

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F403931

KATHY ORRENDER, EMPLOYEE	CLAIMANT
S & L PAWN, INC., EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MARCH 17, 2005

A hearing in this case was conducted on January 28, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Russellville, Pope County, Arkansas.

Claimant was represented by William F. Smith, Attorney at Law, Russellville, Arkansas.

Respondents were represented by Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 7, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations; these stipulations are set forth in the Prehearing Order, were confirmed by the parties at the hearing, and are hereby accepted.

1. The employee-employer-carrier relationship existed on November 3, 2003, and at all relevant times.

2. Claimant's average weekly wage is \$276.00.

3. Respondents controvert this claim in its entirety.

At the January 28, 2005 hearing, the parties discussed the issues set forth in the

Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury on November 3, 2003.
2. Whether Claimant is entitled to reasonably necessary medical benefits.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to an attorney's fee.

All other issues are reserved, including whether Claimant is entitled to permanent partial disability benefits and whether she is entitled to rehabilitation and return to work under Ark. Code Ann. § 11-9-505.

Claimant contends that she sustained a compensable injury to her low back on November 3, 2003, as she assisted another employee in lifting a large television set. She argues that she is entitled to medical benefits in connection with this injury, as well as temporary total disability benefits and an attorney's fee. Respondents allege Claimant did not sustain a compensable injury in the course and scope of her employment and that there is no objective medical evidence to support this claim.

DISCUSSION

The Respondent employer is a pawn shop. Claimant's job duties included storing and arranging merchandise, which involved lifting. She described an incident at work that occurred on November 3, 2003.

We had a 32-inch color TV come out of pawn. And we had to take a dolly and take it back there and lift the TV and put it on the dolly. Well, we did that, but putting the TV down Tammy's [Claimant's manager] fingers got stuck underneath the TV. And I panicked and I picked the TV up. And that's when I felt the sharp, stabbing pain in my back and it went down my right leg. And I thought I'd pulled a muscle. I wasn't sure what happened.

Claimant exclaimed to her manager that she had hurt her back. Shortly thereafter the business owner noticed Claimant limping. She asked Claimant what happened, and Claimant reported the incident to the owner.

Initially, Claimant believed she had just pulled a muscle. She worked the rest of that day, although she continued to limp. She did not sleep well that evening and her pain worsened. The next morning Claimant called her manager and reported that she needed to go see a doctor. Her manager spoke to the business owner, and then called Claimant back to authorize a visit with a doctor.

Dr. Lucas Andrada examined Claimant on November 4, 2003. He recorded Claimant's history: "The patient reports hurting her low back and mid back yesterday while lifting a TV at work. She has pain radiating to both legs and also into her right hip." Dr. Andrada assessed "[l]ow back pain, musculoskeletal," prescribed certain medications, and took Claimant off work for three days.

Claimant remained off work from November 4, 2003 until November 18, 2003. She then worked at light duty until December 3, 2003, at which time the business owner informed her that light duty was not really available and that Claimant had to be let go. Claimant recalled her physical condition: "I was in a lot of pain. I couldn't do much. I couldn't stand for long. I couldn't sit for long. It was just up and down." She testified that she has not worked anywhere else since her injury on November 3, 2003. She tends to some housework, but she "can't do a whole lot." She denied any history of back problems.

Q. All right. Tell me, have you ever had any kind of sharp pain and problems in the area of the back that you experienced on November 3rd? Have you ever had any of that before?

A. No, sir.

Q. Have you ever been -- had any treatment or care or gone to see a doctor for a pain or injury to that area of the back that you had? The pain you had that day on 11/3?

A. No, sir.

Q. No history of any kind of back problems?

A. None at all.

Claimant denied engaging in any activities other than around her house, from November of 2003 until she had her second MRI in March of 2204.

Claimant confirmed that, as of the time of the hearing, her physical condition had more or less remained the same since she lifted the television in November of 2003. She did not obtain any relief from physical therapy or steroid injections, but a TENS unit provided some relief. She takes Hydrocodone and Flexeril daily to obtain a "little" pain relief. Dr. Andrada recently informed Claimant she has three options: medical management, lumbar fusion, or disc replacement. However, as stated on a medical record dated January 19, 2005, Dr. Andrada would like for Claimant to see another doctor for a second opinion. She is still under Dr. Andrada's care; she testified that she has not been released to return to work and that she cannot perform physical labor like she did for the Respondent employer.

As to prior injuries, in 1993 Claimant injured her neck in a motor vehicle accident; she did not undergo surgery, but she did undertake physical therapy. She was not on any kind of medication for her 1993 injury at the time of her November 3, 2003 work incident. Claimant did undergo work-related right knee surgery in either 2000 or 2001.

To summarize Claimant's medical records, her complaints of pain in her low back and right leg have been substantially consistent since November 3, 2003. (Claimant's

Exhibit #1 at 16, 17, 20, 22, 26, 30, 32, 67, 74, 77-78, 80-81, 84-85, 89-90, 91-94, 106, 107, 108, 109, 110, 112, 113, 115, 116, 117, 118, 119, 120-21, 126, 127.) Some days were better than others; sometimes her back hurt worse than her leg, and vice versa; some treatment did provide temporary relief; but Claimant's complaints have been continual.

Claimant's diagnoses have been substantially consistent, as well. On November 17, 2003, Dr. Andrada diagnosed Claimant with lumbar strain and sciatica. On January 30, 2004, Dr. Marc Valley diagnosed sacroiliitis, low back pain, and "[m]uscle spasms overlying." On March 26, 2004, Dr. Chris Horan assessed Claimant with "[c]hronic back pain." Dr. Valley diagnosed Claimant with low back pain, disc disruption in her lumbar spine, and degenerative disc disease of her lumbar spine, on July 22, 2004. On October 1, 2004, Dr. Valley wrote that Claimant's "current diagnosis includes low back pain, disc disruption, lumbar spine, and sciatica." As late as January 19, 2005, Claimant was diagnosed with "low back pain, lumbar disc disease."

The medical records document the presence of muscle spasms. On November 17, 2003, among other medications Dr. Andrada prescribed: "Flexeril 5, 1 p. o. three times a day p.r.n. muscle spasm, #20." As noted above, on January 30, 2004, Dr. Valley assessed Claimant with "[m]uscle spasms overlying." Muscle spasms are also indicated in medical records dated March 9, 2004 and March 18, 2004.

Four studies are contained in the medical records. On November 7, 2003, a "lumbar spine three views" resulted in an impression of "minimal osteoarthritis... no other significant abnormality." An MRI of Claimant's lumbar spine performed on November 24, 2003, resulted in an impression of "[n]egative MRI of the lumbar spine." However, a second MRI of Claimant's lumbar spine taken on March 30, 2004 resulted in an impression of "[s]mall

central disc herniation, L5-S1.” This MRI’s findings include:

There is a small central disc herniation at the L4-S1 level. It does not significantly compress the spinal cord or cause any neural foramina narrowing or compression of exiting nerve root. The remaining levels are unremarkable.

Claimant’s fourth study is a “CT lumbar spine, post-discogram” performed on September 22, 2004. It resulted in an impression of “[a]nnular tears at L4-5 and L5-S1 discs.”

Tammy Hibbs testified at the January 28, 2005 hearing; she was Claimant’s manager on November 3, 2003, and recalled Claimant’s incident at work.

Kathy and I went back, you know, to do the pulls that you do in the morning, and we had to get the big television which was down on a shelf. I don’t know how high it was we was going [to] have to lift it to put it on the little dolly thing. Well, my hand got hung underneath it, and she picked up the TV to get it off my hand. And she said, Oh, my God. I’ve hurt my back and she was bent over and couldn’t hardly straighten back up.

Hibbs told the business owner that Claimant had hurt her back. She noticed Claimant limping after the incident; Hibbs had never noticed Claimant limping before, nor did she recall Claimant ever complaining of back problems before. On the following morning Claimant “called and said her back was hurting her real bad and she’d suffered all night with it, and she was going to go to the doctor and see what they could do about it.” Hibbs talked to the business owner about Claimant’s need to see a doctor. Hibbs was present when the business owner took a call from the doctor’s clinic: “I don’t know who she was speaking to on the other end of the phone from the clinic, but she told them, yes, that she [Claimant] had hurt her back and that she’d pay for that initial visit.”

A. Compensability of the Claim

Claimant must prove that she sustained a compensable injury.

“Compensable injury” means: ... an accidental injury causing internal or

external physical harm to the body... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, ___ Ark. App. ___, ___ S.W.3d ___ (September 8, 2004). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). The employee must sustain her burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant proved by a preponderance of the evidence that she sustained a compensable injury on November 3, 2003. The elements necessary to state or prove a compensable injury will be discussed in turn.

Claimant’s injury arose out of and occurred in the course of her employment by the Respondent employer.

In order to prove a compensable injury a claimant must prove, among other things, a causal relationship between the injury and the employment.... Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical evidence establishes a causal relation to a work-related incident.

Horticare Landscape Mgmt. v. McDonald, 80 Ark. App. 45, 50, 89 S.W.3d 375, ___ (2002)

(citations omitted). In this instance, the parties stipulated that the employee-employer relationship existed on November 3, 2003. Claimant testified that she experienced an injury to her back, with pain running into her right leg, as she lifted a large television set on that date. Claimant's testimony was corroborated by that of her manager, Tammy Hibbs. The evidence of greater convincing force establishes the causal relationship between Claimant's employment and her injury.

Claimant's injury was caused by a specific incident identifiable by time and place of occurrence. Claimant and her manager agree that Claimant's injury arose out of an incident occurring on the morning of November 3, 2003, at the Respondent employer's place of business. Claimant identified a specific incident, lifting the television set, and testified to immediate and subsequent pain and discomfort, including limping. This testimony was corroborated by Claimant's manager.

Claimant's injury caused physical harm to her body. She had not previously experienced or been treated for pain or injury to that area of the back she injured on November 3, 2003; she denied any history of back problems. Hibbs did not recall Claimant either limping or complaining of back problems prior to the on November 3, 2003 incident. Following the incident, Claimant's testimony, as corroborated by the medical records, establishes that she has continually needed treatment for her low back and right leg. The record contains medical evidence supported by objective findings establishing Claimant's injury. These findings include indications of muscle spasms on four separate occasions; Claimant's second MRI taken on March 30, 2004, indicating a "[s]mall central disc herniation, L5-S1"; and Claimant's September 22, 2004, CT lumbar spine, post-discogram, resulting in an impression of "[a]nnular tears at L4-5 and L5-S1 discs."

Claimant's injury required, and still does require, medical services. Claimant's testimony, as corroborated by the medical record, establishes that she experienced pain after the incident and that her condition has remained the same since November 3, 2003. Claimant cannot perform the physical labor that she could prior to this date and is limited in the housework she can perform. She remains under a doctor's care, has been provided with options for further treatment, and continues to take medication for her condition.

Respondents' contention concerning a lack of objective medical evidence is noted. Claimant's first two studies (both taken after the injury in November of 2003) failed to reveal any objective findings establishing her injury. Nonetheless, the evidence of greater convincing force establishes the presence of objective findings. Again, muscle spasms are indicated in medical records dated November 17, 2003; January 30, 2004; March 9, 2004; and March 18, 2004. Throughout this period Claimant complained of pain in her low back and right leg. Then, on March 30, 2004, Claimant's second MRI indicated the presence of a small central disc herniation at L5-S1. Despite the results of Claimant's first two studies, the record contains a substantial number of objective findings that are consistent with Claimant's complaints.

B. Medical Benefits

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the

compensable injury.” Greer v. Phillip Mitchell Constr., Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, ___ Ark. App. ___, ___ S.W.3d ___ (March 16, 2005).

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical benefits in connection with her injury. Claimant did not require medical treatment for her low back and right leg prior to November 3, 2003; her testimony and the medical records establish that she has continually needed such treatment since that date. She testified that she has obtained some relief from medications and a TENS unit, but not from physical therapy and steroid injections. She remains under a doctor’s care and has been provided with options for future treatment. Thus, the record reflects a need for medical treatment on Claimant’s part, in connection with her November 3, 2003 compensable injury.

C. Temporary Total Disability Benefits

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889, ___ (2002). “Disability” means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The hearing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing

period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, ___ (2002). The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 4, 2003 to November 17, 2003; and then from December 4, 2003 to a date to be determined. Dr. Andrada kept Claimant off work from November 4, 2003 to November 17, 2003; she returned to work on November 18, 2003, performing light duty. Claimant's employment was terminated on December 3, 2003; after that date, she has remained under a doctor's care and has been unable to perform the physical labor she could prior to the injury. Claimant testified to her continuing disability and inability to work or tend to "a whole lot" of housework. There is no evidence in the record that Claimant's healing period has terminated, or that she has been declared at maximum medical improvement; indeed, she has been presented with options for future treatment.

D. Attorney's Fees

Since Claimant's compensable injury occurred after July 1, 2001, her request for an attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Under the statute, attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This opinion awards Claimant temporary total disability benefits; the parties stipulated that Respondents have controverted her claim in its entirety. Therefore, Claimant is entitled to an award of attorney's fees under the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on November 3, 2003, and at all relevant times.
3. Claimant's average weekly wage is \$276.00.
4. Respondents controvert this claim in its entirety.
5. Claimant proved by a preponderance of the evidence that she sustained a compensable injury to her back on November 3, 2003. She sustained this injury by a specific incident, lifting a large television on the morning of November 3, 2003 at the Respondent employer's place of business. The injury arose out of and in the course of Claimant's employment, since Claimant was performing a job duty when she lifted the television and sustained her injury at work. Her injury caused physical harm to her body; she denied any history of back problems prior to November 3, 2003, but since that date has needed treatment for pain in her low back and her right leg. Claimant's compensable injury is established by medical evidence supported by objective findings including muscle spasms, a herniated disc, and annular tears. Her injury requires medical services; she has been under a doctor's care since November 3, 2003, and has been provided with options for future treatment.
6. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical benefits in connection with her injury. Claimant did not require medical treatment for her low back and right leg prior to November 3, 2003; she has required such treatment since that date. She remains under a doctor's care and has been provided with options for future treatment.

7. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 4, 2003 to November 17, 2003; and then from December 4, 2003 to a date to be determined. Claimant was kept off work by a doctor from November 4, 2003 to November 17, 2003; her employment was terminated on December 3, 2003, after which she has remained under a doctor's care and has been unable to perform the physical labor she could prior to the injury. Claimant remains within her healing period, because she still is under a doctor's care and has been presented with options for future treatment.

8. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715. The parties stipulated that Respondents controverted this claim, which would include the indemnity benefits awarded in this opinion.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

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

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml