

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F313628

SHEILA LAMB, Employee	CLAIMANT
MURPHY OIL COMPANY, Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 17, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 17, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 24, 2004, and a pre-hearing order was filed on that same date. 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 December 23, 2003.
3. The claimant sustained a compensable injury to her shoulder on December 23, 2003.
4. The claimant was earning an average weekly wage of \$161.75 which would entitle her to a compensation rate of \$108.00 per week for temporary total disability benefits.

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

1. Compensability of injuries to neck and head on December 23, 2003.
2. Related medical.
3. Temporary total disability benefits from January 12, 2004 through a date yet to be determined.
4. Attorney fee.

The claimant's contentions as set forth in her pre-hearing questionnaire are as follows: "The claimant contends that as a result of the compensable injury sustained to her head on December 23, 2003 during and within the scope of her employment she is entitled to medical treatment. Her primary treating physician is Dr. Ralph Ingram of Sparks Preferred Medical Clinic. Dr. Ingram has referred claimant to Dr. Margaret Tremwel of Sparks Medical Foundation Neurology. The respondents have refused medical treatment and have terminated temporary total disability benefits. The claimant is entitled to temporary total disability benefits from the date of termination of benefits to a date yet to be determined. These benefits have been controverted in their entirety. The claimant is further entitled to medical expenses and treatment at the direction of Dr. Ralph Ingram."

The respondent's contentions as set forth in its pre-hearing questionnaire are as follows: "The claimant has no objective medical findings of a neck or head injury. She had some objective findings regarding a minor shoulder injury but all of the tests have been normal. She was treated and released on January 12, 2004 to return to full duties. She is not entitled to additional temporary total disability and further treatment is not reasonable or necessary."

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 March 24, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her cervical spine as a result of the incident on December 23, 2003.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head as a result of the incident which occurred on December 23, 2003.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable head injury.

5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning January 12, 2004 and continuing through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 29-year-old woman with a 12th grade education who worked for the respondent as a cashier at one of its gas stations located on a Wal-Mart parking lot. Claimant testified that in addition to normal cashier duties, she was also responsible for stocking soft drinks and cigarettes; emptying trash; and cleaning bathrooms.

On December 23, 2003, the claimant was apparently in the process of stocking a storage bin with 20-ounce soft drinks. The storage bin had a double folding metal door on top of the bin which had a broken or bent latch. As claimant was attempting to stock

the storage bin the metal door fell down and struck her in the head causing her to fall to the ground. Randy Barentine, a customer pumping gas at the time, testified that he heard a loud bang and looked up to see the claimant in the air going backwards. Barentine testified that he saw the back of claimant's head hit the concrete and bounce some three or four inches in the air before falling back down. According to Barentine he ran to the claimant who was unresponsive. Paramedics were eventually called and claimant was taken to the emergency room.

At the emergency room claimant was complaining of pain in her head, neck, and shoulder. Following her treatment at the emergency room claimant came under the care of Dr. Ingram who diagnosed claimant as suffering from a concussion with contusion to the occipital scalp; a contusion to the right shoulder; and a cervical spine strain. Claimant has continued to receive care from Dr. Ingram. In addition, claimant was also evaluated by Dr. Griggs, a neurologist.

Respondent accepted as compensable an injury to the claimant's right shoulder as a result of the incident on December 23, 2003. However, respondent has denied liability for injuries to claimant's neck and head. Claimant has filed this claim contending that she suffered compensable injuries to her neck and head as a result of the accident on December 23, 2003. She seeks payment of related medical benefits as well as temporary total disability benefits from January 12, 2004 through a date yet to be determined.

ADJUDICATION

Claimant contends that she suffered compensable injuries to her neck and head as a result of the accident which occurred on December 23, 2003. Therefore, claimant's claim is for a specific incident 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 failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her neck. I also find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head on December 23, 2003.

With respect to claimant's neck injury, I note that one of the elements of compensability requires medical evidence supported by objective findings establishing an injury. My review of the evidence presented fails to reveal objective findings establishing an injury to claimant's neck. As previously noted, claimant initially sought medical treatment from the emergency room on December 23, 2003, at which time she was complaining of pain in her head, neck, and shoulder. As a result, a CT scan of the claimant's cervical spine was ordered at that time. Other than some findings related to a sinus condition, the CT scan of the claimant's cervical spine was normal. Furthermore, the remaining medical records are also devoid of any objective findings establishing an injury to the claimant's neck or cervical spine. Accordingly, based upon a lack of objective findings establishing an injury to the claimant's neck or cervical spine, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she

suffered a compensable injury to her neck on December 23, 2003.

I do find however that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head on December 23, 2003. Initially, I note that there appears to be no question that this incident occurred on December 23, 2003, as evidenced by the respondents accepting as compensable an injury to claimant's shoulder as a result of the accident on that date. Nevertheless, even if that were not the case, I would still find that claimant has met her burden of proving by a preponderance of the evidence that an injury to her head arose out of and in the course of her employment with respondent and that she has offered proof by a preponderance of the evidence that the injury was caused by a specific incident identifiable by time and place of occurrence. This finding is based upon the testimony of the claimant which I find to be credible as well as the testimony of Randy Barentine, a customer who observed the claimant falling to the ground and striking her head on the concrete.

The primary issue regarding the compensability of an injury to claimant's head involves objective findings. Respondent contends that there are no objective medical findings of an injury to the claimant's head.

With respect to this issue, I do agree that objective testing has been negative. Claimant has undergone a CT scan of her head, an EEG, and a brain stem auditory evoked response test. All of those tests have returned normal. However, the day after this incident the claimant sought medical treatment from Dr. Ingram. Dr. Ingram's medical report of that date contains the following with respect to his evaluation of the claimant's head and scalp area: "I can see no discoloration and can feel only slight swelling." (Emphasis added.) Swelling is an objective finding which is not within the voluntary control of the patient. While the swelling observed by Dr. Ingram was only "slight," the statute does not require any specific level of objective findings. Instead, the statute only requires that there be objective findings which are defined as findings which cannot come under the

voluntary control of the patient. I find that this swelling though described by Dr. Ingram as “slight” is sufficient to establish an injury to the claimant’s head.

I also find based upon the medical reports that this injury to claimant’s head caused internal or external physical harm to her body which required medical services or resulted in disability. As a result of this injury to claimant’s head she was in need of medical treatment from the emergency room and has remained under the care of Dr. Ingram. In addition, claimant has also received medical treatment from Dr. Griggs, a neurologist.

In reaching this decision, I am aware that claimant underwent an evaluation by Dr. Griggs, a neurologist. After performing an EEG and brain stem auditory test on the claimant, Dr. Griggs stated in his report of January 12, 2004 that he could not find anything organically wrong with the claimant. However, Dr. Griggs did not opine that claimant had not suffered an injury to her head.

Accordingly, for the foregoing reasons, I find that the credible evidence of record establishes that claimant suffered a compensable injury to her head as a result of the accident which occurred while working for respondent on December 23, 2003. As a result, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant’s compensable head injury.

The next issue for consideration involves claimant’s request for temporary total disability benefits beginning January 12, 2004 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits for an unscheduled injury, 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).

After claimant’s initial treatment at the emergency room she was evaluated by Dr. Ingram beginning on December 24, 2003. At that time Dr. Ingram diagnosed claimant’s

head condition as a concussion with contusion to the occipital scalp. Dr. Ingram prescribed medications and scheduled a follow-up appointment for December 30, 2003.

On December 30 Dr. Ingram noted that claimant was complaining of post-concussion headaches associated with nausea if she moved too fast. He also noted that claimant was complaining of forgetfulness. Dr. Ingram extended claimant's medical leave from work for two more weeks with a follow-up appointment scheduled for January 14, 2004.

Prior to the January 14, 2004 follow-up appointment with Dr. Ingram claimant was evaluated by Dr. Griggs, a neurologist. It is unclear who precipitated this appointment. Claimant's husband, Tim Lamb, testified that the claimant precipitated the visit with Dr. Griggs because Dr. Griggs was a friend of Tim Lamb's stepfather. On the other hand, Dr. Griggs' medical report indicates that claimant was referred to him by Dr. Ingram. However, Dr. Ingram's medical report indicates that the evaluation by Dr. Griggs was at the behest of the workers' compensation carrier.

Regardless of how the claimant came to see Dr. Griggs, she did undergo an evaluation on January 12, 2004 at which time Dr. Griggs diagnosed claimant as suffering from post-traumatic headaches and dizziness. As a result, he ordered additional testing, consisting in part of an EEG and a brain stem auditory test. Both of those tests returned as normal. In his report of that date Dr. Griggs went on to state that he was not certain of a prognosis for the claimant; that he could not find anything organically wrong with the claimant although he was certain she did have some aches and pains as a result of her injury; and that there might be a psychiatric component to her condition. Dr. Griggs went on to state that he believed the claimant could return to work with limited duties which did not require lifting more than 25 pounds and which allowed her to sit most of the day instead of being on her feet.

Claimant testified that following her release by Dr. Griggs she contacted the respondent about returning to work. However, claimant testified that she was told by

respondent that she could not sit most of the day as limited by Dr. Griggs. Instead, respondent informed her that she would have to continue performing the outside job activities.

Following her evaluation by Dr. Griggs claimant returned to see Dr. Ingram on January 14, 2004. Dr. Ingram noted that there had been no improvement in the claimant's post-concussion headaches. At the time of that visit Dr. Ingram continued to prescribe medication and also completed a slip indicating that claimant should remain off work until January 28, 2004. At the time of his evaluation on January 28, 2004, Dr. Ingram noted that claimant continued to have headaches and recommended that claimant be seen by Dr. Tremwel for a second neurological opinion. He also extended claimant's medical leave for an additional two weeks until February 11, 2004.

Claimant testified that she did not undergo the second neurological evaluation by Dr. Tremwel because it was not approved by the respondent. As a result, claimant returned to Dr. Ingram on February 11, 2004. At that time Dr. Ingram completed an off-work slip indicating that claimant should remain off work from February 11, 2004 through February 25, 2004. This is the last medical report of Dr. Ingram.

Initially, I find based upon the medical evidence presented, particularly the medical evidence of Dr. Ingram, that claimant has remained within her healing period and that she is in need of additional medical treatment. Specifically, Dr. Ingram has opined that claimant should undergo a second neurological evaluation. Accordingly, I find that claimant has met her burden of proving by a preponderance of the evidence that she remains within her healing period.

I also find that claimant has met her burden of proving by a preponderance of the evidence that she continues to suffer a total incapacity to earn wages. During his treatment Dr. Ingram has completed off-work slips indicating that claimant should remain off work. The last off-work slip completed by Dr. Ingram indicates that claimant should

remain off work from February 11, 2004 through February 25, 2004. Obviously, Dr. Ingram's last off-work slip could be interpreted as reflecting his opinion that claimant no longer suffered a total incapacity to earn wages subsequent to February 25, 2004. However, based upon the totality of the evidence presented in this case, I do not make such a finding. First, the evidence indicates that instead of simply taking claimant off work for an indefinite period of time, Dr. Ingram completed new off-work slips each time he evaluated the claimant. These were generally for a two-week period of time. Although the last off-work slip indicates that claimant should remain off work through February 25, 2004, Dr. Ingram did not author a medical report indicating that claimant could return to work after that date. This is significant under these circumstances given claimant's testimony that she has continued to be evaluated by Dr. Ingram and her testimony that she has not been released by Dr. Ingram to return to work.

Furthermore, and just as importantly, I would find based upon the testimony of the witnesses who I find to be credible and entitled to great weight that claimant continues to suffer a total incapacity to earn wages. The claimant testified that her cognitive skills are limited. She testified that she has difficulty adding and subtracting and can no longer handle the family check book. Claimant testified that she requires daily assistance from her sister and mother to perform normal household duties including care of her child and shopping. Claimant testified that she suffers from headaches every day and blacks out approximately two times a month.

Also testifying at the hearing was Tim Lamb, the claimant's husband. Lamb testified that he has seen the claimant pass out some four to five times. Lamb also confirmed that claimant can no longer keep the family check book or go shopping. He also testified that claimant is not able to drive a car. Finally, Sherry Holloway, the claimant's sister, testified that she had observed the claimant black out on one occasion. Holloway testified that claimant has difficulty functioning on a day-to-day basis; that she

gets confused easily; and that she gets headaches. Specifically, Holloway testified that claimant was not capable of performing a job with respondent exchanging money.

Accordingly, even if Dr. Ingram's last off-work slip were interpreted as his opinion that claimant could return to work as of February 25, 2004, I find that the remaining evidence in the form of the testimony of claimant, the claimant's husband, and claimant's sister is credible and entitled to greater weight. Based upon this evidence I find that claimant has continued to suffer a total incapacity to earn wages since January 12, 2004.

It should be noted that during the hearing claimant requested an opportunity to submit additional medical records. Following an objection by the respondent I denied that motion. Following the hearing, claimant did in fact proffer medical records with a treatment date of April 21, 2004. Acting on my instructions, my administrative assistant placed those proffered exhibits in a sealed envelope and they have not been reviewed or considered by me in reaching this decision.

Accordingly, for the foregoing reasons, I find that claimant is entitled to temporary total disability benefits beginning January 12, 2004 and continuing through a date yet to be determined.

AWARD

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her neck or cervical spine on December 23, 2003. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her head while working for respondent on December 23, 2003. Claimant is entitled to payment for all reasonable and necessary medical expenses provided in connection with her compensable head injury. Claimant has also met her burden of proving that she is entitled to temporary total disability benefits beginning January 12, 2004 and continuing through a date to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity 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