

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F212505

LINDA CROUCH, Employee	CLAIMANT
FUN CITY, Employer	RESPONDENT #1
UNION STANDARD INSURANCE CO., Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED AUGUST 11, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On July 2, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 30, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed between the claimant and respondent #1 on May 28, 2003 and at all relevant times.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle her to compensation rates of \$197.00 for temporary total

disability benefits and \$154.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's back on May 28, 2002.
2. Medical.
3. Temporary total disability benefits from October 2002 through a date yet to be determined.
4. Attorney fee.

The claimant's contentions as set forth in her pre-hearing questionnaire are as follows: "On February 1, 2002, claimant underwent a hemilaminotomy at L5-S1 to repair a left-sided disc herniation that resulted from a non-work related event. On April 4, 2002, claimant's surgeon, Dr. Luke Knox, released claimant to be seen only as needed. At this point claimant returned to work for the respondent. On May 28, 2002, claimant sustained a compensable injury to her back when she felt a pop in her lumbar spine while lifting a box in the course and scope of her employment with the respondent. On this day an accident report was completed by a co-employee named Tonie Germany. Claimant continued to work for the respondent, but respondent refused to pay for her to see a physician. It should be noted that respondent was going through a change of ownership during this period of time. Although claimant attempted to work with management, she could not get anyone to address her injury and authorize her to see a doctor. Therefore, she returned to Dr. Knox and paid for the treatment using her personal insurance. On November 14, 2002, Dr. Knox opined the claimant had a current disc herniation from her work injury. Since this time, claimant has participated in physical therapy with no success. Currently, Dr. Knox has recommended surgery, but the claimant cannot afford the co-pay for the surgeon's fee and the hospital."

Respondent #1's contentions as set forth in its pre-hearing questionnaire are as follows: "The claimant has had long standing back problems and underwent a surgical

procedure with Dr. Knox in February 2002. The claimant returned to work for respondent #1 and worked on a regular basis until she left her employment in October. The respondents contend the claimant did not sustain a compensable injury and, at best, her present problems are due to a recurrence of her prior back problems and resulting surgery. The claimant indicated in her deposition that she had low back and left leg problems. She was released by Dr. Knox in late March or early April and described having good and bad days. She did contact Dr. Knox's office on May 28 and indicated that she had a recurrence of her back problems. The claimant did not indicate that she sustained an injury on that date. The claimant also went to the doctor on July 15 for chest wall pain but mentioned nothing regarding her back. She was then seen in August 2002 at Northwest Medical Center and again there is no mention of her back, a copy of these records are attached to the claimant's pre-hearing."

Respondent #2, Second Injury Fund, contends the case is not yet ripe for the issues of extent of disability and Second Injury Fund liability.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 30, 2003, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned sufficient wages to entitle her to a compensation rate of \$197.00 for temporary total disability benefits and \$154.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on May 28, 2002.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant is entitled to temporary total disability benefits beginning November 1, 2002 and continuing through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a forty-one year old woman with an eighth grade education who began working for the respondent in December 2000. Shortly after she began working for the respondent she suffered a non-work related injury when she slipped and fell on ice in a parking lot in December 2000. Claimant was diagnosed as suffering from a herniated disc at the L5-S1 level following that fall and as a result underwent surgery which was performed by Dr. Knox. Claimant testified that the surgery eliminated her leg pain but not all back pain.

After her non-work related injury the claimant returned to work for respondent in late March or early April, 2002. The respondent is an indoor playground for children which also serves food items such as pizza, hot dogs, and soft drinks. When claimant returned to work for respondent in late March or early April of 2002, its owner was Annette Snyder. Shortly after the claimant returned to work for the respondent, the respondent was apparently sold to Sam Mathias and Mathias Properties. As a result, Gene Housley began operating the respondent for Mathias in early April 2002. Housley continued in that role until September 9, 2002, when Zacc Arnold began operating the respondent for Mathias.

When claimant returned to work for the respondent in late March or early April 2002, she returned as the manager. Claimant testified that upon arrival each day she would be responsible for getting the business ready for opening. This included some cleaning, the setting up of various tables and preparation of some food items.

Claimant testified that on May 28, 2002, she arrived for work at approximately 9:00 a.m. and was the only person there. Claimant testified that she first rotated pizza crust boxes in the cooler. She stated that after performing this activity her back hurt but that she had no leg pain. Claimant next used a vacuum cleaner to clean under some slides. This required claimant to get on her hands and knees. Again, claimant testified that she had some pain in her back. Claimant next set up some tables and again had some back pain.

After she set up the tables, claimant testified that she noticed the syrup on the Dr. Pepper portion of the soft drink machine was low. Syrup used for the machine comes in plastic containers inside a cardboard box. Claimant testified that as she was lifting up a box of Dr. Pepper she felt her back pop and had pain in her back and leg. Claimant testified that after this incident she performed some additional job activities before she went outside and sat on the sidewalk. After some period of time a co-employee, Tonie Germany, arrived and claimant reported her injury to Germany. Germany and another co-employee completed an accident report and apparently placed it on the desk of Housley. Claimant also testified that she telephoned Housley and reported this incident.

Also on this day the claimant contacted Dr. Luke Knox's office to request additional medication. Dr. Knox had performed the prior surgery on claimant's low back.

Aside from an additional refilling of her medication, claimant did not seek additional medical treatment for her back until October 2002. At that time claimant returned to Dr. Knox and subsequent testing has revealed a recurrent herniated disc at the L5-S1 level. Claimant last worked for respondent on or about October 30, 2002, and has not worked

for any other employer since that date.

Claimant filed this claim contending that she suffered a compensable injury to her back on May 28, 2002. She seeks payment for medical treatment, temporary total disability benefits beginning October 2002, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her back while lifting a box of Dr. Pepper mix on May 28, 2002. Therefore, her claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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;
- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on May 28, 2002.

Initially, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered an injury which arose out of and in the course of her

employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Here, there is no question that claimant had a pre-existing injury in the form of a herniated disc which had occurred in December 2000 and which resulted in surgery being performed by Dr. Knox. There is also no question that the evidence indicates that claimant had some good days after her surgery and some bad days after her surgery. However, I do note that since claimant is alleging a specific injury she does not have the burden of proving by a preponderance of the evidence that her employment was the major cause of her injury. *Farmland Insurance Company v. Dubois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996). Instead, claimant must only prove that she suffered a new injury or an aggravation of her pre-existing condition.

My review of the totality of the evidence in this case reveals that there is evidence which both sides could point to in support of their contentions. It is obvious that there are some inconsistencies in the claimant's testimony such as the exact job activity she was performing at the time of her injury. Claimant testified that she was lifting boxes of Dr. Pepper mix when the incident occurred. On the other hand, there is also some indication that claimant reported the back problems occurring after lifting tables or after lifting food items in the cooler. However, I believe that it is important to note that claimant was performing these job activities shortly before her injury on May 28. I also note that a claimant does not have to present perfect evidence in order to prevail. Instead, a claimant only has the burden of proving by a preponderance of the evidence that they have met their burden of proof. I find that claimant has met her burden of proof based upon the evidence presented.

First, I find it very important that claimant testified that she reported her injury at work to her supervisor, Gene Housley, on May 28, 2002. Indeed, Housley was called as a witness at the hearing and testified that on that date the claimant did mention back problems which she related to lifting boxes. Housley testified that he does not recall the

claimant mentioning Cokes or Dr. Pepper, but instead recalled claimant indicating that she was lifting boxes of cheese in the walk-in cooler. I do not find this discrepancy to be significant in this case in part because claimant testified that she did have back pain after working in the cooler. What is significant is Housley's testimony confirming that claimant reported an injury to him on that date.

I also find it significant that on May 28, 2002, claimant contacted Dr. Knox's office to request additional medication. Claimant apparently talked to a nurse in Dr. Knox's office on that date and reported a recurrence of back and leg pain after moving tables at work. Again, I do not find significant under the facts in this case a reference to moving tables versus lifting boxes of drink mix. Claimant testified that she had moved tables earlier that morning which caused pain in her back, and she reported an injury at work to Dr. Knox's office on May 28, 2002.

Thus, on the date which claimant contends that she suffered a compensable injury to her back, she not only reported a history of a work-related injury to Dr. Knox's office but also reported a history of a work-related injury to Gene Housley, her supervisor. Finally, I also note that claimant reported the injury on the day it allegedly occurred to Tonie Germany when Germany arrived at work. While Germany is the claimant's cousin, the evidence also indicates that claimant reported a work-related injury to her supervisor on that date.

Another inconsistency noted by the respondent involves her recorded statement wherein claimant indicated that her injury occurred in April 2002, not May 2002. First, I note that claimant testified that when this recorded statement was taken she was working and waiting on customers. Second, my review of the recorded statement indicates that during that same conversation the claimant also later acknowledged that the incident occurred in May, not April 2002. Therefore, I do not find this to be significant.

In finding that claimant has met her burden of proof, I also find significant the

testimony of Dr. Luke Knox, the neurosurgeon who performed claimant's initial back surgery. Dr. Knox testified by way of deposition and indicated that on April 4, 2002, he authored a report noting that the claimant was doing well and released her from his care. He indicated that he had no records of any additional problems until claimant contacted his office on May 28, 2002, indicating that she had re-injured her back at work. Dr. Knox acknowledged that it would be possible but unusual for someone to have surgery and then have a recurrent disc which was unrelated to any particular problem. Dr. Knox went on to opine that the claimant's recurrent herniated disc was causally related to her work-related injury. Admittedly, Dr. Knox stated that his opinion was based on the history of injury given to him by the claimant.

I also note that testimony was offered indicating that claimant was not required to lift boxes at work. The fact that claimant may not have been required to lift boxes at work does not mean that she did not do so. Indeed, according to claimant's testimony, she was the only worker present on many times when the playground opened. Housley testified that it was possible that the claimant would not have help until after the store opened. Thus, under those circumstances, claimant would have been required to perform some lifting in order to put down tables and change boxes on the soft drink machine.

I also note that testimony was offered by Housley and Arnold indicating that at some point in time the claimant told them of an incident wherein she fell on her deck and was unconscious for a period of time. Claimant disputes this testimony. Even assuming that the testimony of Arnold and Housley is true, there is no evidence that claimant injured her back as a result of that incident.

In summary, claimant has the burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back which arose out of and in the course of her employment with the respondent. While this claimant did have a pre-existing non-work related injury, it was her testimony that she suffered a new injury to the back when

she lifted a box of soft drink mix on May 28, 2002. Although there are some inconsistencies present, I do not find these significant. I do not find these inconsistencies significant primarily because they involve the specific activity which claimant was engaged in at the time of her injury. While claimant attributes her back injury to the lifting of the soft drink mix box, claimant also testified that she had back pain after performing other job activities that day, including the rotation of food products in the cooler and the setting up of tables. Given claimant's testimony that she had back pain as a result of these job activities, I do not find this evidence to be sufficiently inconsistent to find that claimant's testimony is not credible. I do find significant evidence that claimant reported an injury at work to Dr. Knox's office on May 28, 2002, as well as testimony of Housley, claimant's supervisor, that claimant mentioned back problems to him related to lifting boxes at work. Based upon the foregoing, as well as the remaining evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on May 28, 2002. I also find that claimant has proven by a preponderance of the evidence that her injury was caused by a specific incident identifiable by time and place of occurrence.

In addition, I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and resulted in disability and that she has offered medical evidence supported by objective findings establishing an injury. Here, the evidence reflects that claimant was prescribed additional medications when she contacted Dr. Knox's office on May 28, 2002. Thereafter, claimant was given a refill of medication by Dr. Knox's office on July 26, 2002. Claimant testified that she continued to work for respondent and that her back pain continued to increase. As a result, claimant again contacted Dr. Knox's office in October 2002 complaining of recurrent back and leg pain. As a result of claimant's complaints Dr. Knox ordered an MRI scan and a myelogram which

revealed a recurrent herniated disc at the L5-S1 level. Based upon this evidence, I find that claimant has satisfied the remaining elements of compensability.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on May 28, 2002.

Having found that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with her compensable back injury. It appears from a review of the evidence that some of claimant's medical treatment may have been paid for by group health insurance. Pursuant to A.C.A. §11-9-411, respondent is entitled to a credit for those benefits.

The next issue for consideration involves claimant's request for temporary total disability benefits. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

It appears that claimant last worked for respondent on or about October 30, 2002. Claimant testified that on that date when she arrived at work she discovered that various trash bins had not had a trash bag placed in them before they were filled with trash. Claimant testified that she was unable to lift these trash bins and as a result contacted her supervisor at that time, Zacc Arnold. Claimant testified that Arnold told her that if she could not perform her job duties she would no longer be needed. Arnold disputed claimant's testimony stating that claimant called and voluntarily terminated her employment because food supplies had not been put away by employees the night before.

Claimant testified that after she left the employment of respondent she did not feel

she was capable of working because she could not stand for long periods of time and could not walk very far. At his deposition Dr. Knox testified that his records do not reflect that he specifically took claimant off work in November of 2002. However, he testified that it would not be unusual for him to do so. Furthermore, based upon her injury, Dr. Knox testified that claimant should not be lifting tables or boxes as she was doing for the respondent. Dr. Knox also testified that he would recommend that the claimant avoid surgery if at all possible. However, if a second surgery was performed it would most likely be a fusion. Claimant's last visit with Dr. Knox occurred on January 9, 2003, at which time she was instructed to return as needed. Claimant testified that she has not had money to seek any additional medical treatment since that time and that she wants to have the surgery recommended by Dr. Knox.

Based upon the foregoing evidence, I find that claimant has remained within her healing period and has suffered a total incapacity to earn wages since the date she last worked for respondent on October 30, 2002. The medical evidence indicates that claimant suffers from a recurrent herniated disc for which surgery may be necessary. In addition, although Dr. Knox's notes do not reflect that he specifically took the claimant off work, he testified that it would not have been unusual for him to do so. Furthermore, Dr. Knox testified that based upon claimant's injury she should not be lifting tables or boxes on the job. Given this evidence, I find that claimant is entitled to temporary total disability benefits beginning November 1, 2002, and continuing through a date yet to be determined.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier

and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on May 28, 2002. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Respondent is entitled to a credit for medical benefits previously paid by a group health carrier pursuant to A.C.A. §11-9-411. Finally, claimant is entitled to temporary total disability benefits beginning November 1, 2002, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE