

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F214099**

<b>FRANCES D. CROWDER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>RANDY'S SNAX SALES, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CINCINNATI INDEMNITY COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 13, 2004**

A hearing was conducted on July 19, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Searcy, White County, Arkansas.

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

Respondent was represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On July 19, 2004, the above-captioned claim came on for a hearing at Searcy, Arkansas. A prehearing telephone conference was held on this claim on June 1, 2004; a Prehearing Order was filed on June 2, 2004.

The parties agreed to four stipulations; the first two are set forth in the Prehearing Order and were confirmed by the parties at the hearing, while the third and fourth stipulations were agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The relationship of employee-employer-carrier existed on November 22, 2002, the date upon which Claimant sustained a compensable injury.

2. Claimant was paid temporary total disability benefits from December 6 through December 29, 2002, and medical benefits were paid through August 4, 2003.

3. Those temporary total disability benefits paid to Claimant from December 6 through December 29, 2002, were paid at a rate of \$118.00 per week.

4. The Commission entered a change of physician order on March 27, 2003, concerning a change of physician from Dr. Terry Brown to Dr. Terry Green. Respondents complied and paid Dr. Green's bill.

At the July 19, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. After noting a disagreement concerning Claimant's compensation rate, the parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to reasonably necessary medical treatment from Dr. Mocek.

2. Whether Claimant is entitled to continuing temporary total disability benefits.

3. What is Claimant's average weekly wage.

4. Whether Claimant is entitled to an attorney's fee.

Claimant contends that she is entitled to additional temporary total disability benefits starting on December 30, 2002. She continues to experience pain and other symptoms, and therefore seeks continued reasonably necessary medical benefits in connection with her compensable injury. Respondents contend that further treatment is not related or authorized and that Claimant is not entitled to temporary total disability benefits since a light duty job was made available to Claimant.

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## **DISCUSSION**

It is stipulated that Claimant sustained a compensable injury on November 22, 2002. On that date she lifted a heavy box and then attempted to place it on a stainless steel work table a few feet to her right. She testified: "[W]hat I did, I slung it on that stainless steel

table. And when I did, that's when I got injured." She testified that she immediately felt pain "[s]hooting down the right side of my neck, all the way down the right side of my back, and to my right arm and my right leg. Even to the heel on my right foot." Claimant sought medical treatment, and was taken off work on December 6, 2002.

#### **A. Entitlement to Medical Benefits**

Claimant's medical records document complaints relevant to her present claim. A note dated May 22, 1995 records her complaint of "non-traumatic lower back pain, radiating into her right knee"; sciatica was assessed. Claimant completed a form for the Joseph Medical Clinic on October 30, 2001; under the heading "Past Illness/Diseases," she wrote: "Back curvature of spine, extreme pain in back, neck, shoulders, hips." A clinic note dated October 31, 2001 records a finding of "mild kyphosis" and includes an assessment of "myalgia." On November 13, 2001, Claimant presented for an examination of her back and neck; the doctor assessed back pain.

After Claimant sustained her compensable November 22, 2002 injury, she presented to the Central Arkansas Hospital on December 5, 2002 for an evaluation. She reported the history of her incident. The emergency room note does not indicate whether Claimant reported her prior history of neck and back pain. Dr. Carter Dalton recorded some tenderness upon examining Claimant's neck. He diagnosed right-sided neck and back pain as well as right trapezius and paraspinal muscle back pain or strain after lifting.

Dr. Terry Brown excused Claimant from work starting December 6, 2002 until further notice. A clinic note dated December 11, 2002 documents decreased range of motion and a finding of spasm. However, an MRI of Claimant's thoracic spine performed December

17, 2002 produced the following impression: "Very mild degenerative change in the mid-thoracic spine. No evidence of disk herniation or cord abnormality. No fractures." Dr. Brown subsequently diagnosed pulled muscles and muscle spasms, and released Claimant to return to work on December 30, 2002 with restrictions.

The parties stipulated that Claimant obtained a change of physician order, changing her physician from Dr. Brown to Dr. Terry Green. His note dated April 23, 2003 records Claimant's chief complaints of "neck and back pain, dull headaches." Claimant also completed a pain chart on April 23, 2003; she indicated pain in her neck and the right side of her back, but did not indicate pain in her right arm or right leg. Upon examination, Dr. Green noted that Claimant "has some spasm in the thoracolumbar region, a mild thoracolumbar scoliosis and kyphosis of the thoracic spine." He also noted "a slightly positive straight leg raising test on the right." Dr. Green diagnosed "1. Thoracolumbar strain. 2. Cervical spondylosis, lumbar spondylosis, thoracic kyphosis and osteoporosis."

Claimant reported to Dr. Green on June 2, 2003. He diagnosed low back pain, but noted "[n]o treatment recommendation at this time." Claimant again presented to Dr. Green on August 4, 2003, complaining of pain in her lower cervical region and her right thoracic, lumbar, and hip regions. Dr. Green noted brisk reflexes and that examination "of the spine reveals a kyphoscoliosis." X-rays indicated a normal cervical spine and mild thoracic scoliosis and kyphosis.

Claimant reported to Dr. Green one final time on August 13, 2003. Previously, on August 8, 2003, Claimant underwent an MRI of her cervical spine and thoracic spine. That procedure produced an impression of "[m]oderate degenerative disc changes of the thoracic spine with no frank disc protrusion or impingement upon the spinal cord or neural

foramina.” Dr. Green’s August 13, 2003 clinic note acknowledges this impression and that Claimant’s physical “exam is unchanged.” He diagnosed thoracic kyphosis and degenerative changes. He concluded:

Recommend family doctor for routine medical care. I cannot with reasonable medical certainty relate the current symptoms to the lifting incident on 11/22/02. From the orthopedic standpoint, I think that we can say that she has reached maximum medical improvement and as far as we are concerned, can be released for return to work.

Dr. Green discussed his treatment and findings concerning Claimant in his deposition taken June 30, 2004. He explained that Claimant’s kyphosis is a deformity in her thoracic spine; he did not believe this was caused by Claimant’s compensable injury, and he agreed that Claimant’s kyphosis is reflected in an October 31, 2001 clinic note. Dr. Green was not certain of his finding of muscle spasm, which was observed in the area of Claimant’s kyphosis: “[t]hat’s hard to judge when there’s a little abnormal curve too, because sometimes it’s a little rib-humping and make it look like spasm. Maybe there was or wasn’t spasms.” He noted that Claimant’s examination was fairly normal with the exception with the abnormal curves in her spine; he did not find any objective signs of a problem related to Claimant’s compensable injury. Dr. Green could not, with reasonable medical certainty, relate Claimant’s current symptoms to her lifting incident. He believed that Claimant’s “complaints were so far out of line with any objective findings that I thought there was gross exaggeration of her complaints.”

Apparently, there was some friction between Claimant and Dr. Green. Claimant testified that the relationship was “very unprofessional” on both sides, and that she did not get along with Dr. Green very well. Dr. Green characterized Claimant as “a hostile patient and rude.” Claimant insisted that Dr. Green never physically examined her, and that if his

records indicate that he did, they would be mistaken.

Claimant subsequently obtained treatment from Dr. Christopher Mocek. Dr. Mocek's treatment has included an epidural steroid injection at C6-7; a nerve root block at C7; nerve root blocks at right L4 and L5; decompression of a bulging disc at C5-6; and decompression of the disc at C6-7. Claimant testified that she did obtain some relief from these procedures, but that she still experienced pain and still sought medical treatment.

Dr. Mocek elaborated on his treatment in a deposition given June 8, 2004. Dr. Mocek was asked about the timing of Claimant's nerve problems.

Q. If she had these nerve problems from an accident or injury that occurred back in November of '02, would you have expected those symptoms and problems to have manifested themselves by April of 2003 when Dr. Green saw her?

A. How many months is that, November to -

Q. That would be about six months.

A. Usually, yes, usually by that time.

Similarly, Dr. Mocek was asked about Claimant's radicular pain.

Q. Is it significant that she did not develop radicular pain between fifteen to eighteen months following the injury? Is that out of the question or medically unique?

A. It's not uncommon for patients to have the delayed onset of occurrence of the pain, but most patients after an injury, within the first six months will have an onset of the symptoms.

Dr. Mocek was asked a similar question concerning Claimant's disk problem.

Q. And, again, I think you indicated to me earlier that you had thought six months out that she should have at least had some leg pain or arm pain. Would the same thing apply to her back if she had a disk at that point?

A. That's correct.

Dr. Mocek was questioned concerning causation.

Q. One last thing, can you say within a reasonable degree of medical certainty that the disk problems that you're treating her for are related back to a remote injury back in November of 2002?

A. I can only go by what the patient says, and she said that the pain in the back radiating down the right leg and the neck radiating down the right arm occurred immediately after the lifting injury at work. Obviously, you have a report that says she had some right leg pain in 1995. I did not have that medical information when she came to see me.

Later in his deposition, Dr. Mocek affirmed that he believed within a reasonable degree of medical certainty that the condition for which he was treating Claimant arose from her compensable injury. However, he also confirmed that some of the symptoms Claimant reported to him were not reported to Dr. Green on Claimant's pain charts over the course of the four months that Dr. Green treated Claimant.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). A claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary in connection with her compensable injury. See Ark. Code Ann. § 11-9-704(c)(2); Patchell v. Wal-Mart Stores, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (May 19, 2004). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant has not sustained her burden of proving by the preponderance of the evidence that further medical treatment from Dr. Mocek is reasonably necessary in connection with her compensable injury. As of August 13, 2003, Dr. Green emphatically

could not relate Claimant's current symptoms to her lifting incident; he believed her complaints were so far out of line with any objective findings that there was gross exaggeration of her complaints. He explained that his finding of muscle spasm was not certain, and could have been related to Claimant's kyphosis which appeared on a medical record pre-dating her compensable injury. While Dr. Mocek's testimony was much more supportive of Claimant's position, he conceded that several of the symptoms that he treated typically should have been manifest at approximately the time Dr. Green began treating Claimant. He also conceded that his earlier opinion concerning causation was based upon an incomplete patient history. I find that the evidence of greater convincing force does not causally link her November 22, 2002 injury to the treatment Claimant received since leaving Dr. Green's care. Therefore, further medical treatment from Dr. Mocek is not reasonably necessary in connection with Claimant's compensable injury.

**B. Entitlement to Additional Temporary Total Disability Benefits**

Dr. Brown excused Claimant from work until December 29, 2002. He released her to return to work on December 30, 2002, with restrictions: "no lifting more than 20 lbs for next 6 weeks then may resume normally."

Jeannie Hancock testified as a co-owner of the respondent employer. After receiving Dr. Brown's release with restrictions, she and her husband offered Claimant a position that they believed was within Dr. Brown's restrictions.

So the only thing we could come up with was that [Claimant] could wash dishes, and we called over there and talked to Noba and Amanda and them, we told them that [Claimant] was going to come back, to put her to washing dishes, but make sure that she didn't carry out the trash, you know, and, you know, for everybody to look out for her, and they all said they would.

Hancock believed that the dishwashing job was within Claimant's restrictions, and that her

co-employees would have performed any tasks outside Claimant's restrictions. Hancock did not believe that any other position would have satisfied these restrictions.

Amanda Wolfe worked for the respondent employer from January 2002 until January 2003, so that she and Claimant worked together for a time. Wolfe had performed the dishwashing job offered to Claimant.

Q. Being familiar with the dishwashing job, would that have been a job that [Claimant] should have been able to do and stay within the 20 pounds?

A. Yes. If we took out the garbage, which we had agreed to do.

Wolfe testified that it was her job to make sure Claimant stayed within her restrictions. However, Wolfe did not think Claimant ever returned to work.

Claimant's sister-in-law, Noba Crowder, also worked with Claimant for the respondent employer. She affirmed that a light duty job within Claimant's restrictions was arranged. She testified that Claimant's fellow employees were directed to "help her, like take out the trash, you know, anything that was over 20 pounds."

Hancock testified that they never got an opportunity to provide Claimant with light duty because she did not return to work. Claimant testified that she did not consider the dishwashing job to be light duty. She was believed this was not a bona fide job offer; physically, she did not believe she was able to do the work.

Q. You never gave the Hancocks an opportunity to work you in a light duty job, did you? You never showed up?

A. I gave them a[n] opportunity to give me a light duty job. I did not refuse a light duty job. I told them that job, I talked to Mrs. Hancock and told her that that job exceeded my limitations.

...

You load them up, there's a tray about this long and about that wide. You put them in that. You push them in that dishwasher. Then you go to the other side. Then you pull them out. Then you stack them up. You pull, tug,

push, lift. You go out and there's trays that's taller than I am, where all the dishes go in, the dirty dishes, on serving trays, and you push them over a hump, into the kitchen, and you unload all those too.

In Claimant's view, "[a]ll of that is outside of my restrictions."

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889, \_\_\_ (2002) (citation omitted). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). A claimant bears the burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant has not sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits subsequent to December 29, 2002. Specifically, the evidence of greater convincing force establishes that Claimant was not incapacitated to earn wages, because of the light duty job offered to Claimant by the respondent employer. I acknowledge that Claimant did not consider this to be a bona fide offer. However, the credible testimony of a co-owner of the respondent employer, as well as two of Claimant's former fellow employees, establishes the feasibility of the position modified to ensure that Claimant could work within her restrictions. The respondent employer offered light duty work; this work was within Claimant's restrictions; Claimant refused to avail herself of this opportunity. Because Claimant was offered work that she could perform within her restrictions, she did not suffer a total incapacity to earn wages, and is therefore not entitled to temporary total disability benefits.

**C. Claimant's Average Weekly Wage**

Because no benefits are awarded herein, this issue is not ripe for determination.

**D. Entitlement to an Attorney's Fee**

Among other requirements, attorney's fees are only allowed upon those benefits payable or awarded. See Ark. Code Ann. § 11-9-715(a). Since no benefits are awarded herein, Claimant is not entitled to an award of attorney's fees.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon are reasonable and are approved.
2. The relationship of employee-employer-carrier existed on November 22, 2002, the date upon which Claimant sustained a compensable injury.
3. Claimant was paid temporary total disability benefits from December 6 through December 29, 2002, and medical benefits were paid through August 4, 2003.
4. Those temporary total disability benefits paid to Claimant from December 6 through December 29, 2002, were paid at a rate of \$118.00 per week.
5. The Commission entered a change of physician order on March 27, 2003, concerning a change of physician from Dr. Terry Brown to Dr. Terry Green. Respondents complied and paid Dr. Green's bill.
6. Claimant did not sustain her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical treatment from Dr. Mocek in connection with her injury. I find that the evidence of greater convincing force does not causally link Claimant's November 22, 2002 compensable injury to the treatment she received following Dr. Terry Green's care. Respondents paid for Dr. Green's care.

Therefore, further medical treatment by Dr. Mocek is not reasonably necessary in connection with her compensable injury.

7. Claimant did not sustain her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits. She was offered light duty work within her restrictions; therefore, she did not suffer a total incapacity to earn wages after December 29, 2002.

8. The issue of Claimant's average weekly wage is not ripe for determination.

9. Because Claimant is not awarded benefits herein, she is not entitled to an award of attorney's fees.

**ORDER**

For the foregoing reasons, Claimant's claim is respectfully denied.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

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