

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213337

PATRICIA HOLLAND, EMPLOYEE	CLAIMANT
HELENA REGIONAL MEDICAL CENTER, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 28, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 29, 2004, at Helena, Phillips County, Arkansas.

Claimant represented by the HONORABLE CHARLES P. ALLEN, Attorney at Law, West Helena, Arkansas.

Respondents represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was held to determine the claimant's entitlement to payment of medical expenses, temporary total disability and permanent partial disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102 and whether or not a portion of this claim is barred by lack of notice, Ark. Code Ann. §11-9-701.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the claimant sustained a compensable injury but failed to give notice to her employer prior to November 27, 2002, barring a portion of her claim.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on June 6, 2002 at which time the claimant was earning sufficient wages to entitle her to the maximum compensation rate, \$425.00/\$319.00, in the event this claim is found to be compensable. Some benefits were paid by AHA Care/AMCO/Canada Life.

The claimant contends she injured her back on June 6, 2002 and seeks payment of medical expenses, temporary total disability benefits from June 7, 2002 to August 8, 2002, a 10% rating as assessed by Dr. Ron Williams in his report of July 12, 2003, and attorney's fees.

The respondents contend the claimant did not sustain an injury in the course and scope of her employment. The claimant did not report an injury and used her group insurance to pay for treatment. There is no causal connection between her condition and her employment and there is no mention of a work-related injury in the medical records. Alternatively, in the event of an award, the respondents would not be liable for payment of benefits before they received notice of this claim and the respondents would be entitled to offsets for disability benefits (short and long term) received by the claimant.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the deposition of Dr. Patrick Bell, incorporated by reference.

The following witnesses testified at the hearing: the claimant, who was a polite and credible witness and Felicia Delancey, benefits coordinator.

The claimant, age 56 (D.O.B. January 21, 1948) is a registered nurse. She worked for the respondent-employer for thirty-two years. Her supervisory job duties as nurse manager included scheduling, budgeting and managerial tasks for her unit. The claimant was also expected to act as a working staff nurse when necessary. Her health history includes occasional backaches with overuse. In 1995 she saw Dr. Kaplan for lumbar muscle spasms and underwent a CT scan, but she received no specific diagnosis or work restrictions.

Immediately prior to her injury at work, the claimant had worked several twelve hour shifts. After finishing her day shift, she returned to work at 7:00 p.m. to work as a staff nurse. She was bending over a patient working on an infected gastric feeding tube when she experienced back and leg pain.

The claimant told her supervisor, Regina Moody, that her back was hurting and she was unable to perform her job. Ms. Moody could not find anyone to substitute and the claimant was unable to leave the hospital. She enlisted the help of a co-worker, Elizabeth, to tend to the patients.

The claimant notified her family doctor who happened to be working at the hospital that day. He came to find her and admitted her to the hospital. She was given medication that made her sleepy. She was released on June 11.

The claimant then went to Dr. Ron Williams for epidural steroid injections. The pain persisted and she was re-hospitalized from June 16 - June 20. Dr. Williams performed surgery on June 21 and discharged her the next day. The surgery was beneficial and she is presently working in Jacksonville as a case manager for Rebsamen Hospital.

The claimant readily admits that she knew the procedure for reporting a workers' compensation injury but she did not follow it. However, in casual conversation she subsequently told the director of nursing Karen Wade, human resource director Ms. Delancey, and Ms. Fonzie in human resources that her back problem started on the job. Because she had not filed a Notice of Injury report (AR-N) with her employer, she thought she had missed her chance to file a workers' compensation claim. The claimant used her group insurance, paid the deductible and co-pays, used her sick leave and applied for long-term disability. The claimant then learned that she had two years to file a claim and the AR-C was filed with the Commission on November 27, 2002.

Felicia DeLancey testified the procedure for reporting a claim is to report the accident to your supervisor, go to the emergency room and make a report, and see the doctor on call. Once you are released, employees must follow-up with the company physician, Dr. Paine.

MEDICAL EVIDENCE

In his deposition, Dr. Bell, an osteopath, testified he and his partner, Dr. Winston treated the claimant as her family physicians. Dr. Bell referred the claimant to neurosurgeon, Dr. Ron Williams.

The claimant saw Dr. Winston in January 2001 for back pain but there is no history of injury. An MRI was conducted on September 6, 2001 showing multilevel degenerative changes and spurring

at L4-L5. Dr. Bell saw the claimant on May 7, 2002 for back pain and a sensation of heaviness in her legs. There was no history of a specific injury. The claimant was seen again on May 7, 2002 for lumbar muscle spasm and low back pain. Again, there was no history of injury – just a flare-up.

Dr. Bell admitted the claimant to the hospital (from June 6, 2002 to June 11, 2002) for complaints of back and left leg pain.

Dr. Bell's Report of June 6, 2002:

Patient was at work on A wing and had severe pain radiating down the patient's left leg where she was unable to bare weight and concerned about the possibility of a herniated disc but definite sciatic and lumbar muscle spasm being into play.

Dr. Bell's Report of June 11, 2002:

CT of lumbar spine on 6-7-02 showed degenerative changes of the lumbar spine with evidence for central bulging disc at L4 and L5.

On 6-9-02 films were reviewed. She had an HNP at L4 and L5.

Dr. Bell's Report of March 6, 2003:

Patricia Holland's injury was diagnosed while at work. Result of years of progressive deterioration.

Dr. Bell referred the claimant to Dr. Williams.

Dr. Williams' Report of June 12, 2002:

She has had difficulty with her back off and on for quite some time. The pain became much worse about five days ago radiating into the left leg as far as the calf.

A repeat MRI scan conducted June 12, 2002 confirmed a left paracentral disk herniation at L5-S1. The claimant returned to Helena and was hospitalized again by Dr. Bell from June 16, 2002 to June 20, 2002, for numbness in her leg, trouble weight bearing and back pain.

The claimant returned to Dr. Williams and surgery was performed on June 21, 2002. She was discharged the next day with instructions to attend back school and return to Dr. Williams in six weeks. Dr. Williams noted improvement in his report of August 8, 2002, and advised the claimant to return if she had any problems. The claimant never returned to Dr. Williams. His letter of July 25, 2003 indicates maximum medical improvement as of August 8, 2002.

In a report dated July 12, 2003 Dr. Williams assessed a 10% anatomical impairment rating.

The claimant did return to Dr. Bell's clinic in August with complaints of pain. The handwritten note is difficult to read but it does mention left leg numbness and no lifting over five pounds. The claimant returned to the clinic in September for what appears to be salmonella (see report dated September 23, 2002).

The claimant began physical therapy on September 25, 2002 for pain and weakness due to her lumbar surgery. Spasm was noted at L5-S1. She was released from therapy on October 18, 2002 with no spasm or edema and manageable pain.

The claimant returned to Dr. Bell on December 20, 2002 with complaints of back and left leg pain. Dr. Bell lost contact with the claimant after she moved to Jacksonville.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

In a workers' compensation case, the burden rests on the claimant to establish his claim for compensation by a preponderance of the evidence. Bragg v. Evans St. Clair, Inc., 15 Ark. App. 53, 688 S.W.2d 959 (1985). The claimant must also prove a causal connection between the work-related injury and any subsequent physical problem for which he seeks compensation. Bates v. Frost Logging Company, 38 Ark. App. 36, 827 S.W.2d 664 (1992).

My interpretation of the medical evidence is that the claimant had a preexisting degenerative condition of the lumbar spine. However, this condition required only sporadic medical treatment and did not prevent her from working.

On June 6, 2002 the claimant suffered a new injury or disc herniation when she leaned over to assist a patient. This injury resulted in severe left leg pain and back spasms. Dr. Bell noticed the claimant crying and admitted her to the hospital.

The claimant impressed me as hard-working and able to handle strenuous job duties on long shifts until her injury on June 6, 2002. The comparative MRI scans show only degenerative changes at L5-S1 on the September 6, 2001 test while the June 12, 2002 confirmed a left disc herniation at L5-S1. This change in the testing correlates with the claimant's reported severe left leg pain and inability to work. Therefore, I find the claimant has proven a compensable injury by a preponderance of the credible evidence of record.

The second issue for determination is the lack of notice. The hospital was certainly aware that the claimant was being treated for a back injury, however, the claimant herself admits that she did not follow hospital policy to report a workers' compensation claim. This lack of notice is doubly important because the claimant had been treated for back trouble in the past with no specific histories of injury.

Ark. Code Ann. §11-9-701: Notice of injury or death:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of

injury.

Attorney Allen argues that the respondents (employer-carrier) suffered no prejudice as a result of the claimant's failure to provide a written report of injury. That is not entirely accurate.

The Workers' Compensation Act gives the respondents the right to choose the treating physician, join a managed care organization for medical cost containment, and demand a drug test to determine if intoxication played a role in the accident. Delays in reporting also effect investigation of the claim as witnesses' memories fade.

I am aware that not all respondents exercise these options and I am not suggesting that the claimant would have failed a drug test. I am merely pointing out that there are some valid reasons behind the policy to promptly report injuries and the delay in reporting does deprive the respondents of some of these options, thereby prejudicing their handling of a claim. That is why the legislature saw fit to create this defense under Ark. Code Ann. §11-9-701 when the respondents do not receive prompt written notice of a workers' compensation claim.

The hospital policy of reporting to the employer before being referred to a company physician was known to the claimant and I find nothing unreasonable about the policy. The claimant knew her condition arose out of and in the course of her employment as she related the onset of pain to a specific incident helping a patient and her pain was more severe than in the past. Although the claimant was immediately hospitalized, I am not persuaded that she was unable to report the injury. And while her supervisor was aware that the claimant was being treated for back pain, the claimant had a history of non specific flare-ups of back pain in the past and was using her group insurance to pay for this incident, so it was incumbent on the claimant to distinguish this event as a workers' compensation claim.

Accordingly, I find the claimant failed to give notice that she was claiming a work-related injury and respondents are not liable for expenses prior to November 27, 2002.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on June 6, 2002 at which time the claimant was

earning sufficient wages to entitle her to a compensation rate of \$425.00/\$319.00.

2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The claimant failed to give notice of a work related injury until November 27, 2002.
4. Respondents are not liable for benefits and expenses prior to November 27, 2002 pursuant to Ark. Code Ann. §11-9-701.
5. Benefits and expenses payable after November 27, 2002 have been controverted.
6. Respondents are directed to pay all reasonable and necessary medical expenses incurred after November 27, 2002 within thirty days of receipt pursuant to Rule 30.
7. Respondents are directed to pay permanent partial disability benefits equivalent to the 10% rating assessed by Dr. Williams.
8. Respondents are entitled to an offset against benefits paid after November 27, 2002 by third parties.
9. Notice was provided to AHA Care/Amco (see letter of September 16, 2003 and hearing notice) however, no lien has been filed with the Commission and I find they have waived their subrogation rights.
10. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
11. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990)

(D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge

ENTERED NUN PRO TUNC July 30, 2004