

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704206

FERNETTE E. MILLER,  
EMPLOYEE

CLAIMANT

HOLIDAY INN HOLIDOME,  
SELF-INSURED EMPLOYER

RESPONDENT

**OPINION FILED JANUARY 28, 2008**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Texarkana, Miller County, Arkansas.

The claimant was represented by HONORABLE NELSON V. SHAW, Attorney at Law, Texarkana, Texas.

The respondent was represented by HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 1, 2007, in Texarkana, Arkansas. A Prehearing Order was entered in this case on August 20, 2007. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The employee-employer relationship existed on April 9, 2007.

2. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
3. The claimant's average weekly wage was \$166.17; her compensation rate for temporary total disability is therefore \$111.00 per week.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether this claim for a specific incident back injury is compensable.
2. Whether the claimant is entitled to TTD since April 9, 2007, medical expenses, and attorney's fees.
3. Notice.

The record consists of the November 1, 2007, hearing transcript and the exhibits contained therein.

### **DISCUSSION**

#### **1. ACCIDENTAL INJURY**

Ms. Miller contends that she sustained a work-related back injury on April 9, 2007, as a result of pulling a cart of dirty laundry weighing approximately 60-70 pounds. To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place

of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

As the attorneys in this case know, the Arkansas Courts have recognized many types of findings adequate to satisfy the "objective findings" requirement of Act 796 of 1993. For example, passive range motion testing (but not active range of motion testing) is by definition an objective finding. Hayes v. Wal-Mart Stores, 71 Ark. Code Ann. 207, 29 S.W.3d 751 (2000). Muscle spasms observed by a physician or a physical therapist are objective medical findings. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). A fibrous mass observed by a physician is an objective finding. Daniel v. Firestone Building Products, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Diagnostic test results are objective findings. Thus, soft tissue swelling in the hip indicated by x-ray is an objective finding. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1990). Straightening of the normal lordotic curvature of the spine, indicative of muscle spasm, is an objective finding. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Disk abnormalities identified on diagnostic testing are objective findings. Aeroquip, Inc. v. Tilley, 59 Ark. App., 954 S.W.2d 305 (1997).

However, a physical therapist's report of "muscle tightness" is not equivalent to a physical therapist's observation of "muscle spasms," since muscle tightness can come under the voluntary control of the patient. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). Likewise, a physical therapist's observation of muscle spasms is distinguishable from a physical therapist's notation of muscle spasms based on symptoms reported by a claimant, since a claimant's report of symptoms comes within the voluntary control of the patient. See e.g., Continental Express, Inc. v. Freeman, supra.

I do not see any direct physician observations or diagnostic test results which might be deemed objective in

the fourteen pages of medical documentation submitted in Claimant's Exhibit 1.

However, I note that Ms. Miller was prescribed Lortab, Flexoril, and Aleve when she presented to the emergency room for the first time on April 12, 2007. Ms. Miller was prescribed Naproxen when she presented to the emergency room the second time on April 16, 2007. The Arkansas Courts have considered prescription medication as potential objective medical findings on at least three occasions.

In Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), the Arkansas Supreme Court determined that a prescription for Valium "as needed for muscle spasm" qualified as an objective medical finding. In Fred's Inc. v. Jefferson, 361 Ark. Ark. 258, 206 S.W.3d 238 (2005), the Court found that a prescription for Flexoril and physical therapy, under the chronology of the case, also met the statutory requirement. In Rodriguez v. M. McDaniel Co., Inc., 98 Ark. App. 138, \_\_\_ S.W.3d \_\_\_ (2007), the Court determined that a prescription for Robaxin was not an objective finding of a compensable injury in light of a physician's testimony that Robaxin can be prescribed in the absence of muscle spasm as a prophylactic measure.

I find that the evidence presented in the present case establishes essentially the same relevant facts as presented in Fred's v. Jefferson, supra. In this regard, I find credible Ms. Miller's testimony that she was not experiencing any back problems prior to pushing the heavy laundry cart at work on April 9, 2007. When she presented to the emergency room on April 12, 2007, she was diagnosed with a low back strain, as was the claimant in Jefferson. As treatment, Ms. Miller was prescribed Flexoril, as was the claimant in Jefferson. The diagnosis was written on a form entitled "Workers Compensation Authorization For Treatment / Injury Status Report," and the form listed a date of injury of April 9, 2007. Applying the Court's reasoning in Jefferson, the chronology of events in the present case support a reasonable inference that the Flexoril was prescribed to aid Ms. Miller and to treat her injury. I therefore find in light of Jefferson that Ms. Miller has established the existence of her back injury with medical evidence supported by objective findings.

To the extent that Holiday Inn Holidome, through Ms. Kirtley's testimony, seems to contend that Ms. Miller never worked on April 9, 2007, never sustained a back injury on April 9, 2007, and never tried to report a work injury on

that date, I find credible Ms. Miller's description of an injury sustained as a result of pushing a laundry cart on April 9, 2007, and I note that Ms. Miller's testimony regarding a work-related injury occurring on April 9, 2007, is consistent with both her own handwritten note of that date and with the Christus St. Michael workers' compensation form filled out April 12, 2007, which identified an injury date of April 9, 2007. I find Ms. Miller's testimony that she was injured at work on April 9, 2007, more credible than Ms. Kirtley's testimony that Ms. Miller did not work on that date, since the only documentary evidence in the record is consistent with Ms. Miller's testimony, not with Ms. Kirtley's testimony.

I find that Ms. Miller's pushing a heavy laundry cart and experiencing a back pop and a sudden onset of back pain establish by a preponderance of the evidence the occurrence of an accidental injury, i.e., an injury caused by a specific incident and identifiable by time and place of occurrence. The emergency room reports from April 12, 2007, through April 18, 2007, and Ms. Miller's testimony regarding her onset of back symptoms, consistent with these reports, also persuade me that an injury at work on April 9, 2007, caused internal harm to Ms. Miller's lower back which

required medical treatment and caused at least temporary disability. Therefore, I find that Ms. Miller has established by a preponderance of the evidence each of the requirements necessary to establish the occurrence of a compensable accidental injury to her low back on April 9, 2007.

## **2. NOTICE**

Ms. Miller has also established by a preponderance of the evidence that the notice requirements of Arkansas Code Annotated § 11-9-701 will not bar any portion of her claim for benefits at issue. This statute provides in part:

### **11-9-701. Notice of injury or death.**

(a) (1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

(2) All reporting procedures specified by the employer must be reasonable and shall afford each employee reasonable notice of the reporting requirements.

...

(b) (1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death;

...

(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

In the present case, I find credible Ms. Miller's testimony that Tammy was the supervisor in laundry and that Tammy was present when Ms. Miller fell in the laundry room. I find credible Ms. Miller's testimony that after resting, she went up front to report the incident and injury in the laundry room. I find credible Ms. Miller's testimony that she did not know the woman behind the counter that she spoke with. I find credible Ms. Miller's testimony that:

When I got up front, it was somebody else [other than Ms. Davis, the owner] there, and I told her that I had an injury in the back, and she said that they don't...you know, they don't do anything about that, and then I asked them if I had to go to the hospital, would somebody pay for it, and she said, no, they don't pay for nothing like that, so I started writing it down.

Ms. Kirtley testified that a former employee, Janine, had worked the front office when Ms. Davis was not there. Ms. Kirtley testified that Tammy was Ms. Kirtley's cousin, and that Tammy, also a former employee, had been "like a head laundry person."

Ms. Kirtley testified that Ms. Kirtley was the housekeeping supervisor, and that at no time did Ms. Miller ever report a back injury to Ms. Kirtley. Ms. Kirtley also testified on direct examination that had Ms. Miller ever mentioned a back claim to Ms. Kirtley, that Ms. Kirtley "would have done a report or sat there while she wrote it down..." Ms. Kirtley testified that she would have reported it and that "I've been doing it for thirteen years." However, on cross-examination, Ms. Kirtley testified that this is actually the first workers' compensation case that she had dealt with as a supervisor.

On direct examination, Ms. Kirtley testified that she telephoned Ms. Miller on April 12, and Ms. Miller told Ms Kirtley that Ms. Miller was going to the hospital, but did not say anything about hurting her back at work. On cross-examination, Ms. Kirtley testified that Tammy never mentioned any of this to Ms. Kirtley and that the first time Ms. Kirtley "learned of this" was when Ms. Kirtley called Ms. Miller to come in, perhaps on the 15<sup>th</sup>, when Ms. Miller was going to the doctor. Ms. Miller testified that Ms. Kirtley told Ms. Miller when Ms. Kirtley called that it would not be worth filing a workers' compensation claim

because Ms. Miller did not report the incident. Ms. Kirtley denied at the hearing ever making that type of statement.

In light of Ms. Miller's contemporaneous written account of events and the emergency room form from April 12, 2007, identifying this as a workers' compensation injury, I find Ms. Miller's account of events more credible than Ms. Kirtley's account of events. I find that Ms. Miller's report of an injury to the head laundry person, Tammy; Ms. Miller's report of an injury to someone at the front desk on April 9, 2007; the second person's refusal to take action on the oral report of injury; and Ms. Kirtley's remarks discouraging Ms. Miller from filing the injury on workers' compensation over the telephone excuse Ms. Miller's failure to give notice on whatever written forms and by whatever procedure Holiday Inn Holidome may have in place.

### **3. BENEFITS**

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App.

100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, I find that the emergency room treatment and prescriptions documented in the record which Ms. Miller received beginning on April 12, 2007, were appropriate and reasonably necessary to treat her work-related low back injury.

In light of Ms. Miller's testimony that she continued to experience back pain and remained mostly in bed at the time of the hearing on November 1, 2007, I find that the MRI and follow-up treatment originally proposed on April 18,

2007, is reasonably necessary and rendered Ms. Miller still within the healing period for her work-related back injury at the time of the hearing and continuing to a date yet to be determined. Ms. Miller's failed attempt to continue working between April 9 - 12, 2007, along with her hearing description of ongoing back pain and spending her time mostly in bed, establish by a preponderance of the evidence that Ms. Miller has been temporarily totally disabled from working from April 12, 2007, through the date of the hearing on November 1, 2007, and continuing to a date yet to be determined.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer relationship existed on April 9, 2007.
2. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
3. The claimant's average weekly wage was \$166.17; her compensation rate for temporary total disability is therefore \$111.00 per week.
4. The claimant proved by a preponderance of the evidence that she sustained a compensable back injury on April 9, 2007.

5. I find that the claimant's failure to give notice on whatever written forms and by whatever procedures the respondents may have in place for reporting a work-related injury is excused under the circumstances presented in this claim.
6. The claimant has established by a preponderance of the evidence that the emergency room treatment and the prescriptions documented in the record which the claimant received beginning on April 12, 2007, were reasonably necessary to treat her work-related low back injury.
7. The claimant has established by a preponderance of the evidence that the MRI and follow-up treatment originally proposed on April 18, 2007, are also reasonably necessary for treatment of her compensable low back injury.
8. The claimant has established by a preponderance of the evidence that she has been temporarily totally disabled from working from April 12, 2007, through the date of the hearing on November 1, 2007, and continuing to a date yet to be determined.

**AWARD**

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge