

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G509513

MARIAN CAHILL, Employee	CLAIMANT
PETROMARK, INC., Employer	RESPONDENT
HDI GERLING, Carrier	RESPONDENT

OPINION FILED APRIL 27, 2016

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

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

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On April 4, 2016, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 17, 2016, 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/carrier relationship existed among the parties on December 11, 2015.
3. The respondents controvert this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$328.00 which would entitle her to compensation at the rates of \$219.00 for total disability benefits and \$164.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's low back and right hip on December 11, 2015.
2. Medical.
3. Temporary total disability benefits from December 11, 2015 through a date yet to be determined.
4. Attorney fee.

At the time of the hearing claimant clarified that her request for temporary total disability benefits would begin December 14, 2015 through a date yet to be determined.

The claimant contends she sustained a compensable injury while working for the respondent on or about December 11, 2015. At that time, claimant was in the course and scope of her employment with respondent when she slipped and fell, injuring her right hip, shoulder, and low back, with pain radiating down her right leg. Respondents have controverted this claim and have failed to pay medical bills and temporary total disability benefits.

The respondents contend that the claimant did not sustain a compensable injury as that term is defined by Act 796 of 1993.

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 February 17, 2016, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned an average weekly wage of

\$328.00 which would entitle her to compensation at the rates of \$219.00 for total disability benefits and \$164.00 for permanent partial 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 low back/right hip on December 11, 2015.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning December 14, 2015 and continuing through a date yet to be determined.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 44-year-old woman who began working for respondent on August 24, 2015. The respondent operates a gas station/convenience store in Holiday Island. In addition to selling pre-prepared items, respondent also prepares and sells various foods such as pizza, sandwiches, hamburgers, hot dogs, soups, chili, et cetera. Respondent is open from 6:00 a.m. until 9:00 p.m., and claimant testified that she generally worked from 2:00 p.m. until 9:00 p.m. Claimant testified that her job duties required her to work as a cashier, answer questions from customers, clean, stock, and prepare food.

The respondent had a kitchen which had three sinks for washing dishes and which was also used to prepare food. Claimant testified that there are no mats in the kitchen and that the floor is composed of tile.

Claimant testified that on December 11, 2015, she made a sandwich for a customer and she went to the kitchen to clean up the mess from the sandwich and to get a rag to

clean up a spill in the fountain drink area. Claimant testified that as she was walking through the kitchen she slipped and fell, landing on her low back, right hip, and shoulder. Although she assumed the floor was wet, she does not know what caused her to fall. Claimant testified that this occurred between 2:45 and 3:00 p.m.

Claimant testified that only she and the store manager, Barbara Morgan, were present in the store at the time of the fall. Claimant testified that she reported the fall to Morgan after another co-employee named Jason began working at approximately 3:30 p.m.

Claimant testified that she completed her shift that day but was feeling miserable with pain in her back, hip, and shoulder. Claimant testified that she normally gets off work at 9:35 to 9:45 p.m. and after the store closes at 9:00 she has to close out her register and also use a stick to measure the amount of gas left in storage tanks. This information is then written down in a nightly closing report. On her note of that date, claimant wrote a note to Morgan stating that she had fallen in the kitchen that afternoon and could not stick the tanks because her back hurt.

Later that evening the claimant sent a text at 10:09 p.m. to Morgan stating that when she fell in the kitchen she had injured her hip and back and because of the pain was going to the emergency room in Berryville.

Claimant went to the emergency room in Berryville on the night of December 11, 2015, with complaints of pain in her right hip, lumbar spine, and right shoulder. Claimant was diagnosed as suffering from a contusion of the right hip, lumbar strain, and right shoulder strain. Claimant was given medication and instructed to receive follow-up care with the emergency room if her symptoms worsened.

Respondent sent claimant to Dr. Card for further medical treatment. Dr. Card's assessment on December 16, 2015 was that claimant had suffered a recent fall at work with an injury to the right side of her low back causing pain with sciatica, paresthesia, right

upper leg lumbar strain, shoulder strain, and a contusion of the right hip. Dr. Card prescribed claimant medication and indicated that she should apply heat to her back. Dr. Card also indicated that claimant would not be able to return to work until released.

Claimant returned to Dr. Card on December 21, 2015, and he changed claimant's medication. He also noted that claimant was in too much pain for physical therapy and ordered an MRI of claimant's lumbar spine. The lumbar MRI scan was performed on December 24, 2015, which revealed disc bulges at the L1-2, L2-3, and L5-S1 disc levels.

In his report of December 25, 2015, Dr. Card indicated that due to the bulging disc claimant should be referred to a neurosurgeon. Apparently, it was after this referral to a neurosurgeon that respondent controverted claimant's claim.

Following respondent's denial of her claim, claimant sought medical treatment from her family physician, Dr. House, on February 10, 2016. Dr. House provided a trigger point injection to the claimant's low back and changed her medication. Dr. House again treated claimant on March 7, 2016 with a trigger point injection and medication. He also wrote a letter indicating that claimant needed to be excused from work until further notice.

Claimant has filed this claim contending that she suffered a compensable injury to her low back and right hip area as a result of the fall on December 11, 2015. She requests payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her low back/right hip when she fell while working for respondent on December 11, 2015. Claimant's claim is for a specific injury identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury

arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

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 to her low back/right hip on December 11, 2015.

First, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury which arose out of and in the course of employment with respondent and that it was the result of a specific incident identifiable by time and place of occurrence. Here, as previously noted, claimant testified that she slipped and fell while walking through the kitchen at respondent on December 11, 2015. Claimant testified that she landed on her back, right hip, and shoulder. She testified that she completed her shift, but was suffering from pain to the point that she could not complete all of her duties before leaving work that night and it was significant enough that she sought medical treatment from the emergency room later that evening.

Claimant testified that she reported this fall to Morgan, her store manager, after another employee named Jason arrived at approximately 3:30. Morgan denied that claimant reported an injury. Morgan testified that she noticed claimant limping and asked her if her feet hurt and claimant indicated that her hip hurt but did not make any other statement.

I find that claimant's testimony is corroborated by the remaining evidence of record. First, as previously noted, claimant was required to complete a store closing sheet each night. On the night of December 11, 2015, claimant was required to complete this sheet

and she was also required to place a stick in each fuel tank to determine the amount of fuel. However, on the night in question, claimant wrote a note to Morgan on that sheet stating, “When I fell in the kitchen this afternoon I hurt myself. I did not stick tanks because back hurts bad. Sorry.”

Morgan acknowledged seeing this report the next day. In addition, claimant also introduced into evidence a copy of a text message she sent to Morgan at 10:09 p.m. on the night of December 11, 2015. That text message stated:

Hey barb when I fell in the kitchen I hurt my hip and my back
I am in a lot of pain. I am going to go to the e.r. in berryville will
let you know what they say

Morgan also acknowledged that she saw that text the next morning after she awoke and looked at her phone. Finally, Morgan also acknowledged that when she went to work on December 12, 2015, she asked Jason who had worked with the claimant the night before what happened. Morgan testified that Jason described to her what claimant had shown him regarding how she had fallen in the kitchen.

Finally, I note that the emergency room record from December 11, 2015 indicates that claimant reported that she had suffered a work-related injury after slipping on water at work and landing on her right side. In fact, claimant consistently gave a history of having fallen at work to her medical providers. While there is some reference in the medical reports to her having slipped in water, I find this to be irrelevant to the present issue. Whether the floor was wet with water or rather claimant simply slipped on a dry floor is irrelevant as to compensability. In addition, there was some indication that claimant did not specify that she had fallen in the kitchen at work as opposed to her kitchen at home. However, the closing report indicates that claimant had fallen in the kitchen this afternoon. Given that claimant’s shift began at 2:00, there would have been very little time for claimant to have fallen in her kitchen at home. Furthermore, I find insufficient evidence that

claimant fell in her kitchen at home as opposed to the kitchen at work.

In summary, I find that claimant's testimony regarding her injury in the kitchen at work on December 11, 2015 to be credible and entitled to great weight. Based upon her testimony as well as the remaining evidence corroborating her testimony, I find that she has met her burden of proving by a preponderance of the evidence that she suffered an injury which arose out of and in the course of her employment with respondent and that it was caused by a specific injury identifiable by time and place of occurrence.

I also find that claimant has offered medical evidence supported by objective findings establishing an injury and that the injury has resulted in disability or the need for medical treatment. As previously noted, a lumbar MRI scan revealed bulging discs at three different areas in claimant's lumbar spine. Claimant's treating physicians have recommended various medical treatments for her injury including a referral to a neurosurgeon. Based upon the foregoing, 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 lumbar spine/right hip as the result of a fall while working for respondent on December 11, 2015.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

I also find that claimant is entitled to temporary total disability benefits beginning December 16, 2015, and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant must prove 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, I find that claimant has proven that she remained within her healing period for her compensable injury. Claimant was treated at the emergency room on December

11, 2015, and subsequently was treated by Dr. Card and Dr. House. Dr. Card referred claimant to a neurosurgeon before the claim was denied by the respondent. Dr. House has continued to provide medical treatment to claimant up through March 7, 2016. Accordingly, I find that claimant has remained with her healing period.

I also find that claimant has suffered a total incapacity to earn wages beginning December 16, 2015. On that date, Dr. Card indicated that claimant would not be able to return to work until she was released. Dr. Card subsequently indicated that claimant could return to restricted work duties if available. However, no such duties were provided by the respondent and claimant subsequently was evaluated by Dr. House who has opined that claimant should be excused from work until further notice. Based upon the foregoing, I find that claimant has suffered a total incapacity to earn wages.

I find that claimant has met her burden of proving by a preponderance of the evidenced that she is entitled to temporary total disability benefits beginning December 16, 2015, the date she was taken off work by Dr. Card, and continuing to a date yet to be determined.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back/right hip while working for respondent on December 11, 2015. Respondent is liable for payment of all reasonable and necessary medical treatment and claimant is also entitled to temporary total disability benefits beginning December 16, 2015, and continuing to a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity 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 \$429.30.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE