

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F505040

CARMELITA FLORES, Employee	CLAIMANT
WAL-MART DISTRIBUTION, Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED SEPTEMBER 6, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On August 14, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 28, 2006, and a pre-hearing order was filed on that 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 April 30, 2005.
3. The claimant sustained a compensable injury on April 30, 2005.

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

1. Compensability rate.
2. Mileage reimbursement.
3. Additional medical treatment; specifically, a TENS unit subsequent to

September 19, 2005.

4. Temporary total disability benefits from June 17, 2005 through June 30, 2005.
5. Attorney fee.

At the time of the hearing the parties agreed that the issue of mileage reimbursement had been resolved. In addition, the parties agreed that the only medical treatment currently at issue is claimant's entitlement to the use of a TENS unit subsequent to September 19, 2005.

The claimant contends that her correct average weekly wage is \$417.60 which would entitle her to compensation at the rate of \$278.00 for temporary total disability benefits and \$209.00 for permanent partial disability benefits. In addition, claimant requests additional medical treatment in the form of a stimulator which has been prescribed by Dr. Sprinkle. Finally, claimant requests temporary total disability benefits beginning June 17 and continuing through June 30, 2005, as well as a controverted attorney fee.

The respondent contends that it has paid all benefits to which claimant is entitled. With respect to the claimant's compensation rate, respondent contends that claimant's average weekly wage should be calculated based upon the gross wages earned over a 52 week period of time which would result in an average weekly wage of \$328.22 and a compensation rate of \$219.00 for temporary total disability benefits.

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 June 28, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant earned an average weekly wage of \$417.60 which would entitle her to compensation at the rate of \$278.00 for temporary total disability benefits and \$209.00 for permanent partial disability benefits.

3. Claimant has met her burden of proving by a preponderance of the evidence that the stimulator prescribed by Dr. Sprinkle is reasonable and necessary for treatment of her compensable injury.

4. Claimant is entitled to temporary total disability benefits beginning June 17, 2005 and continuing through June 30, 2005.

5. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits, including the difference between benefits previously paid and the correct compensation rate as found in this opinion.

FACTUAL BACKGROUND

The claimant is a 42-year-old woman who worked for the respondent as a forklift driver at its distribution center in Clarksville. Claimant suffered a compensable injury on April 30, 2005 when she slipped and fell on some onion juice.

Claimant was initially sent by the respondent to Dr. Marshall who diagnosed claimant as suffering from a fracture of the sacrum and coccyx. Dr. Marshall took claimant off work for a period of time. The medical records indicate that at some point the claimant underwent an MRI scan which was read as normal. Claimant next sought medical treatment from her family physician, Dr. Carrick, who in a report dated June 15, 2005 noted that x-rays revealed a fracture of the claimant's coccyx. Dr. Carrick also noted that the prior MRI scan had not included the coccyx area. Dr. Carrick prescribed claimant pain medication and took claimant off work for a period of time.

Claimant subsequently was referred by Dr. Marshall to Dr. Sprinkle who initially evaluated her on June 30, 2005. Dr. Sprinkle ordered a bone scan to definitively determine whether a coccyx fracture was present. Until that was performed, Dr. Sprinkle allowed the claimant to return to work with some restrictions.

In a report dated July 19, 2005, Dr. Sprinkle noted that the bone scan had confirmed a coccyx fracture. Dr. Sprinkle gave claimant an injection and prescribed medication and home exercise. In addition, Dr. Sprinkle ordered a stimulator for the claimant. Claimant was next evaluated by Dr. Sprinkle on August 10, 2005, at which time he noted that the injection and the stimulator had been helpful to the claimant's condition. Dr. Sprinkle gave claimant a second injection at that time.

On September 15, 2005 Dr. Sprinkle gave claimant a third injection and ordered an EMG to determine whether radiculopathy was present. Dr. Sprinkle noted that if the EMG were normal claimant would likely have reached her maximum medical improvement at the time of her next visit.

Claimant's next visit with Dr. Sprinkle occurred five days later on September 20, 2005, at which time Dr. Sprinkle noted that claimant's EMG was normal. Dr. Sprinkle noted that the claimant still had some right leg and posterior buttocks pain, but did state that claimant was at maximum medical improvement. Dr. Sprinkle released the claimant to return to work at full duty and assigned her a permanent physical impairment rating in an amount equal to 2 percent to the body as a whole as a result of the coccyx fracture.

Claimant has filed this claim contending that her compensation rate is greater than that previously paid by the respondent. She also requests approval for a stimulator prescribed by Dr. Sprinkle, temporary total disability benefits beginning June 17, 2005 and continuing through June 30, 2005, as well as a controverted attorney fee.

ADJUDICATION

COMPENSATION RATE.

Computation of the compensation rate is governed by A.C.A. §11-9-518.

Subsection (a)(1) of that statute states:

Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

The question is what was claimant's contract of hire in force at the time of the accident. In this case, claimant testified that she earned \$13.05 per hour and was scheduled to work eight hours per day, four days per week. Claimant testified that her weekly schedule did not change and that she was required to be available to work her entire eight-hour shift. Claimant also admitted that she did not always work her entire eight-hour shift, but sometimes worked fewer hours when respondent did not have enough work available for her to perform.

This situation was previously addressed by the Arkansas Supreme Court in *Gill v. Ozark Forest Products, et al*, 255 Ark. 951, 504 S.W. 2d 357 (1974). In that particular case, the employee worked as a logger but did not always work 40 hours per week due to weather conditions and the timber supply. Even though claimant was not guaranteed a full week of work, the Court nevertheless noted that claimant had a contract of hire to work 40 hours per week whenever that work was available. As a result, the Court found that claimant's contract of hire should be computed on a 40-hour work week. In this particular case, the claimant likewise was scheduled to work eight hours per day, four days per week and was required to be available for that time period. On various days the claimant did not work the entire eight hours due to a lack of work. On those days claimant and other employees were given the option of going home. Even though the claimant sometimes voluntarily chose to go home, she did so only when asked by the respondent and this does

not change the fact that claimant always had to be available to work her entire shift of eight hours. It was only because the respondent did not have sufficient work available that claimant was sent home.

Given this evidence, I find that claimant had a contract of hire to work eight hours per day, four days per week, at the rate of \$13.05 per hour. Even though claimant may have worked less than that on some occasions, she was nevertheless required to be available for a full day's worth of work. This translates into an average weekly wage of \$417.60 which results in a compensation rate of \$278.00 for temporary total disability benefits and \$209.00 for permanent partial disability benefits.

STIMULATOR.

The only medical treatment at issue is claimant's request for a stimulator prescribed by Dr. Sprinkle. Dr. Sprinkle had previously prescribed a stimulator for treatment of the claimant's condition at the time of his evaluation on July 19, 2005. Subsequent reports by Dr. Sprinkle indicate that the stimulator was providing a benefit to the claimant. While Dr. Sprinkle indicated that claimant had reached maximum medical improvement on September 20, 2005, he also signed a prescription form for a stimulator on October 7, 2005. That form is contained in the documentary evidence at Page 21 of Claimant's Exhibit Number 1. Dr. Sprinkle prescribed the stimulator for indefinite use and indicated that the stimulator was to be used to relieve pain, increase claimant's range of motion, and relax muscle spasms.

A claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, ____ S.W. 3d ____ (2004).

In this particular case, I find that claimant has met her burden of proving by a preponderance of the evidence that the stimulator is reasonable and necessary for treatment of her compensable injury. While Dr. Sprinkle had opined that claimant had

reached maximum medical improvement, a claimant may still be entitled to medical treatment even after their healing period has ended if the medical treatment is for the purpose of managing claimant's injury. *Patchell, supra; Hydroponics v. Pippin*, 8 Ark. App. 2001, 649 S.W. 2d 845 (1983). In this particular case, Dr. Sprinkle prescribed the stimulator for treatment of symptoms relating to claimant's injury. I find that his opinion is credible and entitled to great weight; therefore, I find that claimant has met her burden of proving by a preponderance of the evidence that the stimulator is reasonable and necessary for treatment of her compensable injury.

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant has requested payment of temporary total disability benefits beginning June 17, 2005 and continuing through June 30, 2005. In order to be entitled to temporary total disability benefits, the 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). Here, I find that claimant remained within her healing period until September 20, 2005, the date Dr. Sprinkle opined that claimant had reached maximum medical improvement. I also find that claimant suffered a total incapacity to earn wages from June 17, 2005 through June 30, 2005 as a result of her compensable injury.

On June 15, 2005, claimant sought medical treatment from her family physician, Dr. Carrick. Dr. Carrick diagnosed a fracture of the claimant's coccyx based upon an x-ray. Dr. Carrick in his report of that date also noted that claimant could not perform her job as a forklift driver and suggested that claimant complete papers for Family Medical Leave. The documentary evidence does contain claimant's request for a leave of absence. A portion of the form completed by the claimant indicates that she is suffering from "Vaginal Bleeding." However, that portion of the form completed by Dr. Carrick indicates that

claimant is under his care for fracture of the coccyx and fluid in the facet joints. As a result, Dr. Carrick indicated that claimant should remain off work from June 17, 2005 through July 1, 2005. Additional FMLA documentation completed by Dr. Carrick lists the claimant's coccyx and low back as the first two reasons for her need for leave with vaginal bleeding listed as the third reason.

Based upon the foregoing evidence, I find that claimant suffered a total incapacity to earn wages as a result of her compensable injury beginning June 15, 2005, the date she was first evaluated by Dr. Carrick and taken off work, and continuing through June 30, 2005, the day she last missed work for the respondent. While claimant may have suffered from vaginal bleeding during this period of time, the documentary evidence also indicates that it was Dr. Carrick's opinion that he was primarily taking claimant off work for her compensable injury of a coccyx fracture.

ATTORNEY FEE.

The respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits as well as the difference in benefits previously paid which are less than the compensation rates of \$278.00 for temporary total disability benefits and \$209.00 for permanent partial disability benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she earned an average weekly wage of \$417.60 which would entitle her to compensation at the rate of \$278.00 for temporary total disability benefits and \$209.00 for permanent partial disability benefits. Claimant has also proven by a preponderance of the evidence that the stimulator prescribed by Dr. Carrick is reasonable and necessary for treatment of her compensable injury. Claimant is also entitled to temporary total disability benefits beginning June 17, 2005 and continuing through June 30, 2005. Finally, respondent has

controverted claimant's entitlement to all unpaid indemnity benefits, including the difference between benefits previously paid and the correct compensation rate as found in this opinion.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE