

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F213823**

<b>MARIE HERRON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MEDICALODGE PROGRESSIVE CARE, EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRAVELERS P &amp; C CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 26, 2004**

Hearing before Administrative Law Judge J. Mark White on September 9, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Robert Montgomery, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On September 9, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on July 19, 2004, and a Prehearing Order was entered that same day. A copy of the July 19, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including February 8, 2000; that on February 8, 2000, the claimant sustained a compensable injury to her low back; that respondents accepted the February 8, 2000, injury as compensable and paid benefits; that Dr. Green assessed the claimant as being at maximum medical improvement and assigned a 5% impairment rating as of November 18, 2002, which rating the respondents accepted and paid; that the claimant was granted a change of physician by the Commission to Dr. Prychodko on March 6, 2003; and that the claimant earned sufficient wages to be entitled to a compensation rate of \$194 per week for total disability and \$154 for permanent partial disability.

The parties agreed that the issues to be presented were whether additional medical treatment was reasonably necessary in connection with the compensable injury; whether the claimant is entitled to additional temporary total disability benefits; whether the claimant is entitled to additional permanent partial disability benefits; whether the claimant is permanently and totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of her permanent anatomical impairment; and controversion and attorney's fees.

The claimant contends that she was initially assessed at maximum medical improvement by Dr. Green prematurely and that she should be awarded additional temporary total disability benefits from December 16, 2003, through the date of her

maximum medical improvement as alleged to be May 12, 2004, when Dr. Akin concluded that she did not need surgery; in the alternative, that even if she did initially reach maximum medical improvement with regard to her injuries, she entered a new healing period following additional treatment and that she should be awarded additional temporary total disability benefits from December 16, 2003, through May 12, 2004; that the medical treatment she has received to date has been reasonable, necessary and related; that she should be awarded a 20% anatomical impairment associated with her compensable injuries, and the respondents to date have accepted and paid only a 5% rating; that she is now totally and permanently disabled; in the alternative, that she should be awarded wage loss disability benefits in excess of the 20% whole person impairment; and that she should be awarded attorney's fees as permitted by law.

Respondents contend that they have paid appropriate benefits for the claimant's injury; that they are not aware of any unpaid benefits owed to the claimant; and that the claimant is currently receiving medical treatment at their expense.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that the medical treatment she received from February 17, 2004, through June 11, 2004, by and at the referral of Drs. Prychodko, Hart and Akin, was reasonably necessary in connection with the compensable injury.
4. The claimant has proven by a preponderance of the evidence that she remained in her healing period until May 12, 2004.
5. The claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages from December 16, 2003, until May 12, 2004.
6. The claimant has therefore proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from December 16,

2003, until May 12, 2004.

7. The claimant has proven by a preponderance of the evidence that she has sustained permanent impairment in the amount of 20% to the body as a whole.
8. The claimant has proven by a preponderance of the evidence that the existence of her permanent impairment is supported by objective and measurable physical findings.
9. The claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent impairment or disability.
10. The claimant has therefore proven by a preponderance of the evidence that she is entitled to permanent partial disability benefits in the amount of 20% to the body as a whole.
11. The claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled.
12. The claimant has proven by a preponderance of the evidence that she has sustained wage loss of 50% over and above her permanent anatomical impairment of 20%.
13. The respondents have controverted all benefits sought herein.

## DISCUSSION

### I. History

The claimant worked for the respondent as a certified nurse's aide, or CNA. On February 8, 2000, she was giving a patient a bath when the patient experienced a seizure. The claimant testified that when she tried to hold the patient down, she felt a warm pain in her low back. The claimant denied experiencing any back or leg problems prior to this incident. She first sought treatment at the emergency room, but the parties submitted no records of this visit into evidence.

On February 17 the claimant saw Dr. Leon Purifoy with complaints of low back spasms and pain radiating into her left leg. Dr. Purifoy diagnosed a lumbar strain and prescribed medication. X-rays performed that same day revealed only "mild degenerative changes of the lumbar spine" and "arthritic changes of the SI joints." An MRI performed March 23 was normal. Dr. Purifoy then referred her to Dr. Michael Pappas, who saw her several times and continued conservative treatment. The claimant continued to work during this time, albeit at light duty.

She underwent extensive physical therapy in July and August, and a bone scan performed September 14 revealed only "mild arthritic changes." By November 5 Dr. Pappas had run out of treatment options and referred the claimant to Dr. J. Brett Dietze. Dr. Dietze opined that her injury was musculoskeletal in nature and

recommended continued conservative treatment. The claimant did not return to him for treatment.

A second MRI exam performed February 21, 2001, revealed no significant change. Before the MRI Dr. Pappas had recommended a pain gel, and on February 26 he quoted the claimant as saying the gel had given her "a significant amount of relief." Dr. Pappas continued to treat her into the fall of 2001. He eventually referred her to a chiropractor, Paul Baker, who saw her on November 27 and reported "slow and gradual improvement." On January 21, 2002, Dr. Pappas noted in his report:

I believe she is plateauing with regards to her getting better. We have made all the referrals with regards to the neurosurgeons, as well as therapy. We have tried all different modalities and now, as a last effort, we are trying a chiropractor, who seems to be helping somewhat.

On April 19, 2002, Dr. Pappas speculated the claimant might have reached maximum medical improvement, but he referred her to Dr. Nayan Patel at the Texas Back Institute for an evaluation. Dr. Patel saw her on May 30 and diagnosed lumbar sprain and a sacroiliac joint dysfunction. He recommended a third MRI, which respondent-carrier denied. He performed SI and facet injections, suspecting the possibility of lumbar facet syndrome, but the injections failed to improve her symptoms. After seeing her again on September 19, 2002, Dr. Patel wrote:

[T]he greatest suspicion would be that she has some

type of internal disc disruption in her lower lumbar spine that is causing her unusual pain. Based on everything that we have done so far, she has failed left sided facet injections, left SI joint injection. This injury has been going on for over two years now. She does note that when she is off for at least more than a couple of days, she does feel better. At this point to see if this is a disc related pain that she is having, the next thing we may need to do in light of the fact that they have denied a repeat MRI would be a discogram study of her lumbar spine. I do think that this is related to her original work related injury on 02/08/00 and she continues to have persistent symptoms as a result of that.

The respondent-carrier denied the proposed discogram and sent the claimant to Dr. Barry Green on November 18 for assignment of an impairment rating. Dr. Green opined that the claimant reached MMI as of that day and that she had sustained permanent impairment of 5% to the body as a whole. The respondents accepted and paid this rating.

Dr. Green diagnosed the claimant with a facet sprain of the lumbar spine. Dr. Patel disagreed with this diagnosis, noting that he had previously performed facet injections with no success.

The claimant then sought a change of physician from the Commission, which was granted on March 6, 2003, to Dr. Andrew Prychodko. She first saw Dr. Prychodko on March 17, and he continued conservative treatment. He said that his main focus would be to treat the claimant's sacro-iliac joint dysfunction, for which

he recommended physical therapy. Yet he also noted that lumbar disc problems “may well be a contributing factor.” A third MRI was performed on October 25, revealing “mild disc bulge and degenerative facet changes at the L3-4, L4-5 and L5-S1 levels” but “no disc herniation.”

On November 6 the claimant’s employment was terminated. On December 16 she returned to Dr. Prychodko who gave her an off-work excuse. He saw her again on January 5, 2004, and noted her “underlying problem” as “a malposition of the sacro-iliac joint.” Nonetheless, he eventually referred her to Dr. Thomas Hart for a discogram to address her discogenic pain. On February 17, 2004, the respondents controverted further medical treatment.

The claimant returned to Dr. Prychodko on February 20, reporting improvement of her sacro-iliac symptoms. She finally saw Dr. Hart on February 27, and he performed a discogram on March 25. The post-discogram CT revealed annular tears at L4-5 and L5-6. Dr. Hart linked the claimant’s complaints to these discogram findings and sent her for a neurosurgical consultation with Dr. Eric Akin. Dr. Akin evaluated her and determined that no surgical treatment was indicated. Dr. Prychodko declared the claimant to be at MMI on June 11. He opined in a letter as follows:

A course of evaluation and management has revealed intractable discogenic back pain at several levels in the

lumbar spine, as well as recurring sacro-iliac joint dysfunction. The most excruciating disc pain comes from the L-4/5 disc, with significant pain and disruption also noted at the L-6/S-1 disc (the patient has a true L-6 vertebrae). There is some disruption although not a significant amount of pain at the L-5/6 disc, and the L-3/4 disc was noted to be basically normal.

She has learned to work with family members to reduce the S-I joint when a subluxation occurs. After several specialist consultations we are resigned that the extent and location of the most severely involved discs leaves us no interventional treatment approaches for the discogenic pain, therefore placing her at MMI.

Dr. Prychodko assigned the claimant a permanent impairment rating of 20% to the body as a whole and released her from his care.

The claimant underwent a functional capacity evaluation on August 12, 2004. The evaluation revealed "full, though not entirely full, effort on" the claimant's behalf. It revealed "some minor inconsistency to the reliability/accuracy of" the claimant's subjective reports of pain or limitation. The report noted that the claimant gave a consistent effort, and concluded that the claimant is "in the unable to work category" on account of her limited lifting capability and a "balance deficit." The reviewer noted that the claimant frequently needed assistance in controlling her balance while walking.

## II. Adjudication

### A. Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The claimant contends she is entitled to payment of all medical expenses incurred after February 17, 2004, when the respondents controverted further treatment. The notes of Dr. Prychodko make clear the claimant's treatment encompassed two separate conditions – a sacro-iliac joint dysfunction, and discogenic pain.

Dr. Prychodko opined that much of the claimant's pain originated with her sacro-iliac joint. In the months after the respondents controverted treatment, Dr. Prychodko continued to treat the sacro-iliac joint, and at his recommendation the claimant underwent physical therapy. There is no medical evidence in the record contradicting Dr. Prychodko's recommendation, and his notes establish that the claimant did experience improvement in her condition.

As for the discogenic pain, the significant lapse of time between the claimant's original injury and the discovery of the annular tears raises a question as

to whether there is a causal connection between the two. I note that the claimant's physicians had speculated as to the discogenic nature of her pain as early as September, 2002, when Dr. Patel recommended a discogram. Dr. Patel specifically opined that he thought this discogenic pain was related to the original compensable injury. There is no medical opinion in the record recommending against a discogram, or contradicting Dr. Patel's opinion that the claimant's discogenic pain was connected to the compensable injury. Likewise, there is nothing in the record to contradict Dr. Prychodko and Dr. Hart's similar opinions.

It is well-settled that the Commission may not arbitrarily disregard medical testimony. *K II Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). Given the opinions and treatment recommendations of Drs. Patel, Prychodko and Hart, and the lack of any contradictory medical opinion, I find that the claimant has proven by a preponderance of the evidence that the medical treatment received from February 17, 2004, through June 11, 2004, by and at the referral of Drs. Prychodko, Hart and Akin, was reasonably necessary in connection with the compensable injury.

### **B. Temporary Total Disability**

An employee who suffers a compensable unscheduled injury is entitled to

temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. 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).

The claimant seeks temporary total disability benefits from December 16, 2003, until May 12, 2004. Dr. Green opined that the claimant reached the end of her healing period no later than November 18, 2002, while Dr. Prychodko opined she reached the end of her healing period on June 11, 2004. As noted above, I find that the treatment rendered to the claimant after February 17, 2004, was reasonably necessary in connection with her compensable injury. Although she experienced no improvement in her discogenic pain during this time, the record shows she did experience improvement in her sacro-iliac joint dysfunction. Therefore, I find that the claimant has proven by a preponderance of the evidence that she remained in her healing period until May 12, 2004.

Dr. Prychodko took the claimant off of work as of December 16, 2003. He continued to keep her off of work until he released her from care the following June. The FCE performed the following August concluded the claimant was unable to

work. There is no medical evidence in the record to the contrary. I find that the claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages from December 16, 2003, until May 12, 2004. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from December 16, 2003, until May 12, 2004.

### **C. Permanent Impairment**

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether her earning capacity is diminished or not. *Id.* Any finding of permanent impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). It must also be shown that the compensable injury was the major cause of the disability or impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a). The Commission has adopted the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) for use

in assessing the extent of permanent anatomical impairment. A.W.C.C. Rule 34 (July 1, 1995).

The claimant has been assigned two competing impairment ratings. Both ratings were made in accordance with the Diagnosis-Related Estimates (DRE) Model of Chapter 3 of the *AMA Guides*. Dr. Green placed the claimant in DRE lumbosacral category II, which is equivalent to a 5% rating. Dr. Prychodko placed her in category IV, which is equivalent to a 20% rating.

The distinction in these two ratings is that Dr. Prychodko opined – based on the discogram performed on March 25, 2004 – that the claimant exhibited “multilevel spine segment structural compromise.” Under the *AMA Guides*, multilevel structural compromise is sufficient to place a patient in Category IV. *AMA Guides* § 3.3g, Table 70. Dr. Green’s rating was made more than a year before the discogram. Dr. Green did not know, and had no way of knowing, of the multilevel structural compromise revealed on the post-discogram CT. Because Dr. Green did not have access to the discography and its findings, I find that Dr. Green’s opinion is entitled to less weight in this matter than that of Dr. Prychodko. Therefore, I find that the claimant has proven by a preponderance of the evidence that she has sustained permanent impairment in the amount of 20% to the body as a whole.

As noted above, the multilevel structural compromise noted by Dr. Prychodko was observed on a post-discogram CT – obviously an objective and measurable test. I find that the claimant has proven by a preponderance of the evidence that the existence of her permanent impairment is supported by objective and measurable physical findings. There is no evidence in the record to show that this multilevel structural compromise pre-existed the compensable injury. Dr. Patel has specifically opined that the claimant’s discogenic pain was related to the original compensable injury, and Dr. Hart has opined that the claimant’s discogenic pain is due to the annular tears revealed by discography. While it is true that Dr. Patel expressed his opinion in terms of “I think,” such phrasing will not bar an opinion as being outside a reasonable degree of medical certainty. *See, e.g., Howell v. Scroll Technologies*, 343 Ark. 297, 35 S.W.3d 800 (2001). Therefore, I find that the claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent impairment or disability.

The claimant has proven every element of permanent partial disability. I find that she has proven by a preponderance of the evidence that she is entitled to permanent partial disability benefits in the amount of 20% to the body as a whole.

#### D. Permanent Total Disability

The claimant contends that she is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519 (e). The claimant bears the burden of proving that she is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant was 49 years old as of the hearing. She has worked for a number of years as a CNA; before that, she worked as a quality control supervisor, a seamstress, a furniture builder, a housekeeper and a cashier. She completed only the eleventh grade and does not have her GED or high school diploma, though she does

have nursing training from Texarkana College. She has not had surgery on her back; her disability appears to be due in part to her back pain, but also in part to the effect of the medications she is taking for that pain. I note that she has a previous impairment rating for a carpal tunnel injury, but there is no evidence this prior injury plays any role in her current disability. Finally, the claimant has applied for social security benefits, and she testified that she cannot go back to work. I find that the claimant is not motivated to return to work.

It appears undisputed from the medical evidence that the claimant is presently unable to work. Nonetheless, I am not convinced from the record that the claimant's present inability to earn meaningful wages is permanent. I find that the claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled.

Even so, it is clear from the record that her compensable injury has negatively affected her ability to work and earn wages. I find that the claimant has proven by a preponderance of the evidence that she has sustained wage loss of 50% over and above her permanent anatomical impairment of 20%.

## AWARD

The claimant has proven by a preponderance of the evidence that additional medical treatment was reasonably necessary in connection with her compensable injury; that she is entitled to temporary total disability benefits from December 16, 2003, until May 12, 2004; that she is entitled to permanent partial disability benefits in the amount of 20% to the body as a whole; and that she has sustained wage loss of 50% over and above her permanent anatomical impairment of 20%. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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 Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge