

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513394

TWILA TREAT, Employee

CLAIMANT

FUEL ZONE, Employer

RESPONDENT

CANNON COCHRAN MANAGEMENT SERVICES, TPA

RESPONDENT

OPINION FILED MARCH 7, 2007

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 14, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 22, 2006, and a pre-hearing order was filed on February 23, 2006. 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-carrier relationship existed among the parties on August 17, 2005.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$265.16 which would compute to a compensation rate of \$177.00 for total disability benefits and \$154.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's right shoulder on August 17, 2005.
2. Temporary total disability benefits.

3. Medical.
4. Attorney fee.

At the time of the hearing the claimant clarified her request for temporary total disability benefits to include the period from November 11, 2005 through January 18, 2006. The respondent's motion for costs has also been added as an issue.

The claimant contends that she was injured on August 17, 2005 when her right shoulder was injured when she was moving 40-pound boxes that had fallen against a freezer door. She requests temporary total disability benefits, medical benefits, and an attorney fee.

The respondents contend the claimant was not injured in the course and scope of her employment. Further, there are no objective medical findings.

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 February 22, 2006, and contained in a pre-hearing order filed February 23, 2006, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$265.16 which would compute to a compensation rate of \$177.00 for total disability benefits and \$154.00 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 right shoulder while employed by the respondent.

4. Respondent's motion for costs is denied.

FACTUAL BACKGROUND

_____The claimant is a 41-year-old woman who began working for the respondent in March 2005. The respondent is a convenience store which includes a gas station along with selling cooked items such as chicken, pizza, catfish, breakfast items, et cetera. Claimant was hired by the respondent to work as a cook generally preparing food for breakfast.

Claimant testified that on August 17, 2005 another employee stacked boxes of breading flour in a walk-in freezer. The boxes then fell against the freezer door making it difficult to open. Claimant and another employee got the door open far enough for claimant to enter the freezer and claimant began to move the boxes of breading from against the door. Claimant testified that as she was moving these boxes she felt a pain shoot down her right shoulder. Claimant testified that she continued to work that day but did not report the incident to Brent Hargis, the owner of the respondent.

Claimant continued to work for the respondent and did not seek any medical treatment for her right shoulder until August 31, 2005 when she saw Dr. Endsley, her family physician. Dr. Endsley diagnosed the claimant as suffering from right shoulder pain and prescribed restrictions, medication, and exercises. Claimant saw Dr. Endsley on several occasions before referring her to Dr. Benafield. Dr. Benafield diagnosed claimant's condition as a right shoulder impingement and recommended medication, continued exercises, and gave claimant an injection. The injection was beneficial only for a brief period of time and Dr. Benafield eventually recommended that claimant undergo physical therapy and an MRI scan. The MRI scan revealed tendinopathy but no thickness tear of the muscle. As a result, Dr. Benafield recommended that the claimant undergo physical therapy. At the time of the hearing claimant had not yet undergone the physical therapy due to controversion of the claim by the respondent.

Claimant has filed this claim contending that she suffered a compensable injury to

her right shoulder while employed by respondent on August 17, 2005. She seeks payment of related medical benefits, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her right shoulder while lifting boxes of breading while working for respondent on August 17, 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 to her shoulder while employed by the respondent.

As previously noted, claimant contends that she suffered the compensable injury while moving boxes of breading from against a freezer door on August 17, 2005. In

support of her contention she relies upon her own testimony as well as the testimony of Carolyn Sue Shannon, a co-employee. Shannon testified that she was present when the boxes fell against the freezer door and claimant had to move them. Shannon testified that while claimant was performing this job activity she indicated that she had pulled something. Shannon has been a friend of claimant's for several years.

In contrast to the testimony of claimant and Shannon is the testimony of Brent Hargis, the owner of the respondent. Hargis testified that breading is not kept in the freezer but instead is kept in the cooler next to the freezer door. Thus, Hargis testified that the breading would have been outside the door, not inside. Furthermore, Hargis testified that claimant never reported an on-the-job injury to him. Claimant testified that it might have been several days after the alleged incident before she reported it to Hargis.

According to Hargis, the claimant did not relate her shoulder problem to an on-the-job injury but instead indicated that she had injured the shoulder during an altercation with her boyfriend. According to claimant's testimony, on the day after her alleged injury at respondent, her boyfriend drug her from the passenger's seat out of the driver's side door on his vehicle. According to claimant's testimony the incident with her boyfriend resulted only in bruises to her left side and did not injure her right shoulder.

Hargis' testimony that claimant related her problems to the incident with her boyfriend is supported by the initial medical report from Dr. Endsley. As previously noted, Dr. Endsley is the claimant's family physician. Claimant was evaluated by Dr. Endsley on August 31, 2005 and her medical report from that date states:

Patient's chief complaint is one of right shoulder pain that has been going on for about a week. It initially started when she was yanked from the car by her significant other. She said that she did not feel any immediate problems, but after working a couple of days, she said she started noticing shoulder pain. (Emphasis added.)

According to claimant's testimony the history contained in Dr. Endsley's medical

report is incorrect. Claimant testified that she had significant bruising on her left side and when asked about that bruising by Dr. Endsley claimant then related the incident with the boyfriend. However, a review of Dr. Endsley's medical report clearly indicates that claimant was relating her right shoulder complaints to the incident with the boyfriend. Furthermore, Dr. Endsley's medical report does not mention any bruising on the left side as alleged by the claimant.

It was not until Dr. Benafield's medical report of October 6, 2005, that a history is contained in the medical records relating claimant's injury to an incident at work.

In short, claimant has the burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by the respondent. In this particular case, the claimant's supervisor, Brent Hargis, testified that claimant never reported an on-the-job injury to him. Instead, claimant related her right shoulder problems to an incident involving her boyfriend. Hargis' testimony is corroborated by the history contained in Dr. Endsley's medical report of August 31, 2005 indicating that claimant's right shoulder pain began when she was yanked from the car by her boyfriend. Dr. Endsley's medical report does not contain a history of any work-related incident. Based upon the foregoing evidence, 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.

The final issue for consideration involves respondent's motion for costs. A hearing on this claim was originally scheduled for December 13, 2006. Approximately one to two hours before the scheduled hearing claimant indicated that she could not appear at the hearing due to transportation problems. As a result, respondent filed a motion for costs involving travel expenses. At the hearing claimant testified that she does not have a vehicle for transportation and relies upon others. On the date of the previously scheduled hearing claimant was scheduled to ride to the hearing with her witness, Carolyn Sue

Shannon. On the date of that hearing Shannon's supervisor with another employer refused to let her off work; therefore, she could not drive claimant to the hearing.

Given the evidence presented, I find that claimant's failure to appear at the prior hearing was unavoidable; therefore, the respondent's motion for costs is hereby denied. In addition, I would note that since no benefits were awarded in this case, there would be no benefits to withhold any costs from had the respondent prevailed on its motion.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by the respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE