

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312862 & F411610

PAULA MESSER,
EMPLOYEE

CLAIMANT

COOPER STANDARD AUTOMOTIVE, INC.,
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

CROCKETT ADJUSTMENT,
THIRD PARTY ADMINISTRATOR

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED APRIL 3, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in El Dorado, Union County, Arkansas.

The claimant was represented by HONORABLE GREGORY GILES, Attorney at Law, Texarkana, Arkansas.

Respondents No. 1 were represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 2 waived appearance at the hearing.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 11, 2007 in El Dorado, Arkansas. A prehearing order was entered in this case on July 11, 2006. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order or during the hearing and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/self-insured employer relationship existed at all relevant times.
3. On July 15, 2003, the claimant sustained compensable gradual-onset injuries to her right hand and low back.
4. On September 8, 2004, the claimant sustained a compensable injury to her left hand.
5. Respondent no. 1 has accepted the July 15, 2003 and September 8, 2004 hand and back injuries as compensable and paid benefits.
6. The claimant was assigned a permanent anatomical impairment rating of 10 percent (10%) to the body as a whole for the compensable low back injury, which rating respondent no. 1 has accepted.
7. The claimant reached the end of her healing period for all compensable injuries no later than December 13, 2005.

8. The claimant was not permanently totally disabled prior to her last day at work.
9. The claimant has been granted by the Commission a change of physician to Dr. Ivy McGee Reed effective December 7, 2004 for her 2003 right hand and low back injuries, and effective February 23, 2005 for her 2004 left hand injury.
10. The appropriate compensation rates for the claimant's 2003 injuries are \$397 per week for temporary total disability and \$298 per week for permanent partial disability; the appropriate compensation rates for the claimant's 2004 injury are \$374 per week for temporary total disability and \$281 per week for permanent partial disability.
11. The claimant last worked for the respondent on June 22, 2005.
12. The claimant seeks additional temporary disability compensation for her 2003 back injury, therefore the 2003 compensation rates apply for the additional temporary disability claim.
13. The respondents paid for the claimant's initial visit to Dr. Reed after entry of a change of

physician order; the respondents have controverted all treatment thereafter.

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

1. Whether the claimant is entitled to additional medical treatment after her change of physician to Dr. Reed.
2. Whether the claimant is entitled to additional temporary disability benefits.
3. Whether the claimant is entitled to unpaid mileage and prescription expenses.
4. Whether the claimant is permanently totally disabled or in the alternative entitled to wage loss benefits.
5. Controversion and attorney's fees.

The record consists of the January 11, 2007 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained an admittedly compensable gradual onset back injury in 2003 and an admittedly compensable right carpal tunnel syndrome injury in 2003 while working for the respondent. Dr. D'Orsay Bryant, an

orthopaedist, performed a right carpal tunnel release surgery on October 1, 2003, from which the claimant later reported no benefit. Dr. Steven Cathey, a neurosurgeon, performed low back surgery on December 12, 2003 to remove an L3-4 herniated disk impinging on the left L4 nerve root. Dr. Cathey concluded that the claimant reached maximum medical improvement after her back surgery on May 14, 2004, and released her to regular work duty. Dr. Cathey assigned a 10% impairment rating for that injury which was paid and is not in dispute. The claimant likewise later reported no benefit from this surgery. The claimant also sustained an admittedly compensable left wrist injury in 2004, which is not in any way the subject of this present claim for additional benefits.

The claimant contends that her back injury healing period did not end on May 14, 2004, as Dr. Cathey concluded, or in the alternative, that she entered a new healing period on October 7, 2004, when the claimant presented on her own to Dr. Ivy McGee Reed.¹ Through referrals and after

¹The claimant did not receive a change of physician to Dr. Reed from the Commission until December 7, 2004 and apparently paid for her visits to Dr. Reed and treatment by subsequent physicians with group insurance. The parties at the hearing reserved the issue of the respondents' potential liability for Dr. Reed's treatment and referrals between

diagnostic tests, Dr. Reza Shahim, a neurosurgeon, performed a disk fusion surgery at the L3-4 level of the claimant's spine on July 1, 2005. Dr. Shahim ultimately concluded that the claimant experienced a 10% impairment to her back, as Dr. Cathey had previously assigned, and again that rating is not in dispute. However, after his surgery, Dr. Shahim ultimately opined on June 8, 2006 that the claimant will be permanently disabled due to radicular pain.

In the present claim, the claimant seeks additional temporary disability benefits after Dr. Cathey released her on May 14, 2004, unpaid mileage and prescription expenses, and payment for her treatment through Dr. Reed, Dr. Shahim, Dr. Shailesh Vora, and Dr. Marcia Hixon.² The claimant also seeks an award of wage loss or permanent total disability as a result of her compensable back injury.³

October 7, 2004 and December 7, 2004. The respondents paid for the claimant's first visit to Dr. Reed after her Commission-authorized change of physician, but denied liability for any additional treatment or referral after that visit.

²The claimant testified at the hearing that at least some of the disputed treatment, including Dr. Shahim's surgery, was paid for by group health insurance, which I note would apparently be subject to the offset provisions of Ark. Code Ann. § 11-9-411.

³Although the claimant sustained admittedly compensable bilateral wrist injuries, in addition to her low back

- 1. Was the additional treatment provided by Dr. Reed, Dr. Shahim, Dr. Vora, or Dr. Hixon reasonably necessary in connection with the claimant's compensable back or wrist injuries?**

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find that the claimant has failed to establish that the additional treatment that she received to her low back at issue after December 7, 2004 was

injury, her physician determined that she is not entitled to an impairment rating for the right wrist, and the physician's determination is not an issue in dispute. Without a compensable anatomical impairment rating for either wrist injury, I am without authority to consider the wrist injuries in deciding the claimant's claim for permanent disability. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000)

reasonably necessary in connection with her compensable 2003 back injury. In this regard, I note that when the claimant's complaints did not let up after his 2003 disk surgery, Dr. Cathey ordered a post-surgery MRI on May 10, 2004. Dr. Cathey had the benefit of reviewing that MRI prior to pronouncing the claimant at maximum improvement on May 14, 2004, and Dr. Cathey reported no signs of abnormality other than the L3-4 operative changes on the left.

On July 12, 2004, Dr. Bryant likewise reviewed the MRI and indicated that the MRI did not support any additional surgical intervention and ordered a functional capacity evaluation for "objectivity." However, the claimant passed only seven of thirty validity criteria on the July 27, 2004 evaluation, and the physical therapist, Jerry Daniel, indicated that the failed validity criteria suggest very poor, voluntary submaximal effort not related to pain, medical impairment or disability. Dr. Bryant indicated on August 24, 2004, that the test cannot yield any useful information or any permanent restrictions.

When the claimant began treating on her own with Dr. Reed shortly thereafter, Dr. Reed took the claimant off work and ordered yet another MRI on December 22, 2004. Dr.

Robert Laakman interpreted the MRI as indicative of signal and volume loss of the intervertebral disk at L3-4 consistent with degenerative disk disease. On February 21, 2005, however, Dr. Shahim interpreted the same MRI as showing collapse of the L3-4 disk space, resulting in lateral recess stenosis.

On February 21, 2005, Dr. Joseph Murphy interpreted x-rays as indicating mild narrowing of the L3-4 disk space compatible with chronic disk degeneration. On March 1, 2005, however, Dr. Shahim interpreted x-rays as showing severe degenerative disk disease at L3-4 from her prior diskectomy, and indicated that the claimant was symptomatic from lumbar spondylosis at L3-4, which has been aggravated by work injury.⁴

The claimant underwent a lumber myelogram and post-myelogram CT on March 15, 2005. Dr. William Henry interpreted the myelogram as indicating "some slight narrowing of the intervertebral space at the L3-4 level and there may be some early degenerative disc changes at this

⁴Dorland's Medical Dictionary (30th Edition) defines lumbar spondylosis as "degenerative joint disease affecting the lumbar vertebrae and intervertebral disks, causing pain and stiffness, sometimes with sciatic radiation due to nerve root pressure by associated protruding disks or osteophytes."

level". Dr. Henry interpreted that "[t]he 3-4 interspace is narrowed consistent with degenerative disk changes."

However, Dr. Henry also indicated at L3-4 no canal stenosis, disc extrusion or protrusion and normal neural foramen."

On June 22, 2005, Dr. Jim Moore obtained a history and reviewed the claimant's medical reports. Dr. Moore opined that the myelogram and post-myelogram CT were "essentially a normal study." Dr. Moore made the following observations about the claimant as a further surgical candidate:

I do not think this patient is a candidate for any further surgery of any sort especially not a fusion. The patient's examination today does not show any obvious neurologic stigmata. Indeed the sensory changes as described would be primarily considered functional and would be consistent with the information determined in the Functional Capacity Evaluation that had been accomplished in the past. I am concerned that this patient might well have unrealistic expectations for the surgery and I am fearful that long term results are not going to be achieved.

Dr. Shahim nevertheless performed a redo discectomy and interbody arthrodesis and fusion on July 1, 2005, and released the claimant to light duty on December 13, 2005. However, Dr. Shahim then ordered another lumbar MRI on February 16, 2006, and another myelogram and post-myelogram CT on March 3, 2006.

When the new diagnostic testing did not identify a source for the claimant's continuing low back and left leg pain complaints, Dr. Amir Qeshi performed diagnostic medial branch nerve blocks on March 13, 2006, in anticipation of radiofrequency facet rhizotomies. On June 8, 2006, Dr. Shahim declared the claimant permanently disabled due to chronic radicular symptoms.

On this record, I note that neither Dr. Cathey, Dr. Bryant, or Dr. Moore indicated that the claimant was a surgical candidate again after Dr. Cathey performed his 2003 discectomy surgery with no subsequent improvement in the claimant's complaints. I also note that of the several physicians reading the claimant's various lumbar diagnostic tests after Dr. Cathey's post-surgical release to full duty on May 14, 2004, only Dr. Shahim interpreted tests as indicating "collapse of the L3-4 disk space" or "severe degenerative disc disease at L3-4". Only Dr. Shahim proposed additional surgery, and then after his fusion surgery, Dr. Shahim declared the claimant permanently disabled from chronic radicular symptoms.

The Arkansas Court of Appeals has indicated that "[p]ostsurgical improvement is a proper consideration in determining whether surgery was reasonable and

necessary....” Winslow v. D & B Mechanical Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Here, based on the claimant’s lack of documented improvement during and after the additional back treatment at issue, based on the opinions of Dr. Bryant and Dr. Moore that the claimant was not a candidate for additional surgery for her back, and based on the claimant’s failed validity criteria on her 2004 functional capacity evaluation, I find that the claimant has failed to establish by a preponderance of the evidence that any of the additional treatment at issue that she has received for her low back after December 7, 2004 was reasonably necessary in connection with her compensable 2003 lumbar injury.

I also find that the claimant has failed to establish that the additional treatment she received for her upper extremities after December 7, 2004 was reasonably necessary in connection with her admittedly compensable 2003 right wrist carpal tunnel syndrome injury. In this regard, I note that Dr. Bryant’s report from October 23, 2003 indicates that the claimant reported her pre-operative wrist pain by that date had resolved after surgery. However, on November 20, 2003, less than four weeks later, the claimant apparently told Dr. Cathey that she had received no benefit

from wrist surgery. In assessing the weight to accord the claimant's various representations to her physicians throughout her entire treatment for her wrist and her back, I note again that the claimant underwent a functional capacity evaluation on July 28, 2004. Based on the claimant having passed only seven of thirty (23%) validity criteria, the therapist indicated that the criteria suggest very poor, voluntary submaximal effort not related to pain, medical impairment or disability. On a third attempt in assessing functional capacity on November 30, 2004, the claimant passed only two of ten validity criteria, which again suggested the same conclusions.

When Dr. Reed referred the claimant to Dr. Hixson for an evaluation on May 11, 2005 for her alleged ongoing wrist symptoms after Dr. Bryant's prior surgery, Dr. Hixson concluded that nerve conduction studies performed by Dr. Rutherford that day were normal, that the claimant did not have a Tinel's sign at either carpal or cubital tunnel, and that Dr. Hixson did not have a good explanation for her pain. The claimant has therefore failed to establish by a preponderance of the evidence that she experienced any ongoing symptoms as of December of 2004 causally connected to her 2003 right carpal tunnel injury.

2. Is the claimant entitled to additional temporary disability compensation for any period after May 14, 2004?

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. An injured employee is entitled to temporary partial disability compensation during the period that she is within her healing period and suffers a partial decrease in her capacity to earn the wages that she was receiving at the time of the injury. Ark. State Highway & Transportation 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).

In the present case, because I find that the claimant has failed to establish that any of the additional medical treatment that she received at issue was reasonably necessary for treatment of her compensable right carpal tunnel syndrome or her compensable back injury, I find that the preponderance of the evidence establishes that her healing period ended on May 14, 2004, when Dr. Cathey determined that she had reached maximum medical improvement

and released her to regular duty. The claimant has therefore failed to establish that she is entitled to any period of temporary total or temporary partial disability at issue after May 14, 2004.

3. Is the claimant entitled to any permanent disability benefits in excess of the 10% permanent impairment rating assigned by Dr. Cathey and paid by the respondents?

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which the worker was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair the worker's earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor.

Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

In the present case, the claimant was 42 years old at the time of the hearing. The claimant has a high school education plus two years of college. She worked over ten years at Cooper Standard Automotive before her first injury where she was a press operator for the last six and one-half years. The claimant previously worked at a chicken processing plant and at fast food restaurants.

After considering the claimant's age, education, work experience, the nature and extent of her work-related injury, and all other relevant factors, I find that the claimant has failed to establish by a preponderance of the credible evidence that her 10% permanent disability assigned by Dr. Cathey impairs her earning capacity. I reach this conclusion based on Dr. Cathey's release to *regular* duty work on May 14, 2004, and by Dr. Bryant's August 24, 2004 conclusion that the claimant's invalid functional capacity testing cannot yield any useful information or *any permanent restrictions*. In addition, I am persuaded by the claimant's return to regular work for periods between April of 2004 and October of 2004, at which point Dr. Reed took the claimant off work, apparently based on the claimant's pain complaints which I do not find credible in light of her two failed functional capacity evaluations.

Dr. Shahim's June 8, 2006 proclamation that the claimant will be permanently disabled due to chronic radicular pain does support the claimant's claim for permanent disability in excess of the 10% rating assigned by Dr. Cathey and paid by the respondents. As discussed above, however, I do not find Dr. Shahim's surgical treatment in this case reasonably necessary treatment for the claimant's compensable L3-4 injury. Furthermore, Dr. Shahim's disability determination appears to be based on the claimant's ongoing subjective radicular complaints which I do not find credible. The claimant has therefore failed to persuade me through her own complaints or through Dr. Shahim's opinions that she sustained any permanent disability caused by her compensable 2003 injury in excess of the 10% impairment rating assigned by Dr. Cathey following discectomy surgery.

4. Is the claimant entitled to mileage reimbursement for her trips to the doctors?

The respondents are responsible for mileage related to Dr. Reed's December 15, 2004 office visit arranged by the Commission as part of the claimant's change of physician order. The respondents are also liable for mileage associated with Dr. Moore's office visit on June 22,

2005 arranged by the respondents. Because the claimant has failed to establish that any additional medical treatment that she received after December 7, 2004 was reasonably necessary in connection with her compensable injuries, the respondents are not liable for any of the other mileage presently at issue in this claim.

5. **Should Dr. Schlesinger's proffered January 3, 2007 report be considered in deciding this claim, and should the claimant be directed to undergo another functional capacity evaluation as Dr. Schlesinger recommended and as the respondents requested at the hearing?**

I have accorded Dr. Schlesinger's proffered January 3, 2007 report no weight in rendering a decision in this case for two reasons. First, the report's exchange by the parties did not comply with the seven day rule contained in Arkansas Code Annotated § 11-9-705, and the respondents did not offer adequate evidence to establish good cause as to why the evaluation by Dr. Schlesinger occurred in an untimely manner. Second, Dr. Schlesinger has acknowledged that he did not have available Dr. Shahim's studies from which Dr. Shahim declared a need for surgery. Therefore, Dr. Schlesinger likewise acknowledged in the proffered letter that he did not have information necessary to determine whether or not the fusion surgery at issue would have been indicated for the compensable injury. Dr.

Schlesinger under these circumstances had no opinion of value to render.

Dr. Schlesinger also recommended in January of 2007, however, another functional capacity evaluation, and the respondents propose in the alternative that the claimant undergo another functional capacity evaluation. The claimant has not requested an opportunity to pursue another functional capacity evaluation, and the claimant has failed the validity criteria of the two evaluations already discussed in the record. I therefore find that the record will not be left open for another functional capacity evaluation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The employee/self-insured employer relationship existed at all relevant times.

3. On July 15, 2003, the claimant sustained compensable gradual-onset injuries to her right hand and low back.

4. On September 8, 2004, the claimant sustained a compensable injury to her left hand.

5. Respondent no. 1 has accepted the July 15, 2003

and September 8, 2004 hand and back injuries as compensable and paid benefits.

6. The claimant was assigned a permanent anatomical impairment rating of 10 percent (10%) to the body as a whole for the compensable low back injury, which rating respondent no. 1 has accepted.

7. The claimant reached the end of her healing period for all compensable injuries no later than December 13, 2005.

8. The claimant was not permanently totally disabled prior to her last day at work.

9. The claimant has been granted by the Commission a change of physician to Dr. Ivy McGee Reed effective December 7, 2004 for her 2003 right hand and low back injuries, and effective February 23, 2005 for her 2004 left hand injury.

10. The appropriate compensation rates for the claimant's 2003 injuries are \$397 per week for temporary total disability and \$298 per week for permanent partial disability; the appropriate compensation rates for the claimant's 2004 injury are \$374 per week for temporary total disability and \$281 per week for permanent partial disability.

11. The claimant last worked for the respondent on

June 22, 2005.

12. The claimant seeks additional temporary disability compensation for her 2003 back injury, therefore the 2003 compensation rates apply for the additional temporary disability claim.

13. The respondents paid for the claimant's initial visit to Dr. Reed after entry of a change of physician order; the respondents have controverted all treatment thereafter.

14. The claimant has failed to establish by a preponderance of the evidence that any of the additional medical treatment that she received to her low back at issue after December 7, 2004 was reasonably necessary in connection with her compensable back injury.

15. The claimant has failed to establish by a preponderance of the evidence that the additional treatment that she received for her right upper extremity after December 7, 2004 was reasonably necessary in connection with her admittedly compensable right wrist carpal tunnel syndrome injury.

16. The claimant has failed to establish by a preponderance of the evidence that she is entitled to any period of additional temporary disability compensation after

May 14, 2004. The preponderance of the evidence establishes that the claimant's healing period for her compensable back injury and her compensable right hand injury ended no later than May 14, 2004.

17. The claimant has failed to establish by a preponderance of the credible evidence that her ten percent (10%) permanent disability assigned by Dr. Cathey impairs her earning capacity. The claimant has therefore failed to establish that she is entitled to benefits for permanent impairment to her wage earning capacity for her compensable back injury.

18. The claimant's motion to exclude Dr. Schlesinger's proffered January 3, 2007 report from consideration is hereby granted. The respondents' motion that the claimant undergo an additional functional capacity evaluation is hereby denied.

19. The respondents are responsible for mileage related to Dr. Reed's December 15, 2004 office visit arranged by the Commission as part of the claimant's change of physician order. The respondents are also liable for mileage associated with Dr. Moore's office visit on June 22, 2005 arranged by the respondents. Because the claimant has failed to establish that any additional medical treatment

MESSER - F312862 & F411610 24

that she received after December 7, 2004 was reasonably necessary in connection with her compensable injuries, the respondents are not liable for any of the other mileage presently at issue in this claim.

AWARD

The respondents are directed to pay mileage reimbursement in accordance with the findings of fact set forth herein. In all other respects, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge