

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F405481

DARLENE HAM, Employee	CLAIMANT
RENT-WAY, INC., Employer	RESPONDENT
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED DECEMBER 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by ROBERT MONTGOMERY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 17, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 15, 2004, and a pre-hearing order was filed on September 16, 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 relationship of employee-employer-carrier existed among the parties on March 8, 2004.
3. The claimant was earning an average weekly wage of \$427.50 which would entitle her to compensation at the weekly rates of \$285.00 for total disability benefits and \$214.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back on March 8, 2004.

2. Temporary total disability benefits from June 4, 2004 through a date yet to be determined.

3. Medical.

4. Attorney fee.

The claimant's contentions as set forth in her pre-hearing questionnaire are as follows: "The claimant contends on March 8, 2004 that the claimant and the assistant manager, Jeremy Lines, were repossessing certain inventory from a client from the East Duarte Apartment Complex in Rogers, Arkansas. The claimant was in the process of moving a mattress into the store truck where the inventory was being loaded and caused the claimant to strain and twist causing a lumbar disc injury. The claimant notified her employer of this injury and continued to work until May 15, 2004 at which time she required medical treatment. The claimant worked light duty until June 4, 2004. The claimant claims temporary total disability benefits from June 4, 2004 to a date yet to be determined. The claimant further is requesting additional medical treatment and attorney's fees for the controversion of this claim."

The respondents contend that claimant did not suffer a compensable injury to her back on March 8, 2004.

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 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 September 15, 2004, and contained in a pre-hearing order filed September 16, 2004, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on March 8, 2004.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's low back injury.

4. Claimant is entitled to temporary total disability benefits beginning June 4, 2004, and continuing through the date she was released to return to work by Dr. Foster in October 2004.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a twenty-five-year-old woman with a GED who was hired by respondent on January 26, 2004 to work in sales. Although claimant's primary job duties involved office work, she was also required to perform delivery work if the respondent was shorthanded. The respondent is a company which rents furniture, electronics, and appliances.

Claimant testified that on March 8, 2004 she and Jeremy Lines, the respondent's assistant manager, went to pick up various items which had been repossessed. These items included furniture and appliances. After most of the items had already been loaded onto a truck including a washing machine, they had to load a mattress. As she and Lines were in the process of putting a mattress in the truck, she stepped into the back of the truck with the mattress and Lines was on the ground holding his end of the mattress. When Lines stepped into the truck, the mattress was shoved toward claimant and the force bent her backwards over the washer. Claimant testified that she felt immediate pain in her low back area.

Upon returning to the respondent's place of business claimant reported the injury to Francis Hicks, the store manager. Claimant testified that Hicks did not complete an accident report and told her to continue working even though she informed him that she needed medical treatment. Claimant testified that over the next few weeks her back continued to hurt and that she reported this to Hicks; however, Hicks would not send her to a doctor.

Claimant testified that after the incident on March 8, 2004 she had continued back pain and popping in her back. On the morning of May 15, 2004, the claimant's back popped when she rolled over in bed causing severe pain. After attempting to work the claimant sought medical treatment from the emergency room at St. Mary's. Claimant was prescribed bed rest and informed that she should seek medical treatment from Dr. Foster, an orthopaedic surgeon, if her back complaints continued. Claimant's back complaints did continue and she sought medical treatment from Dr. Foster on May 19, 2004. Dr. Foster ordered an MRI scan which revealed a small herniated disc at the L4-5 level. Dr. Foster ordered physical therapy which according to claimant she had to pay for herself.

Claimant testified that she was placed on light duty by Dr. Foster until she was terminated by Hicks because she could not perform full-duty work on June 4, 2004.

Claimant has filed this claim contending that she suffered a compensable injury to her back on March 8, 2004. She seeks payment of related medical treatment, temporary total disability benefits beginning June 4, 2004 and continuing through a date yet to be determined, as well as a controverted attorney fee.

ADJUDICATION

The claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993,

the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

As previously noted, claimant testified that she suffered an injury to her back when she was forced to bend over backwards while loading a mattress with Jeremy Lines on March 8, 2004. According to claimant's testimony she had immediate back pain as a result of this incident. Claimant's testimony is corroborated by the testimony of Lines. Lines testified that on that date he saw the claimant hurt herself when she was forced over backwards while loading a mattress. Lines testified that claimant stated that this incident had hurt her back and that she grabbed her back in pain.

I do note that according to claimant's testimony she did not miss any work until March 15, 2004, and did not seek any medical treatment until that date. However, according to claimant's testimony, she requested medical treatment from Francis Hicks, her supervisor, on several occasions and was refused. Hicks was not present at the hearing to deny this testimony.

I also note that the emergency room report from May 15, 2004 indicates that

claimant gave a history of back pain following her back popping that morning while in bed. Claimant acknowledged giving this history at the emergency room. However, claimant testified that her back pain had continued from the date of injury on March 8, 2004 up through May 15, 2004 when she sought medical treatment. Furthermore, it was claimant's testimony that she had a history of her back popping after that incident. Indeed, Dr. Foster's initial medical report of May 19, 2004 reflects that claimant gave a history of her back popping on and off since March 8, 2004. Dr. Foster's medical report of May 19 contains a history of injury consistent with claimant's testimony.

Given this evidence, I do not find that claimant's back problems are the result of a popping which occurred on May 15 while claimant was in bed, but rather that this was simply a continuation of an injury which had begun on March 8, 2004.

Based upon the testimony of the claimant and Lines who I find to be credible and entitled to great weight, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back which arose out of and in the course of her employment with respondent and that this injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. Following her emergency room visit on May 15 claimant sought medical treatment from Dr. Foster, an orthopaedic surgeon, on May 19, 2004. Dr. Foster ordered an MRI scan which revealed a small herniated disc at the L4-5 level. As a result of that finding Dr. Foster prescribed physical therapy and medication. Based upon this evidence, I find that claimant has satisfied the remaining elements of compensability.

Accordingly, for the foregoing reasons, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her

back while working for respondent on March 8, 2004. Having found that claimant has met her burden of proof, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

I also find that claimant is entitled to temporary total disability benefits beginning June 4, 2004 and continuing through the date she was released by Dr. Foster in October. 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. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, based upon my review of Dr. Foster's medical records, I find that claimant remained within her healing period subsequent to June 4, 2004. On May 21, 2004 Dr. Foster indicated that claimant was in need of physical therapy and medication. On June 17, 2004 Dr. Foster noted that claimant had been unable to proceed with physical therapy due to the respondent's controversion of the claim. Dr. Foster noted that this had impeded claimant's recovery. Dr. Foster indicated that claimant should continue her attempt to receive authorization for physical therapy and she should continue her medication. Claimant testified that she continued to be evaluated by Dr. Foster until October 2004.

At the time of claimant's visit with Dr. Foster on May 21, 2004, Dr. Foster indicated that claimant should perform no work greater than light duty. Claimant did in fact continue to work for the respondent at her office job which was light duty. However, according to claimant's testimony when she could not provide her supervisor Hicks with a full duty release, she was terminated by the respondent on June 4, 2004. Dr. Foster in his office note of June 17, 2004 states that claimant was sent home due to her inability to perform full duty work. According to claimant's testimony, Dr. Foster released the claimant to return to work in October 2004.

Based upon the foregoing evidence, I find that claimant has met her burden of

proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages beginning June 4, 2004, the date she was terminated by the respondent for her inability to perform her job due to injury, and continuing through the date she was released by Dr. Foster to return to work in October 2004.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on March 8, 2004. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning June 4, 2004 and continuing through the date she was released to return to work by Dr. Foster in October 2004. Respondent has controverted claimant's entitlement to temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and

to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE