

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403028

CELESTE TANNER, EMPLOYEE	CLAIMANT
FAMILY DOLLAR STORE, INC., EMPLOYER	RESPONDENT
TRAVELERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 11, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on March 18, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MARK ALAN PEOPLES, 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 February 8, 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 Celeste Tanner, the claimant; Dorothy Sharp; Sheila Smith; and Jessie

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

DISCUSSION

Celeste Lee Tanner, the claimant, with a date of birth of October 8, 1967, commenced her employment with respondent on March 25, 2003, as a cashier. Claimant later became an assistant manager in her employment with respondent-employer.

On December 27, 2003, claimant was discharging employment duties in her capacity as an assistant manager. Claimant's supervisor was Sheila Smith, the store manager. Claimant acknowledged that prior to December 27, 2003, she was married, and that she is now separated from her husband. Claimant denies that she was ever the victim of any kind of domestic disturbance such that sought medical treatment. Finally, claimant denies that she had ever sustained any type of significant injury to her neck or shoulder prior to December 27, 2003. The testimony to the claimant does reflect that in 2001 she sought medical treatment for stress related complaint regarding her neck or shoulder.

Claimant denies that she experienced any physical limitations or restrictions regarding her neck or shoulder relative to her ability to lift or perform physical labor at the time she commenced her employment with respondent. Further, claimant maintains that from the time she was hired by respondent until December 27, 2003, she did not have any physical problems relative to her neck or shoulder.

Claimant attributes her neck and shoulder complaints to discharge of her employment duties on December 27, 2003. In describing the special work requirements at respondent after the Christmas holiday, claimant's testimony reflects:

After Christmas holiday, we're supposed to clear all the

Christmas, anything Christmas, off the risers to make room for new frag. It all has to be packed up, put away, and that requires taking everything from the raisers to the top of the ledgers off - all packed and put up.

* * *

Well, you know, when you enter a store, you have the aisles and you have your shelves. You have to take items off the shelves, put them in boxes, label them, and we also have items on top, on the very, very top of the store - I call it a ledger - the ledges. We have to climb up on top of the ladder to get those down, put those in boxes, put them on u-bolts, take them to the back. (T. 11-12).

Claimant's testimony reflects that the weight of the merchandise that had to be removed from the shelves could range up to fifty (50) pounds.

The testimony of the claimant reflects that she worked on Friday, December 26, 2003, and that the same was a "pretty strenuous day". Claimant testified that she usually came in to work at 9:00 a.m and left at 7:00 p.m., with an hour off for lunch. Claimant asserts that at the conclusion of her work day on December 26, 2003, she did not experience any physical problems. Claimant denies experiencing any kind of pain or discomfort in her neck or shoulder when she arrived for work on Saturday, December 27, 2003. In describing the physical requirement of her job duties on December 27, 2003, claimant's testimony reflects:

Pretty much the same thing. We were lifting, taking things off the risers, walking up and down ladders, still continuing to put Christmas merchandise up, basically, and, of course, checking out, you know, the cash register, and just moving our Christmas frag to the back to get it. (T. 13).

Claimant's testimony reflects that around noon on December 27, 2003, the back of her shoulder started hurting to the point that it became hard for her to lift things. Claimant continued working. In describing her physical condition following the onset of symptoms, claimant testified:

It was - I didn't - it hurt, and it kept getting worse throughout the day, and by the time we were ready to close the store, I was in a lot of pain. (T. 14).

Claimant noted that while she was working she commented to Ms. Smith, the store manager, that her shoulder was hurting, and that it was worsening as the day progressed. By the conclusion of the shift, due to her continuing complaints, claimant was asked by Ms. Smith if she wanted her to turn in the complaint on workers' comp. Claimant testified that she told Ms. Smith that she thought that she would be okay. Claimant further testified, in response to Ms. Smith's offer:

I said I think I will be okay. I said I just - maybe I just worked it too hard - maybe I'll be better in the morning. But, that wasn't the case. (T. 15).

Claimant denies that she made any statement to Ms. Smith about sleeping on her arm wrong as the source of her discomfort. Claimant denies that she was experiencing pain or complaints in her shoulder or neck when she reported for work on the morning of December 27, 2003. Claimant asserts that when she came into work that Saturday morning, December 27, 2003, she told Ms. Smith she did not sleep well the night before, however the same had nothing to do with a pain or problem with her neck or shoulder.

Although she had assessed her complaints as possibly over-extending herself, which would resolve, to the point that she declined the offer of her supervisor to file a workers' compensation claim, her testimony reflects with respect to her physical condition at the conclusion of her shift on December 27, 2003:

It was worse. My shoulder was hurting. I was having sharp pains. My fingers and my arm were getting numb, and it just hurt really bad. (T. 16).

Claimant acknowledge that there was not a specific incident or event which served as the basis

for her physical complaints at the conclusion of her December 27, 2003, shift, but rather the continuous lifting and carrying items up and down the ladders. Claimant noted that as she continued working, she could feel her shoulder getting weaker and hurting throughout the day.

The claimant testified that after she got home from work her symptoms did not improve. Claimant explained that her symptoms became so severe that she went to the emergency room for medical treatment. Claimant asserts that she relayed a history of her work activity as the basis for her symptoms and complaints to the emergency room medical personnel:

Yes, I told them I had been lifting and pulling on boxes all day, and climbing ladders all day. (T. 17).

Claimant was treated and released by the attending emergency room physician.

Claimant was scheduled to work the following, Sunday, December 28, 2003, however was unable to physically do so due to residuals of her neck and shoulder complaints. Claimant's testimony reflects, with respect to her efforts to notify respondents of her inability to work:

I was - they had given me steroids and they had given me a pain shot, and on Sunday, I was in the bed. I was just - I was in severe pain. I was unable, you know, to get out of bed. My husband had called Sheila and I explained it to Sheila. I told her that I had to go to the emergency room and I told her that I had got hurt on the job. (T.18).

Claimant is uncertain if she was scheduled to, and in fact the following day, Monday, December 29, 2003. Claimant testified that she was at work on Tuesday, December 30, 2003, and that she requested Ms. Smith to turn in her complaints as a workers' compensation claim. Claimant continued to work while wearing a sling, though with difficulty. Claimant asserts that after approximately one week, she was unable to continued to work due to residuals of her shoulder and neck complaint.

Claimant did follow up with her family doctor, Dr. Vonda Houchin, pursuant to the direction of the emergency room physician. Claimant asserts that relayed the history of her work activities to Dr. Houchin as the basis for injury and complaints. Claimant's testimony reflects that she was eventually referred to a neurosurgeon. After undergoing diagnostic studies, to include a MRI and a myelogram, claimant underwent cervical surgery.

After recovering from her surgery claimant returned to the employment of respondent in February 2004. Initially claimant returned to work for respondent on a part-time light duty basis due to residuals of her injury. Claimant asserts that she remains on light duty to date, working twenty to twenty-four hours per week. In terms of the changes in her job duties or physical capabilities, claimant's testimony reflects:

I can't unload the truck. I can't lift anything over ten pounds. I have trouble just getting through the day. I go in later, of course, because I'm limited to my hours. (T. 21).

Claimant testified that she is not presently physically capable of working a forty hour work week. Claimant's testimony reflects that the last time she went to the doctor on February 24, 2005, she was provided a release restricting the number of work hours to between twenty to twenty-four per week. Claimant added that she furnished to release document to her supervisor.

Ms. Dorothy Sharp, the claimant's mother, provided testimony corroborative of that of the claimant relative to prior neck and or shoulder complaints, or the lack thereof before December 27, 2003. Ms. Sharp's testimony reflects that claimant relayed as the source of her pain the fact that she has been lifting and tugging all day at work.

Ms. Sheila Smith, manager of the Harrisburg store of respondent, testified that claimant returned to the store in the 2004 following her surgery working part-time. Ms. Smith's testimony

reflects that when claimant first returned to work efforts were made to work her more that twenty to twenty-four hours per week, however claimant was unable to physically handle it. Ms. Smith provided testimony regarding her observations and discussions with the claimant about the claimant being the victim of domestic violence. Specifically, separate incidents regrading the claimant's black eye and a half-a-dollar-size wound on the on her elbow, both the product of the claimant and her husband having gotten into altercations as home.

Regarding the claimant's neck/shoulder injury of December 2003, the testimony of Ms. Smith reflects:

Well, she came in on Saturday morning - I hadn't heard anything from her about hurtin' on Friday, you know. She came in Saturday morning. As soon as she got there, she said her shoulder hurt, and I said what's wrong, and she said I don't know, I think I just slep on it wrong. And I said are you sure, and said yeah. Then we went on to work, and then she complained to me that it was hurtin' worse and I said if it's hurtin' worse, are you sure you didn't get hurt at work and I need to call it in, cause I have to call it in the same day that it happens. And, she said no, I think I just slept on it wrong, and I think it'll be okay. And, throughout the day, she kept tellin' me that she was hurtin' even worse, and I said are your sure that I don't need to call this in, and she said no, I'm okay. So, we worked the rest of the day and I didn't call it in.

* * *

Well, we left on Saturday evening; on Sunday morning, her husband called me on the phone and said that Lee - he had to take her to the emergency room that night and that she had had a pain shot and she wasn't going be able to come to work, and I asked him if she was out of it already. The pain shot had kicked in - and was she, was she asleep, and he said no, she was still awake.

* * *

And, uh, so he put her on the phone for me, and I asked her, you know, what the doctor said, and she said that they were treating her for bursitis, and they had given her some steroids and some - a pain shot, and

that she just wasn't going to be able to come to work that day. I didn't hear anything else . . . (T. 36-38).

Ms. Smith testified that she did not hear anything else from the claimant until Tuesday morning when claimant came in to work and reported that her complaint was work-related, that she had gotten hurt at work, and requested that workers' compensation claim be filed.

Claimant has been supervised by Ms. Smith since her March 25, 2003, employment by respondent. While Ms. Smith recalled to two incidents of observing injury to the claimant, a June 2003, black eye, and an August 2003, elbow injury, she testified that she did not know if claimant sought or obtained medical treatment for either incident. Further, Ms. Smith's testimony reflects that she did not observe the claimant evidencing any kind of difficulty with her neck or shoulder performing her job duties between August and December 27, 2003.

The testimony of Ms. Smith reflects that the claimant was a "fantastic" employee, and that there was no indication before December 27, 2003, of the claimant having any kind of physical limitation involving her neck or shoulder. Ms. Smith's testimony corroborated that of the claimant regarding the physical demands and activity at work following the Christmas holidays with respect to climbing ladders and putting away holiday supplies.

Despite her testimony that the claimant reported on Saturday morning, December 27, 2003, that she had slept on her shoulder wrong, Ms. Smith acknowledged that on two (2) different occasions as claimant reported her condition worsening with the lifting, she considered, as a manager, calling in a workers' compensation claim on behalf of the claimant. On another occasion Ms. Smith responded, "all I remember her telling me is that she slept on her arm wrong and she thought she had a crick in her neck". (T. 41). Ms. Smith testified that when the claimant

left work on Saturday night, December 27, 2003, she appeared to be hurting/in pain. Ms. Smith maintains that the claimant never said on December 27, 2003, that her complaints were caused by “the boxes or anything, or because she was straining”. (T. 42). Ms. Smith acknowledged that the claimant reported having gone to the emergency room on Saturday, December 27, 2003, after getting home from work. Further, Ms. Smith acknowledged that the claimant was seen by her family within a short time following the emergency room visit for complaints relative to her neck and shoulder.

The testimony of Mr. Jessie Page reflects that he worked in the Harrisburg store of respondent for approximately one year. Mr. Page left the Harrisburg store in March 2004. Mr. Page testified that the claimant informed him of her injury to her elbow which grew out of an altercation with her husband, which occurred long before Christmas 2003.

The medical in the record reflects that claimant was seen at the emergency room of Regional Medical Center of NEA at 5:39 a.m. on December 28, 2003, with complaints of pain in her left shoulder and arm along with numbness in the hand. The emergency room report noted an onset of symptoms at work at Family Dollar Store on December 27, 2003, which did not severe until she went to bed. The attending emergency room physician prescribed Loratab, Flexeril, medrol dose pak, and provided a sling for the claimant’s arm, after assessing her complaint as a left shoulder strain. Further, claimant was directed to followup with her family physician. (CX. #1, p. 1-7).

On January 5, 2004, claimant was seen by her family physician, Dr. Vonda Houchin, at the Clopton Clinic, for complaints of pain in her left shoulder, left arm and numbness in the left hand. Claimant relayed a history of an injury to her left shoulder/neck at work on December 27,

2003. (CX. #1, p. 8-9). On January 6, 2004, claimant under a MRI of her cervical spine pursuant to the directions of Dr. Houchin which disclosed herniated discs at C3 through C7. (CX. #1, p.10-11).

On January 13, 2004, claimant was evaluated by Dr. Gregory F. Ricca, a Jonesboro neurosurgeon, pursuant to a referral by Dr. Houchin. The January 13, 2004, Consultation report of Dr. Ricca reflects, relative to the claimant:

HISTORY OF PRESENT ILLNESS: The patient is a 36-year-old white female who works at Family Dollar in Harrisburg. On 12/28/03, she began experiencing left shoulder, neck, and back pain while stocking shelves at work. By early that evening, she noted her left thumb was numb. During the night, she was awakened with severe pain and presented to Regional Medical Center emergency room. She was told she had arthritis, was given a shot for pain, and was sent home to followup with Dr. Houchin. When the patient saw Dr. Houchin, an MRI was ordered (do not have these results at present). Based on the results of the MRI, the patient was scheduled for a cervical myelogram. The patient's pain has become worse, and strength in her left upper extremity has progressively decreased. She present today to St. Bernards Medical Center and has undergone a myelogram. We are asked to see the patient for neurosurgical evaluation post myelogram. (CX. #1, p.14).

Dr. Ricca's impression of the claimant's complaints were neck pain, severe left upper extremity pain; left C6 radiculopathy with marked weakness of the biceps and ECRL, as well as numbness in the C6 distribution; and generous herniated nucleus pulposus, C5-6, with compression of the spinal cord and left C6 root.

Surgery was recommended and subsequently performed by Dr. Ricca on February 13, 2004. (CX. #1, p. 27). In a May 11, 2004, responsive inquiry to claimant's attorney, Dr. Ricca reported:

. . . . Based on my review of the records, I believe Ms. Tanner's work activity on about December 27, 2003 is the major cause of her cervical disc rupture, neurologic compromise and need for surgical intervention.

This is within a reasonable degree of medical certainty. She has not reached her maximum point of healing. I will be seeing her again for re-evaluation in the near future. (CX. # 1, p.43)

During the course of her August 24, 2004, deposition, claimant presented more detailed testimony of the job tasks that she discharged on December 27, 2003, which served as the basis of her claimed injury. Claimant's testimony reflects, with respect to her duties on December 27, 2003:

I came in, started working, this was after Christmas, we had all kinds of Christmas items that we had to reduce. We were walking up and down ladders - -

* * *

We were really busy with lots of merchandise, moving it around, getting reduced items. I started having pain in my shoulder and my neck that day. It progressively got worse during the day. I started getting numbness in my arm and it just got worse. The longer that I worked, the worse it got.

* * *

I, like I said, I was lifting boxes and I felt my arm or I felt my shoulder start hurting, start hurting, and over the course of the day it progressively got worse. The more I worked, the worse that it became. (RX. #1, p. 15-16).

Claimant testified that her supervisor, Ms. Smith, was notified of the problems she was experiencing, which she attributed to the movement of the merchandise and Christmas supplies/stock.

I told her these boxes were really heavy. She saw me climbing up and down on ladders with bulk merchandise in my arms and she could tell that I was in pain. She knew that I was in pain.

* * *

She said do you think we need to call - - to call it in? I said, I

think I'm gonna be okay, I might have just over extended myself. I didn't expect to have the injury that I had.

* * *

I knew that my - - I knew that I was in - - in pain but I didn't realize at the time that it was gonna be that much pain. I thought I would go home, relax, and it would be okay, but that wasn't the case.

* * *

To Workmen' Comp. I said - - I said, I really - - I said, I think I've overextended myself, I'm not for sure. I think if I just go home, get some rest, I'll be okay, but that wasn't the case. (RX. #1, p. 17-18).

Upon receiving medical treatment at the emergency room during the early morning hours of December 28, 2003, claimant relayed a history of her injury to medical personnel:

I told him that my shoulder was hurting and my neck and my arm was hurting.

I told him that I was lifting boxes all day.

I was climbing ladders with boxes in my hands, putting them on top risers. (RX. #1, p. 19).

The testimony in the record reflects that the two (2) days following Christmas 2003, December 26, and December 27, 2003, claimant reported to work, along the other employees at 9:00 a.m. and worked until 7:30 p.m.

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

FINDINGS

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

2. On December 27, 2003, the relationship of employee-employer-carrier existed among the parties.

3. On December 27, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$175.00/\$154.00, for temporary total/permanent partial disability.

4. On December 27, 2003, the claimant did not sustained an injury to her neck arising out of and in the course of her employment as a result of respondents.

CONCLUSIONS

Claimant asserts that while discharging employment duties following the Christmas holidays of 2003, she experienced symptoms of pain in her neck as well as pain, numbness, and weakness in her left shoulder and arm, which was later diagnosed as a herniate disc for which she underwent surgery. As a consequence of the afore, claimant asserts entitlement to medical and indemnity benefits as well as controverted attorney fees. Respondents maintain that the claimant is unable to satisfy her burden of proof to establish a compensable injury.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Specifically, claimant asserts that the diagnosed herniated discs in her neck are the product of her employment duties of December 27, 2004, the onset date of her symptoms. Claimant acknowledges that her injury is not the product of a specific incident/accident but rather had a gradual onset over the course of her work day on December 27, 2003.

There is no evidence in the record to reflect that claimant experienced physical limitation

on her employment activities relative to her neck or left shoulder prior to December 27, 2003. Further, there is no dispute regarding the employment activities/job tasks that the claimant discharged on December 27, 2003. The evidence preponderates that during the course of the work day on December 27, 2003, claimant reported complaints of pain in her neck and shoulder to her supervisor. Additionally, the credible evidence preponderates that claimant's supervisor inquired on at least two (2) occasions on December 27, 2003, if claimant wanted to file a workers' compensation claim due to her complaints of pain.

The evidence in the record reflects that on December 26, 2003, and December 27, 2003, the claimant, as well as the other employees of respondent, was busy putting away the Christmas merchandise, which entailed climbing ladders to remove boxes of inventory from the risers. Claimant began to experience symptoms during the course of her work day on December 27, 2003, while removing the merchandise. Claimant's symptoms progressively worsen after their onset.

Claimant was seen at the emergency room in the early morning hours of December 28, 2003, for complaints of pain in her neck and shoulder along with left arm pain and weakness, and numbness. The evidence reflects that claimant attributed her complaints to her work/employment activities of December 27, 2003. In addition to the medical treatment at the emergency room, claimant was seen in followup by her family physician for her complaints of neck and shoulder pain growing out of her December 27, 2003, work/employment activities. Following diagnostic studies which disclosed herniated discs in her cervical spine, claimant was referred to a neurosurgeon and ultimately underwent surgery. The evidence preponderates, as reflected in the May 11, 2004, report of her treating neurosurgeon, that the claimant work

activities of December 27, 2003, was the major cause of the claimant's cervical disc rupture.

Since the claimant does not assert a specific incident as the basis of her injury, and the evidence in the record does not support the same, in order to establish compensability she must satisfy the requirement of Ark. Code Ann. §11-9-102 (4) (A)(ii) (a). Specifically, claimant must prove by a preponderance of the evidence that the injury arose out of and in the course of her employment; caused internal or external physical harm to the body requiring medical services; was caused by rapid repetitive motion; and was the major cause of the disability or need for treatment. *High Capacity Products v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

In the instant claim, claimant has failed to sustain her burden of proof that her injury was cause by rapid repetitive motion. Although noting that the period following the Christmas holiday was busy, there is no evidence on the rapid motion with which claimant discharged her assigned job tasks of changing out the merchandise. Claimant does offer evidence that she climbing up and down the ladder retrieving boxes from the risers, which was repetitive. The evidence preponderates that the claimant suffered a gradual onset neck injury on December 27, 2003, which was not compensable under the Arkansas Workers' Compensation Act at the time. The facts in the present claim are not unlike those in the recent Arkansas Supreme Court ruling in *Automated Conveyor Systems v. Honorable Victor Hill, Judge, and Calvin Dooley*, ____ Ark. ____, ____ S.W.3d. ____ (May 7, 2005). This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge