

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104508

SHARON KIBE,
EMPLOYEE

CLAIMANT

PETROMARK, INC.,
EMPLOYER

RESPONDENT

FEDERATED MUTUAL INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 21, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 7, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on September 12, 2003. A copy of this prehearing 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 this prehearing order was made Commission's Exhibit No. 1 to the hearing. Subsequent to the prehearing order, the claimant's attorney requested, and was granted leave to amend the hearing issues as indicated in Commission's Exhibits No. 2 through 5.

The following stipulations were submitted by the parties either in the Prehearing Order, or during the course of the April 7, 2004 hearing and are hereby accepted:

1. The respondents have accepted liability for a contusion/bruise to the back of the claimant's head. (T. 25)
2. The respondents controvert additional benefits, including additional medical treatment, after June 15, 2001. (T. 24)
3. Dr. Smith and Dr. Brown are licensed psychologists. (T. 108)

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

1. The claimant's appropriate compensation rate, and an alleged underpayment of TTD benefits until June 7, 2001.
2. Compensability of the claimant's depression.
3. Unpaid medical expenses (including Dr. Van Smith).
4. Additional medical treatment for the claimant's back, head, and depression.
5. An MRI for the claimant's entire spine.

6. An MRI/CAT scan to the claimant's head.

7. Attorney's fees.

The record consists of the transcript of the April 7, 2004 hearing with exhibits contained therein.

DISCUSSION

1. Additional medical treatment for the claimant's back, including an MRI of the entire spine.

As a threshold matter, I conclude that the record developed at the April 7, 2004 hearing does not contain "objective findings" supporting the existence of a compensable back injury. Therefore, if the claimant is required under the circumstances of the present case to establish a compensable back injury with medical evidence supported by objective findings, as provided for in Ark. Code Ann. § 11-9-102(4)(D) and (16), she has failed to meet her burden of proof. However, the respondents did not make the compensability of a low back injury a hearing issue in our September 12, 2003 Prehearing Order. In addition, the respondents' attorney acknowledged during the hearing that the respondents in fact provided the claimant a course of back treatment after her April 18, 2001 fall, until Dr. Safman released her on June 15, 2001. Since the respondents did not raise compensability of a back injury as a hearing

issue in a timely manner, I find that the claimant is not now required in this claim for additional medical treatment for her back to establish that a compensable back injury in fact occurred. Accord Elmer L. Mayweather v. Mangum Contracting, Inc., Full Workers' Compensation Commission, Opinion filed November 19, 1999 (E813586) [Full Commission will not consider a compensability theory not timely raised below]; Jimmy Thompson v. City of Bentonville, Full Workers' Compensation Commission, Opinion filed June 6, 2002 (E901941/E911438/E911439) and Freddie Rowland v. Pioneer Concrete of Arkansas, Full Workers' Compensation Commission, Opinion filed March 18, 2003 (E908901) [Administrative law judge errs in finding no compensable injury when the parties stipulate to a compensable injury]. In the present case, the respondents have simply failed to present good cause as to why their current "compensability" issue (regarding the back) was not made in the answers by the respondents in response to the prehearing questionnaire that I sent out in order to identify the issues and contentions for the present hearing.

However, I also note that the respondents are only liable for additional medical treatment which is reasonably necessary for and causally related to the claimant's work

related back injury. In the present case, the claimant requests additional diagnostic testing and treatment for her back after the respondents controverted additional treatment in June of 2001. The claimant seeks this additional treatment based on her own testimony regarding persistent complaints and based on the testimony of her neighbor and friend who described the claimant's changed condition after the fall at work. However, in assessing the weight to accord the testimony, I note that the claimant has waited nearly three years after Dr. Safman last treated her to bring this claim for additional back treatment to a hearing. The claimant has acknowledged that, during this three year delay in proceeding to a hearing, she has not sought treatment for her back from any physician, although she had insurance during at least some of that period that would have permitted her to do so.

In light of Dr. Safman's June 15, 2001 conclusion that he had nothing else to offer the claimant for her back complaints, the lack of any subsequent medical conclusion in the record from any physician reaching a contrary result regarding the claimant's back, and the claimant's inexplicable three year delay in bringing her request for additional back treatment to a hearing, the claimant has

failed to persuade me that any additional testing or treatment would be reasonably necessary for her work related back injury.

2. Compensability of depression.

Arkansas Code Annotated § 11-9-113(a) provides:

(a) (1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence...

(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

In the present case, the parties stipulated at the hearing that Dr. Smith and Dr. Brown are both licensed psychologists. Dr. Brown made clear in his February 26, 2004 letter that he has diagnosed the claimant with depression pursuant to the most current Diagnostic and Statistical Manual of Mental Disorders, and both Dr. Brown and Dr. Smith attribute the claimant's depression to trauma from a work related concussion/closed head injury. Although the respondents have suggested that the claimant's depression was instead caused by stressors or by

hypertension medication, the respondents did not present any expert medical opinion to persuasively rebut Dr. Brown's neuropsychological testing and conclusion that the claimant's depression was caused by a concussion and Dr. Smith's more specific explanation that the depression was caused by "injury or impairment of the frontal architecture of the brain." I therefore find that the claimant has proven by a preponderance of the evidence all requirements of Ark. Code Ann. § 11-9-113(a) (2).

However, under Section 113(a) the claimant must establish the actual existence of a work related physical injury causing the mental injury. In addition, the existence and extent of the physical injury (i.e., in this case diagnosed organic injury to the brain) must be supported by objective findings that cannot come under the voluntary control of the patient. Ark Code Ann. § 11-9-102(4) (D) (Repl. 2002).

I find that the only potential objective medical findings in the record indicative of an organic brain injury are the neuropsychological testing results of Dr. Smith and Dr. Brown, and I understand that neuropsychological testing, without more, is not adequate to establish an organic brain injury by "objective findings" within the meaning of Ark.

Code Ann. § 11-9-102(4)(D). See Watson v. Tayco, Inc. (McDonald's), 79 Ark. App. 250, 86 S.W.3d 18(2002).

Moreover, the claimant's attorney specifically withdrew the compensability of an alleged organic brain injury as a hearing issue in order to seek additional testing to the brain (hopefully at the respondents' expense) in order to establish the existence of an organic brain injury supported by objective findings at some future hearing.

Since the compensability of the claimant's depression depends on the existence of objective findings of organic brain damage which are not present in this record, I am constrained to find that the claimant has failed to establish by a preponderance of the evidence that portion of Ark. Code Ann. § 11-9-113(a)(1) requiring that a mental injury be caused by a physical injury. Therefore, I am also constrained to find that the claimant has failed to establish that she sustained a compensable mental injury.

3. MRI/CAT scan for the head; additional medical for depression and for the head; unpaid medical bills of Dr. Vann Smith.

An injured employee is not required to establish that a compensable mental injury exists under Ark. Code Ann. § 11-9-113 in order to be entitled to a psychological evaluation by a licensed psychologist or psychiatrist at the

respondents' expense. To the contrary, a psychological evaluation may be reasonably necessary to determine whether or not an injured worker has sustained a compensable mental injury caused by his or her compensable physical injury. Terrell v. Arkansas Trucking Serv., Inc., 60 Ark. App. 93, 959 S.W.2d 70 (1998); Merry Nixon v. Hanna's, Full Workers' Compensation Commission, Opinion filed June 6, 2002 (F001921). Conversely, however, without an initial finding of compensability regarding the claimant's alleged organic brain injury, I cannot award either temporary disability or additional medical treatment for that alleged physical injury. Cross v. Magnolia Hosp. Reciprocal Group, 82 Ark. App. 406, 109 S.W.3d 145 (2003).

Consequently, since the claimant has not yet established that she sustained a compensable organic brain injury, and has instead reserved that issue, I find that I am without authority to direct the respondents to provide the claimant the MRI or CAT Scan to the brain that she seeks. Accord Stevenson v. Frolic Footwear, 70 Ark. App. 383, 20 S.W.3d 413 (2000). [Rejecting claimant's legal theory that "she should not be punished for the failure to provide additional objective medical evidence when the

purpose of the hearing is to determine her eligibility to receive funds to obtain that medical evidence"].

Since the medical evidence also does not indicate that the claimant ever experienced any persistent symptoms for the admittedly compensable contusion that she sustained on the back of the head, I also find that the claimant has failed to establish that any additional treatment for her compensable contusion injury would be reasonably necessary.

Finally, since the only compensable physical injury to the head accepted or established to date is the claimant's contusion injury, and since the claimant to date has not established the existence of her alleged organic brain injury to which Dr. Smith accords the abnormalities that he detected on neuropsychological testing, I find that I am without authority to direct the respondents to pay the cost of Dr. Smith's testing on this record. In addition, since the claimant has to date failed to establish that she sustained a compensable mental injury, I am without authority to direct the respondents to pay for future treatment of her depression, as she requests.

4. Compensation rate and alleged TTD underpayments.

I find that a preponderance of the credible evidence in the record establishes that the claimant's contract of hire

provided for the claimant to work 40 hours per week whenever work was made available to her. In this regard, Ms. Mefford explained the respondent-employer's hiring policy as follows:

Q. When you hire people, and I'm talking about in your experience before and after she worked there. It's my understanding you weren't there during the majority of the period that she was hired and you don't have personal knowledge, I'm assuming, of what her contract of hire was.

A. Right.

Q. In your experience as the store manager before you left and after you got back, you hire people, if I understood you correctly, 32 hours was considered full time for your store?

A. Yes, sir.

Q. If someone wanted to come to work for you and they said, I want to be a full time employee and I want to work 32 hours a week, but I don't want to work less than 32 hours a week, and I don't want to work more than 32 hours a week, would they have been guaranteed 32 hours a week? Do you understand my question?

A. No, not really.

Q. Okay, let's break it down. Let's say you explain to people, if I hire you full time, that means I'm guaranteeing you 32 hours a week.

A. Okay.

Q. Now let's say they come to you and they say, I want to work full time, I want to work 32 hours a week, but I don't want to work any more than 32 hours a week. Will you make that a condition of their employment?

A. I would probably tell them that I would have to put them down as part time because there are times when I need that full time person to work 40 hours a week. As a matter of fact, sometimes I need them to work more than 40 hours a week.

Q. Okay.

A. So I probably would make them do part time.

Q. Thank you.

In addition, Ms. Mefford testified that she understood that the employer's policies were not changed during her absence. Because Ms. Mefford was the store manager both shortly before and shortly after the claimant's hiring, I find relevant and admissible her testimony that this employer considers "full time" those employees who are guaranteed 32 hours per week. Clearly, however, this employer also expects its full time employees to work a 40-hour work week (or even more hours) when the respondent needs the employees to do so. Under these circumstances, the statute requires that the compensation rate be determined based on a full-time (i.e., 40 hour) work week. Ark. Code Ann. § 11-9-518(a)(1); Chapel Gardens Nursery v.

Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994).

Therefore, pursuant to claimant's Exhibit No. 2, I find that the claimant's average weekly wage was \$259.67. The respondents therefore underpaid the claimant's TTD benefits in 2001 and are directed to compensate the claimant in lump sum for that underpayment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The respondents have accepted liability for a contusion/bruise to the back of the claimant's head. (T. 25)

3. The respondents controvert additional benefits, including additional medical treatments, after June 15, 2001. (T. 24)

4. Dr. Smith and Dr. Brown are licensed psychologists. (T. 108)

5. The respondents did not timely raise the existence of a compensable back injury as a hearing issue.

6. The claimant has failed to prove by a preponderance of the evidence that any additional testing or treatment is reasonably necessary for her 2001 back injury.

7. The claimant has failed to establish that her depression was caused by a physical injury that arose out of and in the course of her employment. Specifically, the claimant failed to establish the existence and extent of her diagnosed organic brain injury with medical evidence supported by "objective findings."

8. Because the claimant has failed to establish her diagnosed organic brain injury with medical evidence supported by objective findings, and because the claimant has failed to establish that any additional medical treatment is reasonably necessary for her admittedly compensable contusion injury, I am without authority to direct the respondents to pay for an MRI/CAT scan for the head, to pay for treatment for the claimant's depression, to pay for treatment for her diagnosed brain injury, or to pay for the unpaid medical bills of Dr. Vann Smith.

9. The claimant's average weekly wage was \$259.67. The respondents are therefore liable for TTD underpayments in 2001 which were based on an incorrect average weekly wage.

AWARD

The respondents are directed to pay additional TTD compensation benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge