

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410216

JESSICA MARSHALL,
EMPLOYEE

CLAIMANT

JIM DANDY STORE,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 27, 2005

Hearing before Administrative Law Judge Mark Churchwell on June 28, 2005, in Searcy, White County, Arkansas.

Claimant represented by Honorable Scott A. Scholl, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Honorable Gail O. Mathews, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 28, 2005 in Searcy, Arkansas. A Prehearing Order was entered in this case on February 28, 2005. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The employer-employee relationship existed on July 8, 2004.

2. It is expected that the parties will be able to stipulate as to the compensation rate, the total medical bills, and introduction of medical records by the time of the hearing.
3. No benefits have been paid in that respondents controverted the claim in its entirety.
4. The parties stipulate that for purposes of determining an appropriate compensation rate, the claimant was employed for 40 hours per week at \$6.25 per hour.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited as follows in the Prehearing Order:

Claimant:

1. Whether claimant's injuries were received within the course of her employment and whether such injury is compensable under the Arkansas Workers' Compensation Statutes.
2. Claimant contends that claimant suffered a compensable injury, and is entitled to lost earnings, medical benefits, and TTD for approximately three months.

Respondent:

1. Compensability.

2. Respondent contends that the claimant did not sustain a compensable injury.

The record consists of the transcript of the June 28, 2005 hearing and the exhibits contained therein.

DISCUSSION

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, Ms. Marshall had been employed at the Jim Dandy Store in Rosebud, Arkansas for about eleven months when, according to her testimony, she slipped and fell at work on July 8, 2004, while carrying two boxes of sausage. Ms. Marshall testified that a co-worker, Ruthie,

came in and helped her up. According to Ms. Marshall, she explained to Ruthie at that time that she had fallen.

Ms. Marshall recalled the injury occurring between 9:00 a.m and 9:30 a.m. Ms. Marshall testified that she reported the injury to her supervisor, Christy, shortly after Christy came to work about 9:30, and Christy asked if she could work the rest of the day. Ms. Marshall testified that she continued to work for Jim Dandy Store until she called on August 13, 2004 to advise that she could not come in anymore. Ms. Marshall testified that she received \$65 from Jim Dandy Store to pay for chiropractic treatment, and that the store took that money out of her last paycheck.

Ruth Poczik, a 16 year employee at Jim Dandy Store testified that she instead first learned that Ms. Marshall claimed to have fallen at work when the store received a letter from the store's attorney regarding depositions. Jim Dandy Store manager Christy Guffey, and Jim Dandy Store employee Sarah Fry, each testified that Ms. Marshall has attributed her back problem at issue to a beating from her husband.

Yvonne Healy, Jim Dandy Store's office manager, testified that she first learned that Ms. Marshall was contending that she got hurt at work on August 12 or 13 when Ms. Marshall borrowed \$60 to go to the clinic. Ms. Healy

testified that Ms. Marshall did not report a work injury when she borrowed the money, and that Ms. Healy actually first learned of an alleged work injury from "workman's comp" when "workman's comp" called the store on August 13. Ms. Healy testified that she informed workman's comp at that time "it didn't happen at work." Ms. Healy testified regarding paying for work injuries:

Q If she had got hurt on the job, why would you-all pay money out of your pocket instead of sending it through workman's comp?

A That's exactly what we'd like to know. Because we pay lots of dollars for workman's comp. You know, and we have had claims before, so. [sic]

Q It would be kind of silly to loan her money to go to the doctor when you could've gotten it from workman's comp; right?

A Absolutely.

I do not find Ms. Healy's account as to "what happened" credible for two reasons. First, her testimony suggesting that Jim Dandy Store has a financial incentive to report all work related injuries to "workman's comp" appears inconsistent with the "Employment Policy" (Respondent's Exhibit 3) in the record which states in part:

As a JIM DANDY INC. employee, you are protected under the provisions of the Workmen's Compensation Act. JIM DANDY INC. pays a lot of money for this protection. The amount paid is determined by the amount of claims which are filed. Naturally we want to hold these claims to a minimum, in order to keep expenses down. However, if you should have an accident while working, report it

immediately to Jim or Peggy. An accident report must be filed by the company within 24 hours of the accident. It is the employee's responsibility to report an accident IMMEDIATELY so that necessary treatment can be provided and an accident report can be completed. [Emphasis added.]

Contrary to Ms. Healy's hearing testimony, the highlighted portion of Jim Dandy Store's "Employment Policy" indicates that Jim Dandy Store does not have a financial incentive to report work injuries for worker's compensation coverage.

Second, I do not find probable Ms. Healy's account (1) that Ms. Marshall came to her for a loan to see a doctor on August 13, 2004; (2) that Ms. Marshall made no mention to Jim Dandy Store that the injury was work related before Jim Dandy Store loaned her the money to see a doctor, (3) but then on August 13, Ms. Marshall reported a work-injury for the first time to her doctor who then contacted "workman's comp" who contacted Ms. Healy on August 13 for an explanation.

Nor do I find credible the testimony of Ms. Guffy and Ms. Fry that Ms. Marshall attributed her back problem at issue to her husband beating her. While there is no dispute that Ms. Marshall's husband would beat her from time to time in the past, Ms. Marshall also testified that she and her husband had separated during the period in question, and I

do not see any credible evidence rebutting Ms. Marshall's testimony indicating that her husband was not around in July or August of 2003.

The conflicting testimony in the present case brings to my mind conflicting evidence recently discussed by the Full Commission in Roger Massengale v. Pace Industries, Inc., Full Workers' Compensation Commission, Opinion filed August 25, 2005 (F400996). In Massengale, the claimant testified that he hurt his back lifting at work on a Saturday and reported the injury to his supervisor on Monday. The supervisor and a co-worker each testified instead that the claimant attributed his back problems to a lifting incident at home. The supervisor's account was corroborated by what were purportedly contemporaneous notations in a notebook that the supervisor kept. The first medical report in the record referred to an incident away from work, and made no reference to any incident at work.

Nevertheless, the Full Commission did not find credible the testimony and notes of the supervisor or the co-worker's testimony in Massengale where (1) the claimant's testimony was in accord with the type of work that he was doing; (2) the claimant's explanation for not relating a history of a work injury to his doctor was understandable under the circumstances; (3) the claimant had group health insurance

available and instead filed his claim on workers' compensation rather than group health; (4) the Full Commission did not find credible the supervisor's handwritten notebook notations and therefore did not find credible the testimony of any of the employer's witnesses; and (5) the Full Commission concluded that the supervisor was motivated to alter his notebook to avoid the consequences of not following through on the claimant's report of a work related injury.

In the present case, unlike in Massengale, Ms. Marshall had no group insurance available. However, in the present case, unlike Massengale, the medical reports in the hearing record do contain a history of a work injury, corroborating Ms. Marshall's testimony, rather than a history of an injury of a husband beating, which would have corroborated the testimony of testimony of Ms. Fry and Ms. Guffy.

Further, the respondents' Employment Policy quoted above indicates that, in the present case, a financial disincentive existed for the company to report alleged work injuries, and also that negative consequences would occur if the employer did not report alleged injuries within 24 hours of their occurrence. In the present case, as in Massengale, there is no dispute that Ms. Guffy did not follow up on a report of an alleged work injury within 24 hour hours of

July 8, 2004, if in fact Ms. Marshall reported an injury on that date. Therefore, if Ms. Marshall reported an injury on July 8, 2004, then Ms. Guffy and other personnel at Jim Dandy Store appear to have had the same incentive to later fabricate a story as the Full Commission appears to have concluded occurred in Massengale.

I find that Ms. Marshall proved by a preponderance of the credible evidence that she in fact experienced and reported a back injury at work on July 8, 2004 as she asserts. In reaching this conclusion, I am persuaded by the fact that the medical records corroborate the claimant's account of a work injury, and by the fact that neither the medical records or any other type of documentation corroborate the respondents' witnesses' testimony that Ms. Marshall's back injury occurred as a result of a beating by her husband who, as far as I can tell, was not even around in July or August or 2004.

I also find that the claimant has established the existence of her injury with medical evidence supported by objective findings. In this regard, I note that, although one medical report makes reference to Ms. Marshall having some degree of back pain for years, there is no evidence in the record indicating that Ms. Marshall had ever previously received treatment for back problems or ever missed any time

from work for back problems prior to August 13, 2004. I note that Dr. Waller interpreted x-rays as indicating a transitional L5 vertebra partially fused with the sacrum, and as far as I can tell, Dr. Waller has not had an opportunity yet to review Ms. Marshall's lumbar MRI which reportedly indicated minimal disk bulging at L3-4 and L4-5. While none of these particular findings likely represent objective findings of an acute injury, I note that Dr. Waller diagnosed a lumbar strain, and a prior physician on August 13, 2004 prescribed Flexeril for spasm, which I understand to be an objective medical finding consistent with Dr. Waller's diagnosis of lumbar strain. See Fred's, Inc. v. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (04-1085 Op. Del. Mar. 31, 2005).

Consequently, I finding that the claimant has established by a preponderance of the credible evidence all requirements necessary to establish a compensable back injury caused by a specific incident identifiable by time and place of occurrence.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the

underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a) (3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find that all of the medical treatment documented in the medical record from the hearing is reasonably necessary for, and causally related to, diagnosing the extent of and/or treating Ms. Marshall's July 8, 2004 work-related back injury. Ms. Marshall testified that Dr. Waller has also proposed physical therapy to treat her condition, and that she has not received the physical therapy because the insurance company has denied her claim

and she cannot pay for the therapy herself. The last medical report in the record from Dr. Waller indicates on October 18, 2004 that Ms. Marshall is to return after undergoing an MRI. I do not see any reference to physical therapy in the October 18, 2004 report, and the last medical report in the record is an October 20, 2004 MRI report which likewise makes no reference to any proposed physical therapy. Under these circumstances, I make no finding as to what additional medical treatment will or will not be reasonably necessary after October 20, 2004.

Although the claimant contended in our prehearing that she was entitled to three months of temporary total disability, I conclude that she did not begin missing work until August 13, 2004, and as discussed, her last record of medical treatment was on October 20, 2004. Based on Dr. Waller's course of treatment and off-work recommendations presented in the medical records, I find that Ms. Waller proved that she was within her healing period and totally incapacitated from working as per her doctor's recommendation only from August 13, 2004 through October 20, 2004.

Finally, the respondents seek reimbursement for a \$40 court reporter appearance fee from either the claimant or her attorney for a deposition for which Ms. Marshall failed

to appear. Ms. Marshall testified that she lived approximately eight miles from the post office when the letter came, that she only checked her mail approximately once every two weeks during that period, and that she did not check her mail during the relevant period until two days after the deposition. Under these circumstances, I find that neither the claimant or her attorney are liable for the court reporter's appearance fee for the missed deposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee relationship existed on July 8, 2004.
2. No benefits have been paid in that respondents controverted the claim in its entirety.
3. The parties stipulate that for purposes of determining an appropriate compensation rate, the claimant was employed for 40 hours per week at \$6.25 per hour.
4. The claimant has established by a preponderance of the credible evidence that she sustained a compensable back injury on July 8, 2004.
5. The claimant proved by a preponderance of the credible evidence that all of the medical treatment documented in the medical record from the hearing is reasonably necessary for, and causally related to,

diagnosing the extent of and/or treating Ms. Marshall's July 8, 2004 work-related back injury.

6. The claimant proved by a preponderance of the credible evidence that she is entitled to a period of temporary total disability compensation from August 13, 2004 through October 20, 2004.

7. Neither the claimant or the claimant's attorney is responsible to reimburse the respondents for the \$40 court reporter appearance fee for a deposition for which Ms. Marshall failed to appear due to lack of notice.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25 percent attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

HONORABLE MARK CHURCHWELL
Administrative Law Judge

