

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513625

TRACY GANN, Employee	CLAIMANT
RUSSELL CELLULAR, Employer	RESPONDENT
CINCINNATI INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED APRIL 3, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 12, 2007, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 17, 2007, and a pre-hearing order was filed on January 18, 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 stipulation:

1. The prior opinion of April 24, 2006 is final.

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

1. Claimant's entitlement to a lump sum payment of her 10% impairment rating.
2. Claimant's entitlement to temporary total disability benefits from October 13, 2006 through a date yet to be determined.
3. Medical treatment by Dr. Boxell.
4. Attorney fee.

The claimant contends she is entitled to a lump sum payment of her 10% impairment rating, payment of temporary total disability benefits from October 13, 2006

through a date yet to be determined, medical treatment provided by Dr. Boxell, and an attorney fee.

The respondents contend the claimant is not entitled to a lump sum or any additional workers' compensation benefits.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The parties' stipulation that the prior opinion filed on April 24, 2006 is final is hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to medical treatment from Dr. Boxell. This includes surgery which has previously been performed by Dr. Boxell.
3. Claimant is entitled to temporary total disability benefits beginning October 18, 2006 and continuing through a date yet to be determined.
4. Claimant is entitled to a lump sum payment of the remainder of her 10 percent impairment rating.
5. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

This claim was the subject of a prior hearing conducted on April 3, 2006. In an opinion filed April 24, 2006, I found that claimant had met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back while

employed by the respondent; that she was entitled to payment of all reasonable and necessary medical treatment; and that she was entitled to certain periods of temporary total and/or temporary partial disability benefits. That opinion was not appealed by either party and the parties have stipulated that it is now final.

Claimant's injury occurred on November 16, 2005, when she along with two other employees of the respondent were traveling to a mandatory meeting in Springfield, Missouri, and their vehicle was struck from behind by another vehicle. After receiving some initial medical treatment at Summit Medical Center, the claimant sought medical treatment from her family physician, Dr. White, who ordered an MRI scan which revealed a small herniation at the L1 level. Claimant eventually came under the care of Dr. Johnson, a neurosurgeon, who performed surgery on claimant's back in June of 2006. Following her surgery the claimant returned to work for the respondent in July with a gradual increase in her working hours. Claimant was last seen by Dr. Johnson on September 12, 2006, at which time he released her and assigned a permanent physical impairment rating in an amount equal to 10% to the body as a whole.

Claimant testified that following this last visit with Dr. Johnson she continued to have pain and attempted to return to see him. When she was unsuccessful, she sought medical treatment from her family physician, Dr. White, and eventually sought medical treatment from Dr. Boxell who performed a second surgical procedure on claimant's back on November 13, 2006.

Claimant has filed this claim contending that she is entitled to payment of additional medical treatment from Dr. Boxell as well as additional temporary total disability benefits. She also seeks payment of a lump sum of her 10% impairment rating as well as a controverted attorney fee.

### ADJUDICATION

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for any natural consequence that flows from that injury; the basic test is whether there is a causal connection between the two episodes. *Wackenhut Corporation v. Jones*, 73 Ark. App. 158, 40 S.W. 3d 333 (2001). If a second complication is found to be the natural and probable result of the first injury, the employer remains liable. However, if the second episode results from an independent intervening cause, the employer is no longer liable. *Bearden Lumber Company v. Bond*, 7 Ark. App. 65, 644 S.W. 2d 321 (1983). There can be no independent intervening cause unless it is triggered by activity on the part of the claimant which was unreasonable under the circumstances. *Guidry v. J & R Eads Construction Company*, 11 Ark. App. 219, 669 S.W. 2d 483 (1984).

In this particular case, I find that claimant has met her burden of proving by a preponderance of the evidence that a causal connection exists between her subsequent back problems and her original compensable injury. Furthermore, I find that there is no independent intervening cause which would absolve the respondent of liability.

The primary evidence and contention regarding a causal connection and/or an independent intervening cause in this case centers upon activity which occurred in August and September of 2006. Claimant's initial surgery by Dr. Johnson occurred on June 3, 2006, and she was released to return to work on a limited basis beginning in July 2006. Sometime in either August and/or September the claimant apparently moved residences on two different occasions. Respondent contends that claimant injured her back during one or both of these moves.

Testifying on behalf of the respondent was Susan Brown, the sales manager. Brown testified that sometime in September 2006 the claimant informed her that "... she moved over the weekend, and she called me that Monday morning and told me that she

had moved a little too much and just had did too much work that weekend.” Brown went on to testify that claimant informed her that she had injured her back again. Testifying by deposition was Ashley Marie Smith. Smith is no longer employed by the respondent but did work with claimant in the respondent’s store during the months of August and September of 2006. Smith testified that at some point in time the claimant informed her that she was moving and Smith agreed to work for claimant on the Saturday of the move. Smith testified that claimant called her on the following Monday and indicated that she would not be able to come to work because she had injured her back moving a desk in her house. Smith testified that approximately one month later the claimant moved again.

Finally, an emergency room report from Sparks dated October 5, 2006 indicates that claimant presented with a chief complaint of chronic back pain and a history of back surgery. The report goes on to note increased back pain and indicates that the claimant had moved two times in the last five weeks.

Claimant testified that she did not injure her back while moving. Claimant testified that her first move occurred around the first of August and that she did not move any furniture or heavy items herself. Claimant also testified that she did not move any furniture or heavy items during her second move. Corroborating claimant’s testimony is the testimony of her son, Matthew Underdown. Underdown testified that he helped claimant during both moves and that he and other individuals moved all heavy objects. Underdown testified that at the most claimant moved some clothes and shoes, but he did not observe anything that would indicate that claimant had re-injured her back during the course of the moves. To the contrary, Underdown testified that claimant had continued to have problems with her back and legs following her release by Dr. Johnson.

Also testifying at the hearing on behalf of claimant was Grady Gann, claimant’s ex-husband. Gann also helped the claimant move on both occasions. Gann testified that claimant did not move any furniture during these moves. Gann acknowledged that

claimant may have moved some clothes or light boxes, but she lifted nothing heavy.

The fact that claimant was to have help moving heavy objects was corroborated somewhat by the testimony of Susan Brown. Brown testified that when claimant informed her that she was moving she indicated that she had help moving the "big stuff." Brown went on to testify that claimant did not tell her specifically what items she moved, but that Brown knew the big stuff was supposed to have been moved by the men who were helping claimant move.

With respect to this issue, I believe it is important to note that the evidence indicates that claimant was not asymptomatic at the time she was released by Dr. Johnson on September 12, 2006. While respondent has noted nurse's notes from that date indicating that claimant was not suffering from any leg pain, those notes are contradicted by the notes of Dr. Johnson himself. While Dr. Johnson in his report of that date noted that claimant was doing "reasonably well", he also noted that claimant was still having problems with her back and right lower extremity. In fact, claimant's pain was significant enough that Dr. Johnson prescribed narcotic pain medication. Furthermore, while he did indicate that claimant had reached maximum medical improvement, he also indicated that claimant should return to see him in six months or to return as needed. When claimant was unable to return to Dr. Johnson, she sought medical treatment from Dr. White and eventually from Dr. Boxell.

Dr. Boxell testified by deposition and stated that in his opinion he did not believe the surgery performed by Dr. Johnson was the correct surgery for claimant's initial back problem. Dr. Boxell stated that his review of Dr. Johnson's medical report from September 12 and the narcotic pain medication she was prescribed by Dr. Johnson and her family physician did not indicate an asymptomatic patient to him. Finally, it was Dr. Boxell's opinion that the surgery he performed on the claimant's back was the result of the injury she suffered in November 2005.

Q. In your opinion was your surgery a reasonable and necessary treatment modality for her back injury - -

A. Yes.

Q. - - as you understand that injury to have been back in November of 2005?

A. Yes.

Q. And was that back injury the major cause for her need for that surgery?

A. Yes.

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 a causal connection exists between her subsequent back problems and her original compensable injury. I find insufficient evidence that any activity the claimant performed while moving on two occasions constituted an independent intervening cause. As previously noted, in order for an incident to constitute an independent intervening cause, it must have been triggered by activity on the part of the claimant which was unreasonable under the circumstances. Claimant, Underdown, and Gann all three testified that claimant did not lift any heavy objects or move any furniture during these moves. Furthermore, Brown testified that she knew that claimant was to have help moving all heavy objects. While claimant may have moved some clothes or light boxes, I do not find that activity to be unreasonable under the circumstances. The medical records do not contain any evidence that claimant was under any specific lifting restrictions or physical limitations at the time of these moves. While the emergency room report of October 5, 2006 does note a history of claimant having moved two times in the last week, the emergency room report does not indicate that claimant attributed her back pain to any new injury which occurred during that activity.

In contrast to any independent intervening cause, I find sufficient evidence that claimant's continued back problems were the direct result of her November 2005 injury. At the time of her release from Dr. Johnson on September 12, 2006, she was continuing to have back pain as noted in his medical report. In fact, Dr. Johnson prescribed additional narcotic medication for the claimant and indicated that she should return to see him in six months or as needed. When claimant was unable to return to Dr. Johnson she sought medical treatment from her family physician and was prescribed additional narcotic medication for her back pain. Shortly after this visit claimant sought medical treatment from Dr. Boxell who eventually performed surgery.

Based upon the fact that claimant was continuing to have back problems as noted by Dr. Johnson as well as Dr. Boxell's opinion that his surgery was related to claimant's November 2005 injury, I find that claimant has met her burden of proving by a preponderance of the evidence that her subsequent back problems are causally related to her original compensable injury. Therefore, respondent is liable for payment of additional medical treatment from Dr. Boxell. This includes the surgery which he has previously performed.

I also find that claimant is entitled to temporary total disability benefits beginning October 18, 2006, and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits 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. Claimant has requested temporary total disability benefits beginning October 13, 2006. Claimant sought medical treatment from Dr. White on October 12, 2006. Dr. White's note indicates that claimant was requesting a note off work. His report also indicates that he provided claimant a "note for work." However, Dr. White's medical report does not specifically state that he has taken claimant off work or whether he simply limited her activities. However, when claimant sought medical

treatment from Dr. Boxell on October 18, 2006, Dr. Boxell completed an off-work slip indicating that claimant was to remain off work. Dr. Boxell also testified that based upon his observation and examination of the claimant on that date he believes it would have been difficult for the claimant to have worked.

Based upon the foregoing evidence, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages beginning October 18, 2006 and continuing through a date yet to be determined.

The final issue for consideration involves claimant's request for payment of a lump sum of her 10 percent impairment rating pursuant to A.C.A. §11-9-804(a)(1). That section provides that if the Commission determines that it is for the best interest of the parties entitled to compensation, the liability of the employer for compensation may be discharged by payment of a lump sum in an amount equal to the present value of all future payments computed at a 10 percent discount, compounded annually.

In this particular case, the respondent has previously accepted liability for permanent partial disability benefits based upon the 10 percent impairment rating assigned by Dr. Johnson. Respondent is paying those benefits on a bi-weekly basis. Claimant testified that she is requesting the lump sum because her injury has resulted in her divorce and her only transportation is a car owned by her husband. Claimant testified that her husband wants his car back and she needs a car for transportation to work when she is released. She also indicates that she needs the money to pay back to people who loaned her money to pay bills while she has been off from work.

I find that it is in the best interest for claimant to receive a lump sum payment of her 10 percent impairment rating. Accordingly, respondent is to pay the remainder of the 10 percent rating in accordance with A.C.A. §11-9-804(a)(1).

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that a causal connection exists between her subsequent back problems and her original compensable injury. Therefore, respondent is liable for additional medical treatment provided by Dr. Boxell, including surgery, and temporary total disability benefits beginning October 18, 2006 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits. Claimant is also entitled to a lump sum payment of her 10% impairment rating.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE