

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704557

KRISTINA WOLLEN, EMPLOYEE	CLAIMANT
BRINKER INTERNATIONAL d/b/a ON THE BORDER, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 11, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 8, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to workers' compensation benefits. On June 26, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of June 27, 2007, was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit. #1.

The testimony of Kristina Wollen, Judy Wollen, Stephanie Haynes, Kim Fields, and Patrick Ryan, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Kristina Dianne Wollen, the claimant, with a date of birth of March 29, 1971, is a high school graduate with three years of post-secondary education, commenced her employment with respondent-employer as a server on March 4, 2007. Prior to her employment with respondent-employer the claimant worked at her mother's consulting firm performing administrative/clerical duties of filing, making telephone calls, scheduling appointments, scanning and cropping picture for magazines.

In describing her hours of work during her employment with respondent, the testimony of the claimant reflects:

On an average, I worked probably three or four doubles a week. So it would be from 10:00 to 2:00, and then maybe from 4:00 to close, which was 10:00 or 11:00 on the weekends. Or if you work a double all day, you worked from 10:00 to maybe 5:00 or 6:00. (T. 11-12).

Claimant maintains that she sustained an injury to her back on April 19, 2007. In describing the mechanics of the accident, claimant testified:

I, when you're working in the back, there was buckets of ice. And the ice machine is on, you have two different stations, drink stations. One station is on one side, and then on the other side of the restaurant, still in the back, there's another drink station. And that's where the ice machine is. So if you need ice for the station on the other side, you have to go around back to the kitchen, and get the ice out of the ice machine, and bring it back. It's in buckets like the Culligan water buckets. That's the size of the bucket. Some of the buckets have handles, and some of them do not. The ones that do not have buckets, handles, you have to either grab with one hand, or there's two little knobs on the outside of them that you grab and pick them up. They're not as easy to carry as the ones with handles, obviously. But I, we were busy, and I went around to the other side to get ice, as I always did. My nickname up there was the ice queen because that's what I did was go get the ice all the time. And so I went over, we were busy, I got the ice. And I bent over to pick it up. It didn't have the handles on it. When I picked it up, I felt something kind of pop in my back. But we were busy, so. And I didn't

really thin that much of it. I didn't hurt that bad then. I went on back around, dumped the ice, and kept going. (T. 12-13).

While the claimant maintains that she completed her work shift on the date of her accident, she is uncertain if she worked a single shift or double shift, which would dictate when the shift ended. Nevertheless, claimant's testimony reflects that the accident occurred during the lunch shift.

Regarding the symptoms she experienced following the incident, claimant's testimony reflects:

Yeah. I was sore. It hurt. But it didn't hurt, I really, I thought I had pulled a muscle in my buttocks. That's really what I thought had happened. I considered myself to be in good shape. I've been an athlete all my life, never had any, you know, injuries per se that, you know. I don't get hurt that often. So I'm just thinking okay, I probably pulled a muscle. Just suck it up, keep going. You know what I mean. (T. 13-14).

Claimant acknowledged that she did not report the incident/accident to supervisory personnel on April 19, 2007, before leaving work at the conclusion of her shift. Claimant's testimony reflects that she first received treatment for complaints attributable to the April 19, 2007, incident/accident two or three days later when she was seen by her mother's massage therapist, Beth Goode. Claimant explained:

I went to Beth Goode, the massage therapist, because my mom gets massages for her medical problems. She said, you know, it will probably help but if it's a muscle it will just work on out. But I was having such pain down my leg, and my ankle was swollen. And that's what really concerned us. So we wen to the massage therapist. And Beth - - (T. 15).

Claimant was seen by the massage therapist one time in connection with the complaints that she attribute to the April 19, 2007, incident/accident. Claimant maintains that she relayed a history of the work-related incident to the massage therapist:

I told her that I had bent over picking up a bucket of ice, and I thought I had pulled a muscle in my back. And she said well, let's get you on the table and see what's going on. She got me up there, and she said oh,

wow. She said yeah, you've got a lot of swelling back here. I can see it in your ankle. She told me that she's not a chiropractor, but she could feel that my sciatic nerve was swollen. You can actually feel it. I don't know if you're familiar with them. You can feel this - - (T. 16).

Claimant asserts that the massage therapist told her that she needed to go to a doctor. Claimant paid to the cost of the visit to the massage therapist.

The testimony of the claimant reflects that the day following the visit to the massage therapist she sought medical treatment for the complaints attributed to the April 19, 2007, incident/accident from her mother's physician, Dr. Stephen Hathcock. Claimant testified that her treatment under the care of Dr. Hathcock consisted of anti-inflammatory medication and directions to remain off work for two to three days. Claimant asserts that she provide the off work slip to her supervisor.

Claimant asserts that she provided the off-work slip which has been furnished by Dr. Hathcock to the manager, Kevin. Claimant's testimony reflects, regarding her encounter with the manager, Kevin:

. . . I think, if my memory serves me correct, I had called Kevin and told him that I went to the doctor, and I was going to file a workers' comp claim. And he said, okay, make sure you have your documents in order. And that's the next day when I took those, I had a slip from Dr. Hathcock that said he wanted me to go to physical therapy and get an MRI, and that I was off work for those three days. (T. 18).

Claimant explained that she saw the doctor prior to notifying respondents of her April 19, 2007, incident/accident. Regarding te processing of her claim thereafter, claimant testified:

In terms of my claim, I called Brinker because I didn't know who to call. I didn't know who I was supposed to tell. So I just called the head of the company and asked them what do I need to do to file a workers' comp claim. And they assigned me an adjuster, the insurance person on their behalf. Her name was Ginger. And she told me, well have you told anybody at your

job? And I said, I didn't know who I was supposed to tell. I just thought I was supposed to file it with you. And she said, no, you need to go ahead and call over there, and let them know that you're going to go ahead and file the claim so they have notice of it. And I said, okay, well I'll call them right now. And that's what I did. I got off the phone with her, I called , I called, and I spoke with Kevin. Kevin was very rude to me on the phone, and told me that he would do anything in his power to keep me from taking care of this claim, from his company having to take care of this claim because he doesn't understand why I took so long to say something about it. (T. 19-20).

Claimant noted that after the initial telephone conversation with Kevin, the other manager, Pat got on the telephone. Claimant testified regarding her conversation with Pat:

Pat got on the phone, and was very, very nice. He said, you know, I'm going to tell you now Kristina, this doesn't look very good because you did wait over, I think it was over a week to bring this to our attention. I did tell Pat at that time, well, don't you remember me sitting on the heating pad at work, and a lot of my fellow servers were helping me carry my trays, helping me carry heavy, you know, amounts of food. He told me that if I did hurt my back at work, then he would do whatever he could to see that I got the medial help that I needed. (T. 20).

Claimant testified that she did not undergo the diagnostic study recommended by Dr. Hathcock because she did not have insurance.

With respect to respondents providing access to sanctioned medical treatment, claimant's testimony reflects:

Yes. I called Ginger, and I told her I can't take this pain anymore. I can't get out of bed. My leg is numb. I'm going to the emergency room. And she said wait, don't go to the emergency room, just wait a minute. Hang on the phone for a minute. She left me on hold for about ten minutes, and she came back on. She said, okay, Ms. Wollen. I have a place that's called Concentra Medical Center. Go out there. They're waiting on you. They're expecting you, and they're very good, and they will assist you in any way that they can. And I called them, and I went that day. And I saw Dr. Warren, I believe is his name. And he took some x-rays. And when the x-rays came back, he told me that the - -

I was put on anti-inflammatory medication, muscle relaxer medication

for spasms, and a pain mediation, and put on therapy for three times that week with and initial, with another consultation after that first week of therapy to see if, see what progress had been made, if any. (T. 21).

Claimant testified that after attending two days of physical therapy pursuant to the directions of Dr. Warren, on the third day of the scheduled physical therapy she was informed that respondents were denying her claim. The testimony of the claimant reflects that when she contacted the claim adjuster she was informed that the reason her claim was being denied was because two of her co-workers had submitted written statements saying that she had hurt her back having sex.

Claimant testified that the only medical treatment that she has had since her claim was denied by respondents has been prescription pain medication. Claimant explained that the prescription medication was a product of an emergency room visit to Baptist Medical Center.

Claimant testified regarding her work status:

Well, the reason that I have not returned to work at this time is the standing order from Dr. Warren was that you can go back to work, bur you have to be sitting down 80% of the time. You can't lift anything over 20 pounds, you can't twist, you can't bend, you can't, you know.

Right. And at first before I had seen Dr. Warren, I was trying to go back to work. I went and tried to be a hostess. You know, I loved my job. I loved working there. I tried to do what I could there. And then the pain got to be too much. And once I went to see him, he told me, you can go back, but you have to be sitting down. (T. 23).

Claimant maintains that there is no work at respondent-employer that fit the restrictions imposed by Dr. Warren. Claimant asserts that when she provided the written restrictions as authored by Dr. Warren to the manager, Rita, she responded:

Oh, gosh. Krissy, I don't know what we can find for you to do where you're sitting down 80% of the time. I mean she was, it wasn't like she was being mean. She was just like, oh man, I can't even think of anything that you could possibly do here where you would be sitting down. (T. 24).

Regarding her current physical complaints and symptoms attributable to the April 19, 2007, incident/accident, claimant's testimony reflects:

Physically right now, I have pain that shoots down my left leg from my back to my toes. A lot of times if I sit wrong, or if I lay wrong, it's like a sharp stabbing pain that shoots down your leg. I can't bend over and touch my toes. I can't bend over and pick anything up. I can't carry my book bag. I can't ride my bike. I can't go to the gym. I'm getting fat. It's just crippling. It's just making me to where I can't do what I want to do. I can't work. (T. 25).

Claimant denied ever having any physical problem with her back prior to the April 19, 2007, incident/accident at work.

During cross-examination, while acknowledging that she is trying to take care of some bills that her father has paid on her behalf, claimant maintains that the bills or obligations are not being held over her head. Claimant concedes that her employment with respondent-employer was her only source of income.

Regarding the allegation that co-workers were willing to submit statements that she hurt her back having sex, claimant testified that she was surprised. Claimant maintains that she does not talk about sex with co-workers:

I wouldn't, I mean I didn't say we never talked about sex. I said that we didn't talk about sex with me and my person because I don't talk about sex with other women about my man. I don't think that's smart.

* * *

I mean, I don't want to make it seem like we have never talked about sex at work because that would not be true. But do I just volunteer information about me and my man's sex life, no. I do not. (T. 28).

Claimant did offer, however, regarding her deposition:

Right. I believe what I said was when I was talking with Stephanie

at one point, and I was limping off. I was joking. We were laughing, and I turned around to her, and I said I guess this is what happens when you get old and have sex. And made that statement, yes. But I did not make it, I mean if she took it out of context to say that I hurt my back having sex, then that's a misunderstanding. (T. 29).

Claimant testified that she had read the written statements of two of her co-workers and that she disagreed with the statements. Claimant acknowledged that she did tell Stephanie Haynes that she was going to the massage therapist.

Claimant testified that she first saw Dr. Stephen Hathcock when she first moved down to the Little Rock area, in February 2007. The medical records of the claimant furnished by Dr. Hathcock reflects that claimant was first seen on February 20, 2007, for complaint of a cough. Regarding her affirmative response in the medical history provided to Dr. Hathcock regarding prior back pain claimant testified:

Okay. And I can explain that. I had, and it's like I, I had foot surgery when I was in high school. And from having that foot in a cast for approximately eight weeks did cause me some lower back discomfort. And I think that was because I was hauling around extra weight on that leg, and putting a lot more weight on my other leg. But as far as a back injury, or something that has been chronic pain to me, no. I have not. (T.31).

Claimant acknowledged that she was involved in an automobile accident and complained of low back pain:

Yes. I was pregnant at the time. And that someone hit me from the back. The pressure from the baby that I was carrying made it discomfort, you know, made it uncomfortable for me for my back. It wasn't due to the accident. I think it was due to the fact that, I mean I never received any treatment for my back. I was pregnant, and my baby was sitting in my back. (T. 32).

Claimant described the above as situational discomfort. Claimant added:

Well, I'm, I guess I misunderstood you because when you say

have I ever had problems with my back, or if I have ever injured my back, I can honestly say no. I have never injured my back. Have I had discomfort with my back? Has it been uncomfortable? Yes. When you're pregnant, you have lower back pain. It's just one of the things that comes with it. And I was pregnant when I was tapped from behind. And it was uncomfortable for me. I didn't receive any treatment for it. Once I had the baby, it went away. (T. 32).

Claimant acknowledged that in the past she has had "a lot of truthful type issues", to include several felonies and misdemeanors for theft and forgery. Further, the testimony of the claimant reflects that she is receiving some mental treatment with Little Rock Community Mental Health Center:

Yes. I'm bipolar. I was diagnosed as bipolar three years ago. Since being on my medication, I have not had any incidents with the law. One of the things that bipolar people do is when you're manic, you do things to make yourself feel better. And one of those things, you can look at it time and time again, and research and research and research, one of the thing that bipolar people do is they do steal. They do lie. They do, you know, they do do a lot of that stuff. And the main treatment for that is therapy and medication. And since I've been on my medication, and I have been in therapy, I have not had any issues with that.

I have been on medication consistently for a little over a year. When my parents came and got me from Kansas City, almost a year ago, I had not been on my medication consistently. So, but I have been able to complete my last two years of probation without incident. So for about three years, I have been okay. (T. 33-34).

Claimant concedes that she has been manic at home within the last three years:

Well, I have not been out stealing. Now I will say that I have had some issues when I have been manic at home. And I have, one of my things that I do is I'm a spend freak, and I spend money. And I have not managed my money as well as I'd like to in the last three years, or the last year. But as far as stealing anything from anybody or forging anything from anybody, no. I have not. (T. 34-35).

Claimant acknowledged that she was not on her medication at the time of the incident described

in a June 2006, report from Johnson County Mental Health Center when she was facing charges of stealing her grandmother's credit card and checks.

Claimant acknowledged that she has a relapse in December 2006, when she went on a \$2,500.00, spending spree. The testimony of the claimant reflects, regarding the afore:

Yes. I had gone back to Kansas City. Kansas City is not a good place for me. They say you need to leave your old friends and old habits behind. And I went back when I was too fresh, too green still from trying to get away from things. And like I said before, that is one of the things that I had done in my past t comfort me. The holidays are hard on me. I don't have my kids, you know. So they're hard.

* * *

I stopped taking it. I forgot to take my medication with me to Kansas City. I was too scared to tell my parents that I forgot to take it because that's been an issue for us. And as a result of that, that's what happened. (T. 37).

Claimant testified regarding her assessment and understanding of her diagnosed bipolar disorder:

It's not, let me state, let me clear this up. It's not just a mood that I have. It's a chemical imbalance in my brain. I have no control over that. So I don't just get in a funk and get in a mood, and go do something crazy. There's something that triggers in me. It can be a statement. It can be an incident. You know, it could be anything. And I don't know when it is. You know. All I can do is try to train my brain the best way that I can through therapy, and take my medication, and deal with it. You know, this is a progressive illness. This is something I'm going to have to deal with for the rest of my life. So I'm not perfect. I'm not going to have all that. (T. 38).

Claimant acknowledge that on February 23, 2007, she stole her mother's credit card and spent \$500.00. Regarding the afore incident, claimant testified:

No. Actually surrounding that incident, that was one of the first times that I had been left alone at home since I've been here. My parents went out of town. My mon accidentally forgot her credit card at home. It was on the desk. I had run out of the cash that they gave me, and I used her credit card. And yes, I used it excessively that time. It wasn't as bad as the

time before, but yes I did take it. (T. 39).

Claimant acknowledged that she has served jail time on four separate occasions on charges ranging from thefts to forgeries. Claimant is the non-custodial parent of two children, a daughter and a son. Claimant testified that her son was adopted out while she was in jail. Claimant did her son back after she got out of jail, however subsequently lost custody and parental rights.

The claimant testified that over the last fifteen years she has held about 30 jobs, ranging from two to six months in duration. Claimant acknowledged that she was “discharged a lot of times for lying on” her employment application. Claimant testified that since she has never had a workers’ compensation claim, she was not familiar with the proper steps for reporting a work-related injury.

Claimant testified while she took her heating pad with her to work one day after the April 19, 2007, accident, she is not certain which date it was. Claimant concedes that her testimony regarding the afore during her deposition was in error:

On the 20th of April? No. I don’t even think I worked that day. I do remember that I wasn’t clear on my dates. I do know that. But I took it to work one time. I believe Kim was sitting over there. And I remember Pat coming by and saying oh, my gosh. You got that heating pad? And at that time, I hadn’t reported anything. (T. 42).

Claimant testified that she responded that her back hurt, however did not report the work-relatedness of it. Claimant denies that there was a posting on the communication board at work regarding workers’ compensation. Claimant testified:

There’s nothing up there about workers’ comp. And if there is, it just recently got put up there because it was not there when I was working. There was equal opportunity. There was the minimum wage requirements.

There was the dress code, and an advertisement about shoes. But there wasn't anything up there about workers' comp. I read that board. I cleaned that board as one of my side duties. (T. 42-43).

Mrs. Judy Wollen testified that the claimant is her adopted daughter and resides with her. Ms. Wollen confirmed that the claimant commenced her employment with respondent-employer in March 2007. Mrs. Wollen estimates that the claimant was diagnosed as bipolar and OCD two (2) years earlier. Further, Mrs. Wollen confirmed that the claimant returned to Arkansas in July 2006. Prior to the afore, the claimant had been out of the home of her parents since 1989.

Following the claimant's July 2006, return to Arkansas she was employed by Mrs. Wollen. Mrs. Wollen's testimony reflects, regarding the afore:

Yes. We had thought that she might be able to hold a job, but as she lived with us in our house, we could see that that was just not possible at that time until she got regulated on her medication. She required an awful lot of sleep, and it was really hard for her to focus.

* * *

She's been on medication. I've help her to stay on medication. We monitor that very closely. And month by month, we can see the progress in her returning to the person that we used to know before this all began. (T. 47).

Mrs. Wollen's testimony reflects that since July 2006, she has been familiar with the health and physical condition of the claimant. Further, Mrs. Wollen maintains that between July 2006, and April 2007, the claimant had no complaints or problems relative to her back.

Regarding the claimant's claim of a work-related injury which serves as the basis for the present claim, Mrs. Wollen testified told her about the incident. The testimony of Mrs. Wollen reflects:

I remember it very distinctly because she came home one evening.

We had dinner. She got - - and it was late. She got up to go upstairs. And when she put her foot on the step, she kind of grabbed her hip. And she said, oh, I think I pulled a muscle in my butt today. That's exactly what she said. And I said what happened? And she said well, I was just leaning over to pick up this bucket of ice, and it seemed like something snapped. But then, you know, I just went ahead doing what I was supposed to do. And I didn't think much more about it. Little things happen. And she was very focused on working. And we've always thought it was a good idea to keep a positive attitude. So I didn't say much about it, and she didn't either. (T. 48-49).

Mrs. Wollen noted that every day following the initial reporting the claimant seemed to experience more and more difficulty moving, walking, and getting up and down. Mrs. Wollen testified that at one point the claimant requested her assistance putting her socks on, and it was at that point she observed that the claimant's left leg was swollen all the way down to her foot.

Mrs. Wollen's testimony reflects:

And I thought, I asked her what's going on? And she said, well, you know I pulled that muscle in my back. And I think it may have to do with that. And I said Kristy, we have to get this seen. And she said well, I will, but I want to wait until after Cinco De Mayo. (T. 49).

Mrs. Wollen testified that the claimant's condition degenerated to the point that treatment was sought prior to May 5, 2007:

No. Because she kept going to work, but then I don't remember exactly which day it was, either a Sunday or Monday. She was supposed to work two shifts. She came home in between, and she laid down on the couch, and she just honestly couldn't get up again. I think that was Monday after it happened. And that's when I called the massage therapist because she was very fixated on being there for the weekend. And we went to the massage therapist. And I called a really good one because I didn't want just anybody messing with her. And we don't have insurance. And I thought, you know, that's probably going to be the thing that will take care of it best. And when we went to the massage therapist, I could overhear the entire time she was getting the massage. And when they came out, I mean the, what do you call it when your muscles - - (T. 50).

In addition to arranging for the claimant to be seen by the massage therapist, Mrs. Wollen also

arranged for her to be seen by her physician, Dr. Hathcock. Mrs. Wollen testified that it never occurred to report the claimant's injury as a work related injury until an MRI scan was recommended by Dr. Hathcock and she learned that the cost of the diagnostic study was \$1,800.00.

During cross-examination Mrs. Wollen testified regarding her observation of the claimant since the claimant has been back in the household, post-July 2006:

They're not things that - - I don't know exactly how to say this. There are what I would call OCD behaviors sometimes that I have learned to expect or to not be surprised when I see them from Kristy. And we're learning to manage those things. And she's, I would say February was the last of any of that, that I had seen. And if I had seen it continuing into March, April, I would not have agreed for her to be employed. (T. 52).

Regarding the occurrence in February 2007, Mrs. Wollen explained that when the claimant was given money or access to money she did not use it in the manner that was planned.

Mrs. Wollen testified that to her knowledge the claimant has not been sexually active in the last eight months. Mrs. Wollen asserts that the claimant would discuss the afore with her.

Regarding the claimant's sexual relations, Mrs. Wollen's testimony reflects:

No. Not like that. But I know that she has a boyfriend. And I know that that doesn't happen at our house. But I do think probably there is some sexual activity. But I'm not aware of it. I cannot give you any details of that. (53-54).

Mrs. Wollen testified that during the pertinent time period the claimant had some medical issues which leads her to conclude that the claimant was not having sex. Mrs. Wollen explained that she and the claimant talked about the afore and the claimant was in treatment under medical directions to abstain from sexual activity. During the August 8, 2007, hearing before the Arkansas Workers' Compensation Commission in this claim Mrs. Wollen was asked if the

claimant had “been sexually active in the last eight months”, and responded, “to my knowledge, no”. (T. 53).

The testimony of Mrs. Wollen reflects that she was aware that the claimant had an abortion around the time of the asserted injury. Further, Mrs. Wollen testified that it is her understanding that once an individual undergoes the afore procedure they are directed to refrain from sexual activity. Mrs. Wollen compared or likened the procedure to having a baby.

Regarding the proximity of the claimant’s abortion to the asserted work-related back injury, Mrs. Wollen testified:

Oh, yeah. It was probably a couple of weeks before. At first, we thought there might be some relationship. But the swelling in her leg is not related to that. When I saw the legs swell - - I mean, we didn’t even really talk about it. It occurred to me that there might be some relationship to this pain. And, but then when her leg swelled up like it did, and she was having spasms in her back, it was really clear that it was not that. (T. 93).

Based on the testimony of Mrs. Wollen the claimant underwent an abortion between the time she commenced her employment with respondent-employer on March 4, 2007, and the date of the claimant’s reported injury of April 19, 2007. In addressing the time period of the claimant’s abortion, Mrs. Wollen’s testimony reflects:

I’m sure that that could be determined, but my best recollection is that it was within about two weeks, somewhere in there. And in fact we did talk about it because when her claim was denied, and then she called in and found out why it was denied, she said, that’s ridiculous, we couldn’t have been having sex. And she wasn’t, she still wasn’t at the time. (T. 95).

Ms. Stephanie Haynes, a three year employee of respondent-employer, testified that she worked as server and trainer. The testimony of Ms. Haynes reflects that she and the claimant attended the same college, Pulaski Technical College, and that she recommended that the

claimant apply for the job with respondent. Ms. Haynes testified that she and the claimant were friends outside of the workplace as well. The testimony of Ms. Haynes reflects that prior to April 19, 2007, she and the claimant had conversation/discussions regarding sex:

Kind of, you know. I mean, just to get to the point, you know. I know what we're here about. And you know, we were, you know, I walked in one day, and I seen that she was in pain, you know. And I said, what's wrong, you know. And she said, I hurt my back. And you know, I jokingly said, well girl, you shouldn't have sex like that, you know. And she said, well, she said, no seriously. And I said, well, you shouldn't. you know. You shouldn't - - I said well, I thought God, you know. And I said, well, God don't do that. You know. And she said, well I'd pulled my other side out if I had to to have sex, you know. And I was like, you know. I thought it might, you know, be joking. But you know, apparently she had conversations, hearsay, you know. I'm just going by what I know. And we did, you know, that was our conversation. I did say, you know, my brain. I have ADD. It doesn't make up things like that, you know. I couldn't think to make up something. So I did say, you know, I was like well God you know, you hurt your back. And she said, you know - - and I joked. I was the one who brought up the part about sex. And she said, no seriously. And that was it, you know. And then she said I'd pull the other side out, you know. And I thought well maybe she's still joking or something. But we did have the conversation. Yes. Definitely, sex. (T. 58-59).

Ms. Haynes furnished a written statement to respondent regarding her conversation with the claimant. Regarding the written statement Ms. Haynes testified:

Yeah. My statement, I tried to write it verbatim because, you know, I didn't think that anything would go this far, you know. I was kind of pulled into this more or less. And you know, with her being my friend, I absolutely didn't want to be put in this position. But you know my job's everything to me. I have three kids I've got to support. So I'm not going to lose my job over a conversation that other people had heard me having. And, you know, I didn't want to lie about it, so. (T. 59).

The testimony of Ms. Haynes reflects that she was in the presence of the claimant during the period covering April 19, 2007 through April 27, 2007. Ms. Haynes testified:

Yeah. I did see her at school. And I asked her how she was doing.

And she, you know, she said her, she was going to leave that day and go have something done to her back, a massage or something to try to work the kink out or whatever had happened to her. (T. 60-61).

Ms. Haynes denies that the claimant ever said that she hurt her back at work. Regarding her observations of the claimant between April 19, 2007, and April 26, 2007, Ms. Haynes testified that she saw the claimant one day as the claimant was hosting a shift and noted that she was “wobbling” around.

Ms. Haynes testified that she and the claimant have not worked much together since the conversation about hurting her back having sex. Ms. Haynes’ testimony further reflects, regarding the claimant:

. . . . And she never came up to me and said, you know, maybe ice bucket. I will say that she did work a lot when she was there. She worked doubles, doubles, doubles. And I told her, girl, you can’t lift these big trays and do this and, you know. But she was working a lot, you know. And, but that was the conversation we had. (T. 61-62).

Ms. Haynes testified regarding the claimant’s sexual activity level prior to April 19, 2007:

Well, I mean she’s sexually active. Look at her. I mean she’s - - yes. I mean but, yeah, I’m her friend, you know. She would come to my house. She’s helped me clean my kid’s room, you know. We - - I mean, you know, our conversations, they weren’t all about sex. I mean we talked about everything. But yeah, we had conversations maybe, you know, we didn’t get into details and things. But, you know, yeah, she’s sexually active, you know, yeah. (T. 63).

During cross-examination, Ms. Haynes acknowledged that she had never witnessed the claimant having sex. Regarding any threat to her job if she failed or refused to testify about her conversation with the claimant, Ms. Haynes’ testimony reflects:

Well, you know. There was just a conversation heard. And, you know, people are kind of higher ups. And I didn’t want to, you know, go against the people that were in there. Their work would probably be

taken for granted, you know.

Taken them seriously. So I knew that it was on me then that I had to, you know. And I didn't want people that I work with not to trust me because I've worked hard to gain that trust with them. (T. 64).

The testimony of Ms. Haynes reflects that she has known the claimant for seven to eight months. Ms. Haynes testified that she and the claimant have had only one conversation at the job regarding sex. The testimony of Ms. Haynes reflects that based on other conversations with the claimant it is her belief that during the time she has known the claimant she has been sexually active.

On re-direct examination, Ms. Haynes acknowledged that she was not testifying pursuant to a subpoena. Further, Ms. Haynes denied that her continued employment with respondent had been threatened to compel her testimony:

No. They have not threatened me. I love my job. My manager's the best. I think we could tell them anything in the world and, you know, they've worked with me, you know. I love my job. And I love everybody, most of the time, that I work with them. (T. 67).

Ms. Haynes testified regarding the time of day and the circumstances surrounding her conversation with the claimant about the back pain:

It was in the morning when we were all getting out drinks together, you know. We just got there, 11:00 opening. Everybody always goes and gets a to-go-drink and sets it on the ledge, you know, right there where we keep our cups. And we all just kind of stand there and wait for our table. And then some of us mosey on and go get a table, you know. But some people wait to be set. And that's where we kind of sit and congregate in the mornings. So it was 11:00 opening, right as we opened because as soon as I walked in, I always say, hey, how's it going to everybody, you know. And I seen that she was in pain, you know. And I said, hey, how's it going? What's the matter? You know. Because she was hurting. (T. 68).

Ms. Haynes testified that she only worked "Monday, Wednesday, and Thursday. Or, Monday,

Wednesday, Friday”. (T. 68). Ms. Haynes’s testimony further reflects, regarding the claimant:

I don’t even think I worked with her that much. Now I’ll come in and out of the restaurant for things. But Monday, Wednesday, Friday, she’d be there, you know. And yeah 11:00, we always get there together. Yeah. (T. 68).

Ms. Haynes noted that the claimant never mentioned lifting an ice bucket as the basis of her back pain. Ms. Haynes testified that the community board of respondent-employer contained a poster regarding workers’ compensation.

During re-cross examination Ms. Haynes acknowledged that “everybody that works up there has pretty much had bumps and bruises and banged up”. (T. 70).

Kimberly Ann Fields, who has waited tables for over 15 years, is a two and one-half year employee of respondent-employer. Ms. Fields testified regarding her job duties with respondent-employer:

I’m the training coordinator or head wait. I do all of the training for On The Border. I do all of our community projects. And I’m now on-the-road trainer as well. (T. 74).

Ms. Fields testified that there is a posting on the community board at respondent regarding the manner to file a workers’ compensation claim. Further, Ms. Fields noted with orientation in the handbook, which the employee signs, provide information about filing a workers’ compensation claim.

Ms. Fields testified regarding a conversation she had with the claimant when claimant was using a heating pad. Regarding the afore, the testimony of Ms. Fields reflects:

Well, I remember the day first of all because normally I work until 4:00. I close during the day. And that particular day, I didn’t close. I actually sat down at the table and was having lunch. And I was happy that I had gotten flowers from another manager for a drive that we had

done. And I had given Kristina a necklace. I liked her. I liked working with her. I thought she was friendly. I thought that she had had some hard knocks in life. And I had compassion for her. She was sitting down at the booth closest to the restroom where there was a plug in. And she had a heating pad on her back. We were having lunch. We were talking, and it was joking that she had had wild sex with her boyfriend. Matter of fact, they had passed out, and she had to get her panties off the rearview mirror the next day. That was the conversation. After that, I drove her home to her mother's house. She was supposed to work a double that day. I told her that I was sorry her back was hurting. If there was anything I could do, to call me. I saw her in that restaurant one time after that. And I believe she was hosting. And I had already heard about the workers' comp, and didn't want to get into anything. And I believe I said hello, and that was pretty much it. (T. 75).

Ms. Fields' testimony reflects that the claimant did not say anything to her about lifting a bucket of ice as the source of back pain. Ms. testified regarding her first notice of the claimant's workers' compensation claim:

I was in the office when there was a phone call. I answered the phone. Pat was working on the computer or something. I asked who was calling because I know Pat. You ask who's calling before you give him the phone.

Pat Ryan is the general manager. Yes. I was informed it had something to do with workers' comp. I handed the phone to Pat. When Pat hung up the phone, he looked at me, and he said, do you know anything about Kristina hurting her back? He said do you know, did she hurt her back at work? I said Pat, that wasn't my understanding. And I would never relate that kind of story to one of our managers. That's nobody's business. And I was kind of embarrassed that I had to. And I said it's a lie. That's not what she told me. And it went from there. He asked me if I'd like to, if I would write it down. I did. I went to Stephanie, asked her if she had heard about it, if she would write a statement. And she did. And that was the extent until I met you a couple of weeks ago. (T. 76).

Ms. Fields testified that at the time the claimant relayed how she had hurt her back there were other people/employees present, however she was sitting directly across for the claimant at the time, looking each other eye to eye.

Ms. Fields wrote her statement regarding the conversation with the claimant in close proximity to its occurrence. Ms. Fields' testimony reflects:

Yeah. I remember the conversation well. And I just, I know our restaurant. I know, and people look at me because I do orientation with all the new employees. I do their training schedule. I help them out with whatever they need. I do all the community projects. The kind of, even though I'm not a manager, they kind of look at me at that role. If there had been any problem, they all have my home number, if there had been any problem at work, I would have expected someone to come to me. And I would have immediately given them the right steps to take. (T. 77-78).

Ms. Fields testified that she did not hear the conversation between the claimant and Ms. Haynes.

During cross-examination Ms. Fields acknowledged that she has back problems, however she does not attribute them to her employment. Ms. Fields' testimony reflects that she shared that information with the claimant:

To be honest, no. I've always had a back problem starting off when I was young and variously when I started going through puberty and started my period. That's where it started from.

Matter of fact when we spoke, I had hurt my back. And I told you I didn't know how. Unfortunately, I lead a very boring life. I did not attribute it to work. But I told you that I went to the doctor, and I received medication for it, a Prednisone Pack and an anti-inflammatory. And that's what helped me. I believe I gave you that advise. And also told you Dr. Heigel was the doctor I went to, to see if there was something I could do to help you. (T. 79-80).

The testimony of Ms. Fields reflects that she conducted the orientation session with the claimant at the time claimant was hired by respondent-employer. Ms. Fields testified, regarding the orientation that she conducted prior to the claimant's claim:

When I do orientation, I do not bring up workers' comp. That's not something I do. Up until this case, I had orientation on Monday, and believe me, I said it. But when they go through all of their information pack, and when I give them the handbook, one side is English and one side is Spanish. When you flip it open in the middle, they tear it our. They sign

it. I tell them, this is your handbook, take it home with you. And it goes through all of the details. I also give them a tour of the restaurant and tell them where the communications board is. Do I talk about workers' comp? No, I don't. Just like insurance, I describe the insurance that we have. But that's handled through corporate. That's not handled through me. But if they have any questions there, just like the Brinker Family Fund. If there was something that had happened in times of hardship, we have money that people donate to help out other servers or people employed with Brinker who have a hard time. And if that was something that had happened, and she was going through a hard time, I would have moved heaven and earth to help her, as would any one of our managers. (T. 81).

Ms. Fields maintains that if the claimant's injury was the product of work, even if reported a week later that would not have been a problem with handling it as a workers' compensation claim. Ms. Fields' testimony reflects, regarding the claimant's claim:

Something else was the source that she told me. Face to face, one on one. And I gave her a ride home that afternoon. It was me and her alone in the car. We had plenty of opportunity for her to say hey, you know, I hurt my back and I don't know how to go about this. I would have taken her to work. I would have given her the number. I would have called myself. I would have done anything I could to help. (T. 82).

Patrick Ryan testified that he is the general manager or managing partner of respondent-employer in West Little Rock, and has been so for three and a half years. Mr. Ryan testified that he first became aware that the claimant was asserting a workers' compensation claim on April 27, 2007. Mr. Ryan's testimony reflects:

I received a phone call from someone at our home office stating that Kristina had called looking for information on a workman's comp. At that point, I got in touch with her. And we talked about what had happened. And she said that she wanted to file a workman's comp claim. (T. 84).

Mr. Ryan maintains that there were "red flags" when he started working up the claim:

Well, there was, I guess once I talked to Kristina, she gave me a story. And I had gathered some facts before I actually to her on the phone that were very contradictory at that point. So when she and I talked on the phone, I went through our process and took all the information. All the

information she gave me at that point didn't seem to be matching up with some of the info I had gathered from some other employees. (T. 84).

Mr. Ryan noted that he had heard that the claimant had hurt her back having sex. Mr. Ryan also noted the fact of the delay in reporting a work related injury by the claimant was another "red flag":

That's correct. She had, it was pretty much common knowledge that she had hurt her back for a few days prior to me talking to her. And that's kind of the other thing that sent that red flag up in my mind is that she had been injured, and was still trying to work. But at no time was there ever any mention that she had been injured at work. (T. 85).

Mr. Ryan maintains that there is a posting on the community board at respondent-employer regarding workers' compensation.

During cross-examination, Mr. Ryan was questioned why claimant was allowed to obtain sanctioned medical treatment if there existed conflicting accounts of the injury prior to her filing her claim:

I went through our protocol. When an employee calls me or notifies me that there's been an injury at work, I, the first thing I have to do is contact my insurance company and go through a set of procedures. I collect all the information. And I make the claim to the insurance company. At that point, the insurance company takes it. I'm not involved with the process after that. Once an employee has made a claim that they've been injured at work, I make a phone call, and the insurance company takes it from there. I have no more involvement in the process. (T. 86-87).

Mr. Ryan testified that he relays all of the information that he gathers during the claim process to the insurance company. The testimony of Mr. Ryan reflects regarding the mechanism of the handling of the claimant's claim:

I had received a phone call from the folks at our home office because Kristina had called them inquiring about it. And then once I had spoken with her, I called the folks at Liberty Mutual and went through

the process. (T. 89).

Mr. Ryan did request the written statements from the other employees once he learned of the claimant's filing since he was aware of the conflicting account of the asserted injury of the claimant.

The record reflects the presence of a handwritten statement of Beth Goode, a licensed massage therapist, which reflects that she saw the claimant on April 24, 2007, and provided treatment for severe muscle spasms in the low back and sciatic pain down the left leg. The document also reflects that the claimant had swelling in the left ankle. Finally, the document reflects that the claimant relayed a history of having injured her back picking up a bucket of ice at work. (CX. #1). The testimony in the record reflects that the claimant was seen by Ms. Goode on one occasion.

On April 26, 2007, the claimant was seen by Dr. Stephen Hathcock, with complaints of low back pain on the left side and pain down into her left foot. The office note relative to the April 26, 2007, visit reflects the duration of the claimant's symptoms - pain and numbness- of six (6) days. The office note also reflects, "picked up buckets of ice? "Not sure". The office note reflects that Dr. Hathcock recommended an MRI and that claimant noted that she could not afford it or physical therapy. Dr. Hathcock's April 26, 2007, office note reflects of the claimant, "she requests Vicodian specifically, several times". (CX. #1).

On May 3, 2007, the claimant was seen at Concentra Health Centers in Little Rock, by Dr. William Warren, pursuant to the directions of respondents. The clinic note relative to the claimant's May 3, 2007, visit reflects, in pertinent part:

CHIEF COMPLAINT:

Patient is a 36 year old female employee of Liberty Mutual Insurance who complains about her back which was injured on 04/19/2007 1:30 P.M.

PATIENT STATEMENT:

Patient states: "was bending over picking up a buck of ice and injured back"

* * *

HISTORY OF PRESENT ILLNESS:

The mechanism of injury was lifting of a pail of water. The pain began abruptly. The pain is located on left lumbosacral region and. The pain radiated to the left leg. Pain Intensity Level: 5/10. Denies paresthesias, sensory loss, numbness, weakness, stiffness, morning stiffness, abdominal pain, urinary incontinence, fecal incontinence, dysuria, shortness of breath, or difficulty breathing.

* * *

PE:

APPEARANCE: Well nourished, well developed, in no acute distress.

NEUROLOGIC:

- . DTRs: Equal reflects.
- . Sensory: Intact to light touch distally.
- . Motor: 5/5. Negative straight leg rising (CX. #1).

Claimant's complaint was diagnosed as lumbar strain, lumbar pain and sciatica. Restrictions, to include no repetitive lifting over 20 pounds, no pushing and/or pulling over 20 pounds of force, no squatting and/or kneeling, and sitting over 80 % of the time, were imposed on the claimant's employment activities during the May 3, 2007, visit. The claimant was seen in follow-up at the Concentra Health Center on May 4, 2007, by the physical therapist, Eric C. Holifield, at which time her projected date of maximum medial improvement was listed as May 17, 2007. Prior to her third visit to Concentra Health Center the claimant was informed that respondents were controverting the compensability of her claim.

The medial in the record reflects that the claimant was seen at the emergency room of

Baptist Health Medical Center in Little Rock on May 17, 2007, May 30, 2007, and June 5, 2007.

On June 5, 2007, the claimant was discharged from the emergency room with a diagnosis of lumbosacral strain and directions to follow-up with her primary care physician. (CX>#1).

On April 27, 2007, Ms. Kimberly Fields issued a written statement regarding her contact with the claimant and understanding of the mechanism of the claimant's back complaint, which serves as the basis of the present claim:

I had a conversation with Kristina Wollen on the 25th or April or the 23rd we were sitting down having a conversation just about life. Kristina told me and other employees that she got a little wild with her boyfriend having sex and drinking. She said they woke up in the truck and she hurt her back that way. (RX. #3, p.1).

As noted above, Ms. Stephanie Haynes also provided a written statement regarding her conversation with the claimant and the mechanism of the claimant's asserted work-related injury:

I, Stephanie Haynes, did have a conversation with Kristina Wollen earlier this week referring to her hurt back. Basically she complained of her back hurting her, I jokingly said, "Well, I know why, and she said, "No, seriously, I did hurt it having sex." I said, well you better stop that and she said "No, I'll go pull the other side out and laughed. I saw her at College on Thursday April 26, 2007 where she mentioned that she was going to go have a massage to try and help her back when we got out. . . (RX. #3, p. 2).

After a thorough consideration of all to the evidence in this record, to include the testimony of the witnesses, review of the medical evidence and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 19, 2007, the employee-employer-carrier relationship existed among the parties.

3. On April 19, 2007, the claimant earned an average weekly wage of \$374.00, which generates compensation benefits rates of \$250.00/\$187.00, for temporary total/permanent partial disability.

4. On April 19, 2007, the claimant did not sustained an injury arising out of and in the course of her employment with respondents.

CONCLUSIONS

The claimant maintains that she suffered an injury to her low back while discharging employment duties for respondent-employer on April 19, 2007, which required medical treatment and rendered her totally incapacitated for a period of time. Claimant seeks corresponding medical and temporary total disability benefits as a result of the afore. Respondents deny that the claimant sustained an injury to her low within the course and scope of her employment with same.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Claimant maintains that the injury to her low back for which she seeks workers' compensation benefits is the product of a specific incident.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence an injury arising out of and in the course of her employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark Code Ann. §11-9-102

(16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i). Should the claimant fail to establish by a preponderance of the evidence any of the requirement for establishing compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. 126, 938 S.W.2d 876 (1997).

In the instant claim, there is not a dispute regarding the claimant's employment with respondent-employer or the scope of her employment duties, which entailed lifting buckets of ice. Claimant maintains that she sustained the injury to her low back on April 19, 2007, as a product of lifting a bucket of ice.

The credible testimony in the record reflects that the claimant had a good working relationship with her co-workers, and that she counted friends among them. By her own account, claimant did not report a work-related injury to her supervisor or co-worker prior to April 27, 2007, despite the fact that she maintains the injury occurred on April 19, 2007. Further, the evidence preponderates that respondent-employer had in place on its community board a posting regarding the procedure and process of filing a workers' compensation claim. Claimant was furnished an employee handbook at the time she underwent orientation. The handbook covered information regarding the reporting and filing of a workers' compensation claim.

The evidence preponderates that the claimant had more than ample opportunity to report a work-related activities as the product of her back complaint and discomfort, which were noted prior to the April 27, 2007, reporting of a work incurred injury. The evidence preponderates that the contrary was relayed by the claimant. Specifically, claimant relayed that her back injury/complaint was the product of sexual activity with her boyfriend to at least two different co-

employees in separate conversations.

In addition to her testimony during the hearing Ms. Stephanie Haynes provided a written statement regarding her conversations with the claimant wherein the claimant attributed the back injury to the sexual encounter with her boyfriend and later relayed plans to receive a massage to address the complaints. Indeed, at the time of the claimant's contact with Ms. Haynes on April 19, 2007, before beginning work, she complained of back pain attributable to the sexual encounter with her boyfriend the preceding night. Likewise, Ms. Kimberly Fields provided credible testimony regarding her conversation with the claimant at work which detailed the sexual encounter with her boyfriend and the resulting back complaints. Further, Ms. Fields gave the claimant a ride to the claimant's mother's home, wherein the claimant had ample opportunity to relay and report a work related injury.

In *Stephens Truck Lines v. Millican*, 58 Ark App. 275, 950 S.W.2d 472 (1997), the court noted that there will be times when a claimant's account of a work-related incident and the resulting injury is the only evidence available as to the causation between the two. The court observed that in such cases, the issue of causation resolves down to a matter of credibility. In the instant claim, the claimant has failed to sustain her burden of proof by a preponderance of the credible evidence that she sustained an injury to her low back arising out of and in the course of her employment on April 19, 2007. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE