even though it is obvious from the medical reports both Dr. Blankenship and Dr. Wilson thought surgery was imminent. Then on February 2, 2006, claimant had the twisting incident for which she alleges was a compensable event. I disagree. For the claimant to prove an aggravation or a new compensable injury, the same elements for compensability as previously recited herein must be met.

It is clear the claimant’s back condition did not change after the February 2, 2006 twisting incident. The claimant’s need for back surgery and treatment after February 2, 2006 was not due to her twisting on February 2, 2006, but was due to her preexisting back problems as outlined in her December 30, 2005 lumbar MRI. Dr. Blankenship testified in his deposition that the surgeries performed on the

claimant were due to the herniated disc that was apparent in December of 2005 and January of 2006, well before the twisting incident on February 2, 2006.

Q So, once again, Doctor, it sounds like the surgery that was ultimately performed in May, or whenever it was performed, 2006, I think it was may, was performed for the condition for the hemiated disk and the clinical findings and the progression of those clinical findings that were in existence in January of 2006. Is that a fair statement?

A I think some of those symptoms were present even a little bit before January.

Q You're correct. December of 2005 and January of 2006.

A Right. Right.

Q But that's ultimately what the surgery was performed for?

A As far as my knowledge of this condition was - I mean her situation, yes.

It is clear from the objective medical evidence contained in the record that the claimant sustained no new injuries due to the February 2, 2006 twisting incident. The claimant's condition for which she needed medical treatment preexisted her February 2, 2006 incident, and therefore did not arise out of or in the scope of her employment by specific incident on February 2, 2006. Based on the credible evidence, the claimant has failed to prove by a preponderance of the evidence that she sustained either a new compensable injury or a compensable aggravation on February 2, 2006

The claimant alternatively argues that she sustained a compensable gradual onset back injury that manifested itself between June 11, 2005 and February 2, 2006. When a claimant requests benefits for an injury characterized by gradual

onset, Ark. Code Ann. § 11-9-102(4)(A)(ii) (Supp. 2005) controls, defining compensable injury as follows:

(4)(A)(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back or neck injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence...

A claimant seeking benefits for a gradual onset back injury must prove, by a preponderance of the evidence, that (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(E)(ii). In addition, objective medical evidence is necessary to establish the existence and the extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. Wal Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

To prove a gradual onset injury, the claimant must still prove by a preponderance of the evidence that the injury arose out of and in the course of her employment. I find the claimant has fallen short of meeting her burden. I have found that the claimant did not sustain a compensable back injury on June 11, 2005; however, Mr. Matt Erwin testified the claimant did suffer "severe" back pain while at home on June 13, 2005 while the claimant was going to some type of tool shed or outbuilding. Did the claimant's back injury originate on June 13, 2005?

When reaching my conclusion that the claimant has failed to prove a compensable gradual onset back injury by a preponderance of the evidence, I do not dismiss Dr. Wilson's August 31, 2006 opinion regarding causation. (See Exhibit "C" to Respondents' Exhibit 4). Dr. Wilson opined that "it is my opinion w/ a reasonable degree of medical certainty, based on Ms. Quinney's written note, that this indeed a work related injury." While Dr. Wilson's opinion is respected, it was only based on Ms. Quinney's handwritten account of her back injury. Dr. Wilson did not have the voluminous record now before the Commission. Based on the record, I respectfully disagree with Dr. Wilson. First, Dr. Wilson in the same report states that the claimant's problems began in June of 2005. That statement may be true; however, I find that any problems the claimant did have with her back in June of 2005 originated while she was at home on June 13, 2005 and not during the scope of her employment on June 11, 2005. Further, the claimant's narrative, in which Dr. Wilson relied on to form his opinion regarding causation, states that her back pain began again in November 2005 "usually hurt when I was handling packages." (See Exhibit B to Respondents Exhibit 4) However, that account with respect to the nature of her back pain is in direct contradiction with her supervisor at the time, Mr. Jason Guy. Mr. Guy testified that the claimant told him her back problems were due to an "out of work injury." (See page 12, Lines 1-24 of Respondents' Exhibit 3)

It is clear to this examiner that Dr. Wilson did not have all evidence available at the time he gave his opinion regarding causation. As such, I disagree with Dr. Wilson's opinion regarding causation. It is important to note that Jason Guy testified

that at no time prior to the February 2, 2006 twisting incident did Ms. Quinney allege any type of work-related injury to him.

Based on the credible evidence before the Commission, I find the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset back injury that manifested itself between June 11, 2005 and February 2, 2006. As such issues 4, 5, and 6 outlined herein are rendered moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable specific incident back injury while in the respondent's employ on June 11, 2005.
4. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury or aggravation by specific incident on February 2, 2006

5. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset back injury which manifested itself between June 11, 2005 and February 2, 2006.

6. Issues 4, 5, and 6 outlined herein are rendered moot.

ORDER

After careful consideration of all the evidence in this matter, and viewing such impartially, and without giving the benefit of the doubt to either party, I find the claimant has failed to meet her burden regarding compensability of a specific incident back injury on June 11, 2005 and February 2, 2006.

Further, claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset back injury. Therefore, the above-captioned claims are hereby denied and dismissed.

IT IS SO ORDERED.

HONORABLE DALE DOUTHIT
Administrative Law Judge