

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F700361/F801129

KIMBERLY MORROW, Employee

CLAIMANT

BRAUM'S, INC., Self-Insured Employer

RESPONDENT

OPINION FILED AUGUST 6, 2008

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent represented by DALE BROWN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On July 20, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 21, 2008, and a pre-hearing order was filed on May 22, 2008. 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 June 19, 2006 and January 3, 2007.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$385.00 which would entitle her to compensation at the rate of \$256.00 for total disability and \$192.00 for permanent partial disability. The parties also agreed to stipulate that respondent initially accepted the January 3, 2007 injury as compensable and paid temporary total disability benefits in the amount of \$914.28 before controverting the claim in its entirety.

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

1. Compensability of injury to claimant's low back on June 19, 2006.
2. Compensability of injury to claimant's low back on January 3, 2007.
3. Claimant's entitlement to medical treatment.
4. Notice as to the June 19, 2006 injury.

At the time of the hearing the claimant also raised as an issue her entitlement to temporary total disability benefits from January 3, 2007 through January 15, 2007, and again from January 17, 2007 through January 29, 2007. Claimant acknowledges that respondent is entitled to a credit for temporary total disability benefits paid during this period of time. Basically, claimant's attorney is requesting a fee on those temporary total disability benefits based upon the respondent's subsequent controversion of the claim.

The claimant contends she sustained a compensable injury while working for respondent on or about June 19, 2006 to her low back while doing some lifting. Claimant also contends she suffered a low back injury at work on January 3, 2007 while lifting and twisting while stocking the ice cream bin. On July 17, 2007, Dr. Luke Knox recommended an evaluation by Total Spine physical therapy and an RS stimulator with follow-up treatment with Dr. Knox.

The respondent contends that with respect to the June 19, 2006 alleged injury it did not have notice of injury until on or about February 4, 2008 when the claimant filed her AR-C. Therefore, the respondent controverts the claim arising out of the June 19, 2006 alleged injury for lack of and insufficient notice, and the alleged injury did not arise out of and in the course of her employment with respondent. With respect to the January 3, 2007 alleged injury, the respondent initially accepted the injury as compensable and paid benefits. However, the respondent subsequently controverted the claim in its entirety and denied additional benefits on or about April 16, 2007. In addition, respondent contends that the alleged January 3, 2007 injury did not arise out of and in the course of her employment.

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 May 21, 2008, and contained in a pre-hearing order filed May 22, 2008, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$385.00 which would entitle her to compensation at the rates of \$256.00 for total disability benefits and \$192.00 for permanent partial disability benefits is also hereby accepted as fact.

3. The parties' stipulation that respondent paid claimant temporary total disability benefits in the amount of \$914.28 before controverting the January 3, 2007 claim in its entirety is also hereby accepted as fact.

4. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back on June 19, 2006.

5. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back on January 3, 2007.

6. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's January 3, 2007 injury.

7. Claimant's attorney is entitled to the maximum attorney fee on the \$914.28 in temporary total disability benefits previously paid by the respondent.

FACTUAL BACKGROUND

_____The claimant is a 43-year-old woman who graduated from high school and attended

culinary school. Prior to her work with the respondent the claimant worked at Glory Days, a restaurant in Siloam Springs. While working at Glory Days claimant met Tracy Uptegrove. Uptegrove eventually left Glory Days and went to work for the respondent. Uptegrove subsequently asked claimant to come to work for the respondent as well. As a result, claimant began working for the respondent in 2005 as a cook and in May 2006 she was promoted to assistant manager.

Claimant testified that she suffered three separate injuries to her back while working for the respondent. She seeks compensation benefits for two of those injuries. The first injury occurred on January 13, 2006. Claimant testified that on that date she was stocking milk in the milk room when she developed low back pain. Claimant completed a first report of injury but testified that she did not seek any medical treatment for her injury. Claimant testified that her pain went away and she is not seeking compensation benefits for this injury at this time.

The second incident occurred on June 19, 2006. Claimant testified that on that date she was again stocking milk in the milk room and developed pain in her low back. Claimant sought medical treatment for this injury from Dr. Hoffman, a chiropractic physician, on July 3, 2006 and July 8, 2006. Claimant testified that her symptoms resolved following these two visits with Dr. Hoffman.

The third incident occurred on January 3, 2007. Claimant testified that she was bending over loading ice cream into a grocery cart when she felt something snap in her back. Claimant testified that she went to the respondent's office and laid down on the floor in an attempt to alleviate her back pain. When claimant could not get up from the floor her fiancé was called and he took her to Dr. Hoffman that day. On that same day claimant was also seen by Dr. Duncan. Dr. Duncan diagnosed claimant's condition as an acute lumbar sprain and prescribed medication. When claimant's condition did not improve Dr. Duncan recommended physical therapy and ordered an MRI scan. The MRI scan was performed

on January 19, 2007.

Following the MRI scan claimant was referred by the respondent to Dr. Anagnost at the Orthopaedic Center in Tulsa. Dr. Anagnost reviewed the MRI scan and indicated that claimant had a disc herniation at the L4-5 level. Dr. Anagnost prescribed medication, ordered an injection, physical therapy, and placed a lifting restriction on the claimant. When the injection did not improve claimant's condition Dr. Anagnost recommended a diskectomy.

Respondent did not approve the procedure recommended by Dr. Anagnost and claimant sought medical treatment from Dr. Luke Knox, neurosurgeon, on July 17, 2007. Dr. Knox also indicated that claimant had a disc herniation but did not recommend surgery. Instead, he recommended that the claimant undergo an evaluation by Total Spine physical therapy and an RS stimulator unit.

Claimant has filed this claim contending that she suffered compensable injuries to her back while working for respondent on June 19, 2006 and again on January 3, 2007. She seeks payment of medical treatment associated with those compensable injuries as well as an attorney fee on temporary total disability benefits previously paid.

ADJUDICATION

_____ Claimant contends that she suffered compensable injuries to her low back while working for respondent on June 19, 2006 and again on January 3, 2007. Claimant's claims are for injuries caused by specific incidents 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.

The first issue for consideration involves claimant's contention that she suffered a compensable injury on June 19, 2006. Claimant contends that on that date she suffered an injury to her back while stocking milk in the milk room. As a result of this injury claimant sought medical treatment from Dr. Hoffman, a chiropractic physician, on July 3, 2006 and again on July 8, 2006.

I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury on June 19, 2006 for several reasons. First, in order to prove a compensable injury claimant has the burden of offering medical evidence supported by objective findings establishing an injury. Here, a review of Dr. Hoffman's medical reports does not reveal any objective findings establishing a compensable injury. Absent objective findings, claimant cannot meet her burden of proof. Furthermore, I also note that there is no indication that claimant reported an injury to the respondent on that date. Introduced into evidence is an accident report with a date of injury of August 16, 2005. According to claimant's testimony this date is incorrect and the year should be 2006. However, the date of injury of August 2006 is more than two months after it had allegedly occurred. While claimant contends that she provided an off-work slip to the respondent in connection with this compensable injury, the note does not indicate that it was for a work-related injury. Furthermore, claimant admitted that she did not ask the respondent for medical treatment as a result of this accident.

In short, I find that claimant has failed to meet 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 June 19, 2006. Claimant has offered no medical evidence supported by objective findings establishing a compensable injury. Accordingly, I find that claimant has failed to meet her burden of proof.

The second issue for consideration involves claimant's contention that she suffered a compensable injury to her low back on January 3, 2007. I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury on that date.

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 with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. As previously noted, claimant testified that she suffered an injury to her low back on January 3, 2007 when she was bending over loading ice cream into a grocery cart and felt something snap in her back. Claimant went to the respondent's office and laid down on the floor in an attempt to alleviate her pain. When claimant was unable to get up from the floor her fiancé was called and he took her to see both Dr. Hoffman and Dr. Duncan.

Dr. Hoffman's medical report of January 3, 2007 contains a history of injury consistent with claimant's testimony:

Bent over to fill up ice cream bin & felt sharp pain with "snap" - pain "shot down lt leg".

Likewise, Dr. Duncan's medical report from January 3, 2007 contains a history of injury consistent with claimant's testimony.

This is a Workers Comp from Braums'. She was refilling a 1 / 2 gals ice creams this a.m. She bent

over the case and her back popped (sic).

When claimant's back condition did not improve under Dr. Duncan's care she was referred by the respondent to Dr. Anagnost at the Orthopaedic Center in Tulsa. Dr. Anagnost's medical report of February 6, 2007 again contains a history of claimant suffering a back injury while bending over and filling an ice cream bin on January 3, 2007. Dr. Anagnost reviewed the claimant's MRI scan and opined that she had a disc herniation at the L4-5 level. It was Dr. Anagnost's opinion that claimant's condition was the result of an injury on January 3, 2007.

I feel the major cause of her current level of symptoms and condition is directly related to her alleged injury from 1/3/07 while working at Braum's. While she had a previous history of some back pain, it was not this type or quality or severity and was under very good control prior to the alleged injury.

When Dr. Anagnost recommended a discectomy, claimant sought a second opinion from Dr. Knox. Dr. Knox was also of the opinion that claimant's condition was related to her injury of January 3, 2007. In his report of July 17, 2007, Dr. Knox stated:

She does have the significant disc space changes, which are probably related to her workers' compensation injury occurring January 3, 2007.

I also note that claimant completed an accident report on January 3, 2007 indicating that she had injured her back while bending over to put ice cream in a freezer and that same day an accident investigation report was completed by the respondent's management reflecting claimant's statement and indicating that there was no reason the incident should be questioned.

Based upon the foregoing evidence, 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 the respondent and that it was caused by a specific incident identifiable by time and place of occurrence. Claimant has consistently given a history of injury to her medical providers indicating that she injured her back on January 3, 2007 while bending over with ice cream. This history was provided to both Drs. Hoffman and Duncan on the date of injury. Claimant completed an accident report on the date of injury and on that same date an accident investigation report was completed by respondent's management reflecting claimant's history of injury and indicating that there was no reason the incident should be questioned. Finally, both Dr. Anagnost and Dr. Knox have opined that claimant's condition is causally related to the injury of January 3, 2007.

In reaching this decision, I do note as the respondent pointed out that there are some discrepancies and inconsistencies present in this case. However, I do not believe that any of those are significant and they do not outweigh the remaining evidence indicating that claimant suffered a compensable injury on January 3, 2007. For instance, respondent notes that on a form completed at the time of her MRI scan claimant indicated that she had had problems off and on for a year and that she did not mention the January 3, 2007 injury when asked to describe the incident. However, claimant testified that the prior back problems included the injury in January 2006 and the subsequent injury in June 2006 for which she sought medical treatment from Dr. Hoffman. There is no medical evidence indicating that claimant sought any other medical treatment other than from Dr. Hoffman on two occasions in July 2006. Dr. Hoffman's medical reports indicate that claimant did not return to him for any medical treatment until after the incident on January 3, 2007. Furthermore, on that same form when asked to describe the accident claimant did indicate that she had suffered an injury at work while bending over with ice cream. This is reflected on Page 23 of the respondent's exhibit.

In addition, with respect to the injury on January 13, 2006, I do note that a form was completed following claimant's reporting of that incident. According to Tracy Uptegrove,

the manager of the respondent's store and claimant's supervisor, the claimant informed her that she was going to a chiropractor as a result of that injury. She also indicated on that form that claimant had a prior back injury at a previous job. Uptegrove testified at the hearing that that portion of the accident report indicating that claimant was going to seek chiropractic treatment was completed by the claimant. If this is true, it violated the respondent's policy since the form clearly indicates that it is "**NOT TO BE COMPLETED BY INJURED EMPLOYEE.**" I note that there are no medical records indicating that claimant sought any medical treatment as a result of this condition and claimant testified that she did not receive any medical treatment following this incident. Finally, I believe it is important to note that Uptegrove testified that respondent did not send the claimant for medical treatment in January 2006 and that she had no information that claimant had injured her back at a previous job. Uptegrove specifically testified that she was not aware of any back problems the claimant had when she came to work for the respondent and she also indicated that claimant was able to perform all of her job duties in 2006.

Accordingly, I find based upon a preponderance of the evidence that claimant has proven that her injury arose out of and in the course of her employment with respondent and that it 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 or external physical harm to her body which required medical services or resulted in disability and that she has offered medical evidence supported by objective findings establishing an injury. As previously noted, claimant sought medical treatment from Dr. Duncan on January 3, 2007. Dr. Duncan's medical report of that date indicates that he observed muscle spasms in the claimant's lumbar spine. A medical report from Dr. Duncan dated January 16, 2007 indicates that claimant has a knot on her back. An MRI scan was performed which according to Dr. Anagnost and Dr. Knox revealed a herniated disc. Both of those treating physicians have recommended additional

medical treatment. Based upon this evidence which I find to be credible and entitled to great weight, I find that claimant has satisfied the remaining elements of compensability.

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 low back while working for respondent on January 3, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes medical treatment recommended by Dr. Knox in the form of an evaluation by Total Spine and an RS stimulator unit.

Finally, I find that claimant has met her burden of proving by a preponderance of the evidence that she was entitled to temporary total disability benefits for the periods of January 3, 2007 through January 15, 2007, and again from January 17, 2007 through January 29, 2007. 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 suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, based upon the medical records from Drs. Hoffman, Duncan, Aganost, and Knox, I find that claimant remained within her healing period. All of those treating physicians have recommended medical treatment with Dr. Knox recommending an evaluation by Total Spine and an RS stimulator unit. I also find that claimant suffered a total incapacity to earn wages for the requested periods. When claimant sought medical treatment from Dr. Hoffman on January 3, 2007 he took the claimant off work until January 8, 2007. Later that same day the claimant was evaluated by Dr. Duncan who indicated that claimant should remain off work until January 15, 2007 when she could return to work with restrictions. Based upon this evidence, I find that claimant was entitled to temporary total disability benefits from January 3, 2007 through January 15, 2007.

Claimant apparently returned to work for the respondent for one day on January 16,

2007 before returning to Dr. Duncan. Dr. Duncan again took claimant off work and indicated that she could not return to work until January 29, 2007. Accordingly, I find that claimant was entitled to temporary total disability benefits from January 17, 2007 through January 29, 2007. Respondent has previously paid claimant temporary total disability benefits for this period of time. Therefore, additional benefits are not owed to claimant. However, since respondent controverted this claim in its entirety after paying those benefits, claimant's attorney is entitled to the maximum attorney fee on the temporary total disability benefits previously paid. Since claimant has already been paid her compensation benefits, her portion of the claimant's attorney fee is to be withheld from any future disability benefits paid to her by the respondent.

AWARD

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back on June 19, 2006. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while working for respondent on January 3, 2007. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable January 3, 2007 injury. This includes medical treatment which has been recommended by Dr. Knox. Finally, claimant's attorney is entitled to the maximum attorney fee on temporary total disability benefits previously paid due to the respondent's controversion of this claim.

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 \$558.25.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE