

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706415

SHARON M. ERVIN

CLAIMANT

**DOLLAR GENERAL STORE
(SELF-INSURED)**

RESPONDENT EMPLOYER NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

ORDER AND OPINION FILED JUNE 18, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on May 15, 2008. A prehearing conference was held on March 18, 2008 and a prehearing order was filed the same date. A copy of the prehearing order was introduced into evidence as Commission Exhibit No. 1 without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on May 27, 2007.
2. The compensation rate is based on an average weekly wage of \$550.
3. Respondents controverted the claim in February 2008.

The claimant contends that she is entitled to payment of temporary total disability

benefits beginning July 9, 2007 and continuing to a date to be determined. The claimant further contends that she is entitled to medical treatment, both physical and psychological, and controverted attorney's fees.

Respondents contend the claimant is not entitled to additional benefits for her May 27, 2007, claim. Respondents contend that light duty was provided the claimant and she quit on July 8, 2007. Respondents contend the claimant received unemployment benefits from July 21, 2007 to November 28, 2007 and if benefits are awarded, respondents request an offset for such benefits. Respondents further contend if temporary total disability benefits are awarded, the claimant is limited to 26 weeks pursuant to Ark. Code Ann. §11-9-113 for the psychological injury. Respondents also contend that additional medical treatment for both the physical and psychological injuries is not reasonable and necessary and related to the May 27, 2007, claim. Respondents contend any medical treatment the claimant may need is related to her pre-existing condition.

ISSUES TO BE LITIGATED

1. Additional medical.
2. Temporary total disability benefits from July 9, 2007, to a date to be determined.
3. Attorney's fees.
4. Offset for unemployment.

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 Ark. Code Ann.

§11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on May 27, 2007.
2. The compensation rate is based on an average weekly wage of \$550.
3. Respondents controverted the claim in February 2008.
4. The claimant has proven by a preponderance of the evidence that additional medical treatment for her physical and psychological condition is reasonable and necessary and related to the compensable injury.
5. Respondents are responsible for all the reasonable and necessary medical treatment for the physical and psychological problems.
6. The claimant has proven that she is entitled to temporary total disability and temporary partial disability benefits from July 9, 2007, and continuing up to 26 weeks for her psychological injury.
7. Respondents are entitled to an offset for unemployment benefits the claimant was paid during this same time period.
8. The claimant is entitled to the difference in temporary total disability/temporary partial disability benefits and unemployment benefits that were paid.
9. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to

be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 53 years old, was a store manager for the respondent employer. On May 27, 2007, the claimant was working with stocking and, as she was discussing some work with two other employees, two guys with a gun came in to rob the store.

The claimant described what happened:

I went to run. Jenny was standing there, so I couldn't get passed her. So, when I turned around, he stuck a gun in my face. And he pushed me, and I went back like this and landed on my elbows. (T., p. 12, lines 11-14.)

The claimant testified that she believed only one man had a gun and she told the employees to give them the money. The claimant testified further about the incident:

So Jenny started towards the back, and the one with the gun was walking behind her. The other guy came and grabbed me by the neck and pulled me up off the floor and was just dragging me. Then he spotted the other girl; he spotted Lisa. And he just went crazy. (T., p. 12, lines 23-25; p. 12, lines 1-2.)

The claimant testified that she worked 50 to 70 hours per week and made \$550 per week.

According to the claimant, after the robbery incident she was having muscle spasms in her back starting at the base of her neck and running down into the middle of her back into her buttocks. The claimant also described cramping while she sleeps and depression. She also testified that when her back hurt, she had heaviness in her legs.

The claimant initially went to Southwest Hospital emergency room for treatment and then saw her family doctor and finally was sent to Dr. Kenneth Rosenzweig and

went through about three sessions of therapy.

According to the claimant, after the armed robbery she was working in the store when one of the gunmen came into the store. The claimant testified that she could not go to the bathroom at work for fear because the gunman took one of the employees there and she was afraid to work at nights and to be by herself in the store. According to the claimant, she was let go after she worked a double shift from 8:00 a.m. to 9:00 p.m. one day. Because of the long hours, the claimant testified that she was in pain and probably took too much pain medicine, as she was throwing up and she called in sick the following day. One of the supervisors told the claimant she was not eligible for FMLA and she would put her on personal leave. The claimant tried getting back in touch with the employer but never got any calls back from the employer.

The claimant was treating with Dr. Rosenzweig and he referred her for psychological counseling with Dr. A. J. Zolten. She finally saw Dr. Zolten in August 2007 and began some counseling in September 2007 and began receiving some prescription medication. The claimant continued counseling through December 2007 and respondents controverted the claim. Once the respondents stopped paying for counseling, the claimant contacted the Victims of Violent Crime Division for financial assistance. Dr. Rosenzweig gave the claimant three sample bottles of Cymbalta for back and neck spasms and this was in January 2008.

The claimant verified that in October 2007, she was continuing to be tearful, losing weight and no appetite, having hair loss, having flashbacks, being fearful of black people even though she was black, fearful of leaving home, paranoid and suspicious, having physical pain and having angry outbursts and having lack of clarity. The

claimant testified that she continued to have these same problems and the spasms today. The spasms may last for two to three days and she takes over-the-counter medication. The claimant has moved in with her son and daughter-in-law because of no income and fear.

The claimant verified that she received unemployment benefits starting in July 2007 and running through November 2007 and she made job employment contacts by telephone. The claimant verified that she settled a workers' compensation claim against Denny's in 1992 for \$7,000 with the documents stating "acute anxiety secondary to an adult situation or reaction caused by alleged harassment by coworkers and her superiors." T., p. 48. The claimant verified that she was working for Stax in 1993 and was working when a robbery took place and she had some psychological trauma at that time. She treated with Dr. Hope Gibson, a psychiatrist from 1993 through 1997.

Randy Moore, district manager for the respondent employer, testified that the claimant simply stopped coming to work after May 27, 2007, and the claimant received her regular paycheck. Mr. Moore was not the manager who spoke with the claimant when the claimant called in sick. Another manager, Gina, handled that interaction and the claimant testified that Gina put her on sick leave. The claimant's testimony was not disputed.

ADJUDICATION

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. The employee has

the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (March 16, 2005). What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Id.* The Commission has the authority to accept or reject medical opinions and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

It is undisputed that the claimant was involved in an attempted robbery by gun point where she was dragged on the floor. The claimant initially sought emergency room treatment on the day of the incident at Southwest Hospital emergency room and was diagnosed with myofascial strain at trapezoid with right elbow abrasion and prescribed a pain medication and a muscle relaxer. The claimant was referred to Dr. Kenneth Rosenzweig by the case manager and she treated with Dr. Rosenzweig for a time and she was also referred by the case manager to Dr. Zolten, a psychologist for care. The first consultation for the psychological problems appears to be August 7, 2007. Dr. Zolten recommended medication and intensive counseling, starting with 10 weeks of treatment.

The last medical report in evidence is from Dr. Rosenzweig, dated January 17, 2008, and the claimant had returned to see him for low back pain. She described an episode of muscle spasms in her back that debilitated her for a week. Dr. Rosenzweig prescribed a different medication to try and listed her problems as: 1) spinal enthesopathy with chronic pain and 2) Psychologic/psychiatric issues. There is a patient history form from Dr. Rosenzweig's office dated February 11, 2008, but it

appears the claimant did not see Dr. Rosenzweig and it may be because the insurance company controverted the claim. The counselor from St. Vincent Senior Health Clinic also saw the claimant on January 10, 2008, and recommended further treatment by a psychiatrist and a physician for her medical concerns.

Further, Dr. Zolten opined on September 26, 2007, that the claimant “has experienced a legitimate new trauma, meets the psychiatric criteria for Post Traumatic Stress Disorder (PTSD), and that this has exacerbated her long-standing depression.” Resp. Exh. No. 1, p. 172. Dr. Zolten went further to say the claimant needed medication and individual counseling. There simply are no medical reports that indicate that the claimant has reached maximum medical improvement and that no further treatment is needed for either the neck and back spasms or for her psychological problems. It is undisputed that the claimant had previous psychological problems related to another workers’ compensation incident and that the medical documents the claimant had some previous shoulder, back and neck issues. However, the medical documentation following the May 27, 2007, incident relates the claimant’s current physical and psychological problems to the work incident at the current respondent employer. The preponderance of the evidence provides that the additional medical treatment the claimant is requesting is both reasonable and necessary and related to the May 27, 2007, work incident. The Court has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant’s compensable injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004), citing *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Respondents are responsible for the

reasonable and necessary medical treatment that is recommended both for her neck and back pain and for her psychological treatment.

In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant presented credible testimony about her involvement with her employer following the May 27, 2007, robbery and assault. I found her testimony to be credible and undisputed that she called in sick on July 8, 2007, and that the manager, Gina, placed her on “personal leave.” The claimant credibly testified about working a double shift and about taking too much pain medication that evening making her unavailable for work the following day. I found the claimant to be credible when she described her fear of working alone, working at night, and even going to areas in the store where the robbers had been. On July 19, 2007, Dr. Rosenzweig opined that the claimant could return to work from a physical standpoint, but her anxiety and fear are the limiting points. On October 4, 2007, Dr. Rosenzweig again felt the claimant was at maximum medical improvement for her physical injuries; however, he again opined it was critical that she address the psychologic/psychiatric issues of her injury in order to get those stabilized.

Respondents contend that light-duty work was offered to the claimant. Randall Moore, district manager for the employer, testified that he was off work when the robbery occurred on May 27, 2007; however, he did return to work in a week or so. Mr. Moore was not the manager who placed the claimant on “personal leave” and he testified that he was not aware of what her medical records recommended. Mr. Moore

testified that he made contact with the claimant after she was not working and attempted to schedule her; however, she was unable to come in at that time. I gave the claimant's testimony more weight than Mr. Moore's testimony, since he was not familiar with the direction given by another manager and he was unfamiliar with the claimant's medical recommendations.

I find the claimant is entitled to temporary total disability benefits up to 26 weeks pursuant to Ark. Code Ann. §11-9-113 beginning from the date claimant was placed on "personal leave" approximately July 9, 2007, and continuing. Respondents are entitled to an offset for unemployment benefits received under Ark. Code Ann. §11-9-506. Claimant would be entitled to the difference in her temporary total disability benefits and the amount of unemployment she received on a weekly basis. The claimant also attempted to substitute teach some while she has been off work. The claimant would be entitled to temporary partial disability benefits for those weeks when she substituted as a teacher for a day. Ark. Code Ann. §11-9-520.

ORDER

The claimant has proven by a preponderance of the evidence that the additional medical treatment for her physical and psychological conditions is reasonable and necessary and related to the compensable injury. Respondents are responsible for all reasonable and necessary medical treatment for the physical and psychological problems. The claimant has proven that she is entitled to temporary total disability and temporary partial disability benefits from July 9, 2007, and continuing up to 26 weeks. Respondents are entitled to an offset for unemployment benefits the claimant was paid during this same time period. The claimant is entitled to the difference in temporary

total disability/temporary partial disability benefits and unemployment benefits that were paid.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**