

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F605329 & F605330

DYEANN LARRY, EMPLOYEE

CLAIMANT

**RED CARPET EMPLOYMENT AGENCY,
EMPLOYER**

RESPONDENT

**TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED JANUARY 18, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Miller County, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

The respondents were represented by Mr. Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 24, 2007, the above captioned claim came on for a hearing in Texarkana, Miller County, Arkansas. A prehearing conference was conducted on September 10, 2007, and a Prehearing Order was filed on that same date. A copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record without objection, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all

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relevant times, including April 9, 2006.

- 3) The parties agree the applicable compensation rates in this claim are \$206.00 per week for temporary total disability and \$155.00 per week for permanent partial disability.
- 4) That the Claim F605330 concerns claimant's alleged lower extremity injury which occurred prior to April 9, 2006, and that the issues regarding that injury are reserved.
- 5) All issues related to permanent impairment are reserved regarding this claim, F605329.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether the claimant sustained a compensable specific incident back injury on or about April 9, 2006.
- 2) If compensability is overcome, it must be determined if claimant is entitled to temporary total disability benefits from April 10, 2006, to a date yet to be determined, all associated medical expenses, and attorney's fees.

The claimant contended at the full hearing that she was earning \$7.73 an hour and was working 40 hours a week which would give her a TTD rate of \$206.00 and a PPD rate of \$155.00. Claimant also contended that she sustained a compensable injury to her back on or about April 9, 2006. The claimant contends she should be awarded TTD benefits from April 9, 2006, to a date to be determined, that all associated medical treatment she has sustained to date has been reasonable, necessary, and related to her compensable injuries; and that she is in need of additional medical treatment and respondents should be ordered to pay for that treatment. Claimant also

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contends that respondents should be required to pay her attorney's fees as provided by law.

Respondents contended at the full hearing that the claimant did not sustain a compensable injury while in their employ and that no benefits have been paid on either claim.

DISCUSSION

The claimant actually worked for the Red Carpet Employment Agency, a temporary employment service. Through her association with Red Carpet, the claimant was assigned to work at Coleman Cable. The claimant began working for Coleman Cable sometime in March of 2006. The claimant testified that she would work a twelve hour shift for Coleman Cable, that began at 7:00 p.m. until 7:00 a.m. the next morning. The claimant testified that she worked as a machine operator at Coleman Cable, and testified as follows regarding her job duties as a machine operator:

Q And during the three weeks to a month that you were there, what did they have you doing?

A They had me working as a machine operator which dealt with – I think it was like seven different machines. You use a lift to lift up the large, heavy, round spools of wire and put them inside a machine. I had to get them off – pull them off the pallet and roll them over there to the machine, and then I'd put the two big ones inside of the machine and we would have to maneuver them, use my right arm and my left arm to maneuver the heavy spools down off in there because they goes on the

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little slot.

Q And so the big picture of what you are doing everyday, if I can kind of get an understanding here, is there are these big spools –

A Of wire.

Q And you are putting the empty spools in the machine so that the –

A No, they are full of wire. They are full of wire, both of them are full of wire. I got to put the big spools inside the machine and what the machine does is it winds the wires together and it goes through the machine at the other end where there is a smaller spool, and it combines it together on the other end, on the other spool.

Q So you have two separate wires and through the machine it runs them together and makes them into one?

A Right, at the other end of the machine.

Q And at the other end of the machine does it then roll it up onto another spool?

A Yes, it does.

Q Okay. And you've got seven different machines. Is that because there are different size spools in the different machines or why are there different machines?

A That's how many they use for that particular job, you know, because all them spools are the same that goes in there.

Q The same kind of machines, just seven of them?

A Same kind, yes.

Q Okay. So seven machines, they are all doing the same thing?

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A Yes, sir.

Q Are you responsible for operating all seven machines?

A Yes, sir.

(T. pp. 13-14, lines 2-25 & 1-24).

The claimant testified that on the night of April 9, 2006, while performing her job duty of putting spools in the machine, that one of the spools got stuck. The claimant testified that while she was pushing and pulling on the spool trying to get it unstuck, that she injured her back. The claimant testified as follows regarding the incident on April 9, 2006, which she alleges caused her compensable back injury:

Q Okay. So as you are pushing and pulling on it, trying to get it unstuck with your right hand, what happened?

A Well, as I was doing that I was pulling up on it to get it unstuck and as I did that I heard a pop in my back and it was very painful so I stood up for a minute to get some relief from it and stuff, and then I sat down for a second. Then, when the pain kind of eased a little bit, I started trying to do it again.

Q Okay. And at what point in time, where did you feel this pain?

A In the lower part of my back, on the right side.

(T. pp. 17-18, lines 24-25 & 1-11).

The claimant testified that shortly after her back popped while performing her job duties, that her supervisor, Mr. Harvey King, approached her. The claimant testified that at that time she told Mr. Harvey King that she had hurt her back on the

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machine. The claimant testified that Mr. Harvey King told her to just take it easy and he would check back on her later. Mr. Harvey King testified at the full hearing that he was the claimant's supervisor on April 9, 2006, and that at that time the claimant never expressed any problems with her back to him. The claimant testified that she never saw Mr. Harvey King after she told him about her back on April 9, 2006.

The claimant testified that she finished her shift that began on April 9, 2006, the best she could after her back popped and then went home and went to bed. The claimant testified the morning after she got home she awoke and called Red Carpet Employment Agency and talked with a lady named "Misty." The claimant testified that she reported the incident to "Misty" the morning of April 10, 2006, and that "Misty" told the claimant that she would get with her supervisor and call the claimant back. The claimant testified that "Misty" never called back that day and the next day the claimant contacted "Misty" again. The claimant testified that "Misty" told her that she had to be terminated because she did not go through the proper reporting procedures for her injury. The claimant testified that she had told "Misty" in her conversations that she needed to see a doctor, but that "Misty" never advised her of any forms to fill out or procedures to go through to get treated. The claimant testified that following her second conversation with "Misty", that her and her friend, Greg Berry, physically went to Red Carpet Employment Agency's office and requested

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medical treatment. The claimant testified that “Misty” advised her and Greg that Ms. Larry had been terminated and that there was nothing that could be done.

Shortly thereafter the claimant went to Wadley Hospital due to problems she was having with her back. The emergency room records from Wadley Regional Medical Center show that the claimant sought treatment on April 15, 2006, with complaints of low back pain radiating to her right groin. The April 15, 2006, records from Wadley Regional Medical Center also state that the claimant alleged that she had injured herself approximately five days earlier while working for Coleman Cable handling heavy spools. The claimant was released from Wadley Regional Medical Center with medication and instructions to follow up with Dr. Stussy.

The medical records show the claimant went back to Wadley Regional Medical Center on May 1, 2006, complaining of low back pain. Once again the claimant stated to Wadley Regional Medical Center that her problems began when she was lifting at work. An X-ray was taken on May 1, 2006, at Wadley Regional Medical Center that showed a normal examination of the lumbar spine. Once again the claimant was released with medications and instructed to return if her condition worsened. The claimant returned to Wadley Regional Medical Center on May 18, 2006, in a wheelchair again complaining of back pain. The claimant was instructed at that time to get an MRI of her lumbar spine.

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On June 5, 2006, an MRI of the lumbar spine was conducted which showed a annular tear at L4-5 and a broad based disc protrusion at L4-5. (Cl. Ex. 1, pg. 24).

The claimant began treating with a chiropractor, Marc Hagebusch, who recommended a referral to an orthopedist.

The claimant continued to treat with Wadley Regional Medical Center and chiropractor Marc Hagebusch up through November 29, 2006, when she saw Dr. Soeller. Dr. Soeller's report states in part "MRI was reviewed. It shows that she has a tear of the annulus, but there's no evidence of nerve impingement or other significant abnormality which should cause her symptoms. Assessment: leg and back pain of unknown etiology." (Cl. Ex. 1, pp. 71a-71b). The claimant then saw an orthopedist, Dr. Chris Alkire, on February 22, 2007. Dr. Alkire reported that the claimant exhibited an extreme amount of exaggeration of symptoms and stated that her MRI findings do not come close to matching the amount of pain that she described subjectively. Dr. Alkire admitted there was an abnormal disc at L4-5, but found that it was due to a degenerative, age related type reason rather than as a result of her alleged on the job injury. Dr. Alkire did recommend the claimant receive nerve conduction studies for both lower extremities to see if there were any radicular symptoms; but, did state that he did not believe her disc abnormality at L4-5 was causally related to her alleged April 9, 2006, compensable event.

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Claimant then went to see a neurosurgeon by the name of Dr. Fred Contreras on June 26, 2007. Dr. Contreras had a completely opposite opinion regarding causation than that of Dr. Alkire. In Dr. Contreras' June 26, 2007, report, he specifically states "It should be noted that it is my opinion, based upon a reasonable degree of medical probability, that her current symptom complex is related to her work injury." (Cl. Ex. 1, pp. 71e-71f). Dr. Contreras opined that the claimant's MRI showed that she had a disc herniation at L4-5 and recommended a lumbar myelogram/CT to further sort out the anatomy.

The claimant is requesting that her back condition be deemed compensable as a result of her April 9, 2006, work related incident, that she be awarded TTD benefits from April 10, 2006, to a date yet to be determined, all associated medical treatment, and attorney's fees.

The initial issue for consideration involves claimant's contention that she suffered a compensable injury to her back as a result of a work incident on April 9, 2006. 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

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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 the claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back on April 9, 2006.

First, I note that the claimant testified that she had no prior problems with her back before the incident of April 9, 2006. Further, there are no medical records contained in the record that show any prior problems with the claimant's back. Respondents have argued that it cannot be shown that anything actually happened on April 9, 2006, because the claimant failed to notify her supervisor at Coleman Cable. The claimant's testimony and the testimony from Mr. Harvey King are in direct conflict regarding any statements that claimant made to him about her back on April 9, 2006. In determining who to believe regarding what took place on April 9, 2006, it is also necessary to look at the claimant's actions immediately thereafter.

The claimant testifies that as soon as she got up the morning of April 10, 2006,

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she contacted Red Carpet Employment Agency to notify them of her back problems. The testimony from Dewayne Butler, the owner of Red Carpet Employment Agency, shows that “Misty” entered the words “sore back” into the Red Carpet Employment Agency’s computer records regarding Ms. Larry sometime very soon after the alleged compensable event. The claimant testified that she told “Misty” that she needed treatment for her back; however, Mr. Butler testified that according to “Misty,” the claimant actually called in to quit her employment with Coleman Cable. “Misty” did not testify at the full hearing, and I give more weight to Ms. Larry’s direct testimony rather than Mr. Butler’s hearsay testimony regarding what he heard or did not hear “Misty” say.

It is without a doubt that there is medical evidence supported by objective findings that the claimant sustained a back injury. The MRI from the Texas MRI Center contained at Claimant’s Exhibit 1, page 24, shows that the claimant has a broad based disc protrusion at L4-5 with annular tear. Those MRI findings have lead Dr. Contreras, a neurosurgeon, to recommend a lumbar myelogram/CT to further evaluate the claimant’s condition.

Respondents also argue that it cannot be shown that the claimant’s back injury arose out of and in the course of her employment based upon the opinion from Dr. Chris Alkire contained herein in Claimant’s Exhibit 1, pages 71c-71d. In Dr. Alkire’s

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report, he states that he does not believe that the claimant's MRI findings are a result of her alleged on the job injury. Dr. Alkire opines that the claimant's objective findings of injury shown on the MRI are related to degenerative reasons. Of course, Dr. Contreras has a completely different opinion of causation. Dr. Contreras states at Claimant's Exhibit 1, page 71f, that "...it is my opinion, based upon a reasonable degree of medical probability, that her current symptom complex is related to her work injury."

Based upon the fact that the claimant had never had any previous back problems prior to April 9, 2006, the testimony contained in the record, the diagnostic evidence and all medical records, I find that Dr. Contreras' opinion should be given more weight than that of Dr. Alkire. As such, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable back injury which arose out of and in the course of her employment on April 9, 2006.

Also, it must be noted that the testimony from Mr. Dewayne Butler, the owner of Red Carpet Employment Agency, casts serious doubt on his motivation to see that the claimant received medical attention to look into her complaints. It is undisputed from the testimony contained in the record that the claimant and her friend went to Red Carpet Employment Agency shortly after the compensable event to receive medical treatment and to further report a compensable event. It is undisputed that Mr.

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Butler testified that he heard the claimant and her friend complaining to “Misty” about not receiving adequate attention for her back problem. When this Commission questioned Mr. Butler as to why he did not get up and talk to the claimant herself, Mr. Butler replied “By the time I got up, walked out of my office and around the corner, they were gone.” Mr. Butler also testified that the conversation between “Misty” and the claimant and her friend took three, four, or five minutes. I find it odd that the owner of Red Carpet Employment Agency could not talk to Ms. Larry within the time that she was there if he were within earshot of her conversation with “Misty.” It would also seem plausible that Red Carpet Employment Agency would have the claimant’s contact information and that even if Mr. Butler could not reach the claimant before she left his employment agency, why couldn’t he have immediately contacted Ms. Larry by telephone after she left? Mr. Butler himself testified that he knew the claimant was complaining of a back injury when she was in his office that day:

A They left. What action I took at that point was to simply contacting Travelers Insurance to let them know what had just occurred. They asked, of course, for the phone number and information on Ms. Larry and I assume they followed up because I shortly received forms from Mr. Eric Tutson, who is our liaison with Travelers.

(T. pp., 125-126, lines 23-25 & 1-4).

It is clear to this examiner that the owner of Red Carpet Employment Agency knew

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that they claimant was complaining of a back injury but took no steps on his own to contact the claimant to get her report of injury documented.

As I have found that the claimant sustained a compensable back injury on April 9, 2006, the next issue for determination deals with the claimant's medical treatment. 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. A.C.A. § 11-9-508(a). The employee has the burden of proving by a preponderance of the evidence that the medical treatment is reasonable and necessary. As stated, I find that the claimant did sustain a compensable back injury at the L4-5 level and I have reviewed all the medical evidence contained in the record herein. My review of the medical evidence contained in the record leaves this examiner to find that all treatment that the claimant received to her back contained in the record herein was reasonable, necessary, and related to the claimant's compensable injury of April 9, 2006. As such, all medical treatment contained in the record herein is the responsibility of the respondents. I further find that the future treatment from Dr. Contreras is reasonable, necessary, and related as well as the recommendations Dr. Contreras makes in his June 26, 2007, report, wherein he recommends a lumbar myelogram/CT. Dr. Contreras has opined that the claimant has a disc herniation at L4-5 that needs treatment. The respondents are responsible for the additional

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treatment from Dr. Contreras and his recommendations.

The next issue for determination is whether the claimant is entitled to TTD benefits from April 10, 2006, to a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffers a total incapacity to earn wages. Ark. State. Hwy. & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). I find based upon a review of the medical reports and specifically the opinion of Dr. Contreras that the claimant remains within her healing period until she receives the additional treatment now recommended by Dr. Contreras.

The issue of whether the claimant suffers a total incapacity to earn wages is more complex. My review of the medical evidence leads me to find that the claimant is not totally incapacitated to earn wages. Therefore, I must find that the claimant has failed to meet her burden of proof regarding her request for temporary total disability benefits. My review of the medical evidence contained in the record shows that the only doctor that has recommended that the claimant remain off work for any extended period of time is chiropractor Marc Hagebusch. In his August 16, 2006, report, chiropractor Marc Hagebusch recommended that claimant be excused from work pending an orthopedic evaluation of her lumbar spine. (Cl. Ex. 1, pg. 71). It must

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also be noted that when the claimant did get an orthopedic evaluation from Dr. Chris Alkire that Dr. Alkire felt like the claimant was exaggerating her pain, that there was no evidence of nerve impingement, or other significant abnormality which would cause her symptoms; and that in fact the claimant's back condition had nothing to do with her alleged compensable injury.

It is also significant to note that when the claimant saw pain management specialist, Dr. Syed, Dr. Syed discussed a regular exercise program for the claimant. (Cl. Ex. 1, pp. 71h-71j). It must also be noted that Dr. Soeller stated "It shows that she has a tear of the annulus, but there's no evidence of nerve impingement or other significant abnormality which should cause her symptoms. Assessment: leg and back pain of unknown etiology." (Cl. Ex. 1, pp. 71a-71b). Even Dr. Contreras who recommends additional diagnostic studies, still does not indicate that claimant should be off work anywhere in his report. Based upon the evidence contained in the record, I find that claimant has failed to prove by a preponderance of the evidence that she has suffered a total incapacity to earn wages for the period of TTD she has requested. As such, claimant's request for TTD benefits is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission and having had an opportunity to

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hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and hereby accepted as fact.
- 3) Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable back injury while employed by the respondent on April 9, 2006.
- 4) Respondents are liable for payment of all medical treatment contained in the record herein as I find such treatment contained in the record was reasonable, necessary, and related to the claimant's compensable back injury; including, but not limited to, future treatment by Dr. Contreras and the recommendations currently made by Dr. Contreras.
- 5) Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from the date of the compensable incident through the date of this order.

AWARD

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 the respondent. Respondents are liable for the payment of all medical treatment contained in the record here, including, but not limited to the additional treatment now recommended

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by Dr. Contreras.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb