

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F310847**

<b>BERNICE ANDERSON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>DIVERSICARE LEASING CORPORATION, EMPLOYER</b>	<b>RESPONDENT</b>
<b>WAUSAU INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED APRIL 21, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 16, 2004, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and temporary total disability benefits.

At issue is whether or not additional treatment is reasonable and necessary pursuant to Ark. Code Ann. §11-9-508 and whether or not the claimant is entitled to temporary total disability benefits pursuant to Ark. Code Ann. §11-9-102, §11-9-526. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on March 27, 2003 at which time the claimant sustained a compensable injury at a compensation rate of \$206.00/\$155.00. Medical expenses were paid until April 4, 2003.

The claimant contends she injured her back on March 27, 2003 in a specific incident lifting a patient. She remains symptomatic and in need of continuing medical treatment as recommended by Dr. David Collins for a herniated disc at L3-4. The claimant seeks payment of medical expenses,

temporary total disability from January 13, 2004 to a date yet to be determined and attorney's fees.

The respondents contend all appropriate benefits have been paid and the claimant's healing period ended April 4, 2003. The claimant was diagnosed with degenerative disc disease and returned to work for a different employer as a cook. She has no permanent impairment as a result of the compensable injury.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant, who was personable and gregarious, was the only witness to testify at the hearing.

The claimant, age 41, has a high school education and one semester of computer science. The mother of four children, she is separated from her husband and is supporting herself on food stamps and child support. Her work experience includes jobs as a bank teller, cashier, cook at a restaurant, and club manager. She hopes to return to school to become an RN (registered nurse).

The claimant had worked for the respondent-employer as a CNA (certified nurses' assistant) at the Sheridan Nursing and Rehabilitation Center. On March 27, 2003 she injured her back while helping a co-worker lift an elderly patient. She received conservative medical treatment for her back and returned to light duty for five months taking patients' vital signs, passing trays, feeding residents and working in the office.

The claimant voluntarily left the respondent's employ in July, 2003, as it was painful to drive to work in Sheridan from her home in Pine Bluff. She then applied for a job with the hospital, Jefferson Regional Medical Center (JRMC), working in the nursery but was not hired. It was her understanding that Dr. Safman would not release her. At this point, she hired legal counsel. There is no mention in Dr. Safman's records about the need for a release to work at JRMC.

From October 2003 to January 2004 she worked as a cook at a restaurant. In her deposition, she indicated her legs began hurting standing on the concrete floor at work and she developed muscle spasms in her back. She stated she had these symptoms previously, but not as severe. Her employer

at the restaurant is accommodating and it is possible she could return to work there part time.

The claimant has declined the respondents' offer to return to Drs. Safman, Cathey or the Winston Clinic. She stated she has confidence in Dr. Collins and would like to return to him for treatment. She did not like Dr. Cathey.

### **MEDICAL EVIDENCE**

The claimant was initially treated for her back pain by Dr. Scott Wilson with x-rays, medication and light duty at work. These medical records are handwritten and difficult to read, however, it appears the claimant was diagnosed with "lumbago."

The claimant was seen by general practitioner, Dr. Tarig Quadri on March 27, 2003. The claimant was released for light duty on April 3, 2003. Dr. Quadri scheduled an MRI scan and referred the claimant to Dr. Cathey.

An MRI scan conducted May 9, 2003 revealed a small disc protrusion at L3-4 which touches but does not displace the L3 nerve root on the left. Desiccation and bulging were also noted at L4-5 and L5-S1 without significant stenosis.

Neurosurgeon, Dr. Cathey examined the claimant on July 1, 2003. He diagnosed a musculoskeletal injury superimposed on preexisting degenerative disc disease at multiple levels with probable osteoarthritis. However, he did not consider her to be a surgical candidate and recommended consultation with a pain management specialist, Dr. Garlapti. Pain management is maintenance of a chronic condition; it is not intended to improve or cure the underlying condition.

Dr. Cathey also characterized her clinical examination as negative, with no sign of radiculopathy, restricted range of motion or muscle spasm. Her symptoms were not consistent with sciatica, lumbar claudication, or radicular leg pain. He disagreed with the radiologist's interpretation of the MRI scan, opining there was no structural abnormality at the L3-L4 level on the left. He did agree that she had multilevel degenerative disc disease with no nerve root involvement or stenosis.

The carrier did not use the pain specialist recommended by Dr. Cathey, sending the claimant to Dr. Bruce Safman, instead. Dr. Safman changed her medication and kept her on light duty. He

diagnosed a lumbosacral/sacroiliac strain and enthesopathy of the left hip. He administered trigger point injections based on his clinical examination showing tenderness and trigger points, but no muscle spasm. The claimant did not keep her August 18, 2003 appointment with Dr. Safman and reported improvement when she returned to see him on September 3, 2003. Dr. Safman administered another injection.

When the claimant returned to Dr. Safman on September 22, 2003 she reported increased pain with driving back and forth to work. She took a leave of absence to look for other employment. Trigger point injections were repeated.

The claimant returned to Dr. Safman on October 20, 2003 after beginning work as a cook in a restaurant. Dr. Safman assessed maximum medical improvement and assessed 0% impairment. He commented, "She had degenerative disc disease noted on MRI. I cannot say that this is in any way related to her injury."

Other than the fact that the claimant was working, the basis for Dr. Safman's release is unclear. On three previous occasions when the claimant complained of pain, Dr. Safman renewed her medications and administered injections based on "tenderness" not muscle spasm. On the last visit, her symptoms were in the same area as before but he released her, characterizing her symptoms as "suggestive."

The claimant saw Dr. Kevin Collins a board certified rehabilitation physician on December 9, 2003. She complained of low back and bilateral leg pain with muscle spasms in her back and shoulders and weakness in her arms. She described her pain as severe for the last ten months. Dr. Collins reviewed her MRI scan and recommended physical therapy, medication and trigger point injections with Dr. Ramone. Dr. Collins excused the claimant from work beginning January 13, 2004.

Dr. Collins became aware that the carrier had not approved his recommended treatment. He prescribed Zoloft for chronic pain syndrome and depression. The claimant also complained of right knee pain which Dr. Collins stated "could be referred from herniated disc, certainly falls within the

radiation of radicular components of L3-4.” He advised her to get medication from her primary care physician until or unless he was authorized to treat her.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993, which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. Under Act 7696 of 1993, the claimant has the burden of meeting the elements of proof by a preponderance of the credible evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 442 (1947)

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Additionally, the Act provides that an injured employee is not entitled to compensation if she unjustifiably refuses suitable employment, Ark. Code Ann. §11-9-526.

The evidence of record shows that the respondent-employer offered her a job within her work restrictions and she voluntarily left their employ. Since then, she has applied for jobs elsewhere and obtained employment as a cook. Clearly, the claimant is capable of working. Accordingly, I find

the claimant is not entitled to temporary total disability benefits.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, February 17, 1989 (Claim No. D612291). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

The evidence of record shows the claimant's symptoms changed by the time she saw Dr. Collins to include her shoulders, arms and legs. These symptoms developed months after the compensable injury and after she had been employed as a cook for a different employer. There is no causal connection between these wide ranging symptoms and her compensable injury. Wal-Mart Stores, Inc. v. Stotts, 74 Ark. App. 428, 49 S.W.3d 667 (2001). Therefore, I find Dr. Collins' treatment unreasonable and unnecessary.

The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Hill v. Baptist Medical Center, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

The evidence of record shows the claimant's injury to be an aggravation of a preexisting degenerative condition based on Dr. Cathey's interpretation of the MRI results. As a neurosurgeon, Dr. Cathey's opinion is entitled to great evidentiary weight. The respondents have provided the claimant with diagnostic testing, medication, light duty physical therapy, and consultation with specialists. Therefore, I find they have provided the claimant with all reasonable and necessary

medical treatment and have paid all appropriate benefits.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on March 27, 2003 at which time the claimant sustained a compensable aggravation of a preexisting degenerative lumbar condition at a compensation rate of \$206.00/\$155.00.
2. The respondents paid medical expenses until April 4, 2003 for pain management. The claimant has seen physicians at the Winston Clinic, Dr. Safman and Dr. Cathey. She has been released with no permanent impairment.
3. The claimant obtained a change of physician to Dr. Collins but the respondents have controverted any further treatment from him. The scope of recommended treatment has changed and expanded under Dr. Collins and the claimant has failed to prove that Dr. Collins' treatment is reasonably necessary for her compensable injury.
4. The claimant has failed to prove entitlement to temporary total disability benefits as she is capable of working and voluntarily left the respondent's employ when they were providing her light duty. According to Dr. Cathey, whose opinion has been given great evidentiary weight, there is nothing medically that can be done to improve her condition and her healing period has ended.

This claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge