

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504690

PATRICIA WHITE, EMPLOYEE

CLAIMANT

DOLLAR GENERAL STORES,  
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED FEBRUARY 14, 2006

Hearing held on November 22, 2005, at Texarkana, Miller County, Arkansas, before the HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HON. KENNETH A. OLSEN, Attorney at Law, of Little Rock, Arkansas.

Respondents represented by HON. BETTY J. DEMORY, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim on November 22, 2005, in Texarkana, Arkansas. A prehearing conference was conducted in this case on September 21, 2005, and a prehearing order was filed September 22, 2005. At the full hearing the parties announced that the stipulations, issues, and their respective contentions were properly set out in the prehearing order; subject to any oral modification stated on the record at the full hearing. A copy of the prehearing order was introduced into evidence as Commission Exhibit "1" and made a part of the record without objection.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, and that the employee/employer/carrier relationship existed at all relevant times, including April 28, 2005. All issues related to permanent impairment were expressly reserved.

**White, Patricia/F504690**

By agreement of the parties, the issues to be litigated and resolved at the full hearing were limited to the following:

- 1) Whether the claimant sustained a compensable injury on April 28, 2005.
- 2) If compensability is overcome, whether the claimant is entitled to associated TTD benefits, medical benefits and/or attorney fees.
- 3) If indemnity benefits are appropriate, claimant's average weekly wage and TTD rate must be determined.

The claimant contended that she sustained a compensable lumbar spine injury arising from and in the course and scope of her employment on April 28, 2005, entitling her to temporary total disability benefits from April 28, 2005 to a date yet to be determined. The claimant contended she is entitled to all medical treatment associated with her compensable injury, and attorney fees. The claimant further contended that she is still within her healing period, and that all issues related to permanent impairment should be reserved.

The respondents contended at the prehearing conference that the claimant did not sustain a compensable injury arising out of and in the course and scope of her employment with Dollar General. Respondents contend that the claimant's condition is pre-existing and any need for treatment that she may have is not causally related to her employment with Dollar General.

**DISCUSSION**

The claimant alleges she suffered a compensable injury to her back on April 28,

**White, Patricia/F504690**

2005. Specifically, the claimant testified that at the time of the injury she was attempting to lift a buggy filled with potting soil over a small ledge. The claimant testified as follows regarding her account of the incident.

A. I was rolling - we were taking - it had potting soil on it. It was like a - I don't know what you would call it. It was sort of iron like, heavy deal. I was rolling it out the door and as I rolled it out the door it had this embankment, like where you would step down. Well, it rolled over it. I was just going to raise up on it easy, like to ease it back up on it, and when I did that, my back just popped when I went to pick up on it. Okay. I stopped what I was doing, I went and called Diane and I told her, I said, Diane, I popped my back. She said, I'm on the phone, just a minute. I waited until she got off the phone and I told her that I was trying to get that back up on the cement. Okay. She came out there and we got it up. She never said nothing about the doctor or anything, but I did tell her.

Q. Who all were you working with that day?

A. At the time it was just Diane and myself. There was no one else there.

Q. Exactly what happened to cause your back to pop?

A. When I lifted up on the thing, to lift it back up on the - - - -

Q. When you say the thing, I hate to cut you off but what thing

**White, Patricia/F504690**

are you talking about? Was it a cart or something that - - -

A. It was a cart. Yes, sir, it was about like that.

Q. Now you are saying about four or five feet tall?

A. Okay. Taller than me, about like that, and it had potting soil on it. It was a heavy cart. Like you've seen a wrought iron bed?

Q. Did it roll on four wheels?

A. Yes, it had four wheels and two of the wheels had just rolled off the edge of the cement and I thought, well, I'll just lift up on it, that's when my back popped.

Q. So you were trying to lift up the two wheels of the loaded cart?

A. Yes. I was trying to ease it back up onto the cement.

Q. Okay. You weren't lifting a single thing but it was the loaded cart that you were lifting?

A. It was the loaded cart, yes. (T. pgs. 15 & 16, lns. 4-25 & 1-24)

The claimant testified that after hurting her back she immediately told her supervisor, and that her supervisor then came and lifted the cart for her. The claimant's supervisor on duty at the time of the incident was Ms. Diane Ware. Ms. Ware testified that, in fact, stacking and unstacking freight was one of the claimant's job duties.

A. Everyone had the same duties. Nobody does anybody any

**White, Patricia/F504690**

different from anybody else except for the key carriers.

Cashiers, they unload trucks, they check out customers, they put up freight, everything. (T. pg. 63, lns. 6-9)

Ms. Ware went on to testify that on April 28, 2005 the claimant came to her and requested help with a cart that had left the sidewalk:

Q. Did she come in at some point and get your assistance with the cart?

A. Yes, ma'am. She come to the door and told me, she said, Diane, I've let the cart roll off the sidewalk. I said, let the cart roll off the sidewalk? She said, yes. I said, okay, I'm coming. I walked on out there. The two wheels on the very end had rolled off the sidewalk about that far, you know - I'm not good with inches but maybe, you know, just a little step up onto the sidewalk.

Q. It looks like about four inches, four or five inches?

A. Uh-huh. I reached down with one hand, picked it around - because all you had to do was just swing it around and just pick the end up just a little bit and it was back up on the sidewalk.

(T. pgs. 66 & 67, lns. 20-25 & 1-10)

Ms. Ware's testimony differs from the claimant's about a report of a hurt back immediately after the claimant had trouble with the cart. The claimant testified that she reported her back hurting twice on April 28, 2005 to Ms. Ware, once immediately after the

**White, Patricia/F504690**

incident around 9:00 a.m., and again around 2:00 p.m. that day. Ms. Ware recalled only the afternoon report of a hurt back. Claimant testified she continued to work after the incident, but with increasing pain. (T. pg. 22, lns. 1-13)

The claimant testified she spoke with several other people affiliated with Dollar General in the days after the incident, but was never referred for medical treatment. The claimant testified she later went to a doctor on her own by the name of Cathryn J. Gonzales. The medical records indicate the claimant first saw Dr. Gonzales about her work-related back injury on May 5, 2005. (RX-2, pg. 116). On May 5, 2005, Dr. Gonzales found objective signs of muscle spasms. The May 5, 2005 report stated as follows:

"There is a moderate amount of muscle spasm noted as well."

"Problem #1: Low-back pain with muscle spasm." (RX-2, pg. 115)

With the claimant's continuing problems with her low-back, Dr. Gonzales recommended an MRI of her lumbar spine. The MRI was conducted on June 14, 2005 by Dr. Charles Borrell. The MRI report contained the following impression:

"1) Acute to subacute compression fracture or Schmorl's node defect involving the superior end plate of L2 as described above.

2) Component of central spinal stenosis at multiple levels from L1-2 through L3-4 related to mild degenerative changes and bulging of the disc. No focal disc protrusions are identified." (RX-2, pg. 119)

After reviewing the MRI, Dr. Gonzales met with the claimant again on June 23, 2005 and assessed her with "low-back pain with compression fracture of L2." (RX-2, pg. 120). At that time Dr. Gonzales wanted to refer the claimant to a neurosurgeon, Dr. Dietz.

**White, Patricia/F504690**

(RX-2, pg. 120). The claimant testified she never treated with Dr. Dietz due to her financial situation. The respondents controverted the claim in its entirety.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: 1) that an injury occurred arising out of and in the scope of employment; 2) that the injury caused internal or external harm to the body which required medical services, or resulted in disability or death; 3) that the injury is established by medical evidence supported by objective findings, as defined in A.C.A. §11-9-102(16); and 4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. C. Mickel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

The evidence presented leaves little doubt that an April 28, 2005 incident did occur with regard to a cart in which the claimant attempted to lift even though the supervisor on duty, Ms. Ware, denied the claimant immediately said her back was hurting. Ms. Ware did confirm that the claimant reported a back injury on that date. Ms. Ware even confirmed the claimant could not lift the cart on April 28, 2005, and that she had to perform that task for the claimant. Further, Assistant Manager, Marguerite Eubelis testified the claimant told her she had hurt her back while at work for Dollar General. (T. pg. 59, lns 16-17) The evidence shows the claimant reported her alleged injury, but for whatever reason was never referred to a doctor. After not being referred for medical treatment by her employer, the claimant sought treatment herself from Dr. Gonzales on May 5, 2005.

The respondents have introduced numerous medical reports concerning the claimant's pre-April 28, 2005 back problems. A thorough review of those records indicates

**White, Patricia/F504690**

no report of a compression fracture at L2. The respondents point out that the lumbar MRI report stated the compression fracture at L2 could be classified as Schmorl's Node Defect and argued that the dual finding amounts to a lack of objective findings. I disagree. Dr. Gonzales had specifically noted objective findings of muscle spasms in the low back before the MRI. (RX-2, pg. 116) Further, after the MRI, Dr. Gonzales was clear in her diagnosis of a compression fracture at L2 in her June 23, 2005 report. (RX-2, pg. 120).

I do note that the claimant has had various reports of back problems over the years. However, the preponderance of the evidence supports a new compensable injury to the claimant's low back at L-2, or at the very least, a compensable aggravation. The claimant was diagnosed with mild to moderate osteoarthritis prior to the April 28, 2005 incident; however, that finding alone does not outweigh the obvious objective findings of injury present after April 28, 2005. I also note the July 26, 2005 statement from Dr. Gonzales wherein she states the claimant has no previous history of back problems. Although that statement was incorrect, it still does not outweigh the objective findings of injury after the April 28, 2005 incident. Based on the credible evidence presented, I find the claimant has proven by a preponderance of the evidence that she sustained a compensable low back injury while in the respondent's employ on April 28, 2005.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(e). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary.

The claimant has met her burden of proving the compensable injury, and I find the

**White, Patricia/F504690**

respondents are responsible for all medical treatment associated with the claimant's low back between the date of injury and the date of the full hearing. Further, the referral to neurosurgeon, Dr. Dietz, should be carried out as soon as possible and is the responsibility of the respondents.

The parties submitted Joint Exhibit #1 which evidenced the claimant's pay for 34 weeks prior to the April 28, 2005 compensable injury. Based on the joint exhibit, I find the claimant's average weekly wage to be \$146.45 per week, entitling her to a temporary total disability rate of \$98.00 per week.

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. AHTD v. Breashers, 272 Ark. 244, 613 S.W. 2d 392 (1981).

The claimant has requested temporary total disability benefits from April 29, 2005, to a date yet to be determined. It is the claimant's burden to prove entitlement to the requested TTD benefits. The only evidence presented between the date of injury and August 3, 2005 that suggests the claimant was totally incapacitated to earn wages was her own testimony. Even though this examiner has found the April 28, 2005 back injury to be compensable, the finding was based primarily on the objective findings and other witness testimony. I did not find the claimant to be very credible, and therefore do not give much weight to her testimony regarding her inability to work. The claimant led this examiner to doubt her credibility for a number of reasons. First, the claimant's testimony regarding her previous back problems was less than genuine. The claimant acknowledged at the full hearing

**White/F504690**

she had forgotten several instances of back problems when the respondents took her deposition. But even after acknowledging her memory lapse at the deposition, the claimant continued to have selective memory while testifying at the full hearing about her previous back problems. Also, even though the claimant did acknowledge one previous back problem while working at Kroger at her deposition; she again failed to mention any previous back problems to Dr. Gonzales. Dr. Gonzales stated on August 3, 2005, "no previous history of back problems." (CX-1, pg. 8).

Even though this examiner gives little weight to the claimant's testimony regarding her ability to earn wages, Dr. Gonzales did state on August 3, 2005 that the claimant was still within her healing period and unable to work. In that report Dr. Gonzales again mentioned the probable L2 compression fracture. (CX-1, pg. 8). It must be noted the respondents took no steps to have the claimant evaluated, and the credible evidence from Dr. Gonzales indicates the claimant was still within her healing period and unable to work as of August 3, 2005. At no other time did Dr. Gonzales issue a no work statement in her reports prior to August 3, 2005. Therefore, I find the claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits from August 3, 2005 to a date yet to be determined.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had the opportunity to hear the testimony of the witnesses and to observe their demeanor, and without giving the benefit of the doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

**White/F504690**

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her low back on April 28, 2005, supported by objective medical findings.
- 4) Claimant's average weekly wage was \$146.45 per week, entitling the claimant to a temporary total disability compensation rate of \$98.00 per week.
- 5) Claimant has proven by a preponderance of the evidence that respondents are responsible for all of her low back medical treatment incurred after April 28, 2005 through the date of the full hearing, as all low-back treatment between the compensable injury and the full hearing was reasonable, necessary and related to the April 28, 2005 compensable injury. Further, the claimant is entitled to the referral to Dr. Dietz as recommended by Dr. Gonzales.
- 6) The claimant has proven by a preponderance of the evidence she is entitled to TTD benefits from August 3, 2005 to a date yet to be determined.
- 7) The claimant is entitled to the maximum attorney's fee allowed by Arkansas Law consistent with the findings herein.

**White/F504690**

8) All issues related to permanent impairment are reserved.

**AWARD**

Respondents are herein directed and ordered to pay the claimant TTD benefits at the rate of \$98.00 per week from August 3, 2005 to a date yet to be determined. Further, respondents are to pay all reasonable medical expenses related to the claimant's compensable low back injury of April 28, 2005.

Said sums accrued shall be paid in lump sum, without discount. Maximum attorney's fees are herein awarded to claimant's attorney, the Honorable Ken Olsen, pursuant to A.C.A. §11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. §11-9-809, until paid.

IT IS SO ORDERED.

---

DALE DOUTHIT  
Administrative Law Judge

rb