

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F713039

LISA DENNING, Employee	CLAIMANT
WAL-MART ASSOCIATES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED JULY 23, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On July 2, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 10, 2008, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed among the parties on December 5, 2007.
3. The respondent has controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's back on December 5, 2007.
2. Medical.

An additional issue to be litigated is the respondent's motion for costs based upon

claimant's failure to appear at two previously scheduled hearings.

The claimant contends that on December 5, 2007 she was on a ladder getting a box and while trying to catch a falling box she injured her back. She contends she is entitled to medical benefits as a result thereof.

The respondents contend the claimant did not sustain an injury arising out of and in the course of her employment as defined by the Arkansas Workers' Compensation Act.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 10, 2008, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while employed by respondent on December 5, 2007.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

4. Claimant has failed to show good cause for her failure to attend two previously scheduled hearings. Claimant is liable for costs incurred due to her failure to attend previously scheduled hearings. Respondent is entitled to costs in the amount of one hour travel time. This amount is to be deducted from any future indemnity benefits to which claimant may be entitled.

FACTUAL BACKGROUND

_____ The claimant is a 44-year-old woman who began working in the respondent's bakery in August 2007. Claimant testified that on December 5, 2007 she was standing on a ladder in a freezer stocking shelves and as she was reaching for a box at the back of a shelf another box began to fall. As claimant reached for the box to keep it from falling she twisted and almost fell off the ladder. Claimant caught herself, but had pain in the low back which radiated down her left leg. Claimant reported this incident to her assistant manager and completed an accident report.

The next day, December 6, claimant informed her supervisors that her pain was not going away and requested medical treatment. Claimant completed more paperwork, was taken for a drug screen, and an appointment was made for her to be evaluated by Dr. Berestnev.

Dr. Berestnev diagnosed claimant's condition as low back pain and left L5-S1 radiculopathy. Dr. Berestnev prescribed medications, exercises, and restrictions of no lifting more than 20 pounds and the avoidance of climbing ladders. X-rays taken by Dr. Berestnev revealed no fractures or dislocations.

Following this visit with Dr. Berestnev the claimant returned to work for respondent in the bakery and eventually she was placed in a job stocking shelves. Before her next scheduled visit with Dr. Berestnev the claimant sought medical treatment from the emergency room at Northwest Medical Center in Bentonville. Claimant was diagnosed as suffering from a lumbosacral back strain and was prescribed medications. Claimant subsequently returned to Dr. Berestnev on December 13, 2007, at which time he indicated that claimant had some pain out of proportion to her clinical findings. Dr. Berestnev ordered physical therapy and placed restrictions on claimant of no prolonged walking or repetitive bending.

Claimant again sought treatment at the emergency room at Northwest Medical

Center in Bentonville on December 24, 2007. She was again prescribed medication.

On December 27, 2007, Dr. Berestnev completed a form indicating that he did not observe swelling in the claimant's back at the time of his examination. Instead, he indicated that he based his diagnosis and the prescription for medication on the patient's history and complaints.

On January 3, 2008, claimant was evaluated by Dr. Mathur for complaints of low back pain. Dr. Mathur diagnosed claimant's condition as acute lumbago and ordered an MRI scan which claimant has not undergone. Claimant's last medical treatment occurred on April 24, 2008 when she received medication at the emergency room in Siloam Springs.

Claimant has filed this claim contending that she suffered a compensable injury to her low back while working for respondent on December 5, 2007. She requests payment for medical treatment provided for her compensable injury.

ADJUDICATION

_____ Claimant contends that she suffered a compensable injury to her low back when she twisted her back while attempting to keep a box from falling in a freezer while working for respondent on December 5, 2007. Claimant's claim is for an injury caused by a specific incident identifiable by time and place of occurrence. 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 met her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

First, I find that claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. As previously noted, the claimant testified that she was standing on a ladder in a freezer stocking shelves on December 5, 2007. When a box began to fall from the shelf, claimant reached for the box to keep it from falling and twisted which resulted in pain in her low back which radiated down her left leg. Claimant reported this injury to her supervisors and was sent by the respondent for medical treatment the next day. The medical records reflect a history of injury consistent with claimant's testimony.

Claimant further testified that she had no low back problems before beginning work for the respondent. Claimant did acknowledge having been in a motor vehicle accident some 10 years ago which resulted in medical treatment. However, claimant testified that she did not have any problems with her low back as a result of that accident. Medical records relating to that motor vehicle accident in 1998 were introduced into evidence and they contain reference to various complaints including thoracic pain, but there are no complaints of lumbar or low back pain.

Based upon the claimant's testimony which I find to be credible as well as the remaining evidence previously discussed, I find that claimant has met her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment with respondent and that the injury was caused by a specific incident

identifiable by time and place of occurrence.

I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal or external physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings establishing an injury. Here, respondent has introduced a form completed by Dr. Berestnev dated December 27, 2007, indicating that he did not observe swelling in the claimant's lumbar spine at the time of his examination. Instead, he indicates that his diagnosis and the medication prescription was based upon the patient's history and her complaints of pain. In other words, there were no objective findings. However, objective findings in the form of muscle spasms were observed by the emergency room personnel. Claimant sought medical treatment at the emergency room from Northwest Medical Center in Bentonville on December 9, 2007. Claimant was diagnosed with a lumbosacral back strain and was given medications including Flexeril for muscle spasms. Indeed, the after care sheet indicates that this medication is "used to relieve muscle spasm."

Likewise, at the time of claimant's visit at the emergency room on December 24, 2007, she was again prescribed Flexeril for muscle spasms. The after care instruction sheet from that visit indicates: "You have some muscle spasm and inflammation in the low back due to the strain."

Thus, while Dr. Berestnev did not note objective findings, the physicians at the emergency room on December 9 and again on December 24 did observe muscle spasms and prescribed medication for that condition. Muscle spasms are considered an objective finding sufficient to satisfy a finding of compensability. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997).

Finally, all of claimant's treating physicians, including Dr. Berestnev who was chosen

by the respondent are of the opinion that claimant needed medical treatment for her compensable injury. This medical evidence satisfies the requirement that the injury caused internal or external physical harm to claimant's body which required medical services.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her lumbar spine on December 5, 2007 while employed by the respondent.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

The final issue involves respondent's motion for costs. Hearings were previously set in this case for March 12, 2008 and April 3, 2008. Notice of those hearings was sent to claimant by certified mail and she acknowledged that she was aware of these scheduled hearings. With respect to the first hearing, claimant testified that she was unable to attend because she was attending the funeral of her grandmother in Kansas. However, claimant admitted that she had notice of the funeral some two to three days before the scheduled hearing and funeral. Claimant acknowledged that she did not make any effort to contact her attorney or the Commission prior to the scheduled hearing.

With respect to the second hearing, claimant testified that she was at her grandmother's apartment in Kansas cleaning out clothing and personal items. Claimant again indicated that she had advance knowledge that she would be in Kansas and made no effort to contact her attorney or the Commission with regard to the scheduled hearing.

I find that claimant has failed to show good cause as to why she did not attend the hearing or inform the Commission or her attorney that she would be unable to do so. Certainly, the attendance of the funeral was justified. However, claimant made no effort to contact her attorney or the Commission to indicate that a postponement of the hearing was necessary. Claimant's failure to notify her attorney or the Commission that she would be unable to attend the second hearing is even more troubling. Claimant had advance

knowledge that she was going to Kansas to help clean out her grandmother's apartment, but yet made no effort to inform this Commission nor her attorney that she would not be at the scheduled hearing.

In short, I find that claimant has failed to show good cause as to why she did not attend the hearings or to at least contact her attorney or the Commission with regard to a postponement. Therefore, I find that respondent's motion for costs for claimant's failure should be granted. I find that claimant should pay the respondent's attorney fee of 30 minutes travel time for each hearing for a total of one hour.

Although the respondent's motion for costs has been awarded, claimant has not been awarded any indemnity benefits. In the event claimant is eventually awarded or paid any indemnity benefits in this claim, the costs awarded in this opinion are to be deducted from those indemnity benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on December 5, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Finally, respondent's motion for costs is granted. The costs to be awarded involve one hour travel

time for the respondent's attorney.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$287.75.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE