

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210279

TAMMY L. OLDAKER,
EMPLOYEE

CLAIMANT

ELLISON ENTERPRISES, INC.,
EMPLOYER

RESPONDENT

BENCHMARK INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 24, 2005

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL L. HART, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE DAVID LANDIS,
Attorney at Law, Jonesboro, Arkansas.

Decision of administrative law judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed November 26, 2003. The administrative law
judge found that the claimant failed to prove she sustained
a compensable injury. After reviewing the entire record *de*
novo, the Full Commission reverses the opinion of the
administrative law judge. The Full Commission finds that
the claimant proved she sustained a compensable injury. We
find that the claimant proved she was entitled to reasonably

necessary medical treatment, temporary total disability compensation from July 23, 2002 through September 15, 2002, and the 5% anatomical impairment rating assessed by Dr. Giles.

I. HISTORY

Tammy Oldaker, age 40, testified that she began working for Ellison Enterprises in December 1995 (Country Mart in Dardanelle). Ms. Oldaker testified that she "started in the deli and then went to the bakery." On December 6, 1995, the claimant signed a Job Description for the Job Title, "Deli/Baker Clerk." The Job Description included the following Physical Requirements: "Body Positions: Sitting, Standing, Walking, Squatting. Body Movements: Lifting, Carrying, Stooping, Bending, Reaching, Twisting, Grasping and Balance."

The claimant testified that she was transferred to Price Chopper in Russellville in about February 2000. The claimant testified that she "did all the ordering, the unloading of all the supplies that came in, I did the bread, the donuts once in a while, did all the baking, I did catering, all the baking for the catering department." The claimant testified on direct examination:

Q. I want to talk to you, Tammy, because I think it's important about the unloading of goods that you told us about which is one of your duties as the bakery manager at Price Chopper. Tell Judge White, if you will, what that entailed. And be fairly specific, if you will, please.

A. We get supply trucks on Tuesday, Thursday, and Saturday anywhere from 50 to 100 pieces, sometimes more during the holidays.

Q. What are we talking about, Tammy, as far as pieces? What are these pieces?

A. Boxes....Anywhere from table stuff to raw dough and they'd weigh five to 50 pounds, it varied....

Q. How many days a week did this happen where you'd have to unload goods?

A. At least four days because Monday was icing, Tuesday, Thursday and Saturday I worked and those were all, I mean, supply orders....

Q. What was the range on the weight on these pieces that you'd lift that you had to unload?

A. On the AWG it ranged from 5 to 50 pound boxes, icing anywhere between 35/40 pounds.

Q. How many? Did you have any lifting assistance getting these up onto the table or in the freezer or was that all you?

A. It was all me....Climb a ladder and get up on the top shelf and....

Q. When did your back start hurting?

A. It started bothering me real bad the beginning of June.

Q. What year?

A. 2002.

Q. And tell us about the symptoms that you felt in the beginning of June 2002?

A. It felt like someone was just squeezing my back and then my legs started going numb and went numb from about my knees.

A co-worker, Angelia Cothren, corroborated the claimant's testimony with regard to her work duties and associated back pain.

The claimant presented to Millard-Henry Clinic on June 19, 2002, when it was reported, "The patient comes in today complaining of severe back pain. She states it has been giving her trouble now for the past 3 weeks. It is non radiating as far as going up the spine, but she has a lot of pain down in the right leg....Invited Paul from Comprehensive Outpatient Rehabilitation Facility over. He did an evaluation and he agreed it is SI dysfunction."

The record indicates that Dr. Finley B. Turner saw the claimant on June 20, 2002 and assessed "SI dysfunction."

The claimant returned to Dr. Turner on July 8, 2002:

This patient has been going to physical therapy since we last saw her and initially she had an excellent response to this with drop in her pain rating gradually down to 0. Now she is having increasing problems with pain and she is having numbness down the entire right leg. She states that it feels a little weak. She has tried to do

things to help but her big problem happens to be that she is not able to get away from doing her job. The family is depending on her for income.

Dr. Turner assessed "Lumbosacral strain with radiculopathy. I think we need to go ahead and get an MRI on this lady considering her symptomatology."

A lumbar MRI was taken on July 10, 2002:

There is an extruded disc fragment at L5-S1 on the right. There is a bulging annulus at L4-5. The remaining lumbar discs are normal. The bony alignment is normal. Marrow signal is normal. Lower most aspect of the spinal cord is unremarkable.

The impression was "Extruded disc at L5-S1 to the right."

Dr. Turner noted on July 10, 2002, "MRI shows an extruded disk at L5 S1 on the right. Consider referral to orthopedist."

Dr. Turner referred the claimant to Dr. Wilbur M. Giles, who saw the claimant on July 23, 2002:

This 37 year old female started having discomfort two months ago with progressive low back pain and then it became right hip and leg pain which went into the toes. She is presently working as a bakery manager, but continues to complain of low back and hip pain on the right which goes to the outside of the toes and the whole outside bottom of the leg is numb and she feels there is weakness in the right leg. It is constant and increased

with coughing and sneezing and prolonged sitting. She has had physical therapy for ten treatments which has been of minor help and an MRI scan performed....

She is a bakery manager for 6 ½ years and is on light duty status....

She has severe lumbar spasm....

Her MRI shows evidence of a large disc herniation with inferior migration of L5-S1 on the right.

Dr. Giles diagnosed "Lumbar disc syndrome, progressive, L5-S1, with radiculitis." Dr. Giles recommended "a lumbar laminotomy, foraminotomy and discogenic removal....We will proceed with the surgery on her as soon as time will allow." Dr. Giles advised the claimant to remain off work starting July 23, 2002.

The respondents' attorney questioned Bill Sallee, a manager at Price Chopper:

Q. Now, on or about July the 23rd of last year, did Tammy come to you about having any type of problem?

A. Yes, she did.

Q. And as a result of talking with this lady, did you write out a statement?

A. Yes, I did....July she was at the store, she'd come to see me at the store. I'm sorry.

Q. No problem.

A. Said she needed some time off, she'd hurt her back, I immediately asked her: Did you do it here? She said, no, I did not. I said, okay, I hope you get to feeling better; if you need anything, left us know....

Dr. Turner wrote on July 24, 2002, "We have been taking care of Ms. Oldaker for complaint of severe back pain. Her history includes an injury to her back while bending and lifting at her place of employment. We first saw her for this on June 19, 2002. She has had problems with this in the past however with a shoulder strain. She has been receiving physical therapy. Unfortunately, she has elected to continue working and this has made this quite difficult. Recent MRI shows an extruded disk at the L5-S1 level on the right, and she has been referred for evaluation to a neurosurgeon."

Dr. Giles performed surgery on July 26, 2002. Dr. Giles reported on August 27, 2002, "Ms. Oldaker was seen back in the office today for her first postoperative visit, having undergone a lumbar laminectomy for discogenic displacement on July 26th....Since her discharge from the hospital Ms. Oldaker has done well. Her severe intractable pain has cleared....I have placed her on an active exercise program and told her to steadily increase her activity and

she can return to work on the 15th of September without restrictions."

Bill Sallee testified that the claimant did not ask to fill out an accident report until September 6, 2002. Mr. Sallee testified, "Her health insurance denied her claim on her back. I said, Tammy, did you do it here at the store? She said, no, I did not, but they need a denial letter from workmen's comp before they will pay....Every time I have talked to Tammy since this started she has told me she did not do it at work." (The claimant testified on rebuttal examination, "I told him I didn't know how I did it.")

The claimant testified that she returned to work on "September 16th. I was supposed to go back the 15th, but I got a little stomach bug." The claimant testified that she returned to her normal job in the bakery department. The claimant testified that she was transferred to Four Seasons (Ellison) in December 2002.

A pre-hearing order was filed on April 15, 2003. The claimant contended that she sustained a gradual-onset back injury "culminating in disability in July of 2002." The claimant contended that she was entitled to temporary total disability compensation from July 23, 2002 through September

16, 2002. The claimant contended that she was entitled to permanent partial disability based on the 5% rating assigned by Dr. Giles. The parties stipulated that the respondents controverted the claim. The administrative law judge found that the issues for litigation were limited to the following:

1. Whether the claimant sustained a compensable gradual-onset back injury;
2. Whether the claimant was entitled to temporary total disability compensation from July 23, 2002 through September 16, 2002;
3. Whether the claimant was entitled to medical benefits; and
4. Whether the claimant was entitled to compensation for a permanent physical impairment.

Dr. Giles wrote to the claimant's attorney on April 29, 2003:

I am in receipt of your recent letter of April 28, 2003, concerning Tammy Oldaker who did, indeed, have a large disc herniation for which she underwent surgical intervention on July 26, 2003, and did well following the surgical procedure. At the time of her initial evaluation in my office she simply stated that she had had progressive low back pain which eventually became right hip and leg pain as a result of her working as a bakery Manager and stated that this has been progressive over a two month period even though she could not definitely pick an exact time as to when the onset began.

Based on the medical history that she gave it would be my opinion that the heavy lifting that was required of her at her place of employment

was, indeed, the cause of her disc herniation and subsequent surgery that was performed in 2002.

I would feel that it was the major cause of her permanent impairment which is 5% to the body as a whole. This opinion is given with a reasonable degree of medical certainty. She will be in need of occasional muscle relaxants, mild analgesics and possibly even physical therapy from time to time in the future.

After a hearing before the Commission, the administrative law judge found that the claimant failed to prove "that her back condition was caused by rapid and repetitive motion." The administrative law judge also found that the claimant failed to prove "the elements necessary to establish a compensable injury." The administrative law judge therefore denied and dismissed the claim; claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:
(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4) (E) (ii).

In the present matter, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained an injury causing physical harm to her body, which was a back injury not caused by a specific incident and not identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings. The claimant also proved that the compensable injury was the major cause of her disability and need for treatment.

The Full Commission finds that the claimant was a credible witness, and that the clear weight of probative evidence supports her testimony. The Job Description submitted by the respondents describes such duties as "squatting, lifting, carrying, stooping, bending, reaching, grasping, balance." The claimant worked for the respondents

for nearly seven years before reporting back problems. The claimant credibly testified regarding her job duties of lifting, carrying, and shelving occasionally-heavy bakery and deli items. The claimant first sought medical treatment in June 2002, at which time the medical record described "severe back pain."

Dr. Turner noted in July 2002, "her big problem happens to be that she is not able to get away from doing her job." A subsequent lumbar MRI showed the objective finding of an extruded disc fragment at L5-S1.

Dr. Giles began treating the claimant pursuant to a referral from Dr. Turner. Dr. Giles detected "severe lumbar spasm," a patent objective medical finding. Dr. Turner later wrote in July 2002, "Her history includes an injury to her back while bending and lifting at her place of employment....Unfortunately, she has elected to continue working and this has made this quite difficult." Dr. Turner performed back surgery on July 26, 2002. Dr. Giles' subsequent correspondence to the claimant's attorney corroborated the claimant's testimony, stating, "At the time of her initial evaluation in my office she simply stated that she had had progressive low back pain which eventually

became right hip and leg pain as a result of her working as a bakery Manager and stated that this has been progressive over a two month period even though she could not definitely pick an exact time as to when the onset began." Dr. Giles' expert opinion indicated that "the heavy lifting that was required of her at her place of employment was, indeed, the cause of her disc herniation and subsequent surgery that was performed in 2002."

The Full Commission recognizes the testimony of the claimant's manager, Bill Sallee, who contended that the claimant told him "it didn't happen at work." Another upper-level supervisor testified that the claimant did not report an injury to him. The claimant credibly rebutted this testimony, stating that she at first didn't know what was causing her back pain. The claimant had earlier testified, "I told them I wasn't sure how it happened." Based on the preponderance of the evidence, the Full Commission attaches greater weight to the credible testimony of the claimant and the corroborating medical records. The decision of the administrative law judge is reversed.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). In the present matter, the Full Commission has determined that the claimant proved she sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(ii)(b). Dr. Giles recommended surgery as result of the claimant's compensable injury and advised the claimant to remain off work starting July 23, 2002. We therefore find that the claimant proved she was entitled to temporary total disability compensation beginning July 23, 2002. Following surgery, Dr. Giles stated that the claimant could return to work without restrictions on September 15, 2002. The claimant testified that she did not return to work until September 16, 2002, because "I got a little stomach bug." The record does not show that the claimant's illness was the result of her compensable injury. The Full Commission therefore finds that the claimant proved she was entitled to temporary total disability compensation from July 23, 2002 through September 14, 2002.

Based on our *de novo* review of the entire record, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable back injury. The claimant proved she was entitled to reasonably necessary medical treatment as recommended by Dr. Giles and the other physicians of record. The claimant proved she was entitled to temporary total disability compensation from July 23, 2002 through September 14, 2002. The claimant proved by a preponderance of the evidence that she was entitled to the 5% anatomical impairment rating assessed by Dr. Giles. The Full Commission finds that the claimant's compensable injury was the major cause of her 5% anatomical impairment, that the anatomical impairment was supported by objective and measurable physical findings, and that the impairment rating complied with the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) published by the American Medical Association.

The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal to the Full Commission, the

claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2).

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.