

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311412

SANDRA COLE

CLAIMANT

PIC N TOTE SELF SERVICES STORES, INC.

RESPONDENT

ARKANSAS INS ADJUSTING
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOE BYARS, Attorney, Fort Smith, Arkansas.

Respondents represented by CONSTANCE CLARK, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on March 25, 2004, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 23, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On October 23, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$172.00 for temporary total disability and \$154.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury.
2. Related medical.
3. Temporary total disability from October 23, 2003, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she suffered a compensable injury arising out of and in the course of her employment with the respondent. The respondent employer failed to pay temporary total disability from October 23, 2003, through a date yet to be determined. On October 23, 2003, Sandra J. Cole was performing employment services for her employer and injured her back, which constituted an accidental injury and the major cause of Sandra J. Cole's temporary total disability and the need for additional medical treatment. Sandra J. Cole's compensable injury is the major cause of her temporary and/or permanent disability and need for treatment. The claimant, Sandra J. Cole, suffered an accidental injury arising out of and in the course of her employment with the respondent, Pic N Tote Store, Inc., when her back injury occurred, as described in Ms. Cole's medical records.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable accidental injury in the course or scope of her employment for Pic N Tote on October 23, 2003. All benefits have been controverted. The respondents

reserve the right to amend their contentions after the completion of all investigation and discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted a packet of documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted medical information marked Respondents' Exhibit No. 1, non medical information marked Respondents' Exhibit No. 2. The respondents submitted a note from the Cornerstone Family Clinic dated April 9, 1996, which was objected to by the claimant and this objection was overruled and the exhibit was admitted as Respondents' Exhibit No. 3. The respondents also submitted a recorded statement from the claimant which was objected to by the claimant and it was not admitted.

DISCUSSION

The claimant testified that she began work for the respondent in July 2003 and that her supervisor was Duane Porter. The claimant testified that prior to October 23, 2003, she had missed approximately four days from work at different times due to her long-standing problems with endometriosis. The claimant testified that about 9:15 she was cleaning in the fountain area and she bent over to check on supplies and when she bent over she felt a sharp burning stinging sensation and felt a pop in her low back. The claimant testified that she stood up and continued to try and clean the fountain area. The claimant stated that she was carrying some stuff over to clean in the sink and she told Trish, one of her co-

workers that was working in the deli, that she hurt her back when she bent over. The claimant testified that she also told a co-worker, Ann, that she hurt her back and that she was going to sit down. The claimant testified that Ann told her to go ahead to sit down and get off her feet and see if it made her feel any better.

The claimant stated that she finished her shift that day. The claimant testified that her ex-husband, Randy, picked her up from work.

The claimant testified that the next day her back was hurting much worse and she could not move, therefore, she had her ex-husband call to report that she would not be at work. The claimant testified that on Saturday she called her supervisor on his cell phone and told him that she was not able to come to work because she had hurt her back and she was going to have to go to the emergency room probably by ambulance because she was having such severe muscle spasms. The claimant testified that her supervisor told her that he could not talk because he had to find people to work. The claimant testified that she reported to Mr. Porter, her supervisor, that she had hurt her back at work.

The claimant testified that she was transported by ambulance to St. Edward's Hospital on October 25 and was seen in the ER. The claimant testified that she was given medication because her muscle spasms were so severe and an MRI was conducted. The claimant testified that it was recommended that she seek further medical treatment but when she talked to the insurance adjuster further treatment was denied.

The claimant testified that she has not been able to work since October 23, 2003. The claimant testified that she still has low back pain and that this pain has now gone up to the middle part of her back. The claimant testified that she also has problems with her shoulders as well both hands and that she cannot stand for very long periods of time as well as having problems sleeping at night.

The claimant testified that when her deposition was taken she did not mention anything about seeing Dr. Ross in 1996 for back problems. The claimant testified that at that time she was diagnosed with having a muscle strain and really did not think much about it. The claimant remembers that Dr. Ross put her on bed rest as a precaution for her back problems and she did not consider it very important. The claimant testified that associated with her problems with her menstrual cycle, she has severe pain, cramping as well as back pain and excessive bleeding. The claimant testified that back pain is usually associated with menstrual problems but that the back pain and muscle spasms she has experienced subsequent to October 23 are so severe that she could not move, could not get up to go to the restroom, had to crawl to the restroom, could not get out of bed and in fact even had to be carried out of her bedroom on a sheet. The claimant testified that she had never felt that kind of excruciating pain before in her life.

On cross examination, the claimant testified that because she did not get off work until around 9:30 or 10:00 in the evening she was apprehensive about calling her supervisor. The claimant

testified that the employees were discouraged from calling Duane about certain things and, therefore, she did not want to call him. The claimant testified that also she did not report her injury the day it happened because she wanted to wait and see how she would feel. The claimant testified that she did not contact Mr. Porter the following day, Friday, because she did not have a telephone but that her ex-husband went into the store to report that she would not be to work. The claimant testified that she never asked her supervisor, Mr. Porter, to send her to the doctor when she called and talked to him on Saturday. The claimant stated that she did tell him that she was going to the emergency room but she did not ask him to send her to a doctor. The claimant testified that after she had been to the emergency room she was pretty heavily medicated and was unable to telephone Saturday or Sunday and on Monday she held off taking her medication so that she could talk to her supervisor and fill out a first report of injury. The claimant agreed that this was after she had been told that she possibly had a herniated disc. The claimant also agreed that she understood that from the ER records that she was to be off for two weeks.

The claimant testified that she wanted to have additional medical treatment but could not get authorization from her insurance carrier. The claimant agreed that the insurance company called her and took a statement and then they ended up denying her claim and did not send her to the doctor. The claimant testified that she cannot afford to get medical treatment on her own because she does not have the money. The claimant testified that she takes

over the counter medications and she has not tried to work anywhere since her injury. The claimant agreed that in her deposition she had reported that she felt that she could do some sort of sit down work but, due to her lower back pain and pain in her legs, she has not really looked for work. The claimant once again testified that she, during her deposition as well as in her recorded statement, did not report that she had had prior back problems. The claimant explained that she saw Dr. Ross one time for what she understood to be a severe muscle strain for which she was put to bed rest for a period of time. The claimant testified that she remembered the event that took her to Dr. Ross for her low back problems and remembered that she had bent over and was taking a paper towel away from her dog and felt just a pain in her lower back, no popping, no stinging, just pain. The claimant did agree that this pain was sufficient enough for her to seek medical treatment. The claimant testified that even though Dr. Ross had indicated that she might have a herniated disc and had recommended that she have an MRI, and to stay off work for approximately a week with at least three days of bed rest, she did not remember the event. The claimant was asked if she remembered seeing Dr. Ross on February 24, 1998, with complaints of hip and low back pain and the claimant testified that she remembered reporting some hip pain due to wearing high heel shoes. The claimant testified that she does not remember telling any of her co-workers at the respondent's business that she had back problems in the past nor does she remember calling in to work one day and saying she could not work because her back was

bothering her. The claimant was asked if she remembered in her deposition reporting that when she has her periods she had back pain the claimant answered, "I don't recall if, you know---but I do have lower back pain whenever I do have my period sometimes, but not all the time." The claimant agreed that she had been in three car wrecks and in her deposition did not initially make this information known when first asked if she had been in any car accidents. The claimant indicated that she remembered that after she had been reminded that she had revealed in her recorded statement that she had been in a car wreck, then she remembered the event. The claimant testified that she did not remember much about her recorded statement because she was very foggy at that time. The claimant testified that at one point she worked for ABF in their risk management which dealt with workers' compensation claims.

Duane Porter testified that he was the store manager for the respondent. Mr. Porter testified that the claimant had been working just over 90 days prior to her injury. Mr. Porter testified that prior to October 23, 2003, the claimant had complained to him about having back problems. Mr. Porter testified that he remembers specifically that on August 19 the claimant missed work and called in reporting that she was hurting and could not get out of bed. Mr. Porter testified that he had learned that the claimant's husband, Randy Cole, had called in on Friday, October 24 to report that the claimant would not be coming in because of back problems. Mr. Porter denied that the claimant

had contacted him on Saturday following October 23. Mr. Porter testified that someone from the store had told him that someone had come by and told them that the claimant would not be to work but he did not have a direct conversation about her accident. Mr. Porter stated that the first time he knew about her problems was when he received a call from the pharmacy asking for authorization on a prescription for the claimant. Mr. Porter testified that after this conversation the claimant called him to tell him what she had done which was after she had been to the hospital. Mr. Porter opined that this call from the pharmacy was around 6:30 to 7:00 in the evening on Saturday. This witness testified that the claimant did contact him directly on the following Monday about filing a workers' compensation claim. Mr. Porter was asked if the claimant told him that she had hurt her back at work and Mr. Porter responded that the claimant told him that her back was hurting but the main reason for her call was to complain about other employees not doing their work. Mr. Porter further stated that, "Yeah, it was mentioned that her back was hurting her. As far as calling me to say, "I hurt my back at work," no. No. I heard that from the employees."

On cross examination, Mr. Porter testified that it was Saturday night around 6:30 or 7:00 when he first learned that the claimant was claiming a workers' compensation injury. Mr. Porter testified that the claimant did not call and report to him a workers' compensation injury on Thursday night or on Friday and it was not until late Saturday afternoon that he got the call from the

pharmacy and then later talked with the claimant. Mr. Porter testified that his employees are free to call him anytime and that he keeps his cell phone with him all of the time. Again Mr. Porter testified that on August 19 the claimant reported to him that her back was hurting and she could hardly get out of bed and she missed work that day.

Randall Walter Cole testified on behalf of the claimant stating that he and the claimant had previously been married and currently were living together. Mr. Cole testified that he had taken the claimant to work on October 23, 2003, and he returned at the end of the claimant's shift to pick her up. Mr. Cole stated that when he saw the claimant coming out of the respondent's business she was kind of leaning over a little bit and walking fairly slow. Mr. Cole testified that the claimant opened the door and could not quite get in. This witness stated that after some difficulty the claimant did get in the car and she reported to him that she had hurt her back. Mr. Cole testified that prior to October 23 he did not observe the claimant having any back problems like he observed on October 23. Mr. Cole testified that the following day, October 24, the claimant did not go into work and he went to the respondent's business to tell them she would not be in. Mr. Cole testified that the claimant was up most of the night crying and screaming. This witness testified that because they did not have a telephone at that time, he drove to the respondent's business to report that she would not be to work. Mr. Cole testified that when he went in to report that the claimant would

not be in to work, he initially spoke to "the heavy set guy that is there now" and once he reported that the claimant was not coming in because she was hurting, Mr. Duane Porter came out from the back and he talked to him.

On cross examination, Mr. Cole testified that he and the claimant do reside at the same address but it is more of a platonic relationship noting that he dates other women. Mr. Cole further clarified that the claimant was in need of a place to stay and he was just trying to help her out. Mr. Cole stated that he has disabilities himself as well as diabetes and has been tested for alzheimers. Mr. Cole testified that he has a little trouble with memory but not a great deal noting that some of his memory problems are due to his medications. Mr. Cole was asked if he was aware of the claimant having any back problems before October 2003 and Mr. Cole responded that as far as he knew no but that every month she has her monthly cycle that is pretty painful for her and it gets kind of irritating at times. Mr. Cole was asked if the claimant reported to him how she had hurt her back or if she had just said her back was bothering her and this witness responded, "I remember something about the Coke fountain---something to do with cups. That's all I know."

The respondents called Ann Scharaf to testify on their behalf. Ms. Scharaf testified that she was an employee of the respondent and had been so for about a year. Ms. Scharaf testified that she and the claimant had worked the same shift and that she recalls the claimant mentioning several times before October 23, 2003, that her

back was bothering her as well as her legs and feet. Ms. Scharaf was asked if the claimant was complaining about her back on the evening of October 23 and Ms. Scharaf responded, "Yes, Ma'am. She had said earlier in the day and probably not too long after we started work that her back was bothering her." This witness testified that the claimant did not report to her that she was bending over getting some cups and hurt her back. This witness testified that she did not notice anything different about the claimant's physical appearance indicating that the claimant was always walking like she was hurting and she did not appear to be in any more pain toward the end of her shift than she did at the first.

On cross examination, Ms. Scharaf testified that the claimant made at least weekly complaints about her back but she could not say that the claimant complained every day she worked but close to it. Ms. Scharaf testified that the claimant also complained about her feet and legs. This witness was asked why October 23 was so vivid in her memory as to what the claimant had said to her and Ms. Scharaf testified that she was not sure about the date but she just remembers that it was the last day that the claimant worked for the respondent. This witness testified that the claimant never mentioned to her anything about her menstrual cycle but was aware that she had talked to other employers about this problem.

Shannon Boydston testified that he had been working for the respondent approximately five years and was acquainted with the claimant. Mr. Boydston testified that he and the claimant did not

work the same shift but their shifts overlapped so he in fact has worked with the claimant. Mr. Boydston was asked if he had ever heard the claimant complain about any kind of physical ailments and Mr. Boydston responded, "Well, she complained about physical ailments a lot, but I never really---I just ignored her." This witness testified that the claimant complained a lot about her back, legs and especially her feet. Mr. Boydston testified that he was not working the evening of October 23 but does remember working the following Friday. Mr. Boydston testified that the claimant's husband did come in but he does not remember all of what was said but he knew the claimant would not be coming in. Mr. Boydston testified that Duane Porter, the manager/supervisor, was in and out that day but was not present when Mr. Cole came in. This witness remembers specifically that if the supervisor had been there he would have directed Mr. Cole to speak with him because he did not want to be in the middle.

On cross examination, Mr. Boydston testified that he could not say 100 percent if he remembers the claimant complaining about her back but he does remember the claimant would sit and say, "Oh, my back is bothering me," because he remembers her sitting on the stool all the time complaining. Mr. Boydston specifically remembered the claimant complaining about her feet because she did that all the time. Mr. Boydston testified that if the supervisor had been there when Mr. Cole came in to report that the claimant would not be in to work, he would have known it because Mr. Porter would have to walk right by in front of him to get to his office.

The claimant testified in her deposition that on the night that she injured her back she tried to reach Mr. Duane Porter, her supervisor, on his cell phone but was unable to reach him. The claimant also testified that on Friday, the next day, she tried to reach Mr. Porter by phone at the store but he was not in so she left a message for him to return her call but he never did call her back. The claimant also testified that her injury occurred in the evening around 9:15. The claimant testified that she reported to her co-workers, Trish, Ann and a man, that she had hurt her back. The claimant was asked did she tell these three people how she had hurt her back or did she tell them that her back was hurt and the claimant responded, "No. I told them how I did it."

The medical records set forth that the claimant was seen at the St. Edward's Mercy Medical Center ER on October 25, 2003, with complaints of low back injury two days ago at work. A CT scan of the claimant's back was performed on October 25, 2003, which revealed that she had a large herniated disc at L4-L5 with pressure more over the right side. The claimant was prescribed muscle relaxants, steroids and pain medication as well as non-steroidal anti-inflammatory drugs. It was recommended that the claimant follow up with her primary care physician.

Medical records dated April 9, 1996, from the Cornerstone Family Clinic indicate that the claimant was reporting that she stooped over to pick up her little puppy about three or four days ago and felt pain and a pull in her back. It is reported that the claimant seems to be having some aching and discomfort down her

right leg that does improve when she hyper flexes the hip and the knee. Dr. Wendell Ross writes that the claimant has pain which he associates with a muscle spasm and notes that he cannot completely rule out a herniated disc. Dr. Ross recommended bed rest for up to the next three days and prescribed medications.

After a review of this complete record, I find that the claimant has failed to prove by a preponderance of the credible evidence that she sustained a work related injury while working for the respondent on October 23, 2003. It is not questioned that this claimant has back problems but it is seriously questioned that her problems began or are as a result of her work activities for the respondent. The claimant has numerous inconsistencies in her deposition as well as her testimony at trial. Specifically, it is noted that the claimant, at the hearing, testified that she did not try to reach her supervisor on the evening of her alleged event because employees were not encouraged to call Mr. Porter. In her deposition the claimant clearly testified that she tried to reach Mr. Porter by phone on the night of October 23, 2003, but could not reach him. The claimant also testified that she tried to call Mr. Porter on Friday at the store but he was not in so she left a message. At trial the claimant testified that because she did not have a phone she was unable to call in on Friday, therefore, her ex-husband, Randy, went to the respondent's business to report that she would not be able to come in to work. It is also noted that a co-employee, Ann Schaf, testified at the hearing that the claimant did not report to her any work related injury nor did the claimant

by her physical appearance indicate that she had any problems at the end of her shift.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On October 23, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$172.00 for temporary total disability and \$154.00 for permanent partial disability.

4. The claimant has failed to prove by a preponderance of the credible evidence that she sustained a work related injury on October 23, 2003, while working for the respondent. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the credible evidence that she sustained a work related injury while working for the respondent on October 23, 2003. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE