

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E911072/F100246

TAMMY MCCULLOUGH, Employee	CLAIMANT
FAMILY DOLLARS, Employer	RESPONDENT
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 15, 2004

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

Claimant represented by R. GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 10, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 18, 2004, and a pre-hearing order was filed on February 19, 2004. 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 claimant sustained a compensable injury to her low back on April 3, 2000.

At the time of the hearing the parties clarified the stipulation regarding claimant's compensable low back injury. The parties clarified that respondent had accepted a compensable low back injury occurring on June 21, 1999, not April 3, 2000.

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

1. Compensation rate.
2. Unpaid medical.
3. Compensability of left lower leg condition.
4. Attorney fee.

At the beginning of the hearing the parties indicated that they were not aware of any unpaid medical benefits. Indeed, respondent stated that it was not controverting any medical treatment related to claimant's compensable low back injury. However, during claimant's testimony she indicated that some prescription medication was not being accepted and paid for in a timely manner. Also added as an issue at the time of the hearing is whether claimant suffered a compensable injury to her low back in April 2000.

The claimant contends that she suffered a new injury to her low back in April 2000 and that her correct compensation rate is \$266.00, not \$153.00. Claimant also contends she has unpaid medical bills relating to her back injury. Finally, claimant contends that her left lower leg condition is a compensable consequence of her back injury.

The respondents contend that claimant's compensation rate was stipulated at \$153.00 and was affirmed in both the opinion of the administrative law judge and the Full Commission. Respondents contend that claimant did not suffer a new injury in April 2000 and that her left lower leg condition is not causally related to her compensable injury.

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 witness and to observe her 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 Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Claimant sustained a compensable injury to her low back on June 21, 1999.
3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back in April 2000.
4. Having failed to prove by a preponderance of the evidence that she suffered a

compensable injury to her low back in April 2000, claimant's compensation rate is the previously stipulated amount of \$153.00 per week with respect to her June 21, 1999 compensable injury.

5. Respondent remains liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable back injury of June 21, 1999. This includes payment for prescription medication.

6. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left lower extremity while employed by respondent.

FACTUAL BACKGROUND

This claim has been the subject of a prior hearing and opinions by myself and the Full Commission. A prior hearing was conducted on August 23, 2002 at which time the parties stipulated that claimant had suffered a compensable injury to her back on June 21, 1999 for which she was entitled to compensation at the rate of \$153.00 per week. The issue at the time of that hearing was whether claimant was entitled to additional temporary total disability benefits. In an opinion filed August 23, 2002, I found that claimant had met her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits beginning August 26, 2000 and continuing through a date yet to be determined. That opinion was appealed by respondent to the Full Commission which in an opinion filed May 22, 2003, affirmed the finding that claimant was entitled to temporary total disability from August 26, 2000 through a date yet to be determined.

Claimant has now filed this claim contending that she suffered a compensable injury to her low back in April 2000 which would entitle her to a greater compensation rate than that to which the parties previously stipulated. Claimant also contends that she has suffered a compensable injury to her left lower extremity; specifically, her left foot. Finally, claimant testified that she was having difficulty obtaining prescription medication.

ADJUDICATION

APRIL 2000 INJURY.

The initial issue for consideration involves the claimant's contention that she suffered a new injury to her low back in April 2000. 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 new injury in April 2000 either in the form of a specific injury or a gradual onset injury. A review of claimant's testimony reveals that she did not recall any specific injury occurring in April 2000. Instead, claimant testified that she simply continued to have back problems as a result of the 1999 low back injury. In April 2000 claimant wanted to receive additional medical treatment for those back problems and was informed that her claim had been closed and that a new claim needed to be filed. Apparently, this is where the April 2000 injury date originated. I also note that the medical evidence does not reflect claimant reporting a new injury to her treating physicians.

I find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back in April 2000. Claimant testified that she did not recall any specific injury in April 2000. Instead, claimant testified that she simply continued to have additional back problems resulting from her injury in 1999. In addition, the medical evidence does not indicate that claimant reported a new injury to her treating physicians. Apparently, the April 2000 injury date resulted from a new claim being filed after her prior claim was closed by the carrier. However, this does not constitute a new injury. Accordingly, I find that claimant has failed to meet her burden of proof. Instead, I find that claimant's back problems subsequent to that date were a continuation or recurrence of her 1999 compensable back injury.

COMPENSATION RATE.

At the time of the prior hearing on August 5, 2002, the parties stipulated that claimant suffered a compensable injury to her low back on June 21, 1999, for which she would be entitled to compensation at the rate of \$153.00 per week. That stipulation was accepted as fact in the opinion filed August 23, 2002, and it was affirmed in the Full Commission's opinion filed May 22, 2003.

The basis for claimant's request that she is entitled to compensation at a greater rate is based upon the fact that following the 1999 injury she was promoted and was earning a greater average weekly wage at the time of the alleged injury in April 2000. However, I have found that claimant did not suffer a new injury in April 2000; therefore, claimant's compensation rate would not be determined as of April 2000, but rather would be determined at the time of the stipulated injury in June 1999.

MEDICAL.

At the beginning of the hearing the parties indicated that they were not aware of any unpaid medical benefits. During the course of claimant's testimony she testified that she had trouble getting prescriptions filled which had been authorized by her treating physician. With respect to these issues, I do note that respondent's attorney indicated that it was not intending to controvert any related medical treatment. As with all compensable injuries, respondent remains liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury of June 21, 1999. While I do not find that respondent has controverted claimant's entitlement to any prescription medication, an effort should be made to insure that claimant continues to receive related prescription medication prescribed by her authorized treating physician.

COMPENSABILITY OF LEFT LOWER LEG.

Claimant's primary treating physician for her compensable low back injury was Dr.

Allen Beachy. At some point in time Dr. Beachy referred claimant to Dr. John Wright, a podiatrist, for problems associated with left foot pain. Dr. Wright testified that he evaluated the claimant on July 29, 2003 and diagnosed her as suffering from a loss of muscle strength in her left foot area. Dr. Wright also testified that he noticed a difference in temperature between the claimant's left and right foot. Dr. Wright prescribed an insert for claimant to wear in her shoe.

In a letter dated September 26, 2003 and in his deposition Dr. Wright stated that he believed the claimant's foot problems were directly related to her back injury. At his deposition Dr. Wright noted that excessive pronation of the foot can result from muscle weakness. He testified that this condition can have several possible causes including an injury to the nerves in the spine which run to the feet. Based upon claimant's history to him of her back injury, it was Dr. Wright's opinion that her foot problem was causally related to her back injury.

Initially, I believe it is important to note that Dr. Wright's opinion regarding causation was based upon statements made to him by the claimant. Dr. Wright admitted that he has not reviewed any medical records relating to claimant's back condition. Dr. Wright also admitted that he was not aware that testing of the claimant's lumbar spine had shown no nerve root compression. Dr. Wright testified that this finding could be significant.

In determining whether claimant has met her burden of proving a compensable injury to her left lower extremity, it is also important to review the deposition testimony of Dr. Beachy. Dr. Beachy testified that at the time of his visit with claimant on June 20, 2003 she had a plantar wart on her left foot which he injected. At the time of her next visit on July 8, 2003, she was reporting pain in the metatarsal area of her left foot. Dr. Beachy testified that he believed this pain was mechanical in nature as opposed to nerve type pain. Specifically, Dr. Beachy believed claimant's foot pain was related to the injection for the wart and the mechanics of how claimant was walking because of the wart.

A. We thought that was possibly secondary to the previous injection of the foot for the wart and some of the mechanics of how she was walking at that time.

Q. Because of the wart?

A. Right.

Q. Was there anything in particular you could do for the pain?

A. Actually, I have her scheduled to see a podiatrist later this month.

Q. So that doesn't have anything to do with her original injury?

A. No.

Because of these complaints Dr. Beachy referred claimant to Dr. Wright. While Dr. Wright testified that he did not notice a wart on the claimant's left foot, I find it difficult to believe that Dr. Beachy would have given claimant an injection for a plantar wart when none was present.

In summary, claimant has the burden of proving by a preponderance of the evidence that her left foot problem is causally related to her compensable back injury of June 1999. Here, in support of her contention claimant relies primarily upon the opinion of Dr. Wright who has opined that claimant's left foot problems are causally related to her back injury. However, as previously noted, Dr. Wright's knowledge of the claimant's back problem was based entirely upon statements made to him by the claimant. Dr. Wright admitted that he had not reviewed any of the medical records relating to claimant's back condition. In addition, Dr. Wright also testified that he was not aware testing had shown no nerve root compression. Dr. Wright admitted that this could be a significant finding. In contrast to Dr. Wright's opinion is evidence that Dr. Beachy observed a plantar wart on the claimant's left foot which he injected. It was Dr. Beachy's belief that claimant's foot mechanics changed as a result of this injection and plantar wart. This would explain the loss of

muscle strength observed by Dr. Wright. In my opinion, the explanation offered by Dr. Beachy is just as credible if not more so than the opinion offered by Dr. Wright. Since claimant has the burden of proving by a preponderance of the evidence that her left foot problems are causally related to her compensable injury. I find that she has simply failed to meet her burden of proof.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent in April 2000. Claimant has also failed to prove by a preponderance of the evidence that she is entitled to compensation at a rate greater than the previously stipulated amount of \$153.00. Claimant has also failed to prove by a preponderance of the evidence that her left lower extremity condition; specifically, her left foot problem is related to her compensable back injury. Finally, I note that respondent is liable for continued medical treatment relating to claimant's June 1999 compensable back injury. This includes reasonable and necessary medication prescribed by Dr. Beachy.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE