

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513785

CHERYL ROQUE, Employee	CLAIMANT
SILOAM SPRINGS MEMORIAL HOSPITAL, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT

OPINION FILED FEBRUARY 13, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by RONALD M. MCCANN, Attorney, Fayetteville, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 17, 2007 , the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 25, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on November 24, 2005.

At the time of the hearing the parties agreed to stipulate that claimant would be entitled to the maximum compensation rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability.
2. Related medical.

3. Temporary total disability benefits from November 24, 2005 through May 20, 2006 and temporary partial disability from May 20, 2006 through a date yet to be determined.

4. Attorney fee.

The claimant contends she was injured while in the course and scope of her employment. She was initially treated by Drs. Weaver and Tucker. Dr. Weaver referred her to Dr. Danks who performed a lumbar surgery in February of 2006. The claimant contends she remains under Dr. Danks' care at this time. She further contends that she was unable to work until May 20, 2006, at which time she returned on a part-time basis with numerous restrictions. She is therefore entitled to payment of reasonable and necessary medical benefits to Drs. Weaver, Tucker, Danks, and other treating facilities per their referrals. She is also entitled to payment of temporary total disability benefits until her return to work on May 20, 2006, and temporary partial disability benefits from May 20, 2006 to a date yet to be determined, as well as a controverted attorney's fee.

The respondents contend the claimant did not sustain a compensable injury within the course and scope of her employment. The claimant failed and/or refused to timely report an injury. Claimant's complaints are the result of a pre-existing condition for which respondents are not responsible.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 25, 2006, and contained in a pre-hearing order filed that same date,

are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage sufficient to entitle her to compensation at the maximum compensation rates of \$466.00 for total disability benefits and \$350.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her back while employed by the respondent.

### FACTUAL BACKGROUND

The claimant became employed by the respondent in June 2000. Claimant is a certified respiratory therapist and she has performed that job for the respondent since the time of her hiring. A certified respiratory therapist helps with breathing treatments for people with asthma, emphysema, and bronchitis. In addition, they also manage ventilators under doctor's orders and perform tests for arterial blood gasses.

Claimant was scheduled to work from 6:00 a.m. until 6:30 p.m. on November 24, 2005, Thanksgiving Day. Claimant testified that she was asked by a co-worker, Bob Pratt, to perform an arterial blood gas test on a patient that he had missed in the respondent's emergency room. In order to perform this test blood must be withdrawn from a patient's artery. According to claimant's testimony she had checked the patient's collateral circulation and noticed that there was a round stool behind her that had four-five legs with rollers on them. She then testified:

The stool was there, and when I went to sit down, it had rolled out from under me and I landed on my tailbone on the end of the stool. I came down hard. I grabbed the railing to the bed and the stool so that I wouldn't fall to the floor, to prevent my falling.

Claimant went on to testify that she completed taking the sample for the test and

returned to the respiratory department to run the test.

Claimant testified that as the morning passed her pain steadily worsened. When her condition worsened she went to the emergency room and spoke to Doreen Roberts, the house supervisor, who noticed claimant was limping and asked what was wrong. Claimant testified that she reported the injury to Roberts and her response was "That's too bad" and Roberts turned around and walked away. Claimant also testified that she requested treatment from an emergency room physician but was refused because the physician was not a back specialist.

Claimant testified that at some point she called Jeff Copeland, the respiratory department supervisor, who was on vacation in Little Rock. Claimant testified that she reported the incident and informed Copeland that she had found another individual to take her place at work. Copeland gave claimant permission to leave early.

On November 24, 2005 claimant sought medical treatment from Dr. Tucker, a chiropractic physician, from whom she had been receiving treatment for various conditions since 2000. Dr. Tucker referred claimant to Dr. Weaver who ordered an MRI scan of the claimant's lumbar spine. The MRI scan was performed on December 5, 2005, and revealed a herniated disc at the L4-5 level and the L5-S1 level. Claimant was subsequently referred to Dr. Kelly Danks, neurosurgeon, who performed surgery on the claimant's lumbar spine on February 13, 2006.

Claimant has filed this claim contending that she suffered a compensable injury to her back while employed by respondent on November 24, 2005. She seeks payment of related medical treatment; temporary total disability benefits beginning November 24, 2005 and continuing through May 20, 2006; and temporary partial disability benefits beginning May 20, 2006 and continuing through a date yet to be determined.

ADJUDICATION

\_\_\_\_\_ Claimant contends that she suffered a compensable injury to her low back when she sat down hard on a stool in the respondent's emergency room on November 24, 2005. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury while employed by the respondent. Specifically, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that her back injury arose out of and in the course of her employment with the respondent.

Initially, I believe it is important to note that the claimant has a significant and longstanding history of low back problems for which she has received medical treatment from Dr. Tucker, a chiropractic physician. The medical records indicate that claimant has received medical treatment from Dr. Tucker for low back pain as far back as June 2000. In December 2000 the claimant sought medical treatment from Dr. Tucker for complaints

of low back pain following a motor vehicle accident which had occurred on December 1, 2000.

While many of Dr. Tucker's handwritten notes are illegible, they do indicate that claimant sought medical treatment on numerous occasions for low back pain during the calendar years of 2001, 2002, 2003, 2004, and 2005.

In a report dated June 29, 2001, Dr. Tucker indicated that the claimant had an area of permanent injury to both her cervical and lumbar spine that would require treatment on an as-needed basis. He also indicated in a report entitled "Final Short Report" that claimant had been assigned a five percent impairment rating due to her injuries and that she would continue to need treatment approximately one to two times a month for the next year. Indeed, claimant continued to receive medical treatment from Dr. Tucker for low back pain for the next several years.

Most recently, prior to the claimant's alleged injury on November 24, 2005, the claimant sought medical treatment from Dr. Tucker on numerous occasions in 2005. A review of Dr. Tucker's medical reports between the dates of May 31, 2005 and November 22, 2005 indicate that claimant was seen by Dr. Tucker for complaints of low back pain on 23 separate occasions. These include November 12, November 15, and November 22, two days before her alleged injury. A review of Dr. Tucker's note from October 19, 2005 indicates that claimant's low back pain was so severe that every movement caused an increase in her low back pain.

Claimant testified that she injured her back as a result of the incident with the stool on November 24, 2005. Claimant gave a history of this injury to Dr. Weaver when she sought medical treatment from him on November 25, 2005. In addition, Dr. Tucker in a letter dated January 4, 2007 acknowledged that he had treated claimant for various complaints since 2000 including low back pain. However, it was his opinion that when he last saw the claimant on November 22, 2005, there was no indication of a herniated disc.

Even assuming that claimant's low back condition changed from the time of her last visit to Dr. Tucker on November 22, 2005 and her visit with Tucker and Dr. Weaver on November 25, 2005, claimant still has the burden of proving by a preponderance of the evidence that any change in her physical condition is the result of an aggravation or a new injury which occurred while she was working for the respondent. Based upon the evidence presented, I find that claimant has failed to meet that burden of proof.

As previously noted, claimant testified that when her condition worsened on the morning of November 24, 2005, she reported the incident to Doreen Roberts, the respondent's house supervisor. Roberts testified at the hearing and acknowledged that she was the house supervisor for respondent on November 24. Roberts testified that she did not recall any conversation with the claimant regarding an injury on November 24. Roberts testified that if the claimant had reported an injury then she would have been given an incident report to complete and then would have been offered medical treatment in the emergency room.

Also testifying at the hearing was Mary Jo West who at the time of claimant's alleged injury worked for the respondent as the employee health nurse. The employee health nurse was responsible for keeping medical records of the staff including workers' compensation claims. West testified that approximately one week after claimant's injury she did receive a call from the claimant indicating that she had been injured. However, claimant did not give a history of an event in the emergency room, but instead indicated that she had injured her back while getting up from a booth in the employee cafeteria. West testified that she was not aware that claimant was claiming an incident in the emergency room until she received documentation from the respondent's compensation carrier on December 29, 2005.

Also testifying at the hearing was Jeff Copeland, the respondent's director of

respiratory therapy and claimant's supervisor. Claimant testified that she called Copeland who was on vacation in Little Rock and reported the injury in the emergency room. She also testified that she received permission from Copeland to leave work early since she had found someone to cover for her. At the hearing Copeland acknowledged that claimant called him on November 24 and indicated that her back had been injured. However, Copeland testified that the claimant never mentioned an incident in the emergency room. Instead, claimant informed him that she had injured her back while getting up in the cafeteria. Claimant acknowledges reporting increased pain while in the cafeteria, but also contends that she informed Copeland and Roberts of the incident in the emergency room. Nevertheless, two witnesses for the respondent indicate that claimant never mentioned an injury in the emergency room, but instead related her problem to getting up from a table in the cafeteria.

With respect to any incident in the cafeteria, I note that it might be argued that claimant was nevertheless performing employment services while in the cafeteria; therefore, even if the injury occurred in the cafeteria as opposed to the emergency room, the injury would be compensable. However, claimant did not testify that she injured her back while in the cafeteria, but instead testified that she injured her back while attempting to sit on a stool in the emergency room. Thus, any claim for an injury in the cafeteria would be inconsistent with claimant's own testimony.

Finally, perhaps the most important evidence in this case is the testimony of the claimant versus the testimony of Bob Pratt. Pratt is a respiratory therapist and co-employee of the claimant. Pratt was also working for the respondent on November 24, 2005. There are several important inconsistencies between the testimony of Pratt and the claimant. The first inconsistency involves claimant's knowledge of Pratt's presence at the time of the accident. Claimant testified at the hearing that she did not find out until almost one year after her accident that Pratt had witnessed her injury with the stool. However,

Pratt's testimony indicates that he was not only present, but that there was no way claimant would not have known he was present.

Q. Was there any way she would not have known you were there?

A. No. I mean, I walked around the ER with her.

\*\*\*

Q. Is there any reason that Ms. Roque would not have known you were there?

A. No. I walked into the room with her.

Furthermore, claimant testified on direct examination that following this incident she drew blood and went back to the respiratory department to perform the test where she saw Pratt. According to claimant she informed Pratt about the incident at that time. If this is true, it is difficult to understand why Pratt did not inform claimant that he was present at the time of the incident.

Furthermore, there are other inconsistencies in the testimony and Pratt. For instance, claimant testified that she had placed the blood gas kit on the gurney and was not holding anything when the incident occurred.

Q. Were you holding her arm or what were you doing?

A. No, at that point I wasn't holding anything. I had laid the equipment on the gurney.

In contrast to claimant's testimony, Pratt testified that the claimant did have the blood gas kit in her hand.

Q. Now, when you observed this event, did she have anything in her hands?

A. She had a blood gas kit in one hand.

Claimant also testified that as she was about to fall because the stool moved she

grabbed the railing on the bed to prevent herself from falling to the floor.

Q. And what happened from there?

A. The stool was there, and when I went to sit down, it had rolled out from under me and I landed on my tail bone on the end of the stool. I came down hard. I grabbed the railing to the bed and the stool so that I wouldn't fall to the floor, to prevent my falling. (Emphasis added.)

On the other hand, Pratt testified that claimant did not grab the bed rail to keep from falling.

Q. Now, she did not then grab the bed rail?

A. No.

Although Pratt testified that he remembered this incident, he did not believe it was a significant event or an event that would necessarily cause an injury.

Q. Now, was this, in your opinion, a big deal?

A. It didn't look like a big deal to me at the time, no.

Q. Did it look like an event that would necessarily injure somebody, in your opinion?

A. Not in my opinion, no.

Finally, I note that claimant testified as follows:

Q. And so what did you do after - - you kind of got your composure and so forth?

A. I went and - - yeah, you know, took a minute or so and took down the railing and continued doing the arterial blood gas on the patient.

If this incident truly occurred as claimant now contends and it took her a period of time to get her composure, it is again difficult to believe that claimant could not have

noticed the presence of Pratt.

In short, claimant has testified that she suffered a compensable injury to her back when a stool on which she was attempting to sit rolled away from her and she sat down on the stool hard injuring her tail bone. In support of her testimony claimant has offered the testimony of Bob Pratt, a co-worker. According to claimant's testimony she was not aware that Pratt was present until almost one year later. However, according to Pratt's testimony, he walked into the room with claimant and there was no reason for her not to know that he was present. In addition, various details regarding the incident such as whether the claimant had the blood gas kit in her hand and whether she grabbed the rail to keep from falling are contradictory. In my opinion, it is impossible to reconcile the testimony of the claimant and Pratt regarding the incident itself, claimant's knowledge of whether Pratt was present, her reporting of the incident to Pratt shortly after the incident, and the timing of when claimant learned that Pratt was present.

In summary, this claimant suffered from a prior history of low back pain for which she received extensive from Dr. Tucker, a chiropractic physician. This medical treatment included at least 23 separate evaluations for low back pain between May 31, 2005 and November 22, 2005. While claimant contends that she reported the incident in the emergency room to Copeland and West, both of those witnesses testified that claimant did not mention an injury in the emergency room but instead attributed her back pain to getting up from a table in the cafeteria. While it might be argued that claimant was performing employment services while in the cafeteria, such a finding would be contrary to claimant's testimony that her injury occurred in the emergency room, not in the cafeteria. Finally, there are several important inconsistencies between the testimony of the claimant and her primary witness, Bob Pratt. In my opinion, the testimony of the claimant and Pratt cannot be reconciled to explain the inconsistencies which are present.

Accordingly, for the foregoing reasons, I simply find that claimant has failed to meet

her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on November 24, 2005.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent on November 24, 2005. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE