

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F106809 & F103210**

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| <b>CHARLENE HENDERSON, EMPLOYEE</b>                      | <b>CLAIMANT</b>   |
| <b>LENNOX INDUSTRIES, INC., EMPLOYER</b>                 | <b>RESPONDENT</b> |
| <b>AMERICAN MOTORISTS INSURANCE<br/>COMPANY, CARRIER</b> | <b>RESPONDENT</b> |

**OPINION FILED JUNE 23, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on March 26, 2004 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SHEILA F. CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

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

At issue is whether or not the claimant treated with an authorized physician as defined by Ark. Code Ann. §11-9-514, and whether or not the treatment was reasonable and necessary as defined by Ark. Code Ann. §11-9-508.

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 preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on August 16, 2000, at which time the claimant sustained a compensable back injury at a compensation rate of \$391.00. Medical expenses and temporary total disability benefits were paid on this claim F106809. This claim was the subject of an order entered January 7, 2003 by Judge Curdie authorizing Dr. Jim Moore to treat the claimant.

The parties further stipulated to an employer-employee-carrier relationship on October 9, 2000 at which time the claimant sustained a compensable carpal tunnel syndrome injury at a

compensation rate of \$391.00. This claim F103210, was the subject of an order entered January 8, 2002 by the Medical Cost Containment Division authorizing Dr. Markiewitz as the treating physician. Medical expenses and temporary total disability benefits were paid.

The claimant contends her back remained symptomatic despite Dr. Moore's treatment and she returned to Dr. P. B. Simpson who performed surgery. The claimant seeks payment of medical expenses, temporary total disability benefits from October 13, 2003 to March 8, 2004, and attorney's fees.

The respondents contend Dr. Simpson is not authorized and they are not liable for any expenses. Alternatively, the treatment provided by Dr. Simpson is unreasonable, unnecessary, and not causally related to the compensable injury.

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

The claimant was the only witness to testify at the hearing. Her health history includes heart disease.

The claimant injured her back in a lifting incident at work on August 16, 2000. Initially, she came under the care of Dr. Daniels who referred her to Dr. Wilson. Her family physician referred her to Dr. P. B. Simpson.

In a hearing before Judge Curdie, the claimant was awarded a change of physician to Dr. Jim Moore. She saw Dr. Moore periodically throughout the year 2003. He prescribed injections but the claimant didn't find the first one beneficial and declined the second shot in June, 2003. Dr. Moore assessed permanent impairment in a report dated June 25, 2003, but apparently, no benefits were paid.

The claimant felt her leg was becoming weaker and used a cane to help her walk. On August 29, 2003 she returned to Dr. Simpson using her group health insurance on referral from her family physician. She returned to Dr. Moore on September 3, 2003 and returned to Dr. Simpson on September 29, 2003 but she was unsure about proceeding with surgery because of her heart

condition. She returned to Dr. Moore in October and he felt her symptoms emanated from a new site at L5-S1. The respondents then stopped paying benefits. The claimant saw no physician between October 17 and December 16. Although not argued by the claimant, it appears the claim was controverted in October based on Dr. Moore's report of September 3, 2003. Dr. Simpson performed lumbar surgery on December 16, 2003. The claimant felt the surgery was beneficial and improved her leg symptoms. The claimant returned to work on March 8, 2004.

### **FINDINGS AND CONCLUSIONS**

As this case 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.

Ark. Code Ann. §11-9-514 provides for the selection of a physician initially by the employer, allowing the claimant the right to petition for a change of physician.

Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

Any unauthorized medical expense incurred after the employee has received a copy of the Notice (AR-N) shall not be the responsibility of the employer.

The claimant argues that medical treatment provided by Dr. Simpson was an emergency service and the surgery was reasonable and necessary because the claimant's symptoms improved, allowing her to return to work.

Respondents argue that Dr. Moore was the claimant's authorized physician based on Judge Curdie's order. The claimant never requested a change of physician to Dr. Simpson and accordingly, the respondents are not liable for his expenses. Alternatively, Dr. Simpson's treatment was not causally related to the compensable injury. Dr. Simpson treated the claimant's preexisting degenerative disc disease as demonstrated by comparative MRI scans.

With regard to the temporary total disability benefits, the respondents paid indemnity benefits until October 13, 2003 based on Dr. Moore's report that his treatment was now directed to new medical findings unrelated to the compensable injury. In the event of an award, the respondents

contend the claimant's healing period is limited to her recovery from surgery, or from December 16, 2003 to March 8, 2004.

The evidence of record shows that the claimant signed a WCC Form N, acknowledging her change of physician rights. She is familiar with the procedure, having obtained two changes of physician in two different claims and she has had the advice of legal counsel. The claimant did not obtain permission from either the insurance carrier or the Commission before incurring expenses with Dr. Simpson. Additionally, there is no evidence that Dr. Simpson's treatment was provided on an emergency basis. The claimant treated with Dr. Simpson for over three months before he performed surgery. Accordingly, I find Dr. Simpson was unauthorized, but the surgery in December was performed after the claim was controverted in October. Change of physician rules do not apply to controverted claims..

The claimant was initially treated for dessication and herniation at L4 based on an March 30, 2001 MRI scan (see Dr. Moore's report of January 14, 2003). A repeat MRI scan conducted January 31, 2003 revealed changes. A herniated disc was identified at L5-S1 impinging on the nerve root, (see Dr. Moore's reports of June 25, 2003). Dr. Moore opined that the new findings at L5-S1 were unrelated to the compensable injury (see his report of September 3, 2003).

Dr. Simpson ordered a third MRI scan after commenting about the poor quality of the first two tests. This third test was interpreted as showing no problems at L5-S1 and a herniated nucleus pulposus (HNP) at L4-5 on the left (see his report of October 17, 2003). His surgical report of December 19, 2003 shows "she was indeed found to have a very large subscapsular extrusion of disk material right under the takeoff of the L5 nerve root." Dr. Simpson assessed a 10% impairment rating (see his report of February 27, 2004).

After comparing the MRI scans, Dr. Moore's reports and Dr. Simpson's records, I find Dr. Simpson's surgery at the L4-L5 level is causally related to the compensable injury. The claimant has consistently complained of radicular symptoms since the compensable injury and Dr. Simpson's surgery was performed at the same level as the first positive MRI scan after the work-related

accident. The surgery was also reasonable and necessary for treatment of the compensable injury, alleviation of her radicular symptoms and facilitating her return to work.

Although the carrier is not liable for expenses associated with an unauthorized physician (including mileage, prescriptions, medical reports, doctors fees, and treatment), the unauthorized physician's opinion must still be considered by the Commission in evaluating disability. Barton v. J.A. Riggs Tractor Co., 13 Ark. App. 177, 681 S.W.2d 397 (1984), Crain Burton Ford Co. v. Rogers, 12 Ark. App. 246, 674 S.W.2d 944 (1984), Hulvey v. Kellwood Co., 262 Ark. 564, 559 S.W.2d 153 (1977), Alexander v. Lee Way Motor Freight, 15 Ark. App. 41, 689 S.W.2d 3 (1985), Markham v. K-Mart Corp., 4 Ark. App. 310, 630 S.W.2d 550 (1982) and Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

The claimant's treatment was ineffective until Dr. Simpson performed surgery. Accordingly, I find the claimant remained in her healing period, unable to work and is entitled to additional temporary total disability benefits from October 14, 2003 to March 8, 2004. Although not requested in the claimant's prehearing questionnaire, the respondents also remain liable for the anatomical impairment rating to the back.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employer-employee-carrier relationship existed among the parties on August 16, 2000 at which time the claimant suffered a compensable L4-L5 back injury at a compensation rate of \$391.00. Medical expenses and temporary total disability benefits until October 13, 2003 have been paid.
2. The claimant was granted a change of physician to Dr. Jim Moore in an order filed December 4, 2002. In 2003, Dr. Moore began treating the claimant's back at another level, L5-S1, and opined that this condition was unrelated to the compensable injury. Respondents stopped the claimant's benefits on October 13, 2003.
3. The claimant filed a prehearing questionnaire on December 9, 2003 with the Commission requesting payment of surgery as recommended by Dr. P. B. Simpson. She remained symptomatic, and on December 16, 2003, Dr. P. B. Simpson performed

surgery on the claimant for a herniated disc at L4-L5 which improved her symptoms. The claimant returned to work on March 8, 2004.

4. The claimant did not obtain permission from either the insurance carrier or the Commission before she began treating with Dr. P. B. Simpson, however, the claim was controverted on October 13, 2003 before Dr. Simpson performed surgery on December 16, 2003. The change of physician rules do not apply to controverted claims.
5. The respondents are liable for expenses associated with Dr. Simpson's treatment beginning in December, 2003. The surgery was reasonable, necessary, and causally related to the compensable injury at L4-L5 of the lumbar spine.
6. The surgery performed by Dr. Simpson was not an emergency procedure.
7. Respondents remain liable for disability benefits regardless of Dr. Simpson's authorization. The claimant is entitled to temporary total disability benefits as she remained in her healing period, incapacitated from working from October 14, 2003 to March 8, 2004.
8. If they have not all ready done so, the respondents are directed to pay the court reporter's fees and expenses within thirty days of receipt of this opinion.

#### AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN

## Administrative Law Judge