

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413066

ROBIN RAY	CLAIMANT
CITY OF EUREKA SPRINGS	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 18, 2005

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

Claimant represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondents represented by J. CHRIS BRADLEY, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 24, 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 February 9, 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 August 23, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$163.00 for temporary total disability.

By agreement of the parties the issues to be litigated are limited to the following:

1. Compensability of the claimant's low back injury of August 23, 2004.
2. Related medical expenses.
3. Temporary total disability from August 26, 2004 through August 31, 2004, September 1, 2004 and September 7, 2004 to November 28, 2004.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she injured her back on August 23, 2004, while lifting a picnic table while working for the respondent.

In regard to the foregoing issues the respondents contend that the claimant contends that she sustained an injury to her low back on August 23, 2004. Respondents contend claimant did not sustain a compensable injury.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The parties jointly submitted medical information marked Joint Exhibit No. 1. All of these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that she began working for the respondent in March 2004 as a park attendant at Lake Leatherwood. The claimant explained that her duties involved renting boats, running the bait shop, cleaning the cabins and camp grounds and general maintenance of the park. The claimant testified that on August 23, 2004, which was a Monday, around 5:00 she was helping

move big picnic tables which had been rearranged during the weekend. The claimant testified that she and her partner were moving a table sideways and when she twisted she felt pain in her low back and in her neck. The claimant testified that she told "Kurtz", the man she works with, that she hurt her back. The claimant testified that she worked approximately ten minutes more or to the end of her shift and she went home. The claimant testified that she thought she might have just pulled a muscle and since she was to be off Tuesday and Wednesday she felt like it would get better. The claimant testified that by Thursday she still did not feel any better so she went to Dr. Kirkpatrick, a chiropractor, for an adjustment. The claimant testified that she has seen Dr. French who sent her to Tree Of Life for treatment and she has undergone an MRI as well as physical therapy. The claimant testified that she has no return appointments because she owes Dr. French so much money, all she will do is fill her prescriptions.

The claimant testified that she has tried to return to work off and on but just has not been able to do the job. The claimant agreed that the days she has been off work were from August 26, 2004, through August 31, 2004, and then off on September 1<sup>st</sup> and then from September 7<sup>th</sup> to November 28, 2004.

On cross examination, the claimant testified that at the time of her injury she did state to Kurtz that she had hurt her back but that she did not report it to anyone in management. The claimant testified that she did not call in Tuesday or Wednesday because those are her regular days off and she was hoping that she would

feel better by Thursday. The claimant testified that she called and spoke to Bruce Levine, her supervisor. The claimant testified that she told Mr. Levine that she hurt her back on Monday and that she thought she would be feeling better but she was not and what should she do and he told her to get an attorney. The claimant testified that she went to see Dr. Kirkpatrick before she called in to report her injury. The claimant testified that she tried to return to work and realized that she could not and that is when she hired an attorney. The claimant testified that she finally filled out paperwork on her accident on September 6<sup>th</sup> and did write on one of the forms that the employer was notified on September 6, 2004. The claimant agreed that she had spoken with Mr. Levine and told him that she had hurt herself when she called in on August 26. The claimant testified that she had never done anything like this before and she did not know what to do so she did not go in and fill out paperwork until Joyce Dunham, Mr. Levine's secretary, told her to come in and fill out the paperwork. The claimant testified that between the time of her accident and when she finally saw Dr. French, she treated herself with hot baths, cold packs, laying down and aspirin. The claimant agreed that she does own some rental property that she works on but since her accident she has not been able to work on these houses. The claimant testified that she has sold one of her rental properties and that is what she has been able to survive on since her accident. The claimant testified that she filed and has been receiving unemployment benefits.

On redirect examination, the claimant explained that the reason she put her date of injury as around September 6, 2004, was because she did not have a calendar to refresh her memory as to the exact date of her injury. The claimant testified that she only attended one session of physical therapy because she could not afford to pay for anymore. The claimant testified that the physical therapy did seem to help her some but that the injection which she received at a later date really did not seem to help at all. The claimant testified that after it was determined that the steroid injection was not improving her condition, that was when she was sent for an MRI.

Joyce Dunham testified that she is employed by the respondent and works with the Parks and Recreation Commission as an administrative assistant/bookkeeper. Ms. Dunham testified that her immediate supervisor is Bruce Levine who is the director. Ms. Dunham testified that the claimant came in to fill out an accident report on September 29 and she gave her book to sign and to use as a hard copy to fill out her forms. This witness testified that she first talked to the claimant about a low back injury when she called in on August 26 and said she was not going to be able to make it into work. Ms. Dunham testified that the claimant told her that she had stepped off her front porch and hurt her back. Ms. Dunham testified that the claimant did not say anything to her about being hurt on the job. Ms. Dunham testified that she went on vacation the next day, August 27, 2002, and did not return to work until September 13. This witness stated that the claimant called

in sick September 20 reporting that her back was hurting. Ms. Dunham testified that when she got to work on September 23 there was a note on her desk from Mr. Levine stating that the claimant had called reporting that she could not come to work and had questions about workers' compensation forms. This witness testified that she then contacted the claimant to schedule a time for her come in and fill out the workers' comp forms. Ms. Dunham testified that the claimant came in on a Wednesday, September 29, to fill out her workers' comp forms. Ms. Dunham remembers that when she talked with the claimant on September 23 the claimant told her that Kurtz had reminded her that she might have hurt her back moving picnic tables that previous weekend.

On cross examination, Ms. Dunham testified that part of the claimant's job would entail moving picnic tables if they were out of place. Ms. Dunham testified that when the claimant told her she got hurt at home, that was before August 23, 2004, and it was by telephone. Ms. Dunham testified that she did not make any notes on the initial call the claimant made to her on August 26 but she just transferred the call on to the director so he could take care of it.

On redirect examination, Ms. Dunham testified that normally she would take care of problems such as when an employee calls in sick or injured because she would then try to find a replacement. Ms. Dunham explained that because she was going on vacation the next day she wanted the director to be appraised of what was going

on so when the claimant called in on the 26<sup>th</sup> she transferred the call into him.

Bruce Levine testified that he was the director for the respondents' Parks and Recreation Commission. Mr. Levine testified that the claimant did call him on August 26, 2004, reporting that she could not come into work because when she bent over to pick up something that morning, her back seized up. Mr. Levine testified that the claimant did not mention anything about being hurt on the job or picnic tables. Ms. Levine noticed in his notes that he had information that the claimant had to work light duty September 2 to September 6 and that she had been allowed to do so. Mr. Levine remembered talking to the claimant on a Saturday morning when he was at home and that she had called him on his cell phone asking if the respondent would pay for x-rays. Mr. Levine testified that the claimant told him that Kurtz had reminded her that they had moved some heavy picnic tables that previous weekend which would have been back to August 21 he thought. Mr. Levine testified that at that point he was lead to believe that the claimant had talked to Kurtz and that he had reminded her that they had moved one of those heavy picnic tables and that it is possible that that could have caused her injury. Mr. Levine testified that because the claimant had not told him directly that she had hurt herself on the job, he did not take any action. Mr. Levine testified that when he received this call from the claimant, his administrative assistant, Joyce, was on vacation. Mr. Levine testified that Joyce was usually the person who handled the workers' compensation issues and

that it went through his mind that he should wait until Joyce got back so she could take care of it. Ms. Levine testified that on September 9 he had a conversation with the claimant concerning Dr. Kirkpatrick's letter recommending light duty for her and that he told the claimant that if there was any need for heavy work to call him and he would come out and do it. Mr. Levine testified that in his notes he had written that the claimant had told him that she believed that the injury was caused by walking sideways carrying a heavy picnic table with Kurtz Miller. Mr. Levine was asked if the claimant had given him a specific date and he responded, "I had the impression it was the weekend of August 21." Mr. Levine testified that he thinks that the claimant returned to work on about September 13 which was a Monday. Mr. Levine testified that the claimant called him on September 23 and told him that her back was out and that she could no longer work at Lake Leatherwood. Mr. Levine testified that during the course of his conversation he made notes and left it for Joyce because he was going on leave. This witness testified that the claimant said that this was something that happened when she was working at Lake Leatherwood and asked if she was covered by workers' compensation. Mr. Levine testified that he told the claimant that he advised her that since there was no incident report that had been filed at the time it would be difficult to justify. Mr. Levine testified that the claimant asked him if she should get an attorney and he replied that it would be one of her options. Mr. Levine testified that from that point on Joyce Dunn took care of the claim.

On cross examination, Mr. Levine agreed that the claimant had good attendance and was a good employee and was never written up for missing a lot of work or being late. He also agreed that she worked out at Lake Leatherwood and she worked with Kurtz Miller. Mr. Levine further agreed that part of the claimant's job was to move picnic tables back in place which had been moved from their original site. Mr. Levine testified that the claimant had told him that she had had back problems before but this was different because it was more in her hips.

The medical records set forth that the claimant was seen by Dr. Dean Kirkpatrick on August 26, 2004, indicating that her accident occurred on August 23, 2004. It is noted that her condition is severe and acute in the lumbar area with muscle spasms. On a form filled out by Dr. Kirkpatrick it is indicated that on August 23, 2004, the claimant was moving picnic tables and had severe low back pain and currently all movement is painful. There is also a notation of muscle spasm in the lumbar area. The claimant was seen by Dr. Kirkpatrick the following day with the exact same symptoms. The claimant was seen by a doctor on September 14, 2004, with complaints of low back pain and being tender between her shoulder blades with spasm. It is noted in these medical records that the claimant reports that three weeks earlier she was moving picnic tables and pulled her low back and hips out of joint and has been seeing a chiropractor but not getting any better. Medications were prescribed and the claimant was diagnosed with thoracic lumbar strain. When the claimant was

seen at the Tree of Life on September 22 she indicates that her problems are due to an on the job injury which had been reported to her employer. The Tree of Life reports indicate that her symptoms were that her hips were out and that she has problems with her low back. The doctor from Tree of Life notes that the claimant reports that her onset of problems came after picking up a table at work and had instant pain. The claimant was diagnosed with having lumbar strain or sprain and physical therapy was recommended. The claimant underwent an MRI on October 14, 2004, which showed moderate L4-5 disc bulge with mild indentation of the thecal sac but with no significant neural impingement. This same test revealed mild L5-S1 facet degenerative changes. Dr. French saw the claimant on October 19, 2004, following her MRI and diagnosed her with lumbar strain, bulging lumbar disc and facet degenerative disease. Dr. French recommended physical therapy as well as medications. The claimant continued to be seen by Dr. French for medications where it is noted that she had earlier done well with physical therapy but cannot pay for it.

After a complete review of this case, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury while working for the respondent on August 23, 2004. The claimant has testified to an event happening at work moving heavy picnic tables on August 23, 2004, and when she was first seen by the chiropractor on August 26, 2004, she reported this specific date and incident to him as well. Dr. Kirkpatrick notes in his records of August 26, 2004, that the claimant was seen

for acute lumbar pain with muscle spasms and was seen the following day for the exact same symptoms and findings. The claimant, by her own testimony, stated that she did not report her incident on the day that it happened in hopes that her problems would resolve. The claimant testified that she did call in on August 26 and reported to her supervisor, Bruce Levine, that she had hurt her back on Monday. Both Mr. Levine and Ms. Dunham testified that the claimant did call in reporting back problems but they did not recall her relating it to her work. Mr. Levine, however, did testify that on that Saturday, August 28, 2004, he received a call on his cell phone from the claimant asking if the respondents would pay for x-rays. At that time, the claimant reported to him that her injury was caused by walking sideways carrying a heavy picnic table with Kurtz Miller. The claimant has testified that she went to see Dr. Kirkpatrick prior to calling the respondents on August 26, 2004, therefore, the cost of this office visit will not be covered by workers' compensation. The respondents, however, shall pay for the medical treatment received by this claimant for her compensable low back injury as well as that recommended by her various physicians. I further find that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from September 30, 2004, through October 19, 2004. The medical records set forth that on September 30, 2004, Dr. French released the claimant from work until her next appointment on October 19, 2004. When the claimant was seen again by Dr. French on October 19, 2004, there is no indication that she was to continue off work

and it is noted that the claimant was given a note updating her status for her employer. All other times which the claimant is contending that she is entitled to temporary total disability, I find that she has failed to prove her entitlement by a preponderance of the evidence.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On August 23, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$163.00 for temporary total disability.

4. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her low back on August 23, 2004, while working for the respondent. See discussion above.

5. The respondents should pay for all of the claimant's medical treatment for her compensable injury except for her visit with Dr. Kirkpatrick on August 26, 2004. Also see discussion above.

6. That the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from September 30, 2004, through October 19, 2004. This is the period of time which Dr. French has written in her notes that she was releasing the claimant from work as a result of her compensable injury. Also see discussion above.

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

8. 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 low back injury while working for the respondent on August 23, 2004.

The respondents should pay for all of the claimant's medical treatment for her compensable low back injury except for the visit to Dr. Kirkpatrick on August 26, 2004.

The respondents should pay temporary total disability to this claimant from September 30, 2004, through October 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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE