

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609925

BERNICE GILL, EMPLOYEE	CLAIMANT
FOOD GIANT SUPER MARKETS, INC., EMPLOYER	RESPONDENT
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 11, 2007

Matter before Chief Administrative Law Judge David Greenbaum submitted on June 27, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant appearing *pro se*.

Respondents represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This claim is submitted on the record of a hearing conducted on May 18, 2007, together with medical records and reports from Dr. Robert Riley Jones, submitted subsequent to the hearing at the direction of this Administrative Law Judge pursuant to an Interim Opinion and Order filed June 12, 2007, as set out further below.

A prehearing conference was conducted in this claim on April 11, 2007, and a Prehearing Order was filed on said date. A hearing was scheduled and conducted on May 18, 2007, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, a copy

of which was introduced as "Commission's Exhibit 1."

It is undisputed that the employee/employer/carrier relationship existed between the parties at all relevant times, including August 26, 2006; that the claimant reported a work-related incident on said date; that respondents paid various medical and related expenses prior to controverting the claim in its entirety. The parties were unable to stipulate to the claimant's average weekly wage at the prehearing conference. At the hearing, respondents proposed to stipulate to an average weekly wage of \$195.00. The claimant's testimony confirmed that she was hired to work thirty (30) hours per week at \$6.50 per hour which yielded an average weekly wage of \$195.00 and a compensation rate of \$130.00 per week for temporary total disability in the event the claim was found compensable.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that she sustained a back injury as the result of a specific incident identifiable in time and place of occurrence when she slipped and fell at work on August 26, 2006; that respondents should be held responsible for all outstanding medical treatment, together with continued reasonably necessary medical treatment provided by Dr. Susan Jones at the East Arkansas Family Health Center, including, but not limited to any referrals from Dr. Susan Jones. The claimant further contended that she was entitled to temporary

total disability benefits from the date of the injury and continuing through the present, maintaining that her healing period had not ended. The claimant reserved entitlement to permanent disability, if applicable.

The respondents contended that the claimant did not sustain a compensable injury, specifically maintaining that there was no medical evidence containing objective findings to support an injury. Respondents further maintained that the claimant's physical problems, need for treatment, and disability, if any, were due to non-work related conditions.

The claimant, Bernice Gill, was the only lay witness to testify. Her testimony concerning the work-related incident, its prompt reporting, as well as claimant's course of medical treatment is undisputed. The claimant is fifty-one (51) years old. She has a high school education. She stated that she worked for Food Giant Super Markets approximately two (2) years. The claimant last worked on August 26, 2006. She stated that on that date, she slipped on a wet floor which had recently been mopped and fell on her tail-bone. The incident was promptly reported to the store manager, Frank (last name unknown). The claimant left work early on the day she reported the incident. Although an incident report was filled out, the claimant did not request medical treatment and none was provided. The claimant called her employer the following day and advised that she was unable to work. The claimant first sought medical treatment at the Crittenden Memorial Hospital in West Memphis, Arkansas, on August 28, 2006, where she was diagnosed as having

sustained a lumbosacral strain. The claimant was treated with medications and released, and advised to follow-up with her family physician, Dr. Jones, in two (2) to three (3) days. (Cl. Ex. A, pp.1, 7)

The claimant was next examined and treated by Dr. Susan Jones, her family physician, at the East Arkansas Family Health Center in West Memphis, Arkansas. The record reflects that the claimant had previously been treated by Dr. Susan Ward-Jones for various non-work related problems, including a history of seizure disorder, as well as chronic abdominal pain. In fact, the record reflects that the claimant had applied for social security benefit prior to going to work for the respondent and prior to her work-related accident. The claimant testified that after she saw Dr. Susan Jones, her employer advised that she could no longer seek medical treatment from her family physician, at which time the claimant was referred to Dr. Riley Jones, an orthopedic surgeon in Memphis, Tennessee. The claimant stated that she saw Dr. Riley Jones approximately eight (8) times; that she was treated by Dr. Riley Jones with medication and physical therapy; and that respondents paid for all of her medical treatment, including a MRI prior to terminating all benefits upon her discharge by Dr. Riley Jones on or about November, 2006. (Tr.21, 29-30, 37)

As previously pointed out, respondents paid various medical and related expenses prior to controverting the claim in its entirety. Respondents' primary defense was that there was no medical evidence containing objective findings to

support an injury. At the prehearing conference, the claimant asserted that she would offer medical records from the East Arkansas Family Health Center in support of her claim. Respondents stated that it would rely on the medical evidence. Despite instructions from this Administrative Law Judge that the claimant furnish the Commission, as well as respondents' attorney, a copy of the any medical records that she intended to introduce at the hearing, the claimant failed to submit any medical records in advance of the hearing. For unexplained reasons, respondents, likewise, failed and refused to offer any medical evidence despite the fact that it directed the claimant's medical treatment and then denied compensability based upon the assertion that the medical evidence did not contain objective findings to support the injury claimed. As will be set out further below, the medical evidence proffered by the claimant, as well as the medical evidence that respondents were ordered to submit by my Interim Opinion and Order filed June 12, 2007, contain objective findings of injury.

Admittedly, the record reflects that the claimant failed to comply with the provisions of Ark. Code Ann. §11-9-705(c)(2)(A) by failing to produce medical reports at least seven (7) days prior to the hearing as a condition precedent to the right to do so. However, as previously noted, although respondents indicated that it would rely on the medical evidence to controvert compensability of the alleged injury, respondents failed and refused to introduce any medical evidence despite the fact that it directed and paid for all of claimant's medical treatment. (Tr.38)

Commission Rule 099.27 provides, in part:

Medical reports are to be requested by the insurance carrier/self-insured in a timely manner and are to be filed with the Commission upon receipt.

I recognize that an argument can be advanced that medical reports are not required to be filed in medical only claims. However, this is not a medical only claim. Once the claimant filed a claim for workers' compensation benefits, including disability benefits, medical reports should have been filed with this Commission. It appears that respondents have intentionally withheld medical evidence in its possession which the Act required be filed upon receipt. As will be reflected further below, the medical provider that respondents sent the claimant for treatment kept the claimant off work which is inconsistent with a medical only claim. In view of the foregoing, and, pursuant to Ark. Code Ann. §11-9-704(b), I found it necessary to cause further investigation in respect to this claim, specifically, to secure the medical evidence necessary to address the issues presented for determination. It was further found that such an investigation was necessary to ascertain the rights of the parties pursuant to Ark. Code Ann. §11-9-705 and to be within the sound discretion of this Administrative Law Judge under authority granted by Ark. Code Ann. §11-9-705(c)(1)(C)(i).

Accordingly, by Interim Opinion and Order filed June 12, 2007, respondents were directed to submit copies of medical records in its possession, obtained from Dr. Riley Jones, the physician that examined and treated the claimant at respondents' direction. All issues were held in abeyance pending receipt of said

records. The reports from Dr. Riley Jones were received on June 18, 2007. They are blue-backed and made a part of the record herein. The record consists solely of the transcript of the May 18, 2007, hearing, the Interim Opinion and Order filed June 12, 2007, and the medical reports from Dr. Robert Riley Jones.

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 claimant and to observe her 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 Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On August 26, 2006, a work-related incident occurred when the claimant slipped and fell at work.
3. Respondents paid various medical and related expenses, including emergency room treatment at the Crittenden Memorial Hospital, as well as treatment by Dr. Robert Riley Jones, an orthopedic surgeon in Memphis, Tennessee, a physician that examined and evaluated the claimant at respondents' direction prior to controverting the claim in its entirety.
4. The claimant has proven, by a preponderance of the evidence, that she sustained an injury to her low back and tail-bone which arose out of and

during the course of her employment with Food Giant Super Markets, Inc., which required medical services and resulted in disability, and which is confirmed by medical evidence supported by objective findings and which was caused by the work-related incident on August 26, 2006.

5. The claimant's average weekly wage was \$195.00, entitling her to a compensation rate of \$130.00 per week.
6. Respondents have previously paid all medical and related expenses as the result of the August 26, 2006, incident.
7. The claimant's healing period ended on or before December 6, 2006.
8. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to temporary total disability for the period beginning August 27, 2006, and continuing through November 9, 2006, at which time the claimant was released to return to work with restrictions.
9. The claimant has failed to prove entitlement to temporary total disability after November 9, 2006.
10. The claimant has failed to provide entitlement to additional medical beyond the medical previously paid.

DISCUSSION

The claimant was initially examined and treated at the emergency room of the Crittenden Memorial Hospital on August 28, 2006. The history obtained at the emergency room confirms that the claimant's low back complaints were related to

a slip and fall at work. The physical examination clearly reflects muscle spasm. The claimant was discharged with a clinical diagnosis of lumbosacral strain, prescribed medications, and advised to follow-up with her family physician, Dr. Susan Jones in two (2) to three (3) days. (Cl. Ex. A, pp.3, 7)

Respondents paid for the emergency room treatment. The claimant was next seen by her family physician, Dr. Susan Ward-Jones at the East Arkansas Family Health Center in West Memphis, Arkansas. Apparently, respondents paid for the initial visit to Dr. Jones. The claimant was then contacted by a representative for the insurance carrier and advised that they would pay for no further treatment by Dr. Susan Jones. Rather, respondents referred the claimant to Dr. Robert Riley Jones, an orthopedic surgeon in Memphis, Tennessee. The record reflects that the appointment with Dr. Riley Jones was scheduled for the later part of September, 2006. However, claimant's primary care physician issued a certificate taking the claimant off work until she could be evaluated by respondents' doctor. (Tr.28-30)(Cl. Ex. D)

COMPENSABILITY

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's*

Pulpwood Yard, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

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 physical harm to the body which required medical services or resulted in disability or death;
3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Based upon the record of the May 18, 2007, hearing, the claimant has satisfied each and every element necessary to establish compensability.

Respondents objected to the introduction of the medical evidence proffered by the claimant because same was not submitted in advance of the hearing. Despite respondents' objection, the medical evidence was received. I feel compelled to point out that respondents paid for the emergency room treatment at the Crittenden Memorial Hospital on August 28, 2006. I find it hard to believe that it did not have copies of the emergency room records prior to the within hearing. Respondents denied compensability based upon a lack of medical evidence supported by objective findings. The muscle spasms noted in the emergency room record clearly disputes respondents' contention.

I was further persuaded, based upon the claimant's testimony, that respondents withheld medical evidence in its possession which should have been filed with the Commission upon receipt pursuant to Commission Rule 099.27. Accordingly, an Interim Opinion and Order was filed on June 12, 2007, directing that respondents submit copies of medical records in its possession obtained from Dr. Riley Jones. Subsequent to the hearing, respondents submitted records from Dr. Robert Riley Jones. Dr. Jones examined and evaluated the claimant at respondents' request. The initial evaluation was performed on September 25, 2006. At the time of Dr. Jones' initial evaluation, the claimant was already off work. The physical examination performed by Dr. Jones revealed a small fissure just above

the anal area, but no real sign of pilonidal cyst. Dr. Jones continued to keep the claimant off work. It must be noted that at the time of the evaluation, the claimant was taking several prescription medications. Dr. Jones recommended that she continue to take Celebrex as directed. In addition, Dr. Jones prescribed two (2) new medications, Hydrocodone for pain and Flexeril which is normally prescribed for muscle spasms. Our Supreme Court has previously held that a physicians prescription of Flexeril is indicative that the treatment is for relief of muscle spasms associated with acute musculoskeletal conditions. *See, Fred's, Inc., v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005).

The emergency room notes, as well as the records of Dr. Riley Jones, establish a compensable injury supported by objective medical findings.

TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition,

suffers a total incapacity to earn pre-injury wages in the same or other employment.
see, Palazolo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant was next examined by Dr. Jones on October 10, 2006. The physical exam is set out below:

PHYSICAL EXAM: today shows that she still has that little fissure and I think this may well be a pilonidal cyst which would not be related to any type of fall or injury. She flexes now to about 45 degrees. She has better motion and no spasm is noted.

Dr. Jones kept the claimant off work, to return in two (2) weeks. The claimant returned to Dr. Jones on October 31, 2006, having missed her appointment the previous week because of a lack of transportation. Because of the claimant's continued complaints, Dr. Jones ordered a MRI of the lumbar spine. His summary is set out below:

SUMMARY: It's been two months since her injury. I think she has a small pylondial [sic] cyst which is giving her trouble. I'm not sure this is related at all to her injury. We have inconsistencies in her examination. I think to clear the air, we need to get an MRI.

The claimant returned to Dr. Jones on November 9, 2006, following the MRI. His report of said date states, in part:

INTERVAL HISTORY: Ms. Gill returns today. Her physical examination shows that she has positive Waddell's, mild, to rotation, touch and axial load. She had an MRI done and I can not review the films because the CD doesn't work. But it showed degenerative change on L4-5, diffuse annular bulge of the right paracentral portion and of the left paracentral portion. Bilateral degenerative facet arthropathy at L5-S1. Degenerative facet arthropathy with fluid on the right at L4-5 and fluid in the left facets at L4-5 indicating degenerative facet arthropathy. At this point she will flex over to about 80 degrees and complains of some pain with extension, but sits easily and has negative SLR. I think we have met our maximum in therapy. We will let her return to work. We will give her light duty, continue medications and see me back in two weeks.

Based upon Dr. Jones' report, aforementioned, I find that the claimant is entitled to temporary total disability until such time as she was released to restricted work on November 9, 2006, following the MRI. The claimant did not return to work. In fact, the claimant has not returned to gainful employment. Dr. Jones last examined the claimant on December 5, 2006, at which time he released the claimant to return to regular work duty. He opined that the claimant reached maximum medical improvement on that date. He further opined that the claimant had not sustained any permanent partial impairment.

The purpose of the Workers' Compensation Act is to pay timely benefits to legitimately injured workers. The record reflects that respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with reasonably necessary medical treatment. In fact, the record reflects that respondents paid for all of the claimant's medical treatment related to the compensable slip and fall incident which temporarily aggravated a pre-existing degenerative disc disease. The injury, which was diagnosed as a lumbosacral strain, has since resolved without any permanent impairment. The record further reflects that the claimant has a number of pre-existing conditions which acted as a source of disability prior to the August 26, 2006, admitted incident. As previously noted, the record reflects that the claimant had applied for social security disability benefits prior to her employment by respondents herein and prior to the work-related accident. In my opinion, the claimant exaggerated the nature and

extent of her August 26, 2006, injury. However, the extent of the claimant's injury was not the primary issue. Rather, the major dispute concerned the existence of an injury and whether it arose out of and during the course of claimant's employment. Respondents, at all times, maintained that there was no medical evidence to support the injury claimed. Respondents' assertion is simply without merit. The emergency room records, as well as the reports from Dr. Riley Jones, respondents' own doctor, support the claim. It is anticipated that respondents will maintain that the claimant had the burden of proving the job-relatedness of her injury and that she failed to meet that burden because she failed to introduce medical records in advance of the scheduled hearing. I find any such arguments to be disingenuous and not persuasive. The emergency room records introduced by the claimant should have been in respondents' possession since it paid for the emergency treatment. Further, as previously noted, respondents failed and/or refused to file medical reports in a timely manner as required by Commission Rule 099.27. The only possible reason for the failure to file reports would be an argument that such reports are not required in medical only claims. Again, this argument is not persuasive. Clearly, the records of Dr. Riley Jones indicated that the claimant was not working. Dr. Jones kept the claimant off work until November 9, 2006. Copies of all records were furnished to respondents' nurse case manager. Respondents cannot, in good faith, argue that this is a medical only claim.

After reviewing the evidence in this case impartially, without giving the benefit

of the doubt to either party, I find that the claimant has proven that she sustained an injury arising out of and during the course of her employment with Food Giant Super Markets on August 26, 2006, entitling her to appropriate workers' compensation benefits.

Compensability having been determined, the only remaining issue concerns claimant's entitlement to associated benefits. The claimant contended that her healing period for the controverted claim had not ended and that she was entitled to temporary total disability through an undetermined date. The claimant's contentions are simply not supported by the record as a whole. Although the claimant was released to regular duty without impairment on December 6, 2006, she was released to return to work with lifting restrictions on November 9, 2006, and failed and/or refused to return to work. In fact, the claimant has not sought any gainful employment since her injury. The claimant was only working part-time at \$6.50 per hour. I find that the claimant is not totally disabled within the meaning of the Arkansas workers' compensation laws. The claimant is entitled to temporary total disability through November 9, 2006, at which time she was released to return to work.

The claimant has also failed to prove that she is entitled to additional medical treatment. The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. v. Garey*, 61 Ark. App. 18, 963

S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Despite having controverted this claim in its entirety, respondents paid all medical treatment through December 6, 2006. The claimant has not provided any evidence that she needs further medical treatment for the back and tail-bone injury which have since resolved. In view of the foregoing, I hereby make the following:

AWARD

Respondent, Liberty Insurance Corporation, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$130.00 per week beginning August 27, 2006, and continuing through November 9, 2006. All benefits having accrued, respondents are to pay same in lump sum and without discount.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge