

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F102505

MICHELLE ALLEN, Employee	CLAIMANT
HORNER ENTERPRISES, Employer	RESPONDENT
ARKANSAS GUARANTY FUND on behalf of RELIANCE INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JANUARY 15, 2004

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

Claimant represented by BILL WIGGINS, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 17, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 27, 2003, and a pre-hearing order was filed on August 29, 2003. 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 prior Administrative Law Judge opinion filed March 14, 2002 is final and res judicata.

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

1. Additional temporary total disability benefits from August 1, 2003 through a date yet to be determined.
2. Whether claimant's healing period has ended.
3. Claimant's entitlement to an MRI as recommended by Dr. Chakales.
4. Attorney fee.

Subsequent to the pre-hearing conference the MRI scan recommended by Dr. Chakales was performed and Dr. Chakales recommended surgery. Accordingly, claimant

has added as an issue to be litigated whether the surgery recommended by Dr. Chakales is reasonable and necessary in relation to her compensable low back injury.

The claimant contends that as a result of her compensable low back injury she is entitled to payment for an MRI scan recommended by Dr. Chakales and surgery which has been recommended by Dr. Chakales. Claimant contends that the healing period for her compensable injury has not ended and that as a result she is entitled to additional temporary total disability benefits beginning August 1, 2003 and continuing through a date yet to be determined.

Respondent contends that claimant is not entitled to any additional compensation benefits as a result of her compensable injury. Specifically, respondent contends that the problems claimant is now experiencing are low back pain and right side leg pain caused by a disc herniation on the right side whereas a prior MRI scan revealed that claimant's compensable injury was related to the left side. Based upon this respondent contends that claimant's current symptoms are not causally related to her compensable 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 stipulation agreed to by the parties at the pre-hearing conference conducted on August 27, 2003, and contained in a pre-hearing order filed August 29, 2003, is hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that her current back problems are causally related to her compensable low back injury. Therefore, the surgery recommended by Dr. Chakales and the MRI are reasonable and

necessary in relation to claimant's compensable injury.

3. Claimant's healing period for her compensable back injury has not ended. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits beginning August 1, 2003, and continuing through a date yet to be determined.

4. Respondent has controverted claimant's entitlement to unpaid disability and medical benefits.

FACTUAL BACKGROUND

The claimant worked for respondent as a commercial cleaner. Her job duties required her to pick up and carry out trash, mop, sweep, vacuum floors, and clean windows. Claimant suffered an admittedly compensable injury to her low back on February 18, 2001, when she slipped and fell at work.

Following her compensable injury the claimant was evaluated by Dr. Raben in February 2001 and after an MRI scan Dr. Raben opined that claimant suffered from a disc derangement and/or end plate fracture at the L5/S1 level. Dr. Raben treated claimant conservatively by prescribing medication for her back condition. Despite Dr. Raben's treatment the claimant continued to complain of back pain and on November 20, 2001, claimant underwent a disc space injection at the L5/S1 level. In a report of that date, Dr. Raben diagnosed the claimant's condition as lumbar radicular syndrome.

Following the injections and claimant's continued complaints of pain, Dr. Raben recommended that claimant undergo a diskogram which was performed on December 27, 2001. In a report of January 8, 2002, Dr. Raben stated that the diskogram revealed a left-sided disc herniation with fissure at the L5/S1 level. As a result of this testing, Dr. Raben referred claimant to Dr. Chakales for an intradiscal electrothermolplasty evaluation.

Before this procedure could be performed respondent ceased paying medical

benefits and claimant filed a claim contending that she was in need of additional medical treatment as a result of her compensable injury. A hearing on that issue along with other issues was conducted on February 21, 2002. On March 14, 2002, I filed an opinion finding that claimant was entitled to additional medical treatment as a result of her compensable injury. That finding was not appealed and the parties have stipulated that it is final and res judicata.

Following that opinion the claimant underwent the IDET procedure by Dr. Chakales in the summer of 2002. Following that procedure the claimant continued to complain of back pain and continued to be evaluated by Dr. Chakales. In a report dated October 6, 2003, Dr. Chakales recommended that the claimant undergo an MRI scan. Respondent controverted claimant's entitlement to that MRI scan and the present claim was filed. Nevertheless, claimant did undergo the scan at her own expense and an MRI scan performed on October 27, 2003, revealed a herniated disc at the L5/S1 level on the right side. As a result, Dr. Chakales has recommended a surgical procedure. This surgical procedure along with payment for the MRI scan and additional temporary total disability benefits is the subject of the present claim.

ADJUDICATION

In order to be entitled to additional medical benefits or temporary total disability benefits for her compensable injury, claimant has the burden of proving by a preponderance of the evidence that her current back problems are causally related to her original compensable low back injury. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proof.

Initially, I believe it is important to note that while the IDET procedure performed by Dr. Chakales in the summer of 2002 provided claimant with some relief of her low back

pain, that Dr. Chakales' medical reports indicate that this relief was temporary in nature and that claimant's low back pain continued. In a report of November 6, 2002 Dr. Chakales indicated that claimant was not having as much back and leg pain. He indicated that claimant should undergo three weeks of physical therapy and return in four weeks for an evaluation. Claimant's next evaluation with Dr. Chakales occurred on December 16, 2002, at which time he noted that claimant continued to have pain. Dr. Chakales noted that the IDET procedure had helped, but that claimant still has "trouble". Dr. Chakales prescribed medication, indicated that claimant should return for a further evaluation in three months, and noted that claimant might require steroid injections in the future.

Claimant's next visit with Dr. Chakales occurred on March 17, 2003. At that time Dr. Chakales noted that the claimant had a recurrence of her sciatica. He again noted that the IDET procedure had helped claimant for a period of time but that her condition was now deteriorating again. As a result, Dr. Chakales recommended that the claimant undergo steroid injections and that she return for an evaluation in two months.

Dr. Chakales' report of June 24, 2003 indicates that he is of the belief that claimant might have a recurrent disc. Dr. Chakales recommended that the claimant undergo an MRI scan of the lumbar spine and an EMG/NCV of the back and legs. Dr. Chakales advised claimant to return to him for further evaluation after these tests were performed. Claimant's next visit with Dr. Chakales occurred on October 6, 2003, at which time the claimant was again complaining of severe low back pain which radiated into her right leg. Again, Dr. Chakales recommended an MRI scan which was eventually performed on October 27, 2003, and revealed a herniated disc at the L5-S1 level on the right side.

My review of the medical evidence indicates that claimant's back pain has continued from the time of her original injury. The medical reports of Dr. Chakales support his statements that the IDET procedure initially alleviated some of claimant's complaints of pain but that her condition progressively worsened over the course of time.

The respondent contends that claimant's current symptoms as evidenced by the MRI scan showing a right-sided herniated disc at the L5-S1 level are new complaints which are not attributable to the claimant's original compensable injury. Specifically, respondents contend that claimant's initial complaints of pain involved only her left side, not her right side. Respondent contends that claimant's current complaints began when she woke up on September 24, 2003, and could not get out of bed because of excruciating pain radiating down her right leg. This history is contained in a letter report of Dr. Ryan Kaplan dated December 5, 2003. Furthermore, claimant admitted that her symptoms increased after that date.

While the claimant's symptoms and her right-sided pain may have increased after September 24, 2003, the medical reports of Dr. Chakales clearly indicate that claimant had been complaining of right-sided pain as far back as December 2002. Dr. Chakales' medical report of that date indicates that claimant was complaining of both left and right-sided pain. Furthermore, Dr. Chakales' medical report of March 17, 2003, states that the claimant had a recurrence of her sciatica on the right side. Even Dr. John Wilson, a physician chosen by the respondents for an independent medical evaluation, noted in his report dated July 31, 2003 that claimant was complaining of pain on her right side.

In summary, the medical evidence reflects that claimant has continued to have back pain since the time of her injury in February 2001. While the IDET procedure did alleviate some of claimant's pain, the relief was only temporary in nature. The medical reports from Dr. Chakales beginning in December 2002 indicate that claimant's pain had returned and that she was in need of additional medical treatment. This eventually culminated in the claimant undergoing steroid injections and further testing in the form of an MRI scan which revealed a herniated disc at the L5-S1 level. While claimant's symptoms may have increased after September 24, 2003 on her right side, the medical evidence indicates that claimant had been complaining of pain on her right side since at least December 2002.

Given all of this evidence, I find that claimant's current back condition is causally related to her original compensable low back injury of February 18, 2001. I also find based upon the evidence presented that claimant is entitled to additional medical treatment as a result of her compensable low back injury. This includes the MRI scan which was ordered by Dr. Chakales. In addition, I find that the medical treatment proposed by Dr. Chakales for treatment of claimant's condition is reasonable and necessary and causally related to her compensable low back injury. This includes the recommended surgical treatment.

Claimant contends that she is entitled to additional temporary total disability benefits as a result of her compensable injury beginning August 1, 2003 and continuing through a date yet to be determined. In order to be entitled to additional 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). 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).

After reviewing the evidence in this case, I find that claimant's healing period has not ended. Specifically, I find that the underlying condition causing claimant's disability has not become stable and that there is further treatment which will improve claimant's condition. As previously discussed, the MRI scan has revealed a herniated disc at the L5-S1 level for which Dr. Chakales has recommended a surgical procedure. Based upon this evidence which I find to be credible and entitled to great weight, I find that claimant has remained within her healing period since August 1, 2003. I also find based upon the evidence presented that claimant has suffered a total incapacity to earn wages since August 1, 2003. The medical evidence indicates that Dr. Chakales completed an off-work slip for claimant dated June 24, 2003 indicating that she should remain off work until an

undetermined date. Claimant's next visit with Dr. Chakales occurred on October 6, 2003, and Dr. Chakales again indicated that claimant should remain off work until an undetermined date. Following an MRI scan which was performed on October 27, Dr. Chakales on that same date again completed an off-work slip indicating that claimant should remain off work through an undetermined date.

Accordingly, based upon this evidence, I find that claimant has remained within her healing period and that she has suffered a total incapacity to earn wages subsequent to August 1, 2003. Therefore, I find that claimant is entitled to additional temporary total disability benefits beginning August 1, 2003, and continuing through a date yet to be determined.

ORDER

_____ Claimant has met her burden of proving by a preponderance of the evidence that her current low back problems are causally related to her original compensable injury. Claimant has met her burden of proving by a preponderance of the evidence that the MRI scan and the medical treatment provided and proposed by Dr. Chakales is reasonable and necessary and causally related to her compensable injury. In addition, claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning August 1, 2003, and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE