

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F507016

**VICTORIA MARIE MULINA,
EMPLOYEE**

CLAIMANT

**DAIRY QUEEN,
EMPLOYER**

RESPONDENT

**WESTPORT INSURANCE CORP.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 14, 2006.

Pursuant to a hearing conducted April 17, 2006, before Administrative Law Judge Richard B. Calaway in Searcy, White County, Arkansas, with

Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the issue of compensability of an alleged injury to the claimant's left hip and entitlement to related benefits.

The claimant contended that on June 26, 2005, she sustained a compensable injury to her left hip and should be awarded benefits, specifically including an evaluation by Dr. Kyle Blickenstaff to assess the claimant's permanent impairment, reasonably necessary medical and related expenses, and temporary total disability benefits from the date of injury until November 14, 2005. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant did not sustain a compensable injury during the employment; that she suffered from pre-existing hip problems; that she has indicated that she injured her hip at home on another occasion; and that she was on social security disability benefits from 1997 through 2003.

The record, which included documentary evidence and the testimony of the claimant, Peter Ayika, Twyla Baker, Larry Vetter, Joseph Moore, Nila Pasley, and Jessica Barber, was closed at the conclusion of the hearing.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including June 26, 2005; the claimant's average weekly wage was \$349.59; and the claim has been controverted in its entirety.

3. The preponderance of the evidence shows that on or about June 26, 2005, the claimant suffered a compensable injury to her hip, arising out of and in the course of her employment, for which she is entitled to benefits, including reasonably necessary medical and related expenses, such as the expense of surgery performed that day.

4. As the result of the compensable injury, the claimant is entitled to be examined by Dr. Blickenstaff, at the expense of the respondents, in order to assist the Commission in assessing her current condition and any permanent impairment she has sustained as a result of her compensable injury.

5. As the result of her compensable injury, the claimant remained in a healing period and was totally incapacitated to earn wages, so that she is entitled to benefits for temporary total disability, from the date of injury until November 14, 2005.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant had been employed as a server at the employer's fast food restaurant in Searcy, Arkansas, beginning in March, 2005. During June, 2005, she found it necessary to seek medical attention on three occasions, June 2, June 19, and, finally, June 26, when she was found to have an acute left femoral neck fracture for which Dr. Kyle R. Blickenstaff promptly performed surgery.

The claimant contended that her hip fracture was suffered at the end of her work shift at Dairy Queen and is a compensable injury for which she is entitled to benefits.

The respondents have controverted the claim, contending that there was not a compensable injury; that the claimant had pre-existing hip problems; that she had indicated the injury occurred at home; and that she was on social security disability benefits at one time - much of which is accurate, at least in part, but not persuasive.

For example, before the June 26 incident, the claimant had experienced left hip problems and may well have stated that she had an incident at home involving her hip, but not that she had broken her hip there. Moreover, she had sought medical care during this period and no hip fracture had been discovered prior to June 26. Indeed, x-rays of the pelvis and left femur on June 19, 2005, were negative except for the donor site where bone had been taken for prior fusion surgery.

According to the testimony on cross-examination, offered by Joseph Moore, the respondent's witness, on June 26, the claimant came into work around 10:00 a.m. and worked until 4:00 or

5:00 p.m., before falling and reporting the injury. Mr. Moore also testified that the claimant had worked from June 23 through June 26. Thus, the theory of the respondents would seem to be that the claimant had managed to work with a broken hip during that period, including most of the day of the injury, without consulting a physician about her condition until after she feigned an injury at the end of her shift on June 26 and then required immediate surgery. Even though the several witnesses at the hearing offered testimony that was not perfectly congruent with the claimant's, the respondent's theory is more improbable than the claimant's assertions that (1) her problems prior to June 26 did not amount to a broken hip and that, (2) on June 26, she worked most of her shift, then slipped and fell, fracturing her hip at work. The fact that the claimant had been experiencing pain and discomfort prior to June 26 does not establish that she had suffered a fractured hip before the incident at the end of the work shift that day.

The claimant testified that prior to working at Dairy Queen in Searcy she was on social security disability from 1997 to 2003 because of a back injury which had required four surgeries. At Dairy Queen, she worked the drive-through window and the front line, waiting on customers. She stated that on June 2, 2005, while walking through the front area to go to the drive-through window, her foot slid on some water and ice cream, hit a co-worker's foot, and she fell flat on her face, injuring her wrist and arm but without sustaining any broken bones. She denied bruising her hip at that time. Consistent with her testimony, when she arrived at the White County Medical Center, her wrist was x-rayed but not her hip.

She also stated that by June 19, 2004, her hip had been hurting for about a week and she went to the hospital. She stated that her hip pain had started at work, not at home, sometime before June 19. Over several days, she began to have more difficulty walking and was using a crutch to get

around. On June 19, she had the condition of her leg checked out at the White County Hospital where x-rays were taken but did not reveal a fracture. She understood that her hip was inflamed, swollen, and bruised a little.

The claimant continued to have problems with her hip and used the crutch and also leaned on counter tops to help her walk. On June 26, she was working the drive-through window and had made an order, a “Blizzard” and a drink, and was turning around to go back to the drive-through window when one leg went one way and the other went the other way and she went down, and felt a pop in her leg. She stated that she started screaming and Peter Ayika helped her up. She stated that she was crying and had a great deal of pain in her left hip, unlike the kind of pain before, that it was intensified 100% from the past. She said that Mr. Ayika handed her the crutch and helped her to her feet and that she could not stand on one leg. She called Joseph Moore on his cell phone and told him that she had fallen and hurt herself and was going to have to go to the hospital. She said that he advised her to go home and rest it, but she insisted that she could do no more and was going to have to go to the hospital. She called Larry Vetter to come and get her and take her to the hospital. She stated it was hard for her to get into the car because she could not bend her leg and it took about five people to get her out of the car and into the wheelchair at the emergency room.

The testimony of other witnesses was not completely consistent with the testimony of the claimant or each other, if not sometimes self-contradictory. For example, Peter Ayika testified that on June 26 the claimant was leaning on a pole, took a step with her crutch, and fell. He stated that this occurred around noon and also that he was not paying that much attention. His testimony at first was that he helped the claimant up and she “trotted” out the door. He also stated that he did not hear any sound at the time and that claimant was carrying a pack of cigarettes at the time of the incident.

He also denied that the claimant would have slipped in ice cream on the floor. Later, he testified that the claimant had to have assistance leaving.

Twila Baker testified that June 26 she heard the claimant yell out, turned around, and saw her fall down, but did not know where on her body she hit the floor. She testified that the claimant was not carrying cigarettes but had a cup in her hand. She testified that the claimant looked like she might have been hurting before the fall and was crying after the fall. Ms. Baker testified that she called Joe Moore and also that the claimant was not acting like she was in pain before the fall. Tr. at 47. She testified that when she heard the claimant shout she turned and saw her start to fall down and did not remember a crutch and was sure that she saw no crutch. She also testified that she did not see ice cream or water on the floor and if something was on the floor someone would clean it up. However, she also admitted that drinks had spilled on the floor and so she would not know whether something was on the floor at the time of the fall or not.

Mr. Joseph Moore testified that he was the owner of the Dairy Queen in Searcy and that the claimant had first complained of hip problems after her first fall. He also stated that the claimant called him on Monday, June 20, and said it felt like her hip had popped when she tried to get out of bed and that she was not able to come in because she could not get out of bed. He testified that he had taken her to the emergency on June 19 because of wrist, not hip problems, even though the medical record shows that the claimant's problems were then associated with her hip. Mr. Moore also testified that the claimant worked her regular job on a double shift on June 19 and that she missed June 20 and June 21 and that June 22 was her normal day off. He confirmed that the claimant had worked approximately 6.6 of 7 hours that made up her shift on June 26 before she fell

at work. He also testified that the claimant fell on June 18 because she had tripped over a co-workers's foot, although this is more consistent with the incident that occurred on June 2.

Nila Kay Pasley testified that she had worked for six years at the Dairy Queen and that the owner was her son-in-law. She stated that the claimant had been using a crutch prior to her fall and sometimes would prop the crutch up and not use it at all. She also stated that she did not see ice cream or anything on the floor at the time of the fall and when she came out she saw the claimant leaning against the novelty freezer at the end of the front line, not the floor, and that the claimant was crying. She testified that she did not walk to the area where the incident occurred and did not investigate the area. She also stated that there were no cigarettes that she saw.

Jessica Barber testified that she was there on June 26 just in front of the claimant when she fell. She stated that earlier the claimant had used her crutch and seemed to be sore. She stated that the claimant was carrying two large drinks in her hands and that the drinks hit the ground as the claimant yelled out and she turned around and the claimant was sitting on the ground. She did not see any cigarettes.

Thus, most of the witnesses at the time, with the exception of Mr. Ayika whose recollection or observations were not particularly convincing, recalled that the claimant was carrying an order at the time of the incident. Although the witnesses tended to deny that there was a slick substance on the floor, their testimony indicated that the claimant dropped the order at the time that she fell and, if for that reason alone, they should have recalled something on the floor, although they did not. Again, the witnesses tended to show that the claimant had experienced problems getting around but had managed to work for several days and almost the entire shift before her hip was broken when she fell. Thus, the preponderance of the evidence supports the claimant's assertion that she suffered

a compensable injury at that time. It would be necessary to resort to conjecture or speculation to find that the claimant's discomfort she had experienced at home had amount to a hip fracture but she was still able to work for sometime prior to the fall on June 26.

The record also shows that the claimant's medical care was reasonably necessary in connection with her injury and that she was off work until November 14, 2005, and is entitled to temporary total disability benefits. In order to assist in determining what, if any, impairment she may have sustained and to better understand her current condition, the claimant is entitled to return to Dr. Blickenstaff for an examination at the expense of the respondents.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge