

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600453 (11/05/04)

MELINDA MARTIN, EMPLOYEE	CLAIMANT
FOOD GIANT SUPERMARKET, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 12, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on January 10, 2007, at Osceola, Mississippi County, Arkansas.

Claimant represented by the HONORABLE GARLAND L. WATLINGTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On June 27, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. Additional stipulations entered by the parties included the claimant's compensation benefits rate of \$139.00, for temporary total/permanent partial disability and a

temporary total disability period from October 9, 2006, through January 31, 2007, in the event the claim is found to be compensable.

The testimony of Ms. Melinda Martin, the claimant; Ms. Tonia Wilson, and Ms. Kelly Gill, coupled with medical reports and other documents comprised the record in this claim.

DISCUSSION

Melinda Martin, the claimant, with a date of birth of August 5, 1967, commenced her employment with respondent-employer on July 9, 2004, as a clerical office personnel. During the pertinent time period, November 5, 2004, claimant earned \$6.50, per hour and regularly worked Friday, Saturday and Sunday, averaging 32 hours per week.

Claimant denies suffering a prior low back injury before November 5, 2004. The claimant does concede, however that she had health problems prior to November 5, 2004, attributable to her menstrual cycle which produced stomach and back pain along with leg cramps. Medical records of the claimant regarding visits to her primary care physician, which pre-dates the November 5, 2004, fall at work, noted complaints of low back pain. Claimant attributes the afore visits to her menstrual cycle.

The credible evidence in the record reflects that on November 5, 2004, while within the course and scope of her employment, claimant stepped in some water on the floor, slipped, and fell, landing flat on her back. The fall was witnessed by Ms. Tonia Wilson, who was working as a cashier at the time of the accident. The testimony of the claimant reflects that while she was embarrassed by the fall, noting that there were a number of customers in the store at the time, other than some slight pain to her right elbow, she did not think that she was injured.

Nevertheless, the claimant testified that she did report the fall to her supervisor, Ms. Kelly Gill,

on the date its occurrence.

The testimony of the claimant reflects that the following day, November 6, 2004, she hurt all over. Claimant noted that the pain that she experienced in her low back following the November 5, 2004, fall was different from that she which was associated with her monthly menstrual cycle. Claimant sought medical treatment under the care of her primary care physician, Dr. Jerry R. Biggerstaff, on November 15, 2004. The claimant's complaint was ultimately diagnosed by Dr. Biggerstaff as a lumbar strain, for which she was treated with medication.

The claimant again reported her November 5, 2004, slip and fall injury to supervisory personnel of respondent-employer following the November 24, 2004, lumbar strain diagnosis by Dr. Biggerstaff. The claimant continued to discharge her regular employment duties following the November 5, 2004, accident until she underwent low back surgery on October 9, 2006.

Due to complaints associated with her menstrual cycle, which pre-dated the November 5, 2004, accident, claimant did return to her gynecologist, Dr. John White, in November 2004. Claimant noted that Dr. White attributed her symptoms and back pain as gynecologically related. As a consequence of the afore, on in June 2005, claimant underwent a hysterectomy. Claimant was off work three to four weeks following the hysterectomy.

The testimony of the claimant reflects that once she recovered from the hysterectomy, she continued to have the pain in her lower back. Claimant sought treatment from a chiropractic physical who obtained x-rays of her back and identified a physical problem in her back. Claimant then pursued her claim through the Arkansas Workers' Compensation Commission. Claimant acknowledged that she completed the Form N. Claimant testified that the date reflected

on the form that her employer was notified should have been November 23, 2004, rather than 2005. (RX. #2).

Ms. Tonia Wilson testified that she has been employed by respondent-employer for four (4) years. Ms. Wilson was working as a cashier on November 5, 2004, and witnessed the claimant's slip in some water on the floor, and fall. Ms. Wilson's testimony reflects that the claimant landed on her "butt" in the fall.

Ms. Kelly Gill, the night manager of respondent-employer, has been employed by respondent since October 2001, and had worked at the store where the claimant fell since June 2004. Ms. Gill testified that she did not witness the claimant's accident of November 5, 2004, and that she did not have any conversation with the claimant on that day about the fall. As night manager on November 5, 2004, Ms. Gill was the claimant's supervisor. Ms. Gill testified that she first learned on the claimant's claim when she was questioned on November 23, 2004, by her supervisor, Mr. Danny Smith, regarding the claim.

Dr. Jerry R. Biggerstaff, the claimant's primary care physician, provided medical treatment to the claimant prior and subsequent to the November 5, 2004, at work. A history and summary of the claimant's care and treatment is reflected in a April 5, 2006, correspondence of Dr.

Biggerstaff:

. . . On 11/15/04, Mrs. Martin came in the clinic stating that she had slipped on a wet floor on 11/5/04 and had been suffering from low back pain since. Dr. John White had told her that the pain was gynecologically related, and she was scheduled for surgery approximately one month from this date for a hysterectomy, but did not have surgery until June of 2005. On 11/24/04, Mrs. Martin returned to the clinic still complaining of low back pain. On this date, I diagnosed her with a Lumbar Strain and treated her with a steroid injection, muscle relaxers and pain medicine to take while at home. Mrs. Martin was instructed to return to the clinic in two weeks,

but instead started seeing a chiropractor. Then on 10/14/05, Mrs. Martin returned to my office still complaining of low back pain. She was scheduled for a MRI of the Lumbar Spine, which showed that she had a bulging disc at L5-S1 with mild right disc protrusion laterally. This is associated with a moderate degree of right neural foramina narrowing. The MRI also showed a small posterior osteophyte at L5-S1, and evidence of DJD and DDD at L5-S1. Pt was then scheduled with neurosurgery, Dr. Crosby, , because she began having paresthesia in her right lower extremity. Mrs. Martin returned to the clinic on 12/2/05 and was seen by my associate, Dr. Hollis Banks-Giles. She still had complaints of low back pain. She stated that she was going to physical therapy but that the pain was worse with movement extended standing. She was treated with medication and instructed to continue with therapy.

Mrs. Martin's insurance then changed and she began seeing Dr. Gera at the Pain Management Clinic in Jonesboro. Dr. Gera was performing epidural steroid injections. Mrs. Martin is still continuing to see Dr. Gera on an as needed basis and still takes pain medication at home as needed for her low back pain.

It is my opinion that Mrs. Martin's back injury did arise from her slipping on the wet floor at Food Giant. Mrs. Martin has been very compliant in doing everything that I have prescribed and suggested for her in regards to her back pain. (CX. #1).

The medical records of NEA Clinic-Osceola reflects a progress note of November 29, 1999, relative to the claimant, wherein she relayed complaints of back pain for two weeks, however there was no evidence of HNP. (RX. #1, p. 1). A December 22, 2003, Progress Note of NEA Clinic regarding the claimant reflects a chief complaint of back pain for four days. The Progress Note does reflect that the claimant has a five month baby and recites post partum depression. (RX. #1, p. 3). The claimant was again seen at the clinic on April 23, 2004, for depression/anxiety, for which she was prescribed medication. On June 26, 2004, claimant was seen in follow-up to April 23, 2004, visit and relayed complaints of back pain and leg cramps. (RX. #1, p. 5). The claimant was not again seen at the NEA Clinic following the June 2004, visit

until November 15, 2004. In addition to registering complaints of back pain, legs cramp, claimant relayed a history of having slipped on a wet floor on November 5, 2004. (RX. #1, p. 6).

Each of the MRIs , of which there are two, was obtained subsequent to the November 5, 2004, accident of the claimant. The October 21, 2005, MRI of the claimant's lumbar spine was obtained at Great River Medical Center in Blytheville, pursuant to the directions of Dr. Biggerstaff. The MRI scan disclosed a L5-S1 bulging disc with mild right disc protrusion laterally, which was associated with moderate degree of right neural foramina narrowing. (RX. #1, p. 11). The afore findings were addressed in the April 5, 2006, summary of Dr. Biggerstaff. On June 12, 2006, claimant underwent another MRI scan relative to her lumbar spine pursuant to the directions of Dr. Glenn A. Crosby, II. (RX. #1, p. 14-15).

The medical reflects that the claimant was initially referred to Dr. Glenn A. Crosby, II, by Dr. Biggerstaff in November 2005. The November 28, 2005, clinic note relative to the claimant's visit of the same date reflects, in pertinent part:

Melinda Martin is here. She is referred by Dr. Biggerstaff for evaluation of back pain. She has had back pain now for two years. It seems to be worsening with time. It is mostly across her back and somewhat into the legs but particularly into the lower back. It is aggravated by bending and interestingly by the use of heat. It is relieved somewhat by change of position. She has had chiropractic treatment with intermittent relief. No real leg symptoms and no subjective motor or sensory loss. Most of her pain is across her back and worse on the right than the left. (RX. #1, p. 12).

Dr. Crosby had access to the claimant's October 21, 2005, MRI report at the time of the November 28, 2005, office visit. Dr. Crosby's impression of the claimant's complaint following his examination of her was that of symptomatic lumbar spondylosis at L5-S1. (RX. #1, p. 12).

The claimant was again seen by Dr. Crosby on June 26, 2006, following her June 12,

2006, MRI scan. The clinic note relative to the June 26, 2006, visit, reflects, in pertinent part:

Melinda Martin returns. Her MRI reveals spondylosis with neural foraminal stenosis at L5 to the right.

PLAN: I have offered her a right L5 decompressive foraminotomy. I have discussed the fact that this is not to help all of her back pain but just to help the right leg pain. I have discussed the fact that the risks involved include the risk of nerve damage, the risk of infection, . . . She understands the risks and benefits. There is some question about etiology. She indicates that this may be have actually been related to a work injury two years ago when she fell. Prior to that she had some back pain but no leg pain. She thinks it may have been related to that fall. There was some confusion in that she had a hysterectomy during this time which was supposedly suppose to help her back pain as well but was also for utering bleeding. At this point, regardless of the etiology, she has known foraminal stenosis at L5 to the right. I have offered her a right L5 decompressive foraminotomy. (RX. #1, p. 16).

On August 28, 2006, the claimant was seen by Dr. David L. Phillips, pursuant to a referral of Dr. Jeffrey Kornblum. The office consultation report of Dr. Phillips, reflects in pertinent part:

HPI: This is a 39 year old female with a 2 year history of low back pain who is now scheduled for anterior lumbar fusion by Dr. Jeffrey Kornblum. Due to the need for abdominal approach, she now present to general surgery for full discussion of procedure, risks, and benefits.

* * *

IMPRESSION: L5 S1 degenerative disc disease
Diskogenic back pain
HTN

PLAN: At this time, we agree to proceed with anterior approach for lumbar antibody fusion by Dr. Jeffrey Kornblum. . .(CX #1).

On or about October 9, 2006, claimant underwent the above mentioned surgical procedure under the directions of Dr. Kornblum. A January 4, 2006(7), Certificate to return to work authored by Dr. Kornblum, noted that with observation and adherence to restrictions of

lifting no more than 30 pounds and no repetitive bending, the claimant could return to work on February 1, 2007. (CX. #3).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 5, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On November 5, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$139.00, for temporary total/permanent partial disability.
4. On November 5, 2004, the claimant sustained an injury to her low back arising out of and in the course of her employment with respondents.
5. The claimant was temporarily totally disabled fro the period commencing October 9, 2006, and continuing until such time as she reach the end of her healing period or has been released and returned to appropriate work.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the claimant's injury of November 5, 2004. Pursuant to the provisions of Ark. Code Ann. §11-9-411 (a), respondents may claim credit for sums paid on behalf of the claimant by the health care provider.
7. The respondents have controverted this claim in its entirety.

CONCLUSIONS

The claimant asserts that as a result of a slip and fall at work while discharging her employment duties for respondent-employer on November 5, 2004, she suffered an injury to her low back with ultimately required surgery and resulted in a period of total incapacitation entitling her to corresponding medical and indemnity benefits. Respondents deny that the claimant sustained a compensable injury while within their employment and controvert the claim in its entirety.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. In order to be entitled to workers' compensation benefits for a specific incident injury, claimant has the burden of proving by a preponderance of the evidence that she suffered an accidental injury, identifiable by time and place, that arose out of and in the course of her employment, caused internal or external physical harm to her body and required medical services by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102 (4)(A) (i). *Kimbrell v. Arkansas Department of Health*, 66 Ark. App. 245, 989 S.W. 2d 570 (1999). Claimant must establish by a preponderance of the evidence each of the requirements for establishing the compensability of the claim. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The evidence preponderates that the claimant suffered a fall at work on November 5, 2004, within the course and scope of her employment. While the claimant had complained of back and leg cramps prior to November 5, 2004, the evidence disclosed that the majority of the prior symptoms were the product of her menstrual cycle. Claimant had last seen her primary care physician relative to the afore in April 2004, and in follow-up in June 2004. The credible

evidence reflects that following the November 5, 2004, fall at work in which the claimant landed on her buttock/back, the intensity of her back pain increased.

Diagnostic studies performed subsequent to the November 5, 2004, fall of the claimant disclosed the presence of a bulging disc at L5-S1, in addition to evidence of degenerative joint disease and degenerative disc disease. It is noteworthy that following the claimant's November 5, 2004, accident, when seen by Dr. Jerry Biggerstaff, her primary care physician, on November 24, 2004, she was treated with a steroid injection, muscle relaxers and pain medication for her diagnosed lumbar strain, attributable to the November 5, 2004, fall. The claimant's co-worker, who observed the November 5, 2004, accident noted that the claimant landed on her "butt" in the fall.

While it is clear that the claimant's degenerative disc disease and degenerative joint disease pre-existed the November 5, 2004, accidental fall at work, the same does not render the treatment resulting from an aggravation of those conditions non-compensable. An aggravation is a new injury resulting from an independent incident. *Maverick Transportation v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). The aggravation of a pre-existing, non-compensable condition by a compensable injury is itself compensable. *Huble v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). Finally, the aggravation of a pre-existing condition by a specific work-related incident need not be the major cause of a claimant's disability in order to be compensable. *Farmland Insurance Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

The claimant has sustained her burden of proof by a preponderance of the credible evidence that she suffered an injury to her lumbar spine on November 5, 2004, within the course and scope of her employment which required medical treatment and rendered her totally

incapacitated from engaging in gainful employment commencing October 9, 2006, and continuing through the end of her healing period or until such time as she is released to return to suitable employment compatible with her medical restriction relative to the injury. Respondents have controverted this claim in its entirety.

The evidence dose reflects that the claimant's medical bills for treatment relative to the November 5, 2004, compensable lumbar spine injury, were filed with her group health care provider and paid by same. Pursuant to Ark. Code Ann. §11-9-411, respondents may claim credit for such payments.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly rate of \$139.00, for the period commencing October 9, 2006, and continuing through the end of her healing period or until such time as she returns to work within her medical restriction, as a result of her compensable injury of November 5, 2004. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonably necessary medical, hospital, nursing and other apparatus expenses growing out of the claimant compensable injury of November 5, 2004, to include medical related travel. Pursuant to Ark. Code Ann. §11-9-411 (a), respondents may claim credit for sums heretofore paid toward the afore obligation.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE