

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F211758

MARY SUE BURGESS, Employee	CLAIMANT
DILLARD'S, Employer	RESPONDENT
ESIS, INC., Carrier	RESPONDENT

OPINION FILED AUGUST 23, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On July 26, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 24, 2004, and a pre-hearing order was filed on May 25, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed between the parties on September 13, 2002.
3. The claimant sustained a compensable injury on September 13, 2002 when a clothing bar fell and struck her on the head.
4. Claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$376.00 for total disability and \$282.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Temporary total disability benefits from November 8, 2002 through a date yet to be determined.

2. Attorney fee.

The claimant contends that as a result of her compensable injury she is entitled to temporary total disability benefits from November 8, 2002 through a date yet to be determined, as well as a controverted attorney fee.

The respondents contend the claimant is not entitled to temporary total disability benefits from November 8, 2002 through a date yet to be determined. Respondent also contends that claimant was released by Dr. Tremwel to return to work with restrictions and that work was offered to her within those restrictions and that she failed to return to work.

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 witness and to 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 pre-hearing conference conducted on May 24, 2004, and contained in a pre-hearing order filed May 25, 2004, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of her compensable injury.

#### FACTUAL BACKGROUND

The claimant is a 64-year-old woman who worked as a school teacher for 24 years. After working as a school teacher claimant went to work for the respondent in another state

state before moving to Arkansas in 2001 in order to take care of her ill mother. When claimant moved to Arkansas she transferred to respondent's store in Fort Smith. Claimant has worked for the respondent approximately nine and a half years on its floor waiting on customers, running a cash register, and stocking merchandise. The parties have stipulated that claimant suffered a compensable injury to her head on September 13, 2002. On that date the claimant was in the process of moving some clothes from a rack on a wall and when she reached up to get clothes a metal bar fell, striking her across the top of her head. This blow caused a cut on her head and required stitches. According to claimant's testimony she began having headaches after the injury and these headaches have never completely gone away.

Following her compensable injury the claimant was initially treated by Dr. Phomakay. Later, claimant received a change of physician to Dr. Kareus. In addition, claimant has also been evaluated and treated by Dr. Tremwel, a neurologist; Dr. Douglas Brown, a clinical neuropsychologist; Dr. Patricia Walz, a clinical neuropsychologist; and physicians at the Ozark Guidance Center. Some of claimant's treating physicians have diagnosed her as suffering from depression and a loss of cognitive function.

Based in part upon these diagnoses claimant has filed this claim contending that she is entitled to additional temporary total disability benefits beginning November 8, 2002 and continuing through a date yet to be determined as a result of her compensable injury.

### ADJUDICATION

In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages as a result of her compensable injury. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). After reviewing the evidence in this case impartially, without giving

the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of her compensable injury.

Initially, I find that claimant is not entitled to additional temporary total disability benefits with respect to the physical nature of her injury. As previously noted, the bar which struck claimant in the head required stitches. After that medical treatment claimant continued to complain of various symptoms, including headaches and a loss of memory and a lack of emotional feelings.

With respect to claimant's physical injury, I note that she was evaluated by Dr. Tremwel, a neurologist. Claimant saw Dr. Tremwel for complaints of headaches following her head injury. According to Dr. Tremwel's report of October 22, 2002, a CT scan of the claimant's head from September 2002 "shows no evidence of acute abnormality including no evidence of subdural hematoma, no hypodensities or other focal abnormality." Dr. Tremwel noted that claimant's neurologic exam was normal with the exception of profound depression. The diagnosis of depression will be discussed later in this opinion. Dr. Tremwel ordered an MRI of the claimant's head but also indicated that claimant was released to return to work on November 5, 2002 with restrictions of lifting no more than 10 pounds and avoiding standing in place for prolonged periods of time. In response to Dr. Tremwel's opinion the respondent offered claimant a job answering the telephone. Claimant admitted that this job was within the restrictions imposed by Dr. Tremwel. However, claimant did not take the job because she did not feel that she was capable of performing the job activities. Claimant testified that her injury affected her ability to answer the phone and caused concentration problems. However, claimant admitted that she did not even go to the respondent to see the specific activities required. In fact, claimant admitted that she just did not "feel like" performing the job offered by respondent.

Q. So the only thing that would keep you from being able to do the job is that you just wouldn't feel like it?

A. Right.

It might also be argued that claimant suffers from cognitive deficits as a result of her compensable head injury. Claimant was evaluated by Dr. Douglas Brown, a neuropsychologist, in October 2003 and Dr. Brown performed numerous tests on the claimant. Dr. Brown diagnosed claimant as suffering from moderate anxiety and severe depression. He recommended treatment from a psychiatrist and cognitive rehabilitation from either Dr. Bettye Back-Morris or Dr. Patricia Walz. In a letter to claimant's attorney dated February 26, 2004, Dr. Brown stated that in his opinion the claimant's cognitive deficits "are more than likely due to her job-related injury of being struck on the head."

In contrast to Dr. Brown's opinion is the opinion of Dr. Patricia Walz who is also a clinical neuropsychologist. Dr. Walz also performed numerous tests on the claimant. With respect to these tests, I note that claimant contends that Dr. Walz's assistant performed the test while Dr. Brown performed the test himself. I do not find this to be significant in this particular case.

Dr. Walz indicated that the MMPI-II which was performed on the claimant was elevated and suggestive of an exaggeration of symptoms or a "plea for help". While Dr. Brown was of the opinion that claimant's cognitive deficit was due to her job-related injury, Dr. Walz was of the opinion that claimant's cognitive deficit was more likely related to dementia.

While Dr. Brown's impression was of clear left hemisphere dysfunction, the picture today is of a more global type of decline, which appears to be worsening in right hemisphere functioning. It is possible that she has early dementia, and somewhat less likely that she has a dementia related to her head trauma, as the extent of her injury was minimal with no loss of consciousness and no obvious acute physical trauma on the MRI.

Thus, according to Dr. Walz, it is more likely that claimant suffers from early dementia as opposed to a dementia which is related to her head injury. Dr. Walz based her opinion upon the extent of claimant's injury and her review of the MRI scan. On the other hand, Dr. Brown based his opinion as to causation primarily upon statements made to him by the claimant.

Based upon the evidence presented in this case, I find that the opinion of Dr. Walz is entitled to greater weight than that of Dr. Brown. Based upon Dr. Walz' opinion, I find that to the extent that claimant has a cognitive deficit, that she has failed to prove by a preponderance of the evidence that it was caused by her compensable head injury. According to Dr. Walz, claimant's injury was minimal with no loss of consciousness and the MRI scan revealed no acute physical trauma to the claimant's brain.

Accordingly, for the foregoing reasons, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of the physical aspect of her compensable injury. As previously noted, Dr. Tremwel, a neurologist, released claimant to return to work on November 5, 2002 with restrictions. Respondent offered claimant a job within those restrictions which claimant refused. With respect to any cognitive deficits, I find for reasons previously discussed any deficits are not causally related to claimant's compensable injury.

I also find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of depression. Apparently, claimant contends that her depression was caused or aggravated by her injury in September 2002. Pursuant to A.C.A. §11-9-113(a)(1), a mental injury or illness is not compensable unless it is caused by a physical injury to the employee's body. In addition, claimant must prove by a preponderance of the evidence that the mental injury or illness arose out of and in the course of her employment.

After reviewing the evidence in this case, I find that claimant has failed to meet her

burden of proving by a preponderance of the evidence that her depression was caused or aggravated by her compensable injury.

Initially, it is important to note that claimant has suffered from depression for several years. Claimant was diagnosed with depression following a “nasty divorce” and the subsequent suicide of her ex-husband. According to the claimant, “There were just all kinds of things that happened from that in our family.” The medical records indicate that claimant sought medical treatment from Dr. Paul Bean for her depression. The last medical report in evidence from Dr. Bean is dated September 7, 2001. Dr. Bean’s medical report indicates that claimant is still dealing with depression which is “not adequately controlled.” As a result, Dr. Bean discussed a change in claimant’s medication. Although there are no additional reports from Dr. Bean subsequent to September 7, 2001, the claimant acknowledged that she was taking Prozac at the time of her injury in September 2002.

It should also be noted that after claimant’s compensable head injury her mother passed away after a lengthy hospitalization.

With respect to claimant’s depression, I note that she received treatment on several occasions from physicians at the Ozark Guidance Center. Those medical reports indicate that claimant’s depression is not related to her physical injury, but instead is related to a belief that the respondent somehow betrayed her. The treating physician’s note from October 14, 2003 at the Ozark Guidance Center indicates that claimant feels that the respondent betrayed her. More importantly, there is a report from Dr. Robin Ross at the Ozark Guidance Center dated November 24, 2003. Dr. Ross stated:

However, it should be noted that in her opinion and in my opinion, the depression did not start as a direct result of her head injury, but started as a direct result of the way her employer has treated her since her head injury, or at least the way she has perceived he/she has treated her.

According to A.C.A. §11-9-113, a mental injury or illness is not compensable unless it is caused by a physical injury. According to the report of Dr. Ross, claimant's depression is not the result of her physical injury but instead is a result of her perception as to how she was treated by the respondent.

In summary, I find that claimant has failed to prove by a preponderance of the evidence that she suffers from depression which was caused by or aggravated by her compensable injury. The evidence indicates that claimant has suffered from depression for several years and was in fact taking Prozac at the time of her compensable injury in September 2002. Furthermore, according to Dr. Ross, the claimant's depression was not the result of her head injury but instead is a result of claimant's perception as to how she was treated by the respondent. I find that Dr. Ross' opinion is entitled to great weight. Based upon this evidence, I find that claimant has failed to prove by a preponderance of the evidence that she suffers from depression which was caused or aggravated by her compensable injury. Accordingly, claimant is not entitled to additional temporary total disability benefits as a result of her diagnosis of depression.

#### ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of her compensable injury. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE