

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409573

DEBRA CAGE, EMPLOYEE	CLAIMANT
TARGET, EMPLOYER	RESPONDENT
CONSTITUTION STATE SERVICES, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 13, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 15, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SHEILA F. CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable neck injury pursuant to Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on March 27, 2003 at which time the claimant was earning an average weekly wage of \$468.00, entitling her to a compensation rate of \$312.00, in the event this claim is found to be compensable. Some benefits (\$358.21) were paid before this claim was controverted on November 6, 2003.

The claimant contends she injured her neck on March 27, 2003 pulling a heavy box. She seeks payment of medical expenses, temporary total disability from March 28, 2003 to May 27, 2003 and attorney's fees.

The respondents contend the claim was controverted after they learned of a preexisting condition from an earlier (December 2002) motor vehicle accident. Alternatively, in the event of an award, the claimant is not entitled to temporary total disability benefits. Light duty does not have to be made available after a claim has been controverted and after the doctor releases a claimant.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant, who appeared to be confused about the chronology of events and Luke Wright, an EMT and Administrator with Med Core.

The claimant, age 45 (D.O.B. November 2, 1960) was required to lift, pack and push boxes weighing up to 50 pounds as a part of her job duties. She worked twelve hour days three days a week. Her health history includes a drooping left eye, and a December, 2002 motor vehicle accident (MVA) requiring treatment to her neck and back. No medical records were provided for the MVA in the exhibit packets.

On March 27, 2003 the claimant was pulling a heavy box when she felt her neck pop and experienced pain in her right side. She immediately reported the incident to her supervisor, Brady Williams but no claim forms were completed until April. She began treating with chiropractor, Dr. Bennett and the respondents paid benefits until they discovered the claimant's prior MVA. She then used group insurance to see her family physician, Dr. Pledger. If the claimant saw Dr. Pledger, his reports were not introduced into evidence. The claimant testified that Dr. Bennett's work release slips were sent directly to her employer and she did not see them. The "Workability Forms" indicate the claimant is supposed to take the form to the physician and return it to the employer.

The claimant maintains that she had been treated and released from the December 2002 MVA prior to the accident at work in March 2003. A lawsuit is pending over the MVA and part of her damages include her time off from work.

Luke Wright is employed by the respondent-employer to act as a liaison between the doctor and the workers' compensation carrier. He acknowledged that he received medical reports from Dr. Bennett. When Dr. Bennett recommended light duty, the claimant was given a job as a dispatcher. However, the claimant complained that she was unable to perform that job because it was too painful to look up to check the number on the trailer trucks and the loading dock was too cold and dark. This is confirmed by Dr. Bennett's adjustment report of October 20, 2003. Mr. Wright testified he learned of the MVA in March 2003. The dates of the claimant's job as a dispatcher are unclear.

The claimant's supervisor, Corey O'Neal, told the claimant to take time off the job (90 days) or find other employment, but he discontinued her light duty job. The date of this conversation is unclear and the claimant's request for temporary total disability does not total 90 days. The claimant stated that during this time, light duty was still available in the dispatcher's office. She also testified she was willing to work. No one from Human Resources was called to testify.

MEDICAL EVIDENCE

A medical report dated May 5, 2003 shows the claimant was "treated" by Luke Wright for an injury caused by lifting, twisting and pulling at work. Parts of the report are typed and other parts are handwritten.

The claimant's injury is described as:

(Typed) Pain in neck from previous injury,
(Handwritten) Examine (sic) noted Knot on Dorsal
neck, left eye drooping, severe
headache, nausea.

The claimant was then referred to chiropractor, Dr. Bennett. Some of his reports are e-mailed to Luke Wright while some are typed and others are handwritten.

The employer sent the claimant to a chiropractor, Dr. Bennett, who treated the claimant extensively with adjustments and physical therapy for a cervical strain, based on his observation of cervical muscle spasm. Cervical x-rays showed multilevel osteophyte spurs and Kyphosis (curvature). The claimant disclosed her MVA to Dr. Bennett (see his report dated May 5, 2003),

however she was not diligent in keeping appointments or completing all of her exercises during the therapy sessions.

In turn, Dr. Bennett referred the claimant to Dr. Pineau for headache medication, to Dr. Scruggs, an ophthalmologist for evaluation of her drooping eyelid (ptosis), and to Dr. Pierce for a CT scan of the brain for evaluation of her headaches. Dr. Pineau's records were not introduced into evidence but the claimant reported to Dr. Bennett that her headaches did improve with treatment. In a report dated June 4, 2003, Dr. Scruggs opined that the ptosis was unrelated to the compensable injury. Dr. Pierce found the brain CT scan to be within normal limits.

HEALING PERIOD

Dr. Bennett treated the claimant and issued numerous light duty reports with specific work restrictions. It appears there are two periods of temporary total disability in the medical records but only one period is mentioned in Dr. Bennett's letter of February 9, 1995, summarizing her treatment.

Dr. Bennett's		
<u>Workability Reports</u>		(light duty)
5-5-03	5-27-03	
5-10-03	5-29-03	
5-12-03	6-2-03	
5-13-03	6-25-03	MMPI
5-14-03		
5-16-03		
5-25-03		(transition to working harder)

Dr. Bennett's		
<u>Workability Reports</u>		(light duty)
10-1-03 (Not MMPI)	10-22-03	
10-2-03	10-24-03	
10-6-03	10-27-03	
10-8-03	10-29-03	
10-10-03	10-31-03	(controverted)
10-13-03	11-6-03	(missed appts. next office visit 11-12-03)
10-15-03	11-12-03	(phasing out treatment)
10-17-03		claimant failed to return to Dr. Bennett
10-20-03		(claimant going to another doctor to see if he will take her off work)

The dates of the Workability Reports correspond to the dates on the list of medical treatment and expenses.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Dr. Bennett characterized the claimant’s condition as chronic neck pain aggravated by work and the activities of daily living. As I interpret Dr. Bennett’s letter of February 9, 2005, the claimant suffers from a preexisting degenerative condition of the neck (osteophyte spurs and Kyphosis) which was aggravated by the lifting incident at work. Pearline Williams v. L & W Janitorial, 85 Ark. App. 1, 145 S.W.3d 383 (2004).

This injury happened at work while the claimant was performing her job duties and the incident was reported to her employer. Therefore, I find the injury arose out of and in the course of her employment, caused by a specific event identifiable by time and place of occurrence.

This injury, a cervical sprain, resulted in muscle spasm observed by the company physician. Therefore, I find the injury caused internal harm to the body, requiring medical services, resulting in disability and established by objective medical findings. Accordingly, the claimant has proven a compensable injury by a preponderance of the evidence of record.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant has requested temporary total disability benefits from March 28, 2003 to May 27, 2003. No request was made for rehabilitation benefits under Ark. Code Ann. §11-9-505(a). Based on the company physician's medical records, there were two periods of time in which the doctor opined that the claimant could not perform her regular job: from May 5, 2003 to June 25, 2003 and again from October 1, 2003 to November 12, 2003. He was also actively treating the claimant during these same periods of time. Accordingly, I find the claimant was entitled to light duty employment for these two time periods.

The claimant, however, was not totally incapacitated from working. She was under work restrictions, entitling her to possible temporary partial disability or light duty. There is no evidence

the claimant refused a job. She merely complained that the job offered did not meet her work restrictions.

It is customary for employers to document light duty job offers in writing to avoid disputes about when and what type of job was offered to an employee. The date of the document is also used to help establish if and when the employee turned down the job offer. It is also customary to send a job description to the physician to make sure the duties are reasonable in relation to the restrictions. Apparently, that was not done in this case. I am therefore left with the claimant's undisputed testimony that her employer told her to take time off from work and the company physician's decision to impose light duty restrictions on two different occasions.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on March 27, 2003 at a compensation rate of \$312.00. Some benefits (\$358.21) were paid before this claim was controverted.
2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30. This directive includes Dr. Bennett, Dr. Pierce, Dr. Pledger, Dr. Pineau, and Dr. Scruggs.

Although the claimant did not obtain permission to see Dr. Pledger, the respondents offered no proof that the claimant had been given a change of physician notice (AR-N). The claimant was free to see a doctor of her own choosing.

Although the eye condition was not related and the brain scan was normal, Luke Wright referred the claimant for an evaluation of her eye and headaches. Therefore, I find the respondents owe these medical expenses. Britain v. Southern Hospitalities, 54 Ark. App. 318, 925 S.W.2d 810 (1996).

4. The claimant is entitled to temporary partial disability benefits based on Dr. Bennett's medical records as she remained in her healing period and was partially incapacitated from working from May 5, 2003 to June 25, 2003 and from October 1, 2003 to November 12, 2003. The respondents did provide some light duty but those dates are unknown.
5. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge