

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606132

CHARLOTTE DOWNEY	CLAIMANT
BEAVER DAM STORE, INC.	RESPONDENT
ST. PAUL TRAVELERS, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 16, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

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

Respondents represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on November 20, 2006, in Springdale, Arkansas. The deposition of Dr. Kelly Danks was taken on October 24, 2006, and has been admitted as Respondents' Exhibit No. 1. The deposition of Dr. John Unruh was taken on November 16, 2006, and has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on September 19, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, and by agreement of the parties, the additional issue of liability for the expense incurred for services rendered to the claimant by and at the direction of Dr. John Unruh was included. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On November 1, 2004, the relationship of employee-employer-carrier existed between the parties.
3. The appropriate weekly compensation benefits are \$308.00 for total disability and \$231.00 for permanent partial disability.
4. On November 1, 2004, the claimant sustained a compensable injury to her lower back.
5. All medical expenses have been paid through the initial visit by Dr. Raben.
6. No temporary total disability has been paid.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services by Dr. Raben.
2. The claimant's entitlement to temporary total disability benefits from September 1, 2005 through a date yet to be determined.
3. Appropriate attorney's fees.
4. Liability for the expenses incurred for services by Dr. John Unruh, including whether such services were authorized."

In regard to these issues, the claimant contends:

“Claimant was injured on November 1, 2004. Her lower back was injured when she was stocking crates of pop.”

In regard to these issues, the respondents contend:

“Respondents contend that they have paid appropriate benefits and that the claimant’s continuing back problems and need for treatment are related to a degenerative condition and not the compensable injury.”

DISCUSSION

I. LIABILITY FOR THE EXPENSE INCURRED FOR MEDICAL SERVICES PROVIDED TO THE CLAIMANT BY DR. JOHN UNRUH

The first issue to be addressed concerns liability for the expense of medical services provided to the claimant provided by Dr. John Unruh for her lower back and lower extremity complaints. In order for the respondents to be liable for the expense of these services, the claimant must prove that such medical services represented “reasonably necessary medical services” for her admittedly compensable injury. The respondents are also excused from liability for such medical services, if such services represent “unauthorized” medical services, under Ark. Code Ann. §11-9-514.

In order for medical services to be “reasonably necessary”, such services must first be shown to have been necessitated by or connected with the compensable injury. Secondly, it must be proven that these medical services had a reasonable expectation of accomplishing the purpose or goal for which they were rendered, at the time the services were provided. This purpose or goal is not limited to treatment of the physical damage caused by the

compensable injuries, but may extend to other matters such as the accurate diagnosis of the nature and extent of the injury, maintaining the level of healing achieved, alleviating or reducing chronic symptoms, etc. It is also immaterial that the medical services might provide benefit for a concurrent non employment related condition or malady, so long as such services are also required to treat the compensable injury.

After consideration of the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the medical services provided to the claimant by and at the direction of Dr. Unruh were necessitated by or connected with the claimant's compensable lumbar injury. It is my further opinion that the greater weight of the credible evidence establishes that these medical services not only had a reasonable expectation of success, at the time they were rendered. In fact, these services appear to have actually accomplish their intended purpose.

From his deposition, it is apparent that Dr. Unruh was of the opinion that the various chiropractic services he provided the claimant were reasonable and necessary to accurately diagnose the nature and extent of her condition, to appropriately monitor her condition, to improve or resolve the actual physical damage caused by the compensable injury, and to alleviate or reduce the actual symptoms and distress this injury was causing. Dr. Unruh is clearly a chiropractic specialist with particular expertise in the area of the diagnosis and treatment of back injuries. According to his

reports and deposition, together with the claimant's testimony, it is further apparent that the services he provided the claimant actually accomplished these intended purposes. I would further note that Dr. Kelly Danks, a neurosurgeon and specialist in the diagnosis and treatment of back injuries and conditions, has also indicated in his reports and deposition that conservative treatment modalities, such as those employed by Dr. Unruh, would be medically appropriate for the claimant's compensable lumbar injury.

However, the respondents are not liable for the expense of even "reasonably necessary" medical services, if such services represent "unauthorized" medical services under Ark. Code Ann. §11-9-514. Clearly, at the time the claimant consulted Dr. Unruh, she already had an authorized treating physician (in fact, it appears that she had several authorized treating physicians). When the claimant consulted Dr. Unruh, she did so without an authorization from either the respondents or this Commission. If it is further apparent that, at that time, the claimant was actually being provided with appropriate medical services by an authorized provider, Dr. Charles McNeal.

The claimant testified that she desired to be treated by Dr. Unruh (rather than Dr. McNeal), because Dr. Unruh had a piece of equipment that Dr. McNeal did not have. She stated that she had previously been treated in Florida with this type of equipment and that it had proved beneficial. Therefore, she asked Dr. McNeal to "refer" her to Dr. Unruh. Dr. McNeal's records show that the claimant called his office and specifically requested a referral to

Dr. Unruh stating that her “attorney” wanted the referral from Dr. McNeal to Dr. Unruh.

Regardless of whether the claimant or her attorney requested the “referral”, the claimant’s change of physicians from Dr. McNeal to Dr. Unruh would not constitute a valid referral for the purposes of Ark. Code Ann. §11-9-514. Such a transfer of the claimant’s care was not the result of a decision made by her authorized treating medical provider for sound medical purposes. Rather, it would be merely an acquiescence by Dr. McNeal in her request.

Finally, the evidence presented fails to show that the services provided the claimant by Dr. Unruh would constitute “emergency medical services” within the meaning of Ark. Code Ann. §11-9-514. There is absolutely no showing of urgency in regard to the services of Dr. Unruh. The claimant’s difficulties have become chronic long before she consulted Dr. Unruh. It would further appear that both Dr. Danks and Dr. McNeal, authorized competent medical specialists, were readily available to the claimant for appropriate medical care.

Therefore, I find that the medical services provided to the claimant by and at the direction of Dr. Unruh represented “unauthorized” medical services within the meaning of Ark. Code Ann. §11-9-514. Pursuant to subsection (b) of this section, liability for the expense of this treatment cannot be imposed upon the respondents herein.

II. LIABILITY FOR ADDITIONAL MEDICAL SERVICES BY DR. CYRIL RABEN

The next issue to be addressed concerns liability for the expense incurred for medical services provided to the claimant by and at the direction of Dr. Cyril Raben, following his initial evaluation of August 28, 2006. Unlike Dr. Unruh, Dr. Raben is clearly an authorized treating physician, as the claimant obtained an Order from this Commission granting a change of physicians to Dr. Raben. However, the claimant must still prove that the medical services provided by Dr. Raben, after his initial visit, represent “reasonably necessary medical services” within the meaning of Ark. Code Ann. §11-9-508.

As previously noted in this Opinion, “reasonably necessary medical services” must be shown to have been necessitated by or connected with the compensable injury. Further, such services must have a reasonable expectation of accomplishing their intended purpose or goal, at the time the services were rendered.

A review of the reports and records of Dr. Raben show that the subsequent services he provided consisted of oral medication (analgesics and anti-inflammatories), physical therapy, and a TENS unit. He also scheduled the claimant for routine follow up or monitoring.

These particular medical services are commonly recognized and employed by the general medical community for the treatment of chronic back complaints from injuries such as the claimant experienced. Dr. Raben is a board certified orthopaedic surgeon with particular expertise in the area of spinal injuries and

conditions. He would not have recommended these particular treatment modalities, unless he believed they had a reasonable expectation of accomplishing their intended purpose of reducing or alleviating the claimant's chronic symptoms. The records of Dr. Raben and the claimant's testimony indicate that these conservative treatment modalities have to some extent actually accomplished their intended purpose of reducing the claimant's chronic back symptoms.

After consideration of the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that the medical services provided and recommended for her lower back difficulties by Dr. Cyril Raben, after August 28, 2006, represent "reasonably necessary medical services" for her compensable lumbar injury. Thus, the expense of these services is the liability of the respondents herein, subject to the Commission's medical fee schedule.

III. TEMPORARY TOTAL DISABILITY BENEFITS

The final issue to be addressed concerns the claimant's entitlement to temporary total disability benefits for the period beginning September 1, 2005, and continuing through a date yet to be determined. In order to be entitled to such benefits, the claimant must prove by the greater weight of the credible evidence that she continued within her healing period from the effects of her compensable injury, and also continued to be rendered totally disabled as a result of this compensable injury from September 1, 2005 through some date in the future.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period from the effects of the compensable injury continues until the underlying physical damage that was caused by the compensable injury has resolved or at least stabilized at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement. Once this underlying physical damage has resolved or at least stabilized, the mere continuation of chronic symptoms is not sufficient, in and of itself, to extend the healing period.

The medical evidence presented shows that the claimant was initially treated for her compensable back injury by Dr. McNeal and by Dr. Gregory Kresse. Tests requested by Dr. Kresse, in the form of x-rays and an MRI study showed various defects involving the claimant's lumbar spine. These defects involved mild to moderate osteoarthritic changes of the vertebral facets of the L2, L3, L4, L5, and S1 vertebral bodies. There was also mild arthritic changes noted in the sacroiliac. Mild bulging was noted in regard to the L3-4 intervertebral discs and some bulging with a mild disc protrusion was noted involving the L4-5 intervertebral discs. The remainder of the claimant's lumbar thoracic and intervertebral discs were observed to be normal. No impingement was observed in either the exiting nerve roots or the spinal cord. There is no medical evidence introduced to indicate the type or duration of the treatment by Dr. Kresse.

The reports and records of Dr. Charles McNeal, a chiropractic physician, show that he provided the claimant with continuous chiropractic treatment from January 6, 2005 through January 30, 2006. This treatment appears to have consisted of chiropractic manipulation, the application of hot and cold packs, the use of electrical stimulation, and traction. He also appears to have employed these treatment modalities on both the claimant's lumbar and thoracic spines. In total, he treated the claimant on at least sixty separate occasions.

On February 22, 2006, Dr. Scott Rubin, a chiropractic physician in Florida, undertook the claimant's treatment. He provided the claimant with various conservative treatment modalities for her lumbar difficulties, as well as for cervical and thoracic difficulties. He further appears to have treated the claimant for symptoms and complaints involving her shoulders and hips. This period of treatment appears to have run from February 22, 2006 through April 17, 2006, consisting of some seventeen visits.

The claimant then returned to Dr. McNeal on May 1, 2006. On May 5, 2006, the claimant was seen by Dr. Kelly R. Danks, a neurosurgeon. Apparently this evaluation was at the request of the respondents. Dr. Danks, in his report and deposition, attributed the claimant's chronic lumbar and left lower extremity complaints to a combination of the degenerative changes in her lumbar spine and the bulging of the L3-4 disc, the latter of which he attributed to the effects of the claimant's compensable injury of November of

2004. It was Dr. Danks' opinion that the claimant required no aggressive medical treatment, such as surgery. But only needed conservative treatment modalities to manage her chronic symptoms (primarily, in the form of pain). It was his final opinion that these treatment modalities could be adequately provided by her chiropractic physician and the use of over-the-counter pain medication.

The claimant then sought the services of Dr. Unruh. She appears to have been seen on twenty-four occasions between July 22, 2006 and October 31, 2006. She also apparently sought the services of Dr. McNeal on four more occasions, between September 14, 2006 and October 12, 2006.

As previously noted, the claimant came under the care of Dr. Cyril Raben on August 28, 2006. In his follow up visit of September 11, 2006, Dr. Raben expressed the opinion that the claimant was not a candidate for discography or other testing and was not a candidate for surgery or any aggressive treatment modalities. It was his opinion that the only treatment to claimant required consisted of oral anti-inflammatories, anti-spasmodics, pain relievers, and physical therapy. In his final report of November 15, 2006, Dr. Raben did indicate that it was his opinion that the claimant had not reached "maximum medical improvement".

After consideration of all the evidence presented, particularly the medical evidence, I find that the greater weight of the credible evidence fails to show that the claimant's healing period from the effects of the compensable injury continued beyond

May 5, 2006. On that date, Dr. Danks concluded that any damage done to the claimant's lumbar spine by the compensable injury of November 1, 2004, essentially the protrusion or bulging of the L3-4 disc, could not be improved or reduced by aggressive medical treatment such as surgery. Although Dr. Unruh indicated that the damage to this disc could be improved by the decompression procedures he performed (if provided over a six-week period), these exact procedures have previously been provided the claimant over at least a six-week period by Dr. Rubin in Florida. Thus, if these procedures would have been of benefit in improving or reducing the damage to the disc, this would have been accomplished prior to Dr. Danks' evaluation on May 5, 2006.

A review of the medical evidence in the claimant's testimony indicates that her symptoms and difficulties have been at a stable chronic state since May 5, 2006. A review of the medical reflects that all of the treatment modalities provided to the claimant, after May 5, 2006, have been directed toward the management of her chronic pain complaints and not intended to improve or reduce the actual physical damage causing such complaints. This includes the treatment prescribed by Dr. Raben. While such continued treatment may be "reasonably necessary", its continuation, in and of itself, is not sufficient to extend the claimant's healing period. Clearly, if the various treatment modalities, particularly in the form of chiropractic services, were going to resolve or improve the underlying physical damage caused by the claimant's compensable injury, these services should have long since have done so. It is

simply my opinion that the greater weight of the credible evidence proves that the claimant's underlying physical damage caused by her compensable injury had stabilized by at least May 5, 2006. Thus, she would not be entitled to any temporary total disability benefits after that date.

The claimant must next show that during the period of September 1, 2005, through May 5, 2006, her compensable injury rendered her unable to perform any form of regular gainful employment for which she would otherwise be qualified. In this regard, the evidence shows that the claimant is 59 years old. Although she did not indicate the level of her education, her appearance at the hearing would indicate at least a high school education. She further appeared to be personable and of at least average intelligence. Her testimony indicated that she has considerable experience in operating or managing a convenience store. Her previous employment experience would this include managerial as well as clerical skills.

Based upon the medical evidence and the nature of the claimant's injury, her physical restrictions and limitations would prevent her from heavy lifting, frequent or repetitive bending or twisting at the waist, and prolonged periods of sitting or standing. Based upon these restrictions, it would appear that the claimant would be physically capable of many sales or clerical positions, particularly on a managerial level. In fact, the record shows that the claimant continued to manage her business where the injury occurred, for a considerable period of time after the

injury. This would also be at a time where the claimant's injury should have been the most debilitating. Such employments exist in sufficient number in the area of the claimant's residence to provide her with a reasonable expectation of employment, if she were so inclined.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that her compensable injury of November 1, 2004, rendered her totally disabled from performing regular gainful employment during the period of September 1, 2005 through a date yet to be determined. The claimant's failure to prove this necessary requirement prevents her from being entitled to the temporary total disability benefits she now seeks.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On November 1, 2004, the relationship of employee-employer existed between the parties.

3. On November 1, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$308.00 for total disability and \$231.00 for permanent partial disability, when and if such benefits are appropriate.

4. On November 1, 2004, the claimant sustained a compensable injury to her lower back or lumbar spine. This compensable injury was in the form of a bulge or protrusion involving the L3-4 intervertebral disc.

5. With the exception of the expenses of Dr. Unruh, all medical expenses have been paid through the initial visit with Dr. Raben on August 28, 2006.

6. The medical services rendered to the claimant by and at the direction of Dr. Unruh, represent "unauthorized medical services" within the meaning of Ark. Code Ann. §11-9-514. Pursuant to the provisions of this subsection, the respondents are not liable for these expenses.

7. The medical services provided and recommended to the claimant for her low back difficulties by and at the direction of Dr. Cyril Raben, on and after August 28, 2006, represent reasonably necessary medical services for the claimant's compensable injury. The respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

8. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to any temporary total disability benefits, as of the present date. Specifically, the claimant has failed to prove by the greater weight of the credible evidence that she has been rendered totally disabled by the compensable injury from performing all forms of regular gainful employment for which she would otherwise be qualified.

9. The respondents have controverted the claimant's entitlement to the payment of the expenses incurred for the services of Dr. Unruh, the claimant's entitlement to payment for the services of Dr. Raben (after August 28, 2006), and the claimant's entitlement to any temporary total disability benefits.

10. As no controverted benefits have herein been awarded to the claimant, no controverted attorney's fee can be awarded to the claimant's attorney.

ORDER

The respondents shall be liable for the reasonably necessary medical services provided to the claimant for her compensable lumbar injury by and at the direction of Dr. Cyril Raben on and after August 28, 2006. Such liability is limited by the medical fee schedule established by this Commission.

The respondents shall not be liable for any expense incurred as the result of medical services rendered to the claimant by and at the direction of Dr. Unruh, and the claimant's request for such benefits must be denied and dismissed.

For the reasons heretofore stated in this Opinion, the claimant's request for temporary total disability benefits for September 1, 2005 through a date yet to be determined must be and hereby is denied and dismissed.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE

February 16, 2007

Ms. Evelyn Brooks
Attorney at Law
P. O. Box 728
Fayetteville, AR 72702

Mr. Phillip Cuffman
Travelers Insurance Co.
10810 Executive Center Dr. Ste. 215
Little Rock, AR 72211

Re: Charlotte Downey v. Beaver Dam Store
WCC File: F606132

Dear Ms. Brooks and Mr. Cuffman:

Enclosed please find a copy of an Opinion rendered this date,
together with a copy of Appeal procedure.

Yours truly,

MICHAEL L. ELLIG
Administrative Law Judge

MLE:dg
Enclosure
Certified Mail
Return Receipt Requested
C:
Charlotte Downey
P O Box 658
Eureka Springs, AR 72632