

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610657

SHERRY ALLEN

CLAIMANT

BIRCH TREE COMMUNITIES, INC.

RESPONDENT EMPLOYER

**INSURANCE COMPANY - STATE OF
PENNSYLVANIA**

RESPONDENT CARRIER

ORDER AND OPINION FILED APRIL 24, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on February 28, 2007. A prehearing conference was held on December 12, 2006 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable July 9, 2006, injury.
2. The compensation rates are \$219/164.

The claimant contends she is entitled to additional medical benefits, temporary total disability benefits from September 2, 2006, to a date to be determined and attorney's fees.

Respondents contend the claimant suffered a compensable injury for which she received medical treatment. Respondents contend the claimant returned to work and

worked until she was involved in a car accident on September 2, 2006 and it was then that she began missing work. Respondents controverted the claim on September 25, 2006. Respondents are contending the claimant's current problems are the result of an independent intervening incident and to pre-existing conditions.

ISSUES TO BE LITIGATED

1. Additional medical benefits.
2. Temporary total disability benefits.
3. Attorney's fees.

From a review of 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable July 9, 2006, injury.
2. The compensation rates are \$219/164.
3. The claimant has proven by a preponderance of the evidence that the medical treatment she has pursued is both reasonable and necessary.
4. Respondents remain responsible for all reasonable and necessary medical benefits.

5. The claimant has proven by a preponderance of the evidence that she remained in her healing period and totally unable to earn wages from September 12, 2006, through a date to be determined.

6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 41 years old, worked for the respondent employer as a certified mental care professional. The claimant worked with patients with mental issues and helped prepare them for the outside world. She worked with exercise groups and teaching budgeting and other such things. Heather King was the claimant's immediate supervisor. On July 9, 2006, the claimant was walking with a resident who was 360 pounds and 6 feet, 4 inches, tall and he quickly put his arm behind the claimant's waist and pulled her neck over and kissed her. The claimant landed on the ground and began having neck problems shortly thereafter. The claimant went to the emergency room the day of the incident. Between July and September 2006, the claimant testified the pain was getting worse in her neck and she was limited in what she could do at work.

On September 2, 2006, the claimant had a blowout while driving and her car went off an embankment and bent the front of her car into the radiator. Respondents controverted the claim as of September 2, 2006.

The claimant confirmed that she had cervical surgery on August 5, 2002, at C5-6 and that she fell off her porch at home on September 17, 2002, and experienced increased pain. The claimant continued to seek medical treatment in 2002 for neck pain and again sought medical treatment in September 2003 for neck pain after her son put her in a headlock. The claimant sought emergency room treatment in March 2005 for neck pain after helping a friend move. She complained of neck pain and spasms. The claimant confirmed that between her surgery in 2002 and the July 2006 incident, she continued to have prescriptions filled for muscle relaxers and pain medication. The claimant testified her cervical surgery in 2002 was successful and her need for additional medical treatment was mostly related to stress.

The claimant testified that she sought emergency room treatment for her neck on August 30, 2006, several days before the vehicle accident. The claimant testified that she could not turn her neck from side to side. The claimant did not seek any medical attention after the September 2, 2006, car accident. In fact, the first time she went back to the doctor was September 12, 2006, when she was taken off work. The claimant had surgery on November 30, 2006.

Kenneth Allen, ex-husband of the claimant, testified that he sees the claimant daily. Mr. Allen testified that before the July 9, 2006, work incident, the claimant was fine and was exercising and competing in field events at her employer. However, after the July 2006 incident, Mr. Allen testified that he helped the claimant cook and clean and drive the children around because she was in pain. Mr. Allen testified that all the claimant could do following the July 2006 work incident was work and come home and put heating pads on her neck and take hot baths. Mr. Allen testified the September 2,

2006, car accident was a blowout and was not a collision. He testified the air bag did not deploy. Mr. Allen testified that the only work done on the car repair was changing a tire.

Marsha Ogden, assistant human resource director for the respondent employer, testified that the claimant returned to work on July 13, 2006, following the July 9, 2006, incident. Ms. Ogden testified that the claimant already had two of those days scheduled to be off; therefore, only one day off was related to the injury. Ms. Ogden testified the claimant returned to her normal duties following the incident and worked until September 2, 2006. Ms. Ogden stated that the claimant called in after the car accident and advised she did not have transportation.

Ms. Ogden testified under cross examination that she works in Benton and the claimant works in Melbourne; therefore, she never saw the claimant following the work injury. The claimant testified that she spoke directly with her immediate supervisor in Melbourne and she advised her to go back to see Dr. Fran Duke because of her neck pain. The medical records document the claimant saw Dr. Duke on August 2, 2006, for neck pain and then went to the emergency room on August 30, 2006, for neck pain. Only plain x-rays were performed on the claimant's neck until September 12, 2006, when a MRI was ordered.

The claimant first requests additional medical benefits for her compensable July 9, 2006, injury. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2005). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary.

Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

In the present case, I find the claimant has proven by a preponderance of the evidence that the additional medical treatment she sought was both reasonable and necessary. Respondents controverted the claim based on the claimant being involved in a car accident on September 2, 2006, and because of her pre-existing condition. Whether there is a causal connection between the injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. *Oak Grove Lumber v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998). The claimant presented the only testimony about the car incident where she stated that she had a tire blowout and went off an embankment and bent the front of her car. The air bag did not deploy nor did she seek any medical treatment following the September 2, 2006, car accident. There is no medical evidence in the record relating to a motor vehicle incident. In fact, the claimant testified and presented documentary evidence to reveal that she had sought medical treatment on August 2, 2006, and again at the emergency room on August 30, 2006, for neck pain related to her work injury.

On August 2, 2006, Dr. Duke's notes indicate muscle spasms and additional medication was prescribed, to include Hydrocod and Ultram. Additional medication was

prescribed on August 23, 2006, and Soma for muscle spasms was prescribed on August 31, 2006. The claimant was seen at the Community Medical Center of Izard County at the emergency room on August 30, 2006, with a complaint of neck pain since the July injury. She was given some medication and a suggestion she follow up with her family doctor. The next medical report in evidence is the September 12, 2006, visit with the claimant's family doctor, Dr. Fran Duke, and she was taken off work and a MRI was ordered. All these medical records relate to a work injury with no mention of a vehicle accident.

The claimant was referred to Dr. Gregory Ricca and his October 26, 2006, report discusses his review of the claimant's two MRIs:

STUDIES: I reviewed the Cervical MRI done at White River Medical Center on 9/15/6 and compared it to a cervical CT done at White River on 9/17/2. This shows a generous broad based HNP at C4-5 with effacement of the Cord. This is larger than the disc abnormality at C4-5 seen on a cervical CT done at White River on 9/17/2. There is an anterior plate (Atlantis) and ACDF at C5-6. The MRI shows the HNP at C4-5 but the axial images were poor because of artifact from the anterior plate. (Cl. Exh. No. 1, p. 29.)

Dr. Fran Duke's September 12, 2006, letter reveals that she has been treating the claimant since the July 9, 2006, work injury for constant neck pain and her condition has not improved. Dr. Duke referred the claimant to Dr. Ricca for further evaluation. Dr. Ricca did perform fusion surgery on November 30, 2006, for a herniated disc at C4-5. The operative report was the most recent medical report in evidence; however, the claimant testified that she has received relief since the surgery and now feels capable of working. Respondents have related the claimant's need for further treatment to the claimant's car accident; however, with the claimant receiving no medical attention

following the accident and the claimant testifying that medical treatment was not warranted, I find respondents' theory mere speculation and conjecture. Speculation and conjecture cannot substitute for credible evidence. *Dena Const. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1980). I found the claimant's testimony to be the only credible evidence presented concerning the vehicle accident. The medical evidence seemed to corroborate her testimony.

Respondents also contend the claimant's need for treatment is due to her pre-existing condition. It is well settled that an employer takes an employee as he finds him and employment circumstances that aggravate pre-existing conditions are compensable. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The claimant readily admitted she had cervical surgery in 2002 and it was successful and that she had occasions thereafter where she sought some medical care for her neck. It is undisputed that the claimant began her employment with the respondent in October 2005 and worked continuously until she was taken off work September 12, 2006. It is also undisputed that the claimant was involved in an incident at work on July 9, 2006, involving a patient and that medical care was sought for neck pain immediately after the incident as well as some additional follow-up treatment. The claimant's current need for treatment is documented in her medical evidence as arising after her July 9, 2006, injury.

The claimant next contends that she is entitled to temporary total disability benefits from September 2, 2006, to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and

be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, I find the claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from September 12, 2006, through a date to be determined. The medical records document that Dr. Fran Duke took the claimant off work beginning September 12, 2006. The claimant underwent fusion surgery on November 30, 2006, by Dr. Gregory Ricca and the operative report was the most recent report introduced into evidence. The claimant was questioned at the hearing regarding whether she had been released to return to work and she stated that Dr. Ricca had not released her. During cross examination, the claimant was asked if she felt like she could return to work today and she responded she thought she could and she confirmed that she felt like she was doing good at the time of her deposition on January 17, 2007; however, feeling good and being released by your treating physician are not the same. There is no medical document releasing the claimant to return to work. The "healing period" continues until the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve that condition. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

ORDER

The claimant has proven by a preponderance of the evidence that the medical treatment she has pursued is both reasonable and necessary. Respondents remain

responsible for all reasonable and necessary medical benefits. The claimant has proven by a preponderance of the evidence that she remained in her healing period and totally unable to earn wages from September 12, 2006, through a date to be determined.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**