

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501764

PAULA ARD, EMPLOYEE

CLAIMANT

ST. VINCENT HEALTH SERVICE, INC., EMPLOYER

RESPONDENT

ALTERNATIVE INSURANCE MANAGEMENT, CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 25, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on June 27, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WALTER MURRAY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was held to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. Also at issue is whether Mr. Murray is in contempt of court for his failure to attend the first scheduled hearing in this case, pursuant to Ark. Code Ann. §11-9-706, §11-9-717(b).

After reviewing the evidenced impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on January 31, 2005 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$466.00/\$350.00 in the event this claim is found to be compensable. Initially, this claim was accepted and medical expenses and temporary total disability benefits (until February 27, 2005) were paid before the claim was controverted on February 28, 2005. A March 11, 2005 letter from Alternative Management Services indicates the case was controverted on March 2, 2005. However,

I am bound by the stipulations of the parties, (Tr. p. 29). Benefits have also been paid by Unum Life Insurance Company and Healthcare Recoveries.

The claimant contends she injured her back in a specific incident at work on January 31, 2005. She seeks payment of medical expenses with Dr. Holland, Dr. Pollard and Dr. Peek, temporary total disability benefits from February 28, 2005 to a date yet to be determined and attorney's fees.

The respondents contend the claimant did not sustain an injury arising out of and in the course of her employment.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the depositions of Dr. Pareja and Dr. Phelan incorporated by reference. The Commission's exhibits include documentation showing that Mr. Murray received notice of the April 12, 2006 hearing. Mr. Murray's objection to the documentation from third-parties who have paid benefits on this claim was overruled based on Ark. Code Ann. §11-9-411 which provides subrogation rights to third parties and Ark. Code Ann. §11-9-704(b) and §11-9-705(a) which allows an Administrative Law Judge to conduct investigations into a claim without strict adherence to the rules of evidence or civil procedure.

The following witnesses testified at the hearing: the claimant, who walked with the assistance of two canes, and her mother, Veda Ard. They were both articulate witnesses who provided a detailed history of the injury, supporting a specific incident at work. A co-worker, Roberta Cagle, also offered corroborative testimony.

The claimant, age 51 (D.O.B. July 12, 1955), graduated from nursing school in 1984. The claimant had no prior back problems and held down two jobs prior to the incident at work on January 31, 2005. She began work for St. Vincent in 2004 at \$25.00 + per hour. Her job duties required her to travel and provide in-home care to assigned patients five days a week, carrying supplies and a computer. On weekends, the claimant traveled to Searcy to provide respiratory therapy to pediatric

patients. This weekend job ended shortly before the incident on January 31, 2005. The claimant's health history includes fibromyalgia in the neck and arms successfully treated with biofeedback therapy from UAMS in 1991 or 1992. She had gastric stapling in 1978 and has a heart condition (mitral valve prolapse).

On January 31, 2005, the claimant felt a pop in her back as she was trying to lift and reposition a patient in a hospital bed. She continued her work, seeing two more patients, but she stopped en route to buy Advil and a heat wrap for her back. She received permission from her supervisor to complete her documentation on the computer from her home. That night, the claimant used a heating pad but the pain persisted. The next morning she made her usual commute to work from Pine Bluff to Little Rock, but when she arrived at S. Vincent's, she was so stiff and sore she had difficulty getting out of her car. She reported an injury to her supervisor but continued working with the assistance of a nursing student who carried the equipment and helped perform nursing duties.

The claimant's employer sent her to Dr. William Warren at Concentra in February, 2004 for low back and right leg pain. She was prescribed physical therapy and injections which were not helpful. The claimant began wearing a back brace and using her mother's walker as she developed an erratic gait, causing her to lose her balance.

The respondents controverted the claim on February 27, 2005 and the claimant came under the care of Dr. Richard Peek who performed surgery in February 2006 which greatly reduced, but did not alleviate, the claimant's back pain. She remains under Dr. Peek's care and returns to him at three month intervals to x-ray the fusion site and evaluate the surgical union.

The claimant stated that she still has back pain, cannot sit or stand for long periods of time and is unable to help with household chores. The claimant has not worked since February 2, 2005 and was terminated by St. Vincent's. Records in the exhibit packet indicate the claimant is now receiving Social Security Disability benefits.

MEDICAL EVIDENCE

The claimant was initially treated by Dr. William Warren at Concentra. She gave a history of injury consistent with her testimony. Dr. Warren diagnosed a sprain based upon negative x-rays and a positive Waddell's test (symptom magnification) during the examination. However, he did note tenderness bilaterally of the paraspinous muscles at L5. The claimant was prescribed light duty, medication and physical therapy.

The employer did not provide light duty and the claimant returned to the doctor complaining of worsening symptoms. In Dr. Warren's examination of February 4, 2005, he noted bilateral "palpation tenderness" of the S1 joint and gave her an injection. The physical therapist, Eric Holifield also noted positive Waddell's signs in his report of the same date. The claimant began using her mother's back brace and walker and complained of leg pain.

An MRI scan, conducted February 10, 2005, was interpreted by the radiologist, Dr. David Tamas, as showing a large paracentral disc herniation at L4-5 with an extruded fragment severely impinging the L5 nerve root on the right. Degenerative changes were noted at L4-5.

The claimant was referred to neurosurgeon, Dr. Steven Cathey on February 24, 2005. He felt the claimant was not a surgical candidate because her left leg symptoms did not correlate to the right sided disc herniation. It is unclear why Dr. Cathey thought the claimant's symptoms were confined to the left side. The records of Dr. Warren and Mr. Holifield clearly show bilateral symptoms, worse on the right side.

Eric Holifield's physical therapy note of February 2, 2005 indicates "guarded ambulation and mobility with Antalgic (gait) with decreased weight bearing on affected side." Mr. Holifield does not explain which side was affected. Despite Mr. Holifield's concern over the claimant's gait, Dr. Warren's report of the same day indicates, "axial load injury of bilateral lumbar region...the pain did not radiate...negative bilateral leg raise."

Mr. Holifield's report of February 2, 2005 indicates the "patient's condition is improving" and that "the patient is compliant with scheduled visits." However, this was the claimant's first visit to the therapist.

In the claimant's follow-up visit with Dr. Warren on February 4, 2005 she indicated that physical therapy made her condition worse. She complained of bilateral lumbosacral pain and bilateral pain and tenderness in the buttocks. Injections were made bilaterally in the sciatic nerves. Nevertheless, Dr. Warren's report indicates the "pain did not radiate."

Mr. Holifield's report of February 7, 2005 relates that "ever since she received the injections last week her right lower extremity has been 'going out' on her." On February 8, 2005, the claimant reported low back pain radiating to both lower extremities. An "Injury Recheck Encounter" dated February 9, 2005 shows "pain down rt leg almost to foot." Dr. Warren's report of February 14, 2005 shows "the pain is located on the right leg... Radicular leg pain in the right leg."

Dr. Cathey prescribed medication and returned the claimant to Dr. Warren for follow-up. On March 2, 2005 Dr. Warren examined the claimant, again recording positive Waddell's signs. He released the claimant and advised her to see her primary care physician for a non-work related condition.

The claimant saw general practitioner, Dr. Jay Holland on August 6, 2005 who issued a detailed report challenging the findings of Dr. Warren and the physical therapist, Mr. Holifield, and pointing out inconsistencies in the records. According to Dr. Holland, the claimant complained of bilateral leg pain worse on the right that Dr. Warren did not record. Dr. Holland took issue with the Waddell's testing, pointing out that the most important test, nerve distribution correlation, was negative. He also noted references in the reports to stance and gait problems consistent with her symptoms. Dr. Holland also pointed out internal inconsistencies in the reports which seem to indicate that the reports regurgitated the same findings without being updated to reflect the claimant's change in symptoms. Dr. Holland observed that despite Dr. Warren's skepticism of the

claimant's injury, he continued to prescribe medication and therapy and recommended work restrictions.

According to Dr. Holland, disc herniations with free fragments can cause inconsistent symptoms. He felt Dr. Warren did not properly record or follow-up on the claimant's symptoms.

With regard to causation, Dr. Holland opined:

There is no medical or historic evidence that this problem arose from any cause other than the work related incident, which precipitated this herniation. There is no evidence of other degenerative disc disease in this patient.

x x x

With a floating body from a disc herniation patients can have transient pain and it can swap sides.

At her own expense, the claimant saw Dr. Richard Peek on October 13, 2005. He recorded bilateral leg and back pain and noted a limp. Dr. Peek was concerned that the claimant had developed nerve damage due to the delay in treatment for the herniated disc and recommended an EMG/NCV study. Dr. Peek was also worried that the free fragment had migrated and recommended another MRI scan. The claimant told Dr. Peek that she had had right leg symptoms since the injury and had to put her weight on her left leg.

A second MRI scan taken October 13, 2005 showed stenosis, an osteophyte and end plate irregularity with loss of disc space at L4-L5 and a disc bulge at L3-L4. In a November 29, 2005 report Dr. Peek commented:

MRI shows old discitis, so it looks like she developed aseptic discitis after her herniation... Her EMG does show that she has L5 radiculopathy of the left leg, which goes along with her story of severe sciatica with the herniation.

Dr. Peek ordered a bone scan, myelogram and CT scan. In his report of January 3, 2006, Dr. Peek explained her diagnostic changes:

She has changes of discitis and has severe lower back pain unresponsive to conservative care. Her condition is gradually deteriorating and her ability to walk (sic)... Bone scan was hot at L4-5. She has changes fairly classic of status post avascular aseptic necrosis.

Dr. Peek and Dr. Pollard performed surgery on February 14, 2006 for discitis, L4-5, with severe disc degeneration. Dr. Peek recorded "immediate improvement in the radicular pain to the lower extremities" following surgery in his Discharge Summary of February 20, 2006.

In follow-up Dr. Peek stated, "I do think it is unfortunate that she did not get the disc protrusion treated. She is somewhat of an unseen case. One would not expect that a herniated disc would turn into a discitis. This is quite atypical, so it is difficult to say that they (her former physicians) might could have seen this."

In October, 2006 the claimant saw Dr. Peek for neck and thoracic pain. She was diagnosed with a T7 compression fracture. This condition appears to be unrelated to the workers' compensation claim.

Another operation was performed on March 21, 2006 to correct a subclavian port. The claimant required IV vitamins due to malabsorption from her gastric stapling procedure, (see also Discharge Summary of February 20, 2006). Since the employer "takes the claimant as they find them," this treatment is a compensable consequence of the injury.

In response to the claimant's attorney, Dr. Peek authored a letter dated April 30, 2007 regarding causation:

I further reviewed the depositions of Dr. David Phelan and Dr. Jonathan Fravel, (sic, this should be Reginald Pareja).

After reviewing the depositions, as well as the records which have been reviewed, as well as examining and operating on Ms. Ard, it is my medical opinion that she had a herniated disc and developed subsequent discitis at the L4-5 interspace, necessitating a discectomy and interbody fusion related to traumatic herniation. An atypical course developed with discitis after herniation.

In his deposition (consisting of 13 pages of testimony), Dr. Reginald Pareja, testified he performed a whole body bone scan on the claimant in December, 2005. The purpose of the test is to determine the disc level causing the patient's symptoms. The test showed an abnormality at L4-5, which could suggest infection, tumor, fracture and degeneration. Dr. Pareja commented that the uptake in the spine was more intense than would be expected if the only problem was degeneration.

He interpreted the scan as suspicious for infection due to irregularities in the endplate, however this could not be confirmed by the biopsy. Dr. Pareja could not offer an opinion within a reasonable degree of medical certainty and he could not diagnose the L4-5 abnormality with an specificity due to the limitations of the scan.

In his deposition, (consisting of five pages of testimony) Dr. David Phelan, a radiologist, testified he performed one procedure on the claimant, a biopsy of tissue removed from the spinal canal which was benign. He deferred to the claimant's treating physician, Dr. Peek, for any further diagnosis.

The respondents asked Dr. Scott Schlesinger to review the claimant's case. His undated report does not specify the medical records he reviewed. Dr. Schlesinger opined that the claimant's February 9, 2006 surgery and discitis was unrelated to the January 31, 2005 injury. He also indicated that her healing period ended 6-9 months after the injury and her condition warranted a 7% impairment rating.

The respondents also asked a neurosurgeon in Kentucky, Dr. Robert Sexton, to review the claimant's case. Again, it is unknown what records were provided to Dr. Sexton, and it is unknown what questions were asked of the doctor. Dr. Sexton opined that the claimant's January 31, 2005 injury was limited to myofascial lumbar strain and her healing period ended March 31, 2005, with no permanent impairment.

DOCUMENTARY EVIDENCE

The claimant's group insurance carrier, QualChoice and her long term disability provider, Unum have paid benefits on this claim and are entitled to reimbursement pursuant to Ark. Code Ann. §11-9-411.

FINDINGS AND CONCLUSIONS

The respondents have controverted this case, contending the claimant's injury did not arise out of and in the course of her employment.

"Arising out of the employment" refers to the origin or cause of the accident and the phrase

“in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

In this case, the testimony is undisputed that the claimant reported an injury to her supervisor and was sent to their physician for evaluation. The reports from the doctor and physical therapist record bilateral leg pain, worse on the right. Ultimately, the claimant was discovered to have a herniated disc, requiring further medical treatment. Immediately before this accident, the claimant was able to hold down two jobs. Immediately after this accident, she had difficulty even walking.

A claimant is not required to prove the causal connection between her job and her injury by objective medical findings where objective findings establish the existence and extent of an injury and a preponderance of the remaining evidence establishes a causal connection. Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Based on the claimant’s credible testimony and Dr. Peek’s opinion, I find that the claimant established causation by a preponderance of the evidence of record.

With regard to the contempt matter, Mr. Murray told the Commission that he missed the first scheduled hearing due to a clerical error with his calendar. However, when it came time to schedule the second hearing on the very same issues, Mr. Murray asked for time to conduct additional discovery (two depositions and two medical evaluations), suggesting that he was not prepared for the initial hearing. Accordingly, I find Mr. Murray in contempt.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which an employer-employee-carrier relationship existed among the parties on January 31, 2005 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$466.00/\$350.00.
2. The claimant has proven by a preponderance of the

credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102 as she was performing employment services at the time of injury.

3. Respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Commission Rule 30.
4. The respondents are directed to pay the claimant temporary total disability benefits from February 28, 2005 to a date yet to be determined as she remained in her healing period, unable to work.
5. The respondents are directed to reimburse Unum and Healthcare Recoveries for any benefits or expenses paid on this claim pursuant to Ark. Code Ann. §11-9-411.
6. Walter Murray is found in contempt for failure to appear for a scheduled hearing after receiving notice by certified mail. He is fined \$400.00 to be paid to the Fiscal Officer of the Commission within thirty days of receipt of this opinion pursuant to Ark. Code Ann. §11-9-706 and §11-9-717(b).
7. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
8. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge
Entered NUNC PRO TUNC September 27, 2007