

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404626

HELEN LEMONS, EMPLOYEE	CLAIMANT
NATIONAL WIRE FABRIC, INC., EMPLOYER	RESPONDENT
TWIN CITY FIRE INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JUNE 27, 2006

Hearing held before Administrative Law Judge Cynthia Rogers, on March 17, 2006, at Monticello, Drew County, Arkansas, and submitted for a ruling on the record before Administrative Law Judge Dale Douthit on May 3, 2006.

Claimant was represented by HON. KENNETH HARPER, Attorney at Law, Monticello, AR.

Respondent was represented by HON. GENE WILLIAMS, Attorney at Law, Little Rock, AR.

STATEMENT OF THE CASE

The above-captioned claim came on for a hearing on March 17, 2006 before Administrative Law Judge Cynthia Rogers. The claim was reassigned to this Administrative Law Judge on May 3, 2006, for an opinion to be written on the record without objection from the parties. A prehearing conference was conducted on December 5, 2005, and a prehearing order was filed on that same day. A copy of the prehearing order was marked as Commission Exhibit "1" and made a part of the record without objection.

The parties agreed to the following stipulations:

- 1) The claimant sustained a compensable low back injury on  
October 28, 2003.

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- 2) Claimant's applicable compensation rates at the time of her compensable injury were \$440.00 and \$330.00 for TTD and PPD, respectively.
- 3) Respondents last paid TTD benefits associated with the claimant's compensable injury on October 26, 2004.
- 4) Respondents last paid medical benefits associated with the claimant's compensable injury for services occurring on December 22, 2004.
- 5) The claimant worked through May 26, 2004, after her compensable low back injury of October 28, 2003.
- 6) The claimant worked for the respondent-employer eleven (11) days in January of 2005.

The parties agreed to litigate the following issues:

- 1) Whether the claimant is entitled to additional temporary total disability benefits associated with her compensable injury?
- 2) Whether the claimant is entitled to permanent partial disability benefits?
- 3) Whether the claimant is entitled to wage-loss disability benefits?
- 4) Whether the claimant is entitled to past medical expenses and continuing medical expenses?
- 5) Attorney's fee.

At the full hearing, the claimant contended that due to her compensable low back injury she was entitled to additional temporary total disability, payment of past and continuing medical expenses, a permanent partial disability rating of five percent (5%), wage-loss disability in excess of her anatomical disability rating, and attorney's fees.

Respondents contended that they accepted the claim as compensable, that the claimant has been paid all benefits to which she is entitled, that she was released by several doctors as having reached MMI with no impairment rating, and that as such is entitled to no further benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, the following findings of fact and conclusions of law are made in accordance with A.C.A. 11-9-704:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The parties stipulations contained herein are accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.
- 4) The claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits.
- 5) Since the claimant has failed to prove any percentage of permanent physical impairment associated with her compensable low back injury, the issue of

wage-loss disability benefits is rendered moot.

- 6) The claimant has failed to prove by a preponderance of the evidence entitlement to additional medical treatment.

## **I. DISCUSSION**

### **A. HISTORY**

The claimant, age 61, worked for the respondent employer for twelve (12) years prior to her admitted compensable low back injury as a "woven seamer." The claimant described her duties as a "woven seamer" as follows:

A. I was a woven seamer. A woven seamer, I run a machine.

These machines are like a sewing machine at a sewing factory or garment factory, I thread it up, I clipped wires. These are belts that we done for a paper mill; they're big, they're heavy.

We had to get up on the table and we would pull them, we'd push them to get them where - - what I'm trying to say is that the wire has two ends, and we weave these ends together to make one solid piece. And we have to get them just right to get them started off after we thread the machine and everything with wire and all to start them off.

We sat at the machine, we were sitting on stools that was about three foot high a lot of times, most of the time, bent over a machine running the machine.

We stood up, we pulled wires out, we would bend over and thread machines, we had to clip wires after we weave them in, and sometimes they would hang them up on the table, a lot of times, most of the times on the floor, and we had to bend over to where our head was nearly touching the ground pulling hard up with the, I guess you would say the wires that we threaded through, and then we had to clip them off before we they left out.(sic) (T. pgs. 8-9, lines 9-25 & 1-5)

The claimant testified as follows regarding the events of October 28, 2003, that concerned her compensable low back injury of that date:

A. Yes sir, I slid off a table. When we're sitting, they had hung this big wire up on the table, and we went in there and we had been sitting there for - - well, we sit two hours, and then we take a break.

And we had been in there clipping this wire, and when you first get out of it, you can't stand up straight for a little while because it hurts so bad, and you're hurting while you're in there doing this.

So when we finished the wire, I was hurting so bad and I told Ricky, I said, "Ricky, I'm not going to climb, crawl back in to the other end of the wire to get out." I said, "I'm going to slide off the table."

Well, when I did, it throwed me back, and that's when I felt the pain.

Q. Threw you back? What happened to you when it threw you back?

A. Well, it threw me backwards. See, when you first get up from there,

from sitting down, you can't straighten up, you're bent over for a few, you know, minutes, and then gradually you can stand up. Well, this just immediately threw me back. When I slid off the table, it just threw me back.

Q. Did you experience any pain?

A. Yes.

Q. Describe that for the judge.

A. It was just like a sharp pain. It just hit me just like you drove a knife in it back there.

Q. Where is "back there"?

A. Well, in the lower part of my back. (T. pgs. 9 & 10, lines 12-25 & 1-14)

The claimant testified that she worked for approximately three weeks after the accident before seeking medical treatment. The claimant testified that she first went to HealthPlus in Pine Bluff, AR and was then referred to Dr. Kenneth Rosenzweig. The claimant testified that she treated with Dr. Rosenzweig through December 22, 2004, and then started treating with Dr. Kenneth Hall.

The claimant testified she saw Dr. Wayne Buffett about possible surgery, and ultimately continued treating with her family physician, Dr. William McKiever.

According to the claimant's own testimony and the medical records submitted into evidence, the claimant had a history of low back problems which had existed for several years, at least as far back as 1983. In summary, the record shows the claimant suffered a

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compression fracture of L-2 in 1983, (RX-1, pg. 1), while riding a 3-wheeler; lumbar strain in 1989, (RX-1, pg. 4), while buffing a floor; chronic back pain diagnosis in 1998, (RX-1, pg 7), TENS Unit recommendation for back pain in 2000, (RX-1, pg. 10); and review of a May 2003 MRI and prescription for Celebrix and/or Ibuprofen for daily pain on August 7, 2003. (Rx-1, pg. 13).

The parties stipulated the claimant received TTD benefits associated with her compensable injury through October 26, 2004. After the last payment of TTD, the claimant testified she has only been able to work a few days in January of 2005, and that she still has severe pain in her "lower back" and down her "right leg." (T. pg. 15, lines 7-10)

## **II. ADJUDICATION**

### **A. Additional Temporary Total Disability Benefits.**

The record shows the claimant was unclear about the specific periods of additional TTD benefits she was requesting.

JUDGE ROGERS: Mr. Harper, you were going to enumerate the certain periods that you are claiming entitlement to periods of TTD for today

MR. HARPER: Right, Your Honor. The last TTD, like Gene told you, was October 26th of 2004, and we would claim from October 27th through the date of the MMI, which I think is the report from Doctor Rosenzweig where he talks about when she got rated. If she worked any of those days subsequent to

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October 26th, we would not make a claim for temporary total disability for those days she worked.

JUDGE ROGERS: Okay. And what was the date that Doctor Rosenzweig released her as having reached MMI?

MR. HARPER: Do you recall, Ms. Lemons?

JUDGE ROGERS: I think I read it yesterday. Was it November 3rd of 2004?

MR. WILLIAMS: Your Honor, the date that I see for MMI is in a report issued by Doctor Rosenzweig dated September 22nd of 2004. That's in the Claimant's medical exhibits, and it states, let's see here, in the final paragraph of the first page of that report: "from a workers' comp standpoint, it appears that she can be declared at maximum medical improvement."

JUDGE ROGERS: Okay.

MR. HARPER: He comes back later and he rates her as a five percent (5%). (T. pgs. 4 & 5, lines 3-25 & 1-2)

In the above exchange, the respondents' attorney seems to indicate a cut-off date of September 22, 2004 for TTD; and the claimant's attorney seems to ask for the date when Dr. Rosenzweig "comes back later and he rates her as a five percent (5%)." My analysis of the medical records shows that Dr. Rosenzweig gave a possible 5% impairment rating on February 28, 2005. (CI X-1, pg.35-36). Therefore, it seems that the claimant is requesting additional TTD benefits from October 27, 2004 through February 28, 2005. Respondents

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correctly pointed out that Dr. Rosenzweig found the claimant at maximum medical improvement on September 22, 2004. (CI X-1, pg. 18)

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 remains within her healing period for her compensable injury and that she suffers a total incapacity to earn wages.

*Arkansas State Highway & Transportation Dept. v. Breashers*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, Dr. Rosenzweig clearly found the claimant was at MMI on September 22, 2004, and thus her healing period over on that date. Even though Dr. Rosenzweig came back on February 28, 2005, and gave a hypothetical rating, it did not negate his findings of MMI on September 22, 2004. I find the claimant has failed to prove by a preponderance of the evidence that she remained within her healing period for her compensable injury after September 22, 2004, and as such not entitled to TTD benefits after September 22, 2004.

**B. Permanent Partial Disability Benefits  
and  
Wage-loss Disability Benefits.**

The claimant has requested a finding that she is entitled to a five percent (5%) whole body anatomical impairment. The claimant's reliance upon such a request is based on Dr. Rosenzweig's February 28, 2005 report, (CI X-1, pg. 35-36), wherein he states as follows:

"It was my feeling that all of the anatomical findings were pre-existing. However, if one were to use the annular tear as an acute on chronic injury and it can be shown that studies prior to this event did not show an annular tear, one might use the DRE classification table 74 on page 111, or the DRE classification table 72 on page 110 as a Category II, resulting in a 5% whole person impairment of the lumbar spine." (Emphasis added.)

A. C. A. §11-9-102(16)(B) states that "medical opinions addressing

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compensability and permanent impairment must be stated within a reasonable degree of medical certainty." Dr. Rosenzweig clearly states in his report that he felt all the claimant's findings were "pre-existing". It is clear to this examiner that Dr. Rosenzweig's rating was not stated within a reasonable degree of medical certainty, and was in fact a hypothetical rating.

In addition, it must be pointed out that Dr. Smelz, (CI X-1, pg. 26), and Dr. Rosenzweig, (in his November 3, 2004 report - RX-1, pg. 3), found the claimant to have a zero percent (0%) permanent impairment rating. Further, the claimant's MRI of January 29, 2004, is unclear as to whether an annular tear is present. The MRI report from Dr. Morris states " Increased signal intensity is present on the posterior margin, which potentially represents an acute annular tear." (Emphasis added) (RX-1, pg. 14) Also, the medical records reveal the claimant did not sustain any acute trauma on the day of her compensable injury: (CI X-1, pg. 25),

"It does not appear that the described incident could be the mechanism for the findings on MRI; Ms. Lemons stated that she had been in a prolonged fixed position, and slid to standing on the floor from the surface of a high table. She stated that the sudden movement from prolonged severe flexion to erect standing caused severe pain, not that any trauma occurred at that time."

Based on the evidence contained in the record, I find the claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits due to her compensable injury. Since the claimant has failed to show any percentage of permanent physical impairment due to her October 2003 compensable injury, the issue of wage-loss disability benefits becomes moot. See Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W. 3d 882 (2000). A percentage of permanent physical impairment must be

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established before the Commission can consider a claim for wage-loss disability benefits in excess of the employees percentage of permanent physical impairment.

**C. Additional Medical Benefits.**

Once again, the claimant was not very specific about what additional medical treatment she was seeking. The claimant testified as follows regarding the question of additional medical treatment:

Q. Do you need to go back to the doctor?

A. Yes, sir, but I don't have any insurance.

Q. Would you like workers' comp to pay for your doctor?

A. I would like to go to a doctor, yes.

Q. Now specifically you said you are in pain. What type of pain do you have?

A. In the lower back, and it goes around in the front and down my leg, right leg.

Q. Now, did you have this type of pain or this type of problems before the October of '03 accident?

A. No, sir, I never had pain like this. (T. pg. 15, lines 3-13)

The claimant's attorney stated in closing:

"We're just asking to let this lady go back to the doctor to get the treatment that she's entitled to and anything else you might

find she's entitled to as well."

The parties stipulated the respondents last paid for medical treatment occurring on December 22, 2004. The claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury.

**Norma Beaty v. Ben Pearson, Inc.**, Full Commission Opinion filed February 17, 1989.

(D612291). Claimant has the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for a compensable injury. **Dalton v. Allen**

**Engineering Co.**, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

After reviewing the evidence in this matter impartially, without giving the benefit of the doubt to either party, I find the claimant has failed to meet her burden of proof.

As previously noted, the claimant testified at transcript page 15, lines 7-13 that she had pain in her lower back and down her right leg. The claimant went on to testify that she had never had those types of problems or pain before her October 2003 injury. However, Dr. Reding's report of August 7, 2003 states:

"She still has daily pain down the right leg." (RX-1, pg. 13)

It is clear to this examiner that the claimant has had a long standing low back problem beginning with her 3-wheeler accident in 1983 and continuing to the present. The medical records show the claimant never fully recovered from her broken back in 1983, and that she was receiving treatment for the same symptoms she now exhibits right up to August of 2003, just two months prior to her compensable injury.

The claimant must show some causal connection between the treatment she is

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requesting and the compensable injury. The overwhelming medical evidence clearly shows the claimant's need for treatment relates to her degenerative, and pre-existing condition. Dr. Jason Morris states as follows in his July 20, 2004 MRI comparison report:

"No interval change in appearance of the lumbar spine since 5/14/03. No new acute posttraumatic MRI lumbar spine findings." (C1 X-1, pg. 15)

Clearly the claimant's complaints of pain at the time of the full hearing were nearly identical to what she exhibited just shortly before her compensable injury. I find the medical treatment now requested by the claimant to be related to her pre-existing condition and not the October 2003 compensable injury. Further, the claimant has failed to show a causal connection with any additionally requested medical treatment to her October 2003 compensable injury.

**ORDER**

Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment, additional temporary total disability benefits, permanent partial disability benefits, or wage-loss disability benefits. Therefore, her claim for the benefits requested herein is hereby denied and dismissed.

IT IS SO ORDERED.

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S. DALE DOUTHIT  
Administrative Law Judge