

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612276

MICHELLE L. HOLDEN, EMPLOYEE	CLAIMANT
THOMAS & BETTS CORPORATION, EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 20, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on July 27, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Garland L. Watlington, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Michael R. Mayton, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 27, 2007, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on May 9, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed at all relevant times,

including October 6, 2006, and that the respondents had controverted the claim in its entirety for purposes of attorney's fees. At the hearing, the parties announced that the claimant's average weekly wage was \$697.00, which would entitle the claimant to temporary total disability benefits at the rate of \$465.00 and permanent partial disability benefits of \$349.00 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 compensable back injury as the result of a specific incident identifiable in time and place of occurrence on October 6, 2006; that she was entitled to temporary total disability benefits beginning October 7, 2006, and continuing through an undetermined date, while maintaining that her healing period had not ended; that respondents should be held responsible for all outstanding medical and related expenses, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to all benefits awarded. The claimant reserved the issue of entitlement to vocational rehabilitation and permanent disability, if applicable, pending a determination on compensability.

The respondents contended that the claimant did not sustain a compensable injury arising out of and during the course of her employment on October 6, 2006; specifically maintaining that there were no objective medical findings to support

compensability while pointing out that a functional capacity evaluation was invalid, indicating that the claimant put forth a submaximal effort; and respondents controverted the claim in its entirety. Alternatively, in the event compensability was determined, respondents requested an offset for all benefits paid by the claimant's group health insurance, all short-term and long-term disability, and/or any unemployment benefits.

The claimant testified in her own behalf. Hattie Mae Beasley, Mark Timothy Howell, and John Jay David Shatzer were called as witnesses by the respondents. The record is composed solely of the transcript of the July 27, 2007, hearing containing numerous exhibits.

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 Arkansas Workers' Compensation Commission has jurisdiction over 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 back injury arising out of and during the course of

her employment with Thomas & Betts Corporation as the result of one or more specific incidents, identifiable in time and place of occurrence, the last occurrence having occurred on October 6, 2006. A preponderance of the credible evidence reflects that the claimant injury was either a recurrence of a June 5, 2006, work-related accident or a new injury or aggravation sustained on October 6, 2006.

4. The claimant is entitled to temporary total disability benefits for the period beginning October 7, 2006, and continuing through December 1, 2006. The claimant has failed to prove that she was temporarily totally disabled after December 1, 2006.
5. The claimant's healing period ended on or before December 1, 2006.
6. Respondents are responsible for all outstanding medical and related expenses for treatment of her left thoracic spinal strain.
7. Respondents are entitled to a credit or offset for any benefits paid pursuant to A.C.A. §11-9-411 and A.C.A. §11-9-506.
8. Claimant's entitlement to vocational rehabilitation and permanent disability has been specifically reserved.

DISCUSSION

_____The claimant, Michelle Lee Holden, testified in her own behalf. The claimant is thirty-three (33) years old. She began working for the respondent, Thomas & Betts Corporation, in 2002. The claimant worked in the material handling division.

Although the claimant was a team leader, she primarily helped with loading and unloading material used by production workers, including filling back-orders, loading the benches, and cleaning up in the plant. The claimant testified that she repeatedly injured herself at work while lifting totes which contained parts weighing up to eighty (80) pounds. A picture of the totes or container of parts was introduced for illustration only as "Claimant's Exhibit A, p.78-81."

The claimant stated that she first injured herself approximately a year and a half after she began working for the respondent. She described that she repeatedly strained a muscle in the middle, left side of her back which the claimant called a lateral muscle. The claimant estimated that she strained or re-injured this muscle approximately twenty-seven (27) times. Although no credible evidence documented the number of alleged incident, it is undisputed that the claimant reported several specific work-related incidents, including incidents on both June 5, 2006, and October 6, 2006. Following the June 5, 2006, incident, the claimant was sent to the company doctor, Dr. Michael Lack, with Occupational Health Partners in Jonesboro, Arkansas. Dr. Lack's history contained in his June 6, 2006, office notes reflects that the claimant, "injured her back the previous day while picking up a tote and placing it on her shoulder at which time she experienced pain in the left flank." Dr. Lack further noted that the claimant had the same injury in the past. Dr. Lack further reported that the claimant had taken Flexeril for the previous injury. His examination reflected that the claimant was having muscle spasms. Despite noting that the injury

was described as a pulled muscle in the left lower back, Dr. Lack diagnosed shoulder strain and permitted the claimant to return to work with restrictions to avoid the use of the left arm above shoulder level. (Cl. Ex. A, pp.17-19)

It is further undisputed that the claimant reported a second work-related incident on or about October 6, 2006. No report of work-related injury was filled out at that time. The claimant was initially taken, by her husband who also works for Thomas & Betts, to the St. Bernards Medical Center emergency room on the day of the injury. Again, the history reflects lumbar back pain which the claimant described as, "pulled a muscle" without radiculopathy or paresthesias that occurred while, "lifting a tote at work." The history further reflects that the claimant had experienced repeated injuries similar to the most recent incident over the last year. The claimant was prescribed medications and released to follow-up with her personal physician. The claimant was next seen by her personal physician, Dr. William Hurst, D.O., on October 9, 2006. Dr. Hurst allowed the claimant to return to work with a lifting restriction for one week. The claimant returned to Dr. Hurst on October 14, 2006, at which time Dr. Hurst took the claimant off work for ten (10) days. Dr. Hurst also prescribed physical therapy. Thereafter, Dr. Hurst extended the claimant's excuse from work on several occasions, ultimately releasing the claimant to return to work on December 11, 2006. However, the release was to activity as tolerated with no restrictions. (Cl. Ex. A, pp. 22-28)

In addition, Dr. Hurst referred the claimant for an evaluation to Dr. Terence

P. Braden, III, D.O., with Rehabilitation Medicine Associates, P.A., in Jonesboro, Arkansas. Dr. Braden examined the claimant on December 1, 2006. In addition to his physical examination, Dr. Braden also reviewed diagnostic studies. Dr. Braden issued a multiple page report addressed to Dr. Hurst. His final assessment and recommendations are set out, in part, below:

Assessment:

1. Subjective left thoracic pain, chronic.
2. There is no discernible evidence of abnormality.
3. I reviewed her MRI scan which is normal as well.
4. There may be some other psychosocial reasons for Ms. Holden's complaints.
5. I think she is able to go back to her regular work duties without restrictions.
6. There is no further treatment that I could recommend at this time.

She has multiple questions and these are answered as best as possible. She has questions of what other physicians could help to find something that is wrong with her. She also wants to know what other treatments are going to make her better from her chronic problems. As I explained to her today in the office, Perhaps [sic] lifting 80-pound totes is not something she should be doing since she continues to have these subjective complaints although I can find no objective evidence of distinct abnormality. Needless to say, she was not very happy with the return back to work but I can find no objective evidence to keep her out of the work environment. (Cl. Ex. A, pp.34-35)

Hattie Mae Beasley, Mark Timothy Howell, and John Jay David Shatzer were all called as witnesses for the respondents.

Rather than conduct an exhaustive analysis of each witnesses' testimony, suffice it to say that while respondents' witnesses may dispute the specific number of work-related incidents or injuries reported, they did not dispute that the claimant reported injuries on both June 5, 2006, and October 6, 2006. In fact, Mark Timothy Howell, the employer's safety director from April, 2003, until January 1, 2007,

candidly acknowledged that he was aware that the claimant reported at least three (3) separate incidents as being work-related. Apparently, respondents accepted incidents in June and September, 2006, as being work-related, but did not accept the third report as being work-related, apparently deferring to the judgment of its third-party claims administrator. Mr. Howell's testimony on cross-examination follows:

CROSS EXAMINATION

BY MR. WATLINGTON:

Q I don't know if I understood you, but did you say a workers' comp doctor is different than a regular doctor in the way they evaluate people? Did I understand that correctly?

A No, sir. What I said was that it's my understanding that a workers' comp doctor can only treat the injury itself, that they can't look for underlying causes. That was my understanding.

Q So you've heard her testimony that she wanted to go to the doctor and you said, "Ain't nothing that they can do for you." Is that true? Did you tell them that, "There ain't nothing that they can do for you --"

A No, sir.

Q -- as far as a workers' comp doctor --

A No, sir.

Q -- no other doctor?

A No, sir, that's not what I said.

Q So what exactly did you say?

A I said that there must be an underlying cause that's causing her back to continue to be injured, and that the workers' comp doctor could not necessarily do extensive testing, and that she may need to see her personal physician, and if it turned up to be work-related, we would be glad to address anything that was work-

related.

Q Did you offer to have her symptoms treated by a workers' comp doctor?

A We did in June, but not in October.

Q Who makes the decision out there that things are serious or not serious?

A Our company physician, Dr. Lack.

Q Let me rephrase the question. Before you get to go to the doctor, I think I understand your testimony and hers to be that it has to be deemed serious enough. Who makes that kind of call?

A Dr. Lack, we would call Dr. Lack.

Q So if it's a pulled muscle, which in her case it was, then he just probably didn't think it was serious enough, is that fair?

A I don't know what he would think. We would explain the symptoms and talk about what the cause of the injury was and give him all the details, and he would ask for further information if he needed it, and then he would say, "I think they need to come in for an evaluation," or "If you'll try this, this may work."

Q Okay. Do you remember any specific conversations with Dr. Lack concerning Ms. Holden?

A Yes, sir, I believe there was one in September.

Q And what did he say?

A And he said, "You may want to discuss with her that – just applying some heat and ice alternately, and if it's a strained muscle, it should get better in seven to ten days, and if it doesn't get better, she would need to come see me."

Q Okay. Did you treat her that way?

A We did, and she didn't come back to the first-aid.

Q She didn't come back to what?

A She didn't come back and ask for additional treatment.

Q Okay. And I think I heard you say that you know of at least a couple instances before this last time that she says that she puller her muscle.

A I'm aware of two in the first-aid log, yes, sir.

Q Okay. Do you know when they were?

A June the 5th, I believe, was the first one of 2006, and we took her to the doctor on June 6th. September the 5th or 6th of 2006 was the second one, and we treated her in the first-aid room. She was amendable to that.

Q Okay. And then this last time would make three?

A And then the last time would make three, yes, sir. (Tr.44-46)

On cross-examination, respondents also pointed out that a hospital record from a date of service of October 24, 2006, indicated that the claimant may have re-injured her back, "cleaning the toilet." It must be pointed out that this note was generated by a physical therapist who was already treating the claimant pursuant to a referred from Dr. Hurst following the October 6, 2006, incident. (Resp. Ex. A, p.7)

COMPENSABILITY

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).

Suffice it to say that the claimant has satisfied each and every element necessary to establish compensability of her thoracic lumbar strain. Compensability having been determined, the next issue concerns claimant's entitlement to temporary total disability.

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).

Based upon the reports of Dr. Hurst and Dr. Braden, aforementioned, I find that the claimant's healing period ended on or before December 1, 2006. The recommendations of Dr. Braden are sound and are apparent to me. Likewise, they should be apparent to the claimant. Lifting eighty (80) pound totes is something that the claimant should not be performing because it appears that such work activity is beyond her physical capabilities. The claimant has sustained recurring strains as the result of lifting more weight than she is capable of lifting. The claimant should seek work which is less physically demanding than the work she last performed for Thomas & Betts. I feel compelled to point out that even the claimant acknowledged that there were other jobs that she was able to perform; however, the claimant was reluctant to take other jobs because it would mean a cut in pay. (Tr.24)

Respondents did not specifically raise an independent intervening accident as a bar to this claim. However, because it questioned the claimant concerning an October 24, 2006, incident while cleaning a toilet, I feel compelled to point out the law clearly provides that if there is a causal connection between the primary and subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by an activity on the part of the claimant which is unreasonable under the circumstances. *Guidry v. J & R Eads Constr. Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984); *Davis v. Old Dominion Freight Line, Inc.*, 69 Ark. App. 74, 13 S.W.3d 171 (2000).

Respondents have failed to show that the claimant sustained an independent

intervening accident outside the workplace.

AWARD

_____ Respondent, Gallagher Bassett Services, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$465.00 per week beginning October 7, 2006, and continuing through December 1, 2006.

All accrued benefits shall be paid in lump sum and without discount. Respondents may claim credit for any dates that the claimant worked during said period.

Respondents are further directed and ordered to pay all outstanding hospital, medical, and related expenses as the result of claimant's compensable injury.

Respondents may claim a credit or offset for all benefits paid by claimant's health group insurance, all short-term disability and long-term disability, and/or any unemployment benefits, if applicable.

Additionally, claimant's attorney, Mr. Garland L. Watlington, is hereby awarded the maximum statutory attorney's fee on this Award pursuant to, and limited by, Ark. Code Ann. §11-9-715.

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

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge