

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F202526

REBEKAH FITZPATRICK, Employee	CLAIMANT
OZARK BREWING COMPANY, INC., Employer	RESPONDENT
TRUCK INSURANCE EXCHANGE, Carrier	RESPONDENT

OPINION FILED OCTOBER 20, 2003

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

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 24, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 14, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked 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 relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury on February 26, 2002.
4. The claimant was earning an average weekly wage of \$198.00 which would entitle her to compensation at the weekly rate of \$128.00.
5. Respondent paid temporary total disability benefits from the date of the injury through September 10, 2002.

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

1. Additional medical and temporary total disability benefits as a result of her compensable injury.

2. Attorney fee.

The claimant contends she is entitled to additional medical and temporary total disability benefits as a result of her compensable injury.

The respondents contend the claimant has been treated by general practitioners, chiropractors, and specialists. She has been released as having reaching maximum medical improvement with regard to her treatment as of October 3, 2002. According to the medical records, the claimant has also returned to work as of August 20, 2002. As such, it is respondents' position that additional temporary disability benefits are not owed to the claimant. As for her medical, it is respondents' contention that additional medical is not reasonable and necessary for the claimant's compensable injury. All diagnostic tests have been found to be normal. Claimant has been thoroughly worked up with regard to her injuries. She has been provided adequate treatment for same.

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 the pre-hearing conference conducted on May 14, 2003, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment or temporary total disability benefits as a result of her compensable injury.

FACTUAL BACKGROUND

The claimant was employed by the respondent as a prep cook. Claimant suffered a compensable injury to various parts of her body on February 26, 2002, when she fell approximately ten feet after falling through a trap door which had been left open in a storage room. Claimant testified that she landed upside down on her head causing injuries to her back, neck, shoulder, and hip. After initially being treated at the emergency room at Washington Regional Medical Center, the claimant has been evaluated by numerous physicians. These include Dr. John Gaston, Dr. Mark Miller, Dr. Michael Morse, Dr. Pamela Bayers, Dr. Larry Weeks, and Dr. Marty Hurlbut.

Following her compensable injuries multiple tests were performed including x-rays of claimant's skull and spine which were negative. In addition, an MRI scan of the claimant's cervical spine was negative. Because of claimant's continued complaints of back and neck pain, Dr. Gaston referred claimant to Dr. Michael Morse for a neurological evaluation. Dr. Morse's initial evaluation occurred on April 30, 2002. Dr. Morse ordered an NCV test which was also normal as well as an MRI scan of the brain which was also normal. Dr. Morse diagnosed claimant's condition as post-traumatic headaches with no symptoms or physical findings of intracranial process. Dr. Morse noted that these headaches were natural and by history would resolve. Dr. Morse also diagnosed claimant as suffering from right shoulder and neck pain for which he referred claimant to Dr. Larry Weeks, a chiropractic physician, for physical therapy. On October 3, 2002, Dr. Morse opined that claimant had reached maximum medical improvement and released her to return to work without restrictions. Respondent has not paid claimant temporary total disability benefits or medical benefits since that date.

Following her release by Dr. Morse, claimant requested a change of physicians and was granted a change to Dr. Marty Hurlbut, a physician specializing in rehabilitation. Dr. Hurlbut diagnosed claimant as suffering from lumbar and cervical spine pain. Dr. Hurlbut

also recommended a program of strengthening claimant's lumbar and cervical spine along with home exercise and posture techniques.

Also, since approximately two or three days after her injury, claimant has been evaluated and treated by Dr. Pamela Bayers, a specialist in acupuncture and medical herbology.

Claimant has filed this claim contending that she is entitled to additional medical treatment and temporary total disability benefits as a result of her compensable injury.

ADJUDICATION

A claimant has the burden of proving by a preponderance of the credible evidence that additional medical treatment is reasonable and necessary. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291); *Robin Hill v. Rushing and Mason Equipment*, Full Commission Opinion filed January 14, 1987 (D500190).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment as a result of her compensable injury. My finding is based upon the opinion of Dr. Michael Morse, whose opinion I find to be credible and entitled to great weight.

As previously noted, Dr. Michael Morse released claimant to return to work without restrictions on October 3, 2002. Dr. Morse on that date opined that claimant had reached maximum medical improvement. Specifically, Dr. Morse in his report of that date stated"

Rebekah returns. I am seeing her for an on-the-job injury. I spoke with Dr. Weeks. He feels he has done everything that he can. She has been non-compliant with her treatment program and has a different complaint every time she comes in. She has had a negative MRI of her brain, cervical spine, and a negative nerve conduction.

I explained to her that I believe at this time she has reached maximum medical improvement. There is no further evaluation or treatment that is necessary. I believe she will improve over time. There are no restrictions.

She was very upset at this and feels she has an open-ended ability to see a doctor at workers' comp expense any time that she wants and for as long as she wants. I explained to her that it is not possible and that she can get a second opinion if she so desires. The workers' comp case worker was in on this. She is released from my care.

As previously noted, it was shortly after Dr. Morse had released claimant from his care opining that claimant had reached maximum medical improvement that she requested a change of physicians and was permitted to see Dr. Marty Hurlbut on February 4, 2003. As also previously noted, Dr. Hurlbut indicated that he diagnosed claimant's condition as lumbar and cervical spine pain and recommended a program of strengthening along with home exercise. First, with respect to Dr. Hurlbut's recommendations, I note that claimant has previously undergone physical therapy from both HealthSouth and Dr. Weeks as a result of her compensable injury. Dr. Morse's report indicates that Dr. Weeks was of the opinion that claimant had been non-compliant with her physical therapy program with new complaints on each visit. I also note that claimant underwent physical therapy at HealthSouth after a referral by Dr. Gaston. The medical records reflect that on July 22, 2002, claimant was discharged by HealthSouth as having reached her maximum potential with regard to physical therapy. Thus, the evidence indicates that claimant has undergone programs of physical therapy and I find insufficient evidence that an additional strengthening program would be beneficial given claimant's prior treatment of physical therapy from Dr. Weeks and HealthSouth.

As previously noted, claimant has also come under the care of Dr. Pamela Bayers, a specialist in acupuncture and herbology who according to claimant is providing both of those modalities of treatment. With respect to Dr. Bayers' opinion regarding claimant's

need for additional medical treatment, I initially note that claimant admitted that she and Dr. Bayers have been friends for approximately six years. Claimant also admitted that she sometimes “works” or “helps” in Dr. Bayers’ office receiving at times compensation for this work or treatment in exchange for this work. I also note that Dr. Bayers was present at the hearing on this claim. Given the nature of the relationship between claimant and Dr. Bayers, I do not find Dr. Bayers’ opinion to be unbiased.

In short, I find based upon my review of the evidence that the opinion of Dr. Michael Morse is credible and is entitled to great weight. Dr. Morse is a highly respected neurologist who has opined based upon claimant’s physical therapy treatment as well as the negative MRI scans of her brain, cervical spine, and nerve conduction, that claimant has reached maximum medical improvement with no further evaluation or treatment necessary. Based upon this opinion of Dr. Morse which I find credible and entitled to great weight, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment as a result of her compensable injury.

Claimant also contends that she is entitled to additional temporary total disability benefits as a result of her compensable injury. Again, based upon the opinion of Dr. Michael Morse which I find to be credible and entitled to great weight, I find that claimant has reached maximum medical improvement and therefore is not entitled to temporary total disability benefits subsequent to October 3, 2002. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Based upon the opinion of Dr. Morse, I find that claimant did not remain within her healing period subsequent to October 3, 2002.

Furthermore, even if a finding were to be made that claimant’s healing period extended beyond October 2, 2002, I note that claimant had been released by Dr. Weeks

to return to work with limitations in July 2002. In fact, claimant returned to work on August 20, 2002 at the Dickson Street Book Exchange where she worked five to six hours for nine days. Subsequently, claimant became employed at the Red Roof Inn as a desk clerk from January 15, 2003 through March 27, 2003. Claimant testified that she worked four to five days per week and thirty to thirty-two hours per week. Claimant testified that she was physically capable of performing her job as a desk clerk. Thereafter, in April 2003 the claimant went to work for Café Rue Orleans serving drinks and taking orders. Claimant testified that she performed this job for approximately sixteen hours per week for two to three months filling in for individuals on vacation.

Accordingly, even if a finding were to be made that claimant remained within her healing period subsequent to October 3, 2002, I would find that claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated from working. The evidence indicates that claimant has worked for three separate employers since August 2002. Furthermore, claimant testified that she was physically capable of performing her job as a desk clerk with the Red Roof Inn.

For the foregoing reasons, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical benefits or temporary total disability benefits as a result of her compensable injury. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE

