

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613854

TARA SCOTT	CLAIMANT
GRAPHIC PACKAGING	RESPONDENT
LIBERTY INSURANCE INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 20, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent represented by MICHAEL RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 30, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 29, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 24, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$449.00 for temporary total disability and \$337.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury on September 24, 2006.
2. Related medical.
3. Temporary total disability from September 26, 2006, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that on or about September 4, 2006, she sustained an injury to her back while performing her job duties. The claimant contends that she is entitled to temporary total disability benefits from September 26, 2006, until a date yet to be determined and reasonably necessary medical treatment. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant was not injured on September 24, 2006. Her condition is not due to an accidental injury on the job. She did not report the accident or give notice to her employer. She is receiving STD payments for which the respondent will request a credit.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that she had been working for the respondent for approximately three years prior to September 24, 2006. The claimant testified that on September 24, 2006, and for some weeks prior to that date she had been a machine operator for the respondent. The claimant testified that she would load the machine with a cartridge, get it perfected to run, and then change the loads. The claimant testified that there is a lot of lifting required with this job and that she had to lift pallets and stack pallets. The claimant explained that the cartridges which she would lift would weigh over one hundred pounds and the pallets were approximately fifty pounds. The claimant agreed that her job required lots of bending, stooping and twisting.

The claimant testified that on September 24, 2006, she was showing another operator a problem inside the machine and as she bent over she felt a sharp pain shoot down her leg. The claimant testified that the pain started at that moment but she did not report this event to anyone in human resources that day. The claimant testified that when she got off at the end of her shift she began her four days off and while she was off she went to the doctor on September 26, 2006. The claimant testified that when she saw the doctor she reported to him what happened to her at work. The claimant testified that the doctor took x-rays and gave her muscle relaxers. The claimant testified that she has not been back to work for anyone since September 26, 2006. The claimant testified that she has been under active medical care since

September 26, 2006, and has been physically unable to work since that time. The claimant testified that she has undergone surgery performed by Dr. Capocelli and that she is still under his care. The claimant testified that her back and right leg still hurt, that she cannot set for very long, she cannot lift objects that weigh more than fifteen pounds, she cannot bend over, pull, reach, or lift above her head.

The claimant testified that prior to September 24, 2006, she was physically able to do the work required by the respondent. The claimant testified that six years ago she suffered a pulled muscle in her back but that this resolved and she was able to return to work without problems within a day or two of that event. The claimant agreed that for the past three to three and a half years she has been able to perform her heavy repetitive work for the respondent.

On cross examination, the claimant testified that she is twenty-eight years old, had finished high school, and had gone to a little bit of college. The claimant testified that besides jobs requiring manual labor she has also been a cashier and a receptionist. The claimant testified that she has joint custody of her three children who are ten, nine, and six. The claimant testified that prior to September 2006 she never had anything like an MRI, mylogram, or x-rays on her back. The claimant testified that at the time of her accident she was on a letter crew which required her to be four days on and four days off. The claimant agreed that at the time she was seen by the doctor she was also

having cervical and neck problems. The claimant was asked if she injured her neck on the Saturday before her accident on Sunday and the claimant responded, "Not that I know of." The claimant explained that on the day she was injured she was lifting pallets, lifting cartridges that went into the machine, and pulling the loads out when another load would come in which required pulling the spears out. The claimant was asked if this was heavy labor and the claimant responded, "They said you have to pass a hundred-pound weight test to do it." The claimant was asked how her pain developed whether it came on over time or instantaneously. The claimant testified that she felt a sharp pain at once and that at that point she quit working. The claimant was asked if her work activities of lifting and pulling produced the pain in her low back and the claimant responded, "Not the sharp pain, no." The claimant was again asked if her injury was a gradual thing or a specific thing and the claimant responded, "I can't say for sure, I just know I felt the sharp pain at one point, and I never had that before." The claimant testified that after she was seen by the doctor she called and reported to Mike Stockton that she had injured her back at work. The claimant testified that Mr. Stockton is in human resources with the respondent. The claimant testified that when she made her report to Mr. Stockton she told him when it happened, what night, about the time, and what she was doing. The claimant agreed that at the time of her injury she was bending over at the waist with nothing in her hand and pointing at something when she experienced the sharp pain in her back. The claimant

agreed that she had bent over like that before during that day and had bent over like that on days before the event. The claimant testified that she filed for assistance under her group health insurance but reported to them that it was work related. The claimant testified that she also filed for short term disability but did not indicate that her problems were work related. The claimant testified that for the first three months she got paid through short term disability for a forty-hour week but was not reimbursed for any overtime or incentive pay. The claimant agreed that this benefit was around \$600 a week. The claimant testified that after three months she then began receiving two thirds of her pay but does not remember if it was over \$449 per week or not because her insurance was being taken out as well as her 401 benefits. The claimant testified that she received these benefits until about the end of February 2007. The claimant testified that she has not filled out her forms for long term disability. The claimant testified that Dr. Gibbons is the first doctor she saw after her injury. The claimant testified that Dr. Gibbons and her personal care physician, Dr. Frisbie, referred her to Dr. Capocelli. The claimant testified that after she saw Dr. Gibbons initially she then was seen by her primary care physician, Dr. Frisbie, and that Dr. Frisbie kept her off work until her MRI results were returned. The claimant testified that subsequent to her surgery she has continued to experience pain and that she is very restricted on what she can do. The claimant testified that after her surgery her back is better but her leg is not. The

claimant testified that she applied for social security approximately three months prior to the date of this hearing but has not to date received a decision. The claimant testified that she does not feel like she is capable of returning to work either for the respondent or at any of the jobs she had prior to working for the respondent. The claimant testified that the respondent fired her in June or July because her FMLA had expired and since that time her insurance has been canceled because she was not able to pay in on it. The claimant testified that she did not initially file for workers' compensation because the respondent told her that she had a pulled muscle before, therefore it was a preexisting injury and was not work related. The claimant was asked who told her this information and the claimant responded, "Mike Stockton."

On redirect examination, the claimant testified that on September 24, 2006, when she bent over at her machine she was pointing out a problem to an incoming operator. The claimant agreed that this was something that she felt the incoming operator needed to know in order to operate the machine properly. The claimant also agreed that she was performing an employment service at the time she bent over. The claimant testified that when she went to see Dr. Gibbons on September 26, 2006, it was for the pain she was experiencing in her low back and leg. The claimant indicated that when she was first seen by a doctor she gave him a history of having sharp back pain on Sunday while working for the respondent. The claimant further agreed that her job involves lifting and pulling. The claimant testified that at the time she

went to the doctor initially she believed that the respondents would deny her claim because of her past experience with them. The claimant testified that just before she bent over her machine she had been lifting pallets, had set up her machine, and had been pulling all night long. The claimant testified that her injury occurred close to the end of her shift, noting again that her shift is a twelve-hour period.

On recross examination, the claimant testified that when she bent over and felt the sharp pain in her back she did not scream or holler out. The claimant testified that she might have told the person with her that she hurt her back but she does not remember. The claimant testified that it was at the end of her twelve hour shift and she was ready to go home and lay down. The claimant was asked if she told anyone that she just hurt herself and the claimant responded, "No, I didn't tell my co-worker."

The medical evidence sets forth that the claimant was seen at Sparks' Preferred South by Dr. Gibbons on September 26, 2006, with complaints of low back pain. The doctor notes that the claimant reports sharp back pain Sunday while working for the respondent. It is noted that the claimant had cervical spasms on Saturday and was lifting and pulling. Dr. Gibbons notes that the claimant has lumbar spasms at L3 on the right. The doctor prescribed medications. The claimant returned to see Dr. Gibbons on October 2, 2006, where it is noted that she is still complaining of having spasms and constant pain that radiates to her buttock and into her right leg. Upon examination, Dr. Gibbons notes that the claimant

has lumbar spasm as well as pain for which he recommended that the claimant be off work, undergo an MRI, and medications were prescribed. The claimant underwent an MRI of her lumbar spine on October 12, 2006, which revealed that she had a right para central disc herniation at the L5-S1 level with encroachment on the right nerve root at this level. The claimant was seen by Dr. Anthony Capocelli on December 6, 2006, where it is noted in her history that she reports pain that came on somewhat insidiously with some bending activities. The claimant reports pain in her low back radiating into her right leg down to her ankle and foot as well as symptoms in her left leg down to about her knee. Dr. Capocelli notes that her MRI reveals a small right para central disc herniation and possibly impingement of the S1 nerve root on the right side. After examination, Dr. Capocelli writes that the claimant is a candidate for surgical intervention versus lumbar epidural steroid injections. Dr. Capocelli operated on the claimant performing an L5-S1 laminectomy with discectomy utilizing the Metrix system on January 23, 2007. On May 15, 2007, Dr. Capocelli indicates by a form that if the history contained in Dr. Gibbons' September 26, 2006, office note regarding the claimant is correct it is within a reasonable degree of medical certainty that the claimant's job activities at the respondent's business caused the need for her surgery on January 23, 2007. Dr. Capocelli also positively responded to the question that if the claimant had the immediate onset of pain in her back after bending at work and within a few days was found to have lumbar spasms it is likely that

the occurrence of her lumbar spasms are causally related to the bending activity. Dr. Capocelli again writes by letter on June 4, 2007, that the claimant is still under his care and is being managed for some ongoing difficulty with her right leg. Dr. Capocelli indicates that the claimant has not reached maximum medical improvement and anticipates it being an additional six to twelve weeks before she reaches that point. Dr. Capocelli indicates that there will be a permanent impairment rating at the time she reaches maximum medical improvement which will be determined at that time.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable low back injury while working for the respondent on September 24, 2006. The claimant has testified to performing heavy manual labor for the respondent which required lifting, bending, twisting, and at the time of her injury she was bending over a machine pointing out a problem to another operator when she felt a sharp pain in her low back. The claimant testified that she did not immediately report her problem to the respondent but after being seen by Dr. Gibbons on September 26, 2006, she called the respondent and reported to Mike Stockton that she had injured her back at work, what date she injured her back, approximately what time she hurt herself, and exactly what she was doing. The claimant had testified that Mr. Stockton who works in human resources for the respondent told her that she had a pre-existing condition and, therefore, it would not be considered a workers'

compensation claim. The medical records have set forth that the claimant on her first examination by Dr. Gibbons had low back spasms and her MRI revealed a herniated disc for which Dr. Capocelli eventually operated on her to hopefully correct. Dr. Capocelli has clearly set forth in his response to the questions asked him that it is his opinion that the claimant's work related activities with the respondent are the major cause of her need for medical treatment. It is further indicated by Dr. Capocelli that it was the claimant's work activities which occasioned her lumbar spasms. On October 2, 2006, it is indicated by Dr. Gibbons that he filled out FMLA papers for the claimant and she was to be off work. The claimant has indicated that she has been unable to work since first seen by Dr. Gibbons on September 26, 2006, and Dr. Capocelli in his letter has indicated that she has not reached maximum medical improvement as of June 4, 2007, and anticipated her healing period to extend another six to twelve weeks. Therefore the claimant should be entitled to temporary total disability from October 2, 2006, to a date to be determined which will be the date her healing period ends. The claimant has testified that she received short term disability benefits from the respondent and the respondent will be entitled to a credit for the period of time the claimant received the short term benefits. The respondents shall also pay for all reasonable and necessary medical treatment for this claimant's compensable low back injury subsequent to September 26, 2006.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 24, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$449.00 for temporary total disability and \$337.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that she sustained a low back injury while working for the respondent. See discussion above.

5. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable low back injury subsequent to September 26, 2006.

6. The claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability from October, 2, 2006, to a date to be determined. See discussion above.

7. The respondents will be entitled to a credit for the short term disability benefits this claimant received for the period of time she was paid this benefit.

8. The respondents have controverted this claim in its entirety.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable low back injury while working for the respondent on September 24, 2006.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable low back injury subsequent to September 26, 2006.

The respondents should pay to the claimant temporary total disability benefits from October 2, 2006, to a date to be determined. The respondents, however, will be entitled to take a credit for the short term benefits paid to this claimant for the period of time that these benefits were paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE