

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304711

KRYSTAL BURNS

CLAIMANT

McDONALD'S
SELF INSURED

RESPONDENT

OPINION FILED AUGUST 26, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MATTHEW KETCHAM, Attorney, Fort Smith, Arkansas.

Respondent represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled case on June 15, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on March 17, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing (the correction of two clerical errors has made in this Order, the first was a correction to reflect the actual date the Order was filed, which was March 17, 2004, and not March 17, 2003, the second is to reflect that the first stipulation concerned the relationship between the parties which was amended to reflect the actual stipulated date of November 27, 2002-rather than the date of November 27, 2003).

The following stipulations were offered by the parties and are hereby accepted:

1. On November 27, 2002, the relationship of employee-employer existed between the parties.
2. The appropriate weekly compensation rates are \$153.00 for total disability and permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to her back on November 27, 2002.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from November 28, 2002 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that she slipped on the wet floor at McDonald's while she and other crew members were cleaning said store during the closing hours of Wednesday, November 27, 2002, while on the property belonging to her employer, McDonald's. The claimant contends that she received serious injuries to her back and body as a result of the fall which occurred during the course and scope of her employment."

In regard to these issues, the respondent contends:

"Respondents contend the claimant did not sustain an injury arising out of and in the course of the employment defined by the Arkansas Workers' Compensation Act."

DISCUSSION

_____The first issue to be addressed is the question of whether the claimant sustained a "compensable injury" to her low back, as the result of a specific incident on November 27, 2002. The burden rests upon the claimant to prove all of the elements necessary to establish this compensable injury.

She must first prove that her alleged compensable injury satisfies the requirements of A.C.A. §11-9-102(4)(D). This subsection requires the claimant to prove by medical evidence, the actual existence of the physical injury or condition alleged to be compensable. It further requires that the actual existence of this physical injury or condition must be supported by "objective findings", i.e. the independent observation of abnormal findings beyond the claimant's voluntary control.

The initial medical records from the emergency room of Crawford Memorial Hospital give no specific diagnosis and only contain a generic diagnosis of acute low back pain. The claimant was subsequently seen by Dr. Richard Dotson. Dr. Dotson's initial diagnosis was an acute lumbar or

lumbosacral strain with a sacrococcyx contusion and a possible left radiculitis/sciatic contusion (Respondent's Exhibit No. 1, page 91). At that time, he also noted that his review of the claimant's prior lumbar x-rays showed the L5 vertebra tilted mildly to the left. On his physical examination he noted residual presacral bruising on the claimant's lower back. A lumbar MRI was recommended. This MRI study was performed, on December 30, 2002, and was interpreted by the radiologist (Dr. Zubin Balsara) as showing a mild broad base disc bulge at L4-5 and a small left paracentral disc herniation at the L5-S1 level. Following the MRI study, Dr. Dotson diagnosed a lumbar discopathy/herniated nucleus pulposus at L5-S1, with a left radiculopathy (Respondent's Exhibit No. 1, page 94).

I find that the reports and records of Dr. Dotson are sufficient to "establish" the actual existence of a physical injury to the claimant's low back or lumbar spine in the form of a left sided disc herniation at the L5-S1 level. I further find that the medical evidence shows that the actual existence of this diagnosed injury or condition is supported by "objective findings", including radiographic abnormalities revealed by the MRI study of December 30, 2002. Thus, in regard to this particular injury or condition, the claimant has satisfied all of the requirements of A.C.A. § 11-9-102(4)(D).

Next, the claimant must prove that this medically established and objectively supported injury or condition satisfies the definitional requirements for a "compensable injury" that are contained in A.C.A. § 11-9-102(4)(A)(i). These definitional requirements are:

- (1) That the physical injury or condition arose out of and occurred in the course of the claimant's employment;
- (2) That the physical injury or condition was caused by a specific incident;
- (3) That the physical injury or condition is identifiable by time and place of occurrence;
- (4) That the physical injury or condition caused internal or external physical harm to the claimant's body; and
- (5) That the physical injury or condition required medical services or resulted in disability.

In order to prove the first three requirements of A.C.A. §11-9-102(4)(A)(i), the claimant must prove both the occurrence of an employment related “specific incident” (on November 27, 2002), and the existence of a causal relationship between this “specific incident” and her left sided herniated disc at L5-S1. However, she need not prove the existence of this causal relationship to an absolute certainty. Nor, does the Act require that this causal relationship be proven by medical evidence. Finally, it is also unnecessary for her to show that this employment related “specific incident” was the sole or even “major” cause of her left sided disc herniation at L5-S1.

She need only prove that the employment related specific incident likely or probably played a substantial causal role in producing this disc herniation or her resulting difficulties. She may accomplish this by showing that the specific incident could logically cause the disc herniation, that the initial onset of symptoms indicative of the occurrence of this disc herniation appeared within a reasonable period of time following this specific incident, and there is no other reasonable explanation for the occurrence of the disc herniation, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2d 263 (1962).

The claimant’s own testimony is the primary evidence presented to prove both the actual occurrence of a specific employment related incident on November 27, 2002, and the existence of a reasonable close temporal relationship between this incident and her subsequently diagnosed left sided herniated disc at L5-S1. While the testimony of a party is never considered uncontroverted evidence, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address.

Clearly, the claimant’s testimony would be legally competent to prove the occurrence of a specific employment related incident on November 27, 2002. Her testimony would also be legally competent to show the nature of the incident, including the type and magnitude of the stress or trauma involved. Finally, her testimony would be legally competent to prove the time and circumstances surrounding the initial onset of symptoms, which would be indicative of the occurrence of the left sided disc herniation at L5-S1.

After consideration of all the evidence presented, I find the claimant's testimony (concerning the occurrence of the employment related fall on November 17, 2002, and the initial onset and progression of her symptoms) to be credible. Not only did the claimant appear to be a credible witness during her testimony, but her testimony also coincides with the histories and complaints noted in the various medical records.

The claimant testified that, on November 27, 2002, she was carrying food to be placed in the cooler, as part of her assigned employment activities. While performing this activity, she slipped and fell, landing primarily on her buttocks and back. She testified that this fall was witnessed by a co-worker and that she was helped up by her supervisor. She stated that her symptoms progressively worsened and caused her to leave work early on her next scheduled work day (November 29, 2002). At that point, she requested the respondent to provide her with medical treatment. When the requested treatment was not immediately forthcoming, she went to the Crawford Memorial Hospital emergency room. The records of this facility shows that it sought confirmation from the respondent, but does not appear to have received it. The claimant was ultimately informed that the respondent would not provide any treatment, because it had not been sought within twenty-four hours after the fall.

The medical records show that at the time of this fall, the claimant weighed approximately 162 pounds. Clearly, the stress and trauma produced by a fall, as described by the claimant, could logically result in the subsequently observed left paracentral disc herniation at L5-S1.

The claimant testified that contemporaneous with the fall, she immediately experienced pain in the middle of her lower back and her buttocks, primarily on the left side. These described symptoms coincide with those recorded in the claimant's initial medical records of November 30, 2002, from the emergency room of Crawford Memorial Hospital. These initial medical records also note complaints of pain in the back of the claimant's legs (Respondent's Exhibit No. 1, page 83). The history recorded in these records indicate that these symptoms were produced by a fall at work three days prior to her visit. The subsequent records of Dr. Dotson, beginning on December

26, 2002, continued to note low back pain, buttock pain, and pain in the claimant's left leg to the side of her knee. He, too, notes that all these symptoms began with a fall at work.

The claimant's testimony and the subsequent reports of Dr. Dotson both chronicle a progression of the claimant's difficulties, including possible radicular symptoms. While there is mention that some of these radicular difficulties increased or altered, after the claimant had experienced a "pop" in her back, there is no evidence that this "pop" was the result of any independent intervening trauma or injury attributable to the claimant's own negligence or misconduct. Unquestionably, disc herniations can progress as the result of the day to day activities of normal life, particularly when appropriate medical treatment cannot be obtained. It must also be noted that the claimant was displaying significant radicular or neurological symptoms prior to this "pop" as evidenced by Dr. Dotson's records and the results of the MRI.

Thus, the greater weight of the credible evidence further shows that the claimant's left sided herniation occurred within a reasonable period of time following the specific employment related incident of November 27, 2002.

The evidence does not show any other reasonable cause for the objectively demonstrated left sided disc herniation at L5-S1. Clearly, degenerative changes can also play a causal role in ultimately producing a herniated disc, by weakening the annulus. However, the actual herniation of the disc requires specific trauma (the more the degeneration the less trauma that is required). In the present case, there is no evidence of substantial degenerative changes, and such changes would not be reasonably expected for an individual of the claimant's young age. Thus, substantial trauma would be reasonably required to produce the observed disc herniation. There is no evidence of any other substantial trauma occurring within a reasonably close temporal proximity to the appearance of the claimant's herniated disc.

The only evidence of any other trauma that could possibly involve the claimant's low back, was that caused by a prior motor vehicle accident in 1999. However, the claimant testified, that, following this accident, her back pain was in her upper back and that this pain entirely resolved within

a week or so. This testimony is substantially supported by the medical record. This evidence shows that the medical reports, which were generated by this accident, do not mention any complaints involving the claimant's low back or any radicular symptoms involving her buttocks or either of her legs. The only abnormality demonstrated on x-rays, which were taken at the time, involved the claimant's thoracic spine or upper to mid back. Although the respondent has introduced a rather voluminous packet of medical records, none of these indicate any treatment rendered to the claimant for this motor vehicle accident after January 26, 1999.

The only other mention in the voluminous medical records of any difficulties involving the claimant's back, prior to the employment related incident of November 27, 2002, are back complaints attributable to a urinary tract infection. There is no mention of any precipitating trauma, and the symptoms (given at that time) would, in no way, be indicative of the presence of a left sided herniation of the L5-S1 disc.

In summary, the claimant has proven by the greater weight of the credible evidence the occurrence of a specific employment related incident on November 27, 2002, in the form of a fall. She has also proven that the physical injury to her low back (in the form of a left sided disc herniation at L5-S1) is logically attributable to this incident and that this physical injury occurred within a reasonable period of time following this incident. Finally, the evidence shows no other reasonable explanation for the occurrence of this injury. Under the rule announced in Hall, she has established the existence of the necessary causal relationship between this specific employment related incident and this physical injury to her lumbar spine. Thus, she has satisfied the first three requirements of A.C.A. §11-9-102(4)(A)(i).

The greater weight of the credible evidence, particularly the MRI study, clearly shows that this injury resulted in internal physical harm to the claimant's body. By its very nature, this type of physical injury would reasonably require some degree of medical evaluation and treatment. By its very nature, this injury would also clearly produce some limitations on the claimant's potential employment activities and likely result in some degree of permanent impairment. This would satisfy

the final two requirements for a “compensable injury”, as that term is defined by A.C.A. § 11-9-102(4)(A)(i).

Therefore, I find that the claimant has proven that the medically established and objectively documented physical injury to her lumbar spine (in the form of a left sided disc herniation of L5-S1) satisfies all other necessary requirements for a “compensable injury” set out in A.C.A. § 11-9-102(4). It only remains necessary to determine the nature and extent of benefits to which she is entitled, as a result of this compensable injury.

II. MEDICAL SERVICES

A.C.A. § 11-9-508 provides that the claimant is entitled to all “reasonably necessary medical services” for her compensable injury. However, the burden still rests upon the claimant to prove that the medical services provided and recommended, actually represent such “reasonably necessary medical services.

Medical services are “reasonably necessary” when they are necessitated by or are connected with the compensable injury. Such services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

In this regard, the reports and records of Crawford Memorial Hospital, Dr. Quang Nguyen, and Dr. Richard Dotson show that all the services they provided or recommended to the claimant for her lumbar difficulties were necessitated by or connected with her compensable lumbar injury.

All of the medical services were of a type and nature commonly recognized in the medical community as being appropriate to accurately diagnose the nature and extent of the claimant’s injury, to provide her with at least symptomatic relief from the effects of her compensable injury, and to provide or develop appropriate treatment modalities for the actual physical damage caused by her compensable injury. This would include the neurosurgical consultation repeatedly requested by Dr. Dotson. The evidence not only shows that the medical services had a reasonable expectation of accomplishing these various purposes, but (to some extent) did, in fact, do so.

I find that the medical services provided the claimant for her compensable lumbar injury and resulting difficulties by and at the direction of physicians at Crawford Memorial Hospital, Dr. Nguyen, Dr. Dotson, and the neurosurgical consultation requested by Dr. Dotson, all represent “reasonably necessary medical services” for the claimant’s compensable lumbar injury. Pursuant to A.C.A. § 11-9-508, the respondent is liable for the expense of these services, subject to the medical fee schedule established by this Commission.

III. TEMPORARY TOTAL DISABILITY

In order to be entitled to the temporary total disability benefits she now seeks, the claimant must prove that she continued within her healing period from the effects of her compensable injury and continued to be rendered totally disabled from performing all forms of regular gainful employment as a result of this injury.

The issue of the duration of the healing period is a medical question and must be resolved on the basis of the greater weight of the medical evidence presented. A claimant continues within the healing period from the effects of the compensable injury until he or she achieves the maximum benefit of time and medical treatment, in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level of which nothing further in the way of medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of symptoms, once this underlying physical damage has stabilized, is not sufficient, in and of itself, to extend the healing period.

In the present case, the medical evidence shows that the claimant continued under active medical treatment by Dr. Dotson for her compensable injury, through at least May 17, 2003. There is no indication in the reports or records of Dr. Dotson that he ever discharged the claimant from active treatment, or believed that she had achieved the maximum benefit of medical treatment. In fact, he continued his efforts to obtain a neurosurgical consultation throughout this entire period. The evidence also shows that the claimant has continued to make repeated attempts to obtain the

recommended neurosurgical consultation, but has been unable to do so due to a lack of finances. The claimant also testified that her treatment by Dr. Dotson only ceased because he left the area. She stated that she had been unable to obtain continuing treatment elsewhere, again due to a lack of finances.

After consideration of the medical evidence, I find that it shows that the claimant had likely not yet achieved the maximum benefit of time and medical treatment for the resolution or healing of the actual physical damage caused by her compensable lumbar injury. I recognize that, in the present case, the claimant's healing period appears to have been extended by her inability to obtain the recommended medical services. However, the claimant's inability to obtain such services is clearly due to matters beyond her control. In fact, her inability to obtain the recommended medical services is clearly due to the respondent's refusal to accept financial responsibility for these services. Thus, the respondent cannot complain that the claimant's healing period may have been unduly extended due to her inability to receive appropriate medical services. Thus, the claimant has proven the first requirement for her entitlement to the temporary total disability benefits she now seeks.

The evidence shows that since her compensable injury, the claimant has required pain medication. On December 31, 2002, she was medically restricted from engaging in any gainful employment by Dr. Dotson. There is no evidence that this prohibition was ever removed. Prior to December 31, 2002, the claimant had been initially restricted from engaging in any employment activities requiring lifting over 15 pounds.

The claimant testified that she has difficulty lifting, but can occasionally lift her child (who weighs 25 pounds). She stated that the pain, numbness, and tingling in her left leg "comes and goes" and that it generally occurs when she does "a lot of walking", or "a lot of sitting".

Clearly, these restrictions would be compatible with the type of injury sustained by the claimant. This injury would also be expected to prevent her from engaging in any employment activities requiring repetitive bending or twisting at the waist, as well as prolonged standing or sitting and frequent or heavy lifting. At this point, I would note that the respondent's surveillance tape

shows that, in three days of surveillance, the claimant was only observed outside her home on one relatively brief occasion that involved a trip to Wal Mart. None of the claimant's physical activities shown on this videotape would exceed the limitations expected for the type of injury she has sustained.

The claimant testified that since her compensable injury, she had worked a brief period at a video rental store, where she worked approximately 28 hours per week and earned \$5.45 per hour. She testified that this position did not require repeated or heavy lifting and that she was able to alternate between sitting and standing, as needed. She was physically capable of performing this position, but was terminated when she missed work to attend her son's funeral.

The claimant also testified that, since her compensable injury, she has attempted to return to work at Burger King. However, she was unable to continue in this position, because it required excessive standing and walking. She stated that since her job at Burger King, she has not looked for work, but has stayed home with her child.

While it could be argued that the claimant is not overly motivated to return to employment, I do not concur. The claimant has, in fact, attempted to return to employment on at least two occasions, even though there is no indication that Dr. Dotson's medical prohibition against any type of employment has ever been lifted. It must also be noted that the respondent has not attempted to provide the claimant with a position within her restrictions or made any attempt to assist in obtaining such employment elsewhere.

Clearly, the claimant's current physical restrictions which would substantially limit the type of employment the claimant could perform. Most of the types of employment, for which the claimant is qualified by education and experience, would generally exceed her current physical limitations. The fact that there remains a substantial chance that the claimant may require further significant medical treatment for her compensable injury (possibly, surgery) would also make her unattractive to another employer. Obviously, the claimant's compensable injury currently makes her expectation of obtaining regular gainful employment in the open job market extremely low.

After consideration of all the evidence presented, it is my opinion that (except for the periods where the claimant was employed at Movie Gallery and Burger King), the greater weight of the credible evidence establishes that the claimant has been rendered temporarily totally disabled, as a result of the effects of her compensable injury since November 30, 2002. For the periods that she was employed at Movie Gallery and Burger King, she was rendered temporarily partially disabled, as a result of the effects of her compensable injury.

Thus, the claimant has proven her entitlement to temporary total disability benefits for the period beginning November 30, 2002, and continuing through a date yet to be determined, with the exception of the periods where she was employed at Movie Gallery and Burger King. During these periods, the claimant has proven that she is entitled to temporary partial disability benefits at a weekly rate equivalent to two-thirds of the difference between her average weekly wage for the respondent and the average weekly wage she earned in these employments.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 27, 2002, the relationship of employee-self insured employer existed between the parties.
3. On November 27, 2002, the claimant earned an average weekly wage of \$230.00 which would entitle her to a weekly compensation rate of \$153.00 for both total disability and permanent partial disability.
4. On November 27, 2002, the claimant sustained a compensable injury to her lumbar spine, in the form of a left sided herniated disc at L5-S1. Specifically, she has proven by the greater weight of the credible evidence that this physical injury is established by medical evidence and supported by objective findings, that it arose out of and occurred in the course of her employment with this respondent, that it was caused by a specific incident, that it is identifiable by time and place of occurrence, that it caused internal physical harm to her body, and that it required medical services and

resulted in disability.

5. The claimant was rendered temporarily totally disabled as a result of the effects of her compensable lumbar injury for the period beginning November 30, 2002, and continuing through a date yet to be determined, except for brief periods when she was employed at Movie Gallery and Burger King. During these periods of employment the claimant was rendered temporarily partially disabled as a result of the effects of her compensable lumbar injury.
6. The medical services provided the claimant for her lumbar difficulties by and at the direction of Crawford Memorial Hospital, Dr. Nguyen, and Dr. Dotson constitute reasonably necessary medical services for the claimant's compensable lumbar injury. The medical services recommended by Dr. Dotson, in the form of a neurosurgical consultation, also constitutes reasonably necessary medical services for the claimant's compensable lumbar injury. The expense of these services, subject to the medical fee schedule established by this Commission, is the liability of the respondent herein.
7. The respondent has denied the occurrence of a compensable injury to the claimant's back or lumbar spine and has controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary disability benefits herein awarded.

ORDER

The respondent shall pay to the claimant temporarily total disability benefits for the period beginning November 30, 2002, and continuing through a date yet to be determined, except for the periods the claimant was gainfully employed at Movie Gallery and Burger King. The respondent shall pay to the claimant temporary partial disability benefits during the periods the claimant was employed at Movie Gallery and Burger King.

The respondent shall be liable for the expense of medical services provided to the claimant for her back and lumbar difficulties by and at the direction of Crawford Memorial Hospital, Dr.

Nguyen, and Dr. Dotson. The respondent shall also be liable for the expense of the neurosurgical consultation recommended by Dr. Dotson. This liability is subject to the medical fee schedule established by this Commission.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on all controverted temporary disability benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondent from such benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge