

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F100754**

**VIOLET B. ROGERS, EMPLOYEE**

**CLAIMANT**

**LITERACY COUNCIL OF BOWIE/MILLER  
COUNTIES, EMPLOYER**

**RESPONDENT NO. 1**

**AMERICAN CASUALTY COMPANY OF  
READING, PA, CARRIER**

**RESPONDENT NO. 1**

**DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND**

**RESPONDENT NO. 2**

**OPINION FILED JUNE 30, 2006**

Hearing before Administrative Law Judge J. Mark White on May 4, 2006, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On May 4, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on February 6, 2006, and a Prehearing Order was entered that same day. A copy of the February 6, 2006, Prehearing Order has been marked as 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 all relevant times, including January 3, 2001; that on January 3, 2001, the claimant sustained compensable injuries to her lumbar spine and left hand; that the claimant has been assigned a permanent impairment rating of ten percent (10%) to the body as a whole, which rating respondents have accepted; that the claimant reached the end of her last healing period no earlier than July 8, 2004; that the claimant earned wages sufficient to entitle her to a compensation rate of \$68; and that this claim was the subject of a prior Administrative Law Judge Opinion filed July 26, 2001. At the hearing, the parties further stipulated that the claimant earned an average weekly wage of \$101.81; and that the claimant was paid temporary total disability benefits through September 12, 2005.

The parties agreed that the issues to be presented were whether the claimant is permanently totally disabled, or in the alternative, entitled to wage-loss disability benefits; the end of the claimant's healing period; whether the claimant is entitled to additional medical treatment; and controversion and attorney's fees. The parties agreed to waive the issue of whether the claimant is entitled to additional permanent partial disability benefits. Prior to the hearing the parties had also agreed to litigate the issues of whether the respondents must first pay permanent partial

disability benefits prior to payment of any permanent total disability benefits to which the claimant may be entitled; and whether the respondents are entitled to credit for payment of permanent partial disability benefits against their \$75,000 maximum liability. However, the Arkansas Court of Appeals has resolved the legal questions involved in these issues in its decision in the matter of *Death & Permanent Total Disability Trust Fund v. Legacy Insurance Services, et al*, \_\_ Ark. App. \_\_, \_\_ S.W.3d \_\_ (May 10, 2006). Therefore, these two issues will not be considered further herein.

The claimant contends that she is now totally and permanently disabled, or in the alternative should be awarded wage-loss disability benefits in excess of the anatomical rating; that the claimant did not reach the end of her healing period until August 8, 2005; and that the claimant is entitled to additional medical treatment, in the form of the continued refill of medications prescribed by Dr. DeHaan and denied by the respondents.

Respondents contend that they have previously paid out a ten percent (10%) permanent physical impairment rating to the body as a whole; that following claimant's most recent surgery on January 8, 2004, respondents paid additional temporary total disability benefits through January 8, 2005; that respondents deny liability for additional temporary total disability benefits; that respondents deny

liability for permanent partial disability benefits; and that respondent continue to provide medications prescribed by Dr. DeHaan.

### **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 Ark. Code Ann. § 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 reached the end of her healing period on July 8, 2004.
4. All indemnity benefits paid after July 8, 2004, are hereby recharacterized as permanent disability benefits, pursuant to Ark. Code Ann. § 11-9-501 (c)(2).
5. The claimant has proven by a preponderance of the evidence that she is unable to earn any meaningful wages in the same or other employment, as a result of her compensable injury.

6. The claimant has therefore proven by a preponderance of the evidence that she is permanently totally disabled.
7. The claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent total disability.
8. The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically the medication prescribed by Dr. DeHaan, is reasonably necessary in connection with the compensable injury.
9. The respondents have controverted all benefits sought herein.

## **DISCUSSION**

### **I. History**

The claimant sustained a compensable injury to her low back on January 3, 2001, when she slipped and fell on ice. She treated with a number of physicians, and an MRI exam revealed a small disc bulge at L3-4. The medical records indicate that her treatment was delayed for several months due to proceedings before the Commission, which were not resolved until the filing of a prior Administrative Law Judge Opinion on July 26, 2001.

When conservative treatment failed to alleviate the claimant's back and left leg pain, she underwent surgery by Dr. Jeff DeHaan on May 7, 2002, a diskectomy

at L3-4. Dr. DeHaan wrote in his narrative report of the surgery:

The L3-4 disk did have a herniation fairly lateralized but definitely present impinging the nerve root exiting above the disk. The nerve root itself was quite erythematous and quite red.

The claimant testified this surgery provided her little relief: "Not really. It helped some but it didn't - no, it didn't really - with the medication it helped some, but not on its own."

Dr. DeHaan continued to treat her and prescribed additional diagnostic tests. He noted her continued complaints of back and leg pain, and on October 2, 2002, he opined, "I suspect it's probably the same nerve that's just been compressed so long that there may be some permanent sequelae that's present." EMG studies of the lower extremities revealed "chronic changes of the L3 nerve root ... secondary to scarring around the nerve root and/or chronic preoperative damage to the nerve."

Dr. DeHaan declared her to be at maximum medical improvement as of May 14, 2003. He assigned an anatomical impairment rating of 10% to the body as a whole and released the claimant to work with restrictions. The claimant did not return to her job, and she in fact had been terminated from her employment prior to the surgery. The claimant testified that she was unable to work after the first surgery due to the severe pain in her low back and left leg: "I had to spend more time in bed than I - I couldn't have worked."

Dr. DeHaan continued to treat her and at one point prescribed a cane for her use because of giving-way episodes with her leg. He performed a second surgery on January 8, 2004, a "re-do lumbar laminectomy with decompression of the L3-4 level and decompression of the nerve root at that level." During surgery, Dr. DeHaan noted the presence of scar tissue, and he also noted:

The nerve root was identified with great difficulty. It was extremely erythematous and had an abundant amount of scar tissue around it. This was a situation where there was more scarring than anything else. I did not find any recurrent disk herniation at the level of the L3-4 interspace.

The claimant's testimony as to the results of the second surgery was mixed:

With the pain medication I was able to live - I don't sleep good at night. I'm cranky. I have to do my housework a little at a time, which some I can't even do and my husband has to help do the vacuuming, the mopping, but what I do, light laundry, dishes, things like that, with the medication I am able to make it through the day, but without the medication - and I know because I have been without it. They refused to pay for it too many times and so I know how I feel.

Q Let's focus in on the question. After the second surgery, the symptoms that you talked about, did they get better or not?

A Not really but, I mean, you know, they didn't really get better but I was able to, like I said, live with the pain with medication.

The claimant continued to use the cane after the second surgery and for a

time was in a walker prescribed by Dr. DeHaan. She continued to complain of back and leg pain, and Dr. DeHaan specifically tied the leg pain to “injury to the nerve root,” consistent with the nerve root damage he observed in both surgeries. In a later letter, he opined that the claimant’s back pain “is secondary to her injury and the arthritis that she also has in her back.” Since then, the claimant has continued to take narcotic pain medication as prescribed by Dr. DeHaan. She testified the respondents have frequently denied her prescription refills.

A functional capacity evaluation performed August 8, 2005, found the claimant to be capable of at least sedentary-level work. However, the evaluation indicated the claimant gave an unreliable effort, and the evaluator indicated she could be capable of light-duty work, based on the results of isometric strength testing.

Dr. John Sklar saw the claimant on January 25, 2006, for an independent medical evaluation to determine whether she had reached the end of her healing period and to assign a permanent anatomical impairment rating. Dr. Sklar opined that the claimant’s pain has no physical basis and is entirely mental, leading him to conclude that it is not work related.

In his report, Dr. Sklar falsely implied that Dr. DeHaan was unable to identify a “pain generator.” Dr. Sklar either ignored or was not aware of Dr. DeHaan’s

multiple opinions tying the claimant's problems to the L3 nerve root. Dr. Sklar either ignored or was not aware of the significant nerve root damage observed by Dr. DeHaan in both surgeries. Dr. Sklar does not explain why this nerve root damage could not be responsible for the claimant's symptoms. Dr. Sklar likewise does not explain how the claimant's back and leg problems – even if they are without a physical basis – could not be work-related even though they began with a work injury.

On balance, considering Dr. Sklar's failure to consider or account for the L3 nerve root damage observed and treated by Dr. DeHaan, I cannot find his opinion to be credible. Dr. DeHaan's opinion, on the other hand, is plausible and credible in light of the other evidence of record. Therefore, I place more weight on the opinions of Dr. DeHaan herein than those of Dr. Sklar.

## **II. Adjudication**

### **A. Healing Period**

The claimant is considered to remain in her healing period until the underlying condition has become stable, she is as far restored as the permanent character of her injury will permit, and there is nothing further in the way of treatment that will improve her condition. *Wheeler Construction Co. v. Armstrong*, 73

Ark. App. 146, 41 S.W.3d 822 (2001). Whether the healing period has ended is a question of fact. *Id.*

Dr. Sklar opined that the claimant reached the end of her healing period no later than July 8, 2004. Dr. DeHaan had earlier suggested the claimant's healing period extended until 2005, but in a subsequent letter he opined he did not disagree with Dr. Sklar's date. It is clear from the medical records that the treatment received by the claimant after July 8, 2004, did nothing more than stabilize the claimant's condition. I find that the claimant reached the end of her healing period on July 8, 2004. All indemnity benefits paid after July 8, 2004, are hereby recharacterized as permanent disability benefits, pursuant to Ark. Code Ann. § 11-9-501 (c)(2).

### **B. Permanent Disability**

The claimant contends that she is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519 (e). The claimant bears the burden of proving that she is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's

age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.” Ark. Code Ann. § 11-9-522 (b)(1). These “other matters” may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a).

The claimant is 62 years of age. She has an eleventh grade education and no specialized job training. She has worked a number of jobs in her life, mostly manual labor and clerical work. Dr. DeHaan has opined the claimant cannot return to work, while Dr. Sklar has opined the claimant can return to work in a light- to medium-duty work environment. The claimant underwent a functional capacity evaluation showing her capable of sedentary work, though the study indicated an inconsistent effort on her part, such that the evaluator thought her actually capable of lifting at the light-work level. The claimant testified she is unable to work because of her continued back and leg pain.

As noted above, I find the opinions of Dr. DeHaan more credible than those

of Dr. Sklar in this matter. Given the evidence before me, I find that the claimant has proven by a preponderance of the evidence that she is unable to earn any meaningful wages in the same or other employment, as a result of her compensable injury. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is permanently totally disabled.

The claimant denied having any back or leg problems prior to her compensable injury, and I can identify nothing in the medical records to contradict this testimony. Dr. DeHaan did opine that the claimant's current problems are due both to the compensable injury and to arthritis, but on balance, taking into account the medical records and the fact that the claimant's symptoms began with the compensable injury, I find that the claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent total disability.

### **C. 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 employee. Ark. Code Ann. § 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). It is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

As discussed above, I find the opinions of Dr. DeHaan in this matter to be more credible than those of Dr. Sklar. The additional treatment sought by the claimant consists of medications prescribed by Dr. DeHaan. Dr. Sklar opined that these medications were not necessary, but Dr. Sklar also asserted that the medications were not "effective." Dr. Sklar's assertion is contradicted by both the claimant's testimony and the remainder of the medical evidence. Indeed, I can find nothing in the medical record to support Dr. Sklar's assertion, and he offers nothing in his opinion letter to support it.

Therefore, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, specifically the medication prescribed by Dr. DeHaan, is reasonably necessary in connection with the compensable injury.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that she is permanently totally disabled and that she is entitled to additional medical

treatment, specifically the medication prescribed by Dr. DeHaan. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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 Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge