

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204378

LESLIE BLAND,  
EMPLOYEE

CLAIMANT

BAXTER REGIONAL MEDICAL CENTER,  
SELF-INSURED EMPLOYER

RESPONDENT

**OPINION FILED JANUARY 19, 2005**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 3, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on June 29, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The parties stipulate to the employer/employee relationship on March 27, 2002 on which date

claimant sustained a compensable injury to her back.

2. The claimant's average weekly wage was \$415.24 which entitles her to TTD benefits in the amount of \$277.00 per week and PPD benefits in the amount of \$208.00 per week.
3. The respondents have controverted all additional medical and all additional TTD benefits after March 18, 2003.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited during the hearing to the following:

1. The admissibility of the testimony of Dona Langevin regarding the claimant's pre-existing medical conditions, specifically seizures.
2. The admissibility of claimant's proffered Exhibit 1 and claimant's proffered Exhibit 3.
3. Compensability of an alleged closed head injury and/or depression.
4. Additional TTD and medical benefits after March 18, 2003 (for low back, closed head injury and/or depression).
5. Attorney's fees.

The record consists of the November 3, 2004 hearing transcript and the exhibits contained therein, except to the extent that the proffered testimony and documentary exhibits have been excluded as discussed below. In addition, I have retained in the Commission's file respondent's Exhibit 3 which is a videotape surveillance.

### **DISCUSSION**

#### **1. Admissibility of Ms. Langevin's Testimony Regarding Ms. Bland's Medical History**

On page 68 of the hearing transcript, Mr. Spencer objected to Ms. Langevin testifying regarding a history of seizures because this testimony was not identified in the Respondents' Responses to Interrogatories and Request for Production of Documents. After reviewing the respondents' answers to interrogatories no. 1, 2, and 3 in claimant's Exhibit 6, I find that Mr. Spencer's objection is well taken, and I find that the appropriate remedy is to exclude from the record Ms. Worley's question and Ms. Langevin's answer on page 68 beginning on line 18 and ending on line 20.

#### **2. Admissibility of Claimant's Proffered Exhibit 1 and Claimant's Proffered Exhibit 3.**

Ms. Worley objected to the admissibility of these documents on the grounds that many of these documents were

not provided to her at least 30 days prior to the scheduled hearing as provided for in my June 29, 2004 prehearing order. After discussing this matter with both counsel on the record, I find that Mr. Spencer timely provided to Ms. Worley only those documents found at pages 95 - 109 of claimant's Exhibit 1. I find that the appropriate remedy is therefore to exclude from consideration pages 1 - 94 of claimant's Exhibit 1 and to exclude from consideration claimant's Exhibit 3.

### **3. Compensability of Alleged Closed Head Injury**

A compensable physical injury must be established by medical evidence and supported by objective medical findings. Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2003) In the present case, Vann Smith, Ph.D., diagnosed Ms. Bland with "organic brain syndrome" on April 3, 2003 based on neuropsychological testing. However, the Arkansas Court of Appeals has determined that neuropsychological testing is not objective, as that term is defined in Act 796 of 1993. See Watson v. Tayco, Inc., 79 Ark. App. 250, 86 S.W.3d 18 (2002). The claimant has therefore failed to establish any physical brain injury by objective medical findings.

Even if the April 2003 neuropsychological testing is indicative of some degree of then existing organic brain

injury, I note the absence of any alleged brain injury reports in the medical record from the date of injury on March 26, 2002 until April of 2003. I also note the presence of brain trauma documented in the medical record when Ms. Bland was a child. Finally, I note that Ms. Bland did not strike her head in the March 26, 2003 incident. Therefore, to whatever extent, if any, that neuropsychological testing might indicate a brain injury, I also find that the claimant has failed to establish that any physical brain injury she currently experiences arose out of the March 26, 2002 incident at work stopping a patient from falling.

#### **4. Compensability of Mental Injury (Depression)**

Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-113(a), provides:

(a) (1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of

the Diagnostic and Statistical Manual of Mental Disorders.

Vann Smith's April 3, 2003 report represents a preponderance of the evidence to establish that the claimant has in fact developed symptoms of mental injury or illness. His diagnoses included (1) organic brain syndrome secondary to Axis III Conditions (310.8); (2) cognitive dysfunction, non-psychotic, secondary to OBS (294.10); and (3) organic mood syndrome (293.83).

A majority of the Full Commission fairly recently reversed an Administrative Law Judge and found that the claimant proved each of the elements necessary to establish a compensable mental injury where Vann Smith was the only psychological expert to render an opinion, where Vann Smith performed a psychological evaluation, and where Vann Smith ultimately diagnosed a mental injury under Section 293.83 criteria caused by a chronic pain syndrome from a compensable shoulder injury. See Jones v. E-Z Loader Boat Trailer, Inc., Full Workers' Compensation Commission, Opinion filed June 24, 2003 (E814459 & E909560). The principal opinion explained:

Dr. Smith, a neuropsychologist, examined the claimant on April 27, 2000 and diagnosed "organic affective syndrome, arising from chronic pain." Dr. Smith implicitly referenced the Diagnostic and

Statistical Manual Of Mental Disorders, Fourth Edition, specifically mentioning the diagnostic criteria for 293.83 Mood Disorder, due to the claimant's rotator cuff tear. Dr. Smith expressly opined in September 2000 that the claimant's condition was causally related to the compensable injury and resulting pain. Whether or not a diagnosed condition meets the criteria established in the Diagnostic and Statistical Manual is ordinarily a question of fact, and the claimant has the burden of proof on the issue by a preponderance of the evidence. Branscum v. RNR Constr. Co., 60 Ark. App. 116, 959 S.W.2d 429 (1998). Based on the record in the present matter, the Full Commission finds that the claimant's condition as diagnosed by Dr. Smith meets the criteria established in the Diagnostic and Statistical Manual. We find that the claimant proved that he sustained a mental injury or illness pursuant to Ark. Code Ann. § 11-9-113.

Nevertheless, I glean several relevant difference between the facts in Jones and the facts in the present case. In Jones, according to the concurring Commissioner, Dr. Smith could have been no clearer that the claimant's compensable physical injury caused his psychological condition at issue. By contrast, in the present case, Dr. Smith indicated on page 5 of his April 3, 2003 report that Ms. Bland's "depressive" symptoms are compatible with a diagnosis of organic affective syndrome arising secondary to three conditions: chronic pain syndrome, pulmonary insufficiency and seizure activity.

Further, whereas in Jones the claimant sustained a chronic surgical shoulder injury, in the present case the claimant sustained a non-surgical back injury on March 27, 2002, for which she was reporting only minimal symptoms to her physical therapist in August of 2002. In addition, I note that Dr. Smith in his initial evaluation also recorded a history of prior outpatient treatment for treatment of depression.

In comparing the evidence in this case to the facts in Jones, I find that the claimant in this case has established by a preponderance of the evidence that her mental injury or illness at issue was diagnosed by a licenced psychologist and that his diagnosis meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. However, in light of Ms. Bland's reported prior history of depression treatment, the evidence that the claimant's work-related back symptoms became minimal by August of 2002, and the multiple potential axis III factors to which Dr. Smith found the claimant's depressive symptoms compatible, I find that the claimant has failed to establish by a preponderance of the evidence that her diagnosed mental injury is caused by her work-related physical injury.



**5. Additional Temporary Disability or Medical Benefits  
After March 18, 2003 For the Claimant's Low Back Injury**

In the present case, the claimant has undergone diagnostic testing for back symptoms, including a lumbar MRI, EMG testing and a nerve conduction study. She received physical therapy and other conservative treatment in 2002. She has also been evaluated for her back complaints by at least two specialists, Dr. Ronald Williams and Dr. Kenneth Rosenzweig. Dr. Williams concluded that Ms. Bland had reached maximum medical benefit by February of 2003. Dr. Lonnie Robinson, who was following the claimant in March of 2003 indicated that he knew of nothing else to offer Ms. Bland, except another referral to a spine physician.

An injured employee with an unscheduled injury is entitled to temporary total disability compensation during the time that she is within her healing period and is totally incapacitated from earning wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Ark. Code Ann. § 11-9-102(12) defines "healing period" as "that period for healing of an injury resulting from an accident[.]" Whether an employee's healing period has ended is a factual question that is resolved by the Commission. Roberson v. Waste Management,

58 Ark. App. 11, 944 S.W.2d 858 (1997). The persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, the claimant's diagnostic test results, her physical therapy reports, and Dr. Williams' opinion regarding maximum medical improvement persuade me that a preponderance of the evidence establishes that her work related back injury stabilized, and her healing period ended at least by the time the respondents controverted additional benefits on March 18, 2003. Therefore, I find that the claimant has failed to establish that she is entitled to an additional period of temporary disability compensation for her work related back injury.

A claimant may be entitled to additional medical treatment after the healing period ends. However, in the present case, the only additional treatment that Dr. Robinson suggested in March of 2003 was referral to yet another spine specialist, apparently to obtain another second opinion. In light of Ms. Bland's earlier diagnostic testing producing negative results, her prior physical therapy producing positive results, and the records of her

earlier referral to two specialists already, the claimant has failed to prove by a preponderance of the evidence that the additional referral proposed by Dr. Robinson in March of 2003 is reasonably necessary for treatment of her work related back injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The parties stipulate to the employer/employee relationship on March 27, 2002 on which date claimant sustained a compensable injury to her back.

2. The claimant's average weekly wage was \$415.24 which entitles her to TTD benefits in the amount of \$277.00 per week and PPD benefits in the amount of \$208.00 per week.

3. The respondents have controverted all additional medical and all additional TTD benefits after March 18, 2003.

4. Ms. Langevin's proffered testimony regarding the claimant's medical history was not identified in the respondents' responses to Interrogatories and Request for Production of Documents. Ms. Worley's question and Ms. Langevin's answer on page 68 of the hearing transcript beginning on line 18 and ending on line 20 are excluded from the record.

5. With regard to claimant's proffered Exhibit 1 and proffered Exhibit 3, I find that Mr. Spencer timely provided to Ms. Worley only those documents found at pages 95-109 of claimant's Exhibit 1. Therefore, pages 1-94 of claimant's Exhibit 1 and claimant's Exhibit 3 are excluded from the record.

6. The claimant has failed to establish by a preponderance of the evidence that she sustained a compensable physical brain injury. Specifically, the claimant has failed to establish any brain injury by objective medical findings and the claimant has failed to establish that any physical brain injury which she may have arose out of the March 26, 2002 incident at work while stopping a patient from falling.

7. The claimant has failed to establish by a preponderance of the evidence that her diagnosed mental injury is caused by her work-related physical injury.

8. The claimant has failed to establish by a preponderance of the evidence that she is entitled any period of additional temporary disability after the respondents controverted additional benefits on March 18, 2003. Specifically, the claimant has failed to establish by a preponderance of the evidence that she remained within the

healing period for her compensable low back injury as of March 18, 2003.

9. The claimant has failed to prove by a preponderance of the evidence that the additional referral for a spine specialist proposed by Dr. Roberson in March of 2003 is reasonably necessary for treatment of her work-related back injury.

10. Because the claimant has failed to prove by a preponderance of the evidence that she is entitled any of the additional benefits at issue in this claim, the claimant's attorney has failed to prove that he is entitled to an attorney's fee at this time.

**ORDER**

For the reasons discussed herein, this claim for additional benefits must be, and hereby is denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge