

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F205244

**LINDA A. SMART,
EMPLOYEE**

CLAIMANT

**ST. VINCENT HEALTH
SERVICES, INC.,
EMPLOYER**

RESPONDENT NO. 1

**PREFERRED PROFESSIONAL
INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

THE RAWLINGS COMPANY

INTERVENOR

OPINION FILED DECEMBER 14, 2004

Hearing conducted September 28, 2004, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas, appearing for the claimant,

Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1, and

Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas, representing Respondent No. 2, appearance excused.

STATEMENT OF THE CASE

This is a dispute over benefits for two possible injuries from the same incident at work, an admittedly compensable neck injury and a disputed hip injury.

The incident occurred April 25, 2002, when the claimant was working in a closet, boxes fell from a shelf above, striking her on the head and causing her to stumble backward and fall into shelving, ultimately landing on her buttocks, harder on the left side.

The respondents acknowledged that she suffered a neck injury and began paying benefits, including the expenses of surgery performed September 23, 2002, and a period of temporary total disability benefits after the surgery from October 21, 2002, until on or about September 6, 2003.

The claimant contended that she should be awarded two additional periods of temporary total disability, one before and one after the period voluntarily paid by the respondents. The first period begins September 9, 2002, before the neck surgery on September 23 and continues until October 21, 2002. The second period begins on or about September 7, 2003, and continues until a date to be determined. The claimant further contended that the incident also resulted in a compensable hip and leg injury. An attorney's fee for controversion was also requested. Other possible issues, including issues not timely raised and fully developed during the prehearing conference process, were considered reserved.

Respondents No. 1 contended that the medical record does not support the payment of temporary total disability benefits for the first period from September 9, 2002, until October 20, 2002, because of the claimant's neck. They further contended that the record does not support payment of temporary total disability benefits for the second period beginning after September 6, 2003, as a result of either the claimant's neck or alleged hip and leg condition. Moreover, they further contended that the claimant did not sustain a compensable hip or leg injury and that any such problem is the result of pre-existing conditions. They acknowledged owing an attorney's fee for temporary total disability benefits during the interim period of October 21, 2002, until on or about September 6, 2003.

The parties also submitted for decision the issue of whether Dr. Wesley Brent Sprinkle's fee for giving deposition testimony is limited by Rule 30.

In addition to Dr. Sprinkle's deposition, the record included other documentary evidence, such as deposition testimony of Dr. James R. Adametz and Dr. Ralph F. Joseph, II, along with the testimony of the claimant. The record was closed at the conclusion of the hearing.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including April 25, 2002; the claimant suffered a compensable injury to her neck on that date; the benefit rate for total disability was \$425.00; and an attorney's fee for controversion is owed on temporary total disability benefits paid for a period from October 21, 2002, until on or about September 6, 2003.

3. The preponderance of the evidence shows that as a result of the claimant's compensable neck injury she continued in a healing period and was totally incapacitated to earn wages, so that she is entitled to temporary total disability benefits, for a period that included September 9, 2002, and continued through October 20, 2002.

4. The preponderance of the evidence shows that on April 25, 2002, the claimant suffered a compensable injury to her hip and left leg, arising out of and in the course of her employment, established by medical evidence supported by objective findings, for which she is entitled to benefits, including reasonably necessary medical and related expenses.

5. As a result of her compensable hip and leg injury, the claimant remained in a healing period and was totally incapacitated to earn wages, so that she is entitled to temporary total disability benefits, from on or about September 6, 2003, until a date to be determined.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

After the incident in the closet, and even though the claimant had a previous history of neck problems, including prior surgery performed by Little Rock neurosurgeon Dr. John H. Adametz March 4, 1998, the respondents acknowledged that she had suffered a compensable neck injury on this occasion and initiated payment of benefits, including additional surgery, performed by Dr. Adametz September 23, 2002. They also conceded that the claimant's neck injury entitled her to temporary total disability benefits, and an attorney's fee, for the interim period after the surgery from October 21, 2002, through September 6, 2003.

The claimant contended first that she is entitled to a short period of temporary total disability just before this time. For her to receive these benefits, the record must show that she was within her healing period and completely incapacitated to earn wages as a result of a compensable injury. Arkansas Highway & Transportation Department v. Breshears, 272 Ark. 242 (1981).

As to this initial period of benefits, the preponderance of the evidence shows that the claimant experienced temporary total disability for a time that included September 9, 2002, through October 21, 2002. For example, on June 21, 2002, Dr. Adametz recommended an MRI scan of the claimant's cervical spine and commented that if the scan did not show a "major abnormality" in the

neck he thought she could return to work at that point. Of course, it would not be necessary to return the claimant to work unless he considered her then to have been off work because of the condition of her neck. After the scan had been performed later in June, Dr. Adametz wrote on July 22, 2002, that he was recommending surgery at C4-5. This is consistent with a “major abnormality” in her neck that would prevent her from returning to work, consistent with his earlier comment. Her surgery on September 23, 2002, is also an indication that her condition and ability to work had not improved since July 22, 2002. Moreover, there is little reason to think that after surgery on September 23 the claimant was other than within a healing period and totally incapacitated to earn wages, at least until October 21, 2002.

However, as to the final period of temporary total disability beginning September 6, 2003, her cervical spine is not a basis for continuing temporary disability since the record indicates that her healing period had ended and the focus of her medical care had shifted to her leg and buttock pain. For example, Dr. Adametz, who had been her primary treating physician for her neck condition, filled out a statement of disability April 4, 2003, indicated her limitations, and stated that her last visit would be April 7, 2003. In his deposition, he confirmed that April 7, 2003, was her last visit and that he was then focusing on the left SI joint which he injected. He also confirmed that his note of July 18, 2003, referring the claimant back to Dr. Joseph, was for treatment of the SI joint or lower back. Dep. at 34. Thus, the record indicates that the claimant’s neck injury had stabilized and had reached the end of the healing period before the beginning of the final period of temporary total disability requested by the claimant.

However, the claimant also contends that the final period of temporary total disability is the result of a compensable hip and leg injury caused by the same incident in April, 2002. Because the

respondents controvert the hip and leg condition, it is the claimant's burden to prove the occurrence of such an injury, and to establish a compensable injury by medical evidence, supported by objective findings, Ark. Code Ann. §11-9-102(4)(D), where objective findings are considered to be those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Since there is no allegation of a gradual onset injury, there is no need to consider major cause when addressing initial compensability of the alleged injury.

A review of the record shows that the claimant has also met her burden of proving a compensable injury to her hip and leg. First, the occurrence itself is hardly in dispute, even though symptoms involving her low back and legs were less pressing than her cervical spine problems, and possibly more difficult for her physicians clearly to assess. However, when she was seen by her physician April 30, 2002, he noted that the claimant complained of "low back" pain, had point tenderness over the perillumbar region with some increased muscle tone in this area as well as; some mild tenderness over the left SI joint; a positive left straight leg raise. His assessment included "lumbar spasm" and he prescribed Skelaxin for spasm. On May 6, 2002, Dr. Ralph Joseph noted that the claimant had developed pain in the left posterior hip with paresthesias down the back of her left leg intermittently. His assessment included sacroilitis, with some intermittent sciatica. His note recorded that the claimant could not sit and do her computer work due to sacroilitis. On May 20, 2002, Dr. Ralph Joseph's note indicated that the claimant suffered from sacroilitis and had received steroid injection therapy. Objective findings, in addition to the muscle spasms noted early in the record, include Dr. Sprinkle's findings when he later became her treating physician for her hip and leg problems. For example, in his deposition, he testified about the existence of palpable tightness in the muscle when he pressed it in relation to her piriformis syndrome. He described her condition

as taut band, almost like a knot-like feeling in the muscle itself. Dep. at 18. He also stated that the claimant's piriformis syndrome would have been worsened if her symptoms were in fact more intense after the incident at work. Dep. at 40. This is consistent with the claimant's testimony about her worsening condition.

On May 22, 2002, Dr. Adametz, wrote that the claimant felt like her low back is a lot worse and feels different to her than it has previously been. His note indicated that the claimant had undergone physical therapy and an SI joint injection but thought it actually made it worse instead of better. He noted tenderness around her SI joints with the left side being worse. Dr. Adametz wrote that the claimant may have an SI sprain, but it has not responded to the injection and he thought an MRI of the lumbar spine should be undertaken. The report of the MRI scan dated May 28, 2002, indicated that the SI joints were not seen well on either side. On June 21, 2002, Dr. Adametz indicated that the claimant's still got pain in her back and even somewhat down her legs and still had some tenderness around her left SI joint. He noted that she said that the shot from Dr. Joseph did help a little bit but she really had done better one time with an epidural steroid injection Dr. Adametz had given her. He noted that the claimant was still having a lot of trouble with muscle spasm in the low back and neck. When Dr. Adametz saw the claimant July 22, 2002, he noted that she was having some pain in her low back but directed most of his comments to her need for possible cervical spine surgery.

The record shows that the claimant continued to receive active medical care that was reasonably necessary for her hip and leg condition while she was treated for her neck injury and recovered from her neck surgery. Eventually, as note above, Dr. Adametz referred her back to Dr. Joseph for additional care for the hip and leg problem. She also received appropriate medical

attention from Dr. Saer, as well as Dr. Sprinkle. In short, the preponderance of the evidence, including medical record and the claimant's testimony, shows that the claimant has continued in a healing period and has been totally incapacitated to earn wages as a result of her compensable hip and leg condition during the second requested period of temporary total disability beginning on or about September 7, 2003, and continuing until a date to be determined.

It should also be noted that the claimant's history of prior symptoms does not preclude the occurrence of a compensable injury in April, 2002. The record and the claimant's testimony indicate that prior to April, 2002, the claimant had symptoms involving her low back and legs and had been last treated November 19, 2001, by Dr. Adametz. However, it was not necessary for her to return to the doctor until after she had been hurt at work in 2002. The medical record and her testimony indicated that her symptoms were different at that time. Similarly, in his deposition, Dr. Joseph stated, "Now, clearly, she had some similar complaints like in '97 or '99 or so, but this seemed to bring on new symptoms." Dep. at 24. Thus, the preponderance of the evidence shows that the claimant suffered an injury during the incident in April, 2002. This is not to say that the issue of major cause will not come into play should the claimant eventually request benefits for permanent impairment or disability at a later time.

Dr. Sprinkle's deposition testimony indicated that his office was advised over the telephone that his deposition fee would not be governed by the limitations of Rule 30, apparently because he had been paid by the claimant's group health insurance, rather than by workers' compensation insurance. The parties realize that there is no written record or transcript indicating the exact advice given or the context for the advice. However, Rule 30 limits reimbursement for depositions of witnesses and states that the limitation does not apply to an expert who has never provided direct

professional services to a party or who has provided only direct professional services which were unrelated to the workers' compensation case. Whether Dr. Sprinkle's services were related or unrelated can be determined only after compensability of the claimant's hip and leg condition has been resolved by the process of hearings and appeals. If the claimant's condition is compensable, the limitations of Rule 30 apply.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge