

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H007376**

KIMBERLY MOREHEAD, Employee

CLAIMANT

O. K. FOODS INC., Self-Insured Employer

RESPONDENT

OPINION FILED **OCTOBER 12, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by TANNER THOMAS, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On August 1, 2023, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 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 this claim.
2. The employee/employer/carrier relationship existed on August 19, 2020.
3. The respondent has controverted the claim in its entirety.

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

1. Whether claimant sustained a compensable injury on August 19, 2020.
2. If compensable, compensation rate.
3. If compensable, whether claimant is entitled to medical benefits and temporary total

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disability benefits.

4. Attorney's fees.

However, at the beginning of the hearing, the parties stipulated that the claimant's average weekly wage was \$529.80, which yields a temporary total disability rate of \$353.00.

All other issues are reserved by the parties.

The claimant contends that "On August 19, 2020, claimant was in the scope and course of employment when she slipped and fell, sustaining injury to her mid and low back. Respondent denied the claim in its entirety and claimant sought treatment on her own. An MRI revealed a disk protrusion at T12-L1 and L4-5. Claimant contends that she sustained a compensable injury in the scope and course of employment and that she is entitled to temporary total disability, medical benefits, and that her attorney is entitled to an attorney's fee. All other issues are reserved."

The respondent contends that "Claimant did not sustain a compensable injury as that term is defined by Act 796."

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant 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 June 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 that she suffered a compensable injury to her back and hip on August 28, 2020. However, this injury was not reported before September 15, 2020.

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3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injuries after September 15, 2020.

4. Claimant is entitled to temporary total disability benefits beginning September 15, 2020, through November 23, 2020.

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

#### FACTUAL BACKGROUND

At the beginning of the hearing, the parties stipulated that the claimant's average weekly wage was \$529.80, which yields a temporary total disability rate of \$353.00. That stipulation was accepted, and that issue was removed from my consideration in this opinion.

#### HEARING TESTIMONY

Claimant was the only witness at this hearing. She testified that she was working at O.K. Foods in August 2020 when she injured her back while working as a manifester. That job entails working with a scale, weighing packaged products, and printing the ticket to go on the side of the product. The scale claimant was working with was a floor scale, and she estimated that it was six feet by six feet. On August 19, 2020, claimant testified that she slid on some metal that was around the scale. It was wet and became slick, causing her to fall forward onto her hands and knees. She described it as "like a baby crawling." At the time, she felt a tweak in her back; it didn't hurt, but she felt something was not right. The person that put the product on the scale tried to assist her, but claimant declined his assistance at first. He eventually did help claimant to her feet, and she then went to the nurse to report the incident. At the time, claimant was not in pain, but believed it needed to be reported in case something happened later.

Claimant testified that the incident happened on Wednesday, August 19, 2020. Claimant continued to work that week as well as the next week until August 28, when her hip was hurting so

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much, she told her boss that she was going to go home and rest. However, resting over the weekend did not make her hip any better. She testified that when she got out of bed on that morning, she could hardly walk to the bathroom and believed something was “really bad wrong with my hip.” Claimant went to the emergency room on August 31, 2020. She testified that the examination consisted of the doctor pushing a finger into her side. The record from the emergency room reflected that she had a diagnosis of trochanteric bursitis of the left hip.

Claimant testified that she went to get the medication that the emergency room doctor prescribed for her, and she was in great pain as she walked into the Walmart pharmacy to pick up her prescription. When she learned that the prescription wasn’t ready, she returned to her car to wait to be called when the medication was ready because she couldn’t stand there to wait for it. She then had a tele-health conference with Dr. Terri Lewelling and an in-office visit was scheduled for September 3, 2020. Dr. Lewelling took claimant off work until at least September 8, 2020, but Dr. Lewelling extended that until claimant returned to work on November 23, 2020. During the time claimant was treated by Dr. Lewelling, she had a CT scan and an MRI. Claimant was not sure if she went to the nurse’s station at work and made a report of an injury after the CT scan or the MRI.<sup>1</sup> Claimant said that the person she talked to denied the claim. Following that denial, claimant stayed with Dr. Lewelling and underwent a course of physical therapy. Claimant said that the physical therapy worked very well, causing her pain to subside. Although surgery had been suggested, claimant determined that she did not want to go through with it. As of the date of the hearing, she said that she felt better, as the pain was not that bad. Claimant said she still has a little bit of pain in her left side and numbness

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<sup>1</sup> Claimant’s testimony when asked if she reported this before or after the MRI to someone named Carol, who was over the workers’ compensation claims, was “I don’t know for sure. I’m going to say it was probably after, but I am not really sure. It had to have been probably after the CAT [sic] scan, but before the MRI, maybe. I don’t really know for sure. I am sorry.”

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in her leg, but it has gotten better as she does the physical therapy at home.

On cross-examination, claimant said that she was working six days a week, Monday through Saturday. She related an injury that she had on May 10, 2021, which was also a back injury, but it was accepted by O.K. Foods as compensable. Claimant explained that Dr. Lewelling did not properly record what she said about walking into Walmart and being in pain, because that is not when her pain started. She admitted that when she reported the incident on August 19, 2020, to the plant nurse, she denied needing any medical care because she wasn't hurting. The next time she told anyone at O.K. Foods that she had hurt her back at work was after the MRI. Claimant said she didn't realize that the fall on August 19, 2020, had anything to do with her hip hurting. When asked if she reported this as a workers' compensation claim because of the bill that she was going to receive from the MRI, claimant thought her health insurance would pay for it. For an unexplained reason, it did not pay for any of her treatment related to her fall, even after workers' compensation denied the claim; however, Dr. Lewelling is free for the people that work at O.K. Foods.

The following exchange took place between claimant and respondent's counsel:

Q. (by Mr. Zuerker) But roughly in that time period, the 24th, okay up until the time you went to talk to Carol, after either the CT or the MRI, did you tell anybody that you were missing work because of a job-related injury?

A (by claimant) No, I didn't realize that it was a job-related injury.

Q. Okay. And using those same dates, either the MRI or CT, somewhere around September 24, up until the point you had that conversation with Carol in September, did you ask anyone at O.K. Foods to provide you medical treatment for a job-related injury?

A. No. Not that I know of.

Q. In fact, when you reported it the day it happened the nurse asked you if you needed medical care, didn't she?

A. Yes. She asked if I needed Tylenol or Ibuprofen.

Q. And you told her no?

A. I said no, that I wasn't in a lot of pain.

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On redirect-examination, claimant said the pain got gradually worse each day after she fell. On August 28, 2020, the day that she left work early, she said the pain was probably nine out of ten and then it would have been ten out of ten the following Monday when she went to the emergency room. Claimant thought the hours that she was working contributed to some of her issues.

#### REVIEW OF THE EXHIBITS

Claimant first went to the emergency room on August 31, 2020, and was diagnosed with trochanteric bursitis of her left hip. There was no mention of any x-ray or other radiographic testing. The history recorded by Dr. James Russell stated “This is a new problem. The current episode started two days ago. The problem occurs constantly. The problem has not changed since onset. Pertinent negatives include no chest pain, no abdominal pain, and no headaches. The symptoms are aggravated by walking. The symptoms are relieved by heat and lying down”. Claimant was given some prescriptions and then consulted with her primary care provider, Dr. Terri Lewelling. This was a tele-health visit and Dr. Lewelling conducted no physical examination of claimant.

On September 3, 2020, claimant went to Dr. Lewelling’s office and was examined. Dr. Lewelling mentioned the trochanteric bursitis diagnosis from the emergency room but added that she believed the claimant had lumbar radiculopathy. I do not see that Dr. Lewelling arrived at the diagnosis of bursitis on her own during that visit.

Claimant had a tele-medicine visit on September 10, 2020, with Dr. Lewelling in which claimant reported that her hip pain was not better and was radiating down her left leg. Dr. Lewelling added gabapentin to her list of medications.

On September 14, 2020, there was yet another tele-medicine visit, and it appears that the mention of trochanteric bursitis is only made in reference to the emergency room visit of August 31, 2020. Due to the deteriorating nature of claimant’s condition, Dr. Lewelling ordered a CT scan of

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claimant's lumbar spine.

The CT scan was conducted on September 15, 2020, with the following impression:

1. Central left lateral protrusion at L4-5 with facet hypertrophy, left foraminal stenosis, and mild canal stenosis.
2. Calcified spur/disc protrusion at T12-L1 with mild to moderate thecal sac compression.
3. Additional findings as above.

The above findings would include L5-S1, central bulge, probably small central protrusion slightly abutting the ventral thecal sac and S1 nerve roots.

Dr. Lewelling had a tele-medicine conference with claimant on September 16, 2020, and after having reviewed the CT scan results, Dr. Lewelling believed that she might need a referral to a surgeon. In this note, Dr. Lewelling recorded the following: "possible accident or event leading to this pain; fell at work nine days before she had sx; reports that were not classified as workers' comp per patient have been denied. She landed forward on knees and palms; she fell forward, and reports hurt lower part of her back and reported it to the night nurse." Claimant was referred to physical therapy and there was a referral to spine surgery which included an MRI, which was performed September 24, 2020. The impression was:

1. Mild element hypertrophy L4-5 with central to left sicec disc protrusion narrowing the left lateral recess and foramen.
2. Central disc protrusion T12-L1 with mild canal stenosis.

After the MRI, claimant again had a tele-health conference with Dr. Lewelling. After Dr. Lewelling received the results of the MRI, she called claimant to give her the results of the MRI and noted that claimant was already referred to a surgeon for evaluation.

Dr. Lewelling had another tele-medicine visit with claimant on October 5, 2020, which was primarily to take claimant off work for another week, as was the tele-medicine visit on October 12, 2020. On October 21, 2020, Dr. Lewellen reported that claimant had been doing physical therapy for

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two weeks and felt like it was helping.

On November 4, 2020, claimant had yet another tele-medicine appointment with Dr. Lewelling and reported that she was having no pain currently but still some numbness in the left lower extremity. She was to follow up in two weeks to be evaluated to return to work. During the tele-medicine visit of November 18, 2020, claimant was given a note to return to work on November 23, 2020. She was released to follow up with Dr. Lewelling as needed.

### DEPOSITION TESTIMONY

Respondent submitted the claimant's deposition, which was taken on June 27, 2023. Little in it differed from claimant's testimony at the hearing. She did, however, explain in more detail how she came to realize that the fall she thought was nothing more than a "tweak" in her back was the source of her hip pain:

Q. (by Mr. Zuerker) Did you go to work the next day (R. Ex. 2, page 24)

A. (by claimant) No. They had me off three days with the medication I was taking, but it did not-- it didn't do nothing for me. That's when I went down to the O.K. Foods Clinic.

Q. After three days?

A. After three days. I believe it was three days.

Q. What did they do for you at the clinic?

A. I told her about me going to the emergency room and he told me it was bursitis and the medicine wasn't working. When she asked me to explain to her the symptoms I was having and when I told her that, you know, this leg was feeling kind of numb, my left leg was feeling numb, she said I think you have a pinched nerve. So, she referred me to get a CAT scan and an MRI.

Q. Okay.

A. And when that came back, she said-- I mean she told me that it came back I had a pinched nerve.

Q. Up to that point, had you talked to anyone at O.K. about this being related to your fall?

A. No, because I wasn't thinking it had anything to do with the fall. That's when she said to me you must have fell or something. and I said, oh my God, I did like almost two weeks ago. I fell at work and she says I then--- I may not



be able to see you if that's the case.<sup>2</sup> (R. X. 2, page 25)

ADJUDICATION

To prove a compensable injury, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that 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, as defined in Ark. Code Ann. § 11-9-102(16) establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The question in this case is whether claimant injured herself at work on August 19, 2020, when she fell forward onto her hands and knees. The other three factors were amply established by the evidence. The medical records show that there was a disc protrusion in her spine at L-4-5; that is an objective finding of internal harm to her body. Claimant identified the time and place of the occurrence, even reporting the incident to the nurse on duty as a twinge in her back, but she did not think it was anything serious.

That leaves the question as to whether the injury arose from the course of her employment, and if so, at what point did it become compensable. In order to prove a compensable injury a claimant must prove, among other things, a causal relationship between the injury and the employment. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal

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<sup>2</sup> By way of context, claimant explained at the hearing that the employees of O.K. Foods could see Dr. Lewelling as a benefit of working there.

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relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical evidence establishes a causal relation to a work-related incident. *Wal-Mart Stores, Inc. v. Van Wagner*, supra; *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001). While a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

I found claimant to be credible in all aspects of her testimony. She did not think at first that she had injured herself when she fell but did feel something she called a “tweak” in her back immediately. Over the next nine days, however, her condition continued to gradually worsen; she attributed such to the long hours she was working. In addition to finding the claimant’s testimony at the hearing to be credible, I noted her testimony in her deposition did not materially vary from that which she presented at the hearing. Had anything she said in the deposition been inaccurate or even disputed, I would have expected to have heard such at the hearing. She told of the co-worker that helped her back on her feet when she fell, the nurse to whom she reported the fall, and the woman called only “Carol” who made the decision to deny the claim were all mentioned in the deposition; none of them refuted what claimant testified to in that deposition or in the hearing.

I believe claimant continued to perform her regular job duties through August 28, 2020, while the symptoms attributable to the August 19, 2020, injury did not resolve but rather grew progressively worse until she sought treatment. The day she tried to walk into Walmart to get the prescriptions filled was the culmination of what had been building for days, especially after she left work early on August 28, 2020. Because she did not yet appreciate the full extent of her August 19, 2020, injury, she

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did not tell the doctor in the ER about it. As she related in her deposition, it wasn't until Dr. Lewelling indicated that her symptoms were consistent with a fall that claimant made the connection between that incident and the pain in her hip. Based on her credible testimony and the lack of any proof to the contrary, I find claimant has met her burden of proving that she suffered an injury on August 19, 2020. However, an injury does not become compensable until the claimant first learns the extent of her injuries and is off work for a period that would entitle her to benefits for a compensable injury. *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985). That date would be August 28, 2020, when claimant left work early due to the pain in her hip.

However, that does not end my analysis of this matter, as respondent raised a defense that claimant did not report her injury until September 24, 2020.

Arkansas Code Annotated §11-9-701 (a)(1) provides:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

Respondent did not present any additional proof on this issue, relying on claimant's testimony as to when this injury was reported as a work-related injury. Claimant herself conceded that it was not reported as such until after either she had the CT scan, which was performed on September 15, 2020, or the MRI on September 24, 2020—but she wasn't sure which of the two it was. Since no representative of respondent testified as to when the report was made, it failed to prove by a preponderance of the evidence that no claim was made before September 24, 2020; claimant was equivocal on the date she made her report. However, respondent did prove by a preponderance of the evidence that no claim was made before September 15, 2020, as claimant conceded that there was

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nothing reported about a work-related injury before the CT scan.

Having decided in claimant's favor on the issue of compensability and in respondent's favor on the lack of notice before September 15, 2020, I turn now to the medical and indemnity benefits award. I am convinced that all of claimant's medical treatment after September 15, 2020, was reasonable and necessary. She is entitled to reimbursement for any out-of-pocket medical expenses she incurred. I further find that claimant was not able to work between September 15, 2020, until she was released to return to full duty by Dr. Lewelling on November 23, 2020, and is entitled to temporary total disability during that period.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$559.45.

**IT IS SO ORDERED.**

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE