

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406739

MARILYN D. RITCHIE. EMPLOYEE	CLAIMANT
STEWART PROPERTIES, L.L.C, EMPLOYER and EMPLOYERS' MUTUAL CASUALTY CO., CARRIER,	RESPONDENTS NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MARCH 2, 2007

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on December 5, 2006 at El Dorado, Union County, Arkansas.

Claimant represented by HON. GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents No. 1 represented by HON. JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HON. DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by HON. JUDY R. RUDD, Attorney at Law, Little Rock, Arkansas, not attending.

STATEMENT OF THE CASE

On December 5, 2006, the above-captioned claim came on for a hearing in El Dorado, AR. A Prehearing Order was filed in this matter on September 6, 2006, and a copy of said prehearing order was marked as Commission's Exhibit No. 1 and made a

part of the record without objection, subject to any modifications made at the December 5, 2006 full hearing.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including March 18, 2004.
- 3) The parties agree to applicable compensation rates of \$139.00 per week for both TTD and PPD.
- 4) The claimant sustained compensable injuries to her right knee and lower back.
- 5) Claimant was assigned a 22% permanent partial impairment rating associated with her right lower extremity, which has been accepted by Respondents No. 1.
- 6) All issues of constitutionality of A.C.A. §11-9-522(F) would be reserved.

The parties agreed at the full hearing to litigate the following issues:

- 1) To what extent, if any, claimant sustained permanent anatomical impairment to her low back.
- 2) If it is found the claimant sustained permanent partial impairment to her low back, it must be determined whether claimant is entitled to wage-loss disability benefits in excess of the permanent impairment or whether the

claimant is now totally and permanently disabled.

- 3) Whether there is Second Injury Fund liability.
- 4) Whether claimant is entitled to TTD benefits associated with her low back injury for the period of August 25, 2004, to a date yet to be determined.
- 5) Whether claimant's medical treatment associated with her compensable injuries are reasonably necessary including, but not limited to, treatment from Doctors Hart and Lytle.
- 6) Determination of the claimant's MMI date with regard to her compensable injuries.
- 7) Whether claimant's low back injury occurred on March 18, 2004 or March 19, 2004.

Claimant made the following contentions at the full hearing December 5, 2006:

- 1) Respondents initially paid her permanent impairment benefits pursuant to her knee injury prematurely and that at that time, she remained within her healing period and was entitled to additional temporary total disability benefits as a result of her compensable back injuries. In this regard, claimant contends that she did not reach maximum medical improvement associated with the compensable back injury until on or about April 27, 2005, so she should be awarded temporary total disability benefits during the period from August 25, 2004 through April 27, 2005.

- 2) Claimant contends that the additional medical treatment she is continuing to have with Dr. Thomas Hart, Dr. John Lytle, and other family physicians associated with her pain management, has been reasonable, necessary, and related, and respondents should be ordered to pay for that treatment, and additionally claimant contends that respondents should be ordered for her to continue to see her family physician for pain management associated with her compensable injuries.
- 3) Claimant contends that she has been assigned a 5% permanent impairment rating to her low back which respondents have failed to pay for. Claimant states that respondents have previously accepted and paid a 22% impairment rating to her right knee.
- 4) Claimant contends that she is now totally and permanently disabled, or in the alternative is entitled to wage loss disability benefits in excess of the anatomical rating assigned.
- 5) Claimant contends that respondents should be ordered to pay attorney's fees as permitted by law.
- 6) Alternatively, claimant contends that if the Commission finds the claimant reached MMI after April 27, 2005; that she would be entitled to TTD benefits up to the date the Commission deems claimant reached MMI.

Respondents No. 1 contended the following at the full hearing:

- 1) All appropriate benefits have been and are continuing to be paid with

regard to this claim. Claimant has been assigned an impairment rating to her right knee that has been accepted by the carrier. Claimant's 5% rating to her lower back is a result of arthritic changes that are not the responsibility of Respondent No. 1.

2) Claimant has been released as having reached MMI associated with her back and knee. Therefore, TTD benefits have been discontinued.

Respondents No. 1 contend additional medical treatment is not reasonable and necessary for claimant's back or knee.

3) Respondents No. 1 contend claimant is not entitled to TTD benefits for the period 8/25/04 through 4/27/05.

4) Respondents No. 1 contend claimant is not entitled to any PPD benefits associated with her back, but if claimant is found to be entitled to PPD benefits for her back, respondents contend claimant reached MMI for her back on 3/14/05. Respondents contend the claimant sustained no impairment to the body as a whole and, therefore, not entitled to any wage loss disability benefits.

5) Respondents No. 1 contend claimant is not permanently and totally disabled.

6) If it is determined that claimant is entitled to wage loss disability benefits, respondents contend the Second Injury Fund would have liability.

Respondent No. 2 contended the following at the full hearing:

1) Claimant cannot prove entitlement to any degree of PPI for her low back.

The claimant's low back problems were "latent" in that the full nature and character of such low back problems were not known to the claimant or the employer prior to the last work injury of March 19, 2004.

2) The claimant's last injury was scheduled (right knee) and the claimant is not entitled to any amount of wage loss disability unless she can prove she is permanently and totally disabled. She cannot meet her burden of proof in that regard.

3) There is no combination of disabilities or impairments.

4) The Fund contends that it is entitled to any defense not specifically pled further.

5) Second Injury Fund contends claimant suffered no permanent impairment to her back and Second Injury Fund has no liability.

Respondent No. 3 contended that, pursuant to A.C.A. §11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death & Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found not to have liability and the claimant is found to be permanently and totally disabled, the trust fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502.

Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits.

That since the claimant remained in her healing period until March 14, 2005, all benefit payments made by Respondent No. 1 prior to that time were for temporary total disability

benefits.

DISCUSSION

I. Evidentiary Objection.

At the beginning of the full hearing on December 5, 2006, claimant objected to respondents' introduction of a surveillance report and a surveillance video/DVD being submitted into evidence. The surveillance video/DVD was allowed to be proffered by the respondents and marked Respondents' Proffered Exhibit "1", and the surveillance report was allowed to be proffered by the respondents and marked as Respondents' No. 1 Proffered Exhibit No. "2". The parties were advised a ruling would be made with respect to the two proffered exhibits at the time a decision was rendered in this claim.

The two proffered exhibits are both non-medical, and claimant's counsel stated that he had received both proffered exhibits at least two weeks prior to the hearing.

"THE COURT: Okay. Mr. Giles, I guess you can agree that you received the tape and the report within the two weeks before the hearing, correct?

MR. GILES: At least, yes, sir. I'll even go as much as maybe thirty days." (T. pg. 193, lines 16-21)

The claimant has a valid argument regarding hearsay; however, the Full Commission dealt with a similar situation in *Coleman v. Pro Transportation*, 206 AWCC 48, Claim no. F210837, and quoted *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W. 3d 856 (2002), which stated: "The Commission should be more liberal with the admission of evidence, rather than more stringent." Additionally, A.C.A. §11-9-705(a) states "The

Commission is not bound by technical or statutory rules of evidence."

Based on the case law and A.C.A. §11-9-705, I find Respondents' Proffered Exhibit "1" and Proffered Exhibit "2" should be admitted into the record of the December 5, 2006, full hearing.

II. History

The claimant sustained admittedly compensable injuries to her right knee and low back in March of 2004. The claimant testified she injured her knee on March 19, 2004, but was somewhat unsure whether she injured her back on March 18, or March 19, 2004. The claimant testified as follows regarding her right knee injury of March 19, 2004:

Q. Is there something specific that you associate on the 19th with the injury to your right knee?

A. Yes, sir. I moved a bag of that cement stuff, Quik-Crete or whatever it is called. I moved the first bag and it was heavy but it was okay. When I moved the second bag I got it about half way out of - it was off in a corner, kind of pinned in there, and I got it about halfway out. It had solidified and I lost my grip on it and it hit my leg just below my knee and caused an extreme sharp pain in the knee.

Q. Your right leg?

A. My right knee, and then it just hurt. (T. pg. 36, lines 8-20)

Although hesitant, the claimant ultimately testified her best guess was that she sustained her back injury on March 19, 2004 as well:

Q. And as you sit here today, knowing that you worked all that day on the 18th and on the 19th, do you know which day you think that you hurt your back as you sit here and look back on it?

A. I honestly do not. I can't tell you. If I could make a guess?

Q. What would be your impression?

A. My impression would be that it was done on the 19th.

The claimant testified that a few days after her injuries, she reported them to her employer but that her employer did not send her to the doctor. The claimant testified that she went on her own to chiropractor, Dr. Rick Brown. The claimant testified she had been seeing Dr. Brown since she had come to Arkansas in 1991 (T. pg. 38, lines 19-24). The claimant testified that Dr. Brown had treated her "whole spine" prior to 3/19/04. (T. pg. 113, line 3).

The claimant testified that ultimately respondents sent her to see Dr. McKeiver in Monticello, Arkansas. Dr. McKeiver took an MRI of the claimant's knee and referred her to Dr. Lytle. On June 22, 2004, the claimant underwent surgery on her right knee. The claimant testified she worked up to the surgery date, but did not work anywhere after June 22, 2004. After following up with Dr. Lytle after her knee surgery, Dr. Lytle ultimately assessed claimant at MMI with regard to her knee and gave her a

22% impairment to the right lower extremity on August 25, 2004.

The claimant treated with Doctors Akin, Hart, McKeiver, Wilbourn, Jucas, Saer and Ong for her low back complaints. On September 24, 2004, Dr. Ong submitted an MRI report of the claimant's lumbar spine that stated "therefore, I believe that it is a borderline normal MRI study of the lumbar spine." (CIX-1, pgs. 134 & 135). Dr. Diana Jucas issued a whole body bone scan report on September 24, 2004 that stated "evidence of increased activity in the lower lumbar spine at L4-5, both knees, right ankle, and both feet thought to be due to degenerative changes. (Emphasis added.) (CIX-1, pg. 136)

Dr. Akins reviewed the claimant's MRI on November 29, 2004 and noted the degenerative changes at L5-S1 and stated "I do not see anything here that would require any surgical intervention." (CIX-1, pg. 145) Dr. Akin then referred the claimant to Dr. Hart for pain management. On December 28, 2004, Dr. Saer reported "I do not think she is going to need anything done surgically." (CIX-1, pg. 169-170)

Dr. Wilbourn diagnosed the claimant with bilateral lumbar facet joint spondylosis and rated her with a 5% whole body impairment. In his March 14, 2005, report, Dr. Wilbourn opined the claimant has reached MMI with regard to her back and said her prognosis is "excellent." (Rx-2, pg. 35) Dr. Saer agreed with Dr. Wilbourn's findings of MMI in his March 29, 2005 report. (RX-2, pg. 37) The claimant received pain management from Dr. Hart; however, claimant contends she is now permanently and totally disabled due to her compensable injuries, or in the alternative, entitled to wage loss disability benefits in excess of her alleged 5% anatomical whole body impairment.

III. Adjudication

A. Permanent Benefits.

A.C.A. §11-9-102(4)(F)(ii)(a) states:

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

In the case at hand, the claimant has failed to meet her burden. The claimant has failed to prove by a preponderance of the evidence that her compensable injury is the major cause of her disability or impairment. The claimant was diagnosed with lumbar facet joint spondylosis. (RX-2, pg. 35). Dorland's Illustrated Medical Dictionary, Edition 28, defines Spondylosis as "a general term for degenerative changes due to osteoarthritis." In light of the claimant's spinal treatments from Dr. Rick Brown since 1991, it could hardly be said claimant's compensable back injury was the major cause of the degenerative changes in her low back. I find the claimant has failed to meet her burden of proof for permanent benefits because the compensable injury was not the major cause of her disability or need for treatment. "Major cause" is defined as more than fifty percent (50%) the cause, and a finding of major cause shall be established according to the preponderance of the evidence. A.C.A. §11-9-102(14).

I also question the validity of Dr. Wilbourn's 5% whole body impairment rating with respect to its application in the workers' compensation context. Dr. Wilbourn, in his August 22, 2005, report based his impairment rating on page 110, table

72, DRE Impairment Category II AMA Guide to the Evaluation of Permanent Impairment, 4th Edition. When reviewing the DRE Thoracolumbar Category II, "structural inclusions" it states "1) Less than 25% compression of one vertical body; 2) posterior element fracture without dislocation and not due to developmental spondylolysis is present and healing is occurring without loss of structural integrity or radiculopathy. Spinous transverse process fracture or displacement is a thoracolumbar category II impairment, because it does not disrupt the spinal canal. Based on the "structural inclusions," I question the rating given by Dr. Wilbourn because it is based on non-operated on spondylosis. Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W. 3d 738 (2004) states "Notably, the applicable AMA Guides provide no permanent impairment rating for spinal stenosis that has not been operated on." (Dicta)

Since the claimant has failed to prove entitlement for permanent benefits related to her back injury, the issues of wage-loss benefits, Second Injury Fund liability, and issue No. 7 listed herein, have become moot.

I further find the claimant is not permanently and totally disabled due to her compensable knee injury. Permanent total disability is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." (A.C.A. §11-9-519(e).

Several factors weight against the claimant's claim of permanent and total disability. The functional capacity evaluations contained in Claimant's Exhibit 1, pages 219-234, show that the claimant gave "unreliable effort" in the testing. Even with the questions about reliability, the FCE found that the claimant was capable of performing light duty work for an eight hour day. The FCE was completed well after the claimant's

knee surgery. In addition, Dr. Wilbourn stated in his April 27, 2005, report that "Ms. Ritchie may return to work as of today, April 27, 2005, with no lifting, pushing, or pulling over 20 pounds." (RX-2. pg. 39)

Based on the credible evidence presented at the hearing of December 5, 2006, I find the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

B. Temporary Total Disability Benefits
and
Maximum Medical Improvement.

The parties stipulated the claimant sustained compensable injuries to her right knee and low back. The claimant contended she reached MMI for her low back no earlier than April 27, 2005. The respondents contended claimant reached maximum medical improvement for her low back on March 14, 2005. Based on the medical records presented, I find that Drs. Wilbourn and Saer are correct when they assessed claimant at maximum medical improvement as of March 14, 2005. In his March 14, 2005, report, Dr. Wilbourn states "she has reached maximum medical improvement for her back." (RX-2, pg. 35) Dr. Saer concurred with Dr. Wilbourn's opinion in his March 29, 2005, report. (RX-2, pg. 37) Dr. Hart had stated as much in his January 13, 2005 report when he said "there is no cure for her back as it basically boils down to management." (CIX-1, pg. 185-187) Based on the credible evidence, I find the claimant reached MMI for her low back injury on March 14, 2005. With regard to the claimant's right knee, I find the claimant reached MMI for her right knee on August 25, 2004, pursuant to Dr. Lytle's report from the same date. (CIX-1, pg. 125)

The claimant is requesting TTD benefits from August 25, 2004, through April 27, 2005, or later if so determined by the Commission. Since the claimant has been deemed at MMI for her right knee on August 25, 2004, the temporary total disability request must be for claimant's unscheduled back injury only.

In order to be entitled to TTD benefits for an unscheduled injury, an injured worker must prove she remained in her healing period and was totally incapacitated to earn wages. Ark. State Highway Dept. v. Breashears, 272 Ark. 244, 613 S.W. 2d 582 (1982) Respondents No. 1 contended that the claimant did not reach MMI with regard to her back until March 14, 2005. Therefore, by agreement, the claimant remained within her healing period for her back through March 14, 2005.

Following the claimant's knee surgery in 2004, Dr. McKiever took the claimant off work in his June 22, 2004 report. (CIX-1, pg. 116) Claimant treated with several doctors thereafter, including Dr. Wilbourn. Even though Dr. Wilbourn found the claimant at MMI for her low back on March 14, 2005, he still did not release her to go back to work until his April 27, 2005 report. (RX-2, pg. 39) Clearly, Dr. Wilbourn knew the claimant was off work in March of 2005, but still did not release her to return to work until April 27, 2005. Therefore, I find that for the period of August 25, 2004 through March 14, 2005, the claimant was both within her healing period and unable to earn meaningful wages. The period of TTD could have been extended to April 27, 2005; however, Dr. Wilbourn found her healing period to have ended on March 14, 2005 and I agree. Therefore, the claimant has proven by a preponderance of the evidence that she is

entitled to TTD benefits at the stipulated rate for the period August 25, 2004 through March 14, 2005, plus the maximum statutory attorney's fees.

C. Additional Medical Treatment.

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a) A claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 230 S.W. 3d 153 (2003) What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W. 2d 857 (1987)

I have found the claimant to be at MMI for her right knee on August 25, 2004, and based on the credible evidence I find the respondents liable for all treatment contained in the record for claimant's right knee that was incurred before August 26, 2004. With regard to the claimant's back, I have found the claimant reached MMI on March 14, 2005. I further find that all treatment for the claimant's back after March 14, 2005 was for pain management. I further find the pain management after March 15, 2005 was for the claimant's degenerative back conditions and are not related to the claimant's compensable injury of March 2004. Therefore, I find the treatment for the claimant's back after March 14, 2005 to not be the responsibility of the respondents. Respondents are liable for all treatment to the claimant's back contained in the record that occurred prior to March 15, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A. §11-9-704.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) Respondents No. 1's Proffered Exhibits 1 & 2 are hereby admitted into the record.
- 4) Claimant has failed to prove by a preponderance of the evidence that her compensable back injury was the "major cause" of her back disability or 5% impairment rating assigned by Dr. Wilbourn; therefore, claimant has failed to prove entitlement to any permanent partial disability benefits related to her back.
- 5) Claimant's failure to prove entitled to permanent partial disability benefits with regard to her back renders the issues of Second Injury Fund liability, wage loss disability benefits and issue No. 7 outlined herein moot.
- 6) Claimant has failed to prove by a preponderance of the evidence that she is unable, because of her compensable injuries, to earn any meaningful wages in the same or other employment.

- 7) The claimant has, therefore, failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
- 8) Neither the Second Injury Fund, nor the Death and Permanent Total Disability Trust Fund have no liability in this claim.
- 9) Respondents No. 1 are responsible for all medical treatment contained in the record related to the claimant's right knee up to August 25, 2004, only.
- 10) Respondents No. 1 are responsible for all medical treatment contained in the record for claimant's back injury from March 19, 2004 through March 14, 2005, only.
- 11) Claimant's pain management for her back after March 14, 2005, was for degenerative conditions not related to her March 2004 compensable injuries.
- 12) Claimant has proven by a preponderance of the evidence that she is entitled to additional TTD benefits related to her compensable injuries of March 2004 for the period of August 25, 2004 through March 14, 2005, to be paid by Respondents No. 1.
- 13) The claimant is entitled to the maximum attorney's fees allowed by Arkansas Law consistent on the findings herein.

Ritchie/F406739

AWARD

Respondents No. 1 are directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

All sums herein awarded are payable in lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge