

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407048

CELENA TAYLOR

CLAIMANT

K MART CORPORATION

RESPONDENT

AMERICAN HOME ASSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 21, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JAMES FILYAW, Attorney, Fort Smith, Arkansas.

Respondents represented by NORWOOD PHILLIPS, Attorney, El Dorado, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 28, 2004, in Fort Smith, Arkansas. The deposition of James McCain was taken on September 24, 2004, and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on September 2, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties agreed on the appropriate weekly compensation rates and the contested period of temporary total disability was identified. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On May 8, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$187.00 for total disability benefits and \$154.00 for permanent partial disability benefits.

3. The claim is controverted in its entirety.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to her lower back on May 8, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits for the period of May 26, 2004 through September 28, 2004 and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant contends that as a result of her compensable back injury, she has suffered and is suffering temporary total disability. At the end of her healing period, the claimant anticipates she will have suffered a degree of permanent partial disability."

In regard to these issues, the respondents contend:

Respondent contends that claimant did not sustain a compensable injury within the meaning of the Arkansas Workers' Compensation Act."

DISCUSSION

_____ The central issue in this case is the question of whether the claimant sustained a "compensable injury" to her low back or lumbar spine on May 8, 2004. The burden rests upon the claimant to prove the occurrence of this alleged compensable injury. In order to meet this burden, the claimant must prove the occurrence of a physical injury to this portion of her body that satisfies all of the statutory requirements for a "compensable" injury.

The first of these requirements are contained in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant prove by medical evidence the actual existence of a physical injury or condition involving her low back or lumbar spine. Further, she must prove the presence of "objective findings" to support the

existence of this physical injury or condition. The term "objective findings" is statutorily defined by the Act as findings that are beyond the claimant's voluntary control.

The medical evidence presented in this case shows that the claimant has been diagnosed as experiencing a lumbar disc injury at L5-S1 with a resulting right sided radiculopathy. The medical evidence further shows that the actual existence of this diagnosed defect is based upon and supported by "objective findings". These objective findings consist of the visible observation by personnel at St. Edwards Mercy Medical Center of muscle spasms involving the musculature of the claimant's lumbar spine on the right side and abnormalities noted on a lumbar MRI that was performed June 23, 2004. These defects take the form of a small right paracentral disc protrusion or herniation at L4-5 with a borderline canal stenosis at this level and a small to moderate right paracentral disc protrusion or bulge at L5-S1 without any significant canal stenosis.

I find that the claimant has presented sufficient medical evidence to "establish" the actual existence of a physical injury to her lower back or lumbar spine in the L4 to S1 area that is supported by "objective" physical findings. Thus, the claimant has satisfied the initial statutory requirements of Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that this medically established and objectively documented physical injury satisfies the definitional requirements for a "compensable injury" contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements or elements are:

- (1) That the physical injury arose out of and occurred in the course of the employment;
- (2) That the physical injury was caused by a specific incident;
- (3) That the physical injury is identifiable by time and place of

occurrence;

- (4) That the physical injury caused internal or external physical harm to the claimant's body;
- (5) That the physical injury required medical services or resulted in disability.

The claimant's own testimony is the only direct evidence presented to prove that her medically established and objectively supported lower back or lumbar spine injury arose out of and occurred in the course of her employment, was caused by a specific incident, and is identifiable by time and place of occurrence. In this regard, the claimant testified that she had never experienced any previous injuries to or had any difficulties with her low back or lumbar spine. She stated that at approximately 7:30 to 8:00 p.m. on the night of May 8, 2004, she was assisting a Joe Worst (a co-employee from the garden department). She and Mr. Worst were moving merchandise from the back of the store for display in the garden section. This merchandise consisted of patio tables and chairs. She stated that when she and Mr. Worst were attempting to move a large boxed patio table top from the conveyer belt to a cart, she felt a "pull" in her lower back and then her back felt "hot" and stiff. However, she indicated that she and Mr. Worst managed to get the table top onto the cart. At that point, she advised Mr. Worst that she had injured her back and could no longer help him. She further told him that she was going to find James McCain, the overall operations manager. The claimant testified that she was able to find Mr. McCain and advised him of her injury to her lower back. He directed her to report the injury to Maridee Schoenfield, the Human Resource Manager. The claimant testified that she was unable to find Ms. Schoenfield, so she finished her shift and then went home. She stated that her difficulties continued and even worsened throughout the night and the next morning. The following day, May 9, 2004, the claimant sought medical treatment at the emergency room of St. Edwards

Mercy Medical Center.

The claimant testified that she stayed off work until either May 11 or May 12, 2004. Although she described continuing difficulties, she states that her discomfort had improved to the point where she felt that she could go back to work. Upon returning to work, she took the note she had received from the emergency room doctor and gave it to Irene Ainsworth, the store manager. She further testified that she advised Ms. Ainsworth about her accident and injury to her back. She stated that Ms. Ainsworth advised her that the doctor's note was not sufficient information. At that point, the claimant indicated that she informed Ms. Ainsworth that any further information could be obtained from St. Edwards Mercy Medical Center, which was across the street. She further stated that she advised Ms. Ainsworth that if she needed to sign any forms to let her know. At that point, the claimant testified that she clocked in and began her regular shift. It was the claimant's testimony that although she missed some days from work, as a result of her back difficulties, she could not remember the exact dates or the exact number, but continued to work regularly through most of June (at that time, her regular work week was approximately 28 to 32 hours).

The claimant indicated that she returned to the emergency room of St. Edwards Mercy Medical Center on June 21, 2004. At that time, she was again taken off work by the emergency room physician. An MRI was scheduled and the claimant was referred to the Cooper Clinic Occupational Medicine Division.

The claimant testified that following the MRI study, she attempted to work for the respondent, but was advised by the respondent that she would not be allowed to return to work until she could obtain a doctor's release. It was her testimony that due to financial circumstances, she was unable to see a doctor to obtain such a release. Due to her lack of finances, she has also been unable to obtain the further

medical services recommended. She has continued to perform a part-time job delivering weekly newspapers. Since September, she has also performed part-time work, 10 to 15 hours a week, as a clerk or cashier for the Dollar Tree. She further testified that she had recently obtained employment at Moll Plastics, working 30 to 31 hours per week.

The claimant stated that, following her second emergency room visit, she continued to keep the respondent apprised of her situation and has had numerous conversations with the respondent in an attempt to return to work. However, she was told by the respondent that she could not return to work, until she obtained a medical release. The claimant stated that she advised the respondent that she was financially unable to see a doctor to obtain such a medical release or to obtain the recommended medical treatment. She was informed that this was her problem.

In his deposition, James McCain testified that he was the operations manager of the Fort Smith K Mart store on May 8, 2004. He stated that he was one of the claimant's supervisors, although not her direct supervisor. He denied that the claimant reported any employment related accident or injury to her back to him on May 8, 2004. He stated that he first learned of this alleged injury, when he was informed by the store manager (Irene Ainsworth), Marisa Garrett (the claimant's immediate supervisor), and the HR Department sometime later. He stated that to his "knowledge", the claimant never previously told him about any employment related injury to her back. Finally, it was his testimony that it is the company policy of the respondent that a "incident report" is to be completed in the event of any injury, no matter how minor. However, he further indicated that there are two types of incident reports, one is apparently for employees and one is apparently for non employees. He described the employee incident reports as being kept in the HR office or being available "on line" to be printed off and filled out. The other or "general"

incident reports are kept in the security office for the "customer's associates". It is not apparent from his testimony whether the "incident reports" are to be completed by a supervisor or other management personnel or by the injured employee.

Curiously, no actual "incident report" has been introduced in this claim. The only report introduced is a Commission Form A1 filed by the respondent's TPA based upon information obtained over the phone from Irene Ainsworth, on or about July 7, 2004.

Irene Ainsworth testified that she was the store manager of the Fort Smith store on May 8, 2004. She stated that she was also considered to be one of the claimant's supervisors. Ms. Ainsworth testified that the first she knew that the claimant was contending she had sustained an on the job injury to her back was on the date she called in to the TPA and gave the information on the A1 (i.e. July 7, 2004). However, on cross examination, she testified that she had previously received the off work slip the claimant had been given by the emergency room of St. Edwards Mercy Medical Center on May 9, 2004. However, she stated that this off work slip made no reference to any injury to or difficulties with the claimant's back (no copy of this actual slip has been tendered into evidence). On cross examination, she further testified that several weeks following her receipt of this first note, she was contacted by a medical facility requesting authorization for tests to be performed on the claimant (this was likely a request for preauthorization for the MRI study performed on June 23, 2004). Ms. Ainsworth testified that she informed the facility that she was not aware of the claimant being injured, that she could not get permission for the testing, and that she would need to have the claimant fill out an incident report, and that the "incident center" would have to authorize the test. She further testified that this conversation took place after she had received a second "doctor's slip" from the claimant, but could not remember when this slip was received

(this would most likely be a slip generated by the second emergency room visit of June 21, 2004-again, no copy of this actual slip has been tendered). Ms. Ainsworth agreed with Mr. McCain that it was company policy that all employment related accidents and injuries be reported immediately, no matter how seemingly insignificant.

Marisa Garrett testified that she was the "hardlines manager", on May 8, 2004, and was the claimant's immediate supervisor. It was her testimony that the claimant never reported or complained of any employment related back injury to her. However, on cross examination, she stated that, while working with the claimant, the claimant told her that she had been to the hospital for her back, but did not give an explanation as to the cause of the back difficulties, and Ms. Garrett stated that she did not ask about the cause of these difficulties.

Maridee Schoenfield testified that, on May 8, 2004, she was the human resource manager for the respondent's Fort Smith store. She stated that the claimant did report her to that she had sustained an on the job injury to her back. She testified that, at that time, she asked the claimant if she wanted to fill out the appropriate paperwork and the claimant replied that she did not and that she would handle it herself. Therefore, no incident report was completed at that time. Ms. Schoenfield is uncertain as the exact date of this conversation. She did testify that this conversation took place some time prior to the time that she was contacted by the hospital inquiring about payment for the expenses incurred there. Finally, she testified that she did not personally complete any of the paperwork concerning the reporting of the claimant's alleged employment related back injury.

There has been no medical evidence introduced to indicate that the claimant had sought medical treatment for any difficulties involving her lower back or lumbar spine, prior to May 9, 2004. The medical records from St. Edwards Mercy Medical Center show that the claimant appeared there at approximately 12:40 p.m. on May 9,

2004, with complaints involving her back. An accident date of May 8, 2004, is also recorded. Evidence that the claimant's complaints represented a recent or acute injury was noted on physical examination, in the form of muscle spasms involving the right side of the claimant's lower back. The following histories of the onset of the claimant's difficulties are noted in the initial emergency room records:

"Complains of back pain since last night, reports lifting chairs and garden tables. Toes numb this a.m. Tingling now hard to get out of bed this a.m."

"This 27 year old white female presented to the emergency room complaining of severe low back pain. The patient stated that she works at K Mart and that she did a lot of heavy lifting of chairs and tables. This morning, when she woke up, she had severe back pain radiating to her right leg and felt a tingling and numbness in the toes. She has not had that problem before. She denies having fallen down or hurt in any other way, except heavy lifting at work."

In the subsequent emergency room record dated June 21, 2004, the following history is noted:

"This is a 27 year old white female who complains of continued low back pain. She was here in the emergency room department a few weeks ago complaining of low back pain after picking up some furniture at work. She said the back is hurting her still. She has run out of some of the medicine she was given that seemed to be helping some. She is having pain in the right back with pain in the right buttock and down the right leg into the foot. She is having some numbness in the right toes. She doesn't have a medical doctor. She didn't know where to go so she came back here. No bowel or bladder incontinence. She does not have a history of back problems."

Clearly, the testimony of a party is never considered contradicted. However, this does not mean that it may be arbitrarily disregarded. If such testimony is found to be credible, it may be sufficient, in and of itself to prove any facts it is legally competent to address. The claimant's testimony would obviously be legally competent to prove the circumstances surrounding the initial onset of her symptoms indicative of the occurrence of the medically established and objectively documented physical

injury to her low back or lumbar spine. Thus, her testimony, alone, could be sufficient to prove the occurrence of a specific employment related incident and to further prove the existence of a close temporal relationship between this incident and the initial onset of her symptoms indicative of the occurrence of the diagnosed physical injury diagnosed. Her testimony would also be legally competent to prove that she had never experienced any injuries of similar difficulties with her back prior to the occurrence of this employment related incident.

After consideration of all the evidence presented, I found the claimant's testimony to be credible. At the hearing, the claimant appeared to be truthful. The evidence shows that the claimant appears to be well motivated and a "hard worker". She has clearly gone to great lengths to maintain some type of regular gainful employment following the onset of her back difficulties and in spite of these difficulties. Her description of the event surrounding the onset of her lower back or lumbar difficulties is internally consistent and coincides with all the history given by her to her various medical providers, as well as the history ultimately recorded by the respondent.

The only conflict between the claimant's testimony and the other evidence presented concerns the reporting of her difficulties or injuries to the respondent. In resolving this conflict, I find the claimant's testimony to be more credible. Although the respondent's primary witnesses deny any knowledge that the claimant had sustained an employment related injury, until July 7, 2004, this testimony is equivocal and even contradictory. It is apparent that they did, in fact, have actual knowledge or should reasonably have known of such an injury long before July 7, 2004. The claimant's testimony, concerning the reporting of her injury, is substantially corroborated by the testimony of Ms. Schoenfield. It is apparent from Ms. Schoenfield's testimony that the claimant did, in fact, report the back injury to

her (the claimant testified she was directed by Mr. McCain to report her injury to Ms. Schoenfield), long before July 7, 2004. It is further apparent from the testimony of Ms. Garrett that she had some knowledge that the claimant had injured her back long before July 7, 2004. Finally, it is apparent from the testimony of Ms. Ainsworth that she was aware of an employment related injury to the claimant's back at least prior to June 23, 2004 (when a medical facility sought authorization under workers' compensation for recommended testing).

The employment related activity described by the claimant in her testimony could reasonably produce the type of lumbar injury "established" by the medical evidence and supported by the observed objective findings. The greater weight of the credible evidence further shows that the symptoms indicative of the occurrence of this physical injury occurred within a reasonable period of time following the described employment related incident (i.e. contemporaneously). Finally, there is no evidence of any other reasonable cause for the occurrence of this medically established and objectively documented physical injury to the claimant's lumbar spine.

Under the longstanding precedent rule announced by the Court, in Eddington v. City Electric Company, 237 Ark. 804, 376 S.W. 2nd 550(1964), the claimant has proven that her medically established and objectively documented physical injury to her lumbar spine is causally related to the specific employment incident on May 8, 2004 (the lifting of the patio table top). Thus, the claimant has proven that this lumbar injury arose out of and occurred in the course of her employment, was caused by a specific incident, and is identifiable by time and place of occurrence. Thus, the claimant has proven the first three requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

The noted presence of muscle spasms and the defects observed on the MRI study are sufficient to prove that this physical injury has caused internal damage to

the claimant's body. The claimant's testimony concerning the magnitude of her symptoms and the medical evidence establishing the nature of her injury is sufficient to prove that her injury reasonably required medical services and resulted in at least some period of temporary disability. Thus, the claimant has satisfied the final two requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has proven by the greater weight of the credible evidence, that on May 8, 2004, she sustained a physical injury to her lumbar spine that is "established " by medical evidence, that is supported by "objective findings", that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal physical harm to her body, and that required medical services and resulted in disability. Thus, she has satisfied all of the statutory elements for "compensable injury" mandated by the Act.

Next, it become necessary to determine the nature and extent of benefits to which the claimant is entitled as a result of her "compensable injury" to her low back or lumber spine. Clearly, she is entitled to reasonably necessary medical service for this compensable injury, Ark. Code Ann. §11-9-508. The evidence presented shows that the medical services provided and recommended by the physicians at the St. Edwards Mercy Medical Center represent such reasonably necessary medical services. These services were and are clearly necessitated or are connected with by the claimant's compensable injury. These services are also of a type and nature commonly recognized by the general medical community as being appropriate for the evaluation and treatment of injuries such as that experienced by the claimant on May 8, 2004.

The claimant also seeks temporary total disability benefits for the period of May 26, 2004 through September 28, 2004. In order to be entitled to such benefits, the claimant must prove that she continued within her healing period from the effects of her compensable injury and was rendered totally disabled from performing

all forms of regular gainful employment as a result of this injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this physical damage has resolved or at least stabilized, at a point where nothing further in the way of medical treatment offers a reasonable expectation of improvement, then the healing period has ended. In the present case, the medical evidence presented clearly shows that the claimant has not achieved maximum benefit of medical treatment, in regard to her compensable injury. She has received none of the evaluations or treatment recommended. Thus, she has proven the first requirement for her entitlement to temporary total disability benefits.

However, the payroll records of the respondent indicate that the claimant continued to work essentially full-time through at least June 16, 2004. These records further show that the claimant worked a partial week the week of June 23, 2004, and was paid for a partial day the week of July 7, 2004. The evidence presented further indicates that the claimant continued to maintain two separate newspaper or magazine routes, during the period she now seeks temporary total disability benefits. The evidence is somewhat unclear as to exactly when the claimant commenced each of these two employments. However, the claimant testified that she was hired for one of these routes after her compensable injury. The continuation of any concurrent employment position that she may have held at the time of her compensable injury would not preclude her from receiving temporary total disability benefits. However, the continuation of any employment she obtained after her compensable injury would prevent her from being considered temporarily totally disabled. The claimant's

testimony further shows that some time in the latter part of September, she obtained additional employment as a part -time clerk or cashier for the Dollar Tree, working 10 to 15 hours per week. Her testimony further indicates that the part-time nature of this position was due to lack of work available, rather than any limitations resulting from her injury. Some time in late November or early December of 2004, the claimant apparently obtained relatively full time employment with Moll Plastics. While the employment at Moll Plastics occurred after the period of temporary total disability in question, it is not absolutely clear from the evidence presented that the claimant's employment with the Dollar Tree did not begin during the period in question.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that she has been rendered totally disabled from performing all forms of regular gainful employment as a result of her compensable injury for the period of May 26, 2004 through September 28, 2004. In fact, she has failed to prove that she has been rendered totally disabled from performing all forms of regular gainful employment during any portion of this period. While temporary partial disability benefits may be appropriate, this was not an issue presented to the Commission, at the time of the hearing. Therefore, no decision can be made on this issue at the present time, and this issue must be served for future determination (if necessary).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 8, 2004 , the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On May 8, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$187.00 for total disability and

\$154.00 for permanent partial disability.

4. On May 8, 2004, the claimant sustained a compensable injury to her low back or lumbar spine. Specifically, on that date, she sustained a physical injury to this portion of her body that is "established" by the medical evidence, that is supported by "objective findings", that arose out of and occurred in the course of her employment with the respondent, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal physical harm to her body, and that required medical services or resulted in disability.
5. The medical services provided and recommended by the physicians at the emergency room of St. Edwards Mercy Medical Center for the claimant's lower back or lumbar difficulties represent reasonably necessary medical services for her compensable injury of May 8, 2004. The expense of these services, subject to the medical fee schedule established by this Commission, is the liability of the respondent herein.
6. The claimant has failed to prove by the greater weight of the credible evidence that she was rendered temporarily totally disabled as a result of her compensable injury for the period of May 26, 2004 through September 28, 2004. Specifically, she has failed to prove by the greater weight of the credible evidence that her compensable injury rendered her totally disabled during this period.
7. The respondent has denied the occurrence of a compensable injury to the claimant's lower back or lumbar spine and has controverted her entitlement to any and all benefits.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on any benefits which may hereinafter be awarded

directly to the claimant for her compensable injury of May 8, 2004.

ORDER

The respondents shall be liable for the expense of all medical services previously provided and recommended to the claimant for her compensable low back injury by the physicians at the St. Edwards Mercy Medical Center emergency room. Such liability is limited to the medical fee schedule established by this Commission.

As no controverted benefits are presently awardable to the claimant, no controverted fee can presently be awarded to the claimant's attorney.

The claimant's request for temporary total disability benefits for the period of May 26, 2004 through September 28, 2004, must be and hereby is denied for the reasons heretofore set forth in this Opinion.

All issues not specifically addressed in this Opinion are reserved for future determination, if necessary, including the claimant's possible entitlement to temporary partial disability 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.

MICHAEL L. ELLIG
Administrative Law Judge