

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705379

TASHIA SUMMERS	CLAIMANT
CANTEEN VENDING SERVICES	RESPONDENT
AIG CLAIM SERVICES INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 10, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by JEREMY SWEARINGEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 23, 2007, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on July 17, 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 January 15, 2007, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her low back on January 15, 2007.

4. Medical expenses have been paid.

5. Claimant reached maximum medical improvement on May 15, 2007.

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

1. Permanent impairment.
2. Wage loss over any impairment.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that the employee/employer relationship existed on or about January 15, 2007. On that date, claimant sustained a compensable injury while in the scope and course of her employment. The claim was admitted as compensable. The claimant has reached maximum medical improvement. The claimant is no longer employed by respondent and is unable to secure employment making the same or similar wages and, therefore is entitled to wage loss disability. The claimant is entitled to a controverted attorney's fee.

In regard to the foregoing issues the respondents contend that there is no objective and measurable basis, nor is there any evidence of permanent injury, for which any permanent impairment would be appropriate. Respondents contend that the claimant's 5 percent BAW impairment rating from Dr. Knox is invalid and was not assessed using the A.M.A. Guides, Forth Edition. Respondents contend that since the claimant has no valid basis for the assessment of permanent impairment, she is not entitled to wage loss. Respondents further and alternatively contend that the claimant has otherwise sustained no wage loss from her January 15,

2007, low back strain. Respondents reserve the right to supplement or amend this pre-hearing questionnaire response at a later date.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The parties jointly submitted earning information for the claimant marked Joint Exhibit No. 1. The respondents submitted medical documentation marked Respondents' Exhibit No. 1, non medical documentation marked Respondents' Exhibit No. 2, and the deposition of Mr. John Dixon marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The parties have stipulated that the claimant sustained a compensable injury on January 15, 2007.

The claimant testified that she is currently thirty-six years old and completed high school. The claimant testified that she has had no college hours or any type of vocational training. The claimant testified that currently she is employed at The Zone explaining that this was a fitness center in Berryville. The claimant testified that her duties included signing people up for gym membership and tanning as well as stocking protein bars, supplements and drinks in and out of the cooler. The claimant testified that after she graduated from high school she worked cleaning motel rooms, then worked on the line at Cargill trimming turkey breasts, worked at Tyson doing essentially the same duties and that she has done some gardening and landscape work. The claimant explained that her gardening and landscaping work included

digging up dirt and rocks, planting plants, putting mulch out, loading and unloading mulch in a truck, and watering. The claimant testified that she never did operate any type of heavy equipment. The claimant testified that these particular jobs paid her minimum wage.

The claimant testified that when she was working for the respondent she was earning a guaranteed weekly salary of \$450. The claimant explained that if her commissions were higher than the \$450 she was paid the higher amount. The claimant agreed that in the fifty-two weeks she worked prior to her injury she earned \$25,099.53. The claimant testified that while working for the respondent her duties included filling the vending machines, pop machines, snack machines, sandwich machines, making orders, doing weekly inventory, cleaning the machines inside and out, and pulling the money from the machines, bagging it and keeping it until it was picked up. The claimant testified that she had the Berryville route and her only customer was Tyson. The claimant testified that there were forty-one machines at that plant and to keep the machines serviced and cleaned was a full time job.

The claimant testified that following her compensable injury her primary treating physician was Dr. Spurgin who is a general practitioner. The claimant testified that her treatment program consisted of an MRI, x-rays, pain and inflammation medications, as well as shots. The claimant testified that this treatment program helped her temporarily. The claimant explained that her injury affected her low back which caused her back to hurt, her hip to

hurt and burn, and if she sat for very long her right leg would go to sleep and her right foot would tingle. The claimant testified that the most difficult part of her job with the respondent was carrying all of the pop. The claimant explained that she would use a dolly but pulling it up and down the stairs was hard. The claimant testified that also loading and unloading her truck was a problem. The claimant testified that at some point she was given a five-pound lifting restriction and not to do pushing or pulling or overhead work. The claimant agreed that the respondent did provide light duty work for her and that she was never off work long enough to draw workers' compensation benefits. The claimant testified that all of her medical was paid through workers' compensation insurance.

The claimant testified that at some point she was referred to Dr. Luke Knox, a neurosurgeon, and he did some physical assessments and took x-rays but ultimately released her to the care of Dr. Spurgin. The claimant testified that Dr. Spurgin indicated that he had nothing else he could do for her and he also released her from his care. The claimant testified that the only restriction which Dr. Spurgin gave her was to be aware of what her body could or could not do because she knew better than anyone what she could do or what she could not do. The claimant testified that she was terminated by the respondent for insubordination. The claimant testified that after she was terminated she experienced a gallbladder problem but once this resolved she began drawing unemployment benefits. The claimant testified that her work with

her current employer also includes her working to get a training certificate so she can become a personal trainer. The claimant explained that this position would allow her to do assessments on people and training them to lose weight and help them with nutrition. The claimant testified that in order to get this certification she must complete six essay questions provided by the International Sports Science Association. The claimant agreed that her career goal is to become a certified fitness trainer. The claimant testified that as a result of her compensable injury she still has problems when she sits too long because her hip will start hurting and burning. The claimant testified that the muscles in her hips are really weak so she cannot sit or stand for very long. The claimant testified that when her hip begins to hurt sometimes it will go all the way down into her knee. The claimant testified that she also has problems going up and down stairs because this will cause her hip to start hurting. The claimant testified that the only medications she takes is over the counter Aleve.

On cross examination, the claimant testified that she began working for the Zone around the first of October. The claimant testified that she is a part time employee working approximately twenty hours a week and she earns \$7.50 per hour. The claimant stated that she does not get any kind of commissions from signing up new members at the gym. The claimant stated that it is her plan to be a personal trainer at the Zone Fitness Center. When asked, the claimant explained that the tests which she must take which

involves the six essay questions comes off of the internet and that she has a book which she can use while answering these questions. The claimant was asked about her work at the poultry plants and she testified that she was a trimmer earning minimum wage and when she cleaned rooms at the hotel she earned minimum wage. The claimant testified that she also worked at Levi Strauss sewing blue jeans and agreed that this was not a physically strenuous job. The claimant agreed that at the Levi Strauss job she could sit or stand as needed and take a break when needed. The claimant agreed that this was a minimum wage job also. The claimant testified that when she left Levi Strauss she began working for Tyson as a trimmer and then she began to work for Eureka Springs Botanical Gardening where she stayed for three and a half years earning \$7.25 per hour. The claimant testified that her next job was working for the respondent. The claimant was then asked a series of questions about her medical treatment following her compensable injury. The claimant testified that it was her understanding that the MRI on her back was normal. The claimant testified that when she was referred to Dr. Knox he discussed with her her diagnosis which it was her understanding was a soft tissue injury that would heal over time. The claimant agreed that light duty restrictions which were placed on her expired in May or early June 2007 and the only restriction currently is just that she knows what is good for her and what she can or cannot do. The claimant agreed that after her termination by the respondent she underwent some health issues with her gall bladder but once she recovered from her surgery she began

cleaning apartments but this was on an intermittent basis based on when she was called. The claimant testified that she was offered a job by the respondent's competitor but had to turn it down because she did not feel she was physically able to do the loading, unloading, and pulling the dollies of pop up and down the stairs. The claimant testified that her doctors, Dr. Knox and Dr. Spurgin, told her that if she kept doing that kind of work she would be crippled by the time she was fifty. The claimant agreed that if she had not been terminated by the respondent could she have continued working for as long as she felt comfortable. The claimant agreed that if she had taken the job from the respondent's competitor it would have paid her approximately same she was earning with the respondent. The claimant agreed that once she gets her certificate for personal training it is possible for her to earn as much as \$25 to \$30 an hour. The claimant testified that when she was working for the respondent she was earning approximately \$427 per week gross pay. The claimant indicated that she was hopeful that after she gets her personal trainer certificate she has an expectation of earning more than she did while working for the respondent.

Mr. John William Dixon testified by way of deposition on October 15, 2007. Mr. Dixon testified that currently he is working for McBride Distributing but just prior to that he was working for the respondent as a customer service manager. Mr. Dixon stated that he had worked for the respondent for approximately three and a half years. This witness testified that he was acquainted with

the claimant, noting that she was a route driver. Mr. Dixon testified that he had previously been a route driver and this job's duties required filling machines, snack machines, pop machines, coffee, ice cream machines, collect the money, and to insure that it is safely held to be picked up. Mr. Dixon testified that a route driver is also responsible for inventory, overages, shortages, losses, spillage, and breakage. Mr. Dixon also testified that the respondent did not want to have duplicated products in their machines, out dated products, products that are damaged, smashed, or look bad. Mr. Dixon testified that the claimant was one of the employees which he supervised and prior to her work related injury he had written her up twice for lack of effort. Mr. Dixon testified that this was based on what he had previously described as having duplicate products in the machines, out dated products in the machines, and machines that were not being cleaned and cared for. Mr. Dixon testified that following the claimant's compensable injury she was placed on light duty having a five-pound weight lifting restriction. This witness testified that for two days the claimant did not show up for work and on the third day he called her and informed her that she was put on light duty and they had light duty available and she needed to report to work. Mr. Dixon testified that the claimant worked for a period of time under these light duty restrictions. Mr. Dixon testified that he received information from the cafeteria supervisor at the Berryville Tyson plant that the claimant was talking derogatory about the respondent to the Tyson executives.

This witness testified that he contacted his district manager and was told to terminate the claimant immediately. Mr. Dixon testified that according to the respondent's handbook an employee can be terminated for making disparaging remarks to a customer about the respondent. Mr. Dixon was asked if the decision to terminate the claimant had anything to do with the fact that she had a work related injury and the witness responded, "No." Mr. Dixon testified that when he called the claimant in he told her that due to the fact that she had made disparaging comments detrimental to the company she was being released of her duties. Mr. Dixon testified that the claimant told him that the only thing that she had said was the truth.

The medical records set forth that the claimant was seen by Dr. Randall Spurgin on January 15, 2007, with complaints of stomach and right hip pain. Dr. Spurgin notes that she reports that both of these problems have been existing for some time and blames them on the work she does for the respondent. Dr. Spurgin, after examination, assesses the claimant with stomach and back pain likely job related and recommended that she change her job or certainly the way she does her job. The doctor prescribed medications. On January 22, 2007, the claimant reports to Dr. Spurgin that she is not having problems with her stomach but that her back still hurts. Upon examination, Dr. Spurgin notes that she has some right lumbar tenderness and spasm and assesses her with a lumbar strain. Dr. Spurgin recommended physical therapy and placed the claimant on light duty or off work if light duty is not

available. The doctor adjusted her medications. The medical records set forth that the claimant began physical therapy on January 24, 2007, as well as continued to be seen by Dr. Spurgin through February 28, 2007, when he recommended that she undergo an MRI. The claimant underwent an MRI of her lumbar spine on March 1, 2007, which was normal. The claimant continued to be seen by Dr. Spurgin for her low back pain as well as a rash problem and on March 16, 2007, Dr. Spurgin referred her to an orthopedist. Dr. Luke Knox writes on May 15, 2007, that he saw the claimant on March 10, 2007, for her complaints of back pain. Dr. Knox notes that the claimant reports that her back pain radiates into her hips but she has no leg pain but some generalized right foot numbness with extended sitting. Dr. Knox notes that the claimant has been through the gambit of conservative measures including physical therapy, injections, and medications. Dr. Knox writes that the claimant underwent an MRI that was normal and he agrees with Dr. Page's assessment. After examination, Dr. Knox notes that it is his opinion that the claimant has suffered a significant soft tissue abnormality of her lumbar sacral spine and recommended that she not consider any surgery options. Dr. Knox did encourage the claimant to consider pursuing a different type of employment, noting that it was his opinion that she would not tolerate the heavy lifting duties required at her current job. Dr. Knox assessed the claimant with a 5 percent whole body impairment rating based on the AMA Guides, Page 404, Table 15-2, II, Section C under the sub heading of lumbar. Dr. Knox did recommend that the

claimant not pursue any injection therapies since these have not been beneficial to her in the past. Dr. Knox writes that he suspects that the claimant's symptoms would resolve with time. The claimant was seen by Dr. Spurgin on May 15, 2007, where it is noted that her exam is unchanged from the previous examinations. Dr. Spurgin recommended medications as well as additional physical therapy. Dr. Spurgin writes at the bottom of a letter sent to him by Kathleen Leonard, a workers' compensation claims manager, dated May 17, 2007, that at the visit with the claimant on May 15, 2007, he was not aware that Dr. Knox advised the claimant to close out her workers' comp claim, noting further that there is no need for further physical therapy. There is a medical and return to work status form dated June 13, 2007, where it is noted that Dr. Spurgin released the patient on May 17, 2007. A prescription sheet dated June 25, 2007, signed by Dr. Spurgin sets forth that the claimant is cleared to work. Dr. Spurgin writes in his office note of June 25, 2007, that the claimant reports that her back is feeling better since she has been released by her employer. Dr. Spurgin writes that the claimant reports that there is an opening at the Tyson Green Forest plant and she has worked in this plant before. The claimant reports that since she has been off from her job she has been doing a lot of painting, over head work, mowing, and weed eating and says that her back is much better. Dr. Spurgin notes that the claimant reports that if she can get the Tyson job she will take it. Dr. Spurgin concludes that the claimant seems to be doing better and saw no reason why she could not take the job.

After a complete review of this entire matter, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any permanent partial impairment as assessed by Dr. Luke Knox. Arkansas law requires that any assessment of permanent partial disability should be based on the AMA Guides, Forth Edition, and clearly Dr. Knox has not used this guide. It is further noted that the claimant's MRI was negative and although back spasms were noted early in her medical treatment this problem does not seem to be ongoing. Therefore, I find no basis to assess a permanent impairment rating. I further find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss. The claimant has not sustained any permanent partial impairment, therefore, wage loss would be inappropriate.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On January 15, 2007, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to her low back on January 15, 2007.
4. Medical expenses have been paid.
5. Claimant reached maximum medical improvement on May 15, 2007.

6. The claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial impairment as assessed by Dr. Knox. See discussion above.

7. The claimant has failed to prove by a preponderance of the evidence that she is entitled to wage loss over any impairment. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that she sustained any permanent partial impairment as a result of her work related injury.

Since no permanent impairment has been assessed in this matter, wage loss would be inappropriate.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE