

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F312436

PAM WILLIAMS, Employee

CLAIMANT

DOLLAR GENERAL, Self-Insured Employer

RESPONDENT

OPINION FILED JUNE 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by TIMOTHY MYERS, Attorney, Fayetteville, Arkansas.

Respondents represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 28, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 4, 2004, and a pre-hearing order was filed on that same date. 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 relationship of employee-employer existed between the parties on October 1, 2003.
3. The claimant was earning an average weekly wage of \$340.00 which would entitle her to a compensation rate of \$227.00 per week for temporary total disability benefits.

Prior to the hearing the parties agreed to withdraw their stipulation that claimant was earning an average weekly wage of \$340.00 which would entitle her to a compensation rate of \$227.00 per week for total disability benefits. As a result, the claimant's correct compensation rate was added as an issue at the time of the hearing. Subsequent to the

hearing the parties have now agreed that the claimant earned a sufficient average weekly wage to entitle her to the maximum compensation rate in effect for 2003. The maximum compensation rate for 2003 is \$440.00 for total disability benefits and \$330.00 for permanent partial disability benefits.

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

1. Compensability of injury to right knee.
2. Temporary total disability benefits from November 12, 2003 through January 9, 2004.
3. Medical.
4. Attorney fee.

The claimant contends she sustained an injury to her right lower extremity which arose out of and in the scope and course of her employment causing her need for medical treatment and her inability to work for a period of time. Claimant contends she is entitled to medical treatment, temporary total disability benefits, and a controverted attorney fee.

The respondents contend the claimant did not sustain an injury arising out of and in the course and scope of her employment. Specifically, the claimant cannot meet her burden of proof that any complaints she has with her right knee are due to her employment at Dollar General.

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 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. The relationship of employee-employer existed between the parties on October 1, 2003.

3. The parties' stipulation that claimant earned a sufficient average weekly wage to entitle her to the maximum compensation rate of \$440.00 for total disability benefits and \$330.00 for permanent partial disability benefits is also hereby accepted as fact.

4. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee while employed by respondent on or about October 1, 2003.

5. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right knee injury.

6. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning November 16, 2003 and continuing through December 30, 2003.

7. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant began working for the respondent as a stocker at its store in Pea Ridge in May 2003. Claimant worked part-time for the respondent earning \$6.25 per hour. On or about September 13, 2003, all but three employees of the respondent's Pea Ridge store were terminated. Also at that time the claimant was promoted from stocker to assistant store manager/acting store manager. At that time claimant only had two other employees working with her at the store while she was attempting to organize the store and prepare for the upcoming holiday season.

Claimant testified that on or about October 1, 2003, she was in the stockroom and in the process of loading boxes onto a cart to take into the store when a stack of boxes fell

causing claimant to fall with her right knee bent backwards. Claimant testified that she reported this incident to a co-employee, Dottie Van Gonde who was up front running a cash register. Claimant testified that she did not call Risk Management, the company that handled respondent's workers' compensation, but that she believes she left a voice mail with Tom O'Connell, the respondent's district manager. Claimant testified that approximately one week later O'Connell was in the Pea Ridge store and she again reported the accident to him and informed him that she believed she needed medical care. Claimant testified that she continued to work and continued to have problems with her knee which resulted in her buying a brace to wear on her knee.

On November 12, 2003, the claimant sought medical treatment from Dr. Kaler who ordered an MRI scan which revealed a tear of the medial meniscus. As a result, Dr. Kaler recommended an arthroscopic procedure which was performed on November 18, 2003. Claimant has not worked for the respondent since November 15, 2003.

Claimant has filed this claim contending that she suffered a compensable injury to her right knee while employed by respondent on or about October 1, 2003. She seeks payment of medical benefits, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her right knee when a stack of boxes fell on her on or about October 1, 2003. Claimant's claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;

(2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;

(3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee.

Initially, I find that claimant has offered proof by a preponderance of the evidence that the injury arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

In reaching this decision I am aware that there are some discrepancies in testimony given by the claimant at her deposition and at the hearing regarding her reporting of the injury to O'Connell on October 1. At the hearing claimant testified that she believed she left a voice mail for O'Connell on the night of October 1, 2003. However, at claimant's deposition she testified that she did not attempt to report the injury to O'Connell on October 1 because she thought she had simply sprained her knee and that it would go away.

Even though this discrepancy regarding the report of an injury to O'Connell exists, I find based upon the remaining evidence presented that claimant has met her burden of proof. Testifying at the hearing was Michael Sanderson, one of the two other employees who worked with respondent in the fall of 2003. Sanderson testified that he was employed by the respondent as a stocker working approximately three hours per night. Sanderson testified that claimant mentioned the accident to him either on the day it occurred or the next night. Sanderson testified that claimant informed him that boxes had fallen on her

and injured her right knee. Sanderson testified that he noticed the claimant's knee was swollen even though she was wearing pants at the time.

Also testifying at the hearing was Tom O'Connell, the district manager for respondent. O'Connell acknowledged that he had a conversation with the claimant regarding an injury to her knee. O'Connell testified that he was unable to remember all of the details but remembers the claimant mentioning the loading of a blue cart, injuring her knee, and boxes. O'Connell was unsure as to when this conversation occurred, but did not believe it was within a week after the incident. O'Connell also testified that he and claimant had conversations from time to time wherein the claimant would mention that she had problems with her right knee.

Also testifying was Randy Hocker, a store manager at the respondent's Gravette store. Hocker testified that he went to the Pea Ridge store on one or two occasions in early fall or October to help the claimant set up the store for Christmas. Hocker testified that the claimant indicated that her knee was hurting and related her knee condition to some boxes having fallen on her.

In addition to this testimony, I also note that the medical records contain a history of injury consistent with claimant's testimony. Claimant initially sought medical treatment from Dr. Kaler on November 12, 2003. Dr. Kaler recorded a history of claimant having injured both of her knees approximately seven weeks earlier when merchandise fell on her lower extremities. While Dr. Kaler's medical reports do mention pain in both of claimant's knees, her current claim is for an injury relating only to the right knee.

Furthermore, in a letter dated February 18, 2004, Dr. Kaler stated that it was his opinion within a reasonable degree of medical certainty that the symptoms claimant was having after her injury on or about October 1, 2003 were consistent with her torn medial meniscus. He also indicated that his treatment including surgery was related to the medial meniscus tear which he believed resulted from the accident of October 1, 2003.

Based upon the foregoing, I find that claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that her injury was caused by a specific incident identifiable by time and place of occurrence. While claimant's injury was not witnessed and there was some discrepancy as to when she reported the injury to O'Connell, I find that the remaining evidence is credible and sufficient to support a finding that claimant suffered a compensable injury on or about October 1, 2003. On either the day of her accident or the next night, a co-employee, Sanderson, testified that claimant reported the injury and he observed swelling of the claimant's knee. Furthermore, O'Connell did testify that the claimant reported an injury to him. The same testimony was also given by Randy Hocker who testified that claimant mentioned her knee hurting after boxes had struck her. Finally, the medical evidence contains a history consistent with claimant's testimony and Dr. Kaler has opined that claimant's medical meniscus tear is consistent with claimant's history of injury.

I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services or resulted in disability and that she has offered medical evidence supported by objective findings establishing an injury. Here, as previously noted, Dr. Kaler ordered an MRI scan of the claimant's right knee which in addition to a fusion revealed a tear of the claimant's medial meniscus. As a result, surgery was performed by Dr. Kaler on November 18, 2003. This evidence satisfies the remaining elements of compensability.

Accordingly, for the foregoing reasons, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee while working for respondent on or about October 1, 2003.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right knee injury. This includes

surgery performed by Dr. Kaler.

I also find that claimant is entitled to temporary total disability benefits beginning November 16, 2003, and continuing through December 30, 2003. Following the claimant's MRI scan which revealed a torn medial meniscus, Dr. Kaler completed an off-work form dated November 17, 2003 indicating that claimant should remain off work for her surgery. Dr. Kaler at that time indicated that claimant could return to work as of November 24, 2003. However, claimant was unable to return to work as of that date and Dr. Kaler subsequently completed an off-work slip indicating that claimant was to be off work for an additional period of time beginning November 25, 2003 and continuing through December 30, 2003. Claimant acknowledges that Dr. Kaler released her to return to work without restrictions as of December 31, 2003.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning November 16, 2003 and continuing through December 30, 2003. Claimant last worked for respondent on November 15 and Dr. Kaler opined as of November 17 that claimant should remain off work. Dr. Kaler continued to take claimant off work through December 30, 2003.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee while employed by respondent on or about October 1, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning November 16, 2003 and continuing through December 30, 2003. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE