

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510144

HOLLY L. ARNDT, EMPLOYEE	CLAIMANT
ST. JOSEPH'S MERCY HEALTH CENTER, EMPLOYER	RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 25, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on July 24, 2008, at Hot Springs, Garland County, Arkansas.

Claimant represented by Mr. Marc Honey, Attorney-at-Law, Hot Springs, Arkansas.

Respondents represented by Mr. John D. Davis, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 24, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on June 25, 2008, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to an additional stipulation concerning the applicable compensation rates, as well as further clarification concerning their respective contentions.

At the prehearing conference, it was stipulated that the employee/employer/carrier relationship existed at all relevant times, including July

10, 2004, as well as June 26, 2005; that the claimant sustained a compensable back injury on July 10, 2004, which was treated as a medical only claim and for which respondents paid all appropriate medical and related expenses prior to June 26, 2005; and that respondents had controverted compensability of the alleged June 26, 2005, injury. At the hearing, the parties announced that the claimant's average weekly wage was \$554.98, which would entitle the claimant to compensation rates of \$370.00 per week for temporary total disability and \$278.00 per week for permanent partial disability.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to additional benefits must be addressed.

Claimant contended, in summary, that she sustained a second work-related back injury arising out of and during the course of her employment with St. Joseph's Mercy Health Center as the result of a specific incident identifiable in time and place of occurrence on June 26, 2005; that respondents should be held responsible for all hospital, medical, and related expenses as the result of the injury, including, but not limited to back surgery; that respondents should be held responsible for continued, reasonably necessary medical treatment; that she was entitled to temporary total disability benefits beginning July 4, 2005, and continuing through March 29, 2007; that, in addition, she was entitled to a seven percent (7%) whole body impairment which resulted from the injury and surgery; and that a controverted

attorney's fee should attach to all benefits awarded. The claimant reserved the issue of wage-loss disability, if applicable. At the hearing, the parties agreed that the claimant was released on March 29, 2006, rather than March 29, 2007. The claimant amended her request for temporary total disability consistent with the evidence.

The respondents contended that the claimant did not sustain a compensable injury within the meaning of the Arkansas workers' compensation laws. At the hearing, as an alternative contention, respondents maintained that, if compensability was overcome, that temporary total disability would be appropriate from the date of claimant's surgery, specifically, November 10, 2005, until the claimant began receiving unemployment compensation in December, 2005, further maintaining that the claimant worked after July 4, 2005, which is the date claimant was requesting temporary total disability.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the July 24, 2008, hearing containing numerous exhibits.

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The relationship of employee/employer/carrier existed between the parties at all relevant times, including June 26, 2005, at which time the claimant earned sufficient wages to entitle her to compensation rates of \$370.00 per week for temporary total disability and \$278.00 per week for permanent partial disability.
3. The claimant has proven, by a preponderance of the evidence, that she sustained a work-related back injury arising out of and during the course of her employment with St. Joseph's Mercy Health Center as the result of a specific incident identifiable in time and place of occurrence on June 26, 2005, which is confirmed by medical evidence supported by objective findings, and which entitled the claimant to appropriate workers' compensation benefits.
4. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's June 26, 2005, injury, including, but not limited to back surgery, and respondents remain responsible for continued, reasonably necessary medical treatment.
5. The claimant is entitled to temporary total disability benefits for all days that the claimant missed work after June 26, 2005, and continuing through at least March 29, 2006.

6. The claimant's healing period ended on or about March 29, 2006.
7. Respondents are entitled to a credit or offset for any days that the claimant worked for the employer herein after June 26, 2005, and, in addition, respondents are entitled to a credit or offset for the weeks in which the claimant received unemployment compensation pursuant to the provisions of Ark. Code Ann. §11-9-506.
8. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to a seven percent (7%) whole body impairment as the result of her June 26, 2005, injury and subsequent surgery.
9. Respondents are not entitled to a credit or offset for receipt of unemployment compensation against its liability for permanent impairment benefits.
10. Respondents have controverted this claim in its entirety.
11. Issues not addressed herein are specifically reserved for future determination.

DISCUSSION

The relevant facts in this claim are undisputed. The claimant began working for the employer on April 1, 1996. The claimant was employed as a Licensed Practical Nurse (LPN). The claimant testified that she injured her low back on June 26, 2005, as the result of a specific incident identifiable in time and place of occurrence as described below:

A I was walking in the storage room to look for something to clean the beds with after the patients left, and there were biohazard bags on the floor with biohazard in

them. I stepped around them and went in to look, and was coming out of the storage room and stepped on the biohazard bag. My foot came out from under me. I stepped back down onto the biohazard bag, and both feet went out from under me and I fell on my back.

Q Okay. Did you fall backwards and land flat on your back?

A Yes.

Q And were you still in the storage room when you fell?

A Yes. (Tr.13)

The record reflects that the claimant was assisted by another nurse, Tanya Baier, after her fall. The claimant resumed her job duties. Because of continuing symptoms, the claimant next reported the injury to her charge nurse, Alicia Bell. An incident report was filled out the same day that the injury was reported. The claimant also requested medical treatment on the date of her injury. After reporting the injury to the house supervisor, Karen (last name unknown), the claimant signed a form for in-house medical treatment. The claimant was initially examined in the emergency room of the respondent hospital on the day of the injury. The claimant reported low back pain, as well as right leg pain, together with numbness and tingling in the right lower extremity. The claimant was seen the following day at the employer's business health service and permitted to return to work with restrictions. Initially, the employer exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant work in a secretarial position. The claimant then received follow-up treatment from Dr. Atta at the direction of the employer. Respondents apparently paid all related in-house medical treatment

through on or about August 12, 2005, at which time, for some inexplicable and unexplained reason, respondents terminated all medical treatment. Because respondents terminated the claimant's medical treatment, she next went to her primary care physician, Dr. Martin Hannon. Dr. Hannon ordered an MRI which revealed an annular protrusion which progressed to a small disc herniation with compression. Dr. Hannon referred the claimant to Dr. James Arthur, a neurosurgeon in Hot Springs, Arkansas. Prior to seeing Dr. Arthur, the employer terminated the claimant's employment, allegedly as the result of a work-force reduction. (Tr.27)

The record reflects that Dr. Arthur initially treated the claimant conservatively and with epidural injections which proved unsuccessful. The claimant underwent low back surgery performed by Dr. Arthur on November 10, 2005. The claimant stated that the surgery greatly improved her overall condition. Dr. Arthur released the claimant with restrictions and assessed a seven percent (7%) whole body impairment on March 29, 2006. (Cl. Ex. A, p.11)

COMPENSABILITY

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of 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 medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,

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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Rather than conduct a further analysis of the record in this cause, suffice it to say that the claimant has satisfied each and every element necessary to establish compensability of her claim. As previously noted, the claimant's extremely credible testimony is undisputed. At the conclusion of the hearing, respondents were specifically questioned concerning the reasons for its controversion of the claim. Respondents replied that the claimant had failed to call any witnesses to corroborate her testimony.

First, I feel compelled to point out that the documentary evidence presented by the claimant corroborates her claim. Further, there is no requirement under our workers' compensation laws that the claimant call lay witnesses to corroborate her testimony. Admittedly, a claimant's testimony is never considered uncontroverted. Further, the testimony of an interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842

(1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The claimant's undisputed testimony is that her injury was observed by a coworker, Tanya Baier, and promptly reported to Alicia Bell and Karen, the house supervisor. The documentary evidence corroborates the claimant's credible testimony. Further, when no explanation was offered for the absence of company employees as witnesses, who are in a position to contradict the claimant's testimony if it was not true, the Commission, as triers of fact, may properly draw the inference that their testimony would have been unfavorable to the company. *Brower Mfg. Co. v. Willis, et al*, 252 Ark. 755, 480 S.W.2d 950 (1972). See also, *Barnes v. Greenhead Farming and AIG Claims Services*, 101 Ark. App. 129, ___ S.W.3d ___ (2008).

Alternatively, respondents contend that if the claimant establishes a compensable injury, she would only be entitled to temporary total disability from the date of her surgery on November 10, 2005, until on or about December, 2005, when she applied, and began receiving unemployment compensation.

Respondents' alternative contention is without merit.

The record reflects that the respondents initially exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant light-duty employment. Respondents then controverted all medical treatment after August 12, 2005. Respondents next terminated the claimant's

employment on September 8, 2005, due to an alleged reduction in work-force. Whether or not the employer was justified in terminating the claimant's employment on September 8, 2005, was not an issue at the immediate hearing because the issue was one of compensability. Whether or not the claimant is entitled to benefits under A.C.A. §11-9-505 has not been raised. However, respondents did request that the claimant not be awarded any temporary total disability during the time she received unemployment compensation. Again, respondents' assertion is only, in part, correct. The limitations on workers' compensation benefits based upon receipt of unemployment benefits is provided in Ark. Code Ann. §11-9-506 which is set out in its entirety below:

(a) Any other provisions of this chapter to the contrary notwithstanding, no compensation in any amount for temporary total, temporary partial, or permanent total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment insurance benefits under the Arkansas Employment Security Law, §11-10-101 et seq., or the unemployment insurance law of any other state.

(b) Provided, however, if a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits. (Emphasis supplied)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of

proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven that she sustained a compensable injury arising out of and during the course of her employment with St. Joseph's Mercy Health Center, entitling her to appropriate workers' compensation benefits.

AWARD

Respondent is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$370.00 per week beginning June 27, 2005, and continuing through March 29, 2006.

All accrued benefits shall be paid in lump sum and without discount, and respondents may claim credit for the dates that the claimant worked during the aforementioned period, as well as for the periods of time that the claimant drew

unemployment compensation while eligible for temporary total disability.

Respondents are further directed and ordered to pay, to the claimant, permanent impairment benefits at the rate of \$278.00 per week beginning March 29, 2006, and continuing for 31.5 weeks, representing a seven percent (7%) whole body impairment. Respondents are not entitled to a credit against the claimant impairment benefits.

Respondents are further directed and ordered to pay all hospital, medical, and related expenses the result of claimant's compensable injury, including, but not limited to back surgery performed by Dr. James Arthur, and respondents remain responsible for continued, reasonably necessary follow-up medical care.

Additionally, claimant's attorney, Mr. Marc Honey, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to, and limited by, Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge