

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405754

CYNTHIA J. TRIMBLE, EMPLOYEE	CLAIMANT
ORTHO ARKANSAS, EMPLOYER	RESPONDENT
CINCINNATI INDEMNITY COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 6, 2006

Hearing held on November 14, 2005, in Little Rock, Pulaski County, Arkansas, before the HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HON. TERENCE C. JENSEN, Attorney at Law, of Benton, Arkansas.

Respondents represented by HON. WILLIAM C. FRYE, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

_____ On November 14, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on September 21, 2005, and a Prehearing Order was entered that same day. A copy of the September 21, 2005, Prehearing Order was marked as Commission Exhibit No. 1 and made a part of the record herein without objection.

The parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including April 27, 2004; that the claimant earned an average weekly wage of \$422.00, entitling her to a compensation rate of \$282.00 per week for temporary total disability benefits; and that the claimant sustained a compensable back injury on April 27, 2004, for which the respondents paid temporary total disability benefits up to October 7, 2004.

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The parties agreed the following issues would be presented for determination at the full hearing:

- 1) Whether the claimant is entitled to additional medical treatment related to her April 27, 2004, compensable injury.
- 2) Whether the claimant is entitled to additional temporary total disability benefits from October 8, 2004 through September 30, 2005.
- 3) Whether the claimant is entitled to temporary partial disability from October 1, 2005 to a date yet to be determined.
- 4) Applicable attorney's fees.

The claimant contended, in summary, that she sustained a compensable injury on April 27, 2004, and as a result is entitled to all reasonable and necessary medical treatment. Specifically, claimant contended she is currently being treated by Dr. Christopher Mocek and that Dr. Mocek's treatment is reasonably necessary treatment and the responsibility of the respondents. Further, claimant contends she is entitled to additional TTD benefits from October 8, 2004 through September 30, 2005; and TPD benefits from October 1, 2005 to a date yet to be determined, plus attorney's fees.

The respondents contended, in summary, the following:

- 1) The claimant was treated by Dr. Wilson conservatively for back and right leg pain, and an MRI was done, which was found to be within normal limits.
- 2) The claimant was noted to have a normal neurological

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examination.

3) Dr. Wilson prescribed a lumbar epidural steroid injection and physical, and the claimant continued to work for the respondent-employer.

4) The claim was accepted as compensable. The respondents contend the claimant has received all benefits to which she is entitled.

5) The claimant was sent to Dr. Jim Moore who gave claimant a TENS unit and a right sacroiliac trigger injection.

6) That Dr. Moore referred the claimant to Dr. Meador for an evaluation, and Dr. Meador noted the claimant made a complete change from what her complaints had previously been.

7) That Dr. Meador treated the claimant with injections and physical therapy and released the claimant back to work, regular duty, as of October 7, 2004, with no impairment rating.

8) That claimant went on her own to see Dr. Mocek, who says the claimant has a disc protrusion.

9) That Dr. Moore and Dr. Wilson have both stated there is no evidence of any nerve compression.

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

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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 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 additional medical treatment remains reasonably necessary in connection with the compensable injury. Specifically, the claimant is entitled to the treatment from Dr. Mocek concerning her low back, including, but not limited to, a discogram.

However, the respondents are not responsible for the thoracic MRI recommended by Dr. Mocek nor any treatment related to the claimant's thoracic spine.

4) The claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated to earn wages from October 8, 2004 through September 30, 2005, and therefore is not entitled to temporary total disability benefits for that period.

5) The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits from October 1, 2005

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through a date yet to be determined.

6) The respondents have controverted all benefits sought herein.

DISCUSSION

I. HISTORY

There is no dispute that the claimant sustained a compensable injury to her back on April 27, 2004. At that time, the claimant was a surgical technologist for the respondent-employer. The claimant testified as follows regarding her work related incident on April 27, 2004:

A. On April 27th, I was moving a patient from the OR bed to the stretcher, and there was three people - a CRNA, the RN and myself - and there was a sheet under the patient. You lift them up and they put a board under the patient and then you push to get the patient onto the stretcher. When I did that, my right leg came out from underneath me - the floor had been wet from a knee oproscopy - and my whole back leg came out from behind me really fast, and I fell onto the OR bed. (T. pg. 9, lns 17-22)

The claimant testified she reported the incident to her employer on April 27, 2004, but that she continued to work for another week with increasing pain. The

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claimant sought treatment with Dr. Michael Beard, who referred her to Dr. John Wilson. Dr. Wilson conducted an MRI, which showed the claimant to have a bulging disc at L4. (T. pg. 12, ln. 24) Dr. Wilson recommended physical therapy, but eventually quit treating the claimant because they both worked for the respondent-employer. (T. pg. 12, lns 11-14)

Dr. Wilson referred the claimant to Dr. John Moore, a neurosurgeon. Dr. Moore recommended a TENS Unit and LipoDerm Patches. Dr. Moore gave the claimant one injection, but after only a few visits the claimant testified her caseworker with Cincinnati Insurance changed her treating physician to Dr. Meador. The claimant underwent injections and physical therapy while under the care of Dr. Meador. The claimant was released to full duty by Dr. Meador on October 7, 2004. The claimant testified she was still in pain after being released from Dr. Meador, and went back to her primary care physician, Dr. Michael Beard. Dr. Beard then referred the claimant to Dr. Christopher Mocek. Dr. Mocek did an epidural and a nerve block at L4-5. The claimant, still having pain, was then scheduled for a discogram by Dr. Mocek; however, the respondents controverted all medical treatment after the claimant was released by Dr. Meador.

The claimant testified she was unable to work at all between October 8, 2004 and September 30, 2005. The claimant did go to work part-time on October 1, 2005 for Caudell Preliminary Professional Associates as an auto-transfusionist.

II. ADJUDICATION

A. Additional Medical

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. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. GEO Specialty Chemical, Inc. v. Clingan, 64 Ark. App. 369, 13 S.W. 3d 218 (2000).

It must first be understood that the respondents have acknowledged and accepted the claimant sustained a compensable back injury in April of 2004. Obviously, the respondents relied heavily on Dr. Meador's October 7, 2004 report in determining when claimant's benefits should stop. The respondents also rely on Dr. Wilson's' and Dr. Moore's assessment that the claimant's bulge at L4-5 is not pressing against the nerve root. The claimant relies on Dr. Mocek's's reports recommending a discogram, and opining that the L4-5 bulge is causing nerve root irritation. Dr. Mocek's's reports also indicate the claimant's problems may be discogenic in nature. Under either scenario, Dr. Mocek opined that a discogram followed with CT would be the best course of treatment for the claimant.

It is not disputed that the claimant has a disc protrusion on the right at L4-5. Medical opinions vary as to the extent, if any, the claimant's nerve is irritated due to the protrusion; however, it is reasonable to treat the protrusion if the treatment can help with claimant's admitted compensable injury. It is also reasonable to think the protrusion could have disrupted the disc. I find Dr. Mocek's opinion recommending the discogram followed with CT Scan is reasonable, necessary and related to the claimant's stipulated compensable

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injury.

Dr. Mocek was clear in his report dated May 6, 2005 wherein he states:

“The patient continues to have persistent back and right leg pain consistent with nerve root irritation from the disc protrusion on the right at L4/5. She has had two steroid injections in the spine and physical therapy. She continues to have persistent pain. Would recommend proceeding with a lumbar discogram with post-discogram CT.” (Emphasis added.)

I find Dr. Mocek’s diagnosis and treatment options to be reasonably necessary.

In making this finding, I do not disregard the full duty release and report executed by Dr. Meador on October 7, 2004. However, even Dr. Meador recommends pool therapy for the claimant in her October 7, 2004 report. (RX-1, pg. 4) I find the claimant has undergone multiple regimens of physical therapy without benefits. The H₂O therapy recommendation from Dr. Meador seems to be redundant. Dr. Mocek’s diagnostic recommendation seems to be the wiser course of treatment for the claimant at the present time. It can be determined if the claimant’s problems, due to the compensable disc protrusion, are discogenic in nature with the discogram. I find the respondents are responsible for the lumbar back treatments from Dr. Mocek. I further find the respondents are responsible for the discogram followed with CT recommended by Dr. Mocek.

That being said, in Dr. Mocek’s earliest reports he recommended a thoracic MRI. I find that recommendation not to be related to the compensable injury and not the responsibility of the respondents.

B. 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 she

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suffers a total incapacity to earn wages. AHTD v. Breashers, 272 Ark. 244, 613 W.S. 2d 392 (1981).

There are two medical reports in direct contradiction with regard to the claimant's ability to work after October 7, 2004. The claimant testified she was unable to work at all between October 7, 2004 and September 30, 2005. Dr. Meador released the claimant to return to work, full duty, effective October 8, 2004, in her report dated October 7, 2004. (RX-1, pg. 42)

Dr. Mocek gave the claimant an "off work" slip from December 22, 2004 through March 17, 2005. (CX-1, pg. 9) In analyzing the two opposite opinions, I note when Dr. Mocek gave the claimant an "off work" slip, he also executed a report that stated as follows regarding claimant's work status on December 22, 2004:

"We will just get her through the PT and then get her back to work part time with no lifting over 25 pounds when she returns from therapy. We will advance her work schedule gradually"
(CX-1, pg. 10)

In reviewing Dr. Mocek's December 22, 2004 report regarding claimant's ability to return to work, and the restrictions he recommended in his October 21, 2005 statement, they appear to be identical. The main difference is that in December of 2004 Dr. Mocek wanted the claimant to complete physical therapy before proceeding with the work restrictions. Of course, now, with the benefit of perfect hindsight, we know the physical therapy did not help the claimant and thus the reason for the recommended diagnostic test. The restrictions essentially did not change between December 22, 2004 and October 21, 2005, according to Dr. Mocek, and even though the claimant may still be within her healing period; she has failed to prove by a preponderance of the evidence that she was totally

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incapacitated to earn wages during the period of requested TTD. Dr. Meador released the claimant to light duty as early as 9/20/04. (RX-1, pg. 39)

The claimant has the burden to prove entitlement to the requested TTD period, and taking all the evidence into consideration, I find she has fallen short.

C. Temporary Partial Disability.

Temporary partial disability is that period within the healing period within which an injured employee suffers a decrease in her capacity to earn the wages she was receiving at the time of the injury. **AHTD v. Breashers**, 272 Ark. 244, 613 W.S. 2d 392 (1981). As stated earlier, the claimant may still be within her healing period, but due to the respondents failure to provide the diagnostic test recommended by Dr. Mocek it is difficult to ascertain. I do not hold the claimant accountable for the respondents failure and lean in her direction concerning the healing period argument. However, the claimant still has the burden to prove she suffered a decrease in wages from October 1, 2005 to a date yet to be determined.

The claimant testified she was working a few hours per week after October 1, 2005 for her new employer, but no evidence was presented to show how much per hour she was earning; or even an average of how many hours per week she was working. The claimant requested temporary partial disability benefits from October 1, 2005 to a date yet to be determined, but the lack of evidence presented concerning her current wages leaves too many gaps in the formula.

It is difficult to determine an amount of lost wages if the claimant doesn't attempt to see what type of employment she can perform. It would seem rational for the claimant to

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attempt some sort of mitigation before claiming lost wages. However, the claimant testified she never looked for work within her restrictions. (T. pg. 42, ln. 6). The claimant testified the only reason she got a job on October 1, 2005, was that a lady at church approached her and said "would you like to go to work for me." (T. pg. 42, lns 7-13)

The testimony, lack of evidence presented concerning current wages, Dr. Meador's report stating the claimant could return to full duty, and failure of the claimant to pursue work even under Dr. Mocek's restrictions, lead this examiner to find the claimant has failed to meet her burden of proof regarding her request for temporary partial disability. It is also important to note the claimant went to work for her current employer prior to Dr. Mocek's statements of October 21, 2005 introduced into the record as Claimant's Exhibit 1, pages 1 & 2.

AWARD

The claimant has proven by a preponderance of the evidence that additional medical treatment remains reasonably necessary in connection with her compensable injury, and the respondents are ordered to provide that treatment in accordance with the Findings of Fact and Conclusions of Law recited herein, pursuant to Rule 30.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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