

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F508340

**JENNIE LEAFERN HESTER,
EMPLOYEE**

CLAIMANT

**MEXICO CHIQUITO, INC.,
EMPLOYER**

RESPONDENT

**COMMERCE & INDUSTRY
INSURANCE COMPANY;
AIG CLAIM SERVICES, INC.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 30, 2007,

Pursuant to a hearing conducted June 13, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the claimant's request for additional benefits related to her admittedly compensable low back injury of July 30, 2005.

Specifically, the claimant requested a discogram, additional temporary total disability benefits, and an attorney's fee. Other possible issues were reserved.

The respondents controverted this request, contending that the discogram was not reasonably necessary and that temporary total disability cannot be extended beyond the end of the healing period, June 2, 2006.

The record, which included documentary evidence and the testimony of the claimant was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann.

§11-9-715(c), except that, after the hearing, respondent's counsel was permitted to correct an unintended deficiency in Respondent's Exhibit 1.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employee-employer-insurance carrier relationship existed at all pertinent times; the claimant suffered a compensable low back injury July 30, 2005; the claimant's average weekly wage at the time of the injury was \$275.48; and Dr. Thomas M. Hart was authorized as a treating physician by a Change of Physician Order dated September 22, 2006.

3. The preponderance of the evidence shows that discography, as recommended by Dr. Thomas M. Hart, is reasonably necessary for the claimant's compensable injury, within the meaning of the Act, and should be performed at the expense of the respondents.

4. The preponderance of the evidence shows that, as the result of her compensable injury, the claimant remained in her healing period and was totally incapacitated to earn wages, so that she is entitled to additional temporary total disability benefits, from October 9, 2006, until a date to be determined.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant suffered a low back injury July 30, 2005, during her employment with Mexico Chiquito, Inc., in Jacksonville, Arkansas, apparently when she fell over some boxes in a cooler. (R. Ex. 1, p. 18.) Lumbar spine x-rays taken on that date, at the direction of Dr. John Daugherty, were read as showing no acute fracture, dislocation or bone destruction, although there were degenerative changes.

The claimant testified that she consulted Dr. Alan Johnston, the company physician, who recommended physical therapy and medication. In a September 16, 2005, lumbar spine MRI scan report, Dr. David C. Harshfield noted several degenerative problems, as well as slightly hypolordotic curvature of the lumbar spine with discopathy of the mid three lumbar disc levels and lower thoracic levels but without high-grade focal disc protrusions or critical canal stenosis, and close approximation of the spinous processes at L4-5 consistent with developing Baastrup phenomenon or disease. Dr. Harshfield's impression included "markedly asymmetric rightward pathology to correlate with the patient's current right lower extremity clinical syndrome." [A copy of this report, intended as part of Respondent's Exhibit 1, was inadvertently omitted from the record. The June 25, 2007, correspondence from respondent's counsel, which offered to correct this omission, is considered part of the record and has been so designated with blue-backing.]

The claimant was subsequently referred for evaluation to Dr. Steven L. Cathey, a North Little Rock neurosurgeon. On November 1, 2005, Dr. Cathey wrote that he had seen the claimant in consultation and believed she had suffered a musculoskeletal injury at the time of her fall on July 30, 2005, and that he certainly ruled out an indication for lumbar disc surgery or other neurosurgical intervention. He described the MRI scan as "unremarkable", with mild degenerative changes noted

in her lower back, but certainly no sign of disc herniation, spinal stenosis, nerve root impingement, etc. He stated that he believed the claimant had suffered a musculoskeletal injury at the time of her fall on July 30, which was the claimant's perception as well.

The claimant was next referred to Dr. Brent Sprinkle, a physical medicine and rehabilitation specialist who first saw her December 21, 2005. She testified at the hearing that at that time she was having a lot of pain in her lower back and down her leg and that it was different from pain she had experienced with previous back problem. Dr. Sprinkle also opined that the claimant did not need surgery but he recommended injection therapy, physical therapy, and that she return to light duty work, limiting her walking to no more than one-half mile per shift and bending to 50 repetitions per shift. On January 10, 2006, he wrote that the trigger point injection helped her quite a bit for about a week but has worn off, and that physical therapy was helping some, but she has not yet been to work, even with restrictions. He noted that she has had an episode of her right leg giving away. He repeated a piriformis injection and scheduled a return visit in 31 days. On February 16, 2006, Dr. Sprinkle wrote that the trigger point injection had been quite helpful and that physical therapy had been helpful. The medical record shows that by March, 2006, the claimant was also receiving transforaminal epidural injection therapy at L3-4, on the right, from Dr. Kenneth M. Rosensweig.

As the respondents have noted, on June 2, 2006, Dr. Sprinkle wrote that the claimant was at maximum medical improvement, although he continued her treatment with trigger point injection therapy, noting that there was a small chance of post injection soreness. He commented that the claimant had right-sided buttocks pain and occasional giving-out sensation of her leg but he had no explanation for this based on the MRI and the EMG nerve conduction. He further stated that the

claimant had tried therapy, muscle relaxers, anti-inflammatories, and a trigger point injection, and there was “nothing else to offer her.”

The claimant attempted to return to full duty work. However, she stated that this did not work, and she tried on her own to do light duty work but that also did not work. Eventually, on August 3, 2006, the claimant’s employment of about sixteen years was terminated for mishandling money as a cashier. She testified that she had been trying to work through pain, as Dr. Sprinkle had suggested, but by then was unable to work full duty as a waitress or hostess and was not allowed to sign up for unemployment benefits because she was not able to go to work.

On September 22, 2006, a Change of Physician Order was entered naming Dr. Thomas M. Hart as the claimant’s treating physician. The claimant stated that when she first saw Dr. Hart on October 9, 2006, she had been gradually getting worse. Dr. Hart’s report indicated that he examined the claimant, reviewed her x-rays and the original MRI itself, and noted that the claimant had failed conservative care. He disagreed with Dr. Sprinkle that, because epidural injection therapy had not been effective, there was nothing else to be offered the claimant. He noted that, as Dr. Sprinkle had mentioned, the claimant had an annular tear, which Dr. Hart described as a very well known cause of discogenic pain. He recommended discography, which has not been authorized by the respondents. Again, in a January 4, 2007, letter, Dr. Hart wrote that the claimant should undergo discography, the contrary opinions of the nurse case manager and Dr. Sprinkle notwithstanding. On April 6, 2007, he wrote a more detailed defense of his recommendation, with citations to medical literature.

On March 6, 2007, Dr. Sprinkle, responding to respondent’s counsel, wrote that a discogram was not justified in his opinion and that he tended to agree with a Dr. Eugene Carragee who had

recently written that he was not convinced of the validity of discography. On May 30, 2007, Dr. Sprinkle again wrote that a discogram was not indicated, this time citing an article in the Wisconsin Medical Journal of February, 2007, entitled “Discography, Over 50 Years of Controversy,” and written by Dr. Heather Wichman. On May 30, 2007, Dr. Cathey, who had seen the claimant once, also wrote to respondent’s counsel, similarly disagreeing with Dr. Hart and again stating that the claimant’s injury was in all likelihood a musculoskeletal injury. A copy of the article in the Wisconsin Medical Journal article was included in the record.

That article refers to “Over 50 Years of Controversy” but contains merely six footnotes, one referring to a 1963 publication indicating that discography had not been popular in European countries and two other footnotes by the same authors. In other words, although the article’s title might suggest an objective survey of the medical literature over the last 50 years, it’s text revealed simply that the author had taken a position against the use of discography and had found a handful of citations to support her argument.

Dr. Hart’s correspondence makes reference to other authorities. One, an article in “Pain Physician” entitled “Systematic Review of Discography as the Diagnostic Test for Spinal Pain and Update”, according to Dr. Sprinkle, reviewed 147 articles and concluded that discography was a useful imaging and pain evaluation tool for cases of chronic spinal pain secondary to intervertebral disc disorders. The second article, entitled “The Complete History of the Evaluation and Details on Discography” in Pain Management, Volume 1, Chapter 11, by Waltman, was said to review 240 articles and to conclude that, although discography had been controversial, today it is well regarded as the only diagnostic modality that can be used to determine whether an intervertebral disc is painful to mechanical forces and it was the standard for diagnosing discogenic pain secondary to

internal disc disruption. Dr. Hart also criticized the reference to Dr. Caragee, and commented that on almost all of his articles against the use of discography had been demonstrated to be poorly presented, poorly performed, and not, in many cases, up to standard of care.

Obviously, well-qualified medical professionals in this area do not agree on the efficacy of discography. However, the opinion of Dr. Hart is entitled to greater weight, since he appears to be more experienced with the use of discography in his practice and he also appears to have studied the scientific literature on the subject more thoroughly than practitioners who are disinclined to use the procedure. Moreover, this Commission has not agreed with the position of Dr. Wichman rejecting discography as never appropriate, but has awarded it in the past. Accordingly, given the claimant's condition, her previous appropriate, but unsuccessful, care, and her continuing symptoms, the preponderance of the evidence indicates that discography recommended by Dr. Hart is reasonably necessary for her job-related condition.

To be entitled to temporary total disability, the claimant must be both in a healing period and totally disabled because of the job-related injury. Here, the preponderance of the evidence shows that the claimant continued in her healing period, even though Dr. Sprinkle mentioned that she had reached maximum medical improvement. It should be noted that Dr. Sprinkle's report also acknowledged the claimant's continuing symptoms and her need for additional treatment, which he performed at that time. This is not wholly consistent with his conclusion that the claimant had reached maximum medical improvement.

Nevertheless, although the claimant continued in her healing period, she was not then totally incapacitated to earn wages, but continued to work until her employment was terminated. However, by the time she saw Dr. Hart on October 9, 2006, her condition merited additional treatment and was

consistent with total incapacity to earn wages, as well as the continuation of her healing period. Of course, the claimant's medical care and her prospects for recovering have been interrupted by the refusal to authorize additional treatment. Thus, the preponderance of the evidence shows that the claimant remained in her healing period and was totally incapacitated to earn wages from October 9, 2006, until a date to be determined, so that she is entitled to additional temporary total disability benefits for that period.

Finally, it should be noted that the respondents have accepted the claimant's back injury as compensable, even though the claimant, 60 years of age at the time of the hearing, had experienced back problems in the past for which she had sought medical care. It was her testimony that at the time of her compensable injury she had recovered from her previous difficulties and that the pain she experienced from her compensable injury was different from what she had felt in the past. The prior medical record shows that she was last treated for a back strain on May 9, 2003, and does not show that she continued to require treatment at the time of her compensable injury.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge