

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F011975

**SHIRLEY W. WALKER,
EMPLOYEE**

CLAIMANT

**UNITED CEREBRAL PALSY
OF CENTRAL ARKANSAS,
EMPLOYER**

RESPONDENT

**GREAT RIVER INS. CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MARCH 9, 2006,

Pursuant to a hearing conducted December 9, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Lewis E. Ritchey, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for additional benefits for permanent anatomical impairment and medical care related to an admittedly compensable low back injury of July 15, 2000.

The claimant's back injury occurred during her employment when she heard a pop in her back and felt pain as she attempted to lift a patient from a wheelchair. After informing the employer, the claimant received medical care, including an examination July 17, 2000, by Dr. William Joseph who diagnosed a lumbar strain and eventually referred her to Little Rock orthopedic surgeon Dr. John L. Wilson. Dr. Wilson also diagnosed a strain and treated the claimant conservatively, apparently recommending physical therapy, a TENS Unit, medication, and Williams exercises. He released the claimant without finding objective evidence of permanent impairment.

The claimant was also evaluated in January, 2001, by Dr. Kenneth M. Rosensweig. According to the previous opinions, Dr. Rosensweig noted that the claimant had mechanical back pain and residual pain with deconditioning and commented that there had been no diagnostic testing to determine the anatomy of her lumbar spine to see if there is any disc disruption or other findings, and stated that he had not seen any films. He also remarked that an MRI and/or further testing may help elucidate the claimant's pain and could possibly change her rating, which he estimated at 0.

In March, 2001, the claimant came under the care of Dr. Kevin J. Collins whose recommendations included medication, physical therapy, to continue job restrictions, and an MRI of the lumbosacral spine. The report of an MRI dated July 9, 2001, again according to the previous opinions, indicated that the claimant had impingement of the right-sided L3 nerve root related to disc extrusion and mild hypertrophy of the articular facets; a broad based disc bulge at L4-5; and pseudoarthritis to the left of midline at the lumbosacral junction related to hypertrophy of the transverse process. On July 16, 2001, Dr. Collins wrote that the claimant has some pain and is not better at all with therapy at this point. He stated that he was running out of options for her and would defer to Dr. Christopher Mocek for followup. He also stated that he checked the MRI of the claimant's hips and noted impingement on the right side of the L3 nerve root related to the disc extrusion and that the patient's symptoms somewhat correspond with this.

The previous opinions also indicate that Dr. Mocek performed diagnostic lumbar facet blocks in August, 2001, which he felt did not indicate that the claimant was a candidate for radiofrequency lesioning of the lumbar facet nerves. He recommended a diagnostic discogram which was opposed by the respondents who sought a second opinion from Dr. Scott M. Schlesinger. On November 8, 2001. Dr. Schlesinger, a neurosurgeon, wrote that from a neurosurgical standpoint, lumbar

discography was not indicated. In a subsequent letter, he wrote that he did not believe in lumbar discography or lumbar fusions for low back pain and, therefore, could not recommend that this be done.

Following a hearing, the discogram was ordered and subsequently performed by Dr. Mocek January 31, 2003, after which Dr. Mocek concluded that the claimant had grossly normal and non-painful L2-3 discs and grossly abnormal L3-4 and L4-5 discs with concordant back pain. An MRI dated January 31, 2003, was read by Dr. Edgardo Angtuaco as normal at L2-3 and showing a grade 4 diffuse annular tear most likely degenerative at L3-4 and L4-5.

Thereafter, the respondents sought an additional second opinion, this time from Dr. Steven L. Cathey. Dr. Cathey's letter of July 29, 2003, indicated that the claimant's impairment was 6%, which the respondents have accepted. The claimant continued her treatment with Dr. Mocek who recommended medication, physical therapy, as well as pool therapy and massage therapy. She also underwent a two-level arthroscopic diskectomy and decompression in October, 2003, and lumbar facet joint nerve radiofrequency lesioning on April 29, 2005. On July 19, 2005, Dr. Collins rated the claimant's impairment at 11%.

The claimant contended that her anatomical impairment as a result of the July, 2000, injury is 11% to the body as a whole, rather than the 6% which has been accepted by the respondents. She further requested additional medical benefits for physical therapy and massage therapy, as well as an attorney's fee for controversion. Other possible issues were reserved.

The respondents contended that the 6% impairment rating is appropriate because the claimant's condition is a non-operated herniated disc and, further, that continuation of medical care is no longer reasonably necessary for this injury because the injury is old, the claimant did not

undergo surgery, she has been working on a full-time basis since the injury, and any need for such treatment is related to her degenerative arthritic condition, rather than the July, 2000, injury.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to her low back

3. The preponderance of the evidence shows that, as a result of her compensable injury, the claimant has sustained anatomical impairment in an amount equal to 11% to the body as a whole.

4. The preponderance of the evidence shows that the claimant is entitled to additional reasonably necessary medical and related services, specifically including her continued membership at the North Little Rock Athletic Club and massage therapy, as recommended by her treating physician.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

As to the permanent anatomical impairment suffered by the claimant as the result of her compensable injury, the preponderance of the evidence favors the claimant's position that she has sustained impairment of 11% to the body as a whole, consistent with the opinion of Dr. Collins. Dr. Cathey's opinion, rendered July 29, 2003, was not inappropriate at the time, since it preceded the claimant's two-level surgery, performed about three months later on October 27, 2003. Table 75 at page 3/113 of the AMA Guides to the Evaluation of Permanent Impairment (Fourth Ed.) provides for an impairment rating of 10% where the claimant has had a surgically treated disc lesion with residual pain and rigidity and adds 1% for each additional level of surgery. Here, the claimant underwent arthroscopic assisted lumbar discectomy and decompression at two levels and has continued to experience difficult symptoms, so that the 11% rating is appropriate.

The claimant has also requested additional medical benefits. The respondents have contended that medical care is no longer necessary for the injury as opposed to her degenerative conditions. Of course, under Ark. Code Ann. §11-9-508, the employer must provide such medical

care as may be reasonably necessary in connection with a compensable injury. Moreover, the employer is also required to take the claimant as he finds him.

The claimant's testimony was that her symptoms have continued and have required medication, exercise programs, and physical therapy, including water aerobics which have helped her. She stated that she discussed her therapy with Dr. Mocek and let him know that the water aerobics at the North Little Rock Athletic Club helped her out and was real good for her back. Initially, the respondents took care of her attendance at the athletic club for water aerobics and other exercises to strengthen her back, under the direction of the staff. She stated that she did not like taking medication because it interferes with her ability to work while water aerobics, instead of medication, enabled her to work. At the time of the hearing, she was a mental health worker at the Arkansas State Hospital and was expected to interact with patients and respond to doctors and nurses. She stated that she has had no other injuries affecting her back.

The medical record is generally consistent with the claimant's testimony concerning her continuing symptoms and the necessity for water aerobics as part of her rehabilitation. For example, on March 23, 2004, Dr. Mocek wrote that the claimant would try some pool therapy to continue the rehab process and noted pool therapy as part of the treatment plan. On April 21, 2004, Dr. Mocek wrote that the claimant's diagnosis was HNP L4-L5 for which he recommended physical therapy and that the claimant continue "to otherwise at NLR Athletic Club." On June 15, 2004, Dr. Mocek wrote that water therapy would be continued since the patient stated it really helps her. This was followed by a prescription indicating the claimant should continue water therapy for three months, which appears to have been his normal time between follow-up visits. On August 17, 2005, Dr. Mocek prescribed massage therapy, noting a diagnosis of HNP lumbar. The record also contains a

prescription dated April 21, 2005, indicating a diagnosis of HNP L4-5 and recommending physical therapy and that the claimant should continue to otherwise at North Little Rock Athletic Club. The respondents have declined to provide the massage therapy and have declined to authorize further activity at the North Little Rock Athletic Club.

Some of the claimant's physical problems may well pre-exist her on-the-job injury and may benefit from the medical care she has requested. However, the statute now directs the employer to provide medical care that is reasonably necessary "in connection with" a compensable injury instead of merely "for" a compensable injury. The existence of pre-existing or degenerative problems unrelated to the claimant's compensable injury is not a defense to the requirement that the claimant receive treatment in connection with the on-the-job injury, particularly where the symptoms have been continual and appear to be related to the injury suffered during the employment. Moreover, the type of care requested by the claimant has the additional benefit of enabling her to function in the workplace by lessening her need for pharmaceutical medication.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge