

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513625

TRACY GANN, Employee	CLAIMANT
RUSSELL CELLULAR, Employer	RESPONDENT
CINCINNATI CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED APRIL 24, 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 WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 3, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 23, 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-carrier relationship existed among the parties on November 16, 2005.
3. The claimant was involved in a motor vehicle accident on November 16, 2005.
4. The respondents have controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$383.00 which would entitle her to compensation at the rates of \$255.00 for temporary total disability benefits and \$192.00 for permanent partial disability benefits.

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

1. Compensability.
2. Related medical.
3. Temporary total disability benefits.
4. Attorney fee.

At the time of the hearing the claimant modified her request for disability benefits to include temporary total disability from January 5, 2006 through February 2, 2006 and temporary partial disability benefits beginning February 3, 2006 and continuing through a date yet to be determined.

The claimant contends that she was involved in a motor vehicle accident on November 16, 2005 while performing employment services. She requests temporary total disability benefits from January 5, 2006 through February 2, 2006, and temporary partial disability benefits from February 3, 2006 through a date yet to be determined. Claimant also seeks payment of related medical, including treatment by Dr. Arthur Johnson, and a controverted attorney fee.

The respondents contend that the claimant's problems to her low back, right leg, and her disc herniation at L-1 are not related to the November 16, 2005 accident.

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 witnesses and to observe their 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 February 23, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$383.00 which would entitle her to compensation at the rate of \$255.00 for temporary total disability benefits and \$192.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on November 16, 2005.

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

5. Claimant is entitled to temporary total disability benefits beginning January 5, 2006 and continuing through February 2, 2006. Claimant is entitled to temporary partial disability benefits beginning February 3, 2006 and continuing through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

The claimant worked as a sales person for the respondent selling cellular phones and satellite television services. On November 16, 2005 the claimant along with two other employees and their supervisor, Christy Smith, were traveling to a mandatory meeting in Springfield, Missouri, when their vehicle was struck from behind by another vehicle. Smith was driving the vehicle and called the owner of the company to report the accident.

Claimant testified that at the time of the accident she was in the front passenger seat and was twisted over the arm rest with her head turned toward the passengers in the back seat of the vehicle. Claimant testified that approximately 45 minutes after the accident her back began hurting and became sore. That night claimant sought medical

treatment from Summit Medical Center in Van Buren. Claimant was given medication and instructed to follow up with her primary care physician if her condition did not improve. Claimant continued working for the respondent and next sought medical treatment from Dr. White, her family physician, on November 22, 2005. Dr. White diagnosed claimant's condition as back pain with radiculopathy, continued claimant's medication, and ordered an MRI scan. The MRI scan was performed on November 30, 2005 and revealed a small herniation at the L1 level.

Although claimant had continued to work for the respondent, she sought additional medical treatment from Dr. White on January 5, 2006 complaining of increased back pain over the last two days. Dr. White took claimant off work at that time. Claimant subsequently sought medical treatment from Dr. Johnson, a specialist, who diagnosed claimant's condition as a right L1-2 disc herniation with radiculopathy and neuropathic pain. Dr. Johnson continued claimant's medications and physical therapy. He also released claimant to return to work for four hours per day with some limitations. Claimant returned to work for respondent working approximately four hours per day.

Claimant has filed this claim contending that she suffered a compensable injury to her low back as a result of the motor vehicle accident while working for respondent on November 16, 2005. She requests payment of related medical, temporary total and temporary partial disability benefits, as well as a controverted attorney fee.

### ADJUDICATION

Claimant contends that she suffered a compensable injury to her back as a result of an automobile accident which occurred while she was working for the respondent on November 16, 2005. Claimant's claim is for a specific incident 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 back while working for respondent on November 16, 2005.

First, as previously noted, claimant testified that on November 16, 2005 she along with two other employees and her supervisor were traveling to a mandatory meeting in Springfield, Missouri, when their vehicle was struck from behind by another. Claimant testified that as a result of this incident she developed a burning and soreness in her back approximately 45 minutes later. After attending the meeting and returning back to Arkansas, the claimant sought medical treatment from Summit Medical Center in Van Buren. A review of the medical report from that evaluation indicates that claimant gave a history of injury consistent with her testimony. Claimant was complaining of back pain which radiated into her right leg. Subsequent medical reports from Dr. White and Dr. Johnson also contain a history of injury consistent with claimant's testimony.

Introduced into evidence was a medical report from Dr. White dated October 31, 2005, some two weeks prior to the claimant's accident. The medical report from Dr. White

contains the following notation: "HX HNP." According to claimant's testimony she has never suffered from any back pain prior to November 16, 2005. Furthermore, other than this report from Dr. White, there is no medical evidence mentioning low back pain, much less a pre-existing herniated disc. I also find it relevant to note that an information sheet completed by the claimant at the time of her evaluation by Dr. White and made a part of the record subsequent to the hearing does not mention any prior history of low back pain or a history of a herniated disc. The information sheet does indicate that claimant had past hysterectomy and a history of kidney stones. Based upon this evidence, I do not find sufficient evidence indicating that claimant had a pre-existing herniated disc prior to November 16, 2005.

I also note that Dr. White's medical report of November 22, 2005 first reflects a history of the accident as described by the claimant. It also contains the following: "Felt good yesterday, rolled over this am [sic] in bed and had severe back pain." I do not find that claimant's current back symptoms are causally related to this alleged incident as opposed to the motor vehicle accident of November 16, 2005. While it might be argued that this incident constituted an independent intervening cause, if a causal connection exists between an injury and subsequent disability there can be no independent intervening cause unless it was triggered by activity on the part of the claimant which was unreasonable under the circumstances. *Guidry v. J & R Eads Construction Company*, 11 Ark. App. 219, 669 S.W. 2d 483 (1984).

The credible evidence of record indicates that claimant had been having ongoing back pain since the time of the accident on November 16, 2005. Therefore, a causal connection was established between her injury and her subsequent disability and need for medical treatment. Getting out of her bed does not constitute activity which was unreasonable under the circumstances. Furthermore, claimant testified that when she informed Dr. White that she "felt good yesterday" she did not mean that her back was not

bothering her, only that it was better than it was in the days immediately after the accident. In short, I do not find that claimant's current back complaints are causally related to an incident which occurred on November 22<sup>nd</sup> as opposed to the motor vehicle accident of November 16, 2005.

In summary, I find claimant's testimony to be credible and entitled to great weight. Based upon her testimony and the evidence presented, I find that claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services or resulted in disability and that she has offered medical evidence supported by objective findings establishing an injury.

The medical records indicate that claimant was seen on the night of November 16 following the motor vehicle accident at the Summit Medical Center in Van Buren. Claimant was prescribed medication and was instructed to follow up with her primary care physician if her condition did not improve. Significantly, medical records from Summit on that date contain a diagram which shows the location of claimant's complaints. That diagram also has a handwritten notation indicating that tenderness and spasm were present. Finally, claimant was given a prescription for medication including Soma, which according to the prescription form was for spasm. Muscle spasms are recognized as an objective finding of injury. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997). In addition, subsequent medical testing in the form of an MRI scan of claimant's lumbar spine revealed a herniated disc at the L1-2 level.

Based upon the foregoing, I find that claimant has met the remaining elements of

compensability and find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back as a result of a motor vehicle accident while working for respondent on November 16, 2005.

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

In order to be entitled to temporary total or temporary partial disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total or partial incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find based upon the medical records presented that claimant has remained within her healing period from the date of her injury and continuing through a date yet to be determined. While claimant initially returned to work for the respondent after the accident, she was subsequently taken off work by Dr. White on January 5, 2006. Claimant continued to remain off work and continued to suffer a total incapacity to earn wages until she was released to return to work by Dr. Johnson for four hours per day as of February 3, 2006. Claimant has continued to work for the respondent for approximately four hours per day since February 3.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning January 5, 2006 and continuing through February 2, 2006. In addition, claimant is entitled to temporary partial disability benefits beginning February 3, 2006 and continuing through a date yet to be determined.

Pursuant to A.C.A. §11-9-520, a claimant entitled to temporary partial disability benefits is entitled to 66 and 2/3's of the difference between their average weekly wage prior to the accident and their wage earning capacity after the accident. While I have found that claimant is entitled to temporary partial disability benefits beginning February 3, 2006, it is impossible from the evidence presented to determine the correct temporary partial

disability rate. While claimant did return to work for the respondent for four hours per day as of February 3, 2006, claimant is not paid strictly on an hourly basis. In addition to her hourly rate, she also receives various types of commissions and may have some deductions for previous commissions earned if customers deactivate their account in less than six months. While the respondent introduced some evidence of claimant's earnings subsequent to February 3, 2006, respondent did not have claimant's most recent earnings and the earnings included back pay of 50 cents an hour dating back to work claimant performed subsequent to December 2, 2005, before she was taken off work. Accordingly, it is impossible for me to determine claimant's correct temporary partial disability rate.

The parties are encouraged to obtain a complete set of claimant's earnings beginning February 3, 2006 up through the date of the hearing. Calculation of claimant's wages for this period of time would include both the commissions and any deductions to arrive at an average wage. It should not include any wages paid to claimant subsequent to February 3 for work performed prior to that date. Finally, it would also include wages at \$7.50 per hour, not \$7.00 per hour that claimant was earning at the time of her injury. While claimant was earning only \$7.00 per hour at the time of her injury, she did in fact earn wages subsequent to February 3 at the rate of \$7.50 per hour due to a raise. Because claimant earned wages at that date subsequent to her return to work, those wages would be used in calculating the correct temporary partial disability rate.

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), 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.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while working for respondent on November 16, 2005. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning January 5, 2006 and continuing through February 2, 2006. Claimant is entitled to temporary partial disability benefits beginning February 3, 2006 and continuing through a date yet to be determined.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE