BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204656

SHANDI ALLEN, EMPLOYEE	**CLAIMANT**
DOMTAR INDUSTRIES, EMPLOYER	**RESPONDENT**
LIBERTY MUTUAL INS. CO., CARRIER	**RESPONDENT**

OPINION FILED DECEMBER 19, 2003

Hearing before Administrative Law Judge J. Mark White on November 13, 2003, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 13, 2003, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on August 11, 2003, and a Prehearing Conference Order was entered that same day. A copy of the August 11, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed between the parties on April 24, 2002; that the claimant sustained a compensable injury to her back on April 24, 2002; that the respondents

paid medical and temporary total disability benefits through February 26, 2003; and that the claimant earned a sufficient weekly wage to entitle her to the maximum compensation rates.

The parties agreed that the issues to be presented for determination were whether additional medical treatment, specifically an IDET procedure, is reasonably necessary in connection with the compensable injury; whether the claimant is entitled to additional temporary total disability benefits; and controversion and attorney's fees. The issues of permanent disability and wage loss are reserved.

The claimant contends that additional medical treatment, including the IDET procedure recommended by Dr. Pierce Nunley, is reasonable, necessary and related to the compensable injury; that the claimant did not reach maximum medical improvement as of February 26, 2003; in the alternative, that the claimant has re-entered her healing period; and that she is entitled to temporary total disability benefits until she recovers from the IDET procedure if performed.

Respondents contend that the recommended IDET procedure is not reasonable or necessary; that the claimant's healing period has ended; that the claimant is not totally incapacitated from working; and that the discogram performed on the claimant is invalid for lack of a concurrent CT scan.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with her compensable injury, to specifically include the IDET procedure and related treatment recommended by Dr. Pierce Nunley.
4. The claimant has proven by a preponderance of the evidence that she remains in her healing period.
5. The claimant has proven by a preponderance of the evidence that she remains totally incapacitated from earning wages.
6. The claimant has proven by a preponderance of the evidence that she

remains entitled to temporary total disability benefits from February 26, 2003, until such time as her healing period ends or she regains her capacity to earn wages, whichever occurs first.

7. The respondents have controverted all the benefits discussed herein.

DISCUSSION

I. History

The claimant hurt her back in the course and scope of her employment on April 24, 2002, while lifting boxes. The respondents initially accepted the claim as compensable and paid benefits. When the claimant reported her injury, the respondents sent her to the company doctor, Dr. Mark Gabbie. Dr. Gabbie diagnosed an "SI strain," noted the presence of muscle spasms and recommended physical therapy. On May 10, 2002, Dr. Gabbie opined that the claimant had reached maximum medical improvement, with no permanent impairment, and released her to full duty.

The claimant worked for three days before she injured her back again, moving large paper rolls in the course and scope of her employment. The claimant returned to Dr. Gabbie, who placed her on light duty and provided two cortisone injections. Dr. Gabbie again opined the claimant to be at MMI as of May 26, 2002,

and released her to full duty. The claimant returned to work for two weeks before stopping work due to continuing back pain. She again returned to Dr. Gabbie, who ordered an MRI that revealed no abnormal findings. Dr. Gabbie placed the claimant on light duty, recommended physical therapy, and eventually referred her to an orthopedic surgeon, Dr. Richard Hilborn.

Dr. Hilborn first saw the claimant on August 22 and treated her conservatively. A functional capacity evaluation performed at Dr. Hilborn's request revealed the claimant was capable of handling her regular work duties, albeit with pain. The evaluation noted that the claimant provided a valid effort and suggested that she was suffering from a "sacral iliac dysfunction." Dr. Hilborn released her to full duty, and she worked for a few days. She stopped working because of her back pain and asked the respondents to send her to a different doctor. The respondents agreed to send the claimant to Dr. Chris Alkire.

Dr. Alkire saw the claimant on October 24, 2002, and excused her from work. He ordered a bone scan and blood tests, all of which yielded normal results. In his first visit with her, Dr. Alkire recorded in his notes,

> I've told her that at times it may not be possible to get a diagnosis for the kind of low back pain she's having. We've discussed the fact that she is very slightly built, thin, not very muscular and the kind of work she's doing she may not have the bodily capacity to perform. We've talked about how Troy Aikman, even though

> he's otherwise fairly healthy, can't play professional football anymore because of his head injuries. I've likened her condition to the same kind of predicament.

As predicted, Dr. Alkire was ultimately unable to diagnose why the claimant continued to suffer back pain and determined that he had no other treatment to offer. He described the claimant's condition as, "severe overuse work syndrome." Dr. Alkire told the claimant that she should not return to her job with the respondents, and that she was not physically capable of doing the work because of her petite size.

Dr. Alkire then referred the claimant to Dr. Barry Green for the assignment of an impairment rating. Dr. Green saw the claimant once and assigned her a permanent impairment rating of 5% to the body as a whole. He also determined the claimant to be at MMI as of the date of his evaluation, February 26, 2003. Dr. Alkire signed a form concurring with Dr. Green's opinion.

Though he had sent the claimant for an impairment rating, Dr. Alkire also referred the claimant to Dr. Ross Nelson for pain management. Dr. Nelson referred her to Dr. Pierce Nunley. Before seeing Dr. Nunley, the claimant saw Dr. Gabbie again on March 5, and he recommended a work hardening program, which the claimant began but did not complete.

The claimant first saw Dr. Nunley on April 4, 2003. Dr. Nunley diagnosed the

claimant with "low back pain with probable discogenic etiology" and pelvic girdle dysfunction (PGD). The medical record does not indicate whether the claimant's PGD was work-related, but her PGD problems resolved with physical therapy. Dr. Nunley ordered another MRI, which revealed "mild degenerative disc disease and mild disc bulge" at L4-5 and L5-S1. There was no indication of disc herniation or neural impingement.

Dr. Nunley performed a discogram on July 10, 2003. During the course of the discogram, Dr. Nunley observed mild fissuring at L4-5 and L5-S1 via radiographic means. Based on the claimant's subjective reports of pain during the discogram, Dr. Nunley diagnosed the claimant with "discogenic pain at L4-5 and L5-S1 with a control level at L3-4." Dr. Alkire explained in his deposition that the "control level" means the doctor tested the pain response of a disc that appeared normal to compare it with the pain response on the discs that appeared problematic. The claimant did not complain of pain at L3-4, the control level.

Based on the claimant's complaints and the results of the discogram, Dr. Nunley recommended an IDET procedure be performed at L4-5 and L5-S1. The respondents denied the proposed procedure, to which Dr. Nunley responded in a treatment note,

> She explained that one of the reasons WC was not covering it because [sic] they don't think that she has an

> annular tear. The discogram shows clear fissuring, which represents a significant annular tear in the disc. Obviously whoever read the report doesn't understand this.

II. Additional Medical Treatment

An employer must 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). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001).The burden of proof rests on the claimant to prove by a preponderance of the evidence that she is entitled to treatment. *Geo Specialty Chemical v. Clingan,* 69 Ark. App. 369, 13 S.W.3d 218 (2000). The Full Commission and the Court of Appeals have previously found the IDET not to be an experimental procedure, and they have likewise found that an IDET may be reasonably necessary treatment for back pain. *White Consolidated Indus. v. Galloway,* 74 Ark. App. 13, 45 S.W.3d 396 (2001).

Only two doctors have given a specific opinion regarding the proposed IDET procedure. Dr. Nunley, of course, recommended the procedure be done at L4-5 and L5-S1. An MRI has confirmed mild disc bulging at both levels, and a discogram revealed mild fissuring at both levels. Dr. Alkire testified in his deposition that the

claimant had reached maximum medical improvement, but he did not agree that further treatment was unreasonable. Dr. Alkire specifically testified that an IDET would be "worth a try." While not a ringing endorsement, Dr. Alkire's opinion still weighs in the claimant's favor. I further note that although Dr. Alkire opined the claimant to be at MMI and referred her to Dr. Green for an impairment rating, he did note in his treatment record that he recommended additional treatment for the claimant in the form of chronic pain management. The claimant eventually saw Dr. Nunley because of this referral by Dr. Alkire for pain management. Clearly, despite his use of the term "maximum medical improvement," Dr. Alkire considered additional treatment to be reasonably necessary.

Aside from these two doctors, the only other relevant medical opinion in the record is that of Dr. Green, who opined that the claimant was at maximum medical improvement. Dr. Green also opined that the claimant "needs no further diagnostic studies and, for sure, she doesn't need surgery." Dr. Green saw the claimant only once, however, and it was specifically for the purpose of assigning an impairment rating. There is no indication in his report that Dr. Green was aware of the fissuring found by Dr. Nunley at L4-5 and L5-S1, or that Dr. Green considered those findings in his conclusions. Dr. Green's opinion is therefore entitled to less weight than the opinions of Dr. Alkire and Dr. Nunley.

The claimant also saw Dr. Gabbie, Dr. Hilborn and Dr. Nelson, but none of them have expressed an opinion in the record regarding the proposed IDET procedure, MMI, or the reasonableness of additional treatment.

Given the recommendation of Dr. Nunley, Dr. Alkire's unenthusiastic concurrence, and the lack of any specific medical opinion opposing an IDET procedure, I must find that the claimant has proven by a preponderance of the evidence that additional medical treatment including an IDET is reasonably necessary in connection with her compensable injury.

In making this finding, I note the respondents' objection that Dr. Nunley's opinion is based on an invalid discogram. The respondents contend that the discogram performed by Dr. Nunley was invalid because it was not accompanied by a CT scan. As explained by Dr. Alkire in his deposition, the discogram measures subjective complaints of pain by the patient, typically followed by a CT scan. The respondents maintain that the subjective nature of the discogram – along with a corresponding lack of objective findings – render it invalid without a subsequent CT scan. The respondents cite no authority for their proposition, though they note that the Court of Appeals has found a discogram *with* a CT scan to be a valid, objective test. *Smith v. County Market,* 73 Ark. App. 333, 44 S.W.3d 737 (2001). Certainly, the law does not require the claimant to establish her need for additional treatment with

objective medical findings. *Williams v. Prostaff Temporaries,* 64 Ark. App. 128, 979 S.W.2d 911 (1998). Such findings, though, can provide persuasive evidence to resolve the question of whether additional treatment is reasonably necessary.

The record reveals that even though no CT scan was performed, the discogram still contains an objective component. Dr. Alkire testified that in performing a discogram, the physician utilizes a flouroscopic x-ray machine to verify the placement of the needle being injected into the disc. Dr. Alkire testified that Dr. Nunley's visualization of a fissure in the disc could have been observed via this method. This is clearly an objective method, outside the control of the claimant. In his report of the discogram, Dr. Nunley's observation of disc fissures is identified under the title, "Radiographic Interpretation." Dr. Nunley later wrote, "The discogram shows clear fissuring, which represents a significant annular tear in the disc." Dr. Nunley's observation of disc fissures during the discogram constitutes an objective finding supporting the claimant's need for additional medical treatment.

III. Temporary Total Disability

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. *Arkansas State Highway &*

Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). If the claimant, during her healing period, is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, her temporary disability is deemed total. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Because I find additional treatment to be reasonably necessary for the claimant's compensable injury, I must therefore find that she remains in her healing period. The only remaining question is whether the claimant remains totally incapacitated from earning wages.

Dr. Nunley has opined that it has been "reasonable and necessary" for the claimant to be off work since February 26, 2003, the day Dr. Green declared her to be at MMI. In addition, Dr. Gabbie had restricted the claimant to light-duty work as of March 5, 2003, when he referred her to a work hardening program. The claimant testified that the respondent-employer had no light-duty work available, and the respondents have not contended otherwise. The claimant testified that she is unable to work at her job with the respondent-employer because of her back pain. She also testified that she is unable to perform other types of work that she has

performed in the past, such as pharmacy aide, because she is unable to stand for long periods of time. However, the claimant has completed two functional capacity evaluations, and the most recent FCE shows she is capable of performing medium-level work.

Despite the results of the FCE, the claimant testified that she was unable to complete the tasks in the FCE without significant pain in her back. I found that her testimony in this regard was credible in that it was plausible and consistent with the medical record. Because the claimant is unable to perform her work with reasonable consistency and without pain and discomfort, *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), and because Dr. Nunley has opined that the claimant should remain off from work beginning February 26, 2003, I must find that the claimant remains totally incapacitated from earning wages. I therefore find that the claimant has proven by a preponderance of the evidence that she remains entitled to temporary total disability benefits from February 26, 2003, until such time as her healing period ends or she regains her capacity to earn wages, whichever occurs first.

AWARD

The claimant has proven by a preponderance of the evidence that she is

entitled to additional medical treatment, specifically the IDET procedure and related treatment recommended by Dr. Nunley, and that she is entitled to additional temporary total disability benefits from February 26, 2003, until she regains her capacity to earn wages or her healing period ends, whichever occurs first. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to ARK. CODE ANN. § 11-9-715.

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

IT IS SO ORDERED.

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HON. J. MARK WHITE
Administrative Law Judge