

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F112953**

**LISA COLLINS, EMPLOYEE**

**CLAIMANT**

**WARD VETERINARY CLINIC, EMPLOYER**

**RESPONDENT**

**CENTENNIAL INSURANCE COMPANY, CARRIER**

**RESPONDENT**

**OPINION FILED SEPTEMBER 4, 2003**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 17, 2003, at El Dorado, Union County, Arkansas.

Claimant represented by the HONORABLE F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On February 25, 2003, a prehearing conference was conducted in this claim from which a prehearing order of March 11, 2003, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as the Commission's Exhibit No. 1.

The testimony of Lisa Collins, the claimant, coupled with medical reports and other documents comprise the record in this claim.

**DISCUSSION**

Lisa Collins, the claimant, with a date of birth of March 27, 1965, commenced her

employment with respondent in August 2001. The claimant discharged employment duties of a veterinary technician at an hourly rate of \$7.00. The claimant maintains that approximately sixty days after she started her employment with respondent she received an increase in her wages in the form of a percentage of the sales. The claimant acknowledged that during her employment with the respondent she had not consistently worked a forty hour week, but rather her work week ranged from thirty-six to forty hours.

With respect to her duties as a veterinary technician in the employment of respondent, the claimant's testimony reflects:

Just about everything in the clinic. Answer phones, assisted in surgeries, I took care of clients in the examination room, restrained animals, I cleaned the kennel, walked dogs, took care of cats. Just anything that was required. (T. 10)

On cross-examination, the claimant acknowledged that prior to October 17, 2001, she experienced muscles strains that caused spasm and pain in her lower back for a period of time. (T. 15)

The claimant last discharged employment duties for respondent on October 17, 2001 when she suffered an injury within the course and scope of her employment with respondent which serves as the basis for the present claim. The claimant's testimony reflects, with respect to the October 17, 2001 injury:

I was helping the groomer take out the trash because the regular person who took out the trash every week wasn't there, and I went to the cat room to get the trash bag out of the 30-gallon can that was in the cat room and it was full of newspapers and cat litter, and I picked it up out of the can and bent over and set it on the floor, and when I tried to straighten up is when the pain occurred. (T. 10)

The claimant asserts that the pain experienced on October 17, 2001, was in the middle of her low back and was sharp in nature. The claimant added that the pain gradually started moving across her hips and down her legs, more in the right leg than the left.

The testimony of the claimant reflects that she first received treatment for her October 17, 2001 injury under the care of Dr. Larry Horn on the day of the occurrence. The following day the claimant initiated treatment under the care of Dr. Rick Brown, an El Dorado chiropractic physician, and was seen by same on several occasions.

The claimant's testimony reflects that once she filed a workers' compensation claim she was directed to Dr. Gregg Massanelli, an El Dorado orthopedic physician, by respondents. The claimant noted that she treated with Dr. Massanelli until she was referred by same to Dr. Scott Schlesinger, a Little Rock neurosurgeon. The claimant added that Dr. Massanelli referred her to physical therapy and wanted to refer her to a pain management doctor.

The claimant testified that she has been seen by Dr. Thomas Hart, a pain management specialist, for complaints relative to her October 17, 2001 injury. The claimant desires to proceed with treatment as recommended by Dr. Hart. The claimant acknowledged that she was not referred to Dr. Hart by either Dr. Schlesinger or Dr. Massanelli.

The claimant's testimony reflects that she did return to the employment of respondent-employer when she was released by Dr. Massanelli. The claimant's testimony reflects, with respect to her discharging employment duties for respondent during the afore period:

Yes, he released me once and I attempted to go back to work at Doctor. Ward's and I worked a half a day, a few hours, a half a day, and then Doctor Ward sent me home, and then I went back to Doctor Massanelli, and after that I don't believe he did. (T. 12)

The claimant is a resident of Spearsville, Louisiana, and was such at the time of her employment by respondent. Since last discharging employment duties for respondent, the claimant has secured employment at two different employers. The claimant's testimony reflects that she worked at Farrar's Grocery for a period earning \$5.50 per hour and working a thirty-two hour week. The claimant's job at Farrar's Grocery was that of a cashier with duties which included ringing up the sales of customers, cleaning behind the counter, and cooking pizzas. The claimant noted that while she discharged employment duties with Farrar's Grocery, the same was not without pain. The claimant, as of the date of the hearing in this claim, has been employed at Ken's Discount Store, in Spearsville, Louisiana for four weeks as a counter salesperson. Claimant worked a forty hour week at Ken's Discount Store at an hourly rate of \$6.00. The claimant's duties at Ken's Discount Store included assisting customers with their purchases and ringing them up at the cash register. The claimant noted that other physical duties required in her employment with Ken's Discount include some lifting:

They have items in there that weigh a hundred pounds. So far, the only thing that I have had to lift is paint cans, gallon paint cans. (T. 14)

The claimant also acknowledged that the job at Farrar's Grocery included sweeping, vacuuming, and mopping.

The medical in the record reflects that the claimant was seen October 18, 2001 by Dr. Rick Brown, an El Dorado chiropractic physician relative to the October 17, 2001 injury in the employment of the respondent. Dr. Brown's progress notes relative to his evaluation of the claimant on said date reflects the presence of objective findings to include muscle spasms (CX1, Tab 2).

On November 15, 2001, the claimant was seen by Dr. Gregg Massanelli, an El Dorado

orthopedic physician, with complaints relative to the October 17, 2001 injury, and came under the care and treatment of same. While under the care of Dr. Massanelli's care and treatment the claimant underwent additional diagnostic studies, to include MRI of her lumbar spine, EMG/nerve conduction studies, medication, and physical therapy. Later, the claimant underwent epidural steroid injections pursuant to the recommendation of Dr. Massanelli, as well as work hardening evaluation. Dr. Massanelli also recommended that the claimant be evaluated by another physician for a second opinion. A January 17, 2002 clinic note of Dr. Massanelli reflects, relative to the claimant:

RECOMMENDATION: I do not think there is a surgical solution to her problem. She is not able to do her previous job. I am going to keep her off work until she obtains a second opinion by a neurosurgeon to verify that surgery is not an option. If she continues to have chronic pain that is not amendable to surgical intervention, she is going to need to be referred to a pain specialist. (CX1, Tab 6, p. 106)

The claimant was evaluated by Dr. Scott M. Schlesinger, a Little Rock neurosurgeon, on or about January 31, 2002. Dr. Schlesinger opined that the claimant's diagnosis was that of degenerative arthritis of the back aggravated by work. (CX1, Tab 1)

The claimant returned to the care and treatment of Dr. Massanelli following her evaluation by Dr. Schlesinger. Dr. Massanelli continued conservative treatment regimens relative to the claimant's complaint, to include a work hardening program. Further, the claimant underwent a Functional Capacity Evaluation at HealthSouth on May 17, 2002, pursuant to a referral of Dr. Massanelli. (RX1, p. 7-11).

On October 11, 2002, the claimant was evaluated by Dr. Thomas Hart, a Little Rock pain management specialist, pursuant to referral of Dr. Rick Brown. During his evaluation of the

claimant, Dr. Hart obtained a history of the claimant's October 17, 2001 injury, and reviewed pertinent prior medical reports and diagnostic studies, to include the November 19, 2001 MRI of the claimant. Dr. Hart's impression of the claimant's complaint was that of multi-level disc protrusion, L4-5, L5-S1, discogenic back pain/referred/radicular pain, right rather than left. Dr. Hart has recommended a discography, and further treatment thereafter, depending upon the findings of the diagnostic studies. (CX2, Tab 1)

After a thorough consideration of all the evidence in the record, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 17, 2001 the relationship of employee-employer-carrier existed among the parties.
3. On October 17, 2001 the claimant earned an average weekly wage of \$245.00, which yields compensation benefits rates of \$163.00/\$154.00 for temporary total disability/permanent partial disability benefits.
4. On October 17, 2001 the claimant sustained an injury arising out of and in the course of her employment.
5. The claimant was temporarily partially disabled for the period beginning October 12, 2002 and continuing through the end of her healing period.
6. Pursuant to Ark. Code Ann. §11-9-514(a)(3)(ii) claimant is entitled statutorily to a one-time change of treating physician relative to her October 17, 2001, compensable injury. Dr. Thomas Hart is herein designated the claimant's treating physician.
7. There is no evidence in the record to reflect that claimant was furnished a Form N,

pursuant to Ark. Code Ann. §11-9-514, such that the change of physician rules are appreciable in the instant claim. Medical treatment recommended by Dr. Thomas Hart relative to claimant's October 17, 2001, compensable injury is reasonable and necessary for the treatment of the injury.

8. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of October 17, 2001.

9. The respondents have controverted the payment of medical benefits to the claimant relative to her treatment under the care of Dr. Thomas Hart and claimant's entitlement to a change of treating physician, and temporary partial disability benefits.

### **CONCLUSIONS**

The claimant was employed by respondent as a veterinary technician from August 2001 through October 17, 2001. On October 17, 2001, the claimant suffered an injury to her back within the course and scope of her employment with respondent. The compensability of the claimant's October 17, 2001 injury is not disputed.

The claimant asserts that as a result of the October 17, 2001 compensable injury, she continues to experience symptoms which limit her physical activity and impair her earning capacity. Accordingly, the claimant asserts that she continues to require medical treatment in the form of pain management and that the same has been recommended by her treating physician. Respondents have controverted the claimant's entitlement to further workers' compensation benefits, to include pain management and indemnity benefits.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of a compensable injury having been sustained subsequent to the effective date of the afore provision.

**ARKANSAS CODE ANNOTATED §11-9-514**

While the compensability of the claimant's October 17, 2001 injury is not disputed, there is no evidence in the record to reflect that the claimant was furnished a Commission Form N, following her injury pursuant to Arkansas Code Annotated §11-9-514(c). The medical in the record evidencing treatment relative to the October 17, 2001 compensable injury of the claimant is an October 18, 2001 report of Dr. Rick Brown, an El Dorado chiropractic physician. There is no evidence to reflect that respondents refused to pay further costs of claimant's treatment under the care of Dr. Brown.

The evidence reflects that claimant was referred to Dr. Gregg Massanelli, an El Dorado orthopedic physician by respondent after she filed a claim for workers' compensation benefits in the claim. The claimant was initially seen by Dr. Massanelli on November 15, 2001. Thereafter, the claimant's medical treatment relative to her October 17, 2001 compensable injury was had under the care of or at the direction of either Dr. Massanelli or respondent until she was seen by Dr. Thomas Hart on October 10, 2002 pursuant to a referral of Dr. Rick Brown.

Since there is no evidence that the claimant received the Form N pursuant to Arkansas Code Annotated §11-9-514 (c) following her injury, the change of physician rules do not apply. Thereafter, the issue becomes whether the treatment obtained or sought is reasonably necessary relative to the claimant's injury.

**REASONABLE AND NECESSARY MEDICAL TREATMENT**

At the time the claimant was initially evaluated by Dr. Gregg Massanelli, a El Dorado orthopedic physician, pursuant to the direction of respondent, following his examination of the claimant differential diagnosis included low back strain versus a herniated disc. Dr. Massanelli obtained an MRI relative to the claimant's lumbar spine and thereafter undertook the treatment of

the claimant relative to her compensable injury of October 17, 2001. Following the November 19, 2001 MRI the claimant was seen in follow-up by Dr. Massanelli on November 21, 2001. Dr. Massanelli's November 21, 2001 clinic note reflects, with respect to the claimant:

RECOMMENDATION: I am going to send her to physical therapy. She will go three times a week for the next three weeks with emphasis on motion as well as strengthening. They will also do modalities as needed. I am going to put her on a Medrol Dosepack followed by Mobic 15 mg q.d. I am going to have her stop her current muscle relaxer and I will put her on Skelaxin. I am going to give her a prescription for Darvocet. I will check her back in two weeks to see how she is doing. I am going to let her return to work with lifting restrictions of five pounds. (CX1, Tab 6, p. 96)

The claimant was later placed in a work hardening program by Dr. Massanelli and also later underwent a Functional Capacity Evaluation.

On January 17, 2002, the claimant was seen by Dr. Massanelli following the Functional Capacity Evaluation:

Lisa Collins comes in for followup for her back. She has been through work hardening. She has recently had a Functional Capacity Evaluation. I reviewed the FCE and it showed the presence of full effort and that she lacked symptom magnification. It also showed that she is able to work sedentary light demand jobs. Her job as a veterinarian's assistant is medium heavy, which obviously does not match. The details of her FCE are in a 32-page report which I reviewed. She continues to have a significant amount of pain, especially with activity.

IMPRESSION: Persistent low back pain. (CX1, Tab 6, p. 106)

On or about January 31, 2002, the claimant underwent an evaluation under the care of Dr.

Scott M. Schlesinger, a Little Rock neurosurgeon, relative to her October 17, 2001 compensable injury, pursuant to request of respondent. Dr. Schlesinger diagnosed the claimant's complaint as degenerative arthritis of the back aggravated by work and recommended that the claimant undergo a Functional Capacity Evaluation. (CX1, Tab 1)

At the time the claimant was seen by Dr. Massanelli on January 17, 2002, when the recommendation was had for neurosurgical evaluation, Dr. Massanelli noted that if the claimant continued to have chronic pain that was not amenable to surgical intervention he would refer her to a pain specialist. The claimant was subsequently evaluated by Dr. Scott Schlesinger and found not to have a condition amenable to surgical intervention. Nonetheless, the claimant continued to have chronic pain attributable to the October 17, 2001 injury. During an April 30, 2002 visit Dr. Massanelli noted that the claimant continued to experience persistent low back pain. The April 30, 2002 clinic note further reflects:

RECOMMENDATION: I told her again that it appeared that she does not need surgery in my opinion as well as in the opinion of others. She has gone through extensive physical therapy, which really has not helped. I think she needs pain management, and I plan to do this by setting her up to see a pain management physician. Workers' Compensation wanted me to use Dr. Reginald Rutherford, and she has an appointment with him on May 8, 2002. . . . (RX1, p. 6)

On October 11, 2002, the claimant was evaluated by Dr. Thomas Hart, a Little Rock pain specialist, relative to her October 17, 2001 compensable injury pursuant to a referral of Dr. Rick Brown, D.C. A review of the report of Dr. Hart reflects that he had access to the claimant's prior pertinent medical records and diagnostic studies at the time of his evaluation and physical

examination of October 11, 2002. The October 11, 2002 report of Dr. Hart, relative to the claimant, reflects, in pertinent part:

PLAN: I had a long discussion with Ms. Collins at this time about her current situation. I strongly feel due to a reasonable degree of medical certainty and probability she has very legitimate back pain complaints. Subjectively she complains of pain since having the on the job injury, but objectively one can clearly see per her MRI alone that she has disc protrusions and discogenic pain which is a known cause of back pain. One does not need a large herniated disc sitting on a nerve causing nerve root compression. That is different from discogenic pain. The disc in and of itself is a highly innervated structure. It has its own referred pain pattern. So, to say that Ms. Collins does not have pain would be inappropriate, even though she may not be a surgical candidate according to Dr. Schlesinger that does not mean that something can be done for her. He did make mention of one of his notes that I did find in her chart that he could not see any objective reasons why she had leg pain complaints. I do not agree. When one looks at the medical literature there are numerous articles that discuss that if one had an annular tear or intervertebral disc disease/disruption of the discs and if the contents of the nucleus pulposus which are highly inflammatory, for example phospholipase A2, etc. leak out of the disc through the posterior annulus fibrosis and onto the nerve root. This could cause a chemical radiculitis and can cause leg pain complaints. So, by strictly putting all your faith in an MRI and saying that the patient does not have pain would be incomplete. To this point, one year later, what has not been performed which should be performed at this time, again to a degree of medical certainty and probability would be discography, according to both the North American Spine Society and the International Spine Injection Society's protocol on discography. This would allow us once and for all to subjectively, as well as objectively does she or does she not have painful disc at the L4-5 and

L5-S1 levels. I discussed with Ms. Collins the procedure performed properly in a controlled environment under very strict sterile conditions and that if I find an abnormal disc we will inject intradiscal steroids. This is also more effective than epidural steroid injections followed by post CT imaging. If this indicates a possible free fragment or disc protrusion that would be surgical, then we should obtain the appropriate surgical consult. If, on the other hand, we clearly demonstrate she has an abnormal disc, but not a surgical lesion, I think she would be an appropriate candidate to consider percutaneous discectomy, which is a minimally invasive outpatient non-surgical procedure. The reason for that is if she has contained herniation by decompressing the nucleus pulposus, this could reduce her discogenic pain and at least do something which has not been done for the last year. I find it also extremely unfortunate that she has been “cut off” by Workers’ Compensation. In reviewing the letter of a Ronald A. Scott who is the assistant vice president of Crockett Adjustment he notes “with respect to any pain specialist referral that you may consider necessary, we would request that any such request be made to Dr. Reginald Rutherford here in Little Rock, who is a neurologist who does pain management care”. This was a letter addressed to Dr. massanelli on 3/18/02. For the record, Dr. Rutherford is a neurologist. He is not an interventional pain physician. He does not perform discography and he receives several Work Comp referrals, as well as Dr. Bruce Safman who is a physiatrist or rehab doctor who also has very little understanding of discogenic pain who does not perform the appropriate procedures. So, by sending Ms. Collins to these two physicians would basically, in my medical opinion, not provide any further improvement in Ms. Collins’ care. There does appear to be a significant referral pain pattern to these physicians from numerous Work Comp companies in the State of Arkansas. At this point I discussed with Ms. Collins the right thing to do once and for all is to line her up for provocative discography. According to National Standards if this

demonstrates an abnormal disc the plan is as mentioned above. (RX2, Tab 1, p. 4-5)

In an April 7, 2003 correspondence to Mr. Ronald A. Scott, Dr. Schlesinger noted that he had reviewed the letters of Dr. Massanelli and Dr. Hart relative to the claimant. The April 7, 2003 letter concludes:

Whether or not a discogram would be helpful in her further management, I cannot say. I can only state that there is no evidence that a work injury caused her to have a herniated disc, etc. (RX1, p. 12)

The Arkansas appellate courts have recognized that a discogram is clearly an objective test. Smith v. County Market/Southeast Foods, 73 Ark. App. 333, 44 S.W.3d 737 (2001). In the instant claim Dr. Hart has recommended further diagnostic studies relative to the claimant's October 17, 2001 compensable injury to include the possibility of a discogram. The evidence preponderates that the treatment as recommended by Dr. Hart relative to the claimant's October 17, 2001 compensable injury is reasonably necessary relative to the claimant's injury. Indeed, the evidence discloses that as early as January 2002, Dr. Massanelli had recommended pain management relative to the claimant's compensable injury. The claimant, in fact, was evaluated by Dr. Thomas Hart, a recognized pain specialist, and found to be in need of additional medical treatment relative to her compensable injury. Respondents have controverted the claimant's entitlement to medical benefits subsequent to April 18, 2002, to include pain management. As previously noted, since there is no evidence that the claimant received the Form N, the change of physician rules are not applicable.

#### **APPROPRIATE COMPENSATION BENEFIT RATE**

The claimant acknowledged that at the time of her August 2001 employment by respondent she was paid an hourly rate of \$7.00. Further, the evidence in the record reflects that the claimant

did not work a forty hour week in her employment with respondent. While the claimant asserts that after six days of employment with respondent she received a bonus consisting of a percentage of the sales had by respondent there are no payment records in evidence corroborative of same. It is noted that the claimant's injury occurred on October 17, 2001, approximately two months or sixty days after her employment with respondent. The claimant has failed to sustain her burden of proof by a preponderance of the evidence that her average weekly wage was greater than \$245.00 per week during her employment with respondent.

### **TEMPORARY PARTIAL DISABILITY BENEFITS**

Arkansas Code Annotated §11-9-520 provides, in pertinent part:

In cases of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be added to the employee sixty-six and two-thirds percent (66-2/3%) of the difference between the employee's average weekly wage prior to the accident and his wage-earning capacity after the injury.

As the claimant is within her healing period and there is a decrease in her earning capacity as a result of the injury, she is entitled to the payment of temporary partial disability benefits. The healing period is that period for healing of an injury which continues until the claimant is as far restored as the permanent character of her injury will permit. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Nix v. Wilson-World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). In the instant claim further treatment is available for the claimant relative to her compensable injury, and the underlying condition causing the claimant's disability has not become stable. Further, the evidence preponderates that claimant was no longer able to continue her employment with

respondent because of the residuals of her compensable injury.

The evidence discloses that the claimant's average weekly wage in the employment of respondent was \$245.00 per week. Currently, the claimant has an average weekly wage of \$204.00 per week. The claimant is entitled to 66-2/3% difference in her average weekly wage at the time of her compensable injury her correct employment. Respondents have controverted the claimant's entitlement to temporary partial disability benefits.

### **AWARD**

Respondents are hereby ordered and directed to pay to the claimant temporary partial disability benefits of 66-2/3% of the difference of her average weekly wage at the time of her employment with respondent and her average weekly wages to her current employment as a result of the October 17, 2001 compensable injury. Said sums accrued shall be paid in a lump without discount. Respondents may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondents are further ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus expenses, to include the cost of claimant's treatment under the care of Dr. Thomas Hart, relative to the claimant's October 17, 2001 compensable injury.

Dr. Thomas Hart, is herein designated the claimant's authorized treating physician relative to the October 17, 2001 compensable injury pursuant to Arkansas Code Annotated §11-9-514.

Maximum attorney's fees are herein awarded to the claimant's attorney, the Honorable F. Mattison Thomas, III, on the controverted portions of this award, pursuant to Arkansas Code Annotated §11-9-715, and in accordance with Holiday Inn-West v. Coleman.

This award shall bear interest at the legal rate pursuant to Arkansas Code Annotated §11-9-

809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**ANDREW L. BLOOD**  
**Administrative Law Judge**