

OPINION ENTERED: February 14, 2012

CLAIM NO. 201001378

MINNIE WRIGHT

PETITIONER

VS.

APPEAL FROM HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

OUTER LOOP CHILD CARE CENTER, INC.
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Minnie Wright ("Wright") appeals from the August 12, 2011, opinion, award, and order rendered by Joseph W. Justice, Administrative Law Judge ("ALJ") dismissing her claim for failure to prove a work-related injury. Wright filed a petition for reconsideration requesting the ALJ "revisit the testimony in this matter."

In a November 4, 2011, order overruling Wright's petition for reconsideration, the ALJ made additional findings, and provided further clarification. Wright also appeals from the November 4, 2011, order.

The Form 101 alleges on June 16, 2010, Wright injured her left shoulder while working for Outer Loop Child Care Center, Inc. ("Outer Loop"). Regarding how the injury occurred, the Form 101 states as follows: "Transferring child when child jerked." Among other records attached to the Form 101 is an "EDM Summary Report" from Norton Audubon Hospital ("Audubon") dated June 16, 2010, in which Wright's "stated complaint" is: "L ARM PAIN X 3 WEEKS."

Filed in the record by Outer Loop is an "Emergency Physician Record" from Audubon dated June 16, 2010, in which the following is noted in the section entitled "context": "Lifting 3 yr old grandson 2 wks ago noted pain & swelling in (L) arm & chest." An arrow is drawn to another line, and the notation continues as follows: "chest resolved but arm pain has persisted." In the "chief complaint" section of the record, the following is noted: "pain to L arm, worse with movement x 3 wks."

The May 9, 2011, benefit review conference ("BRC") order lists the following contested issues:

benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the Act; and TTD. The BRC order reflects the claim was bifurcated for the ALJ to determine the following issues: "causation/work-relatedness, medical treatment (surgery), TTD, and notice."

In the August 12, 2011, opinion, award, and order, the ALJ determined as follows:

The ALJ finds that Plaintiff has not proven or persuaded the ALJ that she sustained a work-related injury on June 16, 2010. The only evidence that the record contains of an injury at work on that day is Plaintiff's testimony. To believe Plaintiff's testimony that an injury occurred on June 16, of which they were aware, means that the ALJ would have to disbelieve the testimony of Ms. Christal Meek and Ms. Emma Batroff [sic]. Plaintiff has not presented the ALJ with any reason why their testimony should not be believed. Plaintiff said she complained of her heart on May 31, 2010, the incident about which the ladies testified.

Plaintiff said the injury was on June 16. She said she called in a Mrs. Gilmer, who sat her down and went and got Christal. Then at the hearing she denied saying the name Gilmer. Ms. Meek, site director of Defendant, and Ms. Batroff [sic], who no longer worked [sic] for Defendant, both were consistent in their testimony that on June 16, they attended to Plaintiff for what Plaintiff considered was a heart attack. Another employee came in and sat with them, Belinda Cowhard.

Plaintiff wanted Ms. Meeks to call her daughter, which she did. They denied that Plaintiff had told them of an injury.

Plaintiff later turned in a note from Dr. Gray that restricted Plaintiff to light work, but it did not give any indication that it was because of a work injury. It was months later that she learned Plaintiff was claiming a work injury occurred on June 16.

When she went to Audubon hospital [sic] on the 16th, Plaintiff gave a history of arm pain for three weeks. Her medical was turned in on her private medical policy. A record of the ER of same date obtained and filed by Defendant following submission [sic] recorded [sic] Plaintiff had injured her shoulder lifting her three year old grandson two weeks prior to June 16.

In ruling on Wright's petition for reconsideration, the ALJ made the following additional findings of fact:

2. Plaintiff has testified that she had the incident involving her heart on May 31, 2010. This is true, but the co-employees, Batdorf and Meek, have testified that Plaintiff complained of heart like symptoms on June 16, 2010, and they had not heard of a shoulder injury until months later. (Meek, Dep. P. 10). Plaintiff alleges a missing page in the work records of Plaintiff. The ALJ does not know anything about missing records. Ms. Meek never heard from Plaintiff until she brought in a light duty statement. (Dep. P. 8). Meek approved light duty, but Plaintiff never came back. (P. 9). She did not mention a shoulder injury at that time.

(P. 10). She called up months later and asked if Meek had written her work injury report. This was the first time she heard about an injury.

The ALJ found Ms. Meek and Ms. Batroff [sic] more credible.

3. The ALJ is not going to try to explain any discrepancy when Plaintiff left on the 16th and what the records show. She left work that day and did not return to work. She was in the ER that day with L arm pain x 3 weeks with a torn rotator cuff tear [sic]. If she checked out at end of shift, 6:07 p.m., and went to the ER, why didn't she give a history of work injury? The more important question is why the one record from Norton Healthcare on June 16, 2010, in which she gave a history of lifting her 3 year old grandson 2 weeks ago and not pain and swelling in L arm was not filed in the record. Defendant obtained that by request on August 16, 2011. It is very possible that that was on May 31, and she missed some work as a result. She turned this visit in on her private health insurance.

Plaintiff's testimony is not credible, and the testimony of the two co-workers, together, with the longtime missing Norton Health Care record, confirms [sic] the co-workers' testimony.

On appeal, Wright asserts as follows:

In short, the testimony of the Employees, relied upon by the ALJ in his decision, is simply incorrect. The Employer's own records affirm this. The ALJ relied upon incorrect evidence and testimony not consistent with the record.

Specifically, Wright asserts the "the incident involving 'her heart attack' was on or about May 31, 2010" and not June 16, 2010, as Batdorf and Meek testified. Wright claims as follows:

This was borne out by the time records attached to the deposition of Crystal [sic] Meek, which show for the pay period May 27, 2010 through June 9, 2010, Wright only worked 52.73 hours. For whatever reason, the actual pay records between May 26, 2010 and June 10, 2010 are not attached.

Wright asserts on June 16, 2010, the day on which she injured her left shoulder, she worked a full day, as indicated on her timesheet. However, Wright asserts "[b]oth Meek and Batdorf testified on the date of the 'heart attack' Wright left early. In short, June 16, was not the 'heart attack' day."

In her January 21, 2011, deposition, Wright testified she began working for Outer Loop in May, 2010. On May 31, 2010, she experienced chest pain at work. In that regard, she testified as follows:

Q: What types of problems did you have on that day?

A: I was in my classroom and I remember I went to the sink to get a washcloth and when I bent down I noticed when I raised back up I was feeling light-headed. And I called Ms. Gilmer to the room and she was asking me was I okay, and I told her I wasn't,

I didn't feel good, I was feeling light-headed, felt really sick and my chest was tightening up.

Q: What did you do after that?

A: She sat me down in the break room and went and got Crystal [sic].

Q: And what did Crystal [sic] do?

A: She asked me if she wanted to call the paramedics and I told her no, that she could just call my daughter and have her pick me up and take me and I would go to the doctor.

Q: And your daughter came and picked you up?

A: Yes.

Q: Where did you go?

A: I didn't go anywhere. I couldn't get a doctor's appointment that day.

Wright had an appointment with a cardiologist, Dr. Schwartz, the next day and was told she could go back to work. As to the timing of that incident, Wright testified as follows:

Q: And all that happened at the end of May. This wasn't the same day that you were lifting the child and felt pain in your left side?

A: No, it's a different occasion.

Regarding the incident alleged to have occurred on June 16, 2010, which she claimed caused an injury to her left shoulder, Wright testified as follows:

Q: Yes. When you felt the pop on your left side, that was when you were handing the baby to the other worker?

A: No, it's after I caught her. When she flipped out of my arms.

Q: Right. When you were trying to hand her over to the other lady?

A: No, it happened while she was falling out of my arms and I had to reposition myself to catch her, is when I- when I caught her it's when the pop sound occurred.

Q: Okay. Now, that left shoulder and arm pain developed gradually or did it come on all at once?

A: No, it didn't come all at once, it was as the day was going.

Q: Had you been having any problems with your left arm or left shoulder prior to that?

A: No.

Q: Did you get medical treatment on June 16th after that happened?

A: I went to the doctor and she just put my arm in a sling and told me to return to my doctor.

Q: Which doctor did you go see that day?

A: Dr. Dennis Gray.

Q: June 16th was the first day you felt that sort of pain in your left side?

A: Yes.

Q: You don't recall telling Dr. Gray that you felt pain like that for a few weeks, do you?

A: No.

Wright testified on June 16, 2010, after the incident, she did not leave work early. Rather, she went to Audubon after her work day ended. Wright also testified Dr. Gray informed her she needs surgery on her left shoulder.

At the July 8, 2011, hearing, Wright testified on the day she believed she was having a heart attack, she left early. Wright testified the heart attack incident occurred on May 30, 2010, despite testifying in her deposition that it occurred on May 31, 2010. She did not go to the hospital that same day, and she missed approximately two days of work afterwards. Wright acknowledged her deposition testimony reflects she stated a "Ms. Gilmore" tended to her during the heart attack incident. However, Wright admitted she did not know Ms. Gilmore.¹

At the hearing, Wright was asked about certain language in Audubon's medical records regarding the alleged June 16, 2010, incident and testified as follows:

Q: All right. The medical record from Audubon indicates that you gave those

¹Ms. Gilmore is apparently the person the ALJ referred to as Ms. Gilmer. The record does not reflect the correct spelling of her name.

physicians a history of left arm pain for three weeks. Do you recall reporting that history to them?

A: No, I don't.

Q: Do you have any reason to know why they would put left arm pain for three weeks?

A: No, I don't.

Q: But you had heart problems three weeks prior; is that correct?

A: Yes.

Emma Batdorf, assistant director of Outer Loop at the time of the June 16, 2010, incident, was deposed on February 15, 2011. Batdorf was one of Wright's direct supervisors on the date of the incident. Regarding the events of June 16, 2010, Batdorf testified as follows:

Q: Okay. Did something occur around June 16th or before then with regards [sic] to Ms. Wright having any complaints?

A: Yes, sir. She called me into the room one-- it was afternoon, it was during nap time, which is normally 12 to 2. She called me in her room. She was feeling flushed and light-headed and nauseous and she said she felt like she was having a heart attack. So I tried to calm her down. I called Ms. Christal [Meek], who is our site director, and I stayed in the room and she took Ms. Minnie-- Ms. Wright over to the break room, sat her down, gave her a cool cloth. I can't say [sic] from that point because I wasn't in there to do anything, but that's what

transpired that I could see. And that's what Ms. Wright told me, that she felt like she was going to pass out and she felt like she was having a heart attack.

Batdorf testified Wright never reported a *work-related* injury to her left arm after the June 16, 2010, incident explaining as follows:

Q: Okay. And did Ms. Wright on that occasion ever report that she had injured her left arm?

A: No. The only thing she said was she couldn't really hold the kids because of her chest.

Q: Okay. And after that incident did Ms. Wright ever report any type of work injury to her left arm?

A: No. Not to the best of my knowledge.

Q: Did she ever report to you any injury whatsoever after that event?

A: No, sir.

Q: Do you know if you had any further contact with her after that event?

A: Not as far as her coming in to work. I mean, like I said, she came in-- I'm not-- she popped in one afternoon and we chitchatted a little bit. I'm not sure if she came in to pick up something or what, but she never came in as far as going back on the job.

Q: Okay. When she came in on that particular date did she mention anything about a work injury?

A: She said that-- well, what she said to the best of my recollection was she had to have-- she'd hurt her shoulder. But other than that she never reported to me a shoulder injury or anything. It was just totally that she felt like she was having a heart attack that day, and that was it.

Q: Okay. When she came in this other time, how long after the June incident was this, if you know? Are we talking a matter of days, weeks, months?

A: No, weeks. I honestly couldn't-- I know it really wasn't a month, I know it was weeks, somewhere in there. I'm thinking maybe it might-- I'm wanting to say maybe August, but I honestly can't say, but it was in that time frame.

Q: At that point was that the first time she mentioned to you that she had hurt her left shoulder?

A: Uh-huh.

Q: At that particular meeting did she tell you whether or not she thought it was work related or not?

A: No, she never said anything about it being work related.

Batdorf testified she is sure that on June 16, 2010, Wright complained about a possible heart attack. Her testimony is as follows:

Q: But you're sure that the June 16th or June 17th date that we talked about

here today was the day that she was complaining about a possible heart attack--

A: Yes, sir.

Q: -- and not the shoulder?

A: Positive.

Christal Meek, site director for Outer Loop, was deposed on February 15, 2011. Regarding the June 16, 2010, incident, Meek testified as follows:

Q: I want to draw your attention to June of 2010. Did anything occur around June, June 16th, 2010 that was unusual involving Ms. Wright?

A: Yes. I got-- the lady that was in here, Ms. Emma, had hollered for me and said that Ms. Minnie was having chest pains, so I got another of the staff workers to go in, relieve Ms. Minnie. Myself-- I brought her into our break room and Ms. Emma had [sic] came in with us as well, I sat Minnie down, asked her, what's wrong, what's going on. We all sat around in a little group or around the table with the group and I was like, what's going on? She said that her heart was hurting, she felt really tense and she was having a hard time breathing. And I said, okay, do you feel like you need me to call an ambulance? Just tell me what I need to do for you. She said she didn't want us to call an ambulance, to call her daughter, her daughter would come up here and get her. I did that, I got the phone. She gave me her daughter's number, I called her daughter. She said, okay, I will be up there as soon as I can. I got

her a cup of ice water and then just sat there with her and talked to her, just tried to get her calmed down until her daughter got here. When her daughter got here, she called and I walked Ms. Minnie [Wright] out to her daughter's car.

Meek testified Wright never reported any type of work injury occurring on that date. Her testimony is as follows:

Q: On that particular date did Ms. Wright ever report any type of work injury?

A: No.

Q: Okay. Did you have any contact with Ms. Wright after that?

A: She had [sic] came in and brought in her doctor's statement that said she could come back in as long as she was on light duty, and that was the last I'd ever heard from her.

Q: How often-- how far after this heart incident did that occur?

A: I'm going to say approximately-- because I don't know for sure, I'm going to say within the week she had [sic] came in and brought her doctor's statement in. And when it said that she could go on light duty, I said that was no problem. I said, do you feel like you want to come back or do you need to take time off? And she said she would call me, and I never heard from her until all of this came up.

Meek testified she first learned Wright was alleging a work injury involving her left shoulder "months after the incident." Meek explained as follows:

Q: Okay. When is the first time relatively speaking that she-- that you found out that she was alleging a work injury involving the left shoulder?

A: You know, I can't give you a for sure date. I know it was months after the incident Ms. Minnie had called up here and said that-- if I had written her work injury report, and I was like, what are you talking about? She said I was the reason she didn't get her surgery, and her surgery wasn't paid for because I didn't write an incident report. And that was the first time. And then it wasn't until after that that the unemployment-- we got something in the mail from the unemployment and I had no idea that was going on.

Q: Okay. When she called you and-- did she call you or come in?

A: She called.

Q: Okay. Did you complete any paperwork at that point in time?

A: No. At this point I still-- that was the first I'd heard of any type of work injury. And then I immediately called my supervisor and told her what had happened. I was like, so what do I do? And then she said she would call Richard, which [sic] is the owner, and she would get back with me because she wasn't sure what I needed to do.

Meek was asked to look through timesheets on the computer to determine whether Wright missed any work before June 16, 2010. Regarding the days Wright did not work, Meek testified as follows:

A: Okay. It looks like she missed a Monday, 5-31, a Friday, 6-4, and that was it.

Q: Can you tell from that why she missed those days?

A: No.

Q: Would there be a record anywhere where she would have called in or provided a doctor's statement or anything?

A: No. No.

Q: Do you recall why she missed those days?

A: I'm sorry, I don't.

Regarding the June 21, 2010, certificate to return to work, Meek testified as follows:

Q: Can you read under remarks for me?

A: Ms. Wright needs to be on light duty at work times one month, parentheses, no lifting, due to L shoulder.

Q: Injury?

A: Injury.

Q: Did that not alert you that this was not a chest pain or heart problem but rather was in fact a work injury, at least a shoulder injury?

A: Right. Nothing was ever-- even at this point when she brought this in, she never said one thing to me about it being a work-related injury.

Attached as Exhibit 3 to Meek's deposition are timesheets for Wright spanning May 24, 2010, through May 26, 2010, and June 10, 2010, through June 16, 2010.² The timesheets reflect on June 16, 2010, Wright clocked in at 9:04 a.m., clocked out at 12:32 p.m., clocked in at 1:02 p.m., and clocked out at 6:07 p.m.

As clearly stated in the August 12, 2011, opinion, award, and order and the November 4, 2011, order ruling on Wright's petition for reconsideration, the ALJ relied upon the testimony of Batdorf and Meek regarding the events which transpired on June 16, 2010, and the fact Wright never reported a *work-related* injury to her left arm on June 16, 2010, or for months thereafter. Additionally, the ALJ was convinced by Audubon's June 16, 2010, medical records indicating the following cause of her shoulder pain: "Lifting 3 yr old grandson 2 wks ago noted pain & swelling in (L) arm & chest."

² While Meek's references timesheets covering May 31, 2010, and June 4, 2010, in her deposition, this Board is unable to locate these timesheets. As noted, the timesheets attached as Exhibit 3 to Meek's deposition indicate the times Wright worked from May 24, 2010, through May 26, 2010, and June 10, 2010, through June 16, 2010.

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 98 (Ky. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. In order to reverse the decision of the ALJ, there must be no substantial evidence to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Wright maintains "[b]oth Meek and Batdorf testified on the day of the 'heart attack' that Wright left early," which contradicts the timesheets in the record. Consequently, Wright posits June 16, 2010, could not be the heart attack day. Batdorf testified Wright experienced heart attack symptoms on June 16, 2010, somewhere between noon and 2 p.m. which was during "nap time" at the day care. Significantly, Batdorf never testified to the specific time Wright left work on June 16, 2010, nor did

she testify Wright left early. Meek testified at the time of the heart attack incident on June 16, 2010, Wright requested Meek call Wright's daughter who subsequently came and picked her up. However, Meek never testified to the specific time Wright's daughter arrived on June 16, 2010, nor did Meek testify Wright left early on that day. Meek simply testified Wright's daughter said she would "be up there as soon as [she] can." Even though the timesheets attached to Meek's deposition indicate on June 16, 2010, Wright worked until 6:07 p.m., this does not necessarily represent a discrepancy in the testimony of Batdorf and Meek.

Since the testimony of Batdorf and Meek in conjunction with the June 16, 2010, emergency room records from Audubon, comprise substantial evidence in support of the ALJ's dismissal of Wright's claim for failure to prove a June 16, 2010, work-related injury to her left shoulder, the ALJ's dismissal of Wright's claim cannot be disturbed.

Accordingly, the August 12, 2011, opinion, award, and order and the November 4, 2011, order ruling on Wright's petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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