

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F102699**

<b>ALICE HUCKABEE, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>WAL-MART, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CLAIMS MANAGEMENT, INC., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JUNE 15, 2007**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on March 23, 2007 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE SUSAN FOWLER, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

\_\_\_\_\_A hearing was conducted to determine the claimant's entitlement to payment of additional medical expenses, permanent partial disability benefits, and attorney's fees.

At issue is whether or not continuing medical treatment is reasonable and necessary pursuant to Ark. Code Ann. §11-9-508; and whether or not the anatomical impairment rating is correct pursuant to Ark. Code Ann. §11-9-519 and Rule 099.34.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant on the issue of additional medical treatment, however, the evidence does not preponderate in the claimant's favor on the issue of permanent partial disability benefits.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on March 6, 2001 at which time the claimant sustained a compensable scheduled injury at a compensation rate of \$228.00/\$171.00. Medical expenses, temporary total disability benefits and a 12% rating were paid before this claim was controverted on March 8, 2006.

The claimant seeks payment of additional medical treatment with Dr. Gordon Newbern. Dr. Newbern has opined that the claimant is at risk of developing post-traumatic arthritis as a result of

the injury and may eventually require surgical fusion of the ankle. Her condition therefore needs to be monitored periodically to assess any changes (see Dr. Newbern's reports of April 16, 2003 and February 16, 2004). The claimant also seeks payment of additional permanent partial disability benefits of 16%, (the difference in the 12% paid and the 28% assessed by Dr. Ruth Thomas in her report of January 27, 2004).

The respondents contend all appropriate benefits have been paid and rely on Dr. Blankenship's report of March 8, 2006 opining that no additional treatment was necessary. Respondents also contend Dr. Thomas' 28% rating is in error as it is based on the 5<sup>th</sup> Edition of the AMA Guidelines and takes into account arthritis, a condition that Dr. Blankenship and Dr. Newbern have not yet diagnosed.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. The respondents filed a post-hearing letter brief dated April 1, 2007 which has been incorporated by reference.

The claimant, who seemed sincere and hard-working, was the only witness to testify at the hearing.

The claimant, age 56 (D.O.B. April 13, 1950) has worked for the respondent-employer for nine years in maintenance and housekeeping. She is also a member of the respondents' risk control team, checking the store for safety code violations.

The claimant injured her right ankle on March 6, 2001 when she fell from a ladder while trying to reach products on twelve foot tall shelves. Dr. Gordon Newbern performed surgery and the claimant saw Dr. Ruth Thomas at the respondents' request for a second opinion.

The claimant testified she is currently able to work full time with no restrictions and sometimes walks to work. She desires to continue to see Dr. Newbern for yearly check-ups as recommended. The doctor performs a physical examination, testing her strength and range of motion, and conducts x-ray examinations.

The claimant testified she still experiences pain and walks with a limp. She takes Celebrex

prescribed by her family physician for general aches and pains, and wears an ankle brace purchased by her sister, however, Dr. Newbern has prescribed no specific treatment for her ankle.

### MEDICAL EVIDENCE

Dr. Newbern performed emergency surgery for an open right ankle dislocation on March 6, 2001 and applied a short leg cast. X-rays of the claimant's elbow and leg were performed to rule out fractures. Physical therapy was prescribed and Dr. Newbern assessed permanent impairment of 12% to the lower extremity in a report dated January 4, 2002 based on muscle atrophy and loss of range of motion. Dr. Newbern explained that the claimant was at risk to develop traumatic arthritis. The claimant was released to return to work with no restrictions and instructed to take Aleve for pain.

The respondents sent the claimant to Dr. Ruth Thomas on October 10, 2003 for a second opinion. Dr. Thomas recorded the claimant's complaints of pain and stiffness and prescribed a solid ankle AFO brace. Dr. Thomas interpreted the x-rays as showing early degenerative changes in the right hind foot as a result of the injury and cautioned that the claimant might require surgical fusion of the ankle at some point in the future. However, Dr. Thomas found no muscle atrophy. In a letter dated December 9, 2003, Dr. Thomas agreed with Dr. Newbern's rating.

A little over one month later, Dr. Thomas changed the rating, assessing a 28% rating to the right foot in her report of January 27, 2004 in response to a letter from the respondents. It is unknown what question the respondents posed to Dr. Thomas. Dr. Thomas used the current 5<sup>th</sup> Edition of the AMA Guides to assess the rating, advising that she no longer had the out-dated 4<sup>th</sup> Edition, which was published fourteen years ago.

Dr. Thomas' Letter of 1-27-04 to the Respondents:

You asked for objective findings from my physical examination of the claimant. If you will look through my clinic evaluation dated October 8, 2003, you will note that I refer to the varus positioning of her right foot and the reduced subtalar motion. These are objective findings according to the American Medical Association "Guides to the Evaluation of Permanent Impairment" fifth edition... In addition I commented on changes seen radio (sic) graphically that have occurred since the original date of injury confirming

that the developing arthritis is secondary to this specific injury.

My understanding of the impairment guide suggests that I cannot combine arthritic changes and motion in determining her overall impairment rating. If I combine the varus position of her foot with the arthritic changes seen on x-ray. (sic) Her impairment rating is 28% to the right foot., (Emphasis added)

Dr. Newbern saw the claimant on February 16, 2004 and reviewed x-rays showing “spurring of the talonavicular joint and in the area of the stragalum in posterior subtalar joint...(with) a plantar osteopyte... Persistent symptoms but no significant development of radiographic post traumatic arthritis... it is possible that post traumatic arthritis may worsen.” He opined that the claimant needed yearly check-ups to assess the development of arthritis necessitating an ankle fusion. In a letter dated December 14, 2005, Dr. Newbern opined, “since it is likely that she may have problems with this down the road, I have advised her to keep her case open.”

In a letter dated December 19, 2005, Dr. Newbern commented, “she did suffer some post traumatic arthritis to the joint. (Emphasis added) She may indeed have worsening stiffness, at some point, and she may develop significant post-traumatic arthritis to the ankle joint. This could conceivably result in the need for ankle fusion or ankle replacement.”

The respondents sent the claimant to Dr. William Blankenship for yet a third opinion on March 8, 2006. Dr. Blankenship had no additional treatment to offer the claimant. Dr. Blankenship reviewed x-rays from 2004 and 2005 and found no degenerative changes in the ankle.

In a letter dated December 8, 2006, Dr. Newbern noted stiffness and loss of range of motion during the physical examination. X-rays showed no “gross” abnormalities. Dr. Newbern commented, “it appears that she may go on to have further problems with this ankle that could worsen over time in the future. To what degree is impossible to ascertain... I have recommended that she continue having an annual follow-up visit to monitor the ankle.”

The claimant fell and broke her ankle. Her surgeon, Newbern, assessed a 12% anatomical impairment rating which the respondents did not pay. Instead, the respondents sent the claimant to

a second physician, Dr. Thomas, who assessed a 28% rating. The respondents paid the original 12% rating with penalties and attorney's fees. The respondents then sent the claimant to a third physician, Dr. Blankenship, who opined the claimant did not need additional medical treatment.

Both Dr. Newbern and Dr. Thomas have diagnosed the claimant with post-traumatic arthritis as a direct result of the injury. Both physicians have opined that the claimant's condition needs to be monitored as surgical fusion may become necessary in the future if the arthritis worsens. Although the claimant has returned to work, she remains symptomatic.

The respondents argue that the claimant is merely returning to the doctor to prevent the statute of limitations from closing her case. The issue is not the claimant's motivation for seeking additional medical treatment, but whether she is entitled to continuing medical care. Georgia Pacific v. Dickens, 58 Ark. App. 266, 950 S.W.2d 463 (1997); the Full Commission opinion of Garlan Foote v. Prairie Farms Dairy, Inc., January 17, 2002 E802937 (Affirmed by the Court of Appeals December 4, 2002 in an unpublished opinion).

Employers must promptly provide medical services which are "reasonably necessary in connection with" the compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury." Greer v. Phillip Mitchell Construction, Full Commission opinion February 14, 2003 (E906565). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers'

Compensation Commission, December 13, 1989 (Claim No. D511255).

The development of post-traumatic arthritis, diagnosed by two different physicians, constitutes a compensable consequence and respondents remain liable for monitoring and treatment of that arthritis. The claimant remains symptomatic, walking with a limp; she has been warned by two different physicians that surgical fusion of the ankle may become necessary in the future; and, two different physicians have cautioned her to have the injury checked periodically with x-rays to monitor the progression of the arthritis.

Accordingly, I find that continued monitoring of the post-traumatic arthritis is a reasonable necessary medical expense.

Respondents also argue that Dr. Thomas' rating is in error. As I interpret Dr. Thomas' reports of December 9, 2003 and January 27, 2004, she agreed with Dr. Newbern's 12% rating and only changed the rating to 28% in response to an inquiry posed by the respondents. In trying to reconcile these two reports, I find that Dr. Thomas rated the claimant at 12%, but if she were asked to combine her findings of arthritis and motion changes, (something that is not suggested in the AMA Guides), then the rating would change to 28%.

Accordingly, I find that the claimant's rating is limited to 12%, which the respondents have all ready accepted.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on March 6, 2001 at which time the claimant sustained a compensable scheduled injury, complicated by the development of post-traumatic arthritis, a compensable consequence.
2. The respondents remain liable for follow-up treatment to monitor the progression of the claimant's post-traumatic arthritis and to evaluate the need for surgical fusion or medication as recommended by her physicians. This follow-up care constitutes reasonable and necessary medical treatment as defined by Ark. Code Ann. §11-9-508.
3. Respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.

4. The claimant is not entitled to any additional permanent partial disability benefits based on my interpretation of Dr. Thomas' reports. Dr. Thomas and Dr. Newbern agree the claimant is entitled to a 12% rating which has been accepted.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

6. The respondents are directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

#### AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge