

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F611959

PATRICIA BALLI, Employee	CLAIMANT
MCKEE FOODS CORPORATION, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT

OPINION FILED JULY 12, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On June 6, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 12, 2007, and a pre-hearing order was filed on April 16, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to her head on July 25, 2006.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$429.00 for total disability benefits and \$321.00 for permanent partial disability benefits.
5. The respondent paid temporary total disability benefits from October 30, 2006 through November 13, 2006.

6. The respondent paid medical through October 17, 2006.

At the time of the hearing the parties agreed to stipulate that respondent last paid for medical treatment on December 11, 2006 as opposed to October 17, 2006.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional temporary total disability and medical benefits.

2. Attorney fee.

The claimant contends that as a result of her compensable injury she is entitled to additional temporary total disability and medical benefits, as well as an attorney fee.

The respondents contend they accepted this claim as compensable and paid for all physical injuries due to the claimant's fall which injured her head. The claimant subsequently was diagnosed with vertigo and there have been no measurable and objective findings to support this diagnosis. The respondents contend they have paid all benefits to which the claimant is entitled.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 12, 2007, and contained in a pre-hearing order filed April 16, 2007, are hereby accepted as fact with the exception of stipulation number 6 regarding the date last medical treatment was paid.

2. The parties' stipulation that respondent last paid medical treatment on December 11, 2006 is also hereby accepted as fact.

3. Claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of her compensable injury.

FACTUAL BACKGROUND

The claimant is a 53-year-old woman who began working at the respondent's plant in Gentry in August 1982. On July 25, 2006 the claimant was working as a wrapper operator, operating a machine that wraps Little Debbie snacks. Claimant testified that her job responsibilities required her to load cellophane, thread it into a machine, and make sure that the machine was clean enough to run. Claimant also testified that she was responsible for taking bad cakes off of the production line.

On July 25, 2006, the claimant noticed a bad cake about to go into the wrapping machine and as she got up from her chair to remove it from the line, her chair fell apart and she fell to the floor striking her head on the concrete. Claimant was taken to Siloam Springs Hospital where she was diagnosed as suffering from several ailments, including a concussion and a scalp laceration which required four staples to close. After claimant's treatment at the hospital she was sent by the respondent to Max Beasley, a nurse practitioner. Claimant was initially evaluated by Beasley on July 27, 2006 and his medical report of that date indicates that claimant was complaining of pain in her head, neck, and right shoulder. He also noted that the claimant complained of dizziness or vertigo when her neck was rotated in either direction. He also noted that claimant ambulated slowly and complains of dizziness if she walks too quickly. Claimant was provided medication, range of motion exercises, and was taken off work due to dizziness and positional vertigo.

At the time of claimant's next visit with Beasley on July 31, 2006, she was released

to return to work but was advised to avoid “safety sensitive duties until re-check.” Claimant testified that she returned to work for the respondent on light duty shredding paper and she continued to perform this job until it ended. She has not worked since that time.

On August 3, 2006, Beasley removed the staples from claimant’s head and noted that she still suffered from dizziness when she changed positions too quickly. Claimant was advised to take her medication as needed and to continue to work with the same restrictions. Subsequent to that date claimant was also evaluated by Dr. Vandergriff in the same clinic with Beasley and again by Beasley on August 17, 2006. At the time of that visit Beasley noted that claimant continued to have problems with vertigo and indicated that if claimant did not improve at the time of her follow-up visit in two weeks claimant might need to see a neurologist.

When claimant’s condition did not improve she was referred to Dr. Steven Moon, neurologist. In a report dated September 18, 2006 Dr. Moon noted that since the time of claimant’s injury she has had positional vertigo with associated nausea. Dr. Moon ordered an MRI scan of the claimant’s brain to rule out any underlying structural abnormality. He also indicated that claimant would need a vestibular rehabilitation program. In a report dated October 17, 2006, Dr. Moon noted that the claimant’s MRI scan of the brain was unremarkable other than a few chronic small vessel ischemic changes. Dr. Moon referred claimant to Dr. Mellon, an ENT, for further evaluation of probable post-traumatic vertigo. Instead of Dr. Mellon, it appears that claimant was evaluated and treated by Dr. Marsh. Dr. Marsh’s medical reports indicate that he referred claimant to Health South for vestibular rehabilitation. In a letter dated December 18, 2006 Dr. Marsh indicated that his current diagnosis of claimant’s condition was benign positional vertigo. It was his opinion that claimant’s vertigo was related to her work-related injury.

The last medical report from Dr. Marsh is dated May 14, 2007, and it followed

additional testing including an EMG and ABR. Dr. Marsh's handwritten notes in that report indicate "suspect functional disorder." (Emphasis supplied.)

Respondent accepted as compensable an injury to claimant's head on July 25, 2006. Respondent paid some temporary total disability benefits and medical benefits through December 11, 2006. Claimant has filed this claim contending that she is entitled to additional medical treatment and temporary total disability benefits as a result of her compensable injury.

ADJUDICATION

The initial issue for consideration involves claimant's contention that she is entitled to additional medical treatment for her compensable head injury. Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for her compensable injury. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact to be determined by the Commission. *White Consolidated Industries v. Galloway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury.

The parties have stipulated that claimant suffered a compensable injury to her head on July 25, 2006. A review of the medical reports indicates that claimant was diagnosed as suffering from a concussion and that she had a scalp laceration which required four staples to close. Significantly, the medical reports also indicate that from claimant's initial medical treatment at the Siloam Springs Hospital on July 25, 2006 she complained of dizziness. In fact, while claimant had other complaints involving her head, neck, and right

shoulder, it is the complaint of dizziness which has continued throughout her medical treatment. Claimant was sent by the respondent to Max Beasley, a nurse practitioner. Beasley diagnosed claimant's condition as vertigo and attempted to treat it with medication and avoidance of certain activities. When this treatment was not successful, Beasley referred claimant to Dr. Steven Moon, neurologist. Dr. Moon likewise diagnosed claimant as suffering from positional vertigo and ordered an MRI study. When the MRI of claimant's brain returned essentially normal Dr. Moon referred claimant to an ENT physician for further evaluation. The ENT physician was Dr. Marsh who referred claimant to Health South for vestibular rehabilitation.

In a letter dated December 18, 2006, Dr. Marsh in response to an inquiry from the carrier indicated that claimant's current diagnosis was benign positional vertigo. Dr. Marsh also stated that the claimant's vertigo was related to her work related injury. On January 12, 2007, a letter was written to Dr. Marsh asking what diagnostic testing was used to confirm the diagnosis of benign positional vertigo. Dr. Marsh in a handwritten note on that letter indicated that the diagnosis resulted from claimant's history and no further diagnostic tests would be performed unless claimant's symptoms did not resolve.

Apparently, claimant's symptoms did not resolve and Dr. Marsh ordered additional testing including an EMG and ABR. In a medical report dated May 14, 2007, Dr. Marsh in handwritten notes indicated that the testing did not support a diagnosis of benign positional vertigo but instead Dr. Marsh indicated that he would "suspect functional disorder." (Emphasis supplied.)

In this particular case there is no evidence that claimant suffered from any dizziness prior to her head injury in July 2006. However, at the time of claimant's initial medical treatment at the hospital on that date claimant was complaining of dizziness. The medical records contain a history of these same complaints since that time. The medical records indicate that claimant's treating physicians believe that this condition is a result of her injury

in July 2006. Additional testing which has recently been performed at the request of Dr. Marsh indicates that claimant's condition may be the result of a functional disorder.

Based upon the evidence presented, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury. In this particular case, claimant suffered an injury to her head when she struck it against a concrete floor on July 25, 2006. Claimant was taken to the hospital where she was diagnosed as suffering from a concussion and a scalp laceration which required four staples to close. Since the time of that initial medical treatment the claimant has had complaints of dizziness which her treating physicians have attempted to evaluate and treat. There is no indication that claimant suffered from any dizziness prior to her compensable injury, and the medical records indicate that claimant's treating physicians believe that her current symptoms are causally related to her injury.

While respondent contends that there are no objective medical findings establishing a diagnosis of positional vertigo, I note that according to Dr. Marsh's handwritten note of May 14, 2007 he no longer believes that claimant suffers from positional vertigo, but instead believes claimant's dizziness is the result of a functional disorder. Furthermore, the claimant had an objective finding of injury in the form of a laceration to her scalp which required four stitches to close. This is an objective finding and according to claimant's treating physicians resulted in the dizziness from which she now suffers.

In short, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury. This includes continued medical treatment from Dr. Marsh.

Claimant also contends that she is entitled to additional temporary total disability benefits as a result of her compensable injury. In order to be entitled to temporary total disability benefits for an unscheduled injury claimant has the burden of proving by a

preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Here, even though claimant has remained within her healing period since the time of her compensable head injury, I find that claimant has failed to prove by a preponderance of the evidence that she has suffered a total incapacity to earn wages.

After claimant was initially taken off work by the physicians at the Siloam Springs Hospital and Max Beasley, she was released to return to work with restrictions by Beasley on July 31, 2006. Claimant returned to work for respondent shredding paper until that job was no longer available. However, claimant's treating physicians continued to indicate that claimant could work as long as she did not work around heavy machinery or turn her head a lot. This was the opinion of Beasley and Dr. Moon. In a letter dated December 18, 2006, Dr. Marsh specifically addressed the claimant's ability to work when he stated that claimant was capable of working with the restriction that she should not operate hazardous machinery. There is no indication that claimant has been completely taken off work by her treating physicians.

Thus, while claimant may have remained within her healing period for her compensable injury, claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated from earning wages. Here, all treating physicians subsequent to July 31, 2006 have opined that claimant is capable of working as long as she does not operate heavy or hazardous machinery. This opinion was most recently confirmed by Dr. Marsh in a letter dated December 18, 2006. Accordingly, claimant is not entitled to temporary total disability benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the

amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits for her compensable injury.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter’s charge for preparing the hearing transcript in the amount of \$318.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE