

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306007

NICOLE PEARSON	CLAIMANT
RANDSTAD NORTH AMERICA	RESPONDENT
WARD NORTH AMERICA INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 18, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by JAY KUTCHKA, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on November 20, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on September 15, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

2. On August 20, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her low back on August 20, 2002.

4. Medical expenses paid to September 23, 2003.

5. The claimant is entitled to a compensation rate based on an average weekly wage of \$268.39.

6. The claimant was terminated by the respondent on September 10, 2002.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional medical.

2. Temporary total disability from date of the claimant's termination to a date to be determined.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she sustained a compensable injury to her lower back in May 2002.

In regard to the foregoing issues the respondents contend that the claimant was injured on August 20, 2002. Dr. Keith Holder first treated the claimant for her injury beginning on August 30, 2002. Dr. Holder diagnosed the claimant with lumbar strain. The claimant was also treated by Dr. Holder on September 9, 2002, and September 23, 2002. John Snyder of Ward North America, Inc. sent a letter to claimant, Nicole Pearson, on October 21, 2002, advising her that she had not followed up for her injury since September 23, 2002. The claimant did not respond to this letter, which stated in part that "if there is no response in 30 days, it will be assumed that you do not wish to seek further treatment." The respondents accepted and paid all authorized medical bills pertaining to claimant's reported injury of August 20, 2002. Claimant has not

received any impairment rating and no PPD is owed. Claimant returned to work with Randstad on September 1, 2002, after her initial medical visit on August 30, 2002. Claimant did not lose more than seven days from work due to this injury, therefore, no TTD was owed or paid. Claimant was given light duty work. On September 4, 2002, because of daycare problems, claimant left work early. On September 5, 2002, she called and said she would not be able to work because she had a sick child. On September 6, 2002, she did not contact her employer at all and was terminated for not showing up for work and not calling in on September 6, 2002.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted non-medical evidence marked Respondents' Exhibit No. 1, medical evidence marked Respondents' Exhibit No. 2 and additional medical marked Respondents' Exhibit No. 3. The claimant objected to pages 13, 14 and 15 of Respondents' Exhibit No. 1. The respondents withdrew from their exhibit pages 13 and 14 of their Exhibit No. 1. The Commission sustained the claimant's objection to page 15 of Respondents' Exhibit No. 1, noting that the respondents exception and this page was submitted as Respondents' Proffer No. 1.

#### DISCUSSION

The parties have stipulated that the claimant sustained a compensable injury to her low back on August 20, 2002. The claimant testified that she was lifting boxes of Kaluha tins,

taking them off the pallet, opening up the boxes and taking the boxes out and putting them on the line all day long. The claimant testified that these boxes would weigh at least ten pounds and this activity required her to be bending and lifting the boxes from the floor onto the line all day. The claimant testified that she was getting a box off the top of the pallet and felt something pull in her back and felt pain go through her back. The claimant testified that after this event she continued to have pain whether she was standing or bending and she has had constant pain in her back. The claimant described her pain as being around the belt line in the middle of her low back and through her left leg to her ankle. The claimant testified that she continued to work a couple of days but, due to the discomfort, she then reported it to Miss Carol and Charlie. The claimant testified that when she reported her incident to Charlie she reported that she was lifting Kaluha tins, felt pain in her back and has had pain since then.

The claimant testified that Charlie sent her to Dr. Holder. The claimant testified that she told Dr. Holder how she hurt her back and he examined her. The claimant testified that Dr. Holder prescribed Tylenol III and put her on some working restrictions but she was not sure exactly what these restrictions were. The claimant testified that she continued to be seen by Dr. Holder and he did prescribe physical therapy and she attended some of these sessions. The claimant agreed that it was during this period of time that she discovered that she was pregnant. The claimant testified that her baby was born on January 28, 2003. The claimant

testified that her treatment plan for her low back was hindered due to her pregnancy. The claimant testified that during the months of November, December and January she did not see a doctor for her low back. The claimant testified that she thinks that she returned to see the doctor for her low back in February after her son was born. The claimant testified that during her pregnancy her low back pain continued as well as the pain which ran down her leg into her ankle. The claimant testified that in February she believes that she saw Dr. Hoang. The claimant testified that Medicaid sent her to Dr. Hoang and he had her undergo an MRI which she understood to reveal a severe herniated disc at L4 and some protrusions at L3 and L5. The claimant testified that she had never had low back problems prior to her employment with the respondent. The claimant testified that Dr. Hoang referred her to Dr. Benner and he did surgery on her back which took away her pain but she now has a dropped foot.

The claimant testified that she has not worked since she left the Hiram Walker plant where her injury occurred. The claimant testified that the respondent is a temporary agency which hires for Hiram Walker. The claimant testified that part of her reason for being off work was her pregnancy but part of it was because of her back pain. The claimant testified that, to her knowledge, Dr. Holder did not take her off work but that she was sent back to the Hiram Walker where she sat in the respondent's office rather than go back out into the plant. The claimant testified that one Wednesday she was going to see Dr. Holder when her daycare called

to report that her daughter was sick. The claimant stated that Thursday she called in that she had to be off work and that Friday she did not call in and on Monday when she showed up for work they terminated her for failure to call in.

The claimant testified that since her surgery, her pain has resolved but she does have the problem with her left foot in that it hangs and that she barely has any feeling in it. The claimant testified that she could drive but she cannot drive a standard automobile. The claimant testified that sometimes she will trip and fall as a result of her dropped foot.

On cross examination, the claimant agreed that she first saw Dr. Holder on August 30, 2002, for her work related injury and at that time she was three months pregnant. The claimant also agreed that Dr. Holder released her to light duty work and that was when she was sent back to the Hiram Walker plant and she went and sat in the respondent's office. The claimant agreed that Dr. Holder sent her to physical therapy but she stopped going to physical therapy on her own decision. The claimant also agreed that it was possible that she did not do follow up appointments with Dr. Holder as recommended. The claimant testified that it was possible that she did not keep the October 7, 2002, appointment with Dr. Holder and that after September 23, 2002, she did not return to see Dr. Holder or Dr. Clark and that neither of these physician have referred her to another doctor. The claimant testified that Dr. Hoang never took her off work but that Dr. Benner did take her off work. The claimant testified that there are no documents indicating that Dr.

Benner took her off work prior to September 4, 2003. The claimant testified that she has never filed a request for a change of physician and that between September 23, 2002, when she last saw Dr. Holder and April 29, 2003, when she first saw Dr. Hoang she was not treated by any other physicians for her back. The claimant also testified that she did not report to the respondent or to anyone at Hiram Walker that she was going to see Dr. Hoang in April 2003, and there is no documentation where she notified the respondent or Hiram Walker that she was planning to have surgery on her back.

The medical records set forth that the claimant was seen by Dr. Keith Holder on August 30, 2002, reporting that while lifting boxes of cans she developed pain in her low back lumbar area. After examination, Dr. Holder assessed the claimant with having lumbar strain and prescribed Tylenol as well as back exercises and she was to start physical therapy three times a week for one week. Dr. Holder released the claimant to return to work with no lifting over twenty pounds and no repetitive motions of the back. Dr. Terry Clark writes on September 9, 2002, that the claimant has been seen for follow up of her lumbar strain where it is reported that the claimant is having pain down the posterior leg to the ankle. The claimant was again examined and was assessed with having lumbar strain, noting that the claimant was three months pregnant which limits the diagnostic modalities. Dr. Clark continued the claimant on her Tylenol, physical therapy and work restrictions. On September 23, 2002, Dr. Clark writes that the claimant complains of

left leg pain radiating down to her ankle and that the physical therapy has not helped because they are limited primarily to back packs because of her pregnancy. The claimant's medications and work restrictions were continued. There is a note from the Cooper Clinic Physical Therapy Department dated October 1, 2002, which sets forth that the claimant has been seen for a total of two treatments, the last one being on September 9, 2002. The claimant's treatment program in light of her pregnancy was outlined and it is noted that the claimant did not show for a scheduled appointment on September 11 and has not been seen since September 9, noting that she has an appointment with Dr. Holder on October 7.

The medical records set forth that on April 29, 2003, the claimant was again seen at Cooper Clinic for her complaints of low back and left leg pain which is reported as resulting from her work in 2002. The medical notes reflect that no treatment was undertaken at that time due to her pregnancy. Medications and an MRI were prescribed. On May 5, 2003, the claimant underwent an MRI of her lumbar spine which revealed that she had a large central L4 herniated disc and a broad based L3 and L5 protrusion. Dr. Benjamin Benner writes on June 10, 2003, that he has seen the claimant for her low back and left leg complaints and after examination of the claimant as well as review of her MRIs, the claimant was diagnosed with L5-S1 radiculopathy and the doctor writes that the claimant's condition will not improve with conservative measures and he has recommended surgical intervention. Dr. Benner writes that, based on her history, he would say that

this condition is directly related to a lifting injury on the job and could be covered under workers' compensation. Dr. Benner operated on the claimant's herniated L4-L5 disc on June 25, 2003. Dr. Benner made a note on July 10, 2003, that he tried to contact the claimant due to her missing an appointment for follow up from her surgery. Dr. Benner writes to the claimant on July 17, 2003, noting that she had scheduled appointments for July 10 and July 17, 2003, which she failed to appear. The doctor notes that it is important that she be seen on a regular basis in order to assist in her recovery and to make adjustments in her therapy. Dr. Benner again writes to the claimant on August 14, 2003, noting that she had again failed to show for her appointment and again the doctor notes that it is important for her to be seen for adjustments in her therapy because it may affect her overall final results. Dr. Benner writes on September 4, 2003, to Dr. Hoang that he has finally seen the claimant and this is her first visit in almost three months after her surgery. Dr. Benner notes that he had wanted to start her on some additional therapy but she did not come back in to see him until now. The doctor writes that the claimant wears her foot drop brace which helps her with her walking but she still has no motion. Dr. Benner recommended that she start on vitamin B1 as well as they were trying to arrange for an electrical stimulator for her. On October 16, 2003, Dr. Benner writes again to Dr. Hoang that he has seen the claimant for follow up of her lumbar diskectomy. The doctor notes that the claimant still has a persistent foot drop on the left side which she is being treated

for. Dr. Benner recommended that the claimant be seen in a couple more months and receive an EMG in order to see if there is evidence of nerve return. Dr. Benner writes that presently the claimant remains temporarily totally disabled but might be able to perform light duty work in a couple of months if the nerve function appears to be improving. On November 5, 2003, Dr. Benner writes to the claimant that they have gotten her electrical tests from Dr. Mitchell noting that in Dr. Mitchell's opinion her problem was mainly along the nerve but that he, Dr. Benner, thinks it just indicates that the regrowth has not gotten down to the level of the knee. Dr. Benner recommends that the claimant be seen again in two months when further tests will be run.

The respondents submitted additional medical records as agreed upon at the completion of the hearing. These medical records indicate that the claimant was seen on August 1, 2000, by Dr. Mike Callery for complaints of left upper leg pain. The claimant reported mid left thigh pain in the posterior area of her left leg which started three weeks prior to the date of examination. The claimant did not note any injury and upon examination there was no bump or abnormality noted. X-rays of the claimant's left leg were negative, medications were prescribed and she was told to return if her problems did not resolve. Dr. Callery diagnosed the claimant with left upper leg pain of unknown etiology.

After a review of this complete record, I find that the claimant voluntarily quit seeing Dr. Holder for the treatment of her low back problems. She has testified that without notice to

the respondent or without requesting a change of physician she sought medical treatment from Dr. Hoang and subsequently Dr. Benner who performed back surgery on her in June 2003 and has continued to see the claimant for her follow up of her back surgery and her persistent left foot drop. I find that all the treatment from Dr. Hoang as well as from Dr. Benner is not authorized and will not be the responsibility of this respondent. I also find that the claimant has failed to prove by a preponderance of the evidence that she is temporarily totally disabled from the date of her termination to a date to be determined. The claimant has testified and the medical records set forth that this claimant was not released from work but instead was returned to work with restrictions which the respondent had complied with. The claimant has testified also that at the time of her compensable injury she was pregnant and much of her time off work or not seeking employment had as much to do with her pregnancy as it did with any back problems she was experiencing. The claimant is entitled to temporary total disability, however, from the date of her surgery on June 25, 2003, to a date to be determined. The claimant underwent an L4-L5 left partial hemilaminectomy, foraminotomy with excision of herniated disc fragment at the time of her surgery and it is only logical and responsible that she would be unable to work immediately following such extensive back surgery. Dr. Benner writes to Dr. Hoang on October 16, 2003, that presently the claimant remains temporarily totally disabled but might be able to perform a light duty job in about two months depending on how her

nerve function improved. This notation also indicates that the claimant has been, to that date and continuing, unable to work but that there is hope that within a short period of time she will be able to return to light duty.

#### FINDINGS & CONCLUSIONS

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

2. On August 20, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her low back on August 20, 2002.

4. Medical expenses paid to September 23, 2003.

5. The claimant is entitled to a compensation rate based on an average weekly wage of \$268.39.

6. The claimant was terminated by the respondent on September 10, 2002.

7. The claimant has failed to prove that the medical treatment which she received by Dr. Hoang as well as Dr. Benner was authorized and, therefore, the respondents will not be responsible for their treatment or any follow up therefor or any referrals from these two physicians for the treatment of her low back. The claimant has testified that she never requested a change of physician nor did she notify the respondents in any way that she was going to see Dr. Hoang and Dr. Benner or notify them that she was about to undergo back surgery for her compensable injury.

Therefore, all of their treatment is unauthorized and will not be the responsibility of the respondents.

8. The claimant has failed to prove by a preponderance of the evidence that she was temporarily totally disabled from the date of her termination to a date to be determined. The claimant is, however, temporarily totally disabled from June 25, 2003, to a date to be determined as a result of her back surgery for her compensable injury. See discussion above.

9. The respondents have controverted this claimant's entitlement to additional benefits for her compensable injury.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

#### ORDER

The claimant has failed to prove that her medical treatment by Dr. Hoang and Dr. Benner was authorized, therefore, the respondents will not be responsible for any treatment or referrals from these two doctors for this claimant's compensable injury.

The claimant is entitled to temporary total disability from June 25, 2003, to a date to be determined. The claimant's temporary total disability rate will be figured on her average weekly wage of \$268.39.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE