

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F602832

GLADIS HERNANDEZ, Employee	CLAIMANT
WAL-MART STORES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED APRIL 30, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by BRENT STERLING, Attorney, Fayetteville, Arkansas.

Respondents represented by DALE BROWN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 28, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 10, 2007, and a pre-hearing order was filed on January 11, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on August 11, 2005.
3. The claimant was earning an average weekly wage of \$572.00 which would entitle her to compensation at the weekly rates of \$381.00 for temporary total disability benefits and \$286.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's lumbar spine on August 11, 2005.

2. Temporary total disability benefits from February 8, 2006 through a date yet to be determined.

3. Medical from Dr. Raben.

4. Attorney fee.

5. Credit for group disability benefits and unemployment compensation.

The claimant contends that she suffered a compensable injury to her low back while working for respondent on August 11, 2005. She requests payment of medical benefits from Dr. Raben, temporary total disability benefits beginning February 8, 2006 and continuing through a date yet to be determined, as well as an attorney fee.

The respondent contends that claimant did not suffer a compensable injury. Respondent also raises as an issue its entitlement to credit for disability benefits paid to claimant as well as the issue of an independent intervening cause as the reason for claimant's back problems.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 10, 2007, and contained in a pre-hearing order filed January 11, 2007, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on August 11, 2005.

3. Claimant is entitled to temporary total disability benefits beginning February 23, 2006 and continuing through a date yet to be determined. The respondent is entitled to

a credit for any disability benefits the claimant received during this same period of time.

4. Respondent is liable for payment of medical treatment claimant received from Dr. Raben. This includes testing and the surgical procedures.

5. Respondent has controverted claimant's entitlement to all indemnity benefits subsequent to February 23, 2006.

FACTUAL BACKGROUND

The claimant is a 35-year-old native of El Salvador. She began working for the respondent in September 2000 as a processor in a return center in Bentonville. At the return center merchandise is returned from stores which must in turn be sent back to the supplier. The basic process which claimant performed included taking merchandise out of boxes, scanning the product with a scan gun, and re-packing it in a box. Testimony indicated that the products and boxes come in many different sizes and weights.

Claimant testified that on August 11, 2005 she was in the process of scanning boxes of books when she began feeling pain in her low back. According to claimant's testimony she reported the back pain to both Jim Land, her supervisor, and Ken Pack, her manager. Claimant testified that her pain continually worsened throughout the day, but that she finished her shift and went home.

On August 12, 2005 the claimant again complained of back pain to Land and Pack and completed Commission Form AR-N regarding her injury.

On August 15, 2005, claimant was sent by the respondent to Dr. Moffitt who diagnosed the claimant as suffering from a lumbar sprain and provided her with medication and lifting restrictions. He also indicated that claimant should perform some stretching exercises. Claimant returned to work for the respondent at a lighter duty job.

The medical evidence indicates that claimant continued to be evaluated by Dr. Moffitt subsequent to August 15. On August 18, 2005, Dr. Moffitt gave the claimant an

injection and continued her work restrictions. Dr. Moffitt also ordered physical therapy and eventually ordered an MRI scan. That MRI scan according to Dr. Moffitt's report of September 1, 2005 revealed a herniated disc at the L5-1 level on the right side. In his report of that date Dr. Moffitt indicated that he believed the claimant had a lumbar strain involving the left side of the S1 area. He noted that the herniated disc was on the right and that it did not correlate with claimant's symptoms. Claimant was given additional medication and taken off work. On September 19, 2005, Dr. Moffitt referred claimant to Dr. Tomlinson, orthopaedic surgeon, for a second opinion. In his report dated September 21, 2005, Dr. Tomlinson noted that his impression was that claimant had a protrusion of the L5-S1 disc. He also indicated that he believed the claimant had a chance of full recovery with therapy alone. Following the September 21 visit with Dr. Tomlinson, claimant next saw Dr. Moffitt on September 30, 2005. Dr. Moffitt stated that he did not believe there was any major pathology present in claimant's back and did not feel that she needed any surgical procedure. He released the claimant to return to work with restrictions.

On November 1, 2005, Dr. Moffitt stated that there were no objective medical findings of a problem with claimant's back. He released claimant to full duties with no anticipation of further medical treatment and no permanent impairment.

Claimant returned to work for the respondent and did not return to see Dr. Moffitt again until January 13, 2006. At that time Dr. Moffitt noted that claimant's complaints of pain radiated into her right leg and foot, not the left. Dr. Moffitt gave the claimant an injection and returned her to work without restrictions. After a visit with her family physician, Dr. Donnell, on February 8, 2006, claimant sought medical treatment from Dr. Raben, neurosurgeon, on February 14, 2006. Dr. Raben's medical report of that date notes that the previous MRI scan revealed a herniated disc at the L5-1 level. Dr. Raben ordered a second MRI scan which also revealed a herniated disc at the L5-S1 level. Dr. Raben initially treated the claimant conservatively with medication, injections, and physical

therapy. When claimant's condition did not improve, Dr. Raben performed surgery in the form of a laminectomy on April 13, 2006. Dr. Raben's medical records indicate that claimant's symptoms improved for approximately one week before her back pain returned. Dr. Raben subsequently performed anterior and posterior spinal fusion surgeries on August 2 and August 3, 2006.

The respondent initially accepted claimant's injury as compensable and paid some compensation benefits, including medical treatment from Dr. Moffitt. Respondent has now controverted this claim in its entirety. The claimant contends that she suffered a compensable injury to her low back while working for respondent on August 11, 2005. She seeks payment of temporary total disability benefits beginning February 8, 2006 and continuing through a date yet to be determined. She also seeks payment for medical treatment received from Dr. Raben

ADJUDICATION

The claimant contends that she suffered a compensable injury to her back while scanning boxes of books while working for respondent on August 11, 2005. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back on August 11, 2005.

First, I find that claimant has proven by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that it was caused by a specific incident identifiable by time and place of occurrence. Here, claimant testified that she suffered the injury to her low back while scanning boxes of books on August 11, 2005. Claimant testified that her back pain worsened over the course of the day and that she reported this incident to both Kenneth Pack and Jim Land, her supervisors. Pack testified at the hearing, but Land did not. Pack disagreed with claimant's testimony that she reported an incident to him on August 11, 2005. However, Pack did acknowledge that claimant reported an injury by at least August 12, 2005, the next day.

The documentary evidence also indicates that on August 12, 2005 the claimant completed Form AR-N indicating that she had injured her back on August 11, 2005, and although the handwriting under the section "Cause of Injury" is not completely legible, it does mention "scanning books" and "heavy boxes". Furthermore, claimant completed additional forms on August 15, 2005 again mentioning an injury to her low back on August 11, 2005 as a result of lifting heavy boxes. Likewise, the manager's investigation report mentions scanning books and boxes of books.

As previously noted, claimant was sent by the respondent to Dr. Moffitt on August 15, 2005. Dr. Moffitt's medical report also indicates that claimant gave a history of low back pain after lifting heavy boxes on August 11, 2005.

In short, I find that claimant's testimony regarding the onset of her back problems is credible and entitled to great weight. Claimant testified that she reported this incident to her supervisors on August 11. While one of claimant's supervisors disagreed, he did admit that claimant reported the injury on August 12. In addition, claimant completed various forms for the respondent on August 12 and August 15, 2005 describing an injury consistent with her testimony. Furthermore, a review of the medical records in this case indicates that claimant has consistently given a history of injury having begun on August 11, 2005 while scanning books for the respondent.

Accordingly, based upon the evidence presented, I find that claimant has proven by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that it was caused by specific incident identifiable by time and place of occurrence.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services or resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. Here, an MRI scan was performed at the request of Dr. Moffitt which revealed a herniated disc at the L5-1 level on September 1, 2005, shortly after the claimant's injury. As previously noted, claimant was eventually released by Dr. Moffitt and subsequently came under the care of Dr. Raben, a neurosurgeon who performed multiple surgical procedures on the claimant's lumbar spine. Dr. Raben also ordered an MRI scan which revealed a herniated disc. It was Dr. Raben's opinion within a reasonable degree of medical certainty that the right-sided herniation which was revealed on the MRI scans of September 1, 2005 and February 2006 was causally related to the incident on August 11, 2005. I find that the opinion of Dr. Raben is credible and entitled to great weight. First, as compared to Dr. Moffitt, Dr. Raben is a specialist. Second, as compared to Dr. Tomlinson, Dr. Raben evaluated the claimant on multiple occasions and

performed surgery whereas Dr. Tomlinson evaluated the claimant on only one occasion.

Accordingly, based upon the evidence presented, particularly the opinion of Dr. Raben, I find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and resulted in disability. Likewise, I also find that claimant has offered medical evidence supported by objective findings establishing an injury. Here, two MRI scans revealed a herniated disc at the L5-1 level.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on August 11, 2005.

Even though I have found that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury, I nevertheless find it necessary to address various issues which have been raised regarding compensability and claimant's entitlement to benefits in this case. First, it should be noted that this entire proceeding has been complicated by various family issues which exist between the claimant and her ex-husband and the claimant and a niece. Most of these issues are personal in nature and have no bearing on the issue of whether claimant suffered a compensable injury. However, some of these issues will be addressed in forthcoming paragraphs.

One inconsistency cited by the respondent involves testimony from Kenneth Pack and Adrian Dominguez. As previously noted, Pack was one of claimant's supervisors. In addition, Dominguez is the assistant general manager for the respondent's return center. Pack testified that in the days after claimant reported her injury he observed her moving in a very slow manner as if she was in a great deal of pain. Pack testified that it took claimant a great deal of time to move a short distance from the break room to her work station. Pack also testified that on August 31, 2005, he observed the claimant at a local

convenience store carrying a drink in her hand and walking as if she had no pain. According to Pack she opened the passenger door of her car, put a drink in her car, and proceeded to put gas in her car without any apparent problems or signs of pain. Likewise, Dominguez testified that he observed the claimant walking very slowly at work. However, he testified that on August 27, 2005 he observed the claimant going into a department store and walking normally. He also noted that the claimant did not have a problem opening the door to the department store which he described as very heavy.

Obviously, these descriptions of the claimant by Land and Dominguez showed inconsistencies in the claimant's physical appearance. Despite these inconsistencies, claimant was under the care of Dr. Moffitt who had diagnosed claimant as suffering from a lumbar strain. Furthermore, claimant's back pain was significant enough according to Dr. Moffitt that he ordered an MRI scan which was performed on September 1, 2005, only a few days after both of these incidents. That MRI scan revealed a herniated disc at the L5-S1 level.

In short, while the observations by Land and Dominguez are noteworthy, I do not believe these observations are significant enough to indicate that claimant was not injured on August 11, 2005.

Evidence was also presented regarding the fact that claimant's initial complaints involved her low back and left side and subsequently these complaints involved claimant's low back and her right side. These complaints were noted by Dr. Moffitt in his medical reports. However, Dr. Raben testified at his deposition that even though the herniated disc was on the right side of L5-S1, there were many reasons why claimant's back pain could have also existed on her left side initially. At the beginning of Dr. Raben's deposition he indicated that his review of the claimant's MRI scan of September 1, 2005 would lead him to expect the claimant to suffer from some right leg pain and also perhaps some left leg pain. Because claimant's left leg pain subsided, Dr. Raben did not specifically address

the left side of the L5-S1 disc during his surgical procedure. Significantly, Dr. Raben testified that the fact that claimant's symptoms began on her left side and subsequently developed on the right would not change his opinion as to the cause of claimant's injury.

Evidence was also presented at the hearing regarding the claimant's ability to go to a casino and fishing with her family. Testimony from the claimant as well as other witnesses indicated that on occasion she went to the casino with various family members. According to the testimony, claimant would sit or stand at a machine in order to gamble. Likewise, when claimant went fishing she either sat in a chair or laid down on a blanket. When confronted with this evidence, Dr. Raben testified that it would not change his opinion as to causation or his belief that claimant's need for surgery was a direct result of the injury of August 11. Dr. Raben testified that it did not appear to him that the physical activities described were arduous or very physical in nature. I would agree. While the claimant was able to go to the casino approximately 10 times after her injury and also went fishing on occasion, there has been no evidence presented that claimant engaged in any strenuous physical activities during these trips. To the contrary, it appears that claimant sat, stood, or laid down as needed. More importantly, there is no indication that claimant's complaints were significantly increased or aggravated by these activities.

Testimony and evidence was also presented with regard to the claimant dancing. The claimant attended a birthday party of a friend's 15-year-old daughter in October 2006. Claimant admitted to dancing three or four slow songs on that night. First, I believe it is important to note that there is no indication that claimant had ever been dancing prior to October 2006. Furthermore, by the time this incident occurred claimant had already undergone her surgical procedures from Dr. Raben. Claimant acknowledged at the hearing that the shoes she was wearing that night began to hurt her back and as a result she changed shoes. However, there is no evidence that claimant re-injured her back or did anything to her back on that night which caused her to need additional medical

treatment or extend her healing period.

Finally, evidence was also presented regarding claimant's activities with men other than her husband. Dominguez testified that Sandra Flores, an employee of the respondent's return center and claimant's niece, came to him on December 5, 2006 and indicated that claimant was getting drunk on the weekends with men. He indicated that Flores informed him that she did not believe the claimant was hurt and that she was suing the respondent. Dominguez also indicated that Flores informed him that claimant's husband had found her in a hotel room with another man and took pictures.

Flores testified by deposition. She admitted giving the information to Dominguez that he put in his journal. She testified that she received that information from her family and admitted that she had never seen the claimant drunk on weekends with other men and had never seen any pictures supposedly taken by the claimant's ex-husband. Significantly, Flores testified that she had not seen the claimant out dancing and she had not seen the claimant intoxicated since she was injured.

Respondent contends that claimant's back problems are the result of an independent intervening cause. In order for an independent intervening cause to exist, the claimant's need for medical treatment or subsequent disability must be triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W. 3d 326 (2000); *Georgia Pacific Corporation v. Carter*, 62 Ark. App. 162, 969 S.W. 2d 677 (1998); *Guidry v. J & R Eads Construction Company*, 11 Ark. App. 219, 669 S.W. 2d 483 (1984). In this particular case, I do not find any of the activities which claimant engaged in to have been unreasonable under the circumstances. First, as previously noted, Dr. Raben when questioned about these activities in light of claimant's condition testified that the activities did not seem physical in nature. Furthermore, there is no evidence that the claimant injured, re-injured, or aggravated her back condition as a result of any of these activities. Accordingly, I find

insufficient evidence that claimant's back condition is the result of an independent intervening cause as opposed to the Injury of August 11, 2005.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on August 11, 2005. I note that claimant reported the injury by no later than August 12, 2005 and completed various forms which related her back pain to an incident of scanning heavy boxes of books. Claimant was sent for medical treatment and the medical records contain a history of injury consistent with claimant's testimony. Despite all of the evidence presented regarding casinos, fishing, dancing, and other matters, there is no evidence indicating that claimant injured her back while engaged in any of these activities or alleged activities. Finally, I also rely in large part upon the medical opinion of Dr. Raben regarding causation. I find Dr. Raben's opinion to be credible and entitled to great weight.

Having found that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury, I find that respondent is liable for payment of medical treatment provided to claimant by Dr. Raben. This includes testing as well as the surgical procedures. Introduced into evidence were medical reports involving counseling claimant received at Ozark Guidance Center. Claimant has not requested payment for this medical treatment, but instead has requested only payment of Dr. Raben's medical treatment. Therefore, I only find that respondent is liable for payment of Dr. Raben's medical treatment.

Claimant has also requested payment of temporary total disability benefits beginning February 8, 2006 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation*

Department v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find that claimant remained within her healing period for the period of February 8, 2006 and continuing through a date yet to be determined. However, I do not find that claimant suffered a total incapacity to earn wages until February 23, 2006. On January 13, 2006, claimant was evaluated by Dr. Moffitt. Dr. Moffitt gave claimant an injection and returned her to work without restrictions. Claimant was next seen by her family physician, Dr. Donnell, on February 8, 2006. At that time claimant was scheduled to undergo some steroid injections. Dr. Donnell's medical report of February 8 indicates that claimant requested to be off work until those steroid injections were done. His report also went on to note that claimant was "intolerant of work at present." It is unclear from a review of Dr. Donnell's medical report whether he was of the opinion that claimant was totally incapacitated from working as of that date or whether this was simply claimant's opinion and request. Claimant was first seen by Dr. Raben on February 14, 2006. His report notes that claimant was off work, but he did not state that the claimant was totally incapacitated from working. However, Dr. Raben was of the opinion as of February 23, 2006 that claimant should remain off work.

It should also be noted that at Dr. Raben's deposition he was asked questions with regard to claimant's ability to return to work in light of her dancing in October 2006. Dr. Raben did not believe that the claimant dancing in October 2006 would indicate that she was capable of returning to work. Furthermore, he stated that before he would state that claimant could return to work in some capacity he would have to have an x-ray of her fusion mass, see how the claimant was proceeding with physical therapy, and would have to consider the type of work claimant would be performing. Dr. Raben had testified that it would take claimant's fusion at least one year to mature so she would not reach maximum medical improvement until at least one year after surgery.

Based upon the evidence presented, I find that claimant remained within her healing

period and that she suffered a total incapacity to earn wages beginning February 23, 2006, and continuing through a date yet to be determined.

Claimant testified at her hearing that following her last day of work for respondent on February 8, 2006 she began receiving disability benefits on February 22, 2006, and continued to receive them through August 22, 2006. Claimant received those benefits at the rate of \$278.00 per week. The respondent is entitled to a credit for these disability benefits. However, respondent is still liable for an attorney fee on all indemnity benefits subsequent to February 23, 2006, including those for which it has been given a credit.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on August 11, 2006. Respondent is liable for payment of all reasonable and necessary medical treatment provided by Dr. Raben. This includes testing and surgical procedures. Claimant is entitled to temporary total disability benefits beginning February 23, 2006, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all indemnity benefits subsequent to February 23, 2006.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney

fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE