

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F807281

DONNA S. KAFFKA, EMPLOYEE	CLAIMANT
STARTEK, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 29, 2010

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE BILL STANLEY, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed and dismissed.

OPINION AND ORDER

Respondents appeal from the decision of the Administrative Law Judge finding that the claimant sustained a compensable injury to her back on July 9, 2008, when she sustained an admittedly compensable injury to her right ankle. Based upon our de novo review, without giving the benefit of the doubt to either party, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back that is established with objective medical findings.

Therefore, we find that the decision of the Administrative Law Judge must be reversed.

The claimant sustained an admittedly compensable injury to her right ankle on July 9, 2008, when she slipped and fell on her way to a break. This injury was accepted as compensable for which the claimant received appropriate medical and indemnity benefits. Claimant contends that when she fell, she also injured her back at the same time. Respondents controvert the back claim in its entirety.

With regard to the mechanics of her injury, the claimant testified as follows:

... It was in 2008, July the 9th. We were on break. I went around to the first corridor that goes around to the cooler to get my water, and when I was going around the corner, I slipped and I fell, and I felt a sharp pain in my back, but I heard a loud popping sound, and it was my ankle.

Claimant received prompt medical treatment for her ankle injury. Pursuant to claimant's testimony, she advised each and every physician she saw about her back injury; however, claimant did not introduce any medical records to corroborate this testimony. The only medical records introduced into evidence are the August 7, 2008, Lumbar MRI results and the July 27, 2009, New Patient Evaluation report

from Dr. Carl Covey. Claimant came under the care of Dr. Covey as the result of a Change of Physician request filed with the Commission. Respondents paid for the claimant's evaluation by Dr. Covey, but have controverted the compensability of the claimant's alleged back injury and any medical treatment associated therewith. (The claimant also received a Change of Physician Order to Dr. Ruth Thomas for treatment of her right ankle injury. Respondents have accepted all recommended treatment by Dr. Thomas, including but not limited to additional surgery.)

Dr. Covey took a history from the claimant, compiled a list of complaints, and conducted a thorough examination and evaluation of the claimant. The claimant provided Dr. Covey with the following history:

She gives a several year history of pain in the right lower back. The pain is described as sharp, direct pain that is on the right lower back. Laying flat and pain medications help her pain. Walking a lot, sitting positions and getting up makes her worse.

The injury involved a work related injury. She states that the floors had been recently mopped and she slipped on the floor. She ruptured her Achilles tendon. When she caught herself at the time of the injury to the heel she had the onset of pain in her back. She states that the work comp physician told

her that she was "fat, grotesque and ugly (Sic) to look at". The physician was Dr. Michael Tedder in Jonesboro. He would not acknowledge that the back was from a work related injury. She was placed in a boot after her surgery and this caused her to walk awkward and her back pain increased.

She told her case manager that she needed help for her back. She was seen by her physician in Memphis who never ordered any PT for her back, but she states that one of his reports states that she did have PT and she had done well from her back standpoint. She was also again told that she was obese and this was the cause of her problem.

She does relate that prior to the accident she never had any back complaints.

Dr. Covey's Consultation Report contains a complete list of all surgeries the claimant has undergone, as well as, lists the claimant's medical history, current medications, and allergies. In addition, Dr. Covey took a history of claimant's family medical history. Under the Social History section of his report, Dr. Covey noted that the claimant completed an electronic questionnaire from which he gathered information for his report. The "Review of Systems" section contains all the claimant's complaints for several body systems such as Constitutional, Respiratory, Ears, Nose and Throat, Cardiovascular, and

Gastrointestinal, just to name a few. Under the Musculoskeletal system, Dr. Covey recorded the following complaints:

Positive indications for joint pain, stiffness of joints or swelling, muscle pain or cramps, back pain, cold extremities and difficulty walking. Denies weakness of muscles/joints.

Following his review of the claimant's history and complaints, Dr. Covey conducted a physical examination of the claimant. Of particular interest to the claimant's alleged back injury, Dr. Covey's examination of the claimant's Lower Extremities and Back revealed the following:

Lower Extr: SLR negative. Knee jerk 2+ symmetric. Ankle jerk 2+ symmetric. Normal motor and sensory function. Patient can heel walk and toe walk. Sciatic notch tenderness absent.

Back: No SI joint tenderness. Exquisite low lumbar interspinous tenderness. No paraspinal tenderness or spasm. Pain unchanged with flexion and greatly increased with extension. There is marked tenderness over the right lower lumbar facet joints.

Dr. Covey assessed the claimant with right low lumbar facet arthropathy and recommended additional testing to rule out a facet joint injury.

The claimant had previously undergone a Lumbar MRI while under the care of Dr. Michael Tedder. This MRI

performed on August 7, 2008, revealed the following findings:

Lumbar vertebral body marrow signal and alignment are normal. Region of the conus is normal. There is no focal disc herniation and no significant canal or foraminal narrowing at any of the visualized levels.

The claimant has the burden of proving by a preponderance of the evidence the compensability of his claim. Jordan v. Tyson Foods, 51 Ark. App. 100, 911 S.W.2d 593 (1995); Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995). 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 Ark. Code Ann. §11-9-102(4) (A) (Supp. 2005), 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 findings, as defined in Ark. Code Ann. §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. See also, Ark. Code Ann. §11-9-102(4)(E)(i)(Supp. 2005); Freeman v. ConAgra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001); Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997), see also, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744).

Objective findings are defined at Ark. Code Ann. § 11-9-102(16)(A)(i) as those findings which cannot come under the voluntary control of the patient. The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996).

In finding that the claimant established the

compensability of her back injury with objective medical findings, the Administrative Law Judge relied upon the claimant's complaints as noted by Dr. Covey in the "Review of Systems" portion of his report. Specifically, the Administrative Law Judge found:

The July 27, 2009, report of Dr. Covey reflects the presence of medical evidence supported by objective findings establishing the injury to the claimant's back - positive indications for stiffness of joints, swelling, and exquisite low lumbar interspinous tenderness.

The Administrative Law Judge erred in finding that the complaints listed under the "Review of Systems" were objective medical findings of injury. First, it is noted that the list of complaints uses the conjunction "or" with regard to the claimant's symptoms. Thus, the claimant either has joint pain, stiffness of joints or swelling. It is unclear whether this indicates stiffness of joints or swelling of joints. Likewise the complaints list muscle pain or cramps. Muscle pain is distinct from muscle cramps and it is unknown which symptom the claimant intended to identify; muscle pain or muscle cramps. Second, the complaints listed of "joint pain, stiffness of joints or swelling, muscle pain or cramps" are very general. The

complaints under this section cover the entire Musculoskeletal System, not just the claimant's back. Thus, even assuming that these complaints are findings and not just complaints, it is unknown where within the entire Musculoskeletal System these so called findings are located. Finally, when one reviews the entire list of complaints identified under the "Review of Systems" portion of the report, it is clear that Dr. Covey was listing claimant's complaints, not conducting a physical examination. For instance under the Gastrointestinal and Genitourinary sections Dr. Covey noted "positive indications for painful bm or constipation" and "positive indications for frequent urination." Dr. Covey did not examine these body systems, but rather inquired into the claimant's symptoms and conditions. Likewise, under the Musculoskeletal section the list does not include findings, but rather indicates Dr. Covey's inquired into the symptoms and conditions.

Dr. Covey's actual examination findings begin on page 4 of his report wherein he noted that the claimant was "Alert and oriented, good historian, appropriate affect, minimal distress." With regard to the Gastrointestinal and Genitourinary systems, it is noted that Dr. Covey did note

findings of the Abdomen such as "Soft, non-tender, nonorganomegaly or masses detected...." but that he did not examine the claimant's Genital or Rectal areas.

As for Dr. Covey's examination of the claimant's back no objective medical findings were noted. While Dr. Covey noted tenderness, he did not detect any muscle spasms of any kind, nor did he note the presence of any swelling or edema. Moreover, the lumbar MRI specifically noted no abnormalities and was read as being a negative MRI.

Thus, when Dr. Covey's July 27, 2009, report is reviewed in its entirety, it is clear that the Administrative Law Judge erred in finding that Dr. Covey made objective medical findings of a back injury. Dr. Covey noted complaints by the claimant of back pain and tenderness and possible joint pain or swelling, but he did not note the presence of any objective medical findings when examining the claimant's back. Therefore, we find that the decision of the Administrative Law Judge finding that the claimant established the existence of a compensable back injury by objective medical findings, must be reversed and this claim for benefits denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion, because I agree with the Administrative Law Judge's opinion that the record supports this claim.

Only two medical records were entered into the record in this claim. One is an August 7, 2008 MRI of her lumbar spine, which was negative. The other is a new patient evaluation by Dr. Covey, conducted on July 27, 2009. In that record, Dr. Covey noted that a lumbar MRI was unremarkable, but that lumbar x-rays showed spondylosis. This record also contains a "review of systems" which reflects that there were "positive indications for joint pain, stiffness of joints or swelling, muscle pain or cramps, back pain, cold extremities and difficulty in

walking. Denies weakness of muscles/joints." There are further entries regarding the doctor's observation of lumbar tenderness.

I disagree with the majority for two reasons. First, their interpretation of the medical record is flawed. The record does not indicate that the "review of systems" was from an electronic questionnaire completed by the claimant and, therefore, purely subjective. Under the section labeled "Family History," the record states that the "patient provided the following information about the family medical history when completing an electronic questionnaire." Four entries follow that statement. The next section is entitled "Social history," followed by a similar statement and seven entries. Then, there is a place for information about physical therapy and work status. Following this is the next section, entitled "Review of Systems," in the same format as the family and social history sections. However, there is no similar statement regarding the electronic questionnaire. The medical record clearly marked two distinct sections to show the information therein came from the claimant's answers to the electronic questionnaire. The "Review of Systems" information was not

so distinguished, and the reasonable conclusion is that the section is based upon the physician's actual examination.

Furthermore, Dr. Covey notes that the claimant had a lumbar x-ray which showed spondylosis, which is an objective finding. Therefore, the claimant has satisfied the objective finding element of her claim.

There is no question that she fell in a work-related incident on July 9, 2008. The only remaining question is whether there is a causal relationship among the incident on July 9, the objective findings, and the claimant's need for treatment. The lumbar MRI was performed within one month of the claimant's fall at the direction of Dr. Tedder, the first company doctor the claimant saw. Obviously, the company doctor would not have ordered a lumbar MRI if the claimant had not complained that she hurt her back at the time of the work-related injury. This, coupled with the fact that the claimant did not have prior similar back pain, despite "age-related" spondylosis, before her fall, but did experience pain and resulting disability after her fall, is sufficient to satisfy the element of causation.

The claimant proved that she sustained a

compensable back injury on July 9, 2008, and I would award the claimant additional reasonable and necessary treatment of her compensable back injury.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner