

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. F209192**

MARY JONES, EMPLOYEE

CLAIMANT

VS.

WAL-MART ASSOCIATES, INC., EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC., CARRIER

RESPONDENT

**“Corrected”
OPINION FILED JULY 8, 2003**

Hearing held May 15, 2003, in Hope, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Gregory R. Giles, Attorney at Law, Post Office Box 2631, Texarkana Arkansas 75504.

Respondents are represented by Mr. David Wall, Attorney at Law, PO Box 3618, Fayetteville AR 72702.

This opinion was filed previously on June 30, 2003, reflecting Mr. David Jones, Attorney at Law, 401 W. Capitol, Suite 345, Little Rock AR 72201, as the attorney of record for respondents. Due to this typographical error, this opinion has been re-issued to reflect the appropriate parties and their respective representatives. All other information contained in the Opinion Filed June 30, 2003, remains as previously stated.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in Hope, Arkansas, on May 15, 2003. A prehearing telephone conference was held on this claim on February 10, 2003, with a Prehearing Conference Order filed that same date. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. The employee/employer/self-insured relationship existed between the parties on July 13, 2002;
3. The parties anticipate stipulating to the claimant's average weekly wage and compensation rate;
4. Respondents have controverted this claim in its entirety.

Prior to the hearing, the parties offered a stipulation regarding claimant's compensation rate. The parties stipulated that the claimant earned sufficient wages to be entitled to a compensation rate of \$153.00 per week.

During the prehearing telephone conference the parties agreed to limit the issue to whether claimant sustained a compensable injury for which she is entitled to temporary total disability benefits from July 31, 2002, and continuing through a date yet to be determined, medical benefits, and an attorney's fee.

In this regard, claimant contends that she suffered an injury to her back and developed blood in her urine as a result of a compensable injury on July 13, 2002. Claimant further contends that she is entitled to temporary total disability benefits from July 31, 2003, through the present. Claimant contends that the medical treatment she has received has been reasonable and necessary and respondents should be ordered to pay. Claimant contends that she is entitled to an attorney's fee on the indemnity benefits awarded. Claimant reserves the issue of attorney's

fees on medical benefits. Respondents contend that the claimant experienced an event at work on July 13, 2002, but when she received medical treatment which respondents provided, respondents determined that the claimant's condition did not amount to an injury as defined by the Arkansas Workers' Compensation Act. Therefore, respondents contend that the claimant did not sustain a compensable injury. Alternatively, respondents contend that if claimant sustained a compensable injury, claimant is not entitled to additional medical treatment or temporary total disability benefits.

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and observe her 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 prehearing telephone conference conducted on February 10, 2003, and contained in the Prehearing Order filed that same date, are hereby accepted as fact.
2. Claimant earned sufficient wages to be entitled to a compensation rate of \$153.00 per week.

3. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her upper and lower back which is supported by objective medical findings of scraps, edema, and bulging discs at T6-7 and T9-10.

4. Claimant's healing period ended on August 8, 2002, when she refused to attend work hardening to improve her condition.

5. Claimant was within her healing period and totally incapacitated from earning wages from July 31, 2002, through August 8, 2002.

6. Claimant has proven by a preponderance of the evidence that she is entitled to one day of temporary total disability benefits pursuant to A.C.A. § 11-9-501(a).

7. Claimant's treating physicians have all recommended additional physical therapy.

8. Additional physical therapy is reasonably necessary in connection with claimant's compensable injury.

CONCLUSION

On July 7, 2002, claimant was involved in an incident at work when she fell backwards off a ladder while stocking a shelf. Claimant's middle and lower back struck the metal end caps and her lower back and buttocks landed on the floor. Claimant initially received treatment at the Little River Memorial Hospital where she was treated for an acute strain. X-rays of claimant's lumbar spine yielded negative findings. Claimant was provided instructions to care for her wounds, sprains and

severe bruises. Claimant sought follow-up treatment from Dr. Kevin Kleinschmidt. Dr. Kleinschmidt was concerned about a possible coccyx fracture and ordered an additional x-ray. The x-ray of claimant's coccyx did not disclose any evidence of fracture or dislocation. Dr. Kleinschmidt prescribed physical therapy which the claimant claims made her worse. In his July 31, 2002, office notes, Dr. Kleinschmidt noted findings of lumbar-sacral sprain with radiculopathy and edema. Dr. Kleinschmidt ordered an MRI at that time and removed the claimant from work.

At the direction of the respondent carrier, claimant came under the care of Norman Hebert, a physician's assistant with the Southern Clinic in Texarkana, Texas. Hebert diagnosed claimant with a lumbar-sacral strain, prescribed work hardening, and released the claimant to return to light duty work with restrictions.

Claimant did not attend the work hardening, nor did she return to work. Claimant testified that she could not afford the work hardening. When it was explained to the claimant that she was never required to pay for the work hardening treatment, claimant testified that Hebert did not understand her pain, and that she was unable to go to work hardening because she was in a lot of pain.

After claimant refused to attend work hardening and to return to work, claimant continued to seek treatment from Dr. Kleinschmidt. On August 29, 2002, claimant advised Dr. Kleinschmidt that she was passing blood in her urine. Dr. Kleinschmidt ordered tests but never offered an opinion regarding this complaint.

On September 11, 2002, claimant underwent an MRI which revealed moderate central bulging at T6-7 and minimal central bulging at T9-10.

In a form dated October 29, 2002, Dr. Kleinschmidt advised that he observed objective findings of swelling, bruising, and muscle spasms. Dr. Kleinschmidt further advised that the claimant's symptoms are related to the work related incident and that it was medically reasonable for the claimant to remain off work from July 31, 2002, pending additional testing and treatment. Dr. Kleinschmidt recommended a referral to an orthopedic specialist, heat, rest, and medication.

On January 29, 2003, claimant was examined by Dr. H.G. Weems an orthopedic specialist. Dr. Weems diagnosed claimant with chronic thoracic and lumbar back strain for which he recommended physical therapy. In a follow-up report dated February 26, 2003, Dr. Weems noted that the claimant had not received the therapy he had recommended. In this regard, Dr. Weems wrote, "She says that she hurts too much to go to therapy, she can't afford to go to therapy, so she is just not going to go." Dr. Weems makes mention of claimant's workers' compensation claim against respondent and concluded, "Apparently, there has been some issues of noncompliance in the past so the Worker's (sic) Comp case was dropped." Finally, Dr. Weems stated:

I discussed with her that the MRI only showed a bulging disc in the thoracic spine which is not causing any significant foraminal or spinal stenosis. She has a contusion in the soft tissues in the lumbar region but otherwise negative. I told her that she needs to go to therapy to get better and she says that she just can't

go. I told her that I have nothing else to offer her at this point to help her and she is dismissed from my care.

At the hearing, claimant testified that Dr. Weems had been visited by someone from the respondents trying to influence Dr. Weems' treatment of the claimant. The evidence does not support this unfounded allegation.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. The Full Commission has held that in order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(E)(i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing

compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

There is no dispute that the claimant was involved in a specific incident at work on July 13, 2002, when she fell while stocking a shelf, during the course and scope of her employment. Claimant sought medical treatment and was initially treated for scraps, strains and bruising. Claimant received medication and physical therapy. A subsequent MRI revealed moderate and minimal bulging in the thoracic spine. Dr. Kleinschmidt provided responses to the Physician's Workers' Compensation Questionnaire presented to him by claimant's attorney indicating that the claimant's complaints of severe back pain from the upper back to the hips are the result of her work related activities. Dr. Kleinschmidt identified objective findings of bulging discs, swelling, bruising and muscle spasms. Accordingly, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury on July 13, 2002, which arose out of and in the course of her employment, which was caused by a specific incident and is identifiable by time and place of occurrence, which caused internal and external harm to the body which required medical services and which is supported by objective medical findings.

The period of temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Ark. State Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation not simply because she has a compensable injury, but rather during the period of time that she is within her healing period for the compensable injury **and** while she is totally incapacitated to earn wages as a result of that injury. Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). Accordingly, to be entitled to temporary total disability benefits, an injured employee must satisfy this two-pronged test.

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Claimant was prescribed work hardening, a form of physical therapy, on August 7, 2002, by Norman Hebert, P.A. Claimant refused to attend this therapy. Accordingly, claimant halted her healing by refusing to participate in the recommended treatment. Claimant's reasoning for not attending therapy was that she was in too much pain, that Hebert did not understand her pain, and that he was working with her employer to get her back to work, not to cure her. I do not find claimant's reasoning persuasive. Physical therapy has been recommended as the only active treatment to assist the claimant in her recovery, not only by Hebert, but by Dr. Weems as well. Claimant has been diagnosed with minimal bulging discs in her thoracic spine and with a muscle sprain. Physical therapy is routinely prescribed for these conditions. Claimant's refusal to undergo physical therapy has placed her healing at a plateau. Therefore, I find that the claimant's healing period ended on August 8, 2002, when she refused to attend the recommended work hardening therapy. This is not to find, however, that the claimant cannot re-enter her healing period once she decides to cooperate with her treatment.

Claimant was removed from work by Dr. Kleinschmidt on July 31, 2002. Accordingly, I find that claimant was within her healing period and totally incapacitated from earning wages from July 31, 2002, through August 8, 2002, for a period of nine days. A.C.A. § 11-9-501 states:

(a)(1) Compensation to the injured employee shall not be allowed for the first seven(7) days' disability resulting from injury, excluding the day of injury.

(2) If a disability extends beyond that period, compensation shall commence with the ninth day of disability.

Pursuant to A.C.A. § 11-9-501(a), I find that the claimant is entitled to one day of temporary total disability benefits for her ninth day of disability.

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish her claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

In the present claim, work hardening or physical therapy has been recommended by both Norman Hebert, a physician's assistant and Dr. H.G. Weems, an orthopedic specialist. Claimant is skeptical of this recommendation as she is distrustful of the physicians. However, there is nothing in the record to persuade me to find that these medical care providers did not have the claimant's recovery in mind when prescribing physical therapy. Dr. Weems even noted in his initial office report that physical therapy was recommended to "see if we can't get her some symptomatic relief. I told her that she would be a little bit sore in the

beginning...” This recommendation was made weeks before claimant’s perceived influence by the carrier over Dr. Weems. Accordingly, I find that physical therapy or work hardening is reasonable and necessary medical treatment in connection with claimant’s minimal thoracic disc bulging and back strain.

AWARD

Claimant has proven by a preponderance of the evidence that she sustained a compensable injury. Claimant is hereby awarded one day of temporary total disability benefits. Claimant is further awarded additional medical treatment for physical therapy or work hardening. Claimant’s attorney is entitled to the maximum statutory fee on the indemnity benefits awarded, one-half (½) to be paid by the claimant and one-half (½) to be paid by respondents. Respondents are ordered to withhold claimant’s portion of the attorney’s fees from the claimant’s award and to pay the attorney’s fees directly to claimant’s attorney.

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

IT IS SO ORDERED.

HON. KAREN MCKINNEY
Administrative Law Judge