

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F201034

MINNIE P. BREWER, EMPLOYEE	CLAIMANT
BRADLEY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED JANUARY 31, 2005

Hearing conducted before the Honorable Dale Douthit, Administrative Law Judge, in Hope, Hempstead County, Arkansas.

The claimant was represented by Mr. Nelson V. Shaw, Attorney at Law, Texarkana, Texas.

The respondents were represented by Ms. Betty J. Demory, Attorney at Law, Little Rock, Pulaski County, Arkansas.

STATEMENT OF THE CASE

On December 10, 2004, the above-styled claim came on for a hearing in Hope, Hempstead County, Arkansas. A prehearing conference was held on September 29, 2004, and a Prehearing Order was entered that same day. At the hearing the parties announced that the stipulations, issues, and their respective contentions were properly set out in the Prehearing Order, subject to additional stipulations, contentions and issues agreed to at the hearing. A copy of the September 29, 2004, prehearing conference order was marked as Commission Exhibit "1", and made a part of the record herein without objection.

The parties stipulated that there was an employer/employee/carrier relationship on June 4, 2003; that the respondents accepted the claim as a compensable injury; that the respondents paid some medical and TTD benefits for a period of time; that the compensation rates should be based on an average monthly wage of \$728.00, and that the Arkansas Workers' Compensation Commission

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has jurisdiction of the claim at hand.

The parties agreed the issues to be presented were whether the claimant is entitled to additional medical benefits, additional temporary total disability benefits and attorney fees.

The claimant contends she is entitled to additional medical benefits, additional TTD benefits from September 18, 2003, to a date to be determined and attorney fees, as a result of her June 4, 2003, compensable injury.

The respondents contend the 6/4/03 accident was accepted as compensable, but that all appropriate medical and TTD benefits have been paid. Specifically, respondents state they stopped paying TTD on September 18, 2003, and that the medical treatment of Dr. Diamond has been controverted in its entirety.

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A. C. A. §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. The parties specifically stipulated that the claimant sustained a compensable injury on June 4, 2003.
- 3) Claimant has proven by a preponderance of the evidence that she is entitled to additional medical benefits at respondents' expense.
- 4) The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional TTD benefits.

DISCUSSION

A. History

The claimant was employed by the Bradley School District as a janitor for approximately five years prior to her compensable injury on 6/4/03. She sustained two compensable injuries while working for the respondents. The first was on 1/7/02, and the second was 6/4/03. It is the second injury to which the claimant alleges she is entitled to additional benefits.

On 6/4/03 the claimant testified she was moving furniture and waxing the floor of the school's science room. While waxing the floor, claimant stated she stepped on the wax and fell, thereby hurting her back. She lay there for 30 to 40 minutes before help arrived. An ambulance was called and she was transported to the Wadley Hospital E. R. where she was treated and released. (RX 1, Pg. 40) The E. R. doctor ordered her to stay off work through 6/6/03. On 6/6/03 the claimant filed WCC Form AR-N, and the respondents subsequently accepted the claim as compensable. Claimant stated that after being released by the E. R. treating physician, her condition became worse and she went to her family doctor on 6/10/03, who diagnosed her with back pain and directed her to be off work until 7/1/03, with a follow-up visit in one week. On 6/17/03 claimant went back to her family doctor who noted she was to see Dr. Shahim, a Neurosurgeon, on 6/30/03,

Dr. Shahim reviewed her MRI, which he noted was of very poor quality. He ordered a repeat MRI of her lumbar spine, which was done 7/2/03 and directed claimant to stay off work for another three weeks starting 6/30/03. She went back to Dr. Shahim on 8/4/03. He reviewed her new MRI, and found disc disease at L4-5 & L5-S1, and evidence of lateral recess stenosis at L4-5 due to disc protrusion. Dr. Shahim decided to obtain a CT lumbar myelogram because he suspected

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lumbar radiculopathy due to a lumbar disc herniation which was not clearly identified in the MRI and because she had failed to get any help from the lumbar epidural steroid injection and physical therapy. (RX 1, Pg. 51). Dr. Shahim did return her to light duty until physical therapy was complete. (RX 1, Pg. 52). A lumbar myelogram was conducted on 9/22/03 with the following impression:

- 1) Mild anterior indentation on the thecal sac at L4-5, probably due to a small annular bulge.
- 2) Mild anterior bulge at L5-S1 probably secondary to annular bulge, A post myelogram CT will be performed and will be reported separately.

Interestingly, the respondents began controverting additional benefits on 9/18/04, just four days prior to the lumbar myelogram.

A post myelogram CT of the lumbar spine was conducted on 9/22/03 with the following impression:

- 1) There is a right posterior disc bulge at L5-S1 which extends into the neural foramen and most likely encroaches on the nerve root. There is posterior displacement of the nerve root in the central canal.
- 2) There is annular bulging at L3-4 and L4-5 which slightly effaces the thecal sac, but does not cause significant canal or foraminal stenosis. (RX 1, Pg. 54)

Following the CT lumbar myelogram, claimant again went to Neurology Surgery Associates on 9/30/03 and saw Dr. Shahim, who reviewed her myelogram. Dr. Shahim recommended an IDET procedure, an intradiscal steroid injection, a percutaneous diskectomy at L4-S1 or surgery. At that time, Dr. Shahim resolved to proceed with a lumbar diskectomy bilaterally at L5-S1. (RX 1, Pgs. 55-56).

Claimant, unable to proceed with surgery, went back to her family doctor on 10/31/03 to request more pain medication. He family physician, Dr. Diamond, referred her to Neurosurgeon, Dr.

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Buono, for a second opinion. Before claimant could get in to see Dr. Buono, she returned to Dr. Diamond on 11/18/03 to request more pain medication. At that time Dr. Diamond recommended she be off work until she received the surgery recommended by Dr. Shahim. (RX 1, Pg. 59). However, on 12/8/03 Dr. Shahim did not go so far as to proclaim her unable to return to work, instead he released her back to her primary physician. (RX 1, Pg. 62)

On 1/4/04 the claimant was able to see Dr. Buono at Neurological Associates of Texarkana. Dr. Buono did not recommend surgery but rather a TENS Unit. April 27, 2004 the claimant returned to her first Neurosurgeon, Dr. Shahim, for a visit. Dr. Shahim noted that the physical therapy and steroid injection had not worked and was requesting another MRI; which was completed on 5/7/04. Dr. Shahim saw her again on 5/17/04 and changed his previous recommendation of surgery to now proceed with evaluation for L5-S1 IDET procedure by pain management. Claimant then went to see pain management specialist, Dr. Sunder Krishnan on 8/23/04, who assessed her with multilevel lumbar disk bulging and recommended proceeding with provocative lumbar diskography to delineate the intradiskal anatomy better and pinpoint whether claimant's pain is diskogenic in origin or not. (RX 1, Pg. 77-79)

B. Adjudication

Throughout the records introduced in this matter, the date of the claimant's first injury, 1/7/02 was thrown around almost as much as the claimant's second injury on 6/4/03. It is somewhat uncertain as to whether the claimant ever fully recovered from the 1/7/02 injury. The two accidents could be somewhat convoluted; however, both were accepted as compensable and both occurred while under the employee of the respondent. It seems, based on the medical records, that the 6/4/03

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injury was an aggravation of the 1/7/02 injury, but in any event, employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robinson, 52 Ark. App. 460, 120 S.W. 3rd 1150 (2003). Based on the fact the parties agreed compensability is not an issue, the 1/7/02 incident is relevant to clarify some of the medical records listed above.

Since compensability of both injuries was accepted by the parties, the issue of additional medical treatment must first be addressed. For the respondent to be liable for claimant's medical treatment to date and the future medical procedures recommended by the Neurosurgeon and other doctors, claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. Dalton v. Allen Engraving Co., 66 Ark. App. 201, 989 S. W. 2d 543(1999). The basic test is whether there is a causal connection between the two episodes. Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 SW 3d 1 (2000). 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. A.C.A. §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).

While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident where a preponderance of other non-medical evidence established the causal relationship. Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S. W. ed 375 (2002). In the case at hand; however, Dr. Diamond clearly states there are objective medical findings, and the claimant's injuries are consistent with her on-the-job injury. Dr. Diamond goes on to state the

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claimant's injuries occurred while in the course and scope of her employment and is the major cause of her disability or her need for medical treatment. (RX 1, Pgs. 69-70). The respondent requested Dr. Diamond's treatment not be compensable and sought to discredit her findings. However, the respondent gave no basis or alternative medical evidence to contradict Dr. Diamond. If an injury is compensable, then every natural consequence of that injury is also compensable. The basic test is whether there is a causal connection between the two episodes. id. Air Compressor Equipment v. Sword. Claimant must prove this causal connection by a preponderance of the evidence. Lowe v. University of Arkansas at Pine Bluff, Full Workers' Compensation Commission Opinion filed 1/15/04 (E5111115).

I find the claimant has met her burden of proof for additional medical treatment. She has had two Neurosurgeons recommend further treatment; although the recommendations vary, the underlying fact is that they both stay with Drs. Diamond and Krishnans' recommendation of more treatment. At first Dr. Shahim recommended the IDET procedure or surgery. Later, after a second opinion by Dr. Buono and another MRI, Dr. Shahim limited his recommendation to the IDET procedure and referred her to Dr. Krishnan for the procedure. Dr. Krishnan, on 8/24/04, recommended a provocative lumbar diskography to delineate the intradiskel anatomy better and pinpoint whether her pain is diskogenic or not. (RX 1, Pgs. 77-79) Upon the conclusion of the diskography, it appears Dr. Krishnan will then recommend the IDET procedure or some alternative. I find it reasonably necessary for the claimant to proceed with the medical treatment recommended by Dr. Krishnan and Dr. Shahim, and as such, to be the financial responsibility of the respondents for the future treatment and the treatment received to date by Drs. Diamond, Buono, Shahim and

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Krishnan.

For the claimant to be entitled to temporary total disability, she must prove by a preponderance of the evidence that she is still within her healing period and totally incapacitated from earning wages. AHTD v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981). Although Dr. Diamond states the claimant is still within her healing period (RX 1, Pg. 69), I find the claimant cannot prove by a preponderance of the evidence that she is totally incapacitated to earn wages.

The claimant is requesting TTD from the date the respondent last paid TTD (Sept. 18, 2003) to a date to be determined. On 8/4/03 Dr. Shahim returned claimant to light duty with no lifting over thirty (30) pounds and other restrictions. (RX 1, Pg. 52) However, the respondents kept paying TTD through 9/18/03. On 11/18/03 Dr. Diamond then recommended taking the claimant off work due to the surgery recommendation by Dr. Shahim. (RX 1, Pg.59) However, now with the benefit of perfect hindsight, we know the surgery recommendation was erroneous since it was retracted by Dr. Shahim on 5/17/04 (RX 1, Pg. 74). Dr. Shahim then went on to further release her to work with the restriction of not lifting over fifty (50) pounds (RX 1, Pg. 71). Although the claimant could have benefitted from additional medical treatment, I feel the Neurosurgeon's restrictions to return to light duty during the time she is requesting TTD benefits to be compelling and, therefore deny any request for TTD benefits after September 18, 2003; which makes the issue of attorney fees moot.

AWARD

The claimant has proven by a preponderance of the evidence her entitlement to additional medical treatment. The respondents are ordered to provide medical benefits for treatment

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received to date by claimant concerning her compensable injury and future related treatment.

The claimant has failed to prove by a preponderance of the evidence entitlement to additional TTD benefits thereby making the issue of attorney fees moot.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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