

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F208549

HEATHER CURRAN, Employee	CLAIMANT
WAL-MART STORES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED JULY 11, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On June 14, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 19, 2006, and a pre-hearing order was filed on the same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on July 27, 2002.
3. The claimant sustained a compensable injury to her shoulder on July 27, 2002.
4. The claimant was earning sufficient wages to entitle her to compensation at the rate of \$170.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

Shoulder:

1. Nine days of temporary total disability while undergoing treatment with Dr. Park.

2. Three days of temporary total disability from August 9, 2004 through August 11, 2004.

3. Unpaid ER visit of August 9, 2004.

4. Attorney fee.

Neck:

1. Compensability.

2. Related medical.

At the time of the hearing the parties agreed that they had resolved the issue of claimant's entitlement to three days of temporary total disability benefits in August 2004. Furthermore, claimant clarified her request for temporary total disability benefits relating to her shoulder to include the dates of 4/24/03, 5/21/03, 8/19/03, 10/8/03, 11/26/03, 1/9/04, 2/26/04, 5/13/04, and 9/9/04. These dates represent days the claimant sought medical treatment from Dr. Park.

The claimant contends that with respect to her shoulder injury she is entitled to an additional nine days of temporary total disability benefits for days she sought medical treatment from Dr. Park. It is claimant's contention that she was unable to return to work on the days of those medical visits; therefore, she is entitled to temporary total disability benefits. Claimant also requests payment of an unpaid emergency room visit on August 9, 2004. Claimant also requests payment of an attorney fee on any unpaid temporary total disability benefits. With respect to her neck, claimant contends that she suffered a compensable injury to her neck while employed by the respondent on July 27, 2002. She seeks payment of medical treatment relating to that injury.

The respondents contend they have paid all appropriate benefits for the compensable shoulder injury, and that claimant's neck condition is not causally related to her shoulder injury.

From a review of the record as a whole, to include medical reports, documents, and

other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 19, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits as a result of her compensable shoulder injury.

3. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for payment of medical treatment claimant received at the emergency room on August 9, 2004.

4. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her neck on July 27, 2002. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable neck injury.

FACTUAL BACKGROUND

The claimant is a 27-year-old high school graduate who has primarily worked in retail. Claimant began working for the respondent on August 7, 2001. The claimant has worked for the respondent as a cashier, "front-end" manager, at the service desk, and in the layaway department.

Claimant testified that on July 27, 2002 she was in the process of lifting a 19-inch television set when she felt a popping sensation in the left side of her neck. Claimant went

to the emergency room in Siloam Springs on that date and was evaluated by Dr. Johnson who diagnosed claimant as suffering from a left trapezius strain. Respondent subsequently referred claimant to Dr. Green at the Lowell Medical Clinic for treatment. Dr. Green's medical records indicate that he diagnosed claimant as suffering from a left neck sprain and treated claimant conservatively. Claimant eventually sought medical treatment from her family physician and was referred to Dr. Allard who ordered an MRI scan of the claimant's left shoulder. Dr. Allard diagnosed claimant's condition as a partial tear of the left rotator cuff tendon and recommended an injection. The medical records indicate that approval of this shoulder condition took some time while respondent made a determination as to whether or not to accept liability for medical treatment. Respondent did eventually accept liability for treatment to claimant's shoulder and Dr. Allard provided the injection on January 13, 2003. Dr. Allard subsequently referred claimant to Dr. Park for an additional evaluation; however, before claimant could be evaluated by Dr. Park she was evaluated by Dr. Mitchell who ordered an MRI scan of the claimant's cervical spine. Claimant subsequently received treatment from Dr. Park who recommended an arthroscopic examination of the claimant's left shoulder. Dr. Park performed two surgical procedures on claimant's left shoulder with the first occurring on May 22, 2003 and the second occurring on July 3, 2003. Dr. Park eventually released claimant from his care and assigned claimant a permanent physical impairment rating of one percent to the body as a whole. Claimant subsequently returned to Dr. Park complaining of neck discomfort radiating down into her shoulders. Claimant has undergone a second MRI scan of her cervical spine.

The respondent has accepted as compensable an injury to the claimant's left shoulder and has paid some compensation benefits including medical treatment and temporary total disability benefits. However, claimant contends that she is entitled to an additional nine days of temporary total disability benefits relating to medical treatment she

received from Dr. Park. Claimant also seeks payment for an emergency room visit on August 9, 2004. With respect to her neck, claimant contends that she also injured her cervical spine as a result of the incident on July 27, 2002. She seeks payment of related medical associated with her neck injury.

ADJUDICATION

SHOULDER.

Claimant contends that she is entitled to payment for an additional nine days of temporary total disability benefits over a period of time beginning April 24, 2003 and continuing through September 9, 2004. These nine days represent dates that claimant sought medical treatment from Dr. Park. Claimant testified that on those dates she missed an entire day of work because after her appointment with Dr. Park there was not sufficient time for her to work; therefore, she had an understanding with her supervisor that she would not come into work on those days.

In order to be entitled to temporary total disability benefits for an unscheduled injury, claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the relevant evidence, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits for the nine days she sought medical treatment from Dr. Park. As previously noted, claimant does not contend that she was taken off work by Dr. Park for these nine individual days. Instead, she contends that because of her appointments with Dr. Park it was not feasible for her to work for the respondent. First, I note that according to claimant's testimony during the time she was being evaluated by Dr. Park she was only

working some four to six hours per day. Furthermore, according to claimant's own testimony Dr. Park performed evaluations in the mornings and surgical procedures in the afternoon. Claimant has offered insufficient evidence indicating that she was incapable of working in the afternoons after her treatment with Dr. Park.

In short, I find insufficient evidence that claimant suffered a total incapacity to earn wages on the nine days she sought medical treatment from Dr. Park. While claimant's ability to work a full day may have been limited due to her appointments with Dr. Park, claimant has failed to prove by a preponderance of the evidence that she suffered a total incapacity to earn wages on those days in question. Therefore, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for her compensable shoulder injury.

Claimant also requests payment for an emergency room visit relating to her left shoulder on August 9, 2004. Claimant testified that she sought medical treatment from the emergency room because it was going to take approximately one month to get in to see Dr. Park. Claimant testified that her pain was so great on August 9, 2004 that she went to the emergency room after work.

A.C.A. §11-9-514(b) provides that any medical treatment or services furnished or prescribed by any physician other than the one selected according to statute "except emergency treatment" shall be at the claimant's expense. Since the medical treatment provided at the emergency room was not authorized by the respondent, the question is whether it constituted emergency treatment such that respondent would be liable for payment.

I find that claimant has failed to prove by a preponderance of the evidence that the medical treatment she received on August 9 constituted emergency treatment which should be the liability of the respondent. Claimant admitted at the hearing that she had developed additional pain approximately one week before she sought medical treatment

at the emergency room. Claimant had also admitted that during that week she did not ask the respondent for any medical treatment. In fact, claimant testified that she went to the emergency room after working that day.

Given the fact that claimant made no effort to request additional medical treatment from the respondent for one week prior to August 9, 2004, I find that the treatment claimant received from the emergency room on August 9, 2004 does not constitute emergency treatment pursuant to A.C.A. §11-9-514(b); therefore, respondent is not liable for payment of that medical treatment.

NECK.

Claimant contends that in addition to the injury to her left shoulder on July 27, 2002 she also suffered a compensable injury to her neck as a result of lifting the television set on that date.

Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the

doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her neck at the time of the incident on July 27, 2002.

First, it should be noted that there is no question that this incident involving the lifting of the television set occurred on July 27, 2002. Respondent has stipulated that claimant suffered a compensable injury to her shoulder on that date.

Claimant specifically testified at the hearing that when she was lifting the television set she felt a pop in the left side of her neck which radiated pain. Following that incident the claimant went to the emergency room at Siloam Springs Hospital where she was evaluated by Dr. Johnson. The medical reports from the emergency room indicate that claimant was seen for complaints of left lateral neck pain radiating into her left shoulder with an onset three hours earlier after lifting a television.

Thereafter, claimant was sent by the respondent to Dr. Green at the Lowell Medical Clinic. On July 29, 2002 Dr. Green completed Commission Form AR-3 relating the incident of claimant lifting the television and feeling a pulling sensation in her left neck which radiated down into her left shoulder. Dr. Green subsequently diagnosed the claimant's condition as a left neck sprain.

Claimant subsequently sought medical treatment from her family physician, Dr. Springer, at which time she complained of neck and shoulder pain. Dr. Springer diagnosed claimant's condition as a shoulder strain and possible AC joint strain. Dr. Springer referred claimant to Dr. Allard who noted that claimant had a history of neck pain which radiated down into her hand. At the time of her visit with Dr. Allard on August 22, 2002, her pain was noted to mostly be in her left shoulder and as a result Dr. Allard ordered an MRI scan. Dr. Allard referred claimant to Dr. Park for an additional evaluation and he subsequently performed surgery.

When claimant came under the care of Dr. Park, Dr. Park's treatment was

exclusively for claimant's left shoulder condition, not her neck. However, that does not change the fact that multiple medical reports indicate that claimant was complaining of pain in her neck and received treatment from her physicians including Dr. Green, a physician chosen by the respondent, for a neck condition. Before claimant was evaluated by Dr. Park she was evaluated by Dr. Mitchell on March 28, 2003 at which time he indicated that it was difficult to determine whether the pain was from claimant's neck or her shoulder. Dr. Mitchell believed on that date that the claimant might be suffering from a ruptured cervical disc and ordered an MRI scan of the claimant's cervical spine. That scan was subsequently performed which revealed mild straightening of her cervical spine but was otherwise normal. As a result, claimant subsequently came under the care of Dr. Park who performed the aforementioned surgery on claimant's left shoulder.

After claimant had been treated and released by Dr. Park she returned to him on September 9, 2004 complaining of neck discomfort which radiated into her shoulders. Claimant has also undergone a second MRI scan of the cervical spine in February 2005 which revealed straightening of the normal cervical lordosis.

Based upon the testimony of the claimant, the medical reports containing a history of neck complaints and history of injury consistent with claimant's testimony, as well as the medical reports themselves, I find that claimant has met her burden of proving by a preponderance of the evidence that the injury to her neck arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. Although the MRI scans of claimant's cervical spine have revealed no compression, I do believe that the medical records contain objective evidence establishing an injury. First,

as previously noted, claimant sought medical treatment from Dr. Green on July 29, 2002. At that time Dr. Green diagnosed claimant's condition as a left neck sprain. While Dr. Green's medical report does not contain a notation specifically indicating that he observed muscle spasms, his report does include the following: "We talked about movement as a way of keeping muscle spasm at a minimum." This would indicate that muscle spasm was present. Furthermore, the MRI scan of claimant's cervical spine dated April 2, 2003 revealed mild straightening of her spine. The report goes on to note: "This sometimes is associated with muscle spasm." Finally, the MRI scan of claimant's cervical spine performed on February 3, 2005 also reveals a finding of the straightening of the normal cervical lordosis. I find that these constitute objective findings establishing an injury to claimant's neck on July 27, 2002.

There was some questioning at the time of the hearing regarding claimant's activities outside of work including barrel racing at rodeos. Claimant testified that her last competitive barrel race at a rodeo occurred on July 1, 2002, approximately three weeks prior to her injury with the respondent. Claimant testified that she did not injure her shoulder or neck while engaged in these activities and no evidence has been offered to the contrary. Accordingly, I find no evidence which would support a finding that claimant injured herself while barrel racing or while riding horses.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her neck while employed by the respondent on July 22, 2002.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable neck injury.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the

amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits as a result of her compensable left shoulder injury. Claimant has also failed to prove by a preponderance of the evidence that respondent is liable for payment of treatment claimant received from the emergency room on August 9, 2004. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her neck while employed by respondent on July 27, 2002. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant’s compensable neck injury.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE