

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F213616

BRENDA BAILEY, EMPLOYEE	CLAIMANT
DUMAS NURSING CENTER, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 27, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on October 29, 2004, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

A hearing was held on October 29, 2004, to determine the claimant's entitlement to additional benefits.

The parties stipulated to the existence of the employee-employer relationship on November 13, 2002. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$177.70, based on an average weekly wage of \$264.80. The parties also stipulated that the claim was accepted as compensable and medical has been paid, as well as indemnity benefits for all periods of temporary total disability prior to January 19, 2004.

Claimant contends that she is entitled to additional medical treatment at respondents' expense, specifically discography, which was recommended by Dr. Thomas Hart on a referral from Dr. Andrew Prychodko, to whom the Commission directed claimant under a Change of Physician Order. Claimant further contends that she is entitled to reinstatement of temporary total disability indemnity benefits commencing January 19, 2004, and continuing to a date yet to be determined. As these issues are controverted, claimant contends that attorney's fees should also be awarded.

Respondents contend that the claimant has received all benefits to which she is entitled and that appropriate temporary total disability benefits have been paid. Respondents further contend that claimant was at maximum medical improvement (MMI) as of July 24, 2003, according to medical records, particularly the records of Dr. Bruce Safman, who released claimant at MMI on that date with no permanent impairment. Respondents, therefore, contend that the healing period has ended in regard to additional medical, and contend that further treatment, including discography, is not reasonable and necessary and not related to the compensable injury of November 13, 2002.

STATEMENT OF THE CASE

Claimant was employed as a certified nursing assistant (CNA) for respondent-employer on November 13, 2002, when she sustained a compensable low back injury.

Claimant first saw Dr. Steve Asemota, who took her off work for a while. Claimant then began seeing Dr. Bruce Safman at the recommendation of her case manager. She testified that she saw Dr. Safman from February of 2003 through May of 2003.

Claimant testified that Dr. Safman did not perform or order any tests and he did not even take any x-rays. Claimant testified that he gave her medication only and referred her to Dr. William Ackerman for a spinal injection. She testified that she received one injection from Dr. Ackerman that did not really help her. She testified that she did not miss any scheduled appointments with any of her doctors, although the record reflects a note from Dr. Ackerman stating that claimant did miss one appointment with him for a second injection.

Claimant contends that she was displeased with the treatment, or lack thereof, that she had received from the doctors she had seen; therefore, she asked the case manager for a second opinion. The case manager referred her to Dr. Scott Carle, whom she saw on one occasion for an Independent Medical Evaluation (IME). Claimant testified that he simply performed a reflex test, asked her some questions, and then offered a lengthy report stating that claimant had a disc that was herniated in her back. Claimant testified that all her medical was paid through this point, as well as temporary total disability indemnity benefits for the time periods during which she was off work as a result of this injury.

Claimant testified that she became dissatisfied with the medical treatment that she had received at the direction of respondents because the medicine that was prescribed to her was not helping her with her pain. Therefore, claimant requested a change of physician from this Commission. Her request was granted, and she was issued a change of physician to Dr. Andrew Prychodko.

Claimant saw Dr. Prychodko on more than one occasion. She testified that he performed the reflex test, examined her, and looked at all her previous test results and records, including her MRI and x-rays. Claimant testified that Dr. Prychodko looked at her MRI and told her what was wrong with her. She testified that Dr. Prychodko's care was more thorough than any other doctor she had previously seen. Claimant testified that she prefers Dr. Prychodko because he "knew right off from looking at the MRI that it was something wrong with me," and that she feels more comfortable being under his care.

Dr. Prychodko referred claimant to Dr. Thomas Hart. Claimant saw Dr. Hart one time at her own expense; he recommended claimant have discography. In a letter from Dr. Hart to counsel for claimant on August 15, 2004, Dr. Hart stated as follows:

Ms. Bailey was seen one time and one time only on 4/12/04. After a history, physical and evaluation, as well as review of her imaging studies, I discussed with her an algorithmic approach according to the national standards. Since she has had continuing back pain complaints after failure of conservative care and imaging studies, again, showing disc protrusions most notably at 3-4 and 4-5, *discography would be the appropriate study* according to

the North American Spine Society's Protocol and Commission, i.e., pain beyond four months not delineated by other imaging studies. I have already discussed this extensively.

. . . Again, I would state to a degree of medical certainty and probability that discography would be the appropriate study.

If for some reason worker's comp still continues to deny her care for this appropriate study, there are several neurosurgeons, as well as orthopedic spinal specialists in Little Rock who I think would give an "honest" opinion as to Ms. Bailey's care and *the need for discography in delineating her back pain complaints.*

[Emphasis added.]

Claimant testified that she has been unable, since that time, to see Dr. Hart again, as respondents refuse to pay for his services. Claimant testified that she understands that discography is only diagnostic in nature, but she wants to submit to it because Dr. Hart recommends it in order to determine if there is any other treatment that can help her.

Claimant testified that Dr. Prychodko put her on light duty on January 19, 2004. She testified that she has not worked since that date. She asserts that she took her light duty slip to her supervisor, LaSondra Ermetti, who told claimant she would get back with her. Dr. Prychodko's records of March 26, 2004, indicate that claimant was given a note dated January 22, 2004, signed by nursing home administrator Vicki Brown, stating that there was no light duty position available. His notes further state:

The current management [of respondent-employer] had taken over running the facility on or around April 15, but at that time claimant was offered light duty through May 28. Because the restrictions were not construed in the spirit intended (i.e., part of the management of a workers' compensation injury), I will restate the restriction as "no work" (i.e., temporary total disability) since this is what in fact resulted.

Claimant contends that she has never again heard from respondent-employer to let her know whether light duty work within her restrictions is available. Claimant testified that she is not even sure at this point if she is still employed with respondent-employer.

Claimant testified that she has received no temporary total disability benefits from respondents during this period. She testified that she did draw unemployment for about five months, from March until July 2004, but that she ceased drawing it because she was attempting to get disability and was informed that she could not be receiving unemployment and disability at the same time. She said that she was unaware of this but that as soon as she became aware, she voluntarily ceased drawing unemployment. She testified that she receives some income, about \$700.00 per month, on behalf of her children. Claimant testified that she has filed for Social Security disability but has not been approved at this time. Claimant testified that she is hoping to be able to go back to work.

Claimant testified that her pain is worse today than it was at the time of the initial injury. She testified, "The pain in my leg, it gets to the point where sometimes

I can't get up." She testified that the pain in her back is worse, as well, and that there are things she could do before that she is unable to do now, such as play with her kids and walk three miles a day, as she did before the injury.

FINDINGS OF FACT

1. The claimant is entitled to reinstatement of temporary total disability benefits commencing January 19, 2004, and continuing to a date yet to be determined;
2. The amount of temporary total disability benefits to which claimant is entitled shall be off-set by the amount of unemployment benefits she received during this period;
3. The claimant is entitled to ongoing medical benefits, including discography;
4. Respondents have controverted claimant's entitlement to additional benefits.

DISCUSSION

The Court of Appeals has held that medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. *See generally, Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tiner v. Total*

Petroleum, Full Workers' Compensation Commission, Opinion filed April 3, 2003 (W.C.C. F104990). In addition, an employer may remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). (“Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer.”)

The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes and Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). Where there is conflicting medical evidence in a case, it is well settled that it is the Commission's duty to resolve such conflicts. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra; Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical

evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra; Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

In this case, although none of the physicians claimant saw at the direction of respondents were able to offer claimant any further treatment that she believed was helpful for her pain, she was granted a change of physician by this Commission to Dr. Prychodko. Dr. Prychodko then referred her to Dr. Hart who has opined, to a degree of medical certainty and probability, that discography would be the appropriate study based on claimant's injury and pain. Based upon claimant's testimony and the record as a whole, it is this examiner's opinion that discography is reasonably necessary in relation to claimant's compensable injury of November 13, 2002.

Further, 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 & Transportation Dept. 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(13)(Supp. 1997). The healing period continues until the

employee is as far restored as the permanent character of his injury will permit. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

In this case, Dr. Safman found claimant to be at MMI on July 24, 2003, and released her at that time with no impairment. However, claimant was granted a change of physician to Dr. Prychodko, who took claimant back off work on January 19, 2004, and has kept her off work since. Dr. Prychodko referred claimant to Dr. Hart for discography, which this examiner has opined is reasonably necessary and related to her compensable injury. As such, claimant has re-entered her healing period and is, therefore, entitled to temporary total disability indemnity benefits from January 19, 2004, until this healing period has ended, which is a date to be determined in the future.

Based on the medical records and testimony, it is this examiner's opinion that the claimant in this case has met her burden of proving by a preponderance of the evidence that she is entitled to a reinstatement of temporary total disability benefits commencing January 19, 2004, and continuing to a date yet to be determined, to be off-set by the amount of unemployment benefits she received. Claimant is further entitled to continued medical treatment, including discography.

AWARD

Respondents are directed to pay the claimant temporary total disability benefits as outlined in the findings of fact above.

Respondents are directed to pay all reasonable, necessary, and related medical expenses which have been incurred by the claimant and which may be incurred in the future as a result of her compensable injury of November 13, 2002, including discography.

Respondents are directed to pay the claimant's attorney, Mr. Kenneth Olsen, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge