

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603551

CYNTHIA TAYLOR, EMPLOYEE	CLAIMANT
AMERIS HEALTH SYSTEMS, EMPLOYER	RESPONDENT
ACE PROPERTY & CASUALTY INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 31, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on June 29, 2007, at Luxora, Mississippi County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Ms. E. Diane Graham, Attorney-at-Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 29, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on April 25, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was undisputed that the employee/employer/carrier relationship existed at all relevant times, including March 2, 2006; that the claimant sustained a compensable injury on said date; that respondents paid various medical and related expenses, as well as temporary total disability benefits at the rate of \$120.00 per

week through on or about June 27, 2006; and that respondents had controverted all benefits beyond those previously paid.

By agreement of the parties, the following issues were presented for determination:

- 1) Respondents' responsibility for outstanding and continued medical treatment.
- 2) Claimant's entitlement to additional temporary total disability.

The claimant contended, in summary, that respondents improperly terminated medical treatment; that respondents should be held responsible for all outstanding medical treatment, together with continued reasonably necessary medical treatment, including, but not limited to treatment by a pain specialist pursuant to referral by her primary care physician; that, in addition, she was entitled to additional temporary total disability beginning June 28, 2006, and continuing through the present, maintaining that her healing period had not ended.

The respondent contended that it had paid all benefits to which the claimant was entitled as the result of her March 2, 2006, injury which aggravated claimant's pre-existing degenerative disc disease in the cervical and lumbar spine; that the claimant's healing period ended on June 4, 2006, at which time she was released with a thirty (30) pound lifting restriction for one (1) month; that temporary total disability benefits were paid until the respondent/employer found and offered the claimant a job within said restrictions; and that the various specialists that have evaluated and/or treated the claimant have noted no objective findings other than

the claimant's pre-existing degenerative disc disease.

The claimant has, on multiple occasions, including at the hearing on this claim, been advised of her right to legal representation; that an attorney could not charge her a fee for representing her in a workers' compensation claim without approval of this Commission; that fees were normally awarded only out of benefits obtained in her behalf, and that she would only be responsible for a portion of the fee if an attorney was successful in obtaining benefits for her. In addition, the claimant was advised, on numerous occasions, that she had the burden of proving her claim; that she was only entitled to one hearing; and that, for any reason, if she was unsuccessful, she could not request a second hearing while maintaining that the reason for any failure to prove the claim was lack of legal representation. The claimant elected to proceed in her own behalf.

During the hearing, the claimant testified that, at the time of her injury, she earned \$9.00 per hour and that she was a full-time employee. As previously pointed out, respondents paid temporary total disability benefits at the rate of \$120.00 per week. Respondents proffered a wage statement showing the claimant's total gross earnings during her period of employment with respondent herein and which indicates that the claimant may have been paid at an inappropriate compensation rate. However, this Administrative Law Judge failed to recognize at the prehearing conference that the applicable compensation rate was an issue. No witness was available for respondent to testify concerning the claimant's contract of hire, if any.

Attempts were made subsequent to the hearing to have the parties resolve the applicable compensation rate without the necessity of further litigation. However, the attempts were unsuccessful. Accordingly, by necessity, the issue of the claimant's average weekly wage must be specifically reserved.

The claimant was the only witness to testify. The record is composed solely of the transcript of the June 29, 2007, hearing containing numerous exhibits. My July 25, 2007, letter, together with respondents' July 26, 2007, response concerning the issue of the appropriate compensation rate has been blue-backed for informational purposes only.

From a review of 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 claimant and to observe her 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. Respondents have paid appropriate medical and related expenses as the result of claimant's March 2, 2006, injury.
4. The claimant has failed to prove that she is entitled to continued medical treatment related to her March 2, 2006, injury.

5. The claimant's healing period has previously ended.
6. The claimant has failed to prove, by a preponderance of the credible evidence, that she is entitled to temporary total disability benefits after June 27, 2006.
7. Any additional issues not addressed herein are specifically reserved for future determination.

#### DISCUSSION

The record in this claim is replete with inconsistencies and contradictions. The record reflects that the claimant had significant physical problems, including, but not limited to, problems with her neck and back prior to the March 2, 2006, injury. This claim for additional benefits turns almost entirely upon the claimant's credibility. A claimant's testimony is never considered uncontroverted. The testimony of an interested party is always considered to be controverted. *Lambert v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

I did not find the claimant to be a credible witness. Admittedly, the claimant has a limited education, having completed the 10<sup>th</sup> grade taking special education classes. Further, she was an extremely poor historian. However, as will be set out further below, the claimant had a long history of chronic back problems. She has sustained multiple injuries, including a prior motor vehicle accident, as well as a slip

and fall injury at a Kroger's grocery store which caused her to be off work for six (6) months to a year. Finally, I feel compelled to comment on my observations concerning the claimant's demeanor at the June 29, 2007, hearing. While taking the witness chair, the claimant ambulated extremely slowly and constantly exhibited expressions of severe pain. However, during the course of her testimony, the claimant's demeanor changed. In fact, on cross-examination, the claimant became extremely animated and defensive in response to questions from respondents' attorney and did not exhibit any symptoms. She did not exhibit any apparent discomfort during her entire testimony. When leaving the witness chair, she appeared to be a different person and did not exhibit any expressions of pain previously demonstrated.

On March 2, 2006, the claimant was working as nurse's aide for Ameris Health Systems. Her description of the injury, its prompt reporting, as well as her course of medical treatment is set out below:

Q Tell the Commission how you got hurt.

A Okay. I went – my light came on in the room, and I went in there to see what the patient wanted. It was a young girl and her mother, special child, and she wanted to go to the bathroom. Okay. I went over to assist her to the bathroom, and she jumped out at me. When she jumped out at me, she's like pulling me, and my neck and my back popped. And I went out –

Q What do you mean by jumped out at you?

A She like – you know how a kid jump on – jump out the bed at you? That's what she did.

Q Was this a patient?

A Yes, sir, it was a patient.

Q And –

A I think she was like 12 or 13 years old, but she weighed 158.8 pounds.

Q And what happened when she jumped out at you?

A When she jumped out on me, she like pulled me and twist me.

Q And what kind of injury did you sustain?

A It messed my neck and my back up, sir.

Q Well, what was your primary injury, your neck or your back or both?

A Both. I had to get six shots in my neck that following day when I went to the doctor. I got six shots in my neck. And then she gave me –

Q Now, let's don't get ahead of ourself.

A I'm not – okay. I'm not trying to get ahead of myself. I'm just trying to be honest and tell you what happened.

Q Okay. Did you promptly report this injury?

A Yes, I came out and I told my charge nurse.

Q Reported to your charge nurse, which was who?

A I think it was – I think it was Mary that day –

Q Well –

A – that night. I'm not for sure, but I think it was Mary.

Q Again, they don't dispute that a work-related incident occurred –

A I know.

Q – and that you got hurt.

A Yes, sir.

Q Okay. And did they fill out an incident report at that time?

A They couldn't find the right form of the paper to fill out.

Q Okay. Did you eventually fill out an incident report?

A I eventually fill – eventually report out when I came back to work.

Q Which would have been when?

A It was that – I can't think about what day it was, but I eventually came up there and fill a paper out when I came back up there and told them what – talked to my supervisor and told her.

Q Well, but even before they filled out the paperwork –

A Uh-huh.

Q – they sent you to the doctor, is that right?

A I took myself to the doctor.

Q Okay. Did they tell you to go to whatever doctor you wanted to?

A They never told me I couldn't go to a specific doctor.

Q Okay. So you reported the injury?

A I reported the injury.

Q And did they say, "Well, go to the doctor"?

A I had already went to the doctor.

Q Before you reported the injury?

A Okay. When I got hurt, it was at night.

Q Yes, ma'am.

A It was at night. And the next day it was my time to be off, and so that Monday –

Q When did you report the injury, ma'am?

A I reported the injury that night to my, you know, the super – the nurse that was on duty, I reported the injury to her.

Q And what did you tell her?

A I told her that the patient jumped out of the bed at me, and she hurt my back.

Q Okay. And let me ask you this –

A Uh-huh.

Q – before March the 2<sup>nd</sup> of 2006 –

A Uh-huh.

Q – before this work-related injury –

A Uh-huh.

Q – had you been seeing any doctors for any other physical problems?

A My blood pressure.

Q Other than your blood pressure, were you having any physical problems that affected your body?

A No.

Q Other than blood pressure, you didn't have any problems, is that right?

A No, sir.

Q Okay. Who was treating for your blood pressure?

A Debbie Wilhite was seeing me.

Q Okay. After this injury who is the first medical provider that you saw?

A Debbie Wilhite was the first. (Tr.22-25)

On cross-examination, it was pointed out that Debbie Wilhite, the claimant's primary care provider was an Advanced Nurse Practitioner rather than a physician. The claimant failed to offer any medical records authored by Ms. Wilhite. Despite the claimant's testimony on direct-examination that the only physical problems she experienced prior to March 2, 2006, involved high blood pressure and some arthritis in her knee, the medical evidence reflects that the claimant had a lengthy history of back problems beginning as early as March 11, 2002, which apparently pre-dated an April 26, 2003, motor vehicle accident which further aggravated the claimant's low back as well as her cervical spine. Rather than conduct an exhaustive analysis of the prior medical records, suffice it to say that the claimant experienced significant and multiple physical problems before March 2, 2006, including chronic back and neck problems. (Resp. Ex. A, pp.1-39)

Although the medical evidence is unclear, it appears that Ms. Wilhite may have been a Nurse Practitioner at the NEA Clinic in Osceola, Arkansas. The claimant's first date of medical service for her work-related injury is contained in a March 3, 2006, report from the NEA Clinic which contains the following complaint:

**Chief Complaint**

•workman's comp. Tue night patient was at work and a child jumped out of the bed into the patients arm and she strained her back. Now having low back pain and right side neck pain shaving [sic] numbness alternating between both hands and fingers, also having nausea, vomiting green bile yesterday evening and this morning. (Resp. Ex. A, p.40)

The claimant was diagnosed as having sustained a strain to her back and neck.

She continued under the treatment of the NEA Clinic and was subsequently referred to Dr. Sunil Gera, a pain management specialist in Jonesboro, Arkansas. Various diagnostic studies were taken, including an MRI of the lumbar and cervical spine.

Dr. Gera's May 5, 2006, report is set out below:

Ms. Taylor was last seen on 4/4/2006. An MRI of the lumbar and cervical spine was done which was explained to her it was normal. In the meantime she was scheduled for diagnostic medial nerve branch block. I also talked to her in detail on the telephone and explained it to her, she said she is not worried but her husband is worried. Her husband told her that this is a chronic pain and does not need a needle in her back. Even Debbie Wilhite has explained the procedure to her. I explained it to her again.

She said I did not talk to her and that I just said I was going to this injection and I hung up on her. I think this is a lie. Considering the way the patient has been behaving and is telling me that I hung up on her when I did explain to her, and after I have spent so much time with her and I do not think the patient is credible. I will discharge her. I have explained to her with her lack of credibility I cannot treat her and she has to find another doctor. They left. (Resp. Ex. p.48)

The claimant was next referred by Nurse Wilhite for a neurosurgical consult to Dr. Jeffrey Kornblum, a neurosurgeon in Jonesboro, Arkansas. Dr. Kornblum's initial impression indicated that the claimant described multiply complaints. He did not find any focal deficit on his examination with the exception of some signs suggestive of carpal tunnel which he indicated was a known chronic prior diagnosis for the claimant. Dr. Kornblum indicated that the claimant appeared to have more trouble with her neck than with her low back. He recommended MR imaging of the cervical spine, and suggested that she bring the previous lumbar study upon her return visit. The claimant underwent another MRI of the cervical spine on June 1, 2006. The claimant returned to Dr. Kornblum on June 2, 2006, at which time he

issued the following report:

Mrs. Taylor is seen in follow up on June 2, 2006. She was referred by Dr. W. Wilhite. She is accompanied today with her husband and son. She again notes a burning discomfort in her neck and low back. She has had the imaging as requested. She has brought her disk from St. Bernards which actually also has a lumbar and cervical study on it. She is noted to have some mild desiccation of the L4 disc, there is no significant canal compromise, there is no focal herniation. Her lumbar curvature is normal. In her cervical spine she shows some mild degeneration at C4 and C5, there is some decreased cervical lordosis at these levels. The canal and foramen are quite ample throughout.

Impression: Mrs. Taylor describes burning discomfort since a twisting event back in March. She shows some early degenerative changes, not unusual for her age and body habitus. I have not advocated surgical intervention, I have advised her to continue along the lines of structured exercise, anti inflammatories on an as needed basis, and a continued effort at weight reduction. We have discussed other considerations such as blocks and chiropractic treatment. I have suggested that she try to maintain a 30 pound lifting restriction for the next month for comfort reasons. (Resp. Ex. A, p.54)

Based upon the recommendations of Dr. Kornblum, the employer offered the claimant work within the restrictions imposed upon her by Dr. Kornblum. Apparently, the employer first offered the job verbally. Later, Brenda Ferguson, the H.R. director for the employer, sent the claimant the following letter which was received as reflected by certified mail, return receipt:

This is to confirm that on June 22, 2006, you were verbally offered employment as a transporter for the surgery department by Kathryn Musholt, CNO, and myself in a personal meeting. Ms. Musholt explained to you this employment would not require you to do any lifting over thirty (30) pounds which is within the work restrictions placed by your physician. Other personnel would do any required lifting beyond said restriction. The surgery director, Pam Brister, later contacted you by telephone and offered you the choice of the dates of Tuesday, June 27; Wednesday, June 28; and Friday, June 30, 2006, to return to work.

I also called you today and reiterated the information and offered you the opportunity to ask any questions you might have. (Resp. Ex. A, pp.58-59)

The claimant was also seen one time only for an examination and evaluation by Dr. Robert L. Bourland, a physician in Memphis, Tennessee. Dr. Bourland's diagnosis was cervical and lumbar strain which had resolved. Dr. Bourland could not make any objective findings, stating that the only positive findings were subjective complaints of pain. He recommended that the claimant undergo an aggressive work hardening program in an effort to get her back to some type of functional occupation.

The claimant was last seen by Dr. Kornblum on August 15, 2006. His final impression states:

**Impression:** Ms. Taylor is noted to have ongoing complaints of mechanical discomfort. She has been *without radicular complaint or objective deficit*, her diagnostic imaging reveals mild degenerative changes. I have not advocated surgical intervention. She has had multiple medications including anti-inflammatories, two courses of oral steroids, without benefit. A block is certainly an option to her though she notes allergy to IV contrast. I have discussed with her that I personally do perform epidural injection, though I always use a contrast injection to confirm location of the needle. I would not be comfortable performing the block without use of contrast, though I have informed her that there are physicians that do not routinely check position with contrast. If she wants the block she may wish to pursue another physician to provide that service. With regard to her back condition and work history as requested by her comp. carrier, she has ongoing mechanical complaints that appear consistent with her degenerative disease, *I see no structural lesion to feel that she has suffered a significant structural event from a minor twisting event at work*, though certainly any twisting event may have resulted in the appearance or exacerbation of symptomatology. Clinically her complaints that she related to that twisting event have not resolved. *I would relate her ongoing complaints to her degenerative disease and not to an isolated event.* (Resp. Ex. A, p.57) (Emphasis supplied)

#### TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an

employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

In addition, Ark. Code Ann. §11-9-526 provides:

If an injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless, in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

Based upon my review of the entire record, I find that the claimant has failed to prove that she is entitled to temporary total disability after June 27, 2006. As previously pointed out, the claimant had chronic and longstanding problems with both her back and neck. The claimant sustained a temporary aggravation of her pre-existing condition as the result of the March 2, 2006, admitted incident. The claimant's continued physical problems, if any, are directly and casually related to the pre-existing degenerative disease rather than the work-related incident.

Further, respondents offered the claimant suitable employment within the restrictions imposed upon her by Dr. Kornblum, and the claimant would not be entitled to temporary total disability after work was offered. It must further be noted that the lifting restriction imposed by Dr. Kornblum only extended for a period of one month. The claimant has simply failed to prove entitlement to temporary total disability beyond the period of time benefits were paid. As previously noted, there may be a dispute concerning the applicable compensation rate; however, that issue has been specifically reserved.

#### MEDICAL TREATMENT

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Treatment rendered to solely to address subjective pain complaints, which are over-exaggerated and not supported by any objective or measurable findings

is not reasonable and necessary medical treatment. *Patrick Gossage v. Hardaway Construction Co.*, AWCC E515832, Full Commission Opinion filed February 6, 1998.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Respondents have exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment, as well as a period of temporary total disability. The record reflects that the claimant's continued problems, if any, related to her longstanding, pre-existing condition rather than to the temporary aggravation of said

condition. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that she is entitled to the additional benefits claimed. Accordingly, the within claim is hereby denied and dismissed.

Issues not addressed herein are specifically reserved for future determination.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge