

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E912874**

<b>RACHEL L. THOMASON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>COLEMAN CABLE SYSTEMS, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>FIRE &amp; CASUALTY INSURANCE COMPANY c/o ROYAL &amp; SUNALLIANCE INSURANCE CO., INSURANCE CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED SEPTEMBER 14, 2005**

This matter comes before Administrative Law Judge Dale Douthit on the record.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Amy S. Huffman, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

Pursuant to the Prehearing Order filed May 12, 2005, the parties agreed to submit consideration of this claim on a stipulated record. The record is comprised of the Prehearing Order filed May 12, 2005; the parties' Joint Stipulations of Fact filed May 26, 2005; the hearing brief with attached exhibits submitted by the respondents on June 10, 2005; and the hearing brief with attached exhibits submitted by the claimant on June 17, 2005.

The parties stipulated to the following:

1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2) The employee/employer/carrier relationship existed on September 15, 1999.

3) The claimant sustained a compensable back injury on September 15, 1999.

4) Respondents accepted this claim and paid medical benefits, temporary total disability benefits and permanent partial disability benefits.

5) The claimant earned wages, which entitle her to compensation rates of \$280.00 for TTD purposes and \$210.00 for PPD purposes.

6) The claimant reached MMI on June 18, 2003.

7) On June 18, 2003, Dr. Bruce L. Safman assessed the claimant with a 12% body as a whole impairment rating, which respondents accepted and paid in full.

8) The claimant requested a change of physician with the Commission, and on January 21, 2005, the Commission granted the claimant's one-time change of physician from Dr. Joel Patterson to Dr. Harold Chakales.

9) The claimant treated with Dr. Chakales on February 28, 2005.

The parties agreed the sole issue to be presented for determination was whether the claimant is entitled to recommendations made by Dr. Chakales in his February 28, 2005 report.

The claimant contends her initial change of physician evaluation has not been completed because Dr. Chakales' requests for additional testing have not been conducted due to the respondents' controversion. Alternatively, the claimant contends that the studies recommended by Dr. Chakales are in fact "reasonably necessary" in relation to her compensable injury.

Respondents contend that, because the claimant has undergone extensive diagnostic testing, she has reached maximum medical improvement, and has been released to return to work, with restrictions, she is not entitled to additional medical treatment, as it is not reasonably necessary in relation to the claimant's compensable injury.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

From a review of the record as a whole, to include medical reports, claimant's and respondents' briefs; and all other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. §11-9-704:

1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2) The claimant has proven, by a preponderance of the evidence, that she is entitled to the additional diagnostic studies, specifically, an MRI of the claimant's back and an EMG of her back and legs, as recommended by her authorized treating physician, Dr. Harold Chakales, to determine whether additional treatment is reasonably necessary.

### **DISCUSSION**

The claimant sustained admittedly compensable injuries to the lumbar spine on September 15, 1999. After her injury, the claimant treated with Dr. Mark Gabbie, the company doctor. The company doctor initially diagnosed the claimant with left lumbosacral strain and released her to regular duty work. The claimant continued to complain of back pain and eventually an MRI of the lumbar spine was conducted on November 4, 1999. The results showed a moderate bulge on the left at the L4-L5 level.

Dr. Gabbie then referred the claimant for a neurosurgical consult with Dr. Robert Dickins. The claimant continued to complain of back, leg and hip pain. A second MRI was conducted by Dr. Dickins after injections did not help the claimant. The MRI of August 31, 2000, revealed "chronic disc desiccation and combination of diffuse protrusion and mild left paracentral extrusion at L4-L5," and small disc herniation at L4-5 on the left. The claimant continued treatment with Dr. Gabbie.

Dr. Gabbie recommended the claimant be evaluated by Dr. Steven Cathey. Dr. Cathey offered the claimant surgery in the form of an L4-L5 laminectomy and diskectomy on the left. The claimant did not undergo surgery at that time and Dr. Cathey assessed her with a 7% whole body impairment.

In May of 2001, the claimant developed additional acute symptoms and underwent another MRI on May 23, 2001. Dr. Gabbie referred the claimant to Dr. Joel Patterson. Dr. Patterson also recommended surgery and on October 12, 2001, the claimant underwent left L4-L5 lateral recess stenosis decompression, and left L3-4 laminectomy, diskectomy.

Following her surgery, the claimant continued to complain of pain in her left leg and back. On January 24, 2002, the claimant underwent another MRI, and EMG testing was done on February 25, 2002. The EMG testing revealed mild left S1 radiculopathy. On June 3, 2002, Dr. Patterson opined the claimant “does have an S1 radiculopathy on EMG’s, one might be tempted to say that there is some compression of her left S1 nerve root on the plain film myelogram.”

Interestingly, as early as January 8, 2002, Dr. Patterson was considering an L5-S1 laminectomy. (RX 1 p. 59) Even though Dr. Cathey disagreed with more surgery, Dr. Patterson again on October 21, 2002, stated “I have offered her an L5-S1 laminectomy with a look at the disc and a possible discectomy.”

After undergoing pain management with Dr. Safman for awhile, Dr. Safman found the claimant at MMI on June 18, 2003, however, the claimant continued to treat with Dr. Safman into 2004. With continued back problems, the claimant requested and received a change of physician from the Arkansas Workers’ Compensation Commission to Dr. Harold Chakales.

Dr. Chakales examined the claimant and reviewed previous diagnostic tests and stated as follows:

X-rays of the lumbar spine were made today which are highly suggestive of a Grade 1 spondylolisthesis of L5 on S1. There is questionable defect of the pars interarticularis. This is most pronounced on coned down lateral, with a slip of about 1 cm. (RX 1, p. 94)

Dr. Chakales stated the claimant needed “a repeat MRI of her back, as well as an EMG of her back and both legs. She may indeed be a candidate for a discogram.” (RX 1 p. 94)

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508. Reasonably necessary medical services “may include that necessary to accurately diagnosis the nature and extent of the compensable injury.” Green v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565). Whether a medical procedure is reasonably necessary is a question of fact to be determined by the Commission. The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary.

I find the claimant has sustained her burden of proving by a preponderance of the evidence that the additional tests recommended by Dr. Chakales on February 28, 2005, are reasonably necessary in connection with her admittedly compensable injury. Since the compensable injury, the claimant has consistently complained of pain in her back and leg. Her subjective complaints have always been backed up with objective findings.

The respondents have cited several cases in support of their position. I have reviewed all their citations and find the facts in those citations to be far different from the case at hand. For instance, the respondents have cited Turner v. Tyson Foods, Inc., Full Commission Opinion filed June 28, 1994 (E3056571). In the Turner case,

the Commission denied an independent medical evaluation because of the claimant's pre-existing injury; not the case with this claimant.

Here, the respondents' main contention is the repetitive nature of the MRI's. True, the claimant has seen several doctors and had four MRI's. However, Dr. Chakales, in his February 28, 2005 report, is seeming to agree with Dr. Patterson about the need for surgery at the L5-S1 level. Should that be the case, it is reasonable and necessary to have updated diagnostic tests before any such surgery. The previous EMG showed chronic nerve root irritation, and Dr. Patterson never completely ruled out the possibility of surgery, well before the claimant received her change of physician. In fact, Dr. Patterson's reports recommend another opinion, such as the one now in the record from Dr. Chakales.

It appears the medical reports of Dr. Patterson contained at p. 59 of RX 1 could contain a typo in regard to the date of service on the last entry. Whether Dr. Patterson's report was from January 8, 2002 or January 8, 2003, is irrelevant. Even though Dr. Cathey disagreed with his surgical recommendation, Dr. Patterson still stated he was willing to operate on the claimant, and then stated, "she certainly has the right to a third opinion. Although we are sending her for pain management, she is still under my care." (RX 1, p. 59)

The respondents argue that since Dr. Safman found the claimant at MMI that she is not entitled to additional testing. In light of Dr. Patterson's and Dr. Chakales' reports and the EMG test, I find the MMI assessment from Dr. Safman to be highly suspect.

To be clear, this Administrative Law Judge is not granting the additional tests on claimant's theory of entitlement of a "completed evaluation" pursuant to the change of physician order. The Full Commission was clear in Brinkley v. Gateway Industrial Services, Full Commission Opinion filed June 27, 2005 (F207551), when

they said the claimant is not entitled automatically to additional medical studies when the claimant is granted a change of physician. “The claimant must establish by a preponderance of the evidence that repeat tests are necessary and reasonable in connection with the compensable injury.” I find she has so proven. Id., Brinkley. Further, in Brinkley, the Commission found the claimant’s symptoms were psychological in nature. Not the case in the matter at hand. Also, in Brinkley, the Commission noted that claimant’s MRI was “pristine.” Not so with Ms. Thomason. I find the claimant has proven the additional tests recommended by Dr. Chakales are reasonable and necessary due to her compensable injury.

As stated, Dr. Patterson felt as early as January of 2002 that the claimant had problems at the L5-S1 level. His diagnosis was proven by the EMG studies. Then, on October 21, 2002, Dr. Patterson stated as follows regarding a second surgery:

I think we are now ready to operate on her and she seems willing to proceed. She will need a second opinion. (RX 1, p. 59)

The respondents, in their brief, stated on page 15, “Dr. Patterson recommended a L5-S1 laminectomy, but Dr. Cathey opined the claimant was not a surgical candidate (RX 59). As a result, Dr. Patterson agreed and referred the claimant to Dr. Bruce Safman for pain management (RX 59).” I disagree with respondents’ interpretation of Dr. Patterson’s reports. I find the report is clear in that Dr. Patterson was still offering surgery even after Dr. Cathey’s assessment.

The respondents have an obligation to restore the claimant’s health if medically plausible. It is clear the claimant still has problems with her compensable back injury at the L5-S1 level. The evidence of greater convincing force establishes that these studies are reasonably necessary at this time. Compensability has never been an issue. The claimant’s back injury still persists. The medical records show

Dr. Patterson still felt a second surgery may be needed well before the change of physician order that brought about this controversion. The medical evidence shows Dr. Chakales' recommendations are reasonably necessary.

**AWARD**

Respondents are directed and ordered to pay for the additional diagnostic studies recommended by Dr. Harold Chakales, claimant's authorized treating physician, pursuant to the Findings of Fact and Conclusion of Law contained herein.

Since the claimant's injury occurred before July 1, 2001, the claimant's attorney is entitled to the maximum statutory attorney's fee on all benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents, in accordance with Ark. Code Ann. §11-9-715 (Repl. 1996).

IT IS SO ORDERED.

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DALE DOUTHIT  
Administrative Law Judge