

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F706524

REBECCA DUNCAN, Employee

CLAIMANT

ELLIS PLUMBING, INC., Uninsured Employer

RESPONDENT

OPINION FILED JANUARY 22, 2008

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

Claimant represented by MARK FRYAUF, Attorney, Rogers, Arkansas.

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

STATEMENT OF THE CASE

On December 20, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 3, 2007, 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 between the parties on May 25, 2007.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle her to compensation at the rate of \$406.00 per week for temporary total disability benefits.

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

1. Compensability of injury to claimant's neck, shoulders, and back.
2. Temporary total disability from May 26, 2007 through a date yet to be determined.

3. Medical.
4. Attorney fee.

The claimant contends she suffered a compensable injury when she was involved in a motor vehicle accident. She requests temporary total disability from May 26, 2007 through a date yet to be determined, medical, and an attorney fee.

The respondent contends a motor vehicle accident did occur, but questions the severity of any injury.

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 witnesses and to observe their 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 October 3, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned sufficient wages to entitle her to compensation at the rate of \$406.00 per week for total disability benefits is also hereby accepted as fact.
3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical spine/upper back/left shoulder area.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Payment is to be made according to the Commission's medical fee schedule.
5. Claimant is entitled to temporary total disability benefits beginning May 26, 2007 and continuing through a date yet to be determined.

6. Claimant's attorney is entitled to the maximum attorney fee on all unpaid temporary total disability benefits.

FACTUAL BACKGROUND

The claimant is a 48-year-old woman who has worked for the respondent full time as a plumber since 1999. On May 25, 2007 the claimant was riding as a passenger in the respondent's company truck with Steve Ellis, the owner of respondent. As Ellis stopped in traffic their vehicle was struck from behind by a Waste Management truck. Claimant testified that she felt her neck pop as a result of this collision. After the police came to the accident scene she and Ellis proceeded to the job site where Ellis performed the plumbing work while she waited in the truck. After this job was completed Ellis took claimant to the emergency room where claimant was complaining of neck pain. X-rays were taken and claimant was diagnosed as suffering from a cervical neck strain. Claimant was given medication and advised to receive follow-up treatment.

Claimant was referred by Dr. Garrett to the Northwest Arkansas Neurosurgery Clinic where she was evaluated by Dr. Routsong. Dr. Routsong diagnosed claimant's condition as a cervical and upper thoracic strain with somatic dysfunction. Dr. Routsong prescribed medication and also ordered an MRI scan of the claimant's cervical spine. According to Dr. Routsong's report of July 2, 2007, the MRI scan was interpreted as normal with no sign of nerve or spinal cord compression. Dr. Routsong continued claimant's medication and ordered physical therapy. Claimant underwent a regimen of physical therapy at the Holly Street Physical Therapy in Siloam Springs until sometime in September 2007. Claimant returned to Dr. Routsong on September 5, 2007 at which time he referred claimant to Dr. Ennis, pain specialist, for an evaluation. Claimant was subsequently evaluated by Dr. Ennis and given a cervical epidural steroid injection.

Claimant has filed this claim contending that she suffered a compensable injury as

a result of the accident while working for the respondent. She seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____The claimant contends that she suffered a compensable injury as the result of a motor vehicle accident which occurred while she was working for respondent on May 25, 2007. Claimant's claim is for a specific injury 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. Here, there is no question that claimant was riding as a passenger in the respondent's

company truck with Steve Ellis, the owner of the respondent, on the way to a job site when their vehicle was struck from behind by a Waste Management truck. Claimant testified that she felt her neck pop as a result of this collision. According to Ellis' testimony, the claimant did make complaints of neck pain within an hour after the accident and he took claimant to the emergency room. At the emergency room claimant was diagnosed as suffering from a cervical neck strain. The emergency room records indicate that muscle spasm was noted and claimant was given medication for that spasm. Following the evaluation at the emergency room, claimant eventually came under the care of Dr. Routsong who has diagnosed claimant's condition as a cervical and upper thoracic strain. The medical reports of Routsong as well as the remaining medical records relate claimant's condition to the accident of May 25, 2007.

Based upon the foregoing evidence, I find that claimant has proven 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.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services or resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. Claimant has been diagnosed as suffering from a cervical and upper thoracic strain which also involves her left shoulder area. As a result of that diagnosis, Dr. Routsong and claimant's treating physicians have recommended various modalities of treatment including medication, physical therapy, a TENS unit, and epidural steroid injections. Significantly, the initial emergency room report contains a notation of muscle spasm and indicates that claimant was given medication for muscle spasm. Likewise, Dr. Routsong's medical reports indicate that muscle spasm was present and he prescribed Flexoril for those spasms. Muscle spasms are considered an objective medical

findings. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999).

Based upon the foregoing evidence, I find that claimant has proven by a preponderance of the evidence that her injury caused internal physical harm to the body which required medical services or resulted in disability and that she has offered medical evidence supported by objective findings.

Accordingly, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical/thoracic/left shoulder area while employed by respondent on May 25, 2007.

Having found that claimant suffered a compensable injury, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Medical treatment is to be paid according to the Commission's medical fee schedule.

The next issue for consideration involves claimant's request for temporary total disability benefits. The claimant's injury is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find that claimant has met her burden of proving by a preponderance of the evidence that she has remained within her healing period and that she has suffered a total incapacity to earn wages beginning May 26, 2007 and continuing through a date yet to be determined. First, the medical evidence indicates that claimant remains in need of medical treatment and there is no indication that any of claimant's treating physicians have opined that she has reached maximum medical improvement. Most recently, claimant underwent epidural steroid injections provided by Dr. Ennis. Claimant testified at the hearing that she has a follow-up appointment with Dr. Routsong on January 7, 2008. Based upon this evidence,

I find that claimant has remained within her healing period.

I also find that claimant has suffered a total incapacity to earn wages. In his report dated June 20, 2007, Dr. Routsong indicated that claimant worked as a plumber and due to her spinal pain she could not perform those activities. In a report dated July 2, 2007, Dr. Routsong indicated: "She is not a candidate to return to work, as she works as a plumber." Finally, in a report dated September 5, 2007, Dr. Routsong stated: "She is unable to do any type of work, let alone her work in plumbing."

Based upon the opinion of Dr. Routsong, which I find to be credible and entitled to great weight, I find that claimant has suffered a total incapacity to earn wages beginning May 26, 2007 and continuing through a date yet to be determined.

Accordingly, based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning May 26, 2007 and continuing through a date yet to be determined.

In finding that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury and in the awardance of compensation benefits, I am aware that respondent alleges that claimant may have made her condition worse as a result of a second motor vehicle accident which occurred on August 15, 2007. A review of the testimony indicates that there is some obvious discrepancy over the circumstances surrounding this motor vehicle accident since it occurred while claimant was riding as a passenger in a vehicle with her husband and they were involved in an accident with Steve Ellis. Respondent notes that physical therapy notes prior to this accident indicates that claimant is making slow but steady progress in her recovery. Respondent also notes that the medical report from Dr. Routsong dated September 5, 2007 indicates that claimant's condition has worsened recently. Accordingly, it is respondent's contention that the second motor vehicle accident either caused or has contributed to claimant's condition. However, claimant testified that she did not suffer any additional injury as a

result of this motor vehicle accident and there is no medical evidence attributing claimant's condition or a worsening of that condition to the accident. To find that claimant's condition was caused or even worsened by this accident would require speculation and conjecture. Accordingly, while I have considered this testimony and evidence, I do not find that the second motor vehicle accident caused or contributed to claimant's current condition.

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), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her cervical/thoracic spine and left shoulder area while employed by respondent on May 25, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning May 26, 2007 and continuing through a date yet to be determined. Claimant's attorney is entitled to a fee on all unpaid temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by

the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$713.50.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE