

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700265

DENISA M. MCDOWELL, EMPLOYEE	CLAIMANT
BACK YARD BURGERS, INC., EMPLOYER	RESPONDENT
VALLEY FORGE INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 14, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on February 15, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant appeared Pro Se.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and temporary total disability benefits.

At issue is whether or not the claimant sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on May 23, 2006, and June 19, 2006, at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$83.00 in the event this claim is found to be compensable. The claimant, who is schizophrenic, receives Social Security Disability benefits (\$640.00 monthly), SSI benefits (\$266.00 monthly) and Medicaid.

The claimant, age 23 (DOB 9-19-84), began part-time work for Backyard Burgers in 2006, earning \$6.25 per hour for a twenty hour week. The claimant filed an AR-C on January 8, 2007, contending that she fell and injured her back and right leg on May 23, 2006. She returned to work and reinjured herself in a fall on June 19, 2006. She seeks payment of medical expenses and

temporary total disability benefits. She reported these injuries to managers, Brad and Tasha and completed accident reports.

The respondents contend the claimant did not suffer an injury on May 23, 2006 arising out of and in the course of their employment. Additionally, there are no objective medical findings to substantiate an injury. The respondents also contend the claimant was not performing employment services on June 19, 2006.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the claimant's deposition, incorporated by reference. Respondents questioned the authenticity of the Form AR-3, purportedly signed by Dr. Derek Lewis (Tr. p. 34-37).

The claimant was accompanied by her father at the deposition but she appeared alone at the hearing.

The claimant, (D.O.B. September 14, 1984), has a high school education and some college courses. She spent some time in a court-ordered rehabilitation center when she was seventeen. Her work history includes jobs as a cashier in stores and restaurants. Her health history includes a prior head and back injury in 2005.

The claimant explained that she began work for the respondent-employer in March, 2006. In March or May, 2006, she tripped over a drain in the floor and fell, injuring the right side of her body (Tr. p. 5-6). At page 18 of her deposition, she stated she injured her neck, legs, back and knees. The claimant reported the injury to her supervisor and her grandmother took her to the emergency room. She stated she had trouble collecting her bills to submit to her supervisor for payment. Dr. Lewis released the claimant to return to work on June 9, 2006.

On June 19, 2006, she fell a second time, (Tr. p. 10-12). From the prehearing telephone conference, it was my understanding that she slipped in water. However, at the hearing, she stated her medication made her lose her balance. She also testified she blacked out due to a head injury with the respondent-employer (Tr. p. 25). At the deposition, she testified the second fall happened

after she clocked out (Depo. p. 23). But at the hearing, she stated the accident happened before she clocked out (Tr. p. 30). The claimant did not return to work after the second fall. She stated she had trouble contacting the manager in order to get her bills paid.

The claimant hired former Attorney James Stanley to represent her. He gave her a Form AR-3 to take to her physicians. Dr. Ramaswamy's report of January 8, 2007 indicates he refused to sign a form presented by the claimant. The AR-3 in the exhibit packet was purportedly signed by Dr. Derek Lewis who assessed an anatomical impairment rating of 100% and permanent total disability.

The claimant stated that she presently takes over-the-counter medications for her injuries.

MEDICAL EVIDENCE

The claimant's medical records bounce back and forth between the emergency room and private physicians. At times she was uncooperative, combative, or confused. She first complained of back pain in 2001.

On June 4, 2005, the claimant was being treated at St. Vincent's. The nurse accidentally hit her with the door. Apparently, the claimant was on the floor behind the door and refused to move. She was examined but no injuries were found. The claimant, did however, complain of back pain and muscle spasms were noted in the scapula.

On May 8, 2006 the claimant complained of right leg pain after a fall at work. She described her injury as twisting her ankle and falling on her right knee. X-rays were negative and she was prescribed medication for a muscle strain of the ankle and knee. A report from Dr. Derek Lewis, dated May 24, 2006, indicates the claimant complained of "legs hurting, pain radiating up the back, difficulty getting up" after a fall at work. The report also indicates she reported the accident to her employer but had not followed up with workers' compensation. Dr. Lewis excused the claimant from work from May 29, 2006 to June 9, 2006.

On June 8, 2006 the claimant went to the ER complaining that someone was in her home. She was diagnosed with paranoia and hallucinations.

On July 10, 2006 the claimant saw Dr. Lewis for a routine check-up and refill of her

medications. She also asked to be tested for lead poisoning. She told the doctor she had fallen at work a month earlier on June 13, 2006 and hurt her back. Dr. Lewis excused her from work for one day.

The claimant sought treatment at a Family Clinic on November 9, 2006 complaining of back pain. She reported, a “fall in March but the back pain has been a chronic problem.” Dr. Ramaswamy prescribed weight loss commenting, “I shall treat this as muscle spasm/strain for now” and prescribed medication. Under the caption of “objective” findings, however, the doctor found “no point tenderness” and a negative straight leg examination. I do not interpret this report as a objective finding of muscle spasms.

On November 9, 2006, Dr. Lewis referred the claimant to Dr. Nash for back pain.

On November 30, 2006, the claimant complained to Dr. Carter of fluid retention and spasms in her legs and back.

On January 8, 2007, the claimant returned to Dr. Ramaswamy for back pain with “no history of any injury in the past,” (in contrast to the earlier report showing an injury in March, 2006). He found point tenderness in the lateral lumbar area and diagnosed a strain. He prescribed medication, physical therapy and made a referral to Dr. Qureshi, a pain management specialist.

A January, 2007, physical therapy report shows a history of falling on May 23, 2006 when her right “leg rolled” and she fell on her back. No muscle spasms were found on examination.

The claimant saw Dr. Qureshi on January 24, 2007, reporting neck, right shoulder pain and numbness, right hip and leg pain, and back pain. Dr. Qureshi administered an injection to her shoulder. He diagnosed neck and back pain with myofascial pain syndrome. The claimant returned on February 15, 2007 for injections to the paraspinous muscles.

The claimant returned to Dr. Carter on February 26, 2007 complaining of knee and back pain. He prescribed heat and medication.

The claimant returned to Dr. Qureshi on March 15, 2007. He diagnosed thoracic pain, possible lumbar radiculitis and myofascial pain syndrome. An MRI scan, performed March 20, 2007, was interpreted as normal for both the thoracic and lumbar spine. On April 11, 2007 Dr. Qureshi recommended right lumbar facet injections.

On June 13, 2007, Dr. Lewis signed a WCC Form AR-3 assessing an anatomical impairment rating of 100%, opining the claimant was permanently and totally disabled.

The claimant returned to the clinic on August 17, 2007, complaining of back pain, muscle aches, and pain throughout her body.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must

be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability.
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Due to the claimant’s unfortunate mental illness, her testimony regarding the history of injuries and the extent of her symptoms is unreliable.

Although she has complained of muscle spasms and some of her physicians have noted “tenderness” all diagnostic testing of the knee and spine are normal. I find there is no objective evidence of any injury stemming from either a May or June 2006 incident.

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment....” Ark. Code Ann. §11-9-102. A compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed....” Ark. Code Ann. 11-9-102(4)(B)(iii). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for

determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

The claimant’s deposition testimony differed from her hearing testimony on whether or not she had clocked out before any incident. Again, I would consider this discrepancy to be a problem of reliability, not credibility, due to mental illnesses. I find the claimant cannot meet her burden of proving she was performing employment services at the time of the alleged second injury.

1. The Workers’ Compensation Commission has jurisdiction of this claim.
2. The claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay the court reporter’s fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge