

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301592

KIM L. JONES, EMPLOYEE	CLAIMANT
BEVERLY HEALTH CARE, EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 21, 2005

Hearing held on April 26, 2005, before HONORABLE DALE DOUTHIT, Administrative Law Judge, at Texarkana, Miller County, Arkansas.

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 26, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was conducted on March 30, 2005, and a Prehearing Order was entered that same day. A copy of the March 30, 2005 Prehearing Order has been marked 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

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all relevant times, including January 27, 2003; that the claimant had an average weekly wage of \$516.71, which would give her a temporary total disability compensation rate of \$344.00, and a permanent partial disability compensation rate of \$258.00. The parties further stipulated that on January 27, 2003, the claimant sustained a compensable injury, for which benefits were paid through October 28, 2003. The parties agreed to reserve the issue of underpayment for benefits received prior to October 28, 2003.

By agreement of the parties, the issues to be presented were whether additional medical treatment recommended by Dr. Thomas Hart is reasonable, necessary and related to the claimant's compensable injury, and whether the claimant is entitled to additional TTD benefits and attorney fees.

The claimant contended that the additional medical treatment recommended by Dr. Hart is reasonably necessary and related to her January 27, 2003 compensable injury. Claimant contended she is entitled to additional TTD benefits from October 28, 2003 to a date yet to be determined. In the alternative, claimant contended that if she did reach maximum medical improvement initially, that she has entered a new healing period and is entitled to additional TTD benefits and attorney fees.

The respondents contended that the claimant has been treated and released by many different physicians in the past and that she did not put forth a valid effort on her functional capacity evaluation. The doctors have suggested a home exercise program and a weight loss regimen, but the claimant has done neither. Respondents further contended claimant has been seen by two orthopaedists, a neurologist, and a physical medicine doctor, who have found no reason for additional treatment. That Dr. Hart

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was selected as the claimant's choice for her change of physician; that Dr. Hart is a pain clinic doctor, for which the respondents have paid for the initial evaluation and controverted his treatment after the initial evaluation. Respondents contend Dr. Hart treats pain which is subjective in nature, and that his report does not make any sense. That the opinion of Dr. Hart is opposite the opinion of four other doctors.

### **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 the opportunity to hear the testimony of the witness 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.
- 3) The claimant has proven by a preponderance of the evidence that she is entitled to a discography as recommended by Dr. Hart, and that it is reasonable, necessary and related to her January 27, 2003 compensable injury.
- 4) That the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional TTD benefits.
- 5) The respondents have controverted the benefits sought herein.

### **DISCUSSION**

#### **I. History**

The claimant began working for the respondent-employer on or about January 8,

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2003 as a CNA. On January 27, 2003, the claimant sustained a compensable injury to her back. The claimant initially received medical treatment for her compensable injury at the emergency room of Ouachita County Medical Center on January 29, 2003, from Dr. John Holleran. Thereafter the claimant treated with Dr. W. A. Daniel from January 31, 2003 through February 10, 2003. A MRI was scheduled for February 24, 2003, and Dr. Daniel's records show an appointment was scheduled for the claimant with Dr. Jay Lipke following the MRI.

On March 4, 2003, claimant was evaluated by Dr. Jay Lipke, an orthopedic physician, pursuant to the referral of Dr. Daniel. Following a May 13, 2003 visit with the claimant, Dr. Lipke recommended a myelogram followed by a CT; however, the procedure was denied by respondents. Dr. Lipke continued to treat the claimant, and on June 19, 2003, he referred claimant to Dr. Lon Burba. Dr. Burba conducted EMG/NCV studies on the claimant. Claimant was returned to Dr. Lipke's care following Dr. Burba's diagnostic studies, which were within normal units, with some reservations. Following the EMG/NCV studies, Dr. Lipke again saw the claimant and still recommended a myelogram followed by a CT, but then referred claimant to Dr. Ted Saer, an orthopedic spine specialist, for further evaluation and treatment.

Dr. Saer, after evaluating the claimant, opined that claimant was not a surgical candidate and that a myelogram would probably not be helpful. Dr. Saer referred the claimant to Dr. Brent Sprinkle for non-operative management. Dr. Sprinkle evaluated the claimant and recommended a functional capacity evaluation and exercise. Dr. Sprinkle last saw the claimant on November 3, 2003, at which time he noted the results

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from her FCE were inconclusive because the claimant did not provide full physical effort. At that time Dr. Sprinkle found the claimant at MMI and recommended a R/S Medical Neurostimulator.

The claimant next requested a change of physician to Dr. Thomas Hart, a Little Rock pain management specialist. On February 11, 2004, a change of physician order was entered by the administrator of the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission, which named Dr. Hart as the claimant's newly designated physician relative to the January 27, 2003 compensable injury. The respondents controverted the change of physician order, and on October 18, 2004, Administrative Law Judge Blood ruled that the change of physician order was appropriate and further ordered that Dr. Thomas Hart would be the claimant's authorized treating physician relative to the January 27, 2003 compensable injury. The respondents never appealed Judge Blood's October 18, 2004 Opinion and Order.

The claimant ultimately saw Dr. Hart on December 2, 2004. Dr. Hart opined that the most appropriate study for the claimant would be discography. The respondents have controverted the recommendations from Dr. Hart as well as additional TTD benefits beyond October 28, 2003.

## **II. Adjudication**

### **A. Additional 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

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employee. A.C.A. §11-9-508(a). What constitutes reasonable necessary medical treatment is a question of fact for the Commission. Ark. Department of Correction v. Holybee, 46 Ark. App. 232, 878 S.W. 2d, 790 (1996).

\_\_\_\_\_The claimant contends she is entitled to a discography as recommended by Dr. Thomas Hart. The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to benefits. Dalton V. Allen Engineering, Co., 66 Ark. App. 201, 989 S.W. 3d 543 (1999). In the case at bar, the claimant has met her burden with regard to the additional test she is requesting.

It is undisputed that the claimant sustained a compensable back injury in January of 2003. Since the injury, no one has alleged any independent intervening cause attributable to the claimant's complaints. The claimant's post-injury MRI showed abnormalities and, even though the nerve conduction studies were within normal limits, there were still significant reservations noted. (JX 1, pg. 52) After the MRI, nerve conduction studies and his own personal examination, Dr. Jay Lipke again reiterated his medical opinion of recommending a myelogram with CT to follow. (JX 1, pg. 54)

\_\_\_\_\_Even after Dr. Lipke's second calling for a myelogram, the respondents still refused his recommendation for the additional test. Thereafter, Dr. Saer opined that a myelogram would not likely benefit the claimant. Also, this examiner notes Dr. Sprinkle called for only a neurostimulator and finding of MMI after the claimant had failed the FCE. Dr. Hart, in his multiple page report beginning on page 70 of Joint Exhibit 1, highly recommended a discography. Three of the four previously mentioned doctors all recommended some form of additional treatment; however, the respondents

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controverted the additional treatment.

As stated in the history section of this opinion, the respondents even controverted the change of physician order to Dr. Hart initially. The Commission Administrator signed that change of physician order to Dr. Hart on February 11, 2004. Due to the respondents controverting the order, the claimant did not actually get to see Dr. Hart until over ten months had passed since the entry of the order. Dr. Lipke first recommended the myelogram on May 13, 2003, (JX 1, pg. 40), and now Dr. Hart is recommending a similar diagnostic test two years later and still the respondents refuse. If Dr. Lipke had been left to do his job, this matter may have been resolved over two years ago. Further, ALJ Blood ruled on October 18, 2004, that Dr. Hart was the claimant's designated physician after ten months of controversy; and upon the designated doctors first recommendation the respondents again denied the treatment. I find the denial unjustified. If the respondents never intended to allow the newly designated physician to treat the claimant, they should have appealed the October 18, 2004 ALJ Opinion filed in this case.

\_\_\_\_\_I do not disregard Dr. Sprinkler's opinion altogether; however, I give it very little weight in light of the previous recommendations from Dr. Lipke. I understand Dr. Sprinkle's conclusions are based on the functional capacity evaluation; however, without the additional testing recommended by Drs. Lipke and Hart, I do not believe the FCE to be very probative.

The claimant was asked at the full hearing which test she was asking for, the myelogram recommended by Dr. Lipke, or the discography recommended by Dr. Hart. The claimant advised she wanted the discography. Based on my review of the MRI,

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EMG/NCV studies and all medical reports, I find the discography recommended by the claimant's designated physician to be reasonable, necessary and related to the claimant's January 27, 2003 compensable injury.

B. Additional Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he/she suffered total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breashers, 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).

I must state my preference would have been to see the results of the additional diagnostic test herein ordered prior to determining claimant's right to any additional TTD benefits; however, that issue was not reserved but instead requested to be heard for my determination. The claimant has the burden to prove by a preponderance of the credible evidence her entitlement to TTD benefits from October 28, 2003 to a date yet to be determined, and based on the evidence presented at the full hearing, the claimant has failed to meet that burden.

The only doctor to recommend the claimant be taken off work was Dr. Lipke in 2003. As mentioned, Dr. Lipke also recommended a myelogram with CT to follow; however, the claimant seemed to have abandoned treatment from Dr. Lipke and requested a change of

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physician order to Dr. Hart. Although Dr. Hart recommended an additional test to determine the nature of the claimant's pain, Dr. Hart, in his lengthy report, never concluded the claimant was totally incapacitated to work. Further, Dr. Hart didn't mention any period of time he recommended the claimant to be off work. When the claimant was asked which recommendation for additional testing she preferred, Dr. Hart was the preference.

Further showing the claimant's inability to prove she is still within her healing period are the reports from Drs. Saer and Sprinkle. Although, as stated earlier, this Administrative Law Judge did not give much weight to the reports of Drs. Saer and Sprinkle; they are still two of the three doctors who examined the claimant after October 28, 2003. Of course the other doctor who examined the claimant after October 28, 2003 was Dr. Hart, and even he did not address healing period or claimant's ability to earn wages.

To be fair, it seems Dr. Hart also wanted further tests to make such determinations. For this examiner to determine whether the claimant is still within her healing period and totally incapacitated to earn wages would be purely speculative. With the lack of proof presented on the issue of TTD after October 28, 2003, coupled with the MMI finding of Dr. Sprinkle and the failed FCE, this examiner finds the claimant has failed to meet her burden of proof with regard to additional TTD. Also, there is no proof that the claimant entered a new healing period.

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**AWARD**

The claimant has proven by a preponderance of the evidence that she is entitled to the additional diagnostic test recommended by Dr. Thomas Hart on December 2, 2004. The respondents are directed and ordered to pay for the test in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

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DALE DOUTHIT  
Administrative Law Judge

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