

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510183

DENEA HARDIN,
EMPLOYEE

CLAIMANT

HOLIDAY INN - AIRPORT,
EMPLOYER

RESPONDENT

WAUSAU UNDERWRITERS INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 25, 2007

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,
Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Commission in the above-styled matter and has remanded for further consideration. *Hardin v. Holiday Inn-Airport*, CA06-1183, (May 9, 2007). Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, 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 and temporary disability compensation.

I. HISTORY

Denea Michelle Hardin, age 26, testified that she had previously sustained a right-leg hamstring pull in about January 2005. Ms. Hardin testified, "I had fallen at home and I had went to the doctor several times and it was concluded that I had torn my hamstring and surrounding muscles."

The claimant testified that she had worked at the Holiday Inn Airport, waiting tables. The parties stipulated that the employment relationship existed on April 27, 2005. The claimant testified that she slipped on a wet floor and sustained an accidental injury on that date: "I slipped and fell on my tailbone really hard, and my left leg went out from underneath me, my right leg hit the floor and went out in, like, the splits, and my left leg slammed the floor, which put all the pressure on my shoulder and my neck." The claimant testified that she felt pain "In my lower back, extremely in my left hip, entirely down my whole entire right leg from probably around the buttocks area all the way down to my toes. My left shoulder all the way up to the top

of the left side of my neck." The workplace injuries were "extremely different" than the hamstring pull, the claimant testified.

The claimant testified that she immediately reported the accident to Holiday Inn management. The claimant testified that she sought emergency medical treatment the next day, but there is currently no record of this treatment before the Commission.

The record contains a Report Of Accident from Benton Family Clinic dated May 2, 2005. The Report indicated that there had been an accident on April 27, 2005 at 10:15, and that the claimant had slipped and fallen on a wet floor. Dr. Russell Burton, who the claimant identified as her primary physician, reported the following:

She slipped and fell at work injuring the right knee. She was seen at the ER in North Little Rock, evaluated, placed in a knee immobilizer and sent home. She was given Lorcet Plus for pain. She complains of pain in the left shoulder and left side of the neck as well as the back and right lower extremity. When she slipped apparently her right knee hyperextended and she actually fell to the floor almost in a splint (sic) type position. I see no swelling to the knee and range of motion is normal. There is a popping of the patella though it does not sublux out of the patella groove. There is pain to palpation of the patella and the medial an (sic) lateral joint line. There is also pain to

palpation of the posterior aspect of the knee. SLR is positive on the right. No paraspinous spasm in the lumbar spine region. There is tenderness to palpation of the trapezius muscle of the left side of the neck with fairly normal range of motion of the neck.

Dr. Burton assessed, "Knee Strain, Back Strain and Neck Strain from fall with associated contusion to the knee as well, probably resolving." Dr. Burton planned the following: "MRI of the lumbar spine. Follow up based on results. She will be out of the knee brace as she does bear full weigh (sic) and walks with only a slight limp. However, she will not be able to return to work as yet due to the nature of her job."

The claimant testified that she returned to limited work duty for the respondent-employer. "I had to sit in a chair until my MRI was cleared," she testified. An MRI of the claimant's lumbar spine was taken on May 19, 2005, with the impression, "Negative MRI scan of the lumbar spine."

The record indicates that Dr. Burton saw the claimant on June 2, 2005:

She continues to complain of pain in the left buttocks and also pain down the posterior aspect of the right lower extremity, from the thigh down to the foot. See previous reports and previous note regarding injury. She continues to have pain if she is up on her feet for any length of time and it has really limited her life at this

point....She has been limited on her job to mostly sitting type activity rather than the usual waitress job and as a result has lost a significant amount of income from tips. See results of MRI recently done and normal....There is pain to palpation of the left buttocks below the SI joint. Continued musculoskeletal pain of uncertain etiology now some four months after the initial injury and a couple of months past the second injury. MRI negative so this would not seem to be a radicular problem. I cannot palpate any muscle spasms or pronounced muscle tightness or abnormal masse (sic) within the musculature to substantial (sic) her pain complaints. Therefore, I will send her to Dr. Saflen for chronic pain specialty evaluation for such things as reflex sympathetic dystrophy, etc....

Dr. Burton saw the claimant on or about June 16, 2005:

She is back today for reevaluation and continues to complain of pain in the right lower extremity down the posterior aspect. She has now developed a mottled appearance to the skin. She has been attempting to work but is having a lot of pain....The skin of the left (sic) lower extremity over the calf does have a mottled appearance that is not present on the left calf. MRI results of the lumbar spine reviewed with her. She has had a previous under the table MRI of the hip and knee. Chronic right lower extremity radicular type pain. I think it is certainly neuropathic in origin post-injury....Follow up in one month....I will also check on the referral status for the chronic pain with clinic evaluation with Dr. Cover or Dr. Mocek....

Dr. Christopher K. Mocek, a specialist in Minimally Invasive Spinal Medicine, examined the claimant on or about July 27, 2005:

Full active range of motion with flexion and extension of the lumbar spine as well as rotation to the right and left with flexion and extension....There is some erythematous skin discoloration in the right L5 and S1 dermatomes compared to the left....
No edema in the lower extremities bilaterally....
MRI lumbar spine on 5-19-05 was negative....

This patient is clearly having pain from lumbosacral strain and inflammation of the L5 and S1 nerve roots on the right. She could have an occult annular tear in the L5, S1 disc causing chemical inflammation of the nerve roots. She has had persistent pain for 8 months and we can try a lumbar epidural steroid injection L5, S1 on the right to treat the inflammation around the L5 and S1 nerve roots. Hopefully we can get rid of the radicular pain and get her into some PT and start the rehab process. She may need one or two epidural steroid injections to get rid of this radicular pain. We have seen this on occasions where patients have clearly radicular pain in a dermatomal pattern without any MRI findings.

Dr. Mocek assessed the following: "1) Radiculopathy of the lower limb. 2) Lumbar spine pain." Dr. Mocek's treatment plan included "Schedule lumbar epidural steroid injection L5, S1 on the right under flouro guidance with dye confirmation and conscious sedation."

The claimant testified that she had undergone two injections administered by Dr. Mocek, and that the injections had "helped to a certain degree."

The claimant testified:

Q. And did you, in fact, work on limited duty until August 29, 2005?

A. Yes, I did....That was the last night that I worked.

Q. Okay. And why was that the last night that you worked at the Holiday Inn?

A. Because I found out the next day that we were having a meeting Monday morning and that we probably all did not have a job. Monday morning we went to the meeting and they told us that we were all terminated and we were released and that we could all go receive unemployment....

Q. So everybody in your position got terminated or laid off. Is that correct?

A. Correct.

The claimant testified that she continued to see Dr. Burton.

The claimant testified that she began working at Fire Fall Grill & Bar from October 15, 2005 until November 23, 2005, waiting tables, but that she was physically unable to continue that job. The claimant testified that she began part-time retail employment on November 23, 2005.

A pre-hearing order was filed on November 28, 2005. The claimant contended that she "was injured on April 27, 2005, while employed with Hartland (sic) Hotel, also known as the Holiday Inn at the Airport, that she slipped and fell injuring her back, hips, spine, right leg, left hand, and has been suffering migraine headaches as a result of her injuries. Claimant seeks TTD benefits from the date that she was dismissed from employment because the establishment closed and continuing through a date yet to be determined. Claimant also contends she is entitled to medical benefits and attorney's fees."

The respondents controverted the claim, contending that "there are no objective findings and that claimant continued to work in a light duty capacity and worked until the business closed."

The parties agreed to litigate the following issues: "Compensability; claimant's right to TTD benefits and medical benefits; controversion, and attorney's fees."

In correspondence from the claimant's attorney dated December 9, 2005, Dr. Burton checked "Yes" to the question, "1. Where there objective findings present demonstrating that Ms. Hardin actually had an injury?" Dr. Burton wrote,

"see note 5/2/05 - objective." Dr. Burton checked "Yes" to the question, "3. During your treatment of Denea Hardin, were her work and/or activities limited?" Dr. Burton wrote, "No duty initially followed by sitting duty until referral to chronic pain specialist." Dr. Burton signed the correspondence on December 21, 2005.

The claimant's attorney sent similar correspondence to Dr. Mocek on December 9, 2005. Dr. Mocek identified the following "objective findings": "Only one - positive straight leg raising test right L5 dermatome." Dr. Mocek indicated that the claimant had not reached the end of her healing period, and that the claimant had a work restriction of "No lifting over 25 lbs." Dr. Mocek signed the correspondence on December 22, 2005.

A hearing was held on December 29, 2005. At that time, the claimant contended that she was entitled to temporary total disability compensation from the date of her employment termination, August 29, 2005, through October 15, 2005. The claimant contended that she was entitled to temporary partial disability from November 23, 2005 to a date yet to be determined.

The claimant testified on cross-examination, "I have an extreme amount of pain that goes from all the way down my right leg to my toes and all the way down the side of my calf, and then I have an extreme amount of pain that goes down the lower side of my back and then extremely in my left hip. I have an extreme amount of pain in my left shoulder and all the way up the left side of my neck and my right knee. That was never there before until that injury."

An administrative law judge found, "Claimant has failed to prove by a preponderance of the credible evidence that she sustained a compensable injury arising out of and during the course and scope of her employment on April 27, 2005, or that any work-related injury she may have sustained was the major cause of her condition." The ALJ denied and dismissed the claim, and the claimant appealed to the Full Commission.

In an opinion filed July 12, 2006, the Full Commission affirmed and adopted the administrative law judge's decision. The claimant appealed to the Arkansas Court of Appeals, which has reversed the Commission's finding and has remanded for further consideration.

II. ADJUDICATION

A. Compensability

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

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is 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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission finds that the claimant proved she sustained a compensable injury to her right knee and lower back. The claimant testified that she slipped and fell at work on April 27, 2005. Dr. Burton examined the claimant on or about May 2, 2005 and found

"popping" in the claimant's right patella. The record does not demonstrate that this popping was within the claimant's voluntary control. We therefore find, in the present matter, that the claimant established a compensable injury to her right knee by medical evidence supported by objective findings. Dr. Burton's assessment included knee strain, back strain, and "associated contusion to the knee." A report of "contusion" has been identified as an objective medical finding. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). On June 16, 2005, Dr. Burton reported a "mottled" appearance in the claimant's skin over her right calf. This "mottling," in the present matter, is an additional objective medical finding demonstrating a compensable injury to the claimant's right knee.

Dr. Mocek began treating the claimant on July 27, 2005. Dr. Mocek observed "some erythematous skin discoloration in the right L5 and S1 dermatomes compared to the left." We find in the present matter that the "erythema," i.e., redness of the skin, noted by Dr. Mocek is an objective medical finding establishing a compensable injury to the claimant's lower back. Dr. Mocek stated that the claimant was "clearly having pain from lumbosacral strain and

inflammation of the L5 and S1 nerve roots on the right.” Dr. Burton and Dr. Mocek both subsequently informed the claimant’s attorney that they had observed objective findings on their physical examination of the claimant.

Based on the record currently before us, the Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained an accidental injury to her right knee and lower back on April 27, 2005. We find that the injury caused physical harm to the claimant’s body, arose out of and in the course of the claimant’s employment with the respondents, required medical services, and resulted in disability. The accidental injury was caused by a specific incident and was identifiable by time and place of occurrence. The claimant established a compensable injury to her right knee and lower back by medical evidence supported by objective findings.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of evidence that she is entitled to

requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The Full Commission has found in the present matter that the claimant sustained a compensable injury to her right knee and lower back. Dr. Burton's assessment included knee strain and back strain. Dr. Mocek's diagnosis included lumbosacral strain. The record demonstrates that all of the treatment and referrals provided by Dr. Burton and Dr. Mocek were reasonably necessary in connection with the claimant's compensable injuries to her right knee and lower back.

C. Temporary Disability

The Full Commission has determined that the claimant sustained compensable injuries to her right knee and lower back. The claimant's compensable injury to her lower back is an unscheduled injury. For an unscheduled injury, temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages, whereas temporary partial disability is that period within the healing period in which the employee

suffers only a decrease in the capacity to earn the wages she was receiving at the time of the injury. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The claimant's compensable injury to her right knee was a scheduled injury. See, Ark. Code Ann. §11-9-521. An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability compensation during her healing period or until she returns to work, whichever occurs first. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The claimant in the present matter does not indicate whether the Full Commission should adjudicate temporary total disability for an unscheduled injury or a scheduled injury.

In any event, the instant claimant sustained compensable injuries to her lower back and right knee on April 27, 2005. Dr. Burton saw the claimant on or about May 2, 2005 and assessed knee strain and back strain. The claimant testified that she returned to limited work duty for the respondent-employer. Dr. Burton noted on June 2, 2005, "She has been limited on her job to mostly sitting type activity rather than the usual waitress job and as a result has lost a significant amount of income from tips."

The claimant's testimony indicated that she continued to work limited duty with lower wages until August 29, 2005. The claimant testified that she was told on or about August 29, 2005, that her employment would be terminated. The record indicates that the respondent-employer was closing its business. The claimant contends that she was entitled to temporary total disability from August 29, 2005 through October 15, 2005. The Full Commission recognizes that the claimant's termination was not related to her compensable injuries. However, the evidence shows that the claimant had not returned to full wages after her injuries. We find that the claimant proved she was entitled to temporary partial disability from August 29, 2005 through October 15, 2005. The claimant testified that she returned to work for another employer from October 15, 2005 until November 23, 2005. The claimant would therefore not be entitled to temporary disability during that time.

The claimant testified that she began performing part-time retail employment on November 23, 2005. The record currently before the Commission demonstrates that the claimant remained within her healing period for her compensable injuries as of November 23, 2005. We find that

the claimant proved she was entitled to temporary partial disability compensation from November 23, 2005 until a date yet to be determined.

Based on our *de novo* review of the entire record currently before the Commission, and pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant proved she sustained compensable injuries to her lower back and right knee on April 27, 2005. The claimant proved that all of the treatment and referrals from Dr. Burton and Dr. Mocek were reasonably necessary. The Full Commission finds that the claimant proved she was entitled to temporary partial disability compensation from August 29, 2005 through October 15, 2005, and from November 23, 2005 until a date yet to be determined.

The Full Commission therefore reverses the administrative law judge's finding that the claimant did not prove she sustained a compensable injury. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715 (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) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.