

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201831

MARIEANNEAI R. LEARY, EMPLOYEE	CLAIMANT
BONANZA, EMPLOYER	RESPONDENT
HARLEYSVILLE MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 3, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on February 6, 2004, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Amy S. Huffman, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted February 6, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on January 21, 2004, and a Prehearing Order was filed on said date. At the prehearing conference, the parties stipulated that the employee/employer/carrier relationship existed at all relevant times during January, 2002, and that the claim had been controverted in its entirety. At the hearing, the parties agreed that, in the event claimant sustained a compensable injury, she earned sufficient wages to entitle her to compensation benefits at the rate of \$112.00

per week for both temporary total disability and permanent partial disability.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be determined.

During the prehearing conference, claimant contended, in summary, that she sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on or about January 20, 2002; that respondents should be held responsible for all medical and related treatment; that she was entitled to temporary total disability from the date of her injury and continuing through August 17, 2002; that she was entitled to permanent impairment benefits based upon a ten percent (10%) whole body impairment assigned by Dr. Kenneth Toneymon; and that a controverted attorney's fee should attach to any benefits awarded. Claimant specifically reserved the issue of wage-loss disability, if any. At the within hearing, claimant amended her contentions to request temporary total disability beginning February 6, 2002, and continuing through August 19, 2002.

The respondents contended that the claimant could not prove an accidental injury caused by a specific incident and identifiable by time and place of occurrence which caused internal or external, physical harm to the claimant's back, arising out of and in the course of employment, which required medical services or resulted in disability and established by medical evidence supported

by objective findings.

In addition to the claimant, Mardell Sexton was called as a witness in her behalf. John Harbin was called as a witness for the respondents. The record is composed solely of the transcript of February 6, 2004, hearing containing numerous exhibits, together with the evidentiary deposition of Dr. Kenneth Toneymon which was introduced as "Claimant's Exhibit 1" and retained in the Commission file in bound form.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On or about January 20, 2002, the claimant sustained a compensable back injury as the result of a specific incident identifiable in time and place of occurrence which arose out of and during the course of her employment with Bonanza, and which caused internal, physical harm to the claimant's back, requiring medical services and resulting in disability which has been established by medical evidence supported by objective

findings.

3. At the time of the admitted, specific incident, the claimant earned sufficient wages to entitle her to compensation rates of \$112.00 per week for both temporary total disability and permanent partial disability benefits.
4. Respondents are responsible for all outstanding hospital, medical and related treatment, and respondents remain responsible for continued, reasonably necessary medical treatment.
5. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability benefits for the period beginning February 6, 2002, and continuing through August 19, 2002. The claimant's healing period ended August 19, 2002.
6. The claimant sustained a ten percent (10%) whole body impairment as the result of her compensable injury and subsequent low back surgery.
7. The claimant has specifically reserved the issue of wage-loss disability, if any.
8. Respondents have controverted this claim in its entirety.

DISCUSSION

_____The relevant facts in this case are basically undisputed. The claimant, Marieanneai Ruth Leary, was employed by the respondent, Bonanza, at the Forrest City restaurant for more than eight (8) years prior to January 20, 2002.

The claimant was employed as a waitress, her duties consisting basically of waiting on customers, serving food and bussing tables. It is undisputed that a work-related incident occurred on or about Sunday, January 20, 2002. On that date, the claimant was on her way to pick up a food order when she slipped on some ice cream on the floor, wrenching her low back. The incident was witnessed by a co-worker, Mardell Marie Sexton. The incident was immediately reported to the claimant's immediate supervisor and restaurant manager, John Harbin. No incident report was filled out at the time because the claimant did not believe that she had sustained a significant injury. Mr. Harbin acknowledged that there was no dispute that the incident occurred which was confirmed at the time by Ms. Sexton. (Tr.57)

The record reflects that the claimant did not immediately seek medical treatment. However, the claimant's co-worker, Ms. Sexton, testified that the claimant initially stated that she was feeling fine following the incident while, at the same time, acknowledging that later on the same day of the incident, the claimant reported that her back was hurting. (Tr.35-36)

The record reflects that the claimant initially sought medical treatment at the White River Rural Health Center on January 29, 2002, at which time she attributed her back pain to possible kidney infection which the claimant had apparently experienced in the past. The claimant maintained that her back pain grew progressively worse and that she subsequently began experiencing

tingling in her buttocks and legs, at which time she returned to the White River Rural Health Center on or about February 5, 2002, at which time an MRI of the lumbar spine showed a moderate to large herniated disc at L5-S1 and the claimant was referred to Dr. Kenneth Toneymon, a neurosurgeon in Jonesboro, Arkansas. Dr. Toneymon immediately took the claimant off work. The claimant subsequently underwent low back surgery. The claimant was released to return to work by Dr. Toneymon on August 19, 2002. The claimant never returned to work for the employer herein. She subsequently went to work at the Dollar General Store where she was gainfully employed at the time of the hearing.

The claimant specifically denied experiencing any back problems before January 20, 2002. She also denied any independent intervening cause for her back injury and resulting surgery, and, in fact, there is no evidence of any injury outside the workplace.

The record reflects that respondents controverted this claim in part because of inconsistencies in the alleged date of injury, specifically, incident reports reflecting two (2) different dates, one reflecting date of injury of January 20, 2002, and another on January 27, 2002, which was apparently a date that the claimant did not work.

John Harbin was called as a witness by the respondents. Based upon my observations, Mr. Harbin had poor recall of any specific dates. Again, he did

not document the incident at the time of its admitted occurrence. Mr. Harbin candidly acknowledged that he wrote January 27, 2002, rather than January 20, 2002, as the injury date because that date had been suggested by his supervisor. He further stated that the injury was specifically reported to him on February 5, 2002, but forms were not filled out until February 13, 2002, when the insurance company sent appropriate forms to be filed. Again, Mr. Harbin admitted an incident had been reported to him on the earlier, undocumented date.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. *Arkansas Code Annotated §11-9-704(c)(4)*; *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App.

196, 737 S.W.2d 663 (1987).

When a claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation, the Commission may find the existence of the causal connection. *Hall vs. Pittman Construction Company*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Company vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974). The claimant's credible testimony, together with the testimony of her corroborating witness, as well as the treating surgeon clearly establishes the causal connection. *Kearby vs. Yarborough Brothers Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970); *Exxon Corporation vs. Flemming*, 253 Ark. 798, 489 S.W.2d 766 (1973).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven, by a preponderance of the credible evidence, that she sustained a compensable injury as the result of a specific event identifiable in time and place of occurrence on or about January 20, 2002. The period of claimant's total disability, as well as her ten percent (10%) whole body impairment is undisputed. Accordingly, I hereby make the following:

AWARD

Respondent, Harleysville Mutual Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the

rate of \$112.00 per week beginning February 6, 2002, and continuing through August 19, 2002.

All benefits having accrued, respondent is to pay same in lump sum and without discount.

Respondents are further directed and ordered to pay, to the claimant, permanent impairment benefits at the rate of \$112.00 per week beginning August 20, 2002, and continuing for 45 weeks, representing a permanent impairment of ten percent (10%) to the body as a whole as assessed by Dr. Kenneth Toneymon.

Permanent disability benefits having accrued, respondents shall pay same in lump sum and without discount.

Respondents are further directed and ordered to pay all outstanding hospital, medical and related expenses pursuant to the cost containment guidelines established by Commission Rule 30, and respondents remain responsible for continued, reasonably necessary medical treatment.

Claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715; *Coleman vs. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and *Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc.*, Arkansas Workers' Compensation Claim #E019760, (March 5, 1992).

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge