

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507470 & F510825

NONA REED, EMPLOYEE	CLAIMANT
MAD BUTCHER, INC., EMPLOYER	RESPONDENT NO. 1
BENCHMARK INSURANCE COMPANY/ CRAWFORD & COMPANY (TPA), INSURANCE CARRIER	RESPONDENT NO. 1
FOOD GIANT SUPER MARKETS, INC., EMPLOYER	RESPONDENT NO. 2
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED AUGUST 15, 2006

Hearing before Administrative Law Judge Barbara Webb on May 12, 2006, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 represented by Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on May 12, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on March 20, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

1. The claimant was employed by Respondent No. 1, Mad Butcher, on May 12, 2005, when she sustained a compensable injury for which benefits have been paid.
2. The claimant was employed with Respondent No. 2, Food Giant, which is the same entity as Mad Butcher, simply the names have changed, on September 25, 2005, when she claims she sustained an additional injury.

By agreement of the parties, the issues to be litigated are:

1. Compensability of claimant's alleged September 25, 2005 injury;
2. Claimant's entitlement to additional benefits.

The record consists of a one volume transcript of the May 12, 2006, hearing, consisting of the testimony of Nona "Shea" Reed and Melanie Davidson, and all documentary evidence consisting of claimant's Exhibit No. 1 (medical records); Respondent No. 1's Exhibit No. 1-2 (report of Dr. Wilson and wage statement); and Respondent No. 2's Exhibit No. 1 (wage statement). In addition, the post-hearing letter brief of claimant received May 17, 2006; post-hearing brief of Respondents' No. 1 received June 9, 2006; post-hearing letter brief of Respondents' No. 2 received May 22, 2006; and post-hearing supplemental letter brief of Respondents No. 2 received June 23, 2006, have been blue-backed and will be made part of the record of this case.

FACTUAL BACKGROUND

The claimant alleges that she became employed with Mad Butcher in 2002. After working there approximately two months, she began work in the meat department. Her job duties included wrapping meat, among other things. Claimant continued in this position until she last worked in September 2005.

Beginning in 2003, the claimant began experiencing hand/wrist pain. The claimant sought treatment with her family physician, Dr. Bruce White. She ultimately had three to four months of physical therapy and was provided splints. The claimant then developed numbness and ultimately pain in both arms and wrists, including the hands. She was treated periodically by Dr. Bruce White.

On or about May 12, 2005, the claimant suffered an uncontroverted compensable injury to her left and right hands while working for Mad Butcher. Claimant was seen and evaluated by Dr. John Wilson and her condition was ultimately diagnosed as being resolving tendonitis. Medical expenses and temporary total disability benefits were paid by Respondent No. 1 from the date of the onset of the injury in May of 2005 until claimant returned to work on July 6, 2005.

In late August of 2005, Respondent No. 1, Mad Butcher, sold to Respondent No. 2, Food Giant. The claimant continued performing similar work for Respondent No. 2. On or about September 25, 2005, Claimant contends she experienced pain in her hands and wrists which made the performance of her job duties difficult. She reported this to her supervisor and changed duties until the end of her shift. On September 26, 2005, Claimant returned to Dr. White for medical treatment complaining of pain in both wrists up into her arms. Dr. White diagnosed claimant with persistent tendonitis and bilateral medial epicondylitis. She was ultimately referred to Dr. Mike Moore for evaluation. Dr. Moore opined that the claimant's clinical history and physical examination were consistent with bilateral hand and arm pain and recommended further evaluation with a triphasic bone scan and a nerve conduction study and EMG study. Dr. Moore also issued a status report indicating that the claimant "may return to work" on October 18, 2005, and stating that the

claimant should “continue present work status”. Claimant did not return to work and has not had the diagnostic testing prescribed by Dr. Moore.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. The claimant was employed by Respondent No. 1, Mad Butcher, on May 12,2005, when she sustained a compensable injury for which benefits have been paid
3. Claimant’s compensation rate with Respondent No. 1, Mad Butcher, is \$196 for TTD, \$154 for PPD.
4. Claimant’s compensation rate with Respondent No. 2, Food Giant, is \$169 for TTD, based on an average weekly wage of \$254
5. Claimant was employed by Respondent No. 2, Food Giant, on September 25, 2005, when her symptoms of hand/wrist pain recurred without an independent intervening cause.
6. Claimant has proven by a preponderance of the evidence that she is entitled to additional reasonable and necessary medical benefits, i.e., tryphosic bone scan, nerve conduction study, and EMG study, as a continuation of treatment from her May, 2005, compensable injury from Respondents No. 1.
7. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits in connection with the recurrence of her May, 2005 injury from September 25, 2005 until October 18, 2005, the date she was released to return to work.
8. Claimant has failed to establish by a preponderance of the evidence that she had a compensable injury on September 25, 2006.

9. Claimant has failed to establish by a preponderance that she is entitled to benefits from Respondents No. 2.
10. Respondent No. 1 has fully controverted the payment of all additional benefits.
11. Claimant's attorney is entitled to the maximum statutory attorney's fees allowed on the indemnity benefits awarded to the claimant from Respondent No. 1 herein.

DISCUSSION

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accident injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it

deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

II. AGGRAVATION/RECURRENCE

In the instant case, there is dispute over whether a specific incident occurred on September 25, 2005 at work. It is undisputed that claimant suffered a compensable on-the-job injury in May of 2005 while employed by Mad Butcher. Respondents No. 1 contend that they have provided claimant with all reasonable and necessary workers' compensation benefits for which they are responsible. Additionally, Respondents No. 1 further contend that any need for benefits which claimant may presently have is the result of an aggravation-type injury which she suffered in September 2005 while working for its successor, Food Giant. Respondent No. 2 contends that the claimant's pain did not "resolve" but continued from May 2005 up until the date she last worked in September of 2005, her pain progressively worsened, and there was no unusual event or activity the claimant performed in September of 2005 which led to the difficulties she experienced. Thus, Respondent No. 2 contends this continuation of complaints should be considered a continuation and/or recurrence of the claimant's problems from her admittedly compensable May, 2005, injury.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home

v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

Respondent No. 2 points to the claimant's testimony at the hearing which revealed that she began experiencing elbow, forearm, wrist and hand pain and numbness as early as 2003. Even after the claimant returned to work after the May, 2005 injury in July of 2005, she continued to experience pain and problems with her hands and wrists even though this was diagnosed as "resolving tendinitis" by Dr. John Wilson. Claimant testified emphatically that the pain never "resolved" but remained constant. The claimant also unequivocally testified that there was not any one event on September 25, 2005 which necessarily caused or contributed to

an increase in pain. The claimant agreed that she was performing her normal everyday work activities at the time of the onset of pain.

On the other hand, Respondent No. 1 argues that Dr. John Wilson fully released claimant from his care on July 6, 2005 and returned her to work without any restrictions. In his report from this date, Dr. Wilson also noted that x-rays taken of claimant revealed early arthritic changes at the carpometacarpal articulation. Dr. Wilson reported that claimant's swelling had gone away, that there was no thickening or swelling over the wrists, and that she had normal range of motion. Claimant testified that after she returned to work, July 6, 2005, until September 25, 2005, she missed no time from work and completed all of her shifts. After being returned to work on July 6, 2005, claimant did not seek any medical attention until September of 2005. Respondent No. 1 contends that evidence alone clearly establishes that claimant had recovered from her May 12, 2005, injury. Finally, on this issue, Respondents No. 1 plead that there is no medical evidence which links claimant's medical problems post-September 25, 2005 to her compensable injury of May 12, 2005. Dr. White reports on September 26, 2005 that claimant "was wrapping meat this past Sunday when she began having such great pain in the wrist that she could not continue and had to quit and go home." Respondents note that the report does not state that claimant's pain had been present since she returned to work following her previous injury, nor does the report relate her pain on this day to said injury. Additionally, Respondents point to Dr. Wilson, claimant's treating physician for her May 12, 2005 compensable injury, who opined that since he had fully released claimant from his care and returned her back to work on July 6, 2005, any problems that she had experienced in September 2005 was an aggravation, i.e., a new injury. Finally, Respondent No. 1 notes the testimony of Melanie Davidson, the representative for Respondents No. 1, who recalled a conversation

that she had with claimant in September of 2005 in which she state that her problems “started again on September 16th.” Finally, claimant’s testimony that she had never felt “this kind of pain” lends credence to the fact that she suffered a new injury. Claimant further testified that on the date of her September 25, 2006 injury, her employer, Food Giant, was having a sale on hamburger meat and that all of the packages she had to wrap were extremely large and heavier than normal. Accordingly, Respondent No. 1 contends claimant’s injury was not the result of an ordinary day at work; rather, there was an extraordinary, i.e., specific, incident at work on this day which caused her aggravation injury.

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000). While at first blush, the arguments of Respondent No. 1 appear persuasive, a careful review of the totality of the evidence requires a different result. Claimant was employed by Food Giant for one month, August-September of 2005. Claimant testified that her condition was not “resolved” when she returned to work at Mad Butcher after the May 12, 2005 injury and that she did not feel that she should have been returned to work in July of 2005, in light of the continuing pain. Claimant testified that her pain progressively worsened. Claimant did not return to Dr. Wilson after July of 2005. Therefore, I find that his undated statement that it was his medical opinion that any physical problems she had with her hands and wrists in September, 2005, constituted an aggravation of her previous condition should be afforded little weight since he had not seen the claimant since July of 2005. I further find the testimony of the claimant that her pain had never ceased both credible and compelling in light of the medical records and other evidence which support that her condition was the result of a gradual onset due to the repetitive movements with her hands and wrists

at work while performing regular job duties. Based on my review of the entire record, I find that the preponderance of the evidence demonstrates that claimant's condition was a recurrence of the May 12, 2005, injury in September of 2005, and the result of a specific incident injury or intervening cause.

III. OBJECTIVE FINDINGS

Respondent No. 2 further contends that there are no "objective findings" as required in order to support compensability of a September 25, 2005 injury. The claimant bears the burden of proving a compensable injury by a preponderance of the evidence. Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004). In the present case, the claimant is apparently alleging she sustained a gradual onset injury since she admits there was not a specific incident causing her problems in September 2005. In addition to proving her injury by a preponderance of the evidence, the claimant must establish the existence of the injury by medical evidence and supported by "objective findings." See Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those that cannot come under the voluntary control of the patient. See Ark. Code Ann. § 11-9-102(16)(A)(i). The claimant must also prove that there is a causal connection between the work-related accident and the injury. Stevenson v. Tyson Foods, Inc., 70 Ark. app. 265, 19 S.W.3d 36 (2000). With respect to this proof, the claimant must show that the "major cause" of the injury is the workplace. When making this determination, the claimant does not receive the benefit of the doubt. Ark. Code Ann. § 11-9-704(c)(4)(Supp. 1995); Glencorp Polymer Products v. Landers, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

A claim for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. Arkansas Department of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

In the present case, the claimant has not presented any objective medical findings supporting a change of or the existence of a compensable injury as a result of any work performed by the claimant in September 2005. Without such proof, claimant's claim against Respondent No. 2 must fail.

IV. REASONABLY NECESSARY TREATMENT

Pursuant to Ark. Code Ann. § 11-9-508(a), an employer must promptly provide all reasonably necessary medical services which are needed to treat an employee's compensable injury. However, it was not the intent of the Arkansas Workers' Compensation Law to provide general accident insurance. Duke v. Perkin Wood Products Co., 223 Ark. 182, 264 S.W.2d 834 (1954).

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, Opinion filed February 17, 1989 (D612291); B. R. Hollingshead v. Colson Caster, Full Workers' Compensation Commission, Opinion filed August 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). When assessing whether medical treatment is reasonable necessary for the treatment of a compensable injury, both the proposed procedure and the condition it is sought to remedy must be analyzed. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, Opinion filed December 13, 1989 (D512553). What constitutes reasonably necessary medical treatment is a fact question for the Commission. Wright Contracting co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Also, whether the medical treatment actually provided is reasonable and necessary is a question of fact for the Commission. DeBoard v. Colson Co., supra. While the results obtained may be a consideration in some

cases, the primary considerations are the nature of the service in relation to the injury sustained. Tonnie Crisp v. Weyerhaeuser Corp., Full Workers' Compensation Commission, Opinion filed July 27, 1993 (D812922).

Since Respondent No. 1 was the owner of (and carrier for) claimant's employer at the time of her May 12, 2005 compensable injury, they acknowledge that they would be responsible for any reasonable and necessary workers' compensation benefits which stemmed from said injury. As the record reflects, following said injury respondents provided claimant with medical treatment as well as temporary total disability benefits from May 12, 2005 to July 6, 2005. Based on the evidence, I find that claimant's additional medical treatment on September 26, 2005, by Dr. White and on October 18, 2005, by Dr. Moore, as well as the recommended diagnostic testing by Dr. Moore is reasonable and necessary treatment which stems from the May 12, 2005 compensable injury.

V. TEMPORARY TOTAL BENEFITS

To be entitled to temporary total disability benefits, a claimant must remain in her healing period and be totally unable to earn wages. Ark. State Hwy. & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. J. A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). For the purpose of defining disability, "any other employment" means any other employment in lieu of the one in which the employee was injured.

Stevens v. Mountain Home Sch. Dist., 41 Ark. App. 201, 850 S.W.2d 335 (1993).

In the instant case, I find that the evidence demonstrates that claimant entered a second healing period after the recurrence of her condition in September of 2005. I further find that the second healing period ended when the claimant was released to return to work by Dr. Moore on October 18, 2005.

V. CONTROVERSION

_____Based on my review of the preponderance of the evidence in this case, I find that Respondent No. 1 has fully controverted payment of all medical benefits since July 6, 2005. I further find that Respondent No. 1 has fully controverted payment of temporary total disability benefits. I find that the claimant's attorney is entitled to a maximum statutory attorney's fee allowed on the disability benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied as to Respondent No. 2. The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge