

COMMONWEALTH OF KENTUCKY
DEPARTMENT OF WORKERS' CLAIMS
CLAIM NO. 2014-68008

JUDY CORNETT

PLAINTIFF

VS.

DOLLAR GENERAL CORP.

DEFENDANT

OPINION AND ORDER

Introduction

This case presents a "swearing contest" over the occurrence of a back injury at work. The claimant says she was hurt at work and reported it as such; the Defendant's employees acknowledge her complaints but say she denied work relatedness.

Stipulations, Contested Issues

The parties have stipulated jurisdiction under the Act; an employment relationship; payment of no TTD or medical benefits; an average weekly wage of \$161.45; no current wages; a date of birth of September 11, 1968; and four years of college education. Issues preserved for decision are: work relatedness/causation/occurrence of "injury"/preexisting active; notice; the date of the alleged wrist injury; and the claim for benefits under KRS 342.730, including TTD.

Discussion of the Evidence, Findings and Conclusions

1. Plaintiff **Judy Cornett** is a 47-year-old resident of Cumberland, Kentucky, in Harlan County. She was hired at Dollar General by store manager Melissa Hubbs about 11 months before her work injury. She was working as a cashier on Saturday, July 12, 2014, when she was asked to help with stocking. Cornett's testimony was difficult to follow, and confusing. Her description of her injury beginning at page 27 of her deposition is an example of that. It appears she was moving a food cart or lifting some sugar, or both, when she felt back pain. (see also p. 94) She claims to have "broke" her back in that incident. (see form 101; p. 23, 37, 41) She separately claims to have fractured her right wrist in another incident (detailed below).

She said she told the other cashier, Amanda Widener, right after the back injury happened. Asked why she did not give notice to assistant manager Kim Halcomb, who was in the store at the time, she said it was because "I medically didn't know what had happened," and "She (Halcomb) was in the back stocking and Amanda was closer to me, I went to her." (p. 28)

She returned to work as scheduled on Monday, July 14, 2014, at 3:00 p.m. She "went in crying" to work that day, and informed Holcomb of her back injury. (p. 22, 33, 41) She said Holcomb tried to call in a relief worker, Maggie, but was unsuccessful. She worked as a cashier the full shift that day. She additionally informed Hubbs of her injury by phone on this date. (p. 40-41)

The next day, July 15, 2014, she woke up unable to move with 10/10 pain, so she went to the hospital. Her nurse practitioner, Joann Martin, ordered x-rays of her back, and also her wrist because she was complaining about it hurting badly. (No diagnostic study reports from July 15, 2014, are in evidence. The July 15, 2014, ARH Tri City record from Martin, who Cornett said ordered x-rays on that date, does not reflect such an order. Cornett said the x-rays were contemporaneous with when she told Martin about her hands, which the records reflect occurred on August 29, 2014, and there are x-ray reports from that date; p. 35)

She continued to work her regular job. After the x-rays on August 29, 2014, she came under the (mistaken) impression that she had fractures in her back and wrist. And it was then she took medical, off-work paperwork to Hubbs and informed her of the extent of her injury. She had a conference call with a Dollar General human resources representative, and completed injury paperwork.

She said she cannot return to her cashier's job because of the pain and movement involved.

Relevant to the low back claim, she acknowledged having an MRI in 2002; being recommended for low back surgery in 2002; and having undergone low back injections through 2010. The pain that would bring on the need for injections would occur spontaneously. She would "just wake up and it's bothering me." (p. 43-49) Asked if that onset of 10/10 pain on July 15, 2014, was similar to ones in the past which required injections, she said, "Yeah," but

then said the new event was different; she said, "it was the sugar I was lifting when it hit me, Oh, My god, you know, I mean whatever I mean like I ain't no medical but I knew something had happened." (p. 94-95). There was a "significant change" in her pain that Tuesday, three days after the work injury. (p. 95).

At the Hearing, Cornett gave contrary testimony on when she first informed Hubbs of her injury. She said that occurred during the conference call the day she brought in medical documentation that her back was "broke," which was on or about August 29, 2014. (HT p. 7) But she said Hubbs knew about her injury beforehand from Holcomb. She has not returned to work since she said Martin took her off on August 29, 2014.

The right arm claim is, again, a bit confusing. Cornett testified that she had a preexisting right wrist injury, and was not claiming additional injury to it. (p. 26). But then she testified to striking her arm on a spindle on an unspecified date. (p. 78) When told that the x-ray reported a fracture, she said this was the only incident she could think of to have caused that injury. Another example of her testimony being difficult to follow is this: "there is a spindle, you got bags on it, I hit it real hard one day, bruised my back, and that's the only thing that I know it could have broken, I mean my arm bruised." (p. 26). Presently, her right hand goes numb at night. She acknowledged some preexisting problems with her hands, but said that only involved her thumbs locking up; her pain is worse now, she said. But she was confronted with

treatment notes documenting bilateral wrist pain and tingling prior to her employment at Dollar General.

She said she could no longer take pictures. (p. 63). She later acknowledged pictures she took and posted to her Facebook page around 4:00 p.m., on July 12, 2014, after her shift ended on the date of injury in this claim. (p. 82) Cornett said she remembers being at her father's baptism, but does not remember leaving work and going there the same day as her injury.

The ALJ observes Plaintiff's motion to amend the date of injury to the right wrist. She asked that the date be amended to being a month before her back injury (based on her deposition testimony). Specifically, she says the injury occurred "on or about June 1, 2014, through June 12, 2014." The ALJ does not observe an order in response, but the issue of the date of injury shall be considered, as it was clearly litigated by the parties.

2. **Melissa Hubbs** is the store manager for the Defendant. She testified by deposition, and repeated her testimony at the Hearing. She hired Cornett as a store employee. Her sister and Cornett were married to brothers at one time. She said store policy is for her to be informed by employees of any injury, and she was never informed of such by Cornett. (She had never received a report of injury in 17 years of work.)

She described an incident consistent with Cornett's description of difficulty upon return to work on July 14, 2014. She said Halcomb called her at home to advise she was trying to call in an extra worker because Cornett's back was hurting. There was no mention of the back pain being work related.

She then described interaction with Cornett that is consistent with Cornett believing she had been informed of fractures on August 29, 2014. She asked Cornett how she had broken her back and arm, to which Cornett told her she did not know. Cornett provided an off-work slip, so she gave Cornett the phone number to contact "leave" or risk management to try and have her job held for a couple of months through FMLA. She said the corporate representative alerted her to the fact Cornett was claiming an on-the-job injury. She continued:

And I said, 'That's not what Judy told us,'...I was saying, 'All Judy wants is to be able to come back to work when her doctor releases her.' So we had a three-way on the phone and Judy said, 'That's all I want,'...she says, 'I don't know where I got hurt at. I don't know how I got hurt.' (p. 9)

...
I said, 'Judy, did you get hurt here? Did you get hurt on the job?' and she said, 'No,' she said, 'All I'm wanting is to be able to return back to work.' And that's when the lady said, 'Well, Judy if that's all you're wanting, you know, we can fill out these papers and see.' And then Judy came in about two or three days later and said she had got a letter stating that she wasn't, you know, employed here long enough for them to hold her job... (p. 13)

Sometime after the three-way conference call, Holcomb told her Cornett was in the store shopping, and she (Holcomb) told her (Hubbs) that Cornett said she had remembered that she had hurt her back pulling in a food roller. She did not have an injury report completed because of that conversation because Cornett never informed her personally; because Cornett was no longer working at the store; and because Cornett had previously denied work relatedness.

3. **Kim Holcomb** is the assistant manager for the Defendant. She acknowledged Cornett reporting to work with back pain on Monday July 14, 2014, but said Cornett never attributed that pain to a work injury. She called Hubbs about permission to call in a relief worker. Cornett came back in to work to report that her back and wrist were broken. She asked Cornett how she had injured herself, and Cornett said she did not know. Later, while in the store shopping, Cornett told her she (Cornett) had remembered that she hurt her back while pulling a food roller, and that is the first time she (Holcomb) heard Cornett claim her injury was work related.

4. Plaintiff filed evidence from **ARH Tri City Medical Center**. On July 15, 2014, Cornett presented with a history of three days of back pain from lifting heavy objects. Such an onset "happens every few years." She had a history of a bulging disc in the low back. Pain was 10/10. There was no specific history of a work injury provided. There was no radiating pain. On August 29, 2014, Cornett returned with complaints of right hand pain in addition to the back pain that was now radiating to the right leg. An October 8, 2014, lumbar MRI reported grade II spondylolisthesis, degenerative disc disease, and no herniations. Regarding the right wrist, an x-ray reported an "old ununited fracture of the tip of the ulnar styloid process," but no acute fracture or dislocation.

5. Plaintiff filed evidence from **Dr. David Muffly**, an orthopedic surgeon in Corbin who evaluated Cornett at her attorney's request on February 5, 2015. Dr. Muffly noted that a disc herniation present on a 2002 MRI was

absent on the 2014 MRI, but the 2014 showed spondylolisthesis that the prior study did not. He assigned 6% work related impairment, and recommended restrictions of lifting no more than 25 pounds and infrequent bending and stooping. He said Cornett could not return to her prior job.

6. The Defendant filed evidence from **Dr. Philip Corbett**, an orthopedic surgeon in Lexington who evaluated Cornett at its request on July 1, 2015. Dr. Corbett said Cornett had suffered a myofascial strain superimposed on the degenerative process in the lumbar spine, but the strain had not resulted in permanent impairment. He said Cornett's spondylolisthesis "has existed for at least the last 20 years" based on the presence of tropic bone changes. Cornett told Dr. Corbett that "an orthopedic surgeon in Corbin," presumably Dr. Muffly, had told her her spondylolisthesis was congenital.

7. The Defendant filed records from a **circuit court action** Cornett filed against a grocery store chain based on a 1998 back contusion suffered when a pack of sodas fell from a shelf onto her back. Among the attacks on Cornett's case, the Defendant's effort to sully her because she previously filed an allegedly "frivolous" lawsuit and is doing the same here against a defendant with "deep pockets" is unfounded. The Defendant filed records from a nurse practitioner, **Hazel Eldridge**, that did not appear relevant. The Defendant also filed miscellaneous evidence that included printouts from Plaintiff's **Facebook page**, and documentation that Cornett's initial treatment at **ARH Tri-City**

Clinic was billed to a health insurance carrier and not the workers compensation carrier.

8. **Standard of review.** It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers compensation claim. *Young v. Burgett*, 483 S.W.2d 450 (Ky. 1972). In order for that burden to be sustained, no less than substantial evidence of each element of the claim must be introduced. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

9. **Right wrist injury.** Cornett did not submit evidence of permanency, and in her Brief only asks for an award of medical benefits. However, she has to prove a wrist injury to even be entitled to that, and she has not done so.

In her Form 101, she alleged the date of injury to her wrist as being the same as for her back, July 12, 2014. In her deposition, she said her wrist injury was a fracture, and that an incident "a good month or so" before the back injury when she struck her hand on a spindle is the only thing she could think of that could have caused that. (p. 26) So she amended her claim to assert that such an event occurred between June 1 and June 12, 2014. Obviously, Cornett's change in the allegation of how her injury happened and

inability to specifically identify when it happened reflects poorly on her burden to prove the claim.

Next, she said she notified Dollar General of the work injury after the August 29, 2014, x-ray. The ALJ is skeptical of that, but, even if that occurred, it was over 60 days after the alleged incident had occurred. And she continued working at her regular job with the supposed fracture. The ALJ believes Dollar General's first notice of an injury from striking a spindle was her deposition on June 10, 2015, almost a year later.

Still further, even if she did strike her arm on the spindle, she is mistaken in believing she has a fracture from that incident (p 24-25); the x-ray reported an old fracture, consistent with the right wrist complaints she had long before that alleged injury, but no new fracture.

And finally, there is no medical evidence, including from Cornett's expert, Dr. Muffly, stating that Cornett suffered a work related injury to her right wrist. The wrist injury claim must be dismissed.

10. **Low back injury.** The ALJ finds Cornett has not sustained her burden of proving the work relatedness of her claimed low back injury. In "swearing contests" of this sort, the ALJ is looking to see whose story "adds up" and whose testimony is shown reliable and consistent, against the backdrop that it is the claimant's burden to prove her case. The ALJ found the testimony of Holcomb and Hubbs to be more convincing. In that regard, Cornett did not deny or dispute the statements attributed to her by Holcomb and Hubbs, for example Holcomb's testimony that Cornett first mentioned work relatedness to

her after Cornett had left Dollar General's employment, saying on a subsequent shopping visit she had "remembered" she had hurt her back moving a food roller. The ALJ believes Cornett has attempted to find a work related cause for the acute onset of 10/10 back pain that caused her to seek medical attention on June 15, 2014, just like she attempted to find an event to which to attribute the wrist "fracture" after the x-ray on August 29, 2014.

Cornett avoids all the factual intricacies in her Brief. She basically highlights two things. One, that she gave timely notice because she told Holcomb about her back complaints on July 14, 2014; but that significantly misses the point that (as demonstrated by the very testimony set out in her Brief) she failed to give a history of a work injury connected to those complaints. And two, that Dr. Muffly establishes medical causation; but that opinion is only pertinent if Cornett's history of having suffered the work injury she related by history to him is accepted, which it is not.

The ALJ came to the conclusion that Cornet had not proven her case based on the following. Generally, Cornett was not a good witness. She was a poor historian. To be clear, a witness does not have to be articulate or sophisticated to make her point or be credible, but in this case the ALJ had to read and reread Cornett's testimony multiple times to gain an understanding of her version of events. For example, Cornett initially was confident that the x-rays from which back and wrist fractures were allegedly identified occurred within a couple of days of the injury, which is important because she was firm in her contention that she made Hubbs and Holcomb aware of those work

related fractures. But the medical records proved those x-rays did not occur until some six weeks later (and did not reveal fractures).

And there were idiosyncrasies in Cornett's testimony that caused the ALJ to question it. For example, she was not clear in describing the mechanism of injury. She generally spoke of moving a food cart and, separately, lifting sugar, but the ALJ did not have a clear picture of what happened.

Second, and related to the first, is the question of how the mechanism of injury Cornett described, however vague, was severe enough to cause any type of fracture. Regardless of causation, Cornett's repeated and mistaken belief that she suffered acute back and wrist fractures in the face of medical records to the contrary diminishes the reliability of her overall testimony.

Third, Cornett could have informed a member of management about her alleged injury the day it occurred, but did not. Assistant manager Holcomb was present that day, but Cornett instead chose only to report her injury to her fellow cashier because "I medically didn't know what had happened," and "She (Halcomb) was in the back stocking and Amanda was closer to me." Neither of those explanations makes sense.

Fourth, Cornett's testimony was not consistent. For example, she said she reported the work injury to Holcomb on her first day back to work, July 14, 2014. In her deposition she also said she separately called Hubbs to inform her that same day. (p. 40-41) However, at the Hearing she said she first notified Hubbs of her injury after receiving news of her fractures from the August 29, 2014, x-rays. (p. 7) Further on this point, Cornett specifically

testified at the Hearing she first notified Hubbs of her work injury while on the conference call with the Dollar General representative; the ALJ does not accept that testimony, but it begs the question of why she would not have personally informed Hubbs of the injury prior to a conference call with a corporate representative.

Fifth, Cornett's Facebook page contains pictures she took of her father's baptism on July 12, 2014, within two hours of the alleged back injury. Such activity would not seem likely given that Cornett said her wrist injury had left her unable to take pictures, which was a hobby; and given that she had the most severe back pain, 10 on a 10-point scale, when she went to Martin's office on July 15, 2014. When her testimony was challenged in light of the Facebook evidence, Cornett only offered that she knows she was present for the baptism, but does not remember it being on the same afternoon following her injury.

(depo p. 31, 84)

Sixth, in testifying about her wrist injury Cornett said she had no preexisting numbness or tingling in her hands (depo p .79-80); but the medical records demonstrated that she did. Of course, this testimony concerns the wrist, not the back injury claim, but it speaks to the reliability of the testimony in general.

Beyond Cornett's testimony, the ALJ observed that the initial record from nurse practitioner Martin on July 15, 2014, did not contain a history of a work related low back injury. But the note did specifically record a history of a bulging lumbar disc and a history that an onset of severe pain "happens every

few years.” No medical report contains the history of lifting sugar, about which Cornett testified. (p. 28, 94) She told Dr. Corbett she was lifting cases of vegetables, about which Cornett did not testify, and there is no record of such in the medical notes. Further, the facts that Cornett was terminated from a fast food restaurant because her cash drawer was short, and that she was investigated (civilly, not criminally) for overpayment of unemployment benefits added to an adverse impression from the totality of evidence that it otherwise might not have. (p. 19, 70) And finally, besides the ALJ having found that Dr. Muffly’s evidence was not supported factually by the occurrence a work related event, Dr. Muffly’s opinion was less persuasive in this instance because he did not review diagnostic films (only reports) and did not take x-rays, which would be appropriate in this case given the dispute over the length of presence of spondylolisthesis. Dr. Corbett’s review of films and x-rays demonstrated that the condition had been present prior to 2002 even though it was not mentioned on an MRI taken that year. Notwithstanding the dispute over the duration of that condition, Dr. Muffly assigned impairment for a lumbar strain, for which the ALJ finds there is no objective evidence to prove either its occurrence or, alternatively, its relationship to a work injury, or, alternatively, any resulting permanent impairment.

Order

1. For the foregoing reasons, Plaintiff's claim is dismissed.
2. Duplicate copies of the depositions of Holcomb and Hubbs, filed October 1, 2015, are ordered stricken from the record. The ALJ's copies have been discarded.

Rendered and copies deposited in the U.S. Mail addressed to the parties listed below, this 23rd day of October, 2015.



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