

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403865

VICKIE GIBBS [MURPHY]

CLAIMANT

**UNIVERSITY OF ARKANSAS FOR
MEDICAL SCIENCES**

RESPONDENT EMPLOYER

PUBLIC EMPLOYEE CLAIMS

RESPONDENT CARRIER

ORDER AND OPINION FILED JULY 27, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 13, 2007. A prehearing conference was held on April 3, 2007, 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 with objection.

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

1. There was an April 1, 2004, compensable back and knee injury.
2. The compensation rates are \$351/263.

The claimant contends that respondents accepted the claimant's injuries as compensable. The claimant contends that her back surgery by Dr. Reza Shahim was reasonable and necessary and related to the compensable injury. Secondly, the

claimant contends that Dr. Ken Martin has recommended a total knee replacement for the left knee and claimant contends this surgery is reasonable and necessary in connection with the compensable injury. The claimant next contends she is entitled to temporary total disability benefits from November 8, 2006, through November 15, 2006, and from December 7, 2006, through April 10, 2007. The claimant contends that she returned to work on April 11, 2007. Alternatively, the claimant contends that if she is found not to be entitled to temporary total disability benefits, she contends that she is entitled to benefits under Ark. Code Ann. §11-9-505.

The claimant contends that she was off work about one week and returned to work for a few weeks and her employer, DHS, sent her home and advised she could not return to work until her medical restrictions were lifted. Claimant contends if it was reasonable for DHS to send her home, then she was totally incapacitated from earning wages and is entitled to temporary total disability benefits. If it was not reasonable for them to send her home, then they refused to return her to work without reasonable cause and are responsible for benefits under Ark. Code Ann. §11-9-505. Claimant recognizes that respondents' defense is that it is a different state agency. The claimant worked for UAMS at the time of the injury and is now working for DHHS. Claimant points to the opinion, *Douglas Stocks v. Affiliated Foods*, E614855, dated April 3, 2007. Claimant contends that the Commission held that an employee of a subsidiary corporation is considered to be an employee of the parent corporation as well. Claimant contends by analogy, since both DHS and UAMS are subsidiaries of the State of Arkansas, that is the same employer for purposes of Ark. Code Ann. §11-9-505. For clarification, the November 8, 2006, through November 15, 2006, would be a request

for temporary total disability and December 7, 2006, through April 10, 2007, would be 505 benefits. Claimant reserves any request for treatment to her right knee. Claimant also objected to nurse case management notes offered into evidence by the respondents as hearsay where the notes contradict the written records. That objection was sustained and the notes were not considered.

Respondents contend that there is no dispute with the temporary total disability periods now that there is a closed period of temporary total disability. Respondents are disputing the knee surgery and the back surgery primarily because these are a result of a pre-existing condition and not caused by the compensable injury. Respondents contend that the claimant underwent an arthroscopic process on her knee to treat her condition that was a result of the compensable injury and respondents contend that once the claimant healed from that procedure, she was put back to where she was before the fall. Respondents also contend the claimant's back surgery was not primarily a result of her fall.

Respondents contend the claimant's request for 505 benefits is without merit. Respondents contend the claimant is attempting to make a claim against DHHS who is not a party to this proceeding. Respondents contend the State of Arkansas is not a business corporation and the various agencies are not business corporation subsidiaries. Respondents contend 505 benefits are simply not owed.

ISSUES TO BE LITIGATED

1. Additional medical for back.
2. Temporary total disability benefits.
3. Knee replacement.

4. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents, excellent briefs from the parties 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 an April 1, 2004, compensable back and knee injury.

2. The compensation rates are \$351/263.

3. The claimant has proven by a preponderance of the evidence that the spine surgery she pursued by Dr. Reza Shahim was reasonable and necessary and related to her compensable injury.

4. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from November 8, 2006, through November 15, 2006, and from December 7, 2006, through April 10, 2007.

5. The claimant has proven by a preponderance of the evidence that the knee replacement surgery recommended by Dr. Ken Martin is reasonable and necessary and related to the compensable injury.

6. Respondents are liable for all reasonable and necessary medical benefits associated with the spine surgery and treatment and for the reasonable and necessary medical associated with the knee replacement.

7. 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, 45 years of age, is a child abuse caseworker for the Department of Health and Human Services. The claimant sustained a compensable injury to her back and left knee on April 1, 2004, when she worked for UAMS in the Medicaid Office. The claimant slipped on water in the floor and fell on her right knee but her left leg went out sideways. The left knee started immediately swelling and the incident was immediately reported to the supervisor. The claimant first sought medical attention on April 5, 2004. The claimant used an immobilizer and was off work for about six weeks. The claimant was referred to Dr. Johannes Gruenwald and last saw him on April 20, 2004.

The claimant received a change of physician and began seeing Dr. Ken Martin on September 1, 2004, for treatment of her knee. The claimant underwent a knee scope about September 16, 2004. The claimant was back at work around the second week in May 2005. Later, her back muscles started spasming and she was hardly able to walk. The claimant first treated for her back with Dr. Barry Baskins and then began seeing Dr. Kenneth Rosenzweig. The claimant began seeing Dr. Rosenzweig about August 22, 2005 and continued up through November 2006. The claimant worked at UAMS through August 2004 and began her senior year at UALR and doing her internship from August 24, 2004, through May 10, 2005. The claimant became employed with DHHS on June 14, 2005, and worked through November 7, 2006. On

November 8, 2006, the claimant testified that she woke up and could not straighten her leg out and could not walk. The claimant sought emergency medical treatment. The claimant saw Dr. Scott Schlesinger on November 13, 2006 and he released her back to work pursuant to the FCE.

The claimant returned to work on November 17, 2006, and worked until December 6, 2006, when her employer advised she would no longer be able to work with restrictions. The claimant was experiencing bad muscle spasms in her back with pain going down her leg and her toes were getting numb. The claimant could not stand for any length of time and she had to sit in a chair to testify in court. She could not walk any distance without difficulty. The claimant confirmed that Dr. Schlesinger did not recommend surgery nor did Dr. Edward Saer recommend surgery. The claimant saw Dr. Saer after a referral from Dr. Rosenzweig. The claimant next treated with Dr. Reza Shahim, starting on January 30, 2007, with surgery on February 16, 2007. The claimant testified that her back is much improved since the surgery and she is now able to perform household chores and she has returned to work.

The claimant confirmed that Dr. Martin had recommended a knee replacement. She testified that she still has knee problems and her knee feels like it goes out of place periodically. She continues to have trouble walking and standing. According to the claimant, she did not have any knee or back problems before the April 1, 2004, fall.

Under cross examination, the claimant was asked again if she had experienced any discomfort with her knees and back before the fall and she answered she had not. The claimant did confirm that physicians have advised her to lose weight for her blood pressure. The claimant confirmed that after she returned to work some six weeks after

her fall, she was not able to walk over the hospital to perform her normal duties but she could work in her office. Her employer made accommodations until August 24, 2004, when she left to complete her college work. The claimant started her job with DHHS on June 14, 2005, and worked there until December 6, 2006, and worked with assistance from others at times. It was DHHS that determined they could not accommodate the claimant with the set of restrictions provided after the FCE. Upon questioning if the claimant could handle her old job at UAMS, the claimant confirmed that her supervisor told her she could come back to work anytime, although she had not inquired about employment. The claimant testified that she weighs about 367 now and a medical report shortly after her fall indicated a weight of 320.

The claimant testified that after November 8, 2006, she was taking more Hydrocodone and Flexeril and was having difficulty functioning. Since the back surgery, the claimant testified she does not take pain medicine but occasionally takes Flexeril.

The claimant clarified that Dr. Rosenzweig referred her to Dr. Shahim. She testified that Dr. Rosenzweig was going to refer her to a workers' compensation doctor but after she provided some names, he actually referred her to Dr. Shahim.

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.

The claimant contends that additional medical is reasonable and necessary, to include the spine surgery by Dr. Shahim. According to the claimant, her back condition was manageable until the morning of November 8, 2006, when she woke up and could not straighten out her leg and could not walk. She sought treatment at St. Vincent's emergency room and then followed up with Dr. Scott Schlesinger on November 13, 2006, for an IME. Dr. Schlesinger did not recommend surgery even though he noted a right L5-S1 disc herniation. He assigned a 7% permanent impairment rating and advised she undergo an FCE. The claimant was referred to Dr. Edward Saer and he evaluated the claimant on January 23, 2007, and he opined:

IMPRESSION:

Right sided foraminal disk herniation at L4-L5. I do not think this really correlates well clinically with her symptoms. I suspect she has had a soft tissue injury, as well.

DISCUSSION:

I do not think that surgery is going to be helpful for her. I just do not think the disk problem at L5-S1 is the 'pain generator' in her case. . . .

Cl. Exh. No. 1, p. 46.

The claimant was next referred by Dr. Ken Rosenzweig to Dr. Reza Shahim and her first consult was January 30, 2007. Dr. Shahim opined, in part:

I reviewed her lumbar spine MRI from November. This is a poor quality MRI that does show a right L5-S1 disc herniation with thecal sac and nerve root compression. She also has degenerative disc disease at L4-5 without any nerve root compression. I discussed all options with her. I

do not think that surgery will cure all of her symptoms because her symptoms are very long standing, but it should help with her radicular pain. . . .

Cl. Exh. No. 1, p. 49.

Another MRI was performed on February 6, 2007, and this revealed:

Multilevel degenerative changes most severe at the L4-5 and L5-S1 levels with mild overall canal stenosis at the L4-5 level and asymmetric changes on the right at L5-S1 with right foraminal narrowing of moderate severity and narrowing of the lateral recess potentially affecting the right L5 and S1 nerve roots.

Cl. Exh. No. 1, p. 53.

On February 16, 2007, Dr. Reza Shahim performed the right transforaminal discectomy at right L5-S1. At the claimant's February 28, 2007, evaluation with Dr. Shahim, he reported that the claimant's hip and leg pain have much improved. He indicated on February 28, 2007, that the claimant should remain off work for six more weeks. The claimant returned to work on April 10, 2007, and testified that she is greatly improved. She is able to perform household chores and does not have the limitations she previously had. She was returned to work without restrictions.

After hearing the testimony of the claimant, who I found to be a credible witness, and considering the medical evidence and the post surgery improvement, I find the claimant has proven by a preponderance of the evidence that the additional medical to the claimant's back, to include the spine surgery, was reasonable and necessary and related to the claimant's compensable injury. It is certainly noted that both Dr. Scott Schlesinger and Dr. Edward Saer did not recommend surgery and both are doctors whose opinions I afford great weight; however, the claimant's ultimate surgery and the

success from the surgery indicate even experienced capable surgeons cannot always predict the outcome of a given procedure. I give Dr. Reza Shahim's opinion to proceed with the surgery considerable weight and then the claimant's post surgery improvement provides the necessary nexus to prove the procedure was reasonable and necessary. The claimant testified that she did not have back problems before the fall. Post-surgical improvement is a proper consideration in determining whether the surgery was reasonable and necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Because the surgery and additional medical treatment for the claimant's back was reasonable and necessary, respondents are responsible for additional medical for the back.

The claimant contends she was entitled to temporary total disability benefits while she was unable to work because of her back pain. 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). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant testified that her back symptoms worsened on November 8, 2006 and that she had to seek emergency medical treatment. She was unable to work for a period but did return to light duty on November 17, 2006. She participated in a Functional Capacity Evaluation on November 27, 2006, and the results indicated the claimant gave a reliable effort and she was limited to medium duty work. The claimant

continued working for her employer until December 6, 2006, when her employer directed her to not return to work until she had a full-duty release. Dr. Kenneth Rosenzweig wrote on December 18, 2006, that the claimant was unable to work due to her back. The claimant was referred to Dr. Shahim, surgery was performed and she was released to full duty on April 10, 2007. The claimant was working full time at the time of the hearing.

After considering the credible testimony of the claimant and considering the medical evidence, I find the claimant did remain in her healing period from November 8, 2006 through November 15, 2006, and from December 7, 2006 through April 10, 2007, and was totally incapacitated from earning wages. Respondents asked the claimant if she was able to perform her former job at UAMS and the claimant testified that her former supervisor told her to come back anytime. While a general comment about returning to work anytime sounds promising, that is not an actual job offer. I find the medical evidence is supportive that the claimant remained in her healing period and was unable to work while she was waiting to have spine surgery and while she was recuperating from the surgery.

The claimant next contends that a knee replacement is reasonable and necessary and recommended by Dr. Ken Martin. The claimant sustained a compensable knee injury in her April 1, 2004, fall. On September 14, 2004, the claimant underwent arthroscopic surgery to correct a tear of the lateral meniscus performed by Dr. Ken Martin. On December 18, 2006, Dr. Kenneth Rosenzweig opined that the claimant has advanced osteoarthritis in the knee and is a candidate for a joint replacement. By January 31, 2007, Dr. Martin was evaluating the claimant with

complaints of knee pain and crepitation and stated the claimant cannot take steroids due to her diabetes but continues to have knee pain. Dr. Ken Martin, the treating physician, opined that the claimant's fall exacerbated her arthritis and contributed to the pain level. Dr. Martin has been unequivocal in his opinion that the claimant needs a knee replacement of her left knee and that the work-related fall of April 1, 2004, aggravated the arthritis in her knee. See Claimant's Exhibit No. 1, pages 8, 17 and 59. No contradictory medical report is in evidence and there is no evidence the claimant had prior knee problems requiring medical attention.

It is well settled that for purposes of workers' compensation, an employer takes the employee as he finds him. See, *Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004); *Hermitage Baptist Temple v. Robinson*, 82 Ark. App. 40, 120 S.W.3d 150 (2003). An aggravation of a pre-existing, non-compensable condition by a compensable injury is, itself, compensable, *Hermitage Baptist Temple, supra*.

As the claimant has noted, this case is on point with *Williams v. L&W Janitorial, supra*, where the Court of Appeals held that even though pre-existing arthritis was a factor in the need for the replacement, the compensable injury aggravated the pre-existing condition and the knee replacement was thus reasonably necessary in connection with the compensable injury. The doctors in the *Williams* case agreed that the claimant's injury was not the major cause of her need for knee replacement surgery, but they also agreed that the injury was at least a factor in the resulting surgery.

In the instant case, the claimant sustained a compensable knee injury supported by medical evidence and the medical supports that this injury aggravated her pre-

existing arthritis and as a result of the aggravation, the claimant has been recommended to have a knee replacement. After considering Dr. Martin's unequivocal medical opinion that the knee replacement is necessary and the claimant's fall aggravated her arthritis in the knee, I find the claimant has met her burden of proof that the knee replacement is reasonable and necessary in connection with the compensable knee injury. Respondents are responsible for all reasonable and necessary medical necessitated by the surgery.

ORDER

The claimant has proven by a preponderance of the evidence that the spine surgery she pursued by Dr. Reza Shahim was reasonable and necessary and related to her compensable injury and she is entitled to additional medical benefits. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from November 8, 2006, through November 15, 2006, and from December 7, 2006, through April 10, 2007. The claimant has proven by a preponderance of the evidence that the knee replacement surgery recommended by Dr. Ken Martin is reasonable and necessary and related to the compensable injury.

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**