

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412574

JACKIE BAKER, EMPLOYEE	CLAIMANT
FRED'S, INC., EMPLOYER	RESPONDENT NO. 1
FEDERAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 19, 2007

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

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed February 7, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The employee-employer-carrier relationship existed in June of 2004 and at all other relevant times.
2. Claimant's average weekly wage is \$554; her temporary total disability rate is \$369; and her permanent partial disability rate is \$277.

3. Respondent No. 1 controverts this claim.
4. If any temporary total disability is awarded, the period of disability is September 29, 2004 through December 13, 2005.
5. The claimant reached maximum medical improvement on December 13, 2005.
6. The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on June 17, 2004.
7. Respondents are liable for reasonable and necessary medical benefits for the lumbar spine.
8. The claimant has proven she remained in her healing period and was totally unable to earn wages from September 29, 2004 through December 13, 2005.
9. Respondents are entitled to an offset for group disability benefits the claimant received from September 29, 2004 through December 13, 2005, pursuant to Ark. Code Ann. §11-9-411.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly

applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 7, 2007, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on June 17, 2004. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly I would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a manager. The claimant testified that on the morning of June 17, 2004, she opened the store by herself. Upon entering the store she allegedly bent over to pick up some water hoses that had fallen off of a shelf. She stated that she had pain in her back and was unable to work that day. The claimant waited for her co-workers to arrive and then they assisted her to the

Melbourne Medical Clinic. The claimant was examined by Dr. David Sitzes. The claimant reported back pain attributed to a pulled back muscle. Dr. Sitzes gave the claimant a prescription for muscle relaxers and sent her home for the day. Dr. Sitzes's report does not reference a work related incident nor is there a reference to an incident where the claimant was bending over to pick up a water hose.

On June 21, 2004, the claimant returned to Dr. Sitzes stating that her pain had decreased. On June 28, 2004, she once again visited the clinic and stated that her strain had improved. The claimant was released to return to light duty work. From July 6, 2004, through August 3, 2004, the claimant treated several more times at the Melbourne Medical Clinic. The claimant's records reveal that the claimant's back pain decreased and her condition improved.

The claimant continued working for the employer and in September of 2004, she purportedly experienced a severe exacerbation of back pain during a conference call. The claimant was taken to the Melbourne Medical Clinic where she was examined by Dr. Gray. It was not until Dr. Gray's September 28, 2004, report that there is the first mention of the claimant sustaining a back injury back in June while picking up a water hose.

Dr. Gray recommended that the claimant undergo an MRI. The claimant underwent the MRI and she was referred to Dr. Patrick Chan for a surgical evaluation. Before opting to do the surgery, the claimant received two epidural injections by Dr. Chan but they did not provide any relief. Ultimately, on January 17, 2005, the claimant underwent a lumbar fusion. The claimant was released to return to work on June 8, 2005. The claimant continues to suffer back pain and has not worked since October 12, 2004. She receives \$1475.00 in long-term disability benefits each month and has applied for Social Security Disability benefits.

In my opinion, a review of the evidence fails to demonstrate that the claimant can prove by a preponderance of the evidence that she sustained a compensable injury to her back on June 17, 2004. The evidence demonstrates that the claimant has suffered from degenerative disc disease since 1989. In fact, the medical records show that on October 27, 2003, the claimant complained about her legs and back hurting all the time. Likewise, on April 14, 2004, the claimant visited Dr. Sitzes complaining of back pain so severe that she described it as a "10" on a scale of 0-10. On April 15, 2004, she was admitted to the hospital for unrelated urinary tract infection and she indicated to

the treating physician that she suffered from chronic neck and low back pain.

The claimant conveniently testified that she did not recall registering any of the prior back complaints. The claimant also adamantly insisted that when she visited Dr. Sitzes on June 17, 2004, she told him what happened. However, there is nothing in his medical reports whatsoever. In fact, the water hose incident does not even appear in any medical records until September 28, 2004. The claimant went to the doctor many times during this time period and there is absolutely no mention of a bending/water hose incident.

I cannot find the claimant to be a credible witness. The claimant's testimony is replete with inconsistencies and contradictions.

I find that the claimant is not a credible witness. Her testimony is rife with inconsistencies. Further, it is curious at best why the claimant failed to explain the lack of the medical records containing any mention of a work related incident until sometime in September of 2004. Therefore, based upon all the evidence, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable back injury on June 17, 2004.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner