

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204178

JULIA JESTER,
EMPLOYEE

CLAIMANT

FULTON COUNTY HOSPITAL,
EMPLOYER

RESPONDENT

RECIPROCAL OF AMERICA AND
ARKANSAS PROPERTY & CASUALTY GUARANTY FUND,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 17, 2006

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 C. MICHAEL WHITE, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 7, 2005 in Mountain Home, Arkansas. A prehearing order was entered in this case on October 25, 2005. 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 as amended during the course of the hearing and are hereby accepted:

1. The claimant was employed by Fulton County Hospital on April 8, 2002.
2. Reciprocal of America was the workers' compensation insurance carrier for Fulton County Hospital on April 8, 2002. Reciprocal of American went into liquidation on June 20, 2003. The Arkansas Property and Casualty Guaranty Fund has been handling the claim since that time.
3. The claimant alleged that she sustained an injury to her low back on April 8, 2002, while moving a large patient without assistance. The respondents accepted the compensability of the claim, and indemnity and medical benefits were paid.
4. The claimant was earning an average weekly wage of \$257.00, which entitles her to a total disability compensation rate of \$172.00 and to a partial disability compensation rate of \$154.00.
5. On August 20, 2002, Dr. Wayne Bruffett, M.D., performed a decompression of L4-5, a posterior spinal fusion of L4-5, with pedicle

instrumentation at that level, and an iliac crest bone graft on the left via separate skin incision.

6. The respondents accepted and paid compensation for a twelve percent (12%) permanent physical impairment to the body as a whole.
7. The respondents controvert any additional treatment provided by Dr. Bruffett after July 9, 2003.

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

1. Reasonable and necessary medical treatment by Dr. Bruffett. The claimant saw Dr. Bruffett on March 23, 2005 who referred her for an MRI due to residual problems stemming from her compensable injury of April 8, 2002. [MRI]
2. PPD and PTD benefits. (Reserved)
3. Attorney fees.

The record consists of the December 7, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained a work related low back injury on April 8, 2002. When non-operative treatment failed, Dr.

Wayne Bruffett performed an L4-5 decompression and spinal fusion on August 20, 2002. Dr. Bruffett's intraoperative findings included severe stenosis at L4-5 due to spondylolisthesis. Dr. Bruffett also found marked nerve root compression which was alleviated with a wide laminectomy.

Dr. Bruffett's follow-up office note from September 4, 2002 documented that the claimant noticed a marked improvement in her leg symptoms. On October 9, 2002 Dr. Bruffett recorded that the claimant was doing excellent, and on December 3, 2002, the claimant was doing quite well.

On March 5, 2003, the claimant reported back pain and an inability to do much of anything without having significant back pain. Dr. Bruffett prescribed physical therapy. On June 25, 2003, Dr. Bruffett indicated that the claimant had back pain when she did much bending or working in her yard, but that she said she was doing fine. The claimant underwent a valid functional capacity evaluation on July 2, 2003, and Dr. Bruffett released the claimant to return as needed with a 12% impairment rating on July 9, 2003.

The claimant returned to Dr. Bruffett on March 23, 2005. The claimant reported that she was in extremely

severe low back pain that at all times radiated down her left leg to her knee. Dr. Bruffett obtained x-rays indicating the surgical instrumentation at L4-5 to be in a stable position with evidence of her decompression. Dr. Bruffett proposed an MRI, and a follow-up appointment after the MRI.

The respondents denied liability for any additional treatment by Dr. Bruffett after July 9, 2003, and the respondents contend that the MRI proposed by Dr. Bruffett is not reasonably necessary treatment for the claimant's work related injury.

The Full Commission summarized applicable case law relevant to the reasonable necessity of diagnostic MRI testing in Smith v. Polar Stainless, Full Workers' Compensation Commission, Opinion filed March 11, 1996 (E413260):

Under Ark. Code Ann. § 11-9-508 (a) (Cumm. Supp. 1995), employers must provide medical services which are reasonably necessary for the treatment of a compensable injury. Whether the medical treatment is reasonably necessary for treatment of the compensable injury is a question of fact for the Commission to determine. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). The claimant has the burden of proving by a preponderance of the evidence that the medical treatment was reasonably necessary for treatment of the compensable injury. Mary Ellen Wade v. Sonic Drive-In, Full Workers' Compensation

Commission, March 10, 1993 (Claim No. D612350); Norma Beatty v. Ben Pearson, Full Workers' Compensation Commission, Feb. 17, 1989 (Claim No. D612291). Employers are not required to pay medical expenses for the evaluation and treatment of conditions unrelated to the compensable injury, except to the extent necessary to accomplish treatment of the injury. Artex Hydroponics, Inc. v. Pippin, 267 Ark. 1014, 539 S.W.2d 473 (1980). Likewise, employers are not required to pay to rule out with absolute certainty the possibility of non-compensable causes of the complaint. Jeffrey Motes v. Campbell Soup Co., Full Workers' Compensation Commission, May 15, 1985 (Claim No. D401646). However, whether a diagnostic test yields positive or negative results is clearly not determinative of whether the test is compensable or non-compensable. Joyce Hager v. St. Edward Mercy Medical Center, Full Workers' Compensation Commission, July 25, 1990 (Claim No. D408662). Instead, the primary consideration is the nature of the service in relation to the injury of the claimant. Tonnie Crisp v. Wayerhauser Corporation, Full Workers' Compensation Commission, July 27, 1993 (Claim No. D812922).

In Smith, supra., a majority of the Full Commission found that an MRI of the claimant's thoracic spine was reasonably necessary to treat a work related back injury, even though the MRI produced negative results, where the treating physician's pre-MRI reports indicated that the claimant was demonstrating symptoms consistent with an injury to the thoracic area.

In Gillet v. GenCorp Polymer Products, Full Workers' Compensation Commission, Opinion filed June 24, 1996, the claimant had sustained a non-work back injury with L5-S1

surgery in 1988, and an admittedly compensable back injury at work on November 11, 1993, when she felt her back pop. A majority of the Full Commission found that a thoracic MRI, a lumbar MRI, a whole body scan, abdominal and pelvic CT scans were each reasonably necessary to treat the work injury where these tests were ordered to specifically find the source of the claimant's back complaints or to rule out other causes of the claimant's reported back symptoms.

In Gilbert v. Land O'Frost, Inc., Full Workers' Compensation Commission, Opinion filed February 7, 1997 (E115249), a majority of the Full Commission found both a whole body scan and a 1996 lumbar MRI reasonably necessary to treat a 1991 compensable injury under circumstances where the claimant had experienced chronic complaints, where some of her current complaints were consistent with complaints soon after the accident, and where an IME physician considered an MRI and a bone scan appropriate to assess an etiology for the claimant's persistent low back complaints.

In Edgerton v. Walker, Full Workers' Compensation Commission, Opinion filed May 20, 1999 (E804513), the claimant was a legal secretary who experienced a compensable over-use syndrome for over five years before the respondents decided to controvert the claim in its entirety. Prior to

the controversion, the respondents had the claimant evaluated by Dr. William Griggs who indicated that he needed a cervical MRI to determine whether the claimant's symptoms originated in the cervical spine. A majority of the Full Commission found Dr. Griggs' proposed MRI to be reasonably necessary based on the respondents' choice of Dr. Griggs to perform the evaluation, based on Dr. Griggs' opinion that an MRI was necessary to delineate the extent and nature of the claimant's condition, and based on a statement of the claimant's treating physician that he did not disagree with Dr. Griggs' recommendation.

In Hodge v. Benton Services Center, Full Workers' Compensation Commission, Opinion filed June 4, 1999 (E600814, E603961 & E616815), the claimant was struck in the head by a tree limb on September 18, 1995 and experienced pain in his neck and back, and also reported low back and leg pain. The respondents contended that MRIs of the head and neck, and an MRI of the lumbar spine taken in December of 1995, were performed for the investigation of conditions which pre-existed the claimant's compensable injuries. A majority of the Full Commission found the head and neck MRI reasonably necessary, notwithstanding the presence of some symptoms which may have preceded the September 1995 injury,

where EMG testing also indicated evidence of radiculitis at the C5-6 and C7-8 levels of the neck, which the treating physician felt were related to the September 1995 injury. A majority of the Full Commission found the lumbar MRI reasonably necessary since the MRI was performed to allow the treating specialist to look for a possible cause of leg and back pain which arose after the work injury, and since the MRI permitted the specialist to conclude that the claimant was not a surgical candidate for his compensable injury.

In Mills v. James River Corporation, Full Workers' Compensation Commission, Opinion filed August 27, 1998 (E020287), the claimant sustained a work related back injury in 1990. By January of 1998, the claimant had undergone three MRI scans, a myelogram and a post-myelogram CT, but not surgery. A majority of the Full Commission found that a fourth MRI would not be reasonably necessary under circumstances when the majority found credible a doctor's opinion that any new changes indicated in a new MRI would not be causally related to the claimant's work injury.

In Martin v. Jensen Construction Company, Full Workers' Compensation Commission, Opinion filed March 15, 2005 (F102830), the claimant sustained a compensable neck injury

on September 10, 1999 when he fell backwards on his neck. When conservative treatment failed, Dr. Anthony Russell performed a diskectomy and fusion at the C3-4 level on January 19, 2001. The claimant initially improved, but by March 1, 2001, was experiencing neck pain with radiation into his shoulders. Dr. Russell then performed surgery at C5-6 on December 10, 2001. The claimant later underwent a lumbar MRI at the direction of subsequent physicians.

A majority of the Full Commission in Martin found that a lumbar MRI was not reasonably necessary for treatment of the claimant's work related injury because the claimant did not sustain a work related low back injury. A majority of the Full Commission also found that the C5-6 surgery was reasonably necessary in connection with the claimant's compensable injury, citing Dr. Russell's testimony that fusion at one level accelerates deterioration at other levels. Under these circumstances, the majority concluded that "the surgery at C4-5 [sic] led to the deterioration at C5-6."

After considering the evidence in the present case in light of the Commission's analysis in the cases discussed above, I find that a preponderance of the evidence establishes that an additional lumbar MRI is reasonably

necessary for treatment of the claimant's 2002 lumbar injury and her compensable 2002 lumbar fusion surgery. As in Smith, Gillett, Gilbert, Edgerton, and Hodge, the claimant's current complaints are in her low back, which is where she sustained her 2002 injury (and underwent highly invasive surgery for that injury in 2002). As in the cited cases, a lumbar MRI would assist Dr. Bruffett to delineate the extent and nature of the claimant's current condition, and as in Hodge, would permit Dr. Bruffett to determine whether or not the claimant is again a surgical candidate for abnormalities causally related to her compensable back injury and surgery.

In reaching my conclusion, I recognize that the claimant appears to have had a significant reduction in her back symptoms following the 2002 surgery up until late 2004, when she developed severe pain again. However, the claimant's testimony also persuades me that she was sedentary during that period. The respondents have not cited me to any new activity or injury which would represent an independent intervening cause of the claimant's current back problems, and unlike the circumstances in Mills, no physician has opined that any new changes indicated in a new MRI would necessarily be unrelated to the original injury.

While the respondents may contend that the claimant's current low back problems are simply a progression of preexisting stenosis, the claimant credibly testified to her understanding that the current problems may be related to post-surgical scarring or disc bulging. As discussed above, a majority of the Full Commission has previously found, on at least one occasion in Martin, that post-surgical disc bulging can be a compensable consequence of disc surgery where the surgery itself causes an acceleration of disc degeneration.

I also find that the respondents are liable for Dr. Bruffett's March 23, 2005 x-ray testing and treatment, and for Dr. Bruffett's proposed post-MRI follow up. In this regard, I note that Dr. Bruffett performed a highly invasive surgery and then released the claimant to return as needed. The claimant now requires post-surgical MRI testing to evaluate her post-surgical status, and Dr. Bruffett is clearly an appropriate physician to conduct that evaluation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant was employed by Fulton County Hospital on April 8, 2002.
2. Reciprocal of America was the workers'

compensation insurance carrier for Fulton County Hospital on April 8, 2002. Reciprocal of American went into liquidation on June 20, 2003. The Arkansas Property and Casualty Guaranty Fund has been handling the claim since that time.

3. The claimant alleged that she sustained an injury to her low back on April 8, 2002, while moving a large patient without assistance. The respondents accepted the compensability of the claim, and indemnity and medical benefits were paid.

4. The claimant was earning an average weekly wage of \$257.00, which entitles her to a total disability compensation rate of \$172.00 and to a partial disability compensation rate of \$154.00.

5. On August 20, 2002, Dr. Wayne Bruffett, M.D., performed a decompression of L4-5, a posterior spinal fusion of L4-5, with pedicle instrumentation at that level, and an iliac crest bone graft on the left via separate skin incision.

6. The respondents accepted and paid compensation for a twelve percent (12%) permanent physical impairment to the body as a whole.

7. The respondents controvert any additional treatment provided by Dr. Bruffett after July 9, 2003.

8. The claimant proved by a preponderance of the evidence that Dr. Bruffett's additional treatment beginning March 23, 2005 is reasonably necessary for treatment to the claimant's compensable lumbar injury.

9. The claimant proved by a preponderance of the evidence that a lumbar MRI proposed by Dr. Bruffett is also reasonably necessary for treatment to the claimant's compensable lumbar injury.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney will be entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of the findings set forth herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in

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accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge