

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501164

BRANDI SNIDER, EMPLOYEE	CLAIMANT
OLD NAVY-GAP, EMPLOYER	RESPONDENT
INS. CO.-STATE OF PENNSYLVANIA, CARRIER	RESPONDENT

OPINION FILED AUGUST 15, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 17, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On March 29, 2005, a pre-hearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Brandi Snider, the claimant, Carla Hutchinson, Melissa Mosier, and

Kim Nolen, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Brandi Ann Snider, the claimant, with a date of birth of September 16, 1968, is a high school graduate with one year of post-secondary education. Claimant resides in Jonesboro, Arkansas and has been employed by respondent at its Jonesboro location since November 2004. Claimant was employed by respondents two and one half years previously in Ft. Smith. Claimant was not employed in the intervening time between her employment by respondent in Ft. Smith and in Jonesboro. The testimony of the claimant reflects that she was a stay-at-home mom for two-and-a-half years after leaving the employment of respondent in Ft. Smith.

At the time she commenced her employment with respondent in November 2004, claimant worked part-time. Claimant explained that while she was part-time she was “kind of like a lead in the Men’s Department”, and that she did visual merchandising. In describing what her job responsibilities entailed, claimant’s testimony reflects:

You change all the markdowns; do like the promotions - whatever is on promotion, you put it on promotion; do all of the moves, which means you do like new floor moves when new merchandise comes in; make room for new stuff; just put out shipments - doing everything, basically. (T. 10-11).

In terms of following directions from supervisory personnel in performing her job duties, claimant testified:

No, I knew what I had to do - it depended on what day it was, what we’d be doing that day, whether we’d be, you know, changing markdowns, putting up new signs, you know. Every day I had a certain thing that I would do. (T. 11).

Claimant noted the her routine duties included stocking the store and lifting merchandise in

doing so.

Claimant testified that she had been employed by respondent for approximately one month at the time she suffered the injury which serves as the basis for the present claim.

Claimant described the type of activities that she performed on a daily basis during her employment with respondent:

Well, lifting, reaching, going up and down ladders to put shipment away; usually, you're carrying shipment when you're going down the ladders; you know, pull boxes down; go through boxes; pull shipment out, process it, get it ready to be hung out in the - on the sales floor. (T. 12).

In describing the various areas of the store from which merchandise is retrieved, claimant testified:

Yeah, we have a shipment room, and then we also have what we call the side room and it looks like - kind of a room where we have an over-shipment on merchandise, and it was just packed full of stuff, so I work in there. (T. 12).

Claimant explained that she re-stocked men clothing, to include sweaters, jackets, jeans and shirts for the weekend out of the work-area, noting that it was during the Christmas shopping season. Claimant testified that when she was not restocking she was on her feet, noting, "there's never any sitting down on this job".

Claimant testified that she was injured within the course and scope of her employment on December 4, 2004. Claimant explained that on December 4, 2004, she was working in the side room, an area which housed overflow shipment and probably contained 300 boxes of merchandise. Claimant noted that the condition of the store was not a normal:

This store was a little bit out of control as far as like that, so it was, you know, overflow that shouldn't have been there. (T. 14).

Claimant's testimony reflects that there were 20-foot-high stacks of boxes stacked across the wall.

In describing her employment activities on December 4, 2004, and the occurrence of her injury, claimant's testimony reflects:

I was re-stocking the mens, so basically, I'd have to go back there and rummage through every box like if I was pulling out the winter coats, I'd have to go through all the racks, and take them out. Really, to get to that, I had to climb up a ladder and pull boxes down to do that and go through every box.

So it was like climb a ladder, pull it down, get down there, open it up, pull it out, hang it up.

Well, I just kind of felt like a little jolt in my back, but I thought, you know, maybe I'd pulled a muscle or something. (T. 15).

Claimant explained that at the time she experienced the "jolt" she was up on the top of a ladder pulling boxes down. Claimant estimated the weight of the box that she was pulling on was between 40 to 50 pounds. Regarding her activities following the initial sensation, claimant testified:

Well, I just felt a jolt that day, you know, just kind of like a little lightening shock, and I just kind of, you know went on. I just didn't know if I pulled a muscle or, you know. I just continued to work. I didn't stop or, you know. (T. 17).

Claimant testified that the incident occurred mid-day, between noon and 2:00 p.m. Claimant worked until mid-day on the day of the accident.

The testimony of the claimant reflects that the store remained open until 9:00 p.m. Claimant explained that everyone was scheduled different hours; that some part-timers were scheduled four hours, however she pretty much worked a regular shift. Claimant testified that she could go in at 7:00 a.m. and work until 4:00 p.m. or go in at 9:00 a.m. and work until 6:00

p.m. Claimant note that she was available to work whenever needed.

Claimant acknowledged that she did not report the incident to anyone on the day it occurred. The testimony of the claimant reflects that she “kind of kept going”, and did not realize the seriousness of the incident. Claimant testified that her back complaint seemed to progressively worsen:

Like, you know, there was like a month in between, maybe a little over a month, and it just kind of gradually - it was like walking around with a stiff neck - you know there’s pain there, but you just think it’s going to work itself out, and not until my leg started - I had trouble, you know. Like, within a couple of weeks I got worse and worse. (T. 18).

Claimant denied that she had ever experienced similar complaints of pain as a result of her work activities.

The testimony of the claimant reflects that she was having concerns regarding her leg complaints before going to the doctor for treatment:

When my leg started going, you know, pretty numb, I mean, I didn’t have really any feeling in my leg and stuff, that’s when everyone kind of said, well, that sounds like you done something.(T. 19).

Claimant estimated that the onset of the symptoms in her leg begin two to three weeks following the December 4, 2004, incident. Claimant noted that it gradually got worse and started affecting her left leg.

The testimony of the claimant reflects that Dr. St. Clair is her OB-GYN, who performed exploratory surgery on her to check for endometriosis, which is present in her family medical history, in the end of December 2004. Claimant testified regarding the symptoms she experienced relative to the diagnosed dysmenorrhea, which resulted in the December 22, 2004,

emergency room visit. (T. 42-43). The testimony of the claimant reflects that pursuant to contact by her husband to Dr. St. Clair regarding her leg symptoms, a MRI scan was scheduled. Following the MRI scan, which disclosed a herniated disc, claimant was referred to Dr. Routsong at Mid-South Neurosurgery by Dr. St Clair.

Claimant's testimony reflects that following an examination and review of diagnostic studies Dr. Routsong performed surgery relative to the herniated disc. Claimant testified that the surgery alleviated the numbness in her leg. Claimant has had two(2) follow-up visits with Dr. Routsong and was scheduled for a third one on June 30, 2005. Claimant's testimony reflects that she has received a good result from the surgery and plans to return to the employment of respondent upon her medical release. Claimant's medical bills relative to the treatment received in connection with her back surgery remain unpaid.

Claimant acknowledge that she continued her employment with respondent subsequent to the December 4, 2004, date. Claimant's testimony reflects that when she begin working for respondent in the Jonesboro store she was not given any orientation on what to do if she sustained an injury at work, however she acknowledged that the information was contained in a booklet.

In terms of reporting her injury as work related to personnel of respondent, claimant's testimony reflects that three or four days before she stopped working, she called Carla Hutchinson. Claimant further testified that she talked to Ms. Hutchinson and Ms. Kim Nolen about her medical status after learning of the herniated disc. The conversation occurred prior to claimant's back surgery.

The testimony of the claimant reflects that she was continuing to work for respondent in

late December 2004, when she was seen by Dr. St. Clair, and at the time she had the MRI scan performed. Claimant added that once the results of the MRI scan were obtained by Dr. St. Clair she was directed to remain off work. Claimant estimated that a month elapsed between the MRI scan and before she could be seen by Dr. Routsong.

On cross-examination claimant acknowledged that she was seen at the emergency room of St. Bernards Regional Medical Center on December 22, 2004, with complaints of low back pain. On December 28, 2004, claimant underwent surgery under the care of Dr. St. Clair for endometriosis. Claimant acknowledged that the first form she completed requesting workers' compensation was the Form C reflected that the injury occurred on January 24, 2005. Claimant explained that the January 24, 2005, date was the day that she called in to the respondent, not the date of her accident.

Claimant was seen at the emergency room of St. Bernards Regional Medical Center on January 25, 2005, for complaints relative to her back. Claimant is uncertain of the date that she talked to Ms. Hutchinson in January 2005 and was furnished information regarding workers' compensation filings. While the claimant acknowledged that the first time she went to the emergency room for her back was on January 25, 2005, she does not recall responding in the negative to hospital personnel regarding whether her complaint was work-related. Claimant asserts that she furnished the identity of her employer to the hospital personnel during the January 25, 2005, visit.

Claimant acknowledged that she was initially seen by Dr. Routsong on February 22, 2005, pursuant to the referral of Dr. St. Clair. Claimant also confirmed the history as recited in the initial report of Dr. Routsong. Claimant testified that she did not recall telling Dr. Routsong

that there was no specific incident at the time of the onset of her back pain. Claimant is uncertain if she worked after January 20, 2005. Claimant testified that she had the MRI scan performed on January 27, 2005, and received the results on January 29, 2005. Claimant denies that the filing of her claim for workers' compensation benefits was the product of her being denied full-time employment status.

Ms. Carla Ann Hutchinson, a manager for respondent since February 2004, testified that when she a temporary general manager position in the Jonesboro store on January 17, 2005, claimant was one of the employee at the store. Regarding the information that she was aware of regarding the events in late January 2005, Ms. Hutchinson testified:

Okay. When I took over the store, I - it was in some bad shape, so I went up to help them out, and we make our schedule out on Wednesday and Thursday. The manager that made the schedules out was Kim Nolen, and she said Brandi's been getting 40 hours a week, but she's not a full-time associate - should I cut that back to 30 hours, and I said, yes, definitely, because after a certain period of time, the system automatically rolls them into a full-time status and we can only have a certain number of full-time employees, so we can't just let all of them roll over like that. So, I told her to cut the hours back to 30 or below.

So, that day - Brandi was off that day. She came in to get her schedule and I was in the office and she was very upset when she saw her schedule. She said that she was one of the hardest-working employees in the building and I couldn't just cut her hours and I told her that she was not hired as a full-time associate and she wasn't any longer going to be getting full-time hours. She was very upset about it. She left. She was supposed to work the next morning, 8 to 5 or 9 to 6. She called in and said that she had hurt her back. I asked her when this happened because I knew she didn't work the day before and she that she didn't know when it happened - she thought it happened the beginning of January. So, I said, did you report it to anyone, and she said, no. I asked her why she didn't, and she said at the time it happened, she didn't think that it was anything serious but it had gradually got worse and now she was wanting to go to the doctor. Our way of going about reporting a workers' comp claim is through our computer system and then we fill out an online claim, which

I did as soon as I got off the phone with her. They have up to 24 hours to respond - to call you back and ask you the specifics of all of it, and she called repeatedly through the whole Friday of the 21st wanting to know if I had heard back from them. I kept telling her that I would call her back when I heard back. I told her that since it got filed on Friday afternoon, I might possibly not even hear back from then until Monday morning. And I said I just need to know if you go to the doctor because it asks that on the form, so I need to update that if you go to the doctor. I took it that she was waiting to hear back from me before she went to the doctor. So, I believe it was Monday before Risk Management called me back, and they told me what medical facility to send her to. They gave me the AIG address and phone number to give to her so that she had all of that information to put on her paperwork at the hospital. I called her back and I told her and asked her to keep me updated - to call me back when she found out what was going on. I didn't hear from her again. It was probably two weeks before I heard from her again, and I had to call her. She said that she - I don't know what she said. (T. 46-48).

Ms. Hutchinson testified that claimant told her that she had not told anyone that her injury had occurred. Ms. Hutchinson noted that the employees of the store were working harder after she arrived as of January 17, 2005, because the store was in such bad shape, and that the claimant performed her regular duties through January 20, 2005.

Regarding the description of the mechanism of her injury, Ms. Hutchinson testified the claimant relayed that she was in the side room unpacking boxes and thought that's when she hurt it and then went on to say that she thought one unit fell on her head at one time. Ms. Hutchinson testified that to her knowledge claimant did not have any medical treatment for a back injury prior to January 20, 2005. Ms. Hutchinson noted that in order for a claim for workers' compensation to be filed it has to be reported to a manager, because a manager has to file it.

Regarding her contact with the claimant subsequent to January 24, 2005, Ms. Hutchinson testified that the same occurred a week or two later. Ms. Hutchinson's testimony reflects regarding the conversation:

Yeah, I called her and told her I was waiting on a phone call from her to know what was going on because I didn't know anything. She was still being scheduled. We didn't know if she was coming to work. We didn't know the status of anything. And she said that she assumed that I would just take her off of the schedule indefinitely and I said, I told you that I needed you to call me and tell me what was going on, and she said she didn't really think she needed to. (T. 50).

Ms. Hutchinson testified that claimant never provided any medical documentation indicating an off-work status.

Ms Hutchinson's testimony regarding activity in the Jonesboro store can only address such activity subsequent to her arrival on January 17, 2005. Claimant's testimony reflects that her injury occurred on December 4, 2004. The fact that Ms. Hutchinson's inquiry on January 21, 2005, of any knowledge of the claimant's injury from the other managers and supervisors yielded a negative response is not unexpected in light that claimant had informed her that she had not reported it to anyone. Ms. Hutchinson only worked with the claimant on two occasions, Monday and Wednesday, January 17, 2005, and January 19, 2005.

Ms. Melissa Merger testified that she is a manager at respondent's Jonesboro store and worked with the claimant. While Ms Merger confirmed that she worked with the claimant in the side room, she testified that she had no knowledge of the claimant injuring herself when she was in the side room. Ms. Merger's testimony corroborate that of the claimant regarding her employment activities at respondent. Ms. Merger testified that the claimant never reported to her complaints of pain or numbness in her left leg.

Ms. Kim Nolen, a Customer Service Manager for respondent, testified that claimant never reported injuring herself at work. With respect to whether she was responsible for the claimant's new hire orientation, Ms. Nolen testified:

Gosh - to be honest, I can't remember. I've orientated some classes, but I cannot, to be honest, tell you whether I did that class or not. (T. 60).

Regarding whether she explain to new hires what to do if they are hurt on the job, Ms. Nolen testified:

It's all in the packets that we give the information, you know, this is what you need to do for any circumstances or these are the, you know, rules you can't do, rules you can do, or whatever. (T. 60).

The medical in the record reflects that claimant was seen at St. Barnards Medical Center on December 22, 2004, with complaints of low back and pelvic pain which was diagnosed as dysmenorrhea dyspareunia. (RX. #1, p. 1). Claimant does not attribute the December 22, 2004, visit to her work related activities. Claimant was treated by her ob-gyn, Dr. John T. St. Clair, during the December 2004, admission.

On January 25, 2005, claimant was seen at the emergency room of St. Barnards Medical Center with complaints of back pain. While the December 22, 2004, admission record of St. Barnards Medical Center identified the claimant's employer, it is undisputed that the claimant's medical treatment was for a non-work related complaint. The January 25, 2005, St. Barnards Medical Center record contains the entry "AIG" as the claimant 's employer. The January 25, 2005, hospital visit was made after claimant had been furnished information regarding the respondent-employer's workers compensation carrier. AIG in the third party administrator for the employer's workers compensation carrier. (RX. #1, p. 2).

The evidence reflects that the claimant underwent a MRI scan relative to her low back and left leg complaints pursuant to the directions of Dr. St. Clair. A January 31, 2005, correspondence of Dr. St. Clair to the claimant reflects:

The MRI you had done recently of your lumbar spine revealed a herniated disc in your lower back. This most likely is responsible for your pain. I would recommend referring you to one of the neurosurgeons for follow up. (CX. #1, p.1).

Claimant was directed to call Dr. St. Clair's office to effectuated the neurosurgery appointment.

Claimant followed the directions of the January 31,2005, letter from Dr. St. Clair. A February 22, 2005, consultation report of Dr. Rodney T. Routsong, a Jonesboro D.O., to Dr. St. Clair relative to the claimant reflects, in pertinent part:

HISTORY: Ms. Snider tells me that in early December 2004 while she was at work she noticed some low back and leg pain. She denies any specific incident at that time. The pain is in the lower lumbar and left sacroiliac joint. She also describes severe pain radiating down the posterior aspect of the left thigh and calf. She also describes numbness in the same distribution. Her left leg has also been getting weaker. She has been limping. She denies motor or sensor complaints with the right lower extremity or either upper extremity. She has had some mild "difficulties" at times with the left shoulder. She is unable to get comfortable at night because of the left leg pain. She underwent a laparoscopic surgery to inspect her ovaries on December 28th of 2004 and states that "I was told I was fine."(RX. #1, p. 3).

Dr. Routsong's impression of the claimant's complaints, following his examination and review of diagnostic studies was that of left S1 radiculopathy and lumbosacral somatic dysfunction. Surgery was recommended for the diagnosed herniated disc at the left L5-S1 region. On March 24, 2005, claimant was admitted to St. Bernards Medical Center and underwent surgery relative to her herniated disc under the care of Dr. Routsong. (RX. #1, p. 5-7).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 4, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On December 4, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$187.00/\$154.00, for temporary total/permanent partial disability.
4. On December 4, 2004, the claimant sustained an injury to her low back arising out of and in the course of her employment, of which respondents were notified on January 20, 2005.
5. The claimant was temporarily totally disabled for the period beginning January 21, 2005, and continuing through the end of her healing period.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 4, 2004.
7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

Claimant asserts that she suffered an injury to her low back arising out of and in the course of her employment on December 4, 2004, which ultimately required medical treatment, to include surgery, and rendered her totally incapacitated for a period of time commencing on or about January 21, 2005. Respondents deny that the claimant suffered a compensable injury at any point during her employment. The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions.

In order to prove 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: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4) (A) (i). In the instant claim, the claimant has sustained her burden of proof by a preponderance of the evidence each of the requirements for establishing compensability. Respondents have controverted this claim in its entirety.

There is not a dispute regarding the physical demands of the claimant's job activities during the pertinent time period. Further, the testimony of supervisory personnel is corroborative of that of the claimant regarding the condition of the Jonesboro store of respondent in December 2004/January 2005. Claimant was engaged in employment activities at the time of her December 4, 2004, injury, however did not report the incident to supervisory personnel. Claimant continued discharging employment subsequent to her injury. The credible evidence reflects that claimant's symptoms progressively worsen and she continued discharging employment duties.

Claimant was working in the side room, which contained overflow of inventory/merchandise at the time she suffered the injury to her low back on December 4, 2004. Claimant suffered other health difficulties which had resulted in the December 22, 2004, admission to St. Bernards Medical Center, and subsequent laparoscopic surgery of December 28, 2004. The credible evidence reflects that the progression of claimant symptoms growing out of the December 4, 2004, low back injury include numbness in her left leg along with low back and

leg pain.

Claimant reported the work related injury to supervisory personnel of respondents once her symptoms progressed to the point that she was unable to discharge employment duties. The afore occurred prior to the point in time that claimant sought medical treatment for her injury at the emergency room of St. Barnards Medical Center on January 25, 2005. Claimant relayed a consistent credible history of her injury to supervisory personnel of respondent and to her medical providers. Initially, claimant was able to identify the date of her injury as early December 2004. Despite the incorrect date later cited in documents completed on behalf of the claimant, respondents were aware that claimant attributed her injury to employment duties in early December 2004. It is not a prerequisite to compensability that a claimant identify the precise date upon which an accidental injury occurred; rather, the claimant must only prove the occurrence of the injury is capable of being identified. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001).

Diagnostic studies performed pursuant to the direction of Dr. St. Clair disclosed the presence of a herniated disc relative to the claimant's lumbar spine, and a referral for further medical treatment relative to same. Claimant did in fact undergo surgery under the care of Dr. Routsong, D.O., relative to the herniated disc. As of the date of the hearing in this claim, claimant remained within her healing period relative to her injury and surgery, and had not been released to return to work.

While the respondents were not informed of the claimant's December 4, 2004, compensable low back injury until on or about January 20, 2005, claimant did not obtain medical treatment for same after January 25, 2005. Ark Code Ann. § 11-9-508 (a) mandates that

employers provide such medical services as may be reasonably necessary in connection with the employee's injury. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W.3d 764 (2000).

Medical treatment rendered to the claimant on and after January 25, 2005, was reasonably necessary and related to the claimant's compensable injury of December 4, 2004. Respondents are liable for the cost of said medical treatment.

Claimant last discharged employment duties on or about January 19, 2005. On January 21, 2005, claimant notified respondents of her December 4, 2004, work-related injury, her inability to work as a result of same, and her need for medical treatment. On January 25, 2005, claimant was seen at the emergency room of St. Barnards' Medical Center relative to her low back injury. Claimant underwent a MRI scan on or about January 27, 2005, which disclosed the herniated lumbar disc. In correspondence dated January 31, 2005, claimant was informed of the result of the MRI scan, and a neurosurgery consultation was recommended.

Temporary total disability is that period within the healing period in which a claimant suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). The healing period is defined as that period for healing of an injury which continues until the claimant is as far restored as the permanent character of the injury will permit. Claimant had not been released to return to work as of the June 17, 2005, hearing date, and remained under the care of her treating physician.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$187.00, for the period

commencing January 21, 2005, and continuing through the end of her healing period or until such time as she is released to return to work, as a result of the December 4, 2004, compensable. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonably necessary and related medical, hospital, nursing, and other apparatus expenses, to include medical related travel growing out of the claimant's compensable injury of December 4, 2004.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity fees herein awarded, pursuant to Ark. Code Ann. § 11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge