

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403268

CINDA BRENT, EMPLOYEE	CLAIMANT
FORREST CITY ENTERPRISE, EMPLOYER	RESPONDENT
AIG CLAIM SERVICE, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 15, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on November 12, 2004, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. John P. Talbot, Attorney-at-Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 12, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on October 20, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including March 16, 2004; that the claimant's average weekly wage was \$212.00, entitling her to a compensation rate of \$140.00 per week for both temporary total disability and permanent partial disability in the event her claim was found compensable; and that respondents had controverted the claim in its entirety.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that she sustained a compensable back injury as the result of a specific incident identifiable in time and place of occurrence on March 16, 2004; that she was entitled to temporary total disability benefits through April 14, 2004; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that she sustained a permanent impairment rating as assessed by Dr. Thomas Hayde, entitling her to permanent disability benefits; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant did not sustain an injury arising out of and during the course of her employment with Forrest City Enterprise within the meaning of the workers' compensation laws.

In addition to the claimant, Darlene Murphy was called as a witness in her behalf. Crystal Plunkett and Brenda Thornton were called as witnesses for the

respondents. The record is composed solely of the transcript of the November 12, 2004, hearing containing a joint medical exhibit consisting of twenty (20) pages, as well as four (4) pages of non-medical documentary evidence introduced by the respondents.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that she sustained an injury arising out of and during the course of her employment with Forrest City Enterprise, a/k/a Denny's, in Forrest City, which caused internal, physical harm to her low back requiring medical services and resulting in disability which has been established by medical evidence supported by objective findings and caused by a specific incident identifiable by time and place of occurrence on March 16, 2004.
4. The claimant is entitled to temporary total disability benefits for the period

beginning March 18, 2004, and continuing through April 12, 2004, at which time she was released to return to work by her primary treating physician.

5. The claimant's healing period ended on or before August 31, 2004.
6. The claimant has sustained a five percent (5%) permanent impairment as the result of her March 16, 2004, injury.
7. Respondents are responsible for all outstanding medical and related treatment, as well as continued, reasonably necessary medical treatment.
8. Respondents have controverted this claim in its entirety.

DISCUSSION

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

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 physical harm to the body which required medical services or resulted in disability or death;
3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. *Mikel*

vs. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Rather than conduct an exhaustive analysis of the record in this cause, suffice it to say that the claimant has satisfied each and every requirement necessary to establish compensability of her injury. Although it appears from respondents' cross-examination of the claimant that they question that the injury was caused by a specific incident identifiable by time and place of occurrence at the workplace, the incident itself is undisputed. In fact, as will be set out further below, even the witnesses called by the respondents corroborated the testimony of the claimant.

I found the claim to be a most credible witness. The claimant's demeanor, manner, and attitude on the witness stand was that of a truthful person. Again, her testimony was corroborated by other witnesses, including those called by the respondents. Her testimony is further corroborated by the history contained in the medical evidence. Any perceived inconsistencies were satisfactorily explained by the claimant. The overwhelming weight of evidence supports her claim.

The claimant, Cinda Brent, is twenty-nine (29) years old. She began working for the respondent on January 20, 2004, as a food server. In addition, the claimant also filled in as a cashier and hostess. The claimant maintained that she sustained an injury to her back when she slipped on a wet floor while carrying a pitcher of hot coffee in one hand and a pitcher of water in the other. The claimant stated that she did not fall to the floor, but, rather, caught herself on a wall going around the area.

She stated that she was more embarrassed than concerned with an injury at the moment, but that she developed back pain immediately following the incident which she promptly reported to Ben Williams, the night manager. The incident was observed by various co-workers, including Darlene Murphy and apparently Mr. Williams himself. It is further undisputed that the claimant voiced complaints of back pain to several co-workers. She immediately reported her complaints to Ben Williams who failed to fill out an incident report at the time of its occurrence, in violation of company policy. Likewise, the claimant did not immediately fill out an incident report and continued working the rest of her shift, as well as the following night.

The medical records reflect that the claimant's injury occurred on March 15, 2004, rather than March 16 as alleged. The claimant explained that her shift began on March 15 and ended at 6:00 a.m. on March 16. The claimant subsequently reported the injury to Brenda Thornton, respondent's general manager. The claimant advised Ms. Thornton that she had reported the incident to Mr. Williams and that he did not fill out an incident report or request that she fill out one. The claimant maintained that she requested medical treatment and was advised by Ms. Thornton that she would need to check out some things and would get back with her. The claimant subsequently sought medical treatment on her own. Specifically, the claimant was initially examined and treated by Dr. Thomas Hayde, D.C., with Traylor Chiropractic Clinics in Forrest City, Arkansas, on March 24, 2004. Dr.

Hayde's patient history was totally consistent with the claimant's testimony. A physical examination and x-rays taken by the doctor were negative for fractures or dislocations, but did reveal misalignment at L2/3. X-rays also revealed a kidney stone which Dr. Hayde did not feel was significant because it was not moveable and, for that reason, did not have the potential to lodge in a ureter and cause problems. Dr. Hayde's examination did reflect muscle spasm. He diagnosed thoracolumbar sprain/strain, lumbar intervertebral disc injury, and paravertebral myofascitis. Dr. Hayde treated the claimant with spinal manipulations through on or about April 14, 2004. Thereafter, he has treated the claimant on an as-needed basis. (Jt. Ex. A, pp.1-2, 19)

Apparently, after the claimant filed a written report of injury, she was contacted by the respondent insurance carrier's nurse case manager and sent to Little Rock to be examined by Dr. Scott Carle with Concentra Medical Centers. Dr. Carle evaluated the claimant one-time only on April 5, 2004, and diagnosed a lumbar strain. Dr. Carle also noted the kidney stone previously identified by Dr. Hayde, together with possible urinary tract infection. Dr. Carle released the claimant to return to work on the date of his examination with lifting and bending restrictions while, at the same time, prescribing physical therapy in-house at Concentra. He scheduled the claimant for a return appointment on April 8, 2004. While at Concentra, the claimant received physical therapy from Mr. Daniels one-time only on April 5, 2004. The claimant never returned to Dr. Carle. I note with interest that

Dr. Carle subsequently released the claimant to return to work without restrictions on April 21, 2004, without any further examination. (Jt. Ex. A, pp.13, 18)

The claimant was also examined and treated by Dr. Hayde on April 5, 2004, at which time he found the claimant to be totally disabled. Dr. Hayde's notes also confirmed the claimant's testimony that her injury had been aggravated by hours in the car and by rough physical therapy procedures. (Jt. Ex. A, p.11)(Tr.18-19)

The record reflects that the claimant was released to return to work by Dr. Hayde on April 12, 2004. When the claimant returned to work, her employment was terminated without explanation. It is undisputed that the claimant was released to return to work on April 12, 2004. Again, the claimant has continued to receive sporadic treatment on an as-needed basis since that time. The claimant pointed out that she refuses to take medications for her pain and muscle spasms. (Tr.21, 32)

Darlene Murphy was called as corroborating witness. As previously noted, the incident itself is undisputed. Brenda Thornton, a witness called by the respondents was the general manager at the time of the injury. She has since left the employment of the respondent. A portion of her testimony which I found illuminating is set out below:

BY JUDGE GREENBAUM:

Q When did you first talk to Ms. Brent?

A That Monday evening.

Q Do you know what date that was?

A No, sir, I don't remember what date it was.

Q Okay.

MR. OLSEN: Your Honor, I have a calendar, if that would be of any assistance.

BY JUDGE GREENBAUM:

Q What did Ms. Brent tell you?

A That she had fell.

Q And when she told you that she had fell, you interpreted that to mean fell to the ground, is that correct?

A Correct.

Q But did you question her anymore about it?

A Yes, I asked her why didn't she insist on having an accident report filed if she did fall, and –

Q And did she, when you were questioning her, did she tell you that she had reported this to Ben Williams?

A She did say that Ben had seen it –

Q Okay.

A – was there when it happened.

Q Well, okay, she told you that he was there?

A Uh-huh.

Q And did she indicate to you or tell you that she had reported this incident to Ben Williams?

A She said that – the only thing she said was Ben was there.

Q And then you called Mr. Williams?

A Well, when he came in to work that evening, I questioned him about it.

Q And he confirmed to you that he had observed an incident a week or several days earlier, is that right?

A Correct.

Q Did you ask him why he didn't fill out an incident report?

A Yes, and he informed me that he had talked to her, and that she hadn't fell, and he asked her if she was okay. She said she was fine, nothing was hurting, you know.

Q But at the time that she talked to you, she wanted medical treatment?

A Correct.

Q And, in fact, had she told you that she had already been to the doctor?

A Correct.

Q And that the doctor wanted her off work?

A Correct. (Tr.61-63)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has

met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven that she sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. The claimant has satisfied each and every requirement necessary to establish compensability.

Temporary total disability is determined by the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. It is that period in which an employee is within the healing period and totally incapacitated to earn wages. *Arkansas State Highway Dept. vs. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *J.A. Riggs Tractor Co. vs. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Stafford vs. Arkmo Lumber Co.*, 54 Ark. App. 286, 925 S.W.2d 170 (1996). The healing period is that period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12) (Repl. 2002). The healing period continues until the employee is as far restored as the permanent character of the injury will permit, and if the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods vs. Washam*, 52 Ark. App. 72, 914

S.W.2d 776 (1996); *Carroll General Hospital vs. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher vs. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

I did not find the reports of Dr. Carle to be persuasive. He examined the claimant one-time only. As previously noted, I find inconsistencies in placing restrictions on the claimant's activities and then releasing the claimant without restrictions without follow-up examination. However, Dr. Hayde has been the claimant's primary treating physician. He noted objective findings of injury at the time of the initial examination and has treated the claimant conservatively at all times with apparent success. Dr. Hayde kept the claimant off work until April 12, 2004, which is the date I find her entitlement to temporary total disability ended. He has continued to provide as-needed, sporadic maintenance care which I also find reasonable as set out further below. The claimant has proven entitlement to temporary total disability

as reflected by the findings and conclusions, aforementioned.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The claimant has proven that all of her treatment, to date, through August 31, 2004, is reasonably necessary, as well as related to the work-related injury of March 16, 2004.

The only remaining issue is whether the claimant sustained any permanent impairment. In response to a specific inquiry concerning whether the claimant sustained any permanent impairment, Dr. Hayde issued a September 14, 2004, report which states, in part:

I most recently saw Ms. Brent on August 31st. She has been on an as-needed basis since the first of June. Her residual problems from the work injury are not stable and unlikely to improve further. All of her clinical findings are compatible with a specific injury, and include persistent muscle spasm with asymmetric loss of motion. Using the latest edition of the Guides to the Evaluation of Permanent Impairment, she falls in the DRE Lumbar II category, which provides for 5% to 8% Impairment

of the Whole Person. (Jt. Ex. A, p.20) (Emphasis supplied)

The American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th Edition, apparently identified by Dr. Hayde confirm a five percent (5%) minor impairment for a thoracolumbar strain with persistent muscle spasm. The respondent did not have the claimant examined after she concluded her course of treatment. It could have cross-examined Dr. Hayde, but elected not to do so. Accordingly, I find that the claimant is entitled to a five percent (5%) whole body impairment.

AWARD

Respondent, AIG Claim Service, is hereby directed and order to pay, to the claimant, temporary total disability benefits at the rate of \$140.00 per week beginning March 18, 2004, and continuing through April 12, 2004.

Respondents are further directed and ordered to pay, to the claimant, permanent impairment benefits at the rate of \$140.00 per week beginning September 1, 2004, and continuing for 22.5 weeks, representing a five percent (5%) permanent impairment as assessed by Dr. Thomas M. Hayde.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay and/or to reimburse the claimant for all outstanding medical and related treatment provided by Dr. Hayde, to be paid in accordance with the medical cost containment guidelines established by Commission Rule 30, and respondents remain responsible for continued,

reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Kenneth A. Olsen, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to and limited by Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge