

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F207356 & F213122

**CHARLENE LOUISE HERRING,
EMPLOYEE**

CLAIMANT

**K-MAC ENTERPRISES, INC., D/B/A
GOLDEN CORRAL RESTAURANT,
EMPLOYER**

RESPONDENT NO. 1

**TRAVELERS INDEMNITY CO.
OF ILLINOIS, INSURANCE CARRIER**

RESPONDENT NO. 2

**WAUSAU UNDERWRITERS INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 3

OPINION FILED JULY 24, 2003

Hearing conducted April 29, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. J. Gary Davis, Attorney at Law, Little Rock, Arkansas, appearing for the claimant,

Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas, appearing for Respondent No. 2, and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for Respondent No. 3.

STATEMENT OF THE CASE

This is a dispute over compensability and origin of the claimant's back injury, that is, whether or not it is compensable, either as a natural consequence of an earlier shoulder injury that Travelers has accepted, or as a new compensable injury by gradual onset occurring during Wausau's coverage.

The claimant contended that she suffered a compensable back injury, either as a compensable consequence of her earlier compensable shoulder injury or as a subsequent gradual onset injury, and should be awarded benefits, including reasonably necessary medical and related expenses and

temporary total disability benefits from March 13, 2003, until a date to be determined, as well as an attorney's fee for controversion. A separate order addresses her request that benefits, at least medical benefits, be paid by the carriers jointly, pursuant to Ark. Code Ann. §11-9-806. Other possible issues were reserved.

Travelers contended that the claimant's back condition is not causally related to her compensable shoulder injury of April 4, 2002.

Wausau contended that the claimant's back injury was a compensable consequence of her right shoulder injury, which occurred prior to its coverage period. Specifically, they contended that she returned to work and, in order to protect her shoulder, worked with her left hand and adopted awkward postures causing the injury to her low back.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to her right shoulder on or about April 4, 2002, when Travelers provided workers' compensation coverage; on September 18, 2002, Wausau assumed workers' compensation insurance coverage; and the claimant's average weekly wage was \$200.00 on April 4, 2002, and \$175.50 on November 4, 2002.
3. The preponderance of the evidence shows that the claimant suffered a compensable back injury by gradual onset, first requiring medical attention November 4, 2002, arising out of and

in the course of the claimant's employment during the coverage period of Respondent No. 3, and fails to show that her back injury is a compensable consequence of her earlier shoulder injury.

4. As a result of her compensable back injury, the claimant has incurred reasonably necessary medical and related expenses and was totally incapacitated to earn wages during her healing period from March 13, 2003, until a date to be determined, so that she is entitled to temporary total disability benefits for that period.

5. Respondent No. 3 has controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by Respondent No. 3.

DISCUSSION

On March 26, 2002, when Travelers Insurance Company provided workers' compensation insurance, the claimant slipped and fell, injuring her right shoulder, during her employment as a server for the respondent at its restaurant. She first sought medical attention April 4, 2002. This injury was accepted as compensable and the claimant received medical care, including surgery performed June 27, 2002.

On September 16, 2002, she returned to work where, she testified, she worked left-handed or left-sided in order to protect her right shoulder. She stated that during her last session of physical therapy for her right shoulder injury on September 19, she commented that her left leg was now bothering her. Wausau's coverage period had begun September 18, 2002. At the hearing, the claimant testified that she originally thought this was merely soreness from being away from the workplace. However, other more severe symptoms developed and she eventually found it necessary on November 4, 2002, to seek medical attention. On November 27, 2002, an MRI scan revealed a

small herniated disc at L5-S1. At the hearing, there was little dispute that the claimant had suffered a compensable injury, although the parties did not agree as to its origin.

The claimant's primary theory is that she suffered a new injury by gradual onset. On the other hand, the theory that her back injury could be a compensable consequence of her shoulder injury originated with Wausau. This theory is based on the established principle that when the primary injury has been shown to be compensable, the employer is responsible for any natural consequence that flows from it, the basic test being whether a causal connection exists between the two episodes. See, eg, Bearden Lumber Co. v. Bond, 7 Ark. App. 65 (1983).

Here, while a connection between the earlier shoulder injury and the claimant's back injury is at least possible in theory, the evidence of record offers little of substance to support such a theory. For example, on April 2, 2003, orthopedic surgeon Dr. John L. Wilson wrote that he examined the claimant and noted positive straight leg raising on the left and a depressed ankle jerk on the left when compared to the right, as well as a bulging disc at L4-5 on the MRI. He opined that the claimant had a bulging disc or HNP with sciatica and nerve root damage at S1 on the left and stated that the injury occurred after she had returned to work and not at the time of her shoulder injury. In short, little in the medical record directly supports the theory that the back injury should be attributed to the earlier shoulder injury.

Because Travelers' coverage ended and Wausau's coverage began September 18, 2002, the exact time of the occurrence of the back injury becomes significant. In that regard, the claimant was asked on cross-examination if she noticed pain the first day she went back to work, which was September 16, 2002. Her answer was that she did not recollect but remembered the last day of therapy she mentioned it to her therapist. Indeed, when her orthopedic surgeon Dr. Charles E.

Pierce, Jr., examined her on September 25, 2002, his note does not indicate complaints concerning the claimant's back or leg symptoms. Moreover, the claimant did not seek medical attention for the condition of her leg and back until November 5, 2002. In fact, the medical record does not show an objective basis for concluding that the claimant had an injury in September, 2002, instead of mere aches, pains, and soreness from deconditioning resulting her absence from the workplace. Thus, the preponderance of the evidence fails to show that the back injury developed during Travelers' coverage period, but rather shows that it occurred during the coverage period of Wausau.

A gradual onset back injury causing physical harm and arising out of and in the course of the employment is compensable under Ark. Code Ann. §11-9-102 where the compensable injury is established by medical evidence supported by objective findings and the injury is the major cause of the disability or need for treatment experienced by the claimant.

Here, as noted above, the medical record, including the opinion of Dr. John L. Wilson, indicates that the claimant has a bulging or herniated disc with sciatica and nerve root damage at S1 on the left, objective findings sufficient to satisfy the requirements of the Act. Although the major cause issue is not directly addressed by Dr. Wilson or the claimant's treating physicians, a review of the medical record reveals no other cause for the claimant's disability or need for treatment of her back condition and leg symptoms. Finally, the claimant was not taken off work by a physician on March 13, 2003, but merely stopped working because she felt she could not do it any longer. When she saw Dr. Wilson on April 2, 2003, he recommended an injection of Decadron, a Celestone tabpack, Celebrex, and Robaxin. He also placed the claimant on the William's exercise program and a diet and stated that she was to return for followup. He did not indicate that the claimant should return to work in any capacity. Thus, the preponderance of the evidence shows that the claimant was

within her healing period and totally incapacitated to earn wages from March 13, 2003, through the date of her examination by Dr. Wilson on April 2, 2003, and until a date to be determined.

AWARD

Pursuant to the foregoing opinion and the law, Respondent No. 1 and Respondent No. 3 are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge