

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H005702**

SANDRA SPOON, EMPLOYEE	CLAIMANT
ARBY'S, EMPLOYER	RESPONDENT
ESIS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED **DECEMBER 7, 2021**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MATTHEW J. KETCHAM, Attorney, Fort Smith, Arkansas.

Respondents represented by ERIC NEWKIRK, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 10, 2021, the above captioned claim came before the Workers' Compensation Commission in Fort Smith, Arkansas, for a hearing. A prehearing conference was conducted on August 12, 2021, and a prehearing order filed that same date. A copy of the prehearing order has been marked as Commission's Exhibit No. 1, with modifications as announced at the hearing. It is made part of the record without objection from either party.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on July 6, 2020.
3. The respondents have controverted the claim in its entirety.
4. Claimant's compensation rate for temporary total disability is \$131.20
5. A permanent partial impairment rating has not been assessed.

The issues to be litigated are limited to the following:

1. Whether claimant sustained a compensable injury in regard to her back, right shoulder, right arm, and right hand on July 6, 2020.
2. If any injuries are found compensable, whether claimant is entitled to appropriate medical benefits and any temporary total disability benefits.
3. Attorney fees.

All other issues are reserved.

The claimant contends that “she was injured on July 6, 2020, when replacing the soda syrup box and lost control of it where it fell, and the claimant attempted to catch same.”

The respondents contend that:

“1. Respondents contend that the claimant was not involved in a work incident of any kind on July 6, 2020, and there were no witnesses to the purported incident/event, despite the claimant working alongside co-employees throughout her shift that day.

2. Alternatively, respondents contend that, even if a work incident somehow did occur on July 6, 2020, on the respondent employer’s premises, it did not result in a compensable injury as there are no objective findings in connection with any alleged body part.

3. By way of further alternative defense, to the extent there is any sort of objective abnormality which is somehow later determined to be in existence, any sort of objective findings would be in no way traceable to the alleged work incident as opposed to the claimant’s extensive pre-existing abnormalities and health problems for which she had received significant treatment in the past.

4. By way of additional alternative contention, the respondents contend that, even in the unlikely event compensability is somehow established, the respondents would have no liability for

benefits of any kind until the claimant first gave notice of a purported work injury/incident on July 15, 2020.

5. By way of final alternative contention, the respondents plead an offset of any group medical, or group short-term disability benefits paid to the claimant or on her behalf, as well as an offset for any unemployment benefits paid to the claimant to the extent allowed under Arkansas law.”

The above stipulations are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and having heard testimony and observed demeanor of all witnesses, the following decision is rendered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on August 12, 2021 and contained in the pre-hearing order (as modified at the hearing) filed that same date are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her back, right shoulder, right arm, and right hand on July 6, 2020.

FACTUAL BACKGROUND

Before the first witness was called, the parties brought to my attention an issue with the dates on some of the medical records. On pages 19-26 of claimant’s exhibits, the top right-hand corner of each says the date of the visit was July 10, 2020, and as such, the index to claimant’s records reflected that date. However, when looking at the handwritten portion of the documents, it was evident to the parties that the printed date was incorrect. Page 62 of respondent’s exhibit duplicated one page of claimant’s records and had the same issue regarding the printed date being in error. The parties agreed that the handwritten dates on these records were accurate, and I have so treated the records in this opinion.

As recited above, claimant's contention was that she suffered an injury to "her back, right shoulder, right arm, and right hand." During the hearing, claimant's counsel clarified that there was no claim being made for a lumbar injury, only for the cervicothoracic region of her spine. Any references to a problem with claimant's lower back in the testimony or the medical records are not being considered in deciding this matter.

HEARING TESTIMONY

Claimant testified that she was working at Arby's on Rogers Avenue in Fort Smith, Arkansas as a fry cook and dishwasher on the day she was injured. A person named Kathy was the manager of the store and gave claimant her assignments for the day, although sometimes it was the "lead person" that told claimant where she would be working. Claimant stated that she was injured when she was trying to "change-out the coke" which entailed lifting a box of syrup that she estimated weighed around 15 pounds. She said she had to lift the syrup box over her head, and she didn't have it in the right position. It started to fall, and she caught it before it hit the floor, causing her injury. Claimant testified that she felt a little warmness in her back on her right side, not on her spine but between her shoulder blade and her spine. Claimant was unaware of any witnesses to the event and did not know if there were any videos in the store that recorded the event.¹ Claimant said that she felt a warm sensation but returned to work and finished her shift. She did not report the incident or the sensation to anyone in the store between the time it happened, which was during the lunch rush, and when she left at 5 o'clock. Claimant said that she didn't think anything about it, "it wasn't pain, you know, I wasn't hurting. It was just that warmth, and I went on and did my job." She had not developed any pain when she left work but when she bent over the sink to do dishes, she knew the feeling was there.

¹ In an email exchange between respondent Arby's area director Misty Cunningham and Carol Eden, the worker's compensation claims analyst for respondent, Ms. Cunningham confirmed to Ms. Eden that there were no cameras in that location (R. DX. 3)

After her shift, claimant said she went home where she lived alone. She didn't feel pain or believe she had been injured until she woke up the next morning when she couldn't move. Claimant testified that her whole right side was affected. Claimant stated that the pain was between her shoulder blade and her spine on the right side. Claimant said it went completely down her right arm, causing her to lose feeling in three of her fingers. The pain did not extend from the low back into her lower extremities. Claimant called her son and asked for help. Claimant did not know if she had a stroke because she could not move her right arm. The numbness and tingling were in her middle finger, the finger next to it, and the baby finger. Her son called her employment to let her know that she would not be in that day and claimant then went to Mercy Hospital. Claimant stated that she was told that she did not have a stroke, but they didn't know what was wrong. Claimant said that she called to talk to the manager, Kathy, but was told that she was off for two or three days. Claimant said that she was not able to talk to Kathy until three days after the incident happened. When she did talk to Kathy, she told her that she had lifted a bag in the box, and it started to fall so she caught it. When asked why she hadn't reported it, claimant said that she had talked to a lead person named Teresa and was told that no one could do anything about it except Kathy. Claimant eventually went to the store to meet with Kathy and filled out some forms on the computer, but she didn't know the date this occurred. Claimant said she told Kathy what happened and then she went home.

After her visit to the emergency room, claimant thought she saw a doctor at Mercy, and she believed at the old Sparks, HealthSouth. To her knowledge, she was not diagnosed with anything by those doctors. She went to Balkman Chiropractic and was treated for a pinched nerve between her shoulder blade and her spine. Claimant testified it was in the same area of her body where she felt the warm feeling when lifting the box while working for respondent. Claimant said because workers' compensation has not paid for her treatment, she could not continue with her chiropractor. She next

went to the Good Samaritan Clinic in Fort Smith.

Claimant said that she cannot use her right hand to even peel a potato. When she was doing laundry, she would drop what she was folding. She has trouble at times using a fork to eat with. Claimant testified that those problems were present the day of the hearing. The pain was not as strong, but it is still there, and she has the functional problems that have not improved.

On cross examination claimant had no explanation why there were no records of medical treatment for her injury on July 7 and July 8, which were the two days following the incident on July 6, 2020. Claimant said she told the doctor what happened at work. She did not recall having problems with the upper quadrant of her abdomen or right flank pain, stating that she did not recall telling the doctor anything like that. Claimant asked for clarification as to the meaning of the word “flank,” leading me to believe she didn’t use that term, but it was the doctor’s characterization of what claimant described.

Claimant testified that she had gone to a walk-in clinic on July 9, 2020 and was sent to the emergency room because the testing that she needed done could not be done at the clinic. Claimant testified she left before being seen because she was hurting and had sat there as long as she could. (For clarity, I note that claimant arrived at the emergency room at 8:04 P.M. on July 9 and left at 12:54 A.M. on July 10, 2020.) Claimant denied that upon arrival at the ER, her chief complaint was “three days ago while she was coughing, she experienced lower back pain.” There was an entry from that ER visit that said that claimant’s pain was not related to a recent injury. Claimant said she told whoever was making this entry that she didn’t know if it was going to be a workers’ compensation case because she had not turned it in due to her boss not being at work.

When asked about the entry on a record from Dr. Emily Harrah, claimant said the record was wrong where it said, “patient reports lower back pain starting after sneezing and coughing,” stating

she didn't mention her low back to that doctor. She denied that she said that her pain had existed for a week prior to that visit as well. I note that Dr. Harrah's record (CL. X 7) contains three different dates on the same page as to the onset of claimant's pain: it first says "Pain in back on right side in lower back and shoulder blade that radiates down right arm, started about 2 weeks ago," then "lower back pain started after sneezing and coughing approximately 1 week ago" and finally (and specifically for the right shoulder) "she woke up with the right shoulder day (sic) approximately 5 days ago." I am going to use the "approximately 5 days" in my analysis, because the other two may be referring to lower back pain and is just inartful in its wording.

Claimant stated that she had a cervical fusion around 2005 as a result of a motor vehicle accident and had recovered well following the surgery.

Claimant said that she had a prospective job but because she was unable to hold things with her right hand, she couldn't do it. She couldn't do the chores at Hope Campus where she was required to do laundry. Claimant conceded that she filed for unemployment in October 2020, indicating she had no disability that would limit her ability to do normal job duties. She again applied for unemployment in May 2021, stating again that she had no disability that would affect her ability to work.

On redirect examination, claimant pointed out that when she saw Dr. Harrah on July 10, 2020, she reported that she woke up with a problem with her right shoulder approximately five days previous. Claimant also made reference to a report from her chiropractor, Dr. Alan Alexander, in which she described having radiating pain in her right shoulder blade. Claimant agreed with his diagnostic assessment that she was suffering from a "sematic disfunction of the thoracic region." Claimant stopped treating with Dr. Alexander because respondent was not willing to pay for it.

On recross examination claimant was shown the July 10, 2020, report from Dr. Emily Harrah

which listed the chief complaint as: “pain in back on right side and lower back in shoulder blade that radiates down right arm, that started about two weeks ago.” Claimant did not know that it would have been late June if it had been two weeks before the date of the visit with Dr. Harrah. Claimant was also shown a section of the report that says, “patient report she woke up with her right shoulder pain approximately five days ago”. Claimant said that the doctor put the wrong date down. When asked about why the reports from the medical providers that she had seen on July 9 and July 10 were all devoid of a mention of a work-related injury, claimant said that she told them that she hadn’t filed it because she had not yet talked to her supervisor.

Claimant rested after she testified and respondent called as its first witness Kathy Intharong (referred to as “Kathy” during claimant’s testimony), who is the general manager at the restaurant where claimant was working when she said she was injured. Ms. Intharong said she had been with Arby’s on Rogers Avenue for close to nineteen years and was claimant’s direct supervisor. Ms. Intharong said she was at the restaurant on July 6, 2020, and nothing was reported to her that day. She first became aware that claimant was wanting to file a worker’s compensation claim on July 14 when claimant came to the restaurant to fill out the paperwork. Ms. Intharong said that it was her understanding that claimant had suffered what was thought to be a mini-stroke and she hadn’t been on the schedule. Ms. Intharong said that she filled out paper forms and sent them to her boss, Misty.

On cross examination, Ms. Intharong said that she was at work on July 6 with claimant but left before claimant would have clocked out. She testified that she also was there on July 7 and July 8, as she normally worked Monday through Friday, as well as some weekends.² Ms. Intharong did

² Per *Buxton v. City of Nashville*, 132 Ark. 511, 201 S.W.512 (1918), I am taking judicial notice that July 6, 2020, fell on a Monday. Therefore, July 10, 2020, the day claimant saw both Dr. Harrah and went to the ER at Baptist Health, was a Friday. If claimant called her place of employment the day after those visits, it would have been Saturday, Ms. Intharong’s normal day off. Claimant’s testimony that she was told to call back in a couple of days makes sense with this context, as that would have been when Ms. Intharong would have been at work.

not have the paperwork with her at the hearing that was filled out when claimant came in because it was sent on to someone else after it was completed. She stated that she understood the importance of having the date of the injury and the date of report on the paperwork. The parties then had an off the record discussion, memorialized when the record resumed, in which the first report of injury contained in the Commission's file, received on August 14, 2020, was examined. It was determined that was not the form that Ms. Intharong referred to in her testimony.

Misty Cunningham, the area director for respondent Arby's was also called to testify. Ms. Cunningham testified that as to how instant reports for work related injuries were reported in July 2020. She denied there would have been a handwritten document as all such forms were completed on-line at the time claimant last worked for respondent. Ms. Cunningham believes that Ms. Intharong was wrong about the method that she used to report the case.

REVIEW OF THE EXHIBITS

Claimant's records begin with the visit to Mercy Clinic on July 9, 2020, that was referred to in the testimony. Claimant was seen by Dr. James Cary Wilson with several complaints, including "moderate to marked tenderness in the right trapezius with a fairly large and discrete trigger point in that region." Nothing in that record mentioned the lifting incident at work three days prior.

Claimant's next records were from the July 10, 2020, examination by Dr. Emily Harrah. Claimant again made several complaints, but the one that was pertinent to this claim involved:

"Right sided cervical/shoulder that radiates down into right arm...patient reports pain in her right shoulder pain that radiates down her right arm and fingers. Patient reports her fourth and fifth digits are numb. Patient reports "my pain is so bad I can't hardly stand it." Patient reports she woke up with a right shoulder pain approximately five days ago. Patient denies any history of injuries that would have resulted in pain."

Dr. Harrah's report regarding the examination of claimant's shoulder showed no tenderness

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on palpation of the acromioclavicular joint, the acromion, the subacromial bursa, or the clavicle. Motion in the right shoulder was noted as normal. Dr. Harrah did note that the paracervical muscles were tender on palpation and that cervical spine pain was listed by right-sided motion. There was no mention of an on-the-job injury in Dr. Harrah's report.

A few hours after seeing Dr. Harrah, claimant went to the emergency room at Baptist Health where she was seen by Allissa Ralston, APRN and Dr. Andrew Daniel. I believe this visit was at Dr. Harrah's instruction, because of the entry that reads "she was seen by her PCP today and advised to have x-ray imaging and was given orders however was told she may need to come to the emergency room to have them done." This entry immediately proceeds that quoted above:

"Sandra K. Spoon is a 63-year-old female to the ER today complaining of increasing lower back and right shoulder pain over the past week and a half. She thinks it initially started when she coughed really hard and started having pain in her lower back and now that pain was getting worse and also developed pain in her right shoulder. She is not sure if it is a muscle spasm or what."

Once again, there was no mention of a work-related injury in the records from the Baptist Health emergency room visit on July 10, 2020.

Claimant saw Dr. Alan Alexander at Balkman Chiropractic Clinic on July 27, July 28, July 31, August 5, and on August 7, 2020. On the first visit it is recorded "patient states since July 6 she has had a sharp pain in her right shoulder blade that shoots down her right arm." Nothing is recorded about how the right shoulder blade pain began, nor was there any mention of a work-related injury in the subsequent office notes of Dr. Alexander. Dr. Alexander's diagnosis remained consistent throughout the course of his treatment:

1: Segmental and somatic dysfunction of thoracic region (M99.02), 2: Radiculopathy, cervicothoracic region (M54.13), 3: Pain in thoracic spine (M54.6), 4: Other intervertebral disc degeneration, thoracic region (M51.34), 5: Sprain of ligaments of thoracic spine, initial encounter (523.3XXA)

Claimant's next record was a September 8, 2020, visit to the Good Samaritan Clinic, which is a part of Baptist Health. The entry relevant to this claim reads: "Right arm pain, shoulder-fingers. 3 fingers numb... Has a HX of back pain; numerous activities/injuries that cause her pain" (punctuation added). There is no mention of a work-related injury in those notes.

An MRI was performed at Mercy Tower West on September 16, 2020. Regarding the thoracic region, the impression was:

"multi-level disc degeneration, marginal spondylosis and facet atrophy. Chronic mild anterior wedged deformity T7. No evidence per any recent vertebral compression. Multi-level disc protrusions as outlined above, most pronounced at T7-8 with there being at least mild spinal canal stenosis at this level, with the disc protrusion abutting the ventral belly of the cord and slightly flattening the cord, with preserved CSF dorsal to the cord."

On the cervical MRI performed on the same date and place the impression was:

At T1-2, T2-3, and T3-4, there are focal central disc protrusions with disc extension with a mild degree of canal stenosis mainly at T2-3. The disc protrudes approximately 4 mm. This abuts the ventral belly of the thoracic cord; however, there is residual CSF posterior to the cord at this level, thus, there is no cord compression. The cord has normal signal intensity throughout.

Impressions:

1. Anterior discectomy and cervical fusion spanning C5 to C7.
2. Multilevel degenerative disc disease, marginal spondylosis, and facet arthropathy.
3. Mild disc protrusion C4-5 without canal stenosis.
4. Multilevel foraminal stenosis as outlined above. In particular, there is moderate right foraminal stenosis C7-T1 due to focal disc protrusion.
5. Small focal disc protrusions T1-T2, T2-T3, T3-4 with mild spinal canal stenosis C2-3."

Claimant's final record was from her visit to the Good Samaritan Clinic on October 15, 2020.

In the notes from that visit, there is a reference to a work-related injury: "States she caught a falling box at work in 7/2020 and → ongoing lower back right shoulder and right arm pain." There is again

an entry regarding claimant's right third, fourth and fifth fingers where she related numbness and weakness of those fingers. While hard to read, it appears the plan was to continue claimant on gabapentin and refer her back to Dr. Arthur Johnson, who did her cervical fusion.

RESPONDENTS EXHIBITS

Respondent's records began with thirty-three pages of medical reports dating back to June 2011 and concluding in April 2020. There were two that were particularly pertinent to respondent's defense of this claim. First was the MRI result of June 6, 2011, which contained the following impression: "mild anterior wedging at the approximate T7 level, likely chronic. Moderate Spur formation through the thoracic spine. Post-operative change lower cervical spine." The second was the November 28, 2018, record from the Mercy Clinic emergency room which states "reports three days of right shoulder pain that radiates through her upper arm. It started the day after she has stocked a cooler, which required lifting up above her head heavy cases."

Of the records that were prepared after July 6, 2020, the date of the alleged injury, respondents submitted the same Mercy emergency room record from July 9, 2020, that was in claimant's exhibits as well as the identical record from Dr. Emily Harrah on July 10, 2020, and those from Dr. Alan Alexander. Respondent's records from the Baptist Health emergency room contained more pages than those selected by claimant to introduce. Respondent included page two of that record which stated that the file diagnosis was "strain of muscle, fascia and tendon of lower back, initial encounter. Spondylosis without myelopathy or radiculopathy, lumbar region." Nowhere in the additional records was there a mention of a job-related injury.

Respondent's documentary exhibits were six pages of emails and documents regarding when claimant first reported the injury to her employer, which was either June 14th or June 15th, 2020.

The exact date and manner of reporting is not relevant to my determination of the issues in this matter.

ADJUDICATION

To receive workers' compensation benefits, a claimant must establish (1) that the injury arose out of and in the course of the employment, (2) that the injury caused internal or external harm to the body that required medical services, (3) that there is medical evidence supported by objective findings establishing the injury, and (4) that the injury was caused by a specific incident and identifiable by the time and place of the occurrence. Ark. Code Ann. § 11-9-102(4) The claimant bears the burden of proving a compensable injury by a preponderance of the credible evidence. See Ark. Code Ann § 11-9-102(4)(E)(i). Compensation must be denied if the claimant fails to prove any one of these requirements by a preponderance of the evidence *Rippe v. Logging*, 100 Ark. App. 227, 266 S.W.3d 217 (2007), *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

While claimant testified to a specific incident which was identifiable by time and place, I find that she was not a credible witness on the issue of whether she suffered a compensable injury on July 6, 2020. According to claimant's testimony, she was alone in an area of the store when the alleged injury took place, so no one observed her catching the falling box of syrup. That alone wouldn't be determinative if claimant had been credible on the rest of her testimony. However, for me to find for claimant, I would have to believe the following:

1. That claimant woke up the day after she caught the falling box of syrup at work, hurting so badly that she called her son to come to her house and take her for medical care that same day. She thought she went to Mercy Hospital. However, there are no records from Mercy—or any other provider-- for July 7 or July 8, 2020; the earliest exhibit after the date of the alleged injury was from the ER at Mercy in the evening hours of July 9, 2020.
2. That when she was being screened at the Mercy Emergency Room, she didn't say that "three days ago while she was coughing, she experienced lower back pain" as it appears in the records.

3. That when asked if her pain was related to a recent injury on July 9, 2020, at the Mercy ER, she said “yes,” but the person inputting the information made a mistake and put “no.”
4. That she explained to the doctor and/or the staff at Mercy on July 9, 2020, what happened at work, but it wasn’t recorded in the notes from that visit.
5. That Dr. Harrah put down the wrong date in her July 10, 2020, chart about when claimant’s pain started when the doctor recorded that claimant said “approximately 5 days ago” for the shoulder pain.
6. That the entry on the record from Baptist Health from July 10, 2020, was wrong when it said “complaining of increasing lower back and right shoulder pain over the past week and a half. She thinks it initially started when she coughed really hard and started having pain in her lower back and now that pain was getting worse and also developed pain in her right shoulder. She is not sure if it is a muscle spasm or what.”
7. That all the records from July 10, 2020, are devoid of a mention of a work-related injury, because claimant said she hadn’t filed the claim with her employer yet (even though she said she did tell the staff at Mercy on July 9, 2020).
8. That the several records from Dr. Alexander and the first chart from the Good Samaritan clinic, all of which were after the claim of an on-the-job injury was made to Ms. Intharong, also omitted a mention of how the injury took place.

I’m left to decide if I should believe claimant’s testimony and find the various statements in the records that contradict her claim are inaccurate, incomplete, or otherwise not trustworthy, or if I should accept what is in the records from several different providers that recorded what they were told by claimant shortly after the date she alleges she was injured. I see no way to reconcile the conflicts in claimant’s testimony and the documentary evidence. I find the records to be more persuasive, and

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therefore claimant failed to prove by a preponderance of the evidence that she is entitled to compensation benefits.

ORDER

Claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back, right shoulder, right arm, and right hand on or about July 6, 2020. Therefore, her claim for compensation benefits is hereby denied and dismissed.

Respondents are responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$832.00.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE