

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611811

MELISSA A. HIPPI,
EMPLOYEE

CLAIMANT

MAGNOLIA BAKE SHOP, INC.,
EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 29, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Texarkana, Miller County, Arkansas.

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

The respondents were represented by HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 20, 2007, in Texarkana, Arkansas. A Prehearing Order was entered in this case on October 22, 2007. This Prehearing Order outlined the issues to be litigated and resolved at that 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 and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction.

2. The employer/employee relationship existed on October 19, 2006.
3. The claimant sustained a compensable injury on October 19, 2006.
4. The claimant was paid temporary total disability benefits at the rate of \$175.00 per week through January 2, 2007.
5. The claimant's primary treating physician pursuant to a Change of Physician Order dated February 9, 2007, is Dr. Shailesh Vora.
6. The claimant was released by Dr. Brent Sprinkle on January 15, 2007, following his diagnosis of cervical degenerative disk disease with zero percent (0%) permanent disability.

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

1. Compensation rate.
2. The claimant's entitlement to additional medical treatment since approximately January of 2007.
3. The claimant's entitlement to temporary total disability benefits from January 3, 2007, to a date yet to be determined.

4. Whether the respondents should be ordered to reimburse the claimant medical expenses incurred by the claimant after January 2, 2007, for medical treatment which the claimant contends has been reasonable, necessary and related.
5. Attorney's fees as provided by law.
6. Temporary total disability underpayment.

The record consists of the transcript of the December 20, 2007, hearing and the oral deposition of Dr. Brent Sprinkle taken February 1, 2008, retained under separate cover as Respondent's Exhibit No. 1.

DISCUSSION

1. Average Weekly Wage/Compensation Rate

Arkansas Code Annotated Section 11-9-518 provides:

(a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the

employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40 hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993). The claimant has the burden of proving that she was bound by contract to work 40 hours each week if the work was made available. A & C Servs., Inc. v. Sowell, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

The Arkansas Court of Appeals has concluded that the Commission did not err in basing a claimant's wage rate for seasonal work on a full 40 hour work week under circumstances where the claimant's contract of hire was for

40 hours per week or more whenever the work was available, but the claimant worked less than 40 hours per week when her working hours were reduced because of the weather. Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). Likewise the Arkansas Court of Appeals has affirmed a Commission finding that a claimant should not be penalized for missing work for legitimate leave time including personal health reasons and for company convenience when work was not available. Rheem Manufacturing Mfg., Inc. v. Bark, 97 Ark. App. 224, ___ S.W.3d ___ (2006).

In the present case, the claimant's wage records indicate that she worked 1480.5 hours in the 41 weeks preceding the week of her injury, but that she worked zero hours on week 22 due to illness. She worked 40 hours per week in only 29 of the 41 weeks preceding her injury. Her hourly rate of pay increased from \$6.50 to \$7.00 to \$7.50 during that period.

The claimant testified that she started part-time in September of 2005. She testified that she began working full-time in January of 2006 and that her normal hours to work each week was 40. The claimant had no explanation at

the hearing why she worked less than 40 hours for so many weeks while purportedly a 40 hour per week employee.

I find that the week the claimant was documented off sick should be excluded in calculating her average weekly wage. See Bark, supra. Therefore, I find that the wages provided to me are for 40 weeks of work, not 41 weeks as the respondents calculated. I also find that the claimant's average weekly wage should properly be based on her wage rate at the time of her injury (\$7.50 per hour) as the Commission concluded in Steven Jones v. Griffin Gin Company, Full Workers' Compensation Commission Opinion filed February 13, 1998 (E317917). I therefore find that the respondents' calculations contain an error in this regard as well. However, in light of the numerous weeks that the claimant worked less than 40 hours per week and her inability to explain why this occurred, I find that the claimant has failed to establish by a preponderance of the evidence that she was in fact a full-time employee who was expected to work 40 hours per week when the work was available.

Consequently, I find that the claimant's average weekly wage at issue is:

$$(\$7.50 \text{ per hour}) \times (1480.5 \text{ hours}) / (40 \text{ weeks}) = \$277.59$$

Her compensation rate for temporary total disability compensation is \$185 per week. The respondents are therefore liable for their previous underpayment of benefits at a rate of \$175 per week.

2. Extent Of The Claimant's Compensable Injury Sustained Either On October 19, 2006, Or As A Compensable Consequence Of The Claimant's Fall On October 19, 2006.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The Arkansas Courts have long recognized that when the primary injury is shown to arise out of and in the course of employment, the employer is also responsible for any natural consequence that flows from that injury. The basic test is

whether there is a causal connection between the two episodes. Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

The nature and extent of the compensable injury must be established by medical evidence supported by objective findings. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999) The claimant has the burden of establishing a causal connection between the compensable injury and any objective findings in the record. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

In the present case, the claimant fell at work on October 19, 2006, striking the left side of her body on a concrete floor. Magnolia Hospital Emergency Room personnel documented symptoms that day including neck stiffness, left shoulder and arm pain, and left hip pain. The claimant then followed up with her family physician, Dr. Gary Poole, at the Stamps Medical Clinic. Dr. Poole referred the claimant to Dr. Kenneth Gati, an orthopedic specialist.

On November 6, 2006, Dr. Gati evaluated the claimant for her neck. Dr. Gati diagnosed a cervical strain and

ordered three weeks of physical therapy. Rather than having the claimant follow-up with Dr. Gati in four weeks as planned, Dr. Poole next referred the claimant to Dr. Shailesh Vora, a neurologist and psychiatrist.

On November 21, 2006, Dr. Vora diagnosed the claimant with cervicalgia. Dr. Vora ordered additional physical therapy in his office and performed MRI and nerve conduction velocity studies. In addition, Dr. Vora performed trigger point injections in the claimant's neck on December 5, 2006.

The respondents sent the claimant to Dr. Brent Sprinkle on December 27, 2006. Dr. Sprinkle diagnosed the claimant with cervical degenerative disk disease, cervical strain, and cervical myofascial pain. Dr. Sprinkle opined that the claimant reached maximum medical improvement on January 15, 2007.

The claimant returned to treatment with Dr. Vora. Dr. Vora ultimately performed a second cervical MRI on September 9, 2007, performed a second set of nerve conduction studies on November 29, 2007, and proposed an MRI of the claimant's lower back beginning on or about February 26, 2007. On October 15, 2007, Dr. Reza Shahim recommended a cervical myelogram to rule out nerve root compression on referral from Dr. Vora.

A. Low Back

The first documented notation of muscle spasm in the claimant's low back occurred on February 26, 2007, some four months after the claimant's fall at work. The claimant testified that she had been telling her doctors about back problems all along. The doctors' reports before February 26, 2007, however, do not refer to ongoing low back pain, and I do not find the claimant's testimony credible that she was telling her doctors all along about low back problems. I find that the claimant's low back problems at issue began after Dr. Sprinkle's December 27, 2006, initial evaluation which documented full range of motion and no taut or tender muscle bands in the claimant's lumbar spine upon examination. Under these circumstances, the claimant has failed to establish that her lumbar problems beginning some time after December 27, 2006, are in any way causally related to the claimant's fall at work on October 19, 2006.

B. Extent Of Neck Injury

The claimant's medical reports document persistent muscle spasms in the claimant's neck essentially throughout her course of treatment to date. Dr. Sprinkle testified that the claimant complained of numbness and weakness in her entire left arm when he examined her. Dr. Sprinkle

testified that these complaints were a "Waddell sign" without a physiologic or nerve impingement basis. Dr. Sprinkle testified that the claimant's complaints and symptoms were not consistent with a pattern indicative of a pinched nerve in the neck.

The claimant has undergone two cervical MRIs and two electro-diagnostic studies. Not one physician's report in the record interprets either MRI or either electro-diagnostic study as indicating a nerve root impingement in the claimant's neck. In addition, although Dr. Shahim's October 15, 2007, report interprets the second MRI as indicating a small central disk herniation without any significant stenosis at C5-6, no other physician used the term "herniation" in describing any of the claimant's cervical disks from either MRI study. Dr. Sprinkle credibly testified that the terms disk "bulge" and disk "herniation" are used interchangeably between physicians.

I note that Dr. Gati diagnosed the claimant with a cervical strain, and Dr. Sprinkle's final diagnosis on January 15, 2007, included degenerative disk disease, cervical strain, and cervical myofascial pain. The claimant proved by the diagnoses of Dr. Gati and Dr. Sprinkle that

she developed a cervical strain injury and persistent myofascial pain on October 19, 2006.

However, to the extent that the claimant contends that she injured or aggravated a cervical disk or nerve on October 19, 2006, I note that no physician has opined in any of the reports in the record that the claimant sustained a cervical disk injury or cervical nerve injury on October 19, 2006. In addition, as far as I can glean from the medical reports in the record, no physician has attributed the claimant's complaints and symptoms to any specific abnormalities identified in either MRI or either electro-diagnostic study performed on her. As discussed above, Dr. Sprinkle credibly opined that the claimant's complaints and symptoms were not consistent with a pattern indicative of a pinched nerve, and I see no reason on this record to conclude that Dr. Sprinkle's opinion was based on any material mistake of fact. The claimant has therefore failed to prove by a preponderance of the evidence that she sustained on October 19, 2006, a cervical disk or nerve injury or aggravated a pre-existing cervical disk or nerve abnormality in her fall at work.

3. Reasonably Necessary Medical Treatment

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).

Medical treatment intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). An employer may remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the present case, I find that Dr. Vora's office visits and prescriptions for medication at issue beginning in January of 2007 are reasonably necessary for treatment of the claimant's cervical strain injury, myofascial pain, and documented chronic muscle spasms. Specifically, I find that these follow-up visits and prescriptions have been appropriate in light of the claimant's chronic cervical pain and spasms.

However, since the claimant has failed to establish by a preponderance of the evidence that her current low back problems are in any way causally related to her fall on October 19, 2006, the claimant has failed to establish that a low back MRI proposed by Dr. Vora would be reasonably necessary or causally related to her compensable injury.

In light of (1) the MRI findings for the study performed on December 4, 2006, (2) Dr. Sprinkle's conclusion on December 27, 2006, that the claimant's clinical complaints of weakness and numbness were not consistent with a physiological origin, (3) the lack of any electro-diagnostic findings indicative of cervical nerve root impingement, and (4) the lack of any subsequent physical examination or medical opinion credibly refuting or rebutting Dr. Sprinkle's conclusions, I find that the

claimant has failed to establish that her second cervical MRI, her second electro-diagnostic study, her proposed cervical myelogram, or her evaluation by a neurosurgeon were reasonably necessary to diagnose or treat her compensable neck injury.

4. Additional Temporary Total Disability Compensation

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. 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, I find that the claimant's healing period ended on January 15, 2005, when the claimant declined any further injections, and Dr. Sprinkle opined that the claimant had reached maximum medical improvement.

In reaching this conclusion, I recognize that the claimant has experienced chronic muscle spasm in her neck and has continued to receive medication for those spasms even after January 15, 2007. However, the Courts have noted

that "the persistence of pain may not of itself prevent a finding that the healing period is over, provided the underlying condition has stabilized." Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). In the present case, I do not perceive from the testimony and medical reports in the record that the claimant's cervical strain, myofascial pain, or her muscle spasms either improved further or got worse with her medication at any point after Dr. Sprinkle determined her at maximum medical improvement on January 15, 2007. I therefore find that the claimant's cervical strain stabilized on January 15, 2007, when she declined further injection treatment, and Dr. Sprinkle released her from treatment and to return to work.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction.
2. The employer/employee relationship existed on October 19, 2006.
3. The claimant sustained a compensable injury on October 19, 2006.
4. The claimant was paid temporary total disability benefits at the rate of \$175.00 per week through January 2, 2007.

5. The claimant's primary treating physician pursuant to a Change of Physician Order dated February 9, 2007, is Dr. Shailesh Vora.
6. The claimant was released by Dr. Brent Sprinkle on January 15, 2007, following his diagnosis of cervical degenerative disk disease with zero percent (0%) permanent disability.
7. The claimant's appropriate average weekly wage was \$270.73 entitling her to compensation for temporary total disability at a rate of \$185 per week. The respondents are therefore liable for an underpayment of benefits previously paid at a rate of \$175 per week.
8. The preponderance of the evidence establishes that the claimant sustained a compensable cervical strain injury with myofascial pain and muscle spasms on October 19, 2006. The claimant has failed to establish by a preponderance of the evidence that she sustained a compensable low back injury on October 19, 2006, or that her low back problems currently at issue are in any way casually related to her fall on October 19, 2006. The claimant has also failed to establish by a

preponderance of the evidence that she sustained a cervical disk injury or cervical nerve root injury on October 19, 2006.

9. The claimant has established by a preponderance of the evidence that Dr. Vora's office visits and his prescriptions for medication at issue beginning in January of 2007 are reasonably necessary for treatment of the claimant's cervical strain injury, myofascial pain, and chronic muscle spasms. The claimant has failed to establish by a preponderance of the evidence that a low back MRI, her second cervical MRI, her second electro-diagnostic study, her proposed cervical myelogram, or her evaluation by a neurosurgeon, Reza Shahim, were reasonably necessary to treat her compensable neck injury.
10. The claimant has established by a preponderance of the evidence that she is entitled to additional temporary total disability compensation through January 15, 2007. The claimant has failed to establish by a preponderance of the evidence that she remained within the healing period for her compensable cervical injury thereafter. The

claimant has therefore failed to establish by a preponderance of the evidence that she is entitled to any period of temporary disability compensation after January 15, 2007.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact 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 A.C.A. § 11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge