

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200328

PEARLEY QUALLS

CLAIMANT

QUEBECOR

RESPONDENT EMPLOYER

TRAVELERS

RESPONDENT CARRIER

ORDER AND OPINION FILED JULY 10, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE R. THEODOR STRICKER, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RICHARD LUSBY, Attorney at Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on May 12, 2003. A prehearing conference was held on February 18, 2002 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and admitted into evidence without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on March 22, 2000 and December 21, 2001.
2. The compensation rates are \$292/219.

The claimant contends that she sustained injuries on March 22, 2000 and December 21, 2001 and is entitled to medical benefits and temporary total disability benefits from December 21, 2001 through today's date. The claimant further contends that she is entitled to 505 benefits and attorney's fees.

The respondents contend that the claimant did not sustain a compensable injury on March 22, 2000 and, alternatively, the statute of limitations bars any benefits. The respondents also contend that the claimant did not sustain an injury or a compensable aggravation on December 21, 2001. Alternatively, respondents contend any problems the claimant may have experienced on December 21, 2001 are a recurrence of her previous problems and are either not work related or are barred by the statute of limitations. The respondents deny any liability for 505 benefits because a prerequisite to entitlement to benefits is a compensable workers' compensation injury. Alternatively, the respondents contend that the claimant was not returned to work for reasonable cause. The respondents request an offset for group disability benefits the claimant received, if the claim is found to be compensable. The respondents acknowledge that the claimant's group health insurance has paid some medical in this matter.

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 Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on March 22, 2000 and December 21, 2001.
2. The compensation rates are \$292/219.

3. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on March 22, 2000.

4. The claimant has proven by a preponderance of the evidence that she sustained a temporary aggravation of her pre-existing cervical condition on December 21, 2001.

5. The respondents are responsible for the emergency room visit and the diagnostic x-rays and CT scan associated with the visit as well as Dr. Rebecca Barrett-Tuck's January 2, 2002, evaluation and Dr. Mihaela Savu's February 18, 2002, evaluation.

6. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and unable to earn wages as a result of her December 21, 2001, temporary aggravation of her cervical condition.

7. The claimant has failed to prove by a preponderance of the evidence that she was refused to be returned to work by her employer without reasonable cause.

DISCUSSION

The claimant, 47 years old, began her employment with the respondent in August 1998. The claimant testified her hourly pay was \$11 when she last worked in January 2000 [sic]. The claimant testified that she reported a back injury on approximately March 22, 2000, when she experienced back pain during a twisting episode on the line. According to the claimant, she reported this incident to her foreman, Jackie Mashburn, and she completed an incident report. The claimant did not seek medical attention following this event. The claimant testified that she sustained another injury and she asked her employer to send her to the doctor. According to the

claimant, Dr. William Hurst put splints on her and referred her to Dr. James Schrantz. Dr. Schrantz wanted the claimant to see Dr. John Jiu or Dr. South, but the employer refused to allow this treatment. The claimant testified that she later saw Bob Gray, safety and training coordinator for the employer, and advised him of the numbness she was having and he made an appointment for the claimant to see Dr. Reginald Rutherford. The claimant saw Dr. Rutherford, had an MRI, and then Dr. Rutherford released her to return to full duty work.

The claimant testified that she next saw a chiropractor, Dr. Myshka and she later had to change to Dr. Robert Ziegler; however, the chiropractor treatments did not help much. The claimant testified that she sustained another incident on December 21, 2001. The claimant testified that she was removing bundles of books off the line and wrapping them for the skids when her back snapped and she had a lot of pain. The claimant testified that she laid down on the skid and she was taken to the emergency room by ambulance. The claimant returned to work the following work day, which was Monday, and asked to see a doctor but was denied and she continued to work for a period of time. The claimant testified that she went to a chiropractor on her own and to her family doctor, Dr. Michael Crawley. According to the claimant, Dr. Crawley took her off work and has not released her to return to work. The claimant next testified that Dr. Crawley placed five-pound lifting limitations on the claimant with a gradual increase until she reached 20 pounds; however, the employer only made one job offer and it was to start with lifting 20 pounds and the claimant declined that job. The claimant testified that Dr. Abraham performed two carpal tunnel surgeries, one in April and one in May of 2003 and Dr. Rebecca Barrett-Tuck performed two spine surgeries, one in March 2001

and one in September 2001. The claimant testified that the surgeries helped some and she has not returned to work but is drawing social security disability benefits.

Under cross examination, the claimant testified that she did not know exactly when she reported her cervical spine injury initially, but believed it to be in the first two or three months of 2000. She further verified that she reported carpal tunnel syndrome complaints to Bob Gray in January 2000 and was sent to Dr. Hurst. The claimant verified that she was referred to Dr. Schrantz, an orthopedic surgeon and eventually saw a neurologist, Dr. Reginald Rutherford. The claimant returned to work after being off work for a brief time. The claimant confirmed that she sought treatment on her own with Dr. Myshka, Dr. Ziegler and Dr. Crawley for complaints with her low back, neck, legs and carpal tunnel syndrome. The claimant's family doctor, Dr. Crawley, referred the claimant to Dr. Tuck and the first cervical surgery was performed in March 2001. Dr. Tuck performed another surgical procedure in September 2001. The claimant confirmed that she returned to work on December 15, 2001 and December 21, 2001, the claimant's co-workers found her complaining of pain.

Robert Gray, safety and training coordinator for the respondent, testified that all workers' compensation claims come through his office. He was unaware of a report by the claimant for a neck injury in February or March 2000. Mr. Gray testified the claimant did come to him in that time frame with left hand and arm pain. The claimant was sent to Dr. Hurst, referred to Dr. Schrantz and then sent to Dr. Rutherford with those benefits paid by the company. The claimant returned to work and, according to Mr. Gray, his first knowledge of a neck problem was December 21, 2001. Mr. Gray testified that the December 21, 2001, problems were treated as a recurrence of old

non-work related injuries. Mr. Gray testified the claimant had been off work the better part of 2001 and had surgery during that period. He further testified that while the claimant did make a claim for group health benefits and short term disability benefits, she did not make a claim for workers' compensation benefits. She was also paid short term disability benefits in 2002.

Charlie Kratts, human resources manager for the employer, testified that around September 2002, Dr. Crawley provided a restricted work release for the claimant. Mr. Kratts testified that he inquired about any jobs with only a five-pound lifting duty. Nothing was available. Mr. Kratts advised the claimant nothing was available but they would work with her as time went on. The claimant filed some other legal actions against the company and nothing further was undertaken as far as placement.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on March 22, 2000, arising out of and in the course of her employment. While the claimant testified that she reported an incident to her foreman, the claimant did not seek any contemporaneous medical treatment. Robert Gray, the safety and training coordinator for the respondent, testified that he had not received any report of a March 22, 2000, neck injury filed by the claimant. The earliest medical evidence is an August 17, 2000, report from Ziegler Chiropractic Clinic and the complaints of the claimant at that time were neck, elbow, hand and back pain with no recent trauma or injury noted. The claimant filed an AR-C on November 21, 2002, reporting the March 22, 2000, injury. At the hearing, the claimant tendered some additional medical evidence beginning back in February 2000, but this medical seemed to be treatment or evaluations related to the claimant's carpal tunnel syndrome (another injury not the subject of this hearing). The preponderance of the evidence does not support a compensable neck injury on or about March 22, 2000.

The claimant next contends that she sustained a new injury or an aggravation of her old injury on December 21, 2001. She testified that she was taking bundles of books off the line and bundling them when her back snapped and she had pain. The claimant testified that she asked her employer for a doctor's appointment but she was denied. According to the claimant, she continued going to the chiropractor and her family doctor and continued to work for a period. The claimant had already undergone two cervical surgeries, one in March 2001 and one in September 2001, by the time of the December 21, 2001, incident and had only returned to work on December 15, 2001.

The aggravation of a pre-existing, non-compensable condition by a compensable

injury is itself compensable. See, *Hublely v. Best Western Governor's Inn*, 52 Ark. App. 226, 926 S.W.2d 143 (1996). An aggravation is a new injury resulting from an independent incident. See, *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). A temporary aggravation of a pre-existing condition is a compensable injury. See, *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996). When an accidental injury aggravates a prior condition, an employer is liable for all of the consequences naturally flowing from that incident unless the aggravation is caused by an independent intervening event. See, *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In the present case, the claimant has proven by a preponderance of the evidence that she sustained a temporary aggravation of her pre-existing condition on December 21, 2001, when she was moving and wrapping books. The claimant sought emergency room medical care and underwent some x-rays and a CT of the cervical spine. No fractures, herniations or new findings were found. Some cervical blocks were recommended and were pursued by the claimant. Dr. Tuck's January 2, 2002, office note suggests that the claimant's factory work might be irritating her cervical spine and a job change should be considered. I find that the respondents are responsible for the emergency room visit and the x-rays and CT of the cervical spine, as well as Dr. Tuck's January 2, 2002, examination and Dr. Savu's February 18, 2002, initial evaluation. These diagnostic tests ruled out any new findings of trauma or herniations. I find the claimant's incident on December 21, 2001, was a temporary aggravation of her pre-existing condition.

The only other recommendation in the medical evidence is by Dr. Savu who suggested some injections and then physical therapy at some later time. Dr. Savu also diagnosed the claimant's condition as "ongoing neck and head pain most likely due to cervical spondylosis with facet disease with secondary myofascial pain syndrome." (Cl. Exh. No. 2, p. 88.) This diagnosis certainly seems to suggest the claimant's problems are related to her pre-existing condition. The claimant remains responsible for her medical care and treatment associated with her pre-existing condition.

The claimant next contends that she is entitled to temporary total disability benefits from December 21, 2001, to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has failed to prove by a preponderance of the evidence that she remained in her healing period as a result of the temporary aggravation on December 21, 2001, of her pre-existing condition and was totally unable to earn wages from December 21, 2001, to a date to be determined. While the claimant did receive some medical care and diagnostic testing, these tests did not reveal any new findings of the claimant's cervical spine. In fact, the claimant's diagnosis by Dr. Savu indicated the claimant's neck pain was most likely due to cervical spondylosis with facet disease. The contemporaneous medical evidence following the December 21, 2001, work incident does not support the claimant's contention that she was unable to work due to the December 21, 2001, incident.

The claimant next contends that she is entitled to 505 benefits because the

employer did not return her to work. In order to be entitled to benefits under Ark. Code Ann. §11-9-505, the following criteria must be satisfied. First, the employee must prove that she sustained a compensable injury. Second, she must demonstrate that there is suitable employment within his physical and mental limitations with his employer. Next, she must prove that the employer has refused to return her to work. Last, she must demonstrate that the employer's refusal is without reasonable cause. See, *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In the present case, the claimant did sustain a temporary aggravation of a pre-existing injury. The claimant in the present case is claiming both entitlement to temporary total disability benefits from December 21, 2001, to a date to be determined, as well as 505 benefits from the date Dr. Crawley released her with restrictions (September 9, 2002). Since temporary total disability benefits have been denied in this claim, the 505 benefits will be considered beginning September 9, 2002. The claimant's second hurdle in deciding if 505 benefits are due her is that she must demonstrate that there is suitable employment within her physical and mental limitations with her employer. The claimant has not satisfied this element. The claimant initially had a five-pound lifting limitation and the human resources manager, Charlie Kratts, testified that there were no positions available with those restrictions. While the claimant has not returned to work, the claimant has also failed to prove that the employer's failure to return her to work is without reasonable cause. I find the claimant has failed to prove by a preponderance of the evidence that the employer had a job within her restrictions and without reasonable cause refused to return her to work.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on March 22, 2000. The claimant has proven by a preponderance of the evidence that she sustained a temporary aggravation of her pre-existing cervical condition on December 21, 2001. The respondents are responsible for the emergency room visit and the diagnostic x-rays and CT scan associated with the visit, as well as Dr. Tuck's January 2, 2002, examination and Dr. Savu's February 18, 2002, evaluation. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and unable to earn wages as a result of her December 21, 2001, temporary aggravation of her cervical condition. The claimant has failed to prove by a preponderance of the evidence that her employer refused to return her to work without reasonable cause. The claim for 505 benefits is denied.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**