

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F106661**

<b>SHIRLEY D. WELLS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>WAL-MART STORES, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JUNE 11, 2004**

Hearing before Chief Administrative Law Judge David Greenbaum on April 9, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. David Landis, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Colleen McCullough, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted April 9, 2004, to determine whether the claimant is entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on March 3, 2004, and a Prehearing Order filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to an additional stipulation set out further below, as well as a clarification concerning respondents' contentions. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant

times, including May 14, 2001; that the claimant sustained a compensable injury on said date; that respondents have paid various indemnity benefits at the rate of \$251.00 per week, as well as various medical expenses; and that the respondents had controverted all benefits beyond those previously paid. At the hearing, the parties agreed that claimant's indemnity benefits had been paid at erroneous rates. It was stipulated that the claimant's average weekly wage was \$419.20, entitling her to compensation rates of \$280.00 per week for temporary total disability and \$210.00 per week for permanent partial disability.

By agreement of the parties, the following issues were presented for determination:

- 1) The date claimant's healing period ended, as well as claimant's entitlement to additional temporary total disability, if any.
- 2) Claimant's entitlement to additional medical treatment.

Claimant contended, in summary, that she was entitled to additional temporary total disability following her last day of work on or about June 24, 2003, and continuing through the present, maintaining that her healing period has not ended; that respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant reached maximum medical

improvement on or before July 1, 2002, at which time she was released with no permanent impairment, and that the claimant cannot prove entitlement to additional temporary total disability. In addition, respondents maintained that the claimant's medical treatment beyond that previously paid was the result of claimant's pre-existing condition rather than the May 14, 2001, admitted injury.

At the hearing, respondents amended its contentions, maintaining that the claimant sustained a temporary aggravation of a pre-existing condition and could not show entitlement to additional, related medical treatment. Further, it appears that respondents may have accepted, and paid, some permanent impairment benefits as assigned by Dr. Mulhollan, which, of course, if they have paid, would entitle them to a credit against any benefits awarded.

The claimant testified in her own behalf. Debra West was called as a witness by the respondents. The record is composed solely of the transcript of the April 9, 2004, hearing containing numerous exhibits.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over

this claim.

2. On May 14, 2001, the claimant sustained a compensable injury arising out of and during the course of her employment with Wal-Mart Stores, Inc., at which time she earned sufficient wages to entitle her to compensation rates of \$280.00 per week for temporary total disability and \$210.00 per week for permanent partial disability.
3. The healing period for the claimant's compensable injury ended on or before January 12, 2004.
4. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to additional, temporary total disability following her last day of work on June 24, 2003, and continuing through January 12, 2004.
5. Respondents are entitled to a credit or offset for any benefits that the claimant has previously received in workers' compensation benefits and/or disability benefits paid under any disability policies provided by the employer pursuant to A.C.A. §11-9-411, if applicable.
6. The claimant has proven, by a preponderance of the evidence, that all of her medical treatment is reasonably necessary, as well as related to the May 14, 2001, admitted injury which aggravated a pre-existing, degenerative arthritis of the right knee.
7. Respondents have controverted all benefits beyond those previously

paid.

### DISCUSSION

\_\_\_\_\_The claimant, Shirley D. Wells, is forty-eight (48) years old. After completing high school, the claimant attended college and graduated from Arkansas State University with a major in commercial art and graphic design. The claimant began working for Wal-Mart Stores, Inc., on or about 1992. She has worked primarily as a floral designer. The record reflects that the claimant sustained two (2) prior injuries with the employer herein. The claimant's first injury occurred on or about January, 1993, when she slipped and fell at work, breaking her left foot. Apparently, the claimant was paid appropriate benefits and continued working. The claimant also related sustaining an injury during 1996 when, while lifting a bucket of water, she pulled some muscles on her left side for which she obtained medical treatment and missed a limited amount of work. Again, the claimant was paid appropriate benefits for both injuries. The claimant did not sustain any permanent disability as a result of either of her prior work-related injuries. The immediate injury occurred on May 14, 2001. On that date, the claimant tripped over a box, sustaining an injury to her right foot and leg. The claimant sustained a fracture of her right foot, as well as an injury to her right knee. The claimant was initially examined and treated by the company physician, Dr. Ken Carpenter. Dr. Carpenter immediately referred the claimant to Dr. John T. Woloszyn, an orthopedic surgeon in Jonesboro,

Arkansas. Dr. Woloszyn treated the claimant's fractured right foot by placing it in a walking cast while, at the same time, permitting the claimant to return to work. The claimant stated that she in fact returned to work the day following her injury. Apparently, the claimant continued working with crutches and the use of a wheelchair. She stated that she continued to experience problems with her right knee. After advising Debra West, the personnel manager, about her continued right knee problems, Ms. West referred her back to Dr. Carpenter. Dr. Carpenter ordered a bone scan which revealed an abnormal knee cap at which time the employer referred the claimant to Dr. James Mulhollan, an orthopedic surgeon and knee specialist in Little Rock, Arkansas. Dr. Mulhollan began treating the claimant in November, 2001. The claimant subsequently underwent a MRI. Dr. Mulhollan's initial evaluation stated that the test showed a marked patella alta, as well as hypertrophic degenerative changes in the outer compartment of the right knee. Dr. Mulhollan opined that the strength in the claimant's knee had been suppressed by the May 14, 2001, injury; however, he permitted the claimant to continue working while recommending increasing thigh strength and decreasing body weight to improve the claimant's symptoms. (Cl. Ex. A, p.9)

The record reflects that the claimant continued working despite her continued physical problems until on or about June 24, 2003. The claimant stated that her knee grew progressively worse, to the point that she could not

continue working. The claimant requested further medical treatment on June 24 which was provided. The claimant has not returned to any gainful employment since June 24, 2003. The claimant returned to Dr. Mulhollan on July 3, 2003. Dr. Mulhollan did not have anything further to offer the claimant. He released the claimant with a five percent (5%) physical impairment related to the injury while, at the same time, acknowledging that the claimant's overall impairment was far greater than the five percent (5%), but that it was pre-existing and not related to the work injury. Further, he opined that he could not assist the claimant arthroscopically; that she may be helped by a total knee replacement which was outside his area of expertise, and recommended that she be referred to an orthopedic surgeon in Jonesboro to consider further treatment. (Resp. Ex. A, p.7)

The claimant was also examined and evaluated by Dr. William Hurst, D.O. in Jonesboro. Dr. Hurst initially took the claimant off work beginning June 24, 2003, through July 3, 2003, which he later extended until the claimant could be evaluated by an orthopedic surgeon. As previously pointed out, the claimant returned to Dr. Mulhollan who had nothing further to offer. The claimant then received permission to be examined and evaluated by Dr. R. Edward Cooper, an orthopedic surgeon in Jonesboro, Arkansas. Dr. Cooper apparently first evaluated the claimant on September 15, 2003. Dr. Cooper did not find the claimant to be a surgical candidate for a total knee replacement due

to her obesity. Dr. Cooper treated the claimant conservatively with medications and physical therapy. Although the respondents apparently paid for the initial examination and treatment by Dr. Cooper, it has resisted any further medical treatment. The claimant related that the treatment by Dr. Cooper improved the overall condition of her right knee which is confirmed in his medical reports. The claimant returned to Dr. Cooper on November 11, 2003, as well as January 12, 2004. Dr. Cooper's January 12, 2004, office note is set out in its entirety below:

1-12-04 Ms. Wells returns today. She has had significant improvement in her right knee pain. She still has a complaint of hypermobile right patella which causes her to fall on occasion. The knee is stronger than it was before and is not hurting her as bad, but still is quite bothersome. Today she has ROM from 0-100 degrees of flexion. There is no varus or valgus instability. Today she relates that Dr. Woloszyn did not see her for her knee. He did not evaluate her knee or talk to her about her knee. Therefore, I will make the record clear on that in my note. I assumed because she was seen by him after her injury that her knee was evaluated by him. This was not the case.

**IMPRESSION:**

1. S/P right knee injury in an accident in Wal-Mart now with continued pain and patellofemoral instability and difficulty ambulating.

**PLAN:**

1. I related to her that I think we can make her better, but it would take a multi-pronged approach. Once again I think she will need to lose 100 lbs. of weight.

2. She will continue her quad strengthening exercises home program.

3. Naprosyn.

4. We will schedule her to see Dr. Sara VanScoy for psychological evaluation. Certainly she has had chronic pain in this area and this generally causes significant anxiety and depressive type patterns which can enhance pain. I think if we do not attack the emotional component we will be selling her short.

5. She will return to clinic in 8 weeks for follow-up. I would be surprised if she does not have significant improvement if all of these areas are diligently pursued. REC:jm (Cl. Ex. A, p.6)

It is unclear whether the claimant returned to Dr. Cooper after January 12, 2004. Dr. Cooper did issue a February 11, 2004, narrative report addressed to claimant's attorney which states, in part:

Ms. Shirley Wells is a 47 year old lady who injured her right hip, knee and foot in Wal-Mart about two and a half years ago. She has undergone extensive treatment since that time over the past two and half years, but has continued to have significant right knee and lower extremity symptoms. She related to me that she was asymptomatic prior to falling in Wal-Mart and has remained symptomatic since that time developing significant right knee pain and disability. She was evaluated thoroughly and found to have advanced osteoarthritis of the right knee. It is my opinion that she has longstanding degenerative arthritis of the knee which was indeed present two and a half years ago at the time of the index injury. The injury did aggravate her condition making this become symptomatic and she has continued to have symptoms since that time. She has not recovered as would be expected from the injury because of her degenerative condition. Currently we are working on weight reduction, non-steroidal anti-inflammatory medication, steroid injection and exercises to see if we can improve her symptoms and return her to some level of functioning. (Cl. Ex. A, p.7) (Emphasis supplied)

At the time of the within hearing, the claimant was on a medical leave of absence. It is unclear whether she applied for or received any short-term or long-term disability benefits from the employer. The claimant did point out that she was in a "catch-22" position concerning her need for medical treatment. After respondents terminated her medical treatment following the initial evaluation by Dr. Cooper, she attempted to receive treatment under her group health and accident insurance, but was denied, allegedly because the requested

treatment was related to a work-related injury. (Tr.26)

Debra West testified on behalf of the respondents. Ms. West was the personnel manager at the Wal-Mart Store in which the claimant worked. She stated that the employer, at all times, made appropriate accommodations in order to allow the claimant to continue working. She stated that the claimant advised her on June 24, 2003, that she could no longer perform the work and that the claimant has not returned to work since that time. Again, the record reflects that the respondents permitted the claimant to modify her work, including the use of a wheelchair. The claimant has not returned to work for this employer or any other, and has not requested any modified work. The claimant has apparently filled out two (2) separate requests for leave of absence as a result of her physical condition. (Cl. Ex. B)(Resp. Ex. B)

#### TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. Arkansas State Highway and Transportation Department vs. Breshears, 272 Ark. App. 244, 613 S.W.2d 392 (1981); Johnson vs. Rapid Die & Molding, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities

and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

This claim involves a scheduled leg injury. Our courts have previously determined that when dealing with a “scheduled” injury, a claimant is entitled to temporary total disability benefits as long as she is within the healing period and has not returned to gainful employment. *Wheeler Construction Co., vs. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001); *Farmers Cooperative vs. Biles*, 77 Ark. App. 1, \_\_\_ S.W.3d \_\_\_ (2002).

I find that the claimant’s healing period ended on January 12, 2004. Accordingly, the claimant is entitled to additional temporary total disability following the last day that she worked, June 24, 2003, and continuing through the end of her healing period on January 12, 2004. Although the claimant may require follow-up medical care, it is to stabilize and maintain her existing condition which has actually improved over what it was while continuing to work.

#### MEDICAL TREATMENT

The Workers’ Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an

employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Respondents maintain that the claimant's medical treatment is the result of the pre-existing condition rather than the May 14, 2001, admitted injury. Respondents further maintain that the injury was a mere temporary aggravation of the pre-existing condition.

Clearly, the medical evidence does not support a temporary aggravation. Further, the law is clear that an aggravation of a pre-existing condition is compensable, and that while major cause of the claimant's injury is necessary for a determination of entitlement to permanent disability benefits, it is not necessary for an award of continued medical treatment or entitlement to temporary total disability. See, *Farmland Ins. Co. vs. Dubois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996); *Pearline Williams. vs. L & W Janitorial, Inc., and Cincinnati Insurance Company*, CA03-681 (February 4, 2004).

The claimant has proven, by a preponderance of the credible evidence,

that she requires follow-up medical treatment to stabilize and maintain her condition. Accordingly, respondents remain responsible for continued, reasonably necessary medical treatment.

#### AWARD

Respondent, Claims Management, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$280.00 per week, beginning June 25, 2003, and continuing through January 12, 2004.

All accrued benefits shall be paid in lump sum and without discount; however, respondents may claim credit for any benefits paid, both temporary total disability, which, as previously pointed out, was paid at an erroneous compensation rate, as well as for any permanent impairment benefits which was, likewise, paid at an erroneous compensation rate. In addition, respondents may claim an offset in the event disability benefits have been paid by some other source provided by the employer.

Respondents are further responsible for all outstanding medical and related expenses provided by Dr. Edward Cooper, together with continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. David Landis, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

---

DAVID GREENBAUM  
Chief Administrative Law Judge