

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410745

DOROTHY J. PARDUE, CLAIMANT

CLAIMANT

ATLANTIC RESEARCH CORP., EMPLOYER

RESPONDENT

INSURANCE COMPANY OF
PENNSYLVANIA, CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 8, 2005

Hearing held on June 14, 2005, before HONORABLE DALE DOUTHIT, Administrative Law Judge, at El Dorado, Union County, Arkansas.

Claimant represented by HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above captioned claim came on for a hearing on June 14, 2005, in El Dorado, Arkansas. A prehearing conference was conducted on March 30, 2005, and a prehearing order was filed on March 31, 2005. A copy of the prehearing order was marked Commission Exhibit 1, and made a part of the record, without objection, subject to the modifications made at the full hearing.

At the hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has

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jurisdiction of this claim.

- 2) The employee/employer/carrier relationship existed at all relevant times.
- 3) The claimant had an average weekly wage of \$339.00 at the time of the alleged work accident, entitling her to a temporary total disability rate of \$254.00 per week, and a permanent partial disability rate of \$195.00 per week.
- 4) That there was an incident at work on July 2, 2004 for which the claimant received medical attention, and that the respondents paid medical care related to such incident up to September 9, 2004.
- 5) That all issues not outlined herein are hereby reserved.

At the hearing, the parties agreed the following issues would be presented for determination:

- 1) Whether the claimant sustained a compensable injury on July 2, 2004 to her back.
- 2) If compensability is overcome, whether the claimant is entitled to associated medical after September 9, 2004; for temporary total disability benefits from May 6, 2005 to a date yet to be determined, and attorney fees.

The claimant contends that she had a previous back injury and surgery, but that on July 2, 2004, she was hit in the back while at work. She reported the incident, and an accident report was made and that she was told by the respondents to see her family doctor. Claimant contends she saw Dr. Massanelli and that he referred her

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back to her original doctor, Dr. Peek. Dr. Peek indicated the claimant had a contusion and an annular tear. He related those objective findings directly to the claimant's work-related accident. Dr. Peek, the specialist, clearly indicated her condition was aggravated and worsened by her work-related injury. Respondents have taken the position that claimant's current condition is non-occupational and her previous conditions were not worsened by her job related accident. Claimant further contends she is entitled to temporary disability from May 6, 2005, to a date yet to be determined (T. pg. 82, lines 1-3), associated medical treatment and attorney fees.

The respondents contend the claimant did not sustain either a compensable aggravation, or an compensable injury of any kind on July 2, 2004. That all of the claimant's problems are traceable to her pre-existing lumbar abnormalities. That there are no objective findings to support the existence of a compensable aggravation or injury. Respondents affirmatively state the claimant did have objective findings of a tear in the L4-5 region, as well as problems in the L3-4 region, but that those findings were precisely the same findings contained in MRIs performed prior to the alleged injury of July 2, 2004, and that they could not in any way be connected to the alleged injury of that date. In the alternative, respondents contend that in the event compensability is found, that any benefits beyond September 9, 2004, would not be warranted.

DISCUSSION

A. History

The claimant, age 56, started working for the respondent employer on May 20, 1998. Sometime in 2003 the claimant testified she started having back pain unrelated to her employment with the respondent. The claimant seemed to indicate her 2003 back pain was related to an injury about twelve (12) years earlier when she worked for a different employer as a CNA. (T. pg. 13, lines 20-25 & T. pg. 14 lines 1-2) The claimant also had cervical problems prior to the alleged incident on July 2, 2004. The claimant had neck surgery sometime between September 22, 2003 and December 2, 2003, according to the medical records of Dr. Peek. (RX-1, pg. 13 & 14) The claimant testified it was her back, not neck, that was injured on July 2, 2004, while in the respondents' employ.

Following her neck surgery, the claimant had back surgery on December 29, 2003. (RX-1, pg. 19) The procedure was a L3-4 bilateral laminectomy. Following the back surgery, the medical records show the claimant had follow-up visits with Dr. Peek on January 27, 2004, March 10, 2004, April 8, 2004, and June 8, 2004. Injections were given to the claimant in the lumbar area on January 27, 2004 and April 8, 2004 visits. After her back surgery, the claimant returned to full duty work with the respondent employer on April 23, 2004. (T. pg. 19, lines 23-25)

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The claimant testified as follows regarding the alleged work-related accident of July 2, 2004::

A. Yes, sir. The machine that I was working at, like this is the machine here, and I was sitting like this close to the machine, and - - -

MR. NEWKIRK: May we let the record... (T. pg. 22, lns. 22-25) reflect the distances, Your Honor

THE COURT: Sure. Ma'am, go ahead and if you could state how many inches apart your hands are there.

A. Oh, probably six to eight inches. And the stool that I was sitting up on, you have to look over into the part to drop your segments in it, to make sure you are getting the right count in there. So the first thing I know I felt this hit in my back and it pushed me into the machine, it was a conveyer belt, and I hollered, oh, she hit me in the back. So Geraldine, she said, well, you need to make an accident report.

Q Were there any other witnesses?

A. Yes, sir.

Q. Who were the witnesses?

A. Wendy Coleman, the person that hit me.

Q. Wendy who?

A. Coleman.

MR. NEWKIRK: Was she on a forklift?

A. No, sir, it was a hand push rail. And Marcelle Berry.

Q. Okay. Now this hand rail, can you describe that?

A. Well, it is a railing thing that is, oh, about this high - - - (T. pg. 16, lns 1-25)

Q. For the record - - - -

A. Probably about four feet high and it's about a foot to two foot high?

Q. What does it weigh?

A. It would probably weigh about 60 to 80 pounds.

Q. Is it on wheels?

A. Yes, sir.

Q. And were you in a chair or a stool?

A. Well, we call it a lean-to. It's just a chair that is - it's just L shaped, you know, with like a bicycle seat on it.

Q. And that is what you were on?

A. Yes, sir.

Q. And you say that you were about 6 inches from the table or the machine. Did it push you into the machine?

A. Yes, sir. It pushed me up against it.

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Q. All the way up against it?

A. Yes, sir, but I didn't - it didn't push me out of the seat but it just pushed me into it because you are sitting so close. (T. pg. 17, lines 1-22)

The claimant testified she continued to work for the respondents after the July 2, 2004 incident until she was taken off work by Dr. Peek on May 6, 2005. Dr. Peek's letter of May 10, 2004 stated that the claimant was "disabled from employment for at least the next three months due to lumbar injury and cervical injury with cervical and lower back surgery and cervical and lower back stenosis." (RX-4, pg. 4)

B. Adjudication

It is indisputable that a rail cart rolled and hit the claimant in the back on July 2, 2004 while working for the respondent. The respondents own witness, Ms. Geraldine Torrance, testified almost identically to the claimant about the incident.

A. Well, we was standing at what we call the end of the line and she was on this side and I was on that side facing her. The other young lady pushed a rail up - - - -

Q. Who was that?

A. Wendy Coleman.

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Q. Go ahead.

A. She pushed the rail up to where Ms. Dorothy was and when she pushed it up she hollered rail and let it go and the rail just kept on going and from where I was, couldn't get around there fast enough to stop the rail. I hollered and told Ms. Dorothy that the rail was coming towards her back and, you know, it just coasted on down and hit her in the back. (T. pg. 47, lines 18-25 & pg. 48, lines 1-6.)

After the cart hit the claimant she immediately told Ms. Torres, her supervisor, and then reported it to the company nurse. The claimant reported back pain associated with the hit. Eventually the claimant went to see Dr. Peek who performed her back surgery in December of 2003. The first report from Dr. Peek following the July 2, 2004 incident introduced at the full hearing was dated August 19, 2004. In that report Dr. Peek noted spasms at L4-5. (CX-1, pg. 17)

Even though the claimant had other problems with her lumbar spine prior to July 2, 2004, none of Dr. Peek's reports between her December, 2003 surgery and the July 2, 2004 incident indicate spasms. Obviously the cart hitting the claimant in the back aggravated her condition and the spasms are objective findings evidencing such. An aggravation is defined as "a new injury resulting from an independent incident." Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a

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compensable injury. Ford v. Chemipulp Process, Inc. 63 Ark. App. 260, 977 S. W. 2d 5 (1998). When a claimant alleges she sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, she must prove by a preponderance of the evidence 1) the injury arose out of and in the course of her employment; 2) the injury caused internal or external harm to the body which required medical services, or resulted in a disability or death; 3) that the injury was caused by a specific incident and is identifiable by time and place, and 4) establish that the compensable injury is supported by objective findings as defined in A.C.A. §11-9-102(16). Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W. 3d 760 (2001).

I find the claimant did sustain a compensable aggravation on July 2, 2004. The difficult query is what benefits the claimant is entitled to and the extent of the aggravation. As stated earlier, the claimant has extensive pre-existing back problems and underwent lumbar surgery less than seven months prior to the July 2, 2004 accident. Due to her prior back problems, the Commission has the benefit of perfect hindsight regarding her back condition before July 2, 2004, and after July 2, 2004. On December 23, 2003, six days before her lumbar surgery, a MRI of the claimant's lumbar spine was conducted with the following impressions:

IMPRESSION:

1. L3-4 annular bulge and broad-based right paracentral disc herniation are superimposed on moderate L3-4 canal stenosis.

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2. Mild L4-5 annular disc bulge superimposed upon minimal L4-5 canal stenosis. There is annular tear at this level without focal disc herniation.
3. Mild L4-5 facet arthritis.
4. Signal abnormality in the posterosuperior L2 vertebral body probably representing an atypical hemangioma.

On September 8, 2004, Dr. Massanelli conducted a MRI which contained virtually the same impressions. (CX-1, pgs. 3 & 4) Upon comparing both the December, 2003 MRI and the September 8, 2004 MRI, Dr. Massanelli found the claimant at maximum medical improvement from the July 2, 2004 work-related injury. (CX-1, pgs. 15 & 16) Dr. Massanelli found the exam “unchanged”, with no evidence of any acute findings. I agree with Dr. Massanelli and find the claimant had a temporary aggravation but that any objective findings after September 9, 2004 were pre-existing.

This Administrative Law Judge acknowledges that Dr. Peek disagrees with Dr. Massanelli’s MMI finding and I do not totally disregard Dr. Peek’s assessment. However, Dr. Peek’s own reports indicate that within weeks before the July 2, 2004 incident, the claimant was still in considerable pain from her December 2003 lumbar surgery. (RX-1, pg. 23) In Claimant’s exhibit #1, page 2, Dr. Peek states:

“I also saw her on 6/8/04, and she definitely had a worsening of her condition.”

The fact of the matter is that Dr. Peek should have never signed off on a full

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duty release to return the claimant back to work in April of 2004, following her back surgery. The claimant even testified as follows regarding her return to work:

Q. You had to have a full duty release to return to work, didn't you?

A. Right.

Q. And this was after your back surgery and your neck surgery that were all non-work related, correct?

A. Right.

Q. And I think you actually went to Kim and gave her some restrictions almost the week before where you were under restrictions and the doctor was not wanting to release you and your six months - they have a policy out there where after six months they can't keep paying you STD, short term disability, they have to move it to long term disability and terminate your employment. Is that correct?

A. Right.

Q. And at that point you came back a week later with a release from him to return to full duty work, correct?

A. Yes.

Q. Did you feel like you were ready to return to work at that point?

A. No, I didn't, but I needed to keep my job.
(T. pgs. 37 & 38, lines 13-25 & 1-9)

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It is unfortunate that the claimant had to go against her doctor's advise and her own symptoms to return to work, but I understand the necessity to work and the claimant's needs at that time. The claimant testified at the hearing she couldn't remember going to the doctor between April of 2004 and July of 2004. (T. pg. 21, lines 4-6) In fact, the claimant did see Dr. Peek during that time for her back problems as evidenced by Dr. Peek's medical records. The reality is that the claimant never fully healed from her non-work related back surgery prior to the July 2, 2004 accident.

Once again, the MRIs show that any problems the claimant now has with her back were pre-existing to the July 2, 2004 accident.

Dr. Peek seemed to note new findings in his September 24, 2004 report (CX-1 pg 14); however, the MRIs do not back up his statement and I give Dr. Massanelli's assessment greater weight based on all the evidence.

Therefore, I find the compensable aggravation suffered by the claimant on July 2, 2004 to have been temporary. I find the claimant reached MMI on September 9, 2004, in regard to the July 2, 2004 aggravation. The claimant has not requested any temporary total disability benefits between July 2, 2004 and September 9, 2004; therefore, the only benefits due to the claimant for that period of time is all associated medical, including but not related to Drs. Peek and Massanelli. As stated, the claimant

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has never alleged her current neck problems are in any way associated with the July 2, 2004 incident, and are not the subject of this opinion.

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 conclusion of law are made in accordance with A.C.A.

§11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The parties stipulations are reasonable and hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence she sustained a compensable aggravation of a pre-existing injury on July 2, 2004, while in the respondents' employ.
- 4) The claimant's compensable aggravation was temporary and the claimant reached MMI from the July 2, 2004 aggravation on September 9, 2004.
- 5) That the claimant is entitled to associated medical benefits related to her compensable aggravation for the period of July 2, 2004 through September 9, 2004, including, but not limited to, treatment provided by Dr. Massanelli and Dr. Peek.
- 6) The respondents are entitled to appropriate A.C.A. §11-

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9-414 offsets for benefits paid during the period July 2, 2004 through September 8, 2004.

- 7) The claimant has failed to prove she is entitled to temporary total disability benefits from May 6, 2005 to a date yet to be determined.

ORDER

Respondents are hereby ordered and directed to pay the medical benefits pursuant to the findings of fact and conclusion of law awarded herein forthwith.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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