

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412574

JACKIE BAKER

CLAIMANT

FRED'S, INC.

RESPONDENT EMPLOYER

FEDERAL INSURANCE CO.

RESPONDENT CARRIER NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

ORDER AND OPINION FILED FEBRUARY 7, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Batesville, Arkansas on December 8, 2006. A prehearing conference was held on September 26, 2006, and a prehearing order was filed on September 27, 2006. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. The employee-employer-carrier relationship existed in June of 2004 and at all other relevant times.
2. Claimant's average weekly wage is \$554; her temporary total disability rate is \$369; and her permanent partial disability rate is \$277.
3. Respondent No. 1 controverts this claim.
4. If any temporary total disability is awarded, the

period of disability is September 29, 2004 through December 13, 2005.

5. The claimant reached maximum medical improvement on December 13, 2005.

The claimant contends that she sustained a compensable low back injury on June 17, 2004, and is entitled to medical benefits and temporary total disability benefits from September 29, 2004 through December 13, 2005. The issues of permanent impairment and wage loss are reserved. The claimant also requests attorney's fees.

Respondents contend the claimant did not sustain a compensable injury and is not entitled to benefits. The claim has been denied in its entirety. Respondents contend the first notice of a work injury was September 28, 2004; however, respondents contend there are no objective findings to support a June 17, 2004, work injury. Respondents are not asserting a notice defense. Respondents are alternatively requesting an offset for group disability benefits paid, if the claim is found to be compensable.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Group disability offset.
5. Attorney's fees.

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 Ark. Code Ann.

§11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed in June of 2004 and at all other relevant times.

2. Claimant's average weekly wage is \$554; her temporary total disability rate is \$369; and her permanent partial disability rate is \$277.

3. Respondent No. 1 controverts this claim.

4. If any temporary total disability is awarded, the period of disability is September 29, 2004 through December 13, 2005.

5. The claimant reached maximum medical improvement on December 13, 2005.

6. The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on June 17, 2004.

7. Respondents are liable for reasonable and necessary medical benefits for the lumbar spine.

8. The claimant has proven she remained in her healing period and was totally unable to earn wages from September 29, 2004 through December 13, 2005.

9. Respondents are entitled to an offset for group disability benefits the claimant received from September 29, 2004 through December 13, 2005, pursuant to Ark. Code Ann. §11-9-411.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 59 years old, began her employment with the respondent in October 2001, as a cashier and working part time. The claimant eventually became full time and worked as many as 12 to 14 hours per day with the majority of the time walking, standing, lifting and stocking. In December 2003, the claimant became the store manager supervising 10 to 14 employees and the claimant usually opened and closed the store herself. The claimant earlier sustained a minor injury while at work involving a fall from a ladder but did not lose time from work nor seek medical treatment from that fall.

According to the claimant, on June 17, 2004, she opened the store and was picking up wrapped water hoses that had toppled off the pallet when she felt something like an electrical shock in her back. The pain stopped after a while and the claimant continued putting the hoses back on the pallet; however, by the time the assistant manager arrived to work, the claimant was sitting in the floor crying with pain. The claimant immediately went to the company doctor's office who diagnosed her with a pulled muscle and gave her a shot and sent her home. There were no x-rays or other diagnostic tests. The claimant returned to the doctor's office a short time later and the doctor she had previously seen had been dismissed and she saw a nurse practitioner who told her to return to work on light duty. The claimant continued working in pain until

September 2004, when she was taking a conference call and she moved just slightly and felt a stabbing pain in her low back, feeling as if someone hit her with a hammer. The pain shot down her back into her leg and foot, preventing her from standing. The claimant was carried to her car and taken to Dr. Adam Gray's office. The claimant had been to the doctor on three occasions by then and each time she was diagnosed with a pulled muscle. Dr. Gray ordered x-rays and a MRI and was referred to Dr. Patrick Chan. Dr. Chan tried epidural injections and then performed surgery in January 2005. The claimant was off work from October 2004 through December 2005 and received some short term and long term disability benefits. The claimant testified that her employer terminated her before her back surgery and she no longer has group health insurance. According to the claimant, once Dr. Chan's office discovered her injuries were work related, she was refused further treatment. The claimant takes as many as four methadone pills daily for pain. The claimant has applied for social security disability but has not had a hearing.

Under cross examination, the claimant verified that she had a work injury that required back surgery in 1979 or 1980; however, she recovered and has not had further problems with her back until she started lifting and pulling while working for the respondent employer. The claimant did confirm that she had mentioned back pain before the June 2004 incident at work.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused

internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2005). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on June 17, 2004, when she was picking up water hoses. The claimant presented credible testimony of her job duties and the incident on June 17, 2004, as she was picking up water hoses that had toppled off a pallet. The claimant had been at work for 24 hours while the floors were being refinished. The claimant first sought medical treatment at the Melbourne Clinic and was diagnosed with a lumbar strain, although no tests were performed. The claimant first treated with Dr. David Sitzes and he was thereafter dismissed from the clinic. The claimant testified that she told Dr. Sitzes about the water hose incident; however, the first report in evidence dated June 17, 2004, did not record that event but does mention lifting and replacing on shelves. The June 21, 2004, report indicates this is a follow-up visit for lumbar strain. In September 2004, when the claimant aggravated her back by moving in a particular way during a conference call, she sought treatment with Dr. Gray. Dr. Gray's report records the water hose incident that happened three or four months ago. Dr. Gray ordered a MRI and that was performed

on September 29, 2004 and this revealed the following:

1. Prior laminectomy on the right at L5 and S1.
2. Central disk herniation at L1-L2, which compresses the thecal sac but does not deform the cord.
3. At L2-L3, a central disk herniation is noted which deforms the thecal sac but does not cause definite nerve root encroachment.
4. A broad-based disk bulge with a small focal central disk herniation, which compresses the thecal sac and causes bilateral neural foraminal narrowing.
5. At L5-S1, demonstrates an excentric disk herniation to the right, which compresses the thecal sac but does not deform the cord. (Jt. Exh. No. 1, p. 17.)

The MRI results provide the objective findings required of Ark. Code Ann. §11-9-102(4)(D). The claimant was working without missing work until the June 17, 2004, incident. The claimant began seeking conservative medical treatment while trying to continue to work performing physical tasks. Dr. Gray took the claimant off work on September 28, 2004.

Respondents are responsible for the reasonable and necessary medical treatment the claimant has pursued for her compensable injury. Ark. Code Ann. §11-9-508.

The claimant next contends she is entitled to temporary total disability benefits from September 29, 2004 through December 13, 2005. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from September 29, 2004 through December 13, 2005. The medical evidence reflects Dr. Gray taking the claimant off work on September 28, 2004. Conservative medical treatment was provided and finally the claimant underwent surgery by Dr. Chan on January 17, 2005. The last medical report in evidence is the December 13, 2005, follow-up report by Dr. Gray. While Dr. Gray nor Dr. Chan has assigned a permanent impairment rating, Dr. Gray did opine the claimant is not capable of long term, gainful employment. The parties also agreed that if temporary total disability was awarded, the appropriate periods would be September 29, 2004 through December 13, 2005. The claimant's testimony and the medical evidence support the claimant's contention that she remained in her healing period and was unable to work.

Respondents are entitled to an offset for group disability benefits the claimant has received during the September 29, 2004 through December 13, 2005, time period, as provided by Ark. Code Ann. §11-9-411.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on June 17, 2004. The respondents are liable for reasonable and necessary medical benefits for the lumbar spine. The claimant has proven she remained in her healing period and was totally unable to earn wages from September 29, 2004 through December 13, 2005. Respondents are entitled to an offset for group disability benefits the claimant received from September 29, 2004 through December 13, 2005, pursuant to Ark. Code Ann. §11-9-411.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**