

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F204762

HELEN M. ISAAC, EMPLOYEE	CLAIMANT
TWIN LAKES NURSING & REHAB CENTER, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED OCTOBER 15, 2003

A hearing was held on September 17, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by Frederick Spencer, Attorney at law, Mountain Home, Arkansas.

The respondent was represented by Curtis L. Nebben, Attorney at Law Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 17, 2003, in Mountain Home, Arkansas on September 17, 2003. It was stipulated that:

1. The employee-employer-carrier relationship existed at all relevant times.
2. There is no agreement regarding the average weekly wage.
3. The claimant sustained a compensable right arm, bilateral knee, right shoulder and low back compensable injuries on April 24, 2002.
4. The respondent controverted all benefits after March 6, 2003.

The issues to be litigated at the hearing were as follows:

1. Is claimant entitled to temporary total disability from September 3, 2002, to a date to be determined?

2. Is claimant entitled to unpaid medical bills and medical mileage, along with future medical treatment from Dr. Don Vowell, including a nerve conduction study?

3. Is claimant entitled to an attorney's fee?

According to the medical records, (Cx-1, p.8), prior to the date of the admittedly compensable injuries of April 24, 2002, the claimant had sustained a previous back injury with a herniated disc in the 1970's after a motor vehicle accident. She had another injury to her back in the early 1990's after another accident. She had another incident with her back in 1993 when she lifted a patient while working in a nursing home and strained her lower back. She apparently again injured her back in 1995 while she was lifting a patient in a nursing home. According to the claimant she was diagnosed with two herniated discs, but had no surgery.

The claimant was diagnosed with breast cancer in 1999 on the right side. She had a recurrence of that breast cancer in 2002 before her admittedly compensable April 24, 2002 injury. As of May 7, 2002, the claimant was undergoing radiation for the breast cancer. The claimant testified regarding her April, 2002 injury:

“A. Well, the night that it happened I was at work passing my routine med. Pass down A hall. And I was finished in one room and was getting ready to push the cart to the, to my next patient. And the wheels gave way on the cart and the cart began to topple forward on me. And I reached forward with my arm and the cart just kept coming because of the validity, validity —

Q. Velocity?

A. —velocity of the weight coming. And it, I reached out with my arm and the cart come down my right side and began to pin me against the wall.

And—

Q. Did it, when it hit on your side, did it push you up against the wall?

A. Yes, sir, it did. My back began, became impinged at the lumbar area at the railing that goes down, the hand rail of the wall.

Q. All right. In other words, in the hallway of this nursing home, there's a hand rail where patients can walk up and down and hold onto a rail?

A. Yes.

Q. And that was hitting you in the low back?

A. Yes.

Q. Okay.

A. And it also hit my knee, both knees, but the right one worse than the left.”

(T-24, 25)

The claimant said that she drew temporary total disability from April 25, 2002 through June 21, 2003. She worked light duty thereafter until September 2, 2002. According to the claimant, she was told on September 2, 2002, that she was being placed on medical leave because she was too ill. It is the respondent's position that the medical leave was for cancer-related illness. (T-50).

The claimant testified that she completed an incident report of the injury. She was sent to Dr. Rolland Bailey, who referred her to Dr. Don Vowell, an orthopaedic surgeon. The claimant testified that Dr. Vowell wants to treat her with additional testing and probable surgery on her right elbow, but she is not able to afford the medical treatment, and the respondents have controverted this treatment.

The claimant testified that her problems are due to the compensable injury and not the cancer. She related in detail the problems that she is experiencing at

the time of the hearing:

“ Ms. Issac: My right arm and my right knee. My, my low back does bother me, but I had had a previous injury to that, to my back, so I figured it an exacerbation to the previous injury.”
(T-29)

The claimant testified that her right arm and elbow “burns” and she is in pain all of the time. She experiences numbness down her arm and into her hands and fingers on the ulnar side. She is never pain free in her right elbow. The claimant testified that her knees pops and cracks and feels like it is “gonna go out from under me when I walk.” (T-33). The claimant testified that sometimes when she bends down she is not able to get back up without difficulty. According to the claimant, Dr. Vowell never released her from his care with either the right arm, elbow or knee.

The claimant testified that her back bothers her when she walks or sits for a period of time. It hurts all of the time and she does not go a day without back pain. She testified that she thought her back pain from previous accidents was getting before the April compensable injury.

The claimant was asked to see Dr. Alice Martinson, an orthopaedic surgeon in Berryville, Arkansas. According to the claimant, her benefits were terminated after Dr. Martinson’s report was written.

The claimant testified that she was hired to perform a 40 hour work week. (T-37). According to the claimant she was making \$12.25 per hour. The claimant stated that her average weekly wage was \$490.00.

On cross-examination, the claimant testified that during a previous deposition she testified that she did not know why she was placed on medical leave in

September, 2002. The claimant testified that her back pain subsequent to the April compensable injury is not any different from the back pain she experienced prior to the April compensable injury. (T-43).

It was stipulated that the claimant's husband and son, if called to testify, would corroborate the claimant's testimony.

Jane Foster, a licensed practical nurse, testified at the hearing. She worked for respondent/employer from January 11, 2000 to July, 2003. She was on duty at the same time the claimant was injured in April, 2002. She testified as follows:

"Q. And taking you to the date of April 24th, on or around that date of 2002, do you recall her having an accident, the drug cart knocking, falling over on top of her?

A. The cart did turn over, yes, sir.

Q. And tell me what you recall about that?

A. Helen was at the end of A hall. I was sitting at the nurses station. I heard a crash and looked down the hall and saw Helen holding the cart. It was tilting over.

Q. I'm sorry?

A. Helen was holding the cart. It was tilting over. And I hollered at her to drop the cart.

Q. Okay. And she did? Or did she not?

A. No. She, she continued to hold it and I ran down there.

Q. All right. It was coming over on her?

A. It was coming over. She was between the wall and the cart.

Q. Okay. How much do those carts weigh?

A. I have no idea.

Q. They're very heavy, though, aren't they?

A. They're heavy to push.

Q. Okay. And they're on wheels?

A. Yes, sir."
(T-8, 9)

Ms. Foster testified that the claimant continued to work and refused to go home. The claimant complained of her right side and knee hurting. Ms. Foster testified that the claimant, prior to April, 2002, had complained of problems with right side pain, but she was not sure if they were same type of problems as claimant complained of subsequent to the April compensable injury. (T-16). Ms. Foster testified that prior to the April compensable injury the claimant expressed medical complaints and was having trouble working. According to Ms. Foster, the claimant was fatigued to the point that her co-workers were concerned about her health. (T-17). It was Ms. Foster's impression that the claimant was having right arm pain prior to April, 2002, because of her cancer. (T-20).

Cheryl Ramsey testified that she worked with the claimant at Twin Lakes Nursing and Rehabilitation Center. The cart which fell on the claimant weighed approximately 50 to 60 pounds. She testified as follows:

"A. I found her standing in the middle of the hall trying to hold the cart up where it wouldn't continue to fall over. And there was water, I mean, everything she had on top of the cart was in the floor. And she was holding the cart. The drawers were open. You know, she was trying to keep it from falling on over.

Q. On her?

A. On her, yes.

Q. And as a result of that, did she complain of a number of injuries?

A. Yes, she did.

Q. She was gone for about a month; is that right?

A. Yes.

Q. Then she came back to work; is that right?

A. Yes, she did.

Q. And are you still working there?

A. No, I'm not."

(T-22)

She testified that in April, 2002, the claimant complained of her leg and arm hurting. Ms. Ramsey testified that the claimant was undergoing cancer treatments at that time.

The medical records in this case reflect that the claimant was experiencing pain in different parts of her body subsequent to the admittedly compensable injury. She continued to express pain and numbness in her right arm and fingers. Tests were run and the claimant was diagnosed as having "tardy ulnar nerve palsy." The claimant stated that she did not experience the numbness in her hand before the cart fell on her arm in April, 2002. On August 21, 2002, Dr. Vowell returned the claimant to light duty using her left hand only. (Cx-1, p. 17). A repeat EMG was ordered for October 18, 2002. A report dated October 22, 2002, (Rx-1, p. 17) reflects that there was "wasting" of the first dorsal interosseous muscle. The claimant was complaining of numbness in her little finger and along the ulnar side of her right finger. Dr. Vowell stated:

“It is my impression she has a tardy ulnar nerve palsy of her right elbow. I have no way of gauging whether this is improving or getting worse without being about to do NCT’s. (Nerve conduction) I am going to ask the insurance company to reconsider, and I’d like to recheck her in 6 weeks.”

_____ (Rx-1, p. 17)

A note dated December 20, 2002, (Rx-1, p. 21), reflects that the claimant had an EMG test which showed a “slight worsening of her tardy ulnar nerve palsy.” Dr. Vowell wanted to have the claimant’s ulnar nerve transposed (surgery).

On January 3, 2003, the claimant saw orthopaedic surgeon, Dr. Alice Martinson, for an independent evaluation. Dr. Martinson read all of the clinical records and nerve conduction studies. Dr. Martinson stated:

“I believe that this woman does have a cubital tunnel syndrome affecting her right ulnar nerve at the elbow. Although her injury, as described, did involve some impact of a heavy object on her right arm, her numbness did not appear by her own accounts until approximately 6-8 weeks after her injury. The cause of cubital tunnel syndromes in most individuals is obscure, although they certainly can develop following direct blow to the medial side of the elbow. Given the timing of onset of this woman’s symptoms, I am unable to state with a reasonable degree of probability that her ulnar nerve complaints are a direct result of her April 24, 2002, work injury.”

(Rx-1, p. 24)

Dr. Martinson didn’t believe that the claimant’s right knee problems were (within a reasonable degree of medical certainty) related to her on-the-job injury of April 24, 2002. Dr. Martinson agreed with Dr. Vowell that the claimant would profit from an interior transposition of her ulnar nerve. She believes that the surgical procedure is highly satisfactory for the relief of pain and expected that the claimant’s sensation would be restored in her right elbow.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant

times.

2. There is no agreement regarding the average weekly wage.

3. The claimant sustained a compensable right arm, bilateral knee, right shoulder and low back compensable injuries on April 24, 2002.

4. The respondent controverted all benefits after March 6, 2003.

5. The preponderance of the evidence reflects that the claimant's average weekly wage was \$490.00

6. The preponderance of the evidence reflects that the claimant is entitled to temporary total disability benefits from September 3, 2002 to a date to be determined.

7. The preponderance of the evidence reflects that the claimant is entitled to reasonably necessary medical treatment for her admittedly compensable right arm injury, including unpaid medical, the medical mileage and future medical treatment from Dr. Don Vowell.

8. The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee for Mr. Frederick Spencer for controversion.

DISCUSSION

1. AVERAGE WEEKLY WAGE

The preponderance of the evidence reflects that the claimant's average weekly wage is \$490.00, which is the amount alleged by the claimant. A.C.A. § 11-9-518(a)(1) (Repl. 2000) provides: "Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire enforce at the time of

the accident and in no case shall be computed on less than a full time work week in the employment.”

The claimant testified that she was hired to perform a 40 hour work week at \$12.25 per hour. (T-37). Generally, when the contract of hire provides for a 40 hour, or full time, work week whenever work is available, the average weekly wage is to be computed on the basis of the full time work week, even if the employment is seasonal in nature. Gill v. Ozark Forest Products, 255 Ark. 951 504 S.W.2d 357 (1974); Sanders v. Single Source Transp., WCC Claim Number E613980 (Full Commission Opinion dated 4/28/98).

2. TEMPORARY TOTAL DISABILITY FROM SEPTEMBER 30, 2002, TO A DATE TO BE DETERMINED

The claimant alleges that she is entitled to temporary total disability. The claimant testified that she was placed on medical leave. Respondents agree that she was placed on medical leave, but the leave was due to her cancer complications and not the compensable injury. It was stipulated that the claimant sustained a compensable right arm, bilateral knee, right shoulder and low back compensable injuries on April 24, 2003. Therefore, claimant sustained both scheduled and unscheduled compensable injuries. Both Dr. Vowell and Dr. Martinson agree that the claimant would profit from an anterior transposition of her ulnar nerve. They disagree, however, regarding the probability that claimant’s ulnar complaints are a direct result of her April 24, 2002 work related injury. Once again, it is noted that the respondents stipulated that the claimant sustained a compensable right arm injury on April 24, 2002. The preponderance of the evidence in this case reflects that the claimant’s primary

complaint, which affects her ability to work, is her right elbow injury, which is a scheduled injury. An employee with a scheduled injury is entitled to temporary total disability compensation during the time that she remains within her healing period and has not returned to work. Wheeler Const. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). In the present matter, the preponderance of the evidence reflects that the claimant proved that she is entitled to temporary total disability from September 3, 2002, to a date to be determined. Dr. Vowell, in a letter dated January 10, 2003, (Cx-1, p. 27), stated that he wanted to perform an EMG and NCV tests on the claimant, which were "reasonable and necessary related to the injury of April 24, 2002." The preponderance of the evidence reflects that Dr. Vowell needed to conduct additional testing to confirm his planned transposition surgery of her ulnar nerve. I believe the claimant has remained within a healing period from September 3, 2002, to a date to be determined. The preponderance of the evidence reflects that the claimant certainly had pain and discomfort on her right side due to her mastectomy, recurring cancer and radiation treatment. However, regarding her specific area of complaint, the ulnar nerve on her right elbow, I can find no medical record or testimony that the cancer treatment would have affected the ulnar nerve. However, the preponderance of the evidence reflects that the claimant injured her ulnar nerve to the extent that surgery will be necessary. The claimant has not returned to work since September 2, 2002. Since she remains within her healing period, the preponderance of the evidence reflects that she is entitled to temporary total disability. I do not find that the claimant remains in a healing period subsequent to September 2, 2002 for other than the right arm injury she sustained in April, 2002. Claimant's Exhibit 1, page 3, a report made by Dr. Bailey,

(claimant's first treating physician) noted "multiple contusions." Claimant's Exhibit 1, page 4, shows that Dr. Bailey found contusions on the claimant's right shoulder, arm, both knees and low back. Even though a report dated June 21, 2002, reflects that the claimant had some "numbness in her right arm following her mastectomy", a note dated August 21, 2002, reflected that the claimant noted numbness into the ulnar nerve distribution of the right hand. The numbness included a "cold sensation and a feeling of weakness and incidents where she is dropping at things." Certainly the findings of trauma about the time of the injury corresponds with claimant's complaints of right elbow pain. The objective tests from the EMG/NCV reflect that the claimant does, in fact, have tardy ulnar nerve palsy. The respondents stipulated that the claimant sustained a compensable right arm injury. She is, therefore, entitled to temporary total disability.

3. UNPAID MEDICAL BILLS, FUTURE MEDICAL TREATMENT FROM DR. VOWELL, AND MEDICAL MILEAGE

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a) (Repl. 2000). The claimant must prove by a preponderance of the evidence that the medical treatment is reasonably necessary in connection with her compensable injury. Whether the medical treatment is actually provided is reasonably necessary is a question of fact for the Commission.

The preponderance of the evidence reflects that the claimant sustained an admittedly compensable right arm and other injuries. Some benefits were paid to the claimant, but at a later date additional medical treatment was denied. EMG and

nerve conduction tests reflect that the claimant had tardy ulnar nerve palsy on the right. The claimant told Dr. Vowell that she had not had numbness in her right arm until the medicine cart fell on her arm. That was a change from her statement that she originally gave Dr. Vowell. Regardless, Dr. Vowell also noted wasting of the first dorsal interosseous muscle in the right upper extremity. The claimant complained of numbness in her little finger and the ulnar side of her ring finger.

The preponderance of the evidence in this case reflects that the claimant is entitled to a nerve conduction study from Dr. Vowell. The preponderance of the evidence also reflects that the claimant's unpaid medical bills were reasonably necessary and related to her admittedly compensable injuries. It is apparent that Dr. Vowell and Dr. Martinson believe that the claimant should undergo the ulnar nerve transposition, depending on the outcome of subsequent tests, including the nerve conduction study. The preponderance of the evidence reflects that the claimant's medical treatment in this case was reasonably necessary and related to her admittedly compensable injuries. Therefore, the claimant is entitled to the medical treatment, medical mileage and payment of unpaid medical as requested.

The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee for controversion of benefits requested herein.

AWARD

The claimant is awarded the benefits specifically described herein, along with the attorney's fee for claimant's attorney, Mr. Frederick Spencer, pursuant to the

Arkansas Workers' Compensation law. This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC