

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400982

NANCY LOPER, EMPLOYEE	CLAIMANT
JOE PAULK COMPANY, EMPLOYER	RESPONDENT
STATE AUTOMOBILE MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MARCH 21, 2007

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on December 22, 2006 at Russellville, Pope County, Arkansas.

Claimant represented by HON. LAURA MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by HON. CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On December 22, 2006, the above-captioned claim came on for a hearing at Russellville, Arkansas. A prehearing conference was conducted on October 26, 2006, and a Prehearing Order was filed on that same day. A copy of the Prehearing Order was marked as Commission's Exhibit "1" and made a part of the record without objection.

The parties stipulated to the following at the full hearing:

- 1) The Employee/employer/carrier relationship existed on October 24, 2003, and at all other relevant times.
- 2) The claimant sustained a compensable thoracic back injury on October 24, 2003. (T. pg. 41, lines 11-23)

- 3) Respondents have accepted and paid a three percent (3%) permanent impairment rating and have paid some medical expenses.
- 4) Respondents controvert any permanent disability over the three percent (3%).

At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether claimant sustained a compensable lumbar back injury on October 24, 2003.
- 2) Additional medical benefits.
- 3) Whether claimant is entitled to temporary total disability benefits from October 24, 2003 through July 7, 2004.
- 4) Whether claimant is entitled to a nine percent (9%) permanent impairment rating.
- 5) Whether claimant is entitled to wage-loss disability benefits. (T. pg. 5, lines 1-6)
- 6) Whether claimant is entitled to additional compensation under A.C.A. §11-9-505.

At the full hearing claimant contended the following, in summary:

- 1) That she sustained a compensable thoracic and lumbar spine injury.
- 2) That as a result of her injuries she is entitled to all necessary medical benefits.

- 3) That as a result of her injuries she is entitled to temporary total disability from October 24, 2003 through July 7, 2004.
- 4) That due to her injuries she is entitled to permanent partial disability benefits equal to a nine percent (9%) whole body impairment rating.
- 5) That claimant is entitled to wage-loss disability benefits.
- 6) That she is entitled to benefits under A.C.A. §11-9-505 and attorney's fees.

Respondents contended the following at the full hearing, in summary:

- 1) Claimant has reached the end of her healing period.
- 2) The claimant has been assessed a three percent (3%) permanent impairment rating twice by Dr. Schlesinger, the last being on July 20, 2004, which stated she was at MMI and returned her to work without restrictions and did not anticipate further medical treatment.
- 3) Claimant is not entitled to any permanent disability benefits over the three percent (3%) rating respondents have already paid.
- 4) Pursuant to Dr. Schlesinger's July 20, 2004 report, any additional medical treatment after July 20, 2004, would be unreasonable and unnecessary and not related to the

compensable injury.

- 5) Respondents contended Dr. Raben's nine percent (9%) impairment rating is not valid because some of the rating includes claimant's lumbar spine.
- 6) Respondents contend claimant cannot prove a compensable lumbar injury that is supported by objective medical findings.
- 7) That claimant is not entitled to wage-loss disability benefits.
- 8) With regard to benefits under A.C.A. §11-9-505, respondents contend that after the accident of October 24, 2003, Ms. Loper remained at work until approximately January 23, 2006, when she was terminated for reasons unrelated to her compensable injury. Therefore, work was made available to the claimant for over two years after the accident

DISCUSSION

I. History.

The claimant, age 54, began working for the respondent as a receptionist. Later, the claimant worked as route salesman for the respondent. While performing her duties as a route salesman on October 24, 2003, the claimant was in a motor vehicle accident and sustained a stipulated thoracic spine injury. Claimant contends she also

sustained a compensable lumbar injury in the same motor vehicle accident.

Claimant testified she continued to work after the October 24, 2003 accident and didn't seek medical treatment until November 14, 2003. Following her initial visit with Dr. Kelly Meyer on November 14, 2003, the claimant testified she was off work for two or three weeks. Claimant testified she was paid her full salary the weeks that she missed work. (T. pg. 30, lines 1-4) The claimant testified that when she returned to work, she was put back to work in her receptionist position. The claimant continued to work as a receptionist until she was terminated on January 23, 2006. (T. pg. 29, lines 23-25 & pg. 30 line 1)

After the initial visit with Dr. Meyer, the claimant continued to treat with Drs., Meyer, Schlesinger, May and Raben. Claimant also underwent physical therapy with Seth Coulter and Phil Howard. On July 20, 2004, Dr. Schlesinger reported the claimant was at MMI, able to return to her regular duties and assessed a three percent (3%) whole body impairment. Dr. Schlesinger also reported on July 20, 2004, that he did not anticipate future medical expenses or treatment.

Following Dr. Schlesinger's July 20, 2004 release, claimant continued to treat with Drs. Raben and Meyer. On November 11, 2005, Dr. Raben assigned the claimant an eight to nine percent (8-9%) whole body impairment due to her thoracic and lumbar spine injuries. Dr. Raben opined claimant's lumbar impairment was due to "unoperable discs." (CIX-1, pg. 52) Dr. Raben also opined "no potential for rehab recommendations" and "may, however, require chronic pain management." (CIX-1, pg. 53).

Claimant testified she has only worked a short time since her termination

with respondents as a poll worker; but has subsequently had a stroke which causes her to be unable to work.

II. Adjudication.

A. Compensability of Lumbar Spine.

Claimant contends she sustained a compensable lumbar injury while in the respondents' employ on October 24, 2003. Respondents contend there is a lack of objective medical findings to support a lumbar injury. 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 failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her

lumbar spine while employed by the respondent.

At first glance of the medical records, it appears from Dr. Meyer's November 14, 2003, report that the claimant has a lumbar compression fracture. (CIX-1, pg. 1). Dr. Meyers' November 14, 2003 report says it "appears" from the x-rays "number one appears to have a compression fracture." (Emphasis added.) Dr. Meyers goes on to say "we will get a bone scan to confirm this." Three days later a bone scan was performed, and that report indicated no fracture at L-1. (CIX-1, pg. 3) Subsequently, an MRI of the lumbar spine was conducted on December 15, 2003, and stated as follows:

"Acute compression deformity of the T-12 vertebral body."

"No other acute fractures are seen." (CIX-1, pg. 8)

Dr. Ashley Burnham, radiologist, also reported no lumbar fractures in her January 26, 2004 report and only found a fracture at T-12. (CIX-1. pg. 10). Subsequently, Dr. Meyer saw the claimant again regarding her back and stated she had "degenerative osteoarthritis." (CIX-1, pg. 15). Again, on May 5, 2004, Dr. Meyer stated "she is still having problems with degenerative osteoarthritis." (CIX-1, pg. 22)

Even Dr. Meyer, in his July 19, 2004, report backed off his initial diagnosis of an L-1 fracture and went on to say "she is going to need muscle release and relief with degenerative osteoarthritis. (CIX-1, pg. 24) Dr. Meyer, in the July 19, 2004 report, only acknowledged an acute fracture at T-12. A second MRI was conducted on March 22, 2005, and Dr. Kerin reported the following impressions:

"Old compression fractures of T-11 and T-12 with

retropulsed bone midline and to the right along the posterior inferior margin of T-12." (CIX-1, pg. 32)

Based on these medical records contained in the record, I find the claimant has failed to prove by a preponderance of the evidence a compensable lumbar injury with medical evidence supported by objective findings. I recognize Dr. Raben's January 20, 2006 report wherein he found the claimant with derangement of unoperated discs in the lumbar spine. However, in light of the claimant's diagnosis of degenerative osteoarthritis, I find she cannot prove by a preponderance of the evidence that her lumbar spine problems arose out of her employment. There is no evidence on any acute injury to the claimant's lumbar spine, only degenerative conditions. In addition to failing to show objective medical evidence, claimant has failed to causally link her lumbar condition with the accident of October 24, 2003. Therefore, based on the reasons stated above, I find the claimant has failed to prove by a preponderance of the evidence a compensable lumbar back injury.

B. Additional Medical.

The respondents contended at the full hearing that they were responsible for all medical treatment contained in the record up to February 25, 2005; but that any medical treatment subsequent to February 25, 2005, was controverted. Claimant contends all medical treatment contained in the record after February 25, 2005, should be respondents' responsibility.

Based on the medical records, I find Dr. Schlesinger's report of July 20, 2004 to be given the most weight. I agree with Dr. Schlesinger's finding of MMI with regard to

the claimant's stipulated thoracic spine compensable injury. Dr. Schlesinger opined on July 20, 2004 that the claimant could return to "regular work" and cited no restrictions. (CIX-1, pg. 25) Dr. Schlesinger also noted he did not anticipate further medical treatment.

When reviewing the medical subsequent to July 20, 2004, I find it was not reasonably necessary or related to the claimant's compensable thoracic injury and therefore not the respondents' responsibility. Therefore, claimant's request for additional medical treatment after February 25, 2005 is denied.

C. Temporary Total Disability Benefits.

Claimant contends she is entitled to temporary total disability benefits for the period of October 24, 2003, through July 7, 2004.

The claimant's own testimony shows that an award of temporary total disability benefits is not warranted in this case.

Q. Did you miss any time of work because of your back injury?

A. Yes.

Q. And, approximately, when did you miss work.

A. Okay, I had the wreck and I worked for three weeks because I didn't know my back was broken, and then I was off for two or three weeks when my back was open - I had to stay home. And then I had to come back, or they told me I was going to lose my job so then I came

back.

Q. During that two or three-week period that you were gone, you were paid your full salary, is that right?

A. Yes.

Q. So you were paid your salary. When you came back, they put you on as a receptionist, is that right?

A. Yes sir.

Q. And you worked as a receptionist, which you said they added some duties filing some reports, up until your termination, isn't that right?

A. Yes sir.

Q. And if it hadn't been for this allegation of looking at the computer, you's still be working at Joe Paulk Company, wouldn't you?

A. Yes.

Q. The fact that you no longer work there has nothing to do with your back, does it.

A. No sir. (T. pg. 30, lines 2-23)

The claimant, by her own admission, never missed a paycheck during the period in which she is asking for temporary total disability benefits. Additionally, claimant has failed to prove she was unable to earn any meaningful wages during the

requested period of TTD. Based on the credible evidence, claimant has failed to prove entitlement to TTD benefits.

D. Permanent Benefits

Claimant contended entitlement to a nine percent (9%) permanent whole body impairment based on the rating given by Dr. Raben. Dr. Raben's rating included the claimant's low back which I have found not to be compensable. Therefore, I find Dr. Schlesinger's three percent (3%) rating to be accurate. Respondents have already paid the three percent (3%) rating and therefore claimant is entitled to no more permanent partial disability benefits.

Claimant also contends she is entitled to wage loss disability benefits.

Claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann.

§11-9-522 (Repl. 2002), which states in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

The wage-loss factor is the extent to which a compensable injury has effected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W. 3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Willis Shaw*

Loper/F400982

Express, Inc., 62 App 224, 970 S. W. 2d 316 (1998). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W. 3rd 769 (2000).

When reviewing all the factors outlined above, I find the claimant has failed to meet her burden of proving entitlement to wage-loss disability benefits.

The medical records show the claimant has been released to work with no restrictions by Dr. Schlesinger. The claimant never required surgery and was assigned a three percent (3%) permanent impairment. Based on the relevant factors when assessing wage loss, I find the claimant is entitled to zero wage-loss disability benefits. Any impediment claimant currently has to return to work is due to problems not associated with her compensable thoracic injury.

Q. And you worked as a receptionist, which you said they added some duties filing some reports, up until your termination, isn't that right?

A. Yes sir.

Q. And if it hadn't been for this allegation of looking at the computer, you's still be working at Joe Paulk Company, wouldn't you?

A. Yes.

Q. The fact that you no longer work there has nothing to do with your back, does it.

A. No sir.

Q. Now, you said you can't lift anything over 10 pounds. Have you reviewed the medical records before today?

A. Yes.

Q. Has any doctor since Dr. Schlesinger released you in June of 2004 - is there anything in the medical records that specifically says Nancy Loper has a lifting restriction of so many pounds.

A. No. (T. pg. 30, lines 2-23 & pg. 31, lines 1-6)

E. A.C.A. §11-9-505 Benefits.

Claimant contended entitlement to benefits under A.C.A. §11-9-505; however, she failed to articulate exactly which benefits under §11-9-505 she was wanting. The record shows that the claimant worked for the respondents for over two years after her stipulated compensable thoracic injury.

Clearly, the claimant was offered an opportunity to return to work for the respondents, and she took advantage of that opportunity for over two years. It cannot be said respondents refused to return the claimant to work. Based on the evidence presented, I find claimant has failed to prove by a preponderance of the evidence entitlement to benefits under A.C.A. §11-9-505.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A. §11-9-704.

- 1) The Arkansas Workers' Compensation has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that her lumbar back condition arose out of her employment with the respondents.
- 4) Claimant has failed to show objective medical evidence of a lumbar back injury.
- 5) Therefore, claimant has failed to prove by a preponderance of the evidence that she sustained a compensable lumbar back injury on October 24, 2003.
- 6) Claimant has failed to prove by a preponderance of the credible evidence that her medical treatment after 2/25/05, was related to her stipulated thoracic compensable injury, or that such treatment was

reasonably necessary. As such, claimant's request for additional medical benefits after 2/25/05 is denied.

- 7) Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits for the period of October 24, 2003 through July 7, 2004; and, therefore claimant's requested TTD is denied.
- 8) Claimant has failed to prove by a preponderance of the evidence any permanent partial impairment related to her compensable injury beyond the three percent (3%) whole body impairment by Dr. Schlesinger; and, therefore claimant's request for any additional five or six percent (5 - 6%) permanent whole body impairment is denied.
- 9) Claimant has failed to prove by a preponderance of the evidence entitlement to wage-loss disability benefits in excess of the three percent (3%) whole body impairment.
- 10) Claimant reached MMI for her stipulated thoracic injury on July 20, 2004.
- 11) Claimant has failed to prove by a preponderance of the

Loper/F400982

7 evidence entitlement to benefits pursuant to A.C.A. §11-9-505.

ORDER

_____ Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable lumbar injury while working for the respondents on October 24, 2003. Claimant has failed to prove entitlement to any of the benefits requested herein; therefore, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

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