

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411297

TINA HERZOG	CLAIMANT
CLARION HOTEL & CONFERENCE CTR.	RESPONDENT
GALLAGHER BASSETT SERVICES, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 20, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 26, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 14, 2005. 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 July 11, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant was earning \$8.50 per hour.

4. The claimant is entitled to a workers' compensation rate of \$177.00 for temporary total disability and \$154.00 for permanent partial disability.

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

1. Compensability of the claimant's neck and low back injuries.
2. Related medical.
3. The claimant's entitlement to temporary total disability from July 12, 2004, to August 19, 2004.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she was injured on July 11, 2004, while pushing a speed rack loaded with food. As she was moving the rack when she felt a burning in her neck and lower back which proceeded to make her right side go numb making her unable to stand or walk for a period of time.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury while employed by the respondent employer on or about July 11, 2004. The claimant is not entitled to any benefits. There were no objective medical findings of an injury on July 11, 2004. The claimant's physical problems and need for treatment, if any, are not related to the claimant's employment but are related to causes unrelated to the claimant's employment with the respondent employer. In the alternative, if it is determined this claim is compensable, the respondents are entitled to a set off for all short term disability benefits received by the claimant, all unemployment benefits received by the claimant and any and all payments made by the claimant's group health carrier.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted a packet of documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted a packet of documentary evidence marked Respondents' Exhibit No. 1. The respondents objected to the admission of page 19 of the Claimant's Exhibit which is a Commission Form AR-2. The respondents' objection was overruled and this document was admitted over the respondents' continuing objection. All other documents were admitted without objection.

DISCUSSION

The claimant testified that she was hired to work for the respondent as a waitress in their food service at the time they opened approximately seven years ago. The claimant testified that on the day of her accident she was pushing a large cart that was approximately six feet tall with twenty-one shelves loaded with food when it got stuck over a door jam. The claimant testified that she was trying to pull it over across the door jam and as she was pulling it back she turned and felt a popping in her right side, right eye and all through the right side of her body she went numb and began to burn. The claimant testified that she immediately stopped work and heard Mary Ellen Wood yell at her, "You're not suppose to do that." The claimant testified that she stopped, went over to the counter and as she stood there she began to feel very nauseous. The claimant testified that Mary Ellen came over and walked her into the bar because at that point she could

not walk and was slumping. The claimant described her pain as being in the right side of her back and going up into her neck. The claimant testified that she sat in the bar for approximately two hours until her husband came to pick her up. The claimant testified that she went straight home and that she has not worked since.

The claimant testified that she was first seen by a chiropractor and continued to see him for approximately two to three months. The witness testified that Mohammed Hassan, the chiropractor, recommended that she see her family physician, Dr. Tucker, and that Dr. Tucker referred her to Dr. Kyle. The claimant testified that she did have an MRI in October on her lower back. The claimant testified that she last saw Dr. Kyle in November and has been unable to go back to him due to lack of money.

The claimant testified on the date of her injury, July 11, 2004, she did report her injury to Javier who is a sous-chef for the respondent. The claimant testified that she told Javier that she had hurt herself and was going home. The claimant testified that she has never had any problems with her back prior to this incident and she has not missed any work as a result of any low back problems.

The claimant testified that she has had one other work related injury when she slipped on a wet floor, fell, bruised her buttocks, hit her head causing a concussion and bit off both sides of her tongue. The claimant testified that she did not miss any work as a result of this injury and that these problems did resolve.

The claimant testified that in January 2004 she was involved in a car accident where she jammed her neck and was treated by Dr. Danks for a period of time.

The claimant testified that since her July incident, her physical activities have been severely limited. The claimant noted that she has a farm and, due to her pain, she cannot do the things that she normally did. The claimant testified that she has to lay down a lot. This witness stated that she currently is physically unable to do the requirements that her job required because it was a very active position requiring lots of lifting and walking.

On cross examination, the claimant agreed that as a result of her January 2004 motor vehicle accident she underwent a CT scan of her neck. The claimant agreed that this test showed that she had a herniated disc at the C4 level and that Dr. Tucker was treating her for her many symptoms resulting from her neck problems. The claimant testified that when she saw Dr. Danks on March 26, 2004, she reported to him pain from her neck radiating down both arms, more significant on the right than on the left. The claimant agreed that Dr. Danks had her undergo an MRI which showed disc bulging in her cervical area for which he set out work restrictions. The claimant agreed that her restrictions were to lift nothing over ten pounds, no bending, pulling or pushing and that these restrictions were in place at the time of her July event. The claimant agreed that Dr. Danks and the physical therapist treated her for some low back pain in March and April 2004 but it was her neck that was really bothering her. The

claimant testified that when she was seen by the chiropractor, Dr. Hassan, she noted that her major complaints were severe neck and back pain. The claimant also agreed that she marked no on the report indicating that her injury did not occur at work and also wrote January 24, 2004, car accident out to the side on this form. The claimant explained that the chiropractor was treating her for her neck as well as treating her for her back and that she should have filled out two different forms but did not. The claimant agreed that she was the one that filled out this form for Dr. Hassan.

The claimant testified that Dr. Danks was treating her for her neck and not for her back and that none of his testing was for her low back because it was not hurting her. The claimant agreed that when she was first seen by Dr. Hassan, his initial report indicates that she had an incident at work while pushing a food cart where she felt intense pain in her back and a popping noise with tingling. The claimant testified that the respondent did not follow Dr. Danks restrictions and although they did change some of her duties, she was told to work like everyone else or to clock out and go home. The claimant testified that she did not miss work before July 11 because of her back. The claimant testified that when she had physical therapy following her automobile accident, they put electrodes on her neck not her back.

On recross examination, the claimant testified that while she was being treated by Dr. Danks and undergoing physical therapy her primary concern was her neck but that her secondary problem was her

back. The claimant testified that she did have some complaints about her back prior to July 11, 2004, but it was nothing serious, that it was her neck that was her main concern.

Julie Burke testified that she was a general manager for the respondent and had been for almost seven years. This witness testified that she knew the claimant very well and was aware of her automobile accident in January 2004. Ms. Burke testified that she was aware that the claimant had restrictions as to her work limitations and that as a result of these restrictions, the claimant was moved from being a prep cook to the front line where she would not have as much lifting. This witness testified that the claimant was encouraged to work within her limitations and that to her knowledge the claimant was never instructed to work outside her restrictions. Ms. Burke testified that the claimant continued to work after her automobile accident but that her hours did take a substantial drop after she was given her restrictions in March. Ms. Burke testified that her hours dropped from eighty hours every two weeks to approximately fifty hours every two weeks. This witness testified that following her automobile accident the claimant continually complained about neck and back pain.

On cross examination, Ms. Burke testified that it was her understanding that the claimant's hours were reduced because of her physical therapy sessions as well as her ability to work as much. Ms. Burke testified that at the Sunday buffet there are carts that are pushed and that they, when filled with food, would be above the claimant's restrictions.

On rebuttal, the claimant testified that before July 11, 2004, Dr. Danks had talked to her about neck surgery but she was scared to death about this type of surgery. The claimant testified that she experienced a pop in her neck and a snap in her back when she was pulling the cart on July 11. The claimant testified that she has had back aches prior to July 11 but it was like normal walking around on your feet all day but that her back pain started seriously on July 11.

The medical records set forth that the claimant was treated at the Bates Medical Center on October 24, 2002, following a slip and fall accident at work. A CT scan of the claimant's cervical spine indicated that she had degenerative disc disease at C5-C6 with minimal narrowing present at C6-C7. Dr. David Tucker writes on March 10, 2004, that the claimant continues to have problems with her neck pain since her motor vehicle accident. A CT of the claimant's cervical spine was ordered which revealed a herniated disc at C4. Dr. Kelly Danks writes on March 26, 2004, that he has seen the claimant for her history of neck pain that radiates down both arms, right greater than left. Dr. Danks notes that she does have headaches sometimes resulting in nausea and vomiting. The doctor writes that standing, walking and sitting for any length of time increases her pain and that these came on after a motor vehicle accident on January 24, 2004. After examination, the doctor diagnosed the claimant with cervical disc disease and ordered an MRI of her neck.

On March 29, 2004, the claimant underwent an MRI of her cervical spine. Dr. Danks writes on March 30, 2004, that he has reviewed the claimant's MRI which shows degenerative changes at C4-C5 as well as C5-C6 and C6-C7 with some disc bulging and degenerative changes. Medications were prescribed as well as physical therapy. Dr. Danks also gave the claimant physical restrictions of no lifting over ten pounds and no bending, pulling or pushing. The claimant was seen in physical therapy at Health South from April 1, 2004, through April 12, 2004, with no improvement in her symptoms. Dr. Danks writes on April 13, 2004, that the claimant's medications, Depo-Medrol, gave her little relief and that physical therapy increased her pain. Dr. Danks writes that the claimant has degenerative disc disease which was aggravated by her motor vehicle accident and that she is taking Vioxx. On May 11, 2004, the claimant returned to Dr. Danks where she reports that she still has a continuing headache and that she is taking Midrin. Dr. Danks writes that the claimant reports she has stiffness in her neck for which she continues to take Vioxx.

The claimant was seen by the chiropractor on July 15, 2004, and reports that she is having severe neck and back pain. The claimant does mark that the accident did not occur at work. The claimant does list, however, that she was pushing a cart and felt pain at her neck, low back and felt like she was going to pass out with the severe pain on July 11, 2004. Dr. M. Hassan writes on July 19, 2004, that he saw the claimant initially for severe neck and low back pain on July 15, 2004. After examination, the doctor

writes that the claimant should be taken off work and not do any lifting for two to three months. Dr. Tucker writes on August 19, 2004, that the claimant had an injury while doing some lifting some six weeks ago and has been having continued problems with back pain and seeing a chiropractor. After examination, Dr. Tucker diagnosed the claimant with having persistent lumbar pain with evidence of radiculopathy and recommended that she undergo an MRI or CT scan. Dr. Tucker prescribed medications for the claimant. The claimant underwent an MRI of her lumbar spine on October 6, 2004, which revealed that she had a Grade 1 spondylolisthesis noted at L4-5 and that she had bilateral pars interarticularis defects are likely. The doctor also found that the claimant had a broad based annular bulge and posterior facet arthropathy results in central channel stenosis at L4-5 where the maximum AP diameter is reduced to 10mm in the midline. There is also discovered a small midline disc protrusion present at L5-S1.

After a complete review of this record, I find that the claimant has proven by a preponderance of the evidence that she sustained a work related injury while working for the respondent on July 11, 2004. The claimant has testified to a specific incident occurring on July 11, 2004, which caused her to immediately stop her work and be assisted into another room. The claimant has subsequently received medical treatment for her low back injuries and an MRI done in October revealed that she does have a disc protrusion present at L5-S1 as well as spondylothesis in conjunction with a broad based annular bulge and posterior facet

arthropathy which results in central channel stenosis at L4-5. It is noted that the claimant has had continuing treatment for her neck injury resulting from a motor vehicle accident in January 2004 but according to the claimant's testimony as well as in view of the medical records, this treatment was primarily for the claimant's neck. The claimant has testified that she did have some complaints of low back pain resulting from her work for the respondent but this was attributed to her long hours of standing and lifting and did not result in any lost time from her job as a result of low back problems. The respondents, therefore, should pay for all reasonable and necessary medical treatment for this claimant as well as temporary total disability beginning on July 12, 2004, to August 19, 2004. The chiropractor, which initially saw the claimant for her compensable injury, sets forth that she is physically unable to work and would be for several months.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On July 11, 2004, the relationship of employee-employer-carrier existed between the parties.
3. The claimant was earning \$8.50 per hour.
4. The claimant is entitled to a workers' compensation rate of \$177.00 for temporary total disability and \$154.00 for permanent partial disability.

5. The claimant has proven by a preponderance of the evidence that she sustained a work related injury while working for the respondent on July 11, 2004. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable low back injury. See discussion above.

7. The respondents should pay to this claimant temporary total disability beginning July 12, 2004, to August 19, 2004. See discussion above.

8. The respondents have controverted this claim in its entirety.

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

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her low back while working for the respondent on July 11, 2004.

The respondents, therefore, should pay for all reasonable and necessary medical treatment for this claimant's low back compensable injury.

The respondents should pay temporary total disability to this claimant from July 12, 2004, to August 19, 2004.

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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE