

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F210999

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| ROSLYN BRADLEY, Employee | CLAIMANT |
| ANDY'S RESTAURANT, Employer | RESPONDENT |
| MID-CENTURY INSURANCE COMPANY, Carrier | RESPONDENT |

OPINION FILED NOVEMBER 1, 2004

Hearing before ADMINISTRATIVE LAW JUDGE C. MICHAEL WHITE in Hope, Hempstead County, Arkansas; Opinion issued by ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by GREGORY R. GILES, Attorney, Texarkana, Arkansas.

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

STATEMENT OF THE CASE

This case comes on for review following reassignment from former Administrative Law Judge Michael White.

A pre-hearing conference was conducted in this claim on April 14, 2004 and a pre-hearing order was filed on April 15, 2004. The pre-hearing order indicates that the parties agreed to the following stipulations:

1. The employer/employee/carrier relationship existed on September 15, 2002.
2. The claimant sustained a compensable [injury] on September 15, 2002.
3. The claimant was earning an average weekly wage of \$374.00 which entitles her to a partial total disability compensation rate of \$249.00.
4. The respondents have controverted any benefits not previously paid.

The parties also agreed to litigate the following issues:

1. Whether the claimant is entitled to temporary total disability compensation for the period extending from November 27, 2002 through January 3, 2003.
2. Whether the respondents should be ordered to pay for unpaid medical expenses.

3. Whether additional medical treatment is reasonably necessary for treatment of the claimant's compensable injuries, including referral to a neurologist for EMG testing.

At the time of the hearing claimant indicated that she had undergone the requested EMG testing; therefore, the issue is whether that testing was reasonable and necessary medical treatment for which respondent should be liable.

Claimant contends that she is entitled to temporary total disability benefits beginning November 27, 2002 and continuing through January 3, 2003. Claimant contends that she was taken off work by Dr. Hilborn and given off work slips for that period of time. Claimant also contends that she has incurred medical expenses from Dr. Primeaux, a chiropractor who was approved following a change of physician order. Finally, claimant also contends that respondent is liable for payment of testing from Dr. Vora, including the EMG.

Respondent contends that the medical evidence does not support claimant's request for temporary total disability benefits. Instead, respondent contends that claimant was released to return to work without restrictions or limitations by Dr. Safman on November 27, 2003. Respondent also contends that claimant's compensable injury was to her elbow and lower back and that unpaid medical treatment for which she seeks benefits is associated with unrelated medical conditions. Respondent also contends that based on negative diagnostic testing additional medical treatment by Dr. Primeaux and Dr. Vora is not reasonable and necessary.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, 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 April 14, 2004, and contained in a pre-hearing order filed April 15, 2004, are

hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 27, 2002 through January 3, 2003.

3. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for any unpaid medical expenses. Specifically, I find that claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonable and necessary for her compensable injury.

FACTUAL BACKGROUND

The claimant is a 36-year-old woman who graduated from high school with an additional half a semester of college. Claimant began working for respondent at its restaurant in Hope in October 2001 as an assistant manager. Claimant's job duties primarily included supervision of other employees.

Claimant suffered a compensable injury on September 15, 2002 when she slipped and fell on a wet floor. Claimant testified that after this fall she had pain in her low back and legs. Initially, claimant was treated by Dr. Jacob who ordered x-rays, took claimant off work, ordered physical therapy, and prescribed medication. Following claimant's continued complaints of pain Dr. Jacob referred claimant to Dr. Hilborn, an orthopaedic surgeon. Dr. Hilborn's initial evaluation of claimant occurred on October 3, 2002, at which time he diagnosed claimant as suffering from low back and associated left thigh pain. Dr. Hilborn ordered an MRI scan and medication. The MRI scan of claimant's lumbar spine returned within normal limits and Dr. Hilborn ordered physical therapy and medication. He also took claimant off work from September 17, 2002 through November 12, 2002.

Claimant's last evaluation by Dr. Hilborn occurred on October 29, 2002. At that time Dr. Hilborn noted that claimant continued to have left low back pain. Dr. Hilborn

ordered a functional capacities evaluation to determine claimant's limitations and as a guide for further therapy. Dr. Hilborn also continued claimant's medication and indicated that she should remain off work through November 19, 2002.

Claimant did not undergo the functional capacities evaluation or return to see Dr. Hilborn. Instead, respondent referred claimant to Dr. Safman, an orthopaedic surgeon, for an independent medical evaluation which occurred on November 21, 2002. Dr. Safman's medical report of that date notes that claimant has a great deal of subjective pathology but he nevertheless diagnosed claimant's condition as a lumbar strain. He recommended medication for chronic pain and indicated that trigger point injections might be beneficial. Dr. Safman also indicated that claimant could perform sedentary type work where she could sit and stand as needed.

Claimant's next visit with Dr. Safman occurred on November 27, 2002. Dr. Safman's medical report indicates that at that time claimant was not interested in trigger point injections given the death of her mother following an injection. Dr. Safman stated that in the absence of objective pathology and objective findings, it was his opinion that claimant was at maximum medical improvement; that she had a zero percent impairment rating; and that claimant could return to work without restrictions.

After this visit with Dr. Safman the claimant went to see Dr. Primeaux, a chiropractic physician, who was treating her brother. Claimant began receiving treatment from Dr. Primeaux on December 20, 2002 and eventually received an order from the Commission filed January 14, 2003 authorizing a change of physician to Dr. Primeaux. Dr. Primeaux has provided claimant with conservative care and eventually recommended that claimant undergo an EMG/nerve conduction study from a neurologist. As a result, claimant sought treatment from Dr. Vora who did perform that testing.

Claimant never returned to work for the respondent but instead went to work for Dollar Tree as a cashier in June 2003 where she worked until April 2004. In April 2004

the claimant began working for McDonald's as an assistant manager.

ADJUDICATION

The initial issue for consideration involves claimant's contention that she is entitled to additional temporary total disability benefits beginning November 27, 2002 and continuing through January 3, 2003. 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 wage wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a total incapacity to earn wages subsequent to November 27, 2002.

In support of her contention that she remained temporarily totally disabled from working claimant relies upon off-work slips completed by Dr. Hilborn for the period from November 27, 2002 through January 3, 2003. Although Dr. Hilborn did provide claimant with off-work slips for that period of time, claimant was not evaluated by Dr. Hilborn subsequent to October 29, 2002. Therefore, these off work notes were written by Dr. Hilborn without benefit of an examination. On the other hand, at respondent's request, claimant began treating with Dr. Safman on November 21, 2002. At that time Dr. Safman was of the opinion that claimant could return to work with restrictions of performing sedentary-type duty which allowed her to sit or stand as needed. Claimant's next visit with Dr. Safman was scheduled for November 25, 2002 which she did not keep. Claimant was evaluated by Dr. Safman on November 27, 2002 and trigger point injections were discussed. Dr. Safman indicates in his report of that date that claimant was not interested in trigger point injections given her mother's death following an injection. Dr. Safman's

medical report indicates that he answered questions for the claimant for approximately 25 minutes. Finally, Dr. Safman noted that in the absence of objective pathology and objective findings it was his opinion that claimant was at maximum medical improvement with a zero percent impairment rating and that she had no restrictions prohibiting her return to work.

Finally, as previously noted, claimant sought medical treatment from Dr. Primeaux, a chiropractic physician, beginning on December 20, 2002. Claimant testified that Dr. Primeaux never gave her a note taking her off work and the medical evidence contains a report completed by Dr. Primeaux dated January 15, 2003 indicating that claimant was able to work and that she had not been disabled as a result of her injury.

In summary, I find that claimant has failed to prove by a preponderance of the evidence that she remained totally incapacitated from earning wages subsequent to November 27, 2002. While Dr. Hilborn completed off-work slips for the claimant subsequent to that date, he had not evaluated the claimant since October 29, 2002. On the other hand, Dr. Safman initially opined that claimant could return to work with restrictions and as of November 27 opined that claimant could return to work without restrictions. I find that the opinion of Dr. Safman is credible and entitled to great weight. Finally, I note that claimant began treating with Dr. Primeaux on December 20, 2002, and Dr. Primeaux did not opine that claimant was totally incapacitated from working. To the contrary, Dr. Primeaux later indicated that claimant was able to work and that she had not been disabled.

Accordingly, for the foregoing reasons, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 27, 2002 through January 3, 2003.

The next issue for consideration involves unpaid medical treatment from Dr. Primeaux and Dr. Vora, including testing. Claimant has the burden of proving by a

preponderance of the evidence that medical treatment is reasonable and necessary and causally related to her compensable injury. *Geo Specialty Chemical vs. Clingan*, 69 Ark. App. 369, 13 S.W. 3d 218 (2000). 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 meet her burden of proving by a preponderance of the evidence that respondent is liable for any unpaid medical treatment. Specifically, I find that claimant has failed to prove that any unpaid medical treatment is reasonable and necessary for her compensable injury.

As has been previously noted, claimant began receiving medical treatment from Dr. Primeaux on December 20, 2002. Claimant subsequently received an order from the Commission authorizing a change of physician to Dr. Primeaux. This change of physician order was filed on January 14, 2003. The medical records reflect that claimant continued to receive extensive medical treatment from Dr. Primeaux through April 2003. It also appears that respondent or some other entity has paid for some of Dr. Primeaux's medical treatment. However, it is unclear from the record exactly how much of Dr. Primeaux's treatment remains unpaid. Dr. Primeaux eventually recommended that claimant undergo EMG testing and this was performed by Dr. Vora.

I find insufficient evidence of any real improvement in claimant's condition as a result of treatment from Dr. Primeaux or Dr. Vora. Claimant testified that on direct examination that although she was receiving treatment from Dr. Primeaux some two or three times a week her symptoms were staying "mostly the same". Although claimant did testify that she received some temporary relief from her pain, I do not find claimant's testimony regarding the benefit of her medical treatment to be particularly credible. This opinion is based upon claimant's testimony regarding her examination and treatment by Dr. Safman. On both direct and cross examination claimant specifically denied that Dr. Safman performed a physical examination of her. Claimant specifically denied that Dr. Safman examined her lower extremity, hip area, or thigh area. Claimant also testified that

Dr. Safman did not mention trigger point injections in her low back. Claimant's testimony appears to be in direct conflict with the medical report from Dr. Safman dated November 21, 2002. That report consists of three pages, including a one-page history of claimant's injury and treatment. While claimant denied that Dr. Safman physically examined her, his medical report of that date contains notes detailing his examination of the claimant including her lumbar spine and left lower extremity. I find it difficult to believe claimant's testimony that Dr. Safman never conducted a physical examination of her on November 21. In order to believe this testimony I would have to find that Dr. Safman manufactured all of the physical examination findings contained in his report of November 21, 2002. I am not prepared to make that finding.

It is also important to note that claimant has undergone two MRI scans of her lumbar spine. The first of these occurred on October 12, 2002 and was read as normal. The second MRI scan of claimant's lumbar spine occurred on May 18, 2004 and was again read as normal. On May 18, 2004 the claimant also underwent an MRI scan of the cervical spine which revealed mild and moderate bulging. However, the scan revealed no evidence of impingement.

With respect to claimant's cervical spine scan, I also note that claimant had a prior workers' compensation claim involving her neck and back while working for another employer in 1992. Claimant settled that claim by joint petition in 1993.

As previously noted, Dr. Primeaux referred claimant to a neurologist for an EMG study. That study was performed under the direction of Dr. Vora. In Dr. Vora's report dated June 7, 2004, he indicates that the NCV/EMG shows "left ulnar mid palm sensory response absent/mild neuropathy." Dr. Vora also indicated that left posterior tarsal tunnel syndrome could not be ruled out. The fact that Dr. Vora mentioned claimant's left arm is significant since the initial medical report from Dr. Jacob dated September 17, 2002 does not mention any problem with claimant's left arm. Instead, Dr. Jacob noted that claimant

had a healed abrasion on her right elbow. There is no indication that claimant suffered an injury to her left arm at the time of her fall on September 15, 2002.

Furthermore, with respect to claimant's arm complaints, I note that claimant was previously diagnosed as suffering from tendinitis in 1992 from overuse syndrome while employed by another employer.

In summary, I find that claimant has failed to prove by a preponderance of the evidence that respondent is liable for any unpaid medical treatment received from Dr. Primeaux or Dr. Vora, including testing. While claimant was granted a change of physicians to Dr. Primeaux, it appears that respondent or some other entity has paid for some of Dr. Primeaux's medical treatment. Clearly, under Arkansas Workers' Compensation law, respondent is liable for the initial evaluation following a change of physician. However, with regard to further treatment from Dr. Primeaux and Dr. Vora, I find that claimant has failed to meet her burden of proof. I find insufficient evidence that claimant's condition has improved as a result of this extensive and expensive medical treatment from Dr. Primeaux or Dr. Vora. Claimant admitted on examination that her symptoms were "mostly the same". At best, claimant's testimony would indicate that she was receiving some relief from pain. However, I find claimant's testimony regarding the benefits of her medical treatment not credible for reasons previously discussed involving her examination and treatment by Dr. Safman. I find that Dr. Safman's opinion is credible and entitled to great weight. Dr. Safman was of the opinion that claimant had reached maximum medical improvement, that she had no impairment, and that she could be released to return to work without restrictions as of November 27, 2002. Also relevant is the fact that claimant underwent two MRI scans of her lumbar spine, both of which were read as normal. While an MRI of the claimant's cervical spine revealed bulging discs, there was no evidence of impingement. Finally, according to Dr. Vora, the EMG/nerve conduction study revealed potential problems in claimant's left arm. However, the initial

medical reports from Dr. Jacob do not mention any injury to claimant's left arm but instead mention only an injury to claimant's right elbow. Furthermore, claimant was previously diagnosed with tendinitis in 1992 due to overuse syndrome while working for another employer. Given all of this evidence, I find that claimant has simply failed to meet her burden of proving by a preponderance of the evidence that respondent is liable for payment of any unpaid medical treatment from Dr. Primeaux or Dr. Vora.

ORDER

Claimant has failed to meet her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 27, 2002 through January 3, 2003. In addition, claimant has failed to prove by a preponderance of the evidence that respondent is liable for any unpaid medical treatment received from Dr. Primeaux or Dr. Vora, including testing. Obviously, respondent is liable for payment of Dr. Primeaux's initial evaluation following the Commission's order granting a change of physician. Claimant's claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE