

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214541

SHIRLEY LEMMING	CLAIMANT
WAL MART STORES, INC. SELF INSURED	RESPONDENT
CLAIMS MANAGEMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 4, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by BOYCE DAVIS, Attorney, Lincoln, Arkansas.

Respondents represented by DAVID WALL, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 5, 2004, in Springdale, Arkansas. A pre-hearing order was previously entered in this case on March 9, 2004. This pre-hearing 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 pre-hearing order was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, including December 13, 2002, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$133.00 for total disability and \$133.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. Whether the claimant sustained a compensable injury to her mid back or thoracic spine on December 13, 2002.
2. The claimant's entitlement to the payment of medical expenses, temporary

total disability benefits from December 26, 2002 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends that she is entitled to additional medical benefits. The claimant contends that she is entitled to temporary total disability since her date of injury. The claimant contends she has sustained some permanent disability.

In regard to these issues, the respondents contend that while the claimant did report an incident which occurred on December 13, 2002, said incident did not amount to a compensable injury as it is defined under Arkansas law. Upon receipt of the claimant's report of injury, medical treatment was provided through December 23, 2002, when it was determined that the claimant did not sustain a compensable injury. Medical benefits were terminated at that point in time. The respondents deny the claimant's entitlement to any other workers' compensation benefits.

DISCUSSION

_____The initial issue in this case is the question of whether the claimant sustained a "compensable injury" to her mid back or thoracic spine on December 13, 2002. The burden rests upon the claimant to prove the occurrence of this alleged compensable injury.

In order to meet this burden, the claimant must first prove, by medical evidence that is supported by "objective findings", the actual existence of the physical injury or condition involving her mid back or thoracic spine alleged to be compensable, Ark. Code Ann. §11-9-102(4)(D). To accomplish this purpose, the claimant has introduced medical reports and records from the Arkansas Occupational Health Clinic (the respondent's company physicians).

The reports and records from this facility show that on December 16, 2002, the claimant was diagnosed as having experienced a musculoskeletal injury to her mid back

or thoracic spine. It is further apparent from these medical reports and records that the diagnosis of the existence of this physical injury is based not only on the claimant's history and subjective complaints, but is also supported by "objective findings" that were repeatedly noted on physical examination. In his report of December 16, 2002, Max Beasley (a certified nurse practitioner at the Arkansas Occupational Health Clinic), noted the observation of "tightness" over the left paravertebral thoracic area. In his report of December 23, 2002, Mr. Beasley observed "mild spasm" of the musculature in the claimant's intrascapular area on physical examination.

I find that the medical evidence is sufficient to "establish" the actual existence of a physical injury to the claimant's mid back or thoracic spine and that the existence of this physical injury is supported by the independent observation of physical findings beyond the claimant's voluntary control ("objective findings"). Thus, the claimant has satisfied the initial requirement of Ark. Code Ann. §11-9-102(4)(D).

As the claimant contends that this physical injury was caused by a "specific incident", she must next prove that this physical injury satisfies the definitional requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury must arise out of and occur in the course of the employment.
- (2) The physical injury must be caused by a specific incident.
- (3) The physical injury must be identifiable by time and place of occurrence.
- (4) The physical injury must cause internal or external physical harm to the claimant's body
- (5) The physical injury must require medical services or result in disability.

Should the claimant fail to prove even one of these definitional requirements, then any physical injury she may have experienced to her mid back or thoracic spine would not represent a "compensable injury", within the meaning of the Act.

In order to meet the first three of these definitional requirements, the claimant must prove the likely existence of a causal relationship between the medically established and objectively supported physical injury to her mid back or thoracic spine and a specific employment related incident that occurred while she was performing her assigned employment duties. However, she need not prove the existence of this relationship to an absolute certainty. Nor is it necessary to prove this relationship by medical evidence.

In this regard, the only direct evidence presented by the claimant to prove the existence of such a relationship is her own testimony. Clearly, the testimony of a party is never considered uncontradicted. However, this does not mean that such testimony can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address.

The claimant testified that on December 13, 2002, she was assigned to take 40 pound boxes of pastry dough from the bottom shelf and place them on the top shelf of a walk in cooler. In order to perform this task, she was required to stand on a ladder, take these boxes of dough from a co-employee, and then “heave” or “throw” the boxes onto the top shelf. While performing this activity, one of the boxes slipped back off the top shelf and fell toward her. She stated that she was able to catch this box against her chest and prevented it from falling to the floor. She described the immediate onset of a painful burning sensation in her upper to mid back, slightly above the area of her bra strap, and pain in her chest, where the box had struck. She testified that she mentioned these difficulties to the co-employee, who was assisting her at the time. However, as this incident occurred toward the end of the work day, she completed her shift and went home. The following morning, she continued to experience difficulties and reported the incident and injury to the head of her department (the bakery department) and to Jimmy Johnson, one of the assistant store managers. An incident report was completed, and she was sent to the company physicians at the Arkansas Occupational Health Clinic. However, it

appears that the claimant was never seen by any of these physicians at this facility, but was rather only seen and treated by Mr. Beasley. Finally, the claimant testified that she had never experienced any difficulties with her mid back/thoracic spine or her chest prior to this incident.

Clearly, the claimant's testimony is legally competent to prove the occurrence of a specific employment related incident on December 13, 2002. Her testimony is also legally competent to establish the existence of a reasonably close temporal relationship between this incident and the onset of her symptoms and difficulties indicative of the occurrence of a physical injury to her mid back or thoracic spine. Finally, her testimony is competent to prove that she had not experienced similar symptoms or problems prior to the incident. The claimant's description of the employment related incident and her description of the immediate onset of mid back or thoracic difficulties, which she gave in her testimony, coincides with the history she related to her medical provider. Her testimony that she reported this incident within a reasonable time after its occurrence is not denied or refuted by any evidence presented by the respondent. Clearly, she was sent by the respondent to the company physicians within three days following the occurrence of the employment related incident and onset of her symptoms. There is also no evidence presented of any pre-existing conditions, difficulties, or complaints involving the claimant's mid back or thoracic spine.

It is therefore my opinion that the claimant has proven the existence of a causal relationship between the employment related incident on December 13, 2002 and her medically diagnosed and objectively documented injury to her mid back or thoracic spine. Based upon the credible evidence presented, this injury occurred within a reasonable period of time following the incident, is locally attributable to the described incident, and there is no other reasonable explanation for such an injury, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2nd 263(1962). Thus, the claimant has proven that the

medically diagnosed injury to her mid back or thoracic spine arose out of and occurred in the course of her employment, was caused by a specific incident, and is identifiable by time and place of occurrence. This satisfies the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

Clearly, Mr. Beasley diagnosed the presence of a physical injury or damage to the musculature of the claimant's mid back or thoracic spine. As previously noted, the existence of this physical injury or damage is not only supported by the claimant's subjective complaints, but is also supported by objective findings noted by Mr. Beasley on his physical examinations. The presence of muscle spasms is sufficient in and of itself, to prove that this injury caused internal physical harm to the claimant's body.

It is equally apparent that it was Mr. Beasley's expert medical opinion that this injury required medical services in the form of oral medications, injections, physical therapy, and avoiding stress and activity involving this portion of the claimant's anatomy. It is also apparent that it was Mr. Beasley's opinion that this injury had, at least temporarily, the claimant was unable to lift more than 20 pounds, reach, and stand, walk, or sit for prolonged periods. Thus, she would be effectively disabled from engaging in her pre-injury employment positions or any other employment position requiring activities at least on a temporary basis. This evidence is sufficient to prove that the claimant's physical injury on December 13, 2002, required medical service and resulted in disability. Thus, the claimant has satisfied the final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

Thus, I find that the claimant has proven by the greater weight of the credible evidence that on December 13, 2002, she sustained a "compensable injury" to her mid back or thoracic spine. It therefore becomes necessary to determine the nature and extent of benefits to which the claimant is entitled under the Act for this compensable injury.

Ark. Code Ann. §11-9-508 entitles the claimant to "reasonably necessary medical services" for her compensable injury. As previously noted, the respondent initially provided

the claimant with medical services at the Arkansas Occupational Health Clinic. Apparently, the expense of these services has already been paid or taken care of by the respondent. However, I would note that these services would meet the criteria for reasonably necessary medical services under Ark. Code Ann. §11-9-508. Thus, the expense of these services would be the liability of the respondent.

It is apparent from the reports and records of the nurse practitioner, who evaluated the claimant from this facility, that the claimant was in need of continuing medical services after December 23, 2002. At the time of the claimant's last visit on that date, Mr. Beasley (the nurse practitioner) unequivocally recommends additional medical services. The evidence reveals that due to the respondent's refusal to provide such services and the claimant's financial inability to obtain those services elsewhere, these recommended medical services have never been provided.

I recognize that in the claimant's testimony, she complained of a multitude of symptoms, which she personally attributes to her employment related injury. These include not only the continuing pain in her mid back or thoracic spine, but also numbness of her arms (primarily her right arm), numbness in her legs, and severe headaches. It is difficult to conceive that some of these symptoms could, in any way, be the compensable injury to the claimant's mid back or thoracic spine. However, this would not prevent the claimant from being entitled to reasonably necessary medical services in the form of both a medically appropriate evaluation and treatment for at least the complaints and symptoms which would be reasonably and logically attributable to her injury.

I further recognize that the type of injury diagnosed by Mr. Beasley would not be reasonably expected to continue for a year and half following its occurrence. Generally, musculoskeletal injuries of this type would reasonably be expected to have resolved within a period of a few weeks or months. However, the medical evidence raises some question as to whether the claimant had an opportunity to receive sufficient medical evaluation and

testing to reasonably ascertain the nature and extent of her injury. In fact, the evidence shows that the claimant has never even been seen by an actual licensed physician.

The evidence further reveals that the treatment actually recommended was prematurely terminated. Clearly, this could logically result in delaying the resolution of the claimant's symptoms and her recovery from her injury.

It is my opinion that a medical evaluation of the claimant, by an appropriate licensed physician with expertise in the area associated with the injuries to the back or spine, is reasonably necessary, within the meaning of Ark. Code Ann. §11-9-508. Any decision concerning the claimant's entitlement to additional medical services and treatment is reserved until after this evaluation can be performed and further information can be obtained concerning the nature and extent of the claimant's compensable injury and her current need for medical services. At this point, I would request the parties to make an attempt to agree on the appropriate medical provider of these services. If such agreement cannot be obtained, then an appropriate medical provider will be selected by this Commission.

The final issue concerns the claimant's entitlement to temporary total disability benefits from December 26, 2002 through a date yet to be determined. In regard to this issue, the burden rests upon the claimant to prove two necessary facts. First, she must prove that she has continued within her healing period from the effects of the compensable injury since December 26, 2002. Secondly, she must prove that she has been rendered totally disabled from performing all forms of regular gainful employment, for which she was otherwise qualified, as the result of the effects of this compensable injury.

Clearly, based upon the current medical evidence presented, the claimant continued within her healing period at the time she was last seen by Mr. Beasley on December 23, 2002. It was also apparent that it was Mr. Beasley's expert opinion that this healing period would continue for some time after December 23, 2002. I would also note that this opinion

of Mr. Beasley is supported by his observation of mild muscle spasms in the claimant's mid back or thoracic spine at the time of the December 23, 2002 visit.

The claimant's testimony would support the conclusion that she has continued within her healing period from the effects of her compensable injury since that date. However, the issue of the duration of the healing period is essentially a medical question, and its resolution should properly be based upon expert medical evidence. In the present case, the respondent's termination of the claimant's treatment and the claimant's financial inability to obtain such treatment or medical services elsewhere, makes it impossible to resolve this issue in an informed manner that would be fair to all parties concerned. Thus, it is my opinion that this issue should also be reserved for determination following the previously discussed medical evaluation.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 13, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On December 13, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$133.00 for both total disability and permanent partial disability.
4. The claimant has proven by the greater weight of the credible evidence that she sustained a "compensable injury" to her mid back or thoracic spine on December 13, 2002. Specifically, she has proven by the greater weight of the credible evidence the occurrence of a physical injury to this portion of her body that is "established by medical evidence", that is supported by objective findings, that arose out of and occurred in the course of the claimant's employment, that was caused by a specific incident, and that is identifiable

by time and place of occurrence, that caused internal physical harm to the claimant's body, and that required medical services and resulted in disability (at least, temporarily).

5. The medical services provided the claimant for her compensable injury by and at the direction of personnel at the Arkansas Occupational Health Clinic represents reasonably necessary medical services for the claimant's compensable injury. Thus, the expense of such services rests upon the respondents herein. The greater weight of the credible evidence presented proves that (at least) a medical evaluation of the claimant by an appropriate licensed physician, with expertise in the area of medicine associated with injuries such as that experienced by the claimant, also represents reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508. Thus, respondents are liable for the expenses of such an evaluation. Any ruling on the claimant's entitlement to additional medical services is reserved until this evaluation is completed and all necessary information, sufficient to allow an informed decision that would be fair to all parties concerned, has been obtained.
6. The claimant has proven by the greater weight of the credible evidence that she was rendered temporarily totally disabled as a result of the effects of her compensable injury for the period beginning December 26, 2002 and continuing through at least December 30, 2002. Any opinion on the claimant's temporary total disability after December 30, 2002 should be reserved for future determination, after the claimant has undergone the medical evaluation hereinafter directed.
7. The respondents have denied the occurrence of any compensable injury to the claimant's mid back or thoracic spine and have controverted this claim

its entirety.

8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all benefits herein awarded to the claimant or which may hereinafter be awarded to the claimant for her compensable injury of December 13, 2002.

ORDER

The claimant is directed to undergo, at the respondents expense, an examination or evaluation by a licensed physician, mutually agreed upon by the parties or appointed by this Commission. This evaluation is to be conducted at the earliest convenient date.

The respondents are also liable for the expense of the medical services provided to the claimant for her compensable mid back or thoracic spine injury by personnel at the Arkansas Occupational Health Clinic. Such liability is subject to the medical fee schedule established by this Commission. The respondents are also entitled to credit for all such benefits previously paid.

Any decision concerning the claimant's entitlement to temporary total disability benefits after December 30, 2002, and her entitlement to additional medical expenses, other than those herein addressed, is reserved for future determination following the conclusion of the medical examination and evaluation herein ordered.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

