

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F612629

LESLIE GARRISON, EMPLOYEE

CLAIMANT

DREW COTTONSEED OIL MILL, INC., EMPLOYER

RESPONDENT

**COMMERCE & INDUSTRY INSURANCE CO.
c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 29, 2008

Hearing before Administrative Law Judge Barbara Webb on November 1, 2007, in Monticello, Drew County, Arkansas.

The claimant was represented by Mr. Neal Hart, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Ms. Melissa Wood, Attorney at Law, Worley, Wood, and Parish, P.A., Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on November 1, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on September 12, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the September 12, 2007 Pre-hearing Order is made a part of the hearing record.

By agreement of the parties, the stipulations as submitted by the parties in the Pre-hearing Order as amended on the record are hereby accepted:

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

2. The employer/employee/carrier relationship existed on November 6, 2006, when claimant sustained a compensable back injury.
3. The claimant's average weekly wage was \$320.00, which would entitle her to a temporary total disability rate of \$213.00 and a permanent partial disability rate of \$160.00, if awarded.
4. Respondents have paid some medical and temporary total benefits through May 23, 2007.

ISSUES

By agreement of the parties, the issues presented at the hearing were as follows:

1. Claimant's entitlement to additional medical benefits.
2. Claimant's entitlement to additional temporary total disability benefits.
3. Controversion and attorney's fees.

CONTENTIONS

The claimant contends she is entitled to receive additional medical care at respondents' expense; specifically, treatment recommended by Dr. Carl Covey. The claimant contends that she remains in a healing period and is entitled to payment of temporary total disability benefits from the date last paid through a date yet to be determined and that claimant's attorney is entitled to the maximum statutory attorney's fee on all controverted benefits. All other potential issues are expressly reserved for litigation at a later date.

The respondents contend that all appropriate benefits have been paid with regard to this claim. Dr. Calhoun released the claimant as having reached maximum medical improvement on February 28, 2007. The claimant subsequently received a change of physician to Dr. Covey. The initial evaluation was accepted and paid for by respondent carrier but additional medical treatment has been denied as not being reasonable and necessary. Respondents contend that the authorized medical documentation does not support entitlement to additional indemnity benefits. Respondents alternatively assert a credit for the overpayment of temporary total disability benefits paid to the claimant after February 27, 2007, the date that the claimant was released by Dr. Calhoun, until May 23, 2007, the date that payment of disability benefits ceased.

The record consists of a one volume transcript of the November 1, 2007 hearing, consisting of the testimony of Leslie Garrison, the claimant, Glenda Andrews, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Reports); Respondents' Exhibit No. 1 (Medical Reports); and Respondents' Exhibit No. 2 (Non-medical Evidence with Index).

FACTUAL BACKGROUND

The claimant is twenty-eight years of age. Her birth-date is November 27, 1979. She completed ninth grade and nine weeks of the tenth grade. She subsequently received her GED. She has worked since she was 14 years of age. She has worked in assembly-line factory work, in fast food and convenience stores,

secretarial work, and as a housekeeper, laundry worker, front desk clerk, groundskeeper, and general manager of a small hotel. She began working for Drew Foam in July of 2006. On November 6, 2006, she was working for Drew Foam as an assistant cutter when she injured her back while lifting a box of three-pound foam. She explained that she felt her back "pull a little bit", but was able to finish her shift. She testified that she had difficulty at home getting in and out of bed and was barely able to walk the next day when she got to work. She reported the injury to her supervisor and filled out the proper paperwork to report her claim. She had difficulty finishing her shift and required assistance with the lifting of the boxes. She sought medical treatment from Dr. Simon and eventually underwent an MRI on November 27, 2006. She was referred to Dr. Calhoun, a neurosurgeon, with complaints of back pain radiating down into her right leg. She was treated conservatively with prescription medication and physical therapy. Her symptoms improved after therapy. She subsequently received an epidural injection. She explained that she had to stop physical therapy after the injection because it made her back worse and she couldn't move. She later resumed therapy. On February 28, 2007, she was released by Dr. Calhoun at maximum medical improvement. She requested a change of physician and was treated by Dr. Covey in April of 2007. He prescribed new medication and recommended a different type of injection. She explained that she could not afford the treatment. She is currently taking Tylenol and Ibuprofen since her prescriptions ran out. She believed that Dr. Covey did not release her to return to work but acknowledged that the records reflect that Covey

released her to light duty work. She testified that her back is better today. She explained that some days were better than others but that there was no day that she was pain-free. She can only do limited housework and stand for limited periods of time. She has trouble stooping, bending, lifting, and driving for extended periods of time. She has not applied for unemployment and did not believe she could work consistently every day in a job. She did not contact Drew Foam nor did they contact her to work on a light duty job. She has no income other than her disability payments and has not applied for social security disability.

On cross-examination, Garrison testified that she went on the permanent payroll for Drew Foam in November of 2006, shortly before her injury. She has applied for a substitute teaching position but has not worked due to her injury. She is able to do computer work and housework. She takes care of her two sons, aged 10 and 11, including taking them to football practice and games. She explained that Dr. Covey wanted her to have a right L4-5 SNRB, which she understood was an injection treatment performed under x-ray.

Glenda Andrews testified that she was the human resource manager at Drew Foam. She explained that Drew Foam had light duty available in the form of label printing. She testified that she did not hear from the claimant after she was released by the doctor, but would have created the light duty position if requested. The light duty position is 40 hours a week and pays seven dollars per hour. Her previous position paid eight dollars per hour.

The medical records reflect that claimant was initially treated on November 7, 2006, at the Monticello Medical Clinic with complaints of lower back pain and pain in her right leg. She was released from work until November 10, 2006. She returned with continued complaints of back and right leg pain on November 13, 2006. She underwent an MRI at Drew Memorial Hospital on November 27, 2006.

The MRI resulted in the following findings:

1. Moderate central HNP at L4 with small acute annular tear. Finding results in moderate impression on the ventral thecal sac without significant canal/foraminal stenosis.
2. Multilevel mild facet disease.

On December 28, 2006, the claimant was evaluated by Dr. Calhoun. He noted that the MRI revealed that the claimant had only four lumbar vertebrae and that the second disc, designated at L3-4, had a central bulge at that level with no significant neural impingement. He observed a small annular tear with no significant nerve root compromise. He opined that she did not need surgical intervention but suggested physical therapy and steroid injections, if needed.

On January 10, 2007, Sheila Maxwell, the claimant's physical therapist, noted that the claimant reported a "pulled muscle" on November 6, 2006, while at work. She responded initially to muscle relaxants, but due to continued pain underwent an MRI which revealed a herniated disc at L4-5 and a bulging disc at L5-S1. She notes that Dr. Calhoun recommended physical therapy followed by ESI's if her symptoms did not improve. On February 21, 2007, the therapist reported that after six therapy sessions the claimant reported significant improvement. She further

advised that the claimant had been instructed by the workers' compensation carrier to discontinue therapy and was scheduled for epidural steroid injections.

On January 19, 2007, Dr. Calhoun stated in a letter that "From what I can remember from my evaluation in December, Ms. Garrison suffered a lumbar strain due to her work injury on November 6, 2006. The slight disc bulge at L3-4 was not caused by the injury." On January 24, 2007, Dr. Calhoun wrote that "I believe she suffered a lumbar strain. . . there is clearly some possible secondary gain issues involved." On February 2, 2007, Dr. Calhoun responded to the following questions:

- 1) At what point will the major cause/need for treatment be attributed to the disc bulge at L3/4? (which you have stated was not caused by the injury) 2/28/07 (date)
- 2) What percentage of the patient's condition/diagnosis is related to his acute work injury _____%? "Unknown"
- 3) What percentage of the patient's condition/diagnosis is related to the unrelated disc bulge? _____% "Unknown"
If unable to provide percentages, is 51% or greater of the patient's condition related to the acute lumbar strain? X Yes ___ No
- 5) The date the patient can be considered to have reached maximum medical improvement. 2/28/07 (date)

On April 30, 2007, the claimant was evaluated by Dr. Carl Covey. He recommended a right L4-5 SNRB. He observed that the claimant could return to work in a light duty status. On July 12, 2007, Dr. Covey reported that it was his opinion that the claimant had not reached maximum medical improvement and that she still remained in a healing period secondary to her work injury.

DISCUSSION**Additional Medical Treatment**

The respondents have accepted the November 6, 2006, back injury as compensable and paid medical expenses and temporary total disability benefits from November 8, 2006 until May 23, 2007, and the initial visit of April 20, 2007, with Dr. Covey. Respondents rely on the medical records of Dr. Calhoun and an MRI report which conclude that Garrison suffered a lumbar strain in November of 2006 for which she was treated conservatively with physical therapy, muscle relaxants, and pain medications. Dr. Calhoun concluded there was no need for surgery despite the claimant's continued complaints of back and right leg pain. From his evaluation, Dr. Calhoun opined that the claimant sustained 0% permanent partial impairment and reached maximum medical improvement on February 28, 2007.

On the other hand, claimant contends that she continued to be symptomatic and could not perform her job duties after the November 6, 2006 injury. She points out that after she was released to go back to work by Dr. Calhoun, she continued to experience back and right leg pain and sought treatment with Dr. Covey. Dr. Covey recommends a nerve block injection and additional physical therapy. Claimant relies on the medical records of Dr. Covey to support her claim that the recommended medical treatment, including the right L4-5 SNRB, is reasonable and necessary medical treatment and related to the work-related injury in November of 2006.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy 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). Respondents are responsible only for medical services which are causally related to the compensable injury.

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Id.* Here, as in Williams, there is no dispute that the claimant's injury was compensable. The evidence demonstrates that there is objective medical evidence which established the current need for surgery. Rather, what is disputed is whether the recommended treatment is reasonable and necessary in relation to the compensable injury given the fact that she also suffers from degenerative conditions in her back. This is not a case where the claimant must establish that the compensable injury was the "major cause" of the need for the surgery since the claimant thus far is only seeking medical benefits and temporary total disability. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885(1996). Instead, the respondents must take the claimant as

they found her and the proper determination is whether there is sufficient evidence to establish that the compensable injury was a factor in the need for the surgery.

Williams v. L& W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 183 (2004).

In Davis v. Helena Chemical Co., claimant suffered from a pre-existing lumbar degenerative condition before sustaining a compensable injury. Full Commission Opinion, filed August 3, 1999 (D406121). The Full Commission affirmed an administrative law judge's finding that claimant was entitled to additional medical treatment, stating:

The respondents' and the dissent's central argument in this case is that the treatment the claimant is presently receiving is because of an ongoing degenerative condition which would be occurring whether or not the claimant suffered an injury in 1984. However, this argument overlooks the fact that the claimant's previously asymptomatic degenerative process physically progressed and became symptomatic because of his 1984 compensable injury . . . the compensable injury, not some speculative event, is what resulted in the claimant's present condition.

Id.

The Full Commission later upheld a finding of compensability where symptoms of claimant's pre-existing condition were asymptomatic for five years prior to the compensable event. Jerry Hambelton v. Guy King & Sons, Inc. & Bituminous Casualty Corp., Full Commission Opinion, filed February 22, 2001 (E904812). The Commission held that a preponderance of the evidence showed that claimant's symptoms were the result of his compensable injury, despite the fact that claimant had a pre-existing ongoing degenerative process. Id. at 19.

In the instant case, the medical records of Dr. Covey support the conclusion that the claimant remains in her healing period and is in need of further treatment

for the injury to her back in November of 2006. This medical evidence is further substantiated by the testimony of the claimant. The claimant testified that she had no prior problems with back and right leg and that her condition had improved following the physical therapy in 2006. While the MRI report revealed degenerative conditions, I find that the claimant's immediate onset of symptoms after feeling the "pop" in her back at work and her improvement after conservative treatment are compelling evidence that the claimant's need for additional medical treatment is related to her work-related injury. Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the additional medical treatment recommended by Dr. Covey, including the right L4-5 SNRB and additional physical therapy, is reasonable and necessary and related to the compensable injury.

ADDITIONAL TEMPORARY TOTAL DISABILITY

Claimant is contending that she is entitled to additional temporary total disability benefits from May 23, 2007, to a date yet to be determined. The claimant is entitled to temporary total benefits if she can satisfy a two-prong test: (1) claimant must be within her healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). The preponderance of the evidence demonstrates that the claimant has been released

by both Dr. Calhoun and Dr. Covey to return to light duty work as of February 28, 2007, and that light duty work would have been available to claimant if requested. Notwithstanding the opinions of both doctors, the claimant contends that she was not able to return to work due to continuing symptoms. Based on the preponderance of the evidence, I find that the claimant is not entitled to additional temporary total disability for the time period from May 23, 2007, through a date yet to be determined. I further find that respondents are entitled to a credit for the overpayment of temporary total disability payments after the claimant was released to return to work on February 28, 2007. However, I do find that the claimant will be entitled to temporary total disability for any additional time that she is unable to work or any subsequent healing period that she may enter as a result of the additional medical treatment recommended by Dr. Covey and awarded herein.

CONTROVERSION AND ATTORNEY'S FEES

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of all additional medical and temporary total disability benefits from May 23, 2007, to a date yet to be determined. However, because I do not find that claimant is entitled to additional indemnity benefits at this time, I do not find that the claimant's attorney is entitled to a statutory attorney's fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The employee/employer/carrier relationship existed on or about November 6, 2006, when claimant sustained an injury to her back.
3. The claimant's average weekly wage was \$320.00, which would entitle her to a temporary total disability rate of \$213.00, if awarded.
4. Respondents initially accepted the claimant's claim as compensable and paid temporary total disability benefits and medical benefits through on or about May 23, 2007.
5. The claimant was released to return to light duty work by Dr. Calhoun on February 28, 2007.
6. Claimant was granted a change of physician to Dr. Carl Covey.
7. Respondents paid for the claimant's initial visit with Dr. Covey as ordered by the Commission and that said visit was not controverted.
8. Claimant has proven by a preponderance of the evidence that her need for additional medical treatment from Dr. Covey, including the right L4-5 SNRB and physical therapy, is reasonable and necessary and causally related to her compensable work-related injury in November of 2006.
9. Claimant has not proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.
10. Respondents have overpaid claimant's temporary total disability benefits for the period from February 28, 2007 until May 23, 2007,

and are entitled to a credit against the future payment of any indemnity benefits owed.

11. Claimant is not entitled to a statutory attorney's fee in light of the fact that no additional indemnity benefits have been awarded herein.

AWARD

The respondents are hereby directed and ordered to pay additional medical benefits in accordance with the findings of fact and conclusions of law set forth herein. 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 Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge
