

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H208725

LAUREN FARLEY, Employee	CLAIMANT
OZARK REGIONAL VEIN & ARTERY CENTER, Employer	RESPONDENT
CONTINENTAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JUNE 14, 2023

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

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by KAREN H. MCKINNEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 24, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 1, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as 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 November 21, 2022.
3. The claimant was earning an average weekly wage of \$720.00 which would entitle her to compensation at the weekly rates of \$480.00 for total disability benefits and

\$360.00 for permanent partial disability benefits.

4. The respondents have controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$824.36 which would entitle her to compensation at the rates of \$550.00 for total disability benefits and \$413.00 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 back on November 21, 2022.
2. Related medical treatment; including, treatment recommended by Dr. Deimel.
3. Temporary total disability benefits from November 22, 2022 through a date yet to be determined.
4. Attorney fee.

Claimant clarified at the time of the hearing that she is requesting temporary total Disability benefits from November 22, 2022 through January 24, 2023.

The claimant contends she is entitled to medical treatment for her back as recommended by Dr. Deimel, and to temporary total disability benefits from November 22, 2022 through January 24, 2023, and an attorney fee. Claimant reserves all other issues.

The respondents contend the claimant did not sustain a compensable injury on November 21, 2022. The claimant suffers from a pre-existing degenerative back condition for which she takes pain medication and has had a LESI as recently as October 3, 2022, June 10, 2022, and March 11, 2022. The claimant was not on the clock when her alleged injury occurred. The claimant was not being paid for her time and was volunteering to help respondent employer move into a new facility. The claimant cannot

prove by a preponderance of the evidence that she sustained a compensable injury that arose out of and in the course of her employment that is supported by objective medical findings of a new injury.

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 witness and to observe her 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 a pre-hearing conference conducted on March 1, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. 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 November 21, 2022.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes medical recommended by Dr. Deimel.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning November 30, 2022 and continuing through January 24, 2023.

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

FACTUAL BACKGROUND

Claimant is a 34-year-old woman who began working for respondent in March 2020 as an esthetician with her job duties primarily consisting of performing facials. However, she also performed some other skin care treatments as well as using lasers. She also testified that she occasionally worked at the front desk as a receptionist and was responsible for inventory and ordering supplies.

The claimant has a history of spinal complaints which have included cervical fusions in March and October 2016. In addition, claimant has had some complaints involving her lumbar spine. Since 2020 the claimant has primarily received medical treatment from Dr. George Deimel, an orthopedic surgeon at Ozarks Orthopaedics. In addition, claimant has also received treatment from Thurman Smith, PA-C at Ozarks Orthopaedics. On July 8, 2020 claimant was seen by Dr. Deimel and he noted that claimant was complaining of lumbar pain for which he suspected that she suffered from lumbosacral radicular pain syndrome. Dr. Deimel ordered an MRI scan which was performed on July 21 and was read as showing mild ligamentous and facet disease at L4-5 and L5-S1.

Claimant returned to see Smith on July 23, 2020, at which time he discussed claimant undergoing some injections for diagnostic/therapeutic purposes. Smith's report indicates that claimant wanted to think about that treatment and noted that claimant would call if she wished to pursue injections at the L4-5 and L5-S1 areas.

Claimant did not choose to undergo those injections until she was seen by Dr. Deimel on February 8, 2022. In his report of that date, Dr. Deimel notes that claimant has

noticed that she had worsening pain with increased activity. This was primarily due to her work activities which required prolonged standing, sitting, twisting, and bending. Dr. Deimel indicated that it would be reasonable to consider injections and he performed injections at the L4-5 and L5-S1 levels on March 11, 2022.

Smith's report of April 5, 2022 indicates that following the injection claimant received 95% improvement in her low back pain. Claimant underwent repeat injections by Dr. Deimel on June 10, 2022 and again on October 3, 2022. While the second injection was not as effective as the first, Smith noted in his report of October 18 that claimant received greater than 80% improvement in her lumbar radicular complaints.

Claimant testified that on November 21, 2022, she was sitting at the front desk and was placing various supplies, manuals, and brochures into a box and as she "was bent over, I felt a loud pop in the back and immediately two shooting pains down my leg." Claimant testified that she reported the injury to her HR clinic manager and sought medical treatment the next day from Urgent Care at Ozark Orthopaedics.

Claimant was evaluated by Tanner McGinty at Urgent Care on November 22, 2022 and his report reflects a history of claimant feeling a sudden pop in her sacral region after bending over at work the day before. McGinty prescribed medication and ordered an MRI scan of the claimant's lumbar spine.

Claimant underwent a lumbar MRI on November 28, 2022, which was read as showing mild multilevel spondylosis as well as a disc extrusion at the L5-S1 level.

Thereafter, claimant was evaluated by Thurman Smith on December 6, 2022, and he recommended additional injections based on claimant's positive response to injections in the past. The medical records indicate that claimant underwent lumbar epidural steroid

injections by Dr. Deimel on January 9, 2023. Since the time of that injection claimant's treatment has primarily focused on a right hip labral tear which resulted in surgery in April 2023. Claimant is not contending that her right hip injury is a work related injury.

Claimant has filed this claim contending that she suffered a compensable injury to her low back on November 21, 2022. She seeks payment of related medical treatment as well as temporary total disability benefits and a controverted attorney fee.

ADJUDICATION

Initially, I note that respondent contends that claimant was not performing employment services at the time of her injury. An employee is performing employment services when she is doing something that is generally required by her employer. *Texarkana School District v. Conner*, 373 Ark. 372, 284 S.W. 3d 57 (2008). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's interest, either directly or indirectly. *Javen v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W. 3d 281 (2007).

I find based upon the evidence presented that claimant was performing employment services at the time of her injury. Initially, it should be noted that November 21, 2022 was a Monday. Apparently, on Saturday, November 19, the claimant was present at the respondent's place of business and engaged in activities involving a move. However, claimant testified that she was not injured on Saturday, November 19, and there is no other evidence indicating that claimant's injury actually occurred on November 19 as opposed to November 21.

With respect to November 21, I note that respondent agrees that claimant worked

3.80 hours that day. Claimant testified that she was working at the front desk packing various items in a box when she felt a pop and pain in her low back. The items claimant was packing were related to her employment with the respondent.

Accordingly, I find that claimant was performing employment services at the time of her accident on November 21, 2022. She was at work and was packing items in a box for her employer which advanced the employer's interest, either directly or indirectly.

I also 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 on November 21, 2022. Clearly, as previously noted, claimant did have some prior lumbar complaints for which she received treatment, including lumbar epidural steroid injections.

Under Arkansas workers' compensation law, an employer takes the employee as it finds him, and employment services that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation is a new injury resulting from an independent incident, so it must meet the definition of a compensable injury in order to establish compensability of the aggravation. *Green County Judge v. Penny*, 2019 Ark. App. 552 @ 11, 589 S.W. 3d 478, 486 (citing *Liaromatis v. Baxter County Regional Hospital*, 95 Ark. App. 296, 236 S.W. 3d 524 (2006)).

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 on November 21, 2022, in the form of an aggravation of her pre-existing low back condition.

To prove a compensable injury as the result of a specific incident, identifiable by time and place of occurrence, claimant must establish by a preponderance of the

evidence (1) injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body that required medical services or resulted in disability; (3) medical evidence supported by objective findings, as defined in A.C.A. §11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. A.C.A. §11-9-102(4)(A)(i); *McCutchen v. Human Development Center*, 2018 Ark. App. 239.

Here, for reasons previously discussed, I find that claimant has proven that her injury arose out of and in the course of her employment with respondent. Claimant was in the process of packing a box with various office supplies at the time she felt a pop and pain in her low back. I also find that claimant has proven that her injury was caused by a specific incident identifiable by time and place of occurrence. I find the claimant's testimony regarding her compensable injury to be credible and entitled to great weight. With respect to this issue, I note that claimant's testimony is corroborated by the history contained in the medical records.

Finally, I also find that the claimant's injury caused internal harm to her body that required medical services or resulted in disability and that she has offered medical evidence supported by objective findings establishing the injury. Although claimant did have a history of lumbar back complaints for which she had received a lumbar epidural steroid injection as recently as October 3, 2022, medical records indicate that the incident on November 21, 2022, aggravated that pre-existing condition. As previously noted, McGinty at Urgent Care on November 22, 2022 indicated that claimant felt a sudden pop in her sacral region while bending over at work the day before. As a result of those complaints, McGinty ordered a new lumbar MRI scan. That scan was performed on

November 28, 2022, and contains the following impression:

Mild multilevel spondylosis of the lumbar spine. This is increased from the prior exam at L4-5 and L5-S1 levels.

At L5-S1, there is mild canal stenosis and left greater than right lateral recess stenosis secondary to a new central disc extrusion with caudal migration and worsening moderate bilateral facet arthropathy. Moderate bilateral foraminal narrowing. (Emphasis added.)

Following the claimant's MRI scan, claimant returned to Smith on December 6, 2022, Smith's report contains the following diagnosis:

Acute onset low back buttock and bilateral leg pain status post work injury on 11/21/22 at renew aesthetics [in] Rogers with MRI showing interval development of an L5-S1 small central disc extrusion with lateral recess and moderate neuroforaminal narrowing, lumbar radiculopathy. (Emphasis added.)

Smith went on to indicate that claimant had suffered from acute low back and leg pain after her work accident and that a newer MRI scan showed development of an L5-S1 disc extrusion "and there is greater than 51% confidence that her work incident has caused her acute complication of her low back hip and leg pain and interval findings on her MRI." Smith then went on to recommend repeat epidural steroid injections.

Thus, following the incident on November 21, 2022, claimant underwent a new MRI scan which revealed new findings in the form of a disc extrusion at the L5-S1 level. This was noted in the MRI report and in the report of Smith. In addition, Smith has opined that there is a greater than 51% chance that her work accident caused the findings that

are now present on the MRI scan. Based upon these findings, I find that claimant has proven that her injury caused internal harm to her body that required medical services; that she has offered medical evidence supported by objective findings establishing a compensable injury; and that claimant's accident aggravated her pre-existing low back condition.

In summary, 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 on November 21, 2022.

In reaching this decision, I also note that claimant sought medical treatment from the emergency room on December 23, 2022. Claimant testified that the day before that visit she had family coming in for Christmas and she was standing on her feet for much of the day attempting to cook, resulting in increased low back pain. The emergency room record of that date likewise indicates that claimant had been on her feet for long hours cooking and had increased low back pain. Claimant was given medication along with patches for treatment of her pain. I do not find that this incident serves as an independent intervening cause with respect to claimant's compensable injury. There is no indication that claimant was restricted from standing by her treating physicians. In addition, by this time, an MRI scan had already been performed indicating that claimant had a new disc extrusion at the L5-S1 level which had resulted in her need for medical treatment. Therefore, I do not find that the incident of standing on her feet cooking negates or affects a finding of compensability under the facts of this case.

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

treatment for claimant's low back recommended by Dr. Deimel.

Claimant also contends that she is entitled to temporary total disability benefits from November 22, 2022 through January 24, 2023. Claimant's injury is an unscheduled injury. A claimant who suffers an unscheduled injury is entitled to temporary total disability benefits during their healing period and while they suffer a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

While I find that claimant did remain within her healing period from the date of her injury through January 24, 2023 based upon the medical reports, claimant did not begin suffering a total incapacity to earn wages until November 30, 2022. The day after her accident the claimant was seen by McGinty at Urgent Care who gave claimant medication and ordered an MRI scan. However, his report does not indicate that he took claimant off of work. Thereafter, Dr. Deimel indicated in a note dated November 30, 2022, that claimant should remain off work from November 30, 2022 through January 5, 2023. On December 6, 2022, Thurman Smith indicated that claimant should not perform any work until January 24, 2023.

Based upon this evidence, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages which would entitle her to temporary total disability benefits beginning November 30, 2022 and continuing through January 24, 2023.

AWARD

Claimant has met 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 November 21, 2022. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. In addition, claimant is entitled to temporary total disability benefits beginning November 30, 2022 and continuing through January 24, 2023. Respondent has controverted claimant's entitlement to indemnity benefits awarded herein.

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.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$445.95.

All sums herein accrued are payable in a lump sum without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE