

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613869

TINA KNIGHT	CLAIMANT
TYSON FOODS, INC. SELF INSURED	RESPONDENT
TYNET, TPA	RESPONDENT

OPINION FILED **JULY 31, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by LAURA BETH YORK, Attorney, Little Rock, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above styled case on May 27, 2008, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on March 19, 2008. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, including September 25, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$ 200.00 for total disability and \$154.00 for permanent partial disability.
3. On September 25, 2006, the claimant sustained a compensable injury to her low back.
4. There is no dispute over the expenses of medical services incurred through October 22, 2007.

5. There is no dispute over temporary benefits accruing through April 17, 2007.

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

1. The claimant's entitlement to additional medical services by Dr. Carl Covey.
2. The claimant's entitlement to additional temporary total disability benefits from April 18, 2007 through a date yet to be determined.
3. Attorney's fees.
4. The respondent's entitlement to a credit against any benefits awarded for any group benefits paid.

In regard to these issues, the claimant contends:

"Claimant sustained a work related injury on September 25, 2006. The claimant sustained an admittedly compensable injury when she was pulling a tub of chicken when she felt a pop in her lower back. The claimant sought medical attention and received an MRI, a myelogram CT, and an EMT report, where it was determined that the claimant suffered from bulging discs at L3-4, L4-5, and L5-S1. The claimant received conservative treatment which she contends did not alleviate her pain. However, the claimant underwent an FCE which demonstrated that she could return to sedentary work. The claimant was granted a Change of Physician Order to Dr. Covey on July 13, 2007. Dr. Covey recommended a discogram to determine if the claimant could benefit from intradiscal electrothermal therapy or a fusion. The claimant contends that she is entitled to the discogram, which Dr. Covey recommended and her attorney is owed attorney's fees."

In regard to these issues, the respondents contend:

"Respondent contends that it accepted claimant's injury as compensable and has paid all appropriate benefits. Claimant was initially seen by Dr. Rizwana Khan who diagnosed a lumbar strain. Claimant was

provided medical treatment with Dr. Thomas Cheyne who noted she had a previous history of bulging discs and had had a previously MRI scan. He ordered another MRI scan which revealed degeneration and disc bulging. Dr. Cheyne continued the claimant at work with certain restrictions and ordered physical therapy.

Claimant was subsequently evaluated by Dr. Anthony Capocelli, neurosurgeon, who referred her for an orthopaedic evaluation regarding her hip complaints. She subsequently underwent an MRI of the pelvis and hips which was normal. Claimant was next evaluated by Dr. Rutherford, neurologist. She underwent a second MRI which revealed degenerative disc disease and disc bulging. She had a whole body scan which was normal in the lumbar area and revealed degenerative changes in the thoracic spine. She had an EMG/nerve conduction study which was normal. She had a myelogram which revealed bulging discs.

An FCE was performed April 2, 2007 which indicated that the claimant gave an unreliable effort; it further indicated self limiting behavior and inconsistent effort on claimant's behalf and was not considered a valid representation of claimant's current functional status. Claimant was released to return to work at full duty effective April 9, 2007. She was seen by Dr. Rutherford again on April 17, 2007, who noted she had had a extensive diagnostic testing; she was released to regular duties without restriction; and there was no permanent partial impairment.

Claimant requested and received a change of physician to Dr. Carl Covey. Dr. Covey ordered a lumbar discogram with post discogram CT scan which the respondent has denied as not reasonable and necessary treatment for her work related injury. Respondents contend it has provided all appropriate treatment to which the claimant is entitled and paid all appropriate benefits to which claimant is entitled as a result of her work related injury."

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed is the claimant's entitlement to additional medical services by Dr. Carl Covey. The claimant appears to have initially seen Dr. Covey on October 22, 2007. This initial visit was apparently as the result

of a change of physicians, which the claimant had requested and received from this Commission. The respondents have paid for the initial evaluation, but have declined to provide any further medical services by or at the direction of Dr. Covey. The burden rests upon the claimant to prove that any further medical services by Dr. Covey represent "reasonably necessary medical services" for her compensable low back injury.

Medical services are "reasonably necessary", when they are necessitated by or are connected with the compensable injury. However, the compensable injury need not be the sole or even major cause of the need for these medical services. The medical services must also have a reasonable expectation of accomplishing their intended purpose or goal. This purpose or goal can include services to accurately diagnose the nature and extent of the injury, to develop an appropriate treatment program, to improve the actual physical damage caused by the compensable injury, to maintain the level of healing achieved, or even to merely provide symptomatic relief of chronic symptoms.

It is apparent from Dr. Covey's initial report dated October 22, 2007, that he did not have available or had not reviewed all of the claimant's extensive medical records, including the result of the numerous tests that had been performed. In this report he mentioned only the MRI that was performed on February 5, 2007. He made no mention of the other MRI studies, the various plain x-rays, the EMG-NCV, the myelogram with the accompanying enhanced CT scan, and the FCE. Further, he made no mention of the findings or conclusions reached by the claimant's previous treating physicians.

Based solely on a history, which he apparently obtained from by the claimant, and his own examination of the claimant, Dr. Covey diagnosed the claimant's difficulties as degenerative disc disease of the lumbar spine, low back

pain, and radiculitis of the claimant's left lower extremity. His initial recommendation was a discogram with an accompanying CT scan.

In his report of December 19, 2007, Dr. Covey indicated that if this discogram and accompanying CT scan showed the presence of multi-level disc disease, it would be his opinion the claimant should be treated with nutrition, exercise, and medication. If these tests revealed that the claimant's difficulties were the result of only a single-level defect, then procedures such as intradiscal electrothermal therapy or possibly fusion should be considered.

Clearly, the only purpose for the recommended discogram and post-discogram CT scan was to determine whether the claimant's current difficulties were the result of multi-level disc disease or only single-level disc disease. This recommendation would point out Dr. Covey's obvious lack of knowledge of the results of the previous extensive testing performed on the claimant. These tests include a prior CT scan, numerous MRI studies, a bone scan, and EMG-NCV, and a myelogram with accompanying enhanced CT scan. These prior MRI studies, CT scan, and myelogram with an enhanced CT scan all revealed the existence of multi-level disc disease, which to some degree was present even before the claimant's compensable injury. Thus, a discogram with an accompanying CT would be duplicative and unnecessary to accomplish its expressly stated purpose.

I would also note that Dr. Capocelli, the claimant's treating neurosurgeon, specifically stated, in his report of March 12, 2008, that no further diagnostic studies were necessary to reasonably insure an accurate determination of the nature and extent of the claimant's workers' compensation back injury. In his previous reports, Dr. Capocelli had also clearly stated that in his expert opinion, surgery or other active medical treatment would not offer a reasonable

expectation resolving or improving either the physical damage caused by the claimant's compensable injury or her resulting chronic symptoms. In fact, it was Dr. Capocelli's opinion that treatment modalities would not even be appropriate for the non employment related lumbar defects.

Dr. Capocelli is a highly competent board certified neurosurgeon and has considerable expertise in the treatment of spinal injuries and conditions. While I recognize that Dr. Covey has, for some years, provided treatment for spinal injuries and conditions, his treatment of these injuries has been primarily directed toward chronic pain management. To my knowledge, Dr. Covey's only board certification is in anesthesiology. It is my finding that the expert medical opinion of Dr. Capocelli is entitled to the greater weight and credit.

I further find that the opinion of Dr. Capocelli is supported by the other evidence presented. Not only does his opinion coincide with that expressed by Dr. Rutherford, a board certified neurologist, but his opinion is also supported by the extensive testing performed on the claimant. The various MRI studies and the myelogram with the enhanced CT scan all failed to show any impingement of the spinal cord or exiting nerve roots that could be alleviated by surgical intervention. The EMG-NCV performed by Dr. Rutherford also excluded any deficits involving either the spinal cord or exiting nerve roots in the lumbar area. This test specifically revealed that any difficulties, which the claimant may be experiencing with her lower extremities is not radicular in nature and, in fact, do not even have any neurological basis. Finally, the bone scan failed to show any evidence of inflammation involving the discs or vertebrae in the lumbar area.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to establish that any further

diagnostic testing, including the discogram and post discogram CT scan recommended by Dr. Covey, is necessary in order to reasonably insure an accurate diagnosis of the nature and extent of the claimant's compensable injury. Therefore, this recommended testing would not constitute a "reasonably necessary medical service", under Ark. Code Ann. §11-9-508. The expense of these recommended medical services cannot be imposed upon the respondents herein.

The remaining medical services provided and recommended by Dr. Covey are essentially in the form of chronic symptom management. This includes the monitoring and prescribing of various medications, primarily in the form of anti-inflammatories and pain relievers. These services are well within the area of expertise of Dr. Covey.

In regard to these medical services, the real question arises over whether these medical services are necessitated by or connected with the claimant's compensable injury or whether these services are only necessitated by or connected with the claimant's pre-existing and naturally progressive degenerative disc disease.

The medical evidence shows that the claimant clearly had pre-existing degenerative disc disease at multi-levels of her lumbar spine prior to her compensable injury. In fact, her compensable injury was most likely in the form of an aggravation of this pre-existing condition. Contrary to the claimant's testimony, she clearly experienced significant difficulties with her lumbar spine, her hips, and her leg prior to the compensable injury. The medical evidence shows that, prior to her compensable injury, the claimant voiced symptoms and complaints with her lower back, hips, and legs that were essentially identical to those that she claims to have experienced ever since

her compensable injury and the symptoms that she reported at the time of her visit with Dr. Covey. In this regard, the medical evidence shows that the claimant sought medical treatment from her family physician on September 6, 2006 (less than a month prior to the compensable injury), for difficulties with her left leg, in the area of the hamstring, that appear to coincide almost exactly with difficulties noted by Dr. Covey on his initial evaluation of October 22, 2007.

The medical record further reveals that after the compensable injury the claimant's subjective complaints have varied over the course of time. Following her compensable injury, the claimant's complaints appear to have been limited to her low back and right hip, similar to her complaints in 2005. On October 2, 2006, Dr. Rizwana Khan, the claimant's family physician, expressly noted that the claimant denied any radiation of pain into her leg. However, by October 13, 2006, the claimant was complaining of pain radiating into her right leg. (Mercy Hospital of Scott County emergency room record). By October 24, 2006, the claimant was complaining of low back pain and right leg pain with numbness (Dr. Thomas Cheyne's report of October 24, 2006). When the claimant saw Dr. Rutherford on February 2, 2007, she was complaining of pain in her back radiating into both her legs. On the claimant's initial visit with Dr. Covey, on October 22, 2007, she reported complaints with her low back, groin, hips, legs, and toes. At the hearing, the claimant was complaining of pain in her buttocks, back, groin, legs, ankles, and feet.

The medical evidence also shows that the claimant has had extensive prolonged treatment for her various complaints. In fact, she has had almost every form of recognized treatment modalities. Yet, according to the claimant she has not experienced any improvement as a result of this vast array of

medical treatment, and her subjective complaints have even worsened and spread to other parts of her body.

The medical evidence presented fails to show any defect of the claimant's lumbar spine that would logically act as the etiology of her continuing extensive complaints, particularly those involving her lower extremities. The MRIs of the lumbar spine, the lumbar myelogram with the accompanying enhanced CT scan, and the EMG-NCV of the claimant's lower extremities all exclude any neurological or radicular cause for these advancing complaints. It also appears from the most recent physical examination of Dr. Covey that the claimant's lower extremity complaints, particularly in her left lower extremity, are likely related to a muscular problem involving her hamstring muscle. Such a problem would clearly be unrelated to any compensable injury involving her lower back or lumbar spine. The bone scan performed on the claimant also failed to reveal inflammation or ongoing irritation of any of the structural components of the claimant's lumbar spine.

As early as December 12, 2006, Dr. Capocelli noted that the claimant's subjective complaints appeared magnified and exceeded her clinical findings. Even though Dr. Rutherford noted that the claimant's subjective symptoms had "gotten a lot worse" over the four week period prior to February 2, 2007, the MRI of February 5, 2007, the bone scan of February 8, 2007, the EMG-NCV of February 8, 2007, and the myelogram/CT scan of February 27, 2007, failed to show any physical or anatomical basis for this change. Finally, the FCE of April 2, 2007, was interpreted as showing inconsistent effort on the part of the claimant during testing.

Essentially, the only direct evidence to link the claimant's continuing complaints and resulting need for medical services to mitigate the complaints

after April 17, 2007, with the compensable injury of September 25, 2006, is the claimant's own statements and testimony. I find the claimant to lack sufficient credibility to prove that any medical services she has required after October 22, 2007, were necessitated by or were connected with her compensable injury of September 25, 2006. Therefore, she has failed to prove that any chronic symptoms treatment she may have required from Dr. Covey, after October 22, 2007, represents reasonably necessary medical services for her compensable injury of September 25, 2006. Liability for the expenses of these medical services cannot be imposed upon the respondents' herein.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to additional temporary total disability benefits for the period beginning April 17, 2007 and continuing through a date yet to be determined. Again, the burden rests upon the claimant to prove her entitlement to these benefits. In order to meet this burden, the claimant must prove that during this period she remained within her healing period from the effects of her compensable lumbar injury. Secondly, she must prove that during this period she continued to be rendered totally disabled from performing all forms of regular gainful employment for which she is otherwise qualified, as the result of the effects of her compensable lumbar injury.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period is defined as that period of time necessary for the healing of the actual physical damage caused by the compensable injury. Once the underlying physical damage that has been caused by the compensable injury resolves or at least stabilizes, at a level

where nothing further in the way of time or medical treatment offers a reasonable expectation or improvement, then the healing period has ended.

The medical evidence shows that by April 17, 2007, the claimant had been discharged from active medical treatment for her compensable injury by Dr. Capocelli, her treating neurosurgeon, and by Dr. Patrick Walton, an orthopaedic surgeon that had seen the claimant at the request of Dr. Capocelli. On April 17, 2007, the claimant was released by Dr. Reginald Rutherford , a neurologist and the claimant's primary treating physician at that time. Dr. Rutherford opined that the claimant required no further active medical treatment, that her compensable injury had stabilized with no residual permanent physical impairment, and that the claimant could return to work without restriction.

The medical record indicates that, after the claimant's release by Dr. Rutherford, she sought medical services at the St. Edwards Mercy Medical Center emergency room, on May 2, 2007, and by and at the direction of Dr. Carl Covey, on and after October 22, 2007. However, none of the medical services provided to the claimant by the personnel at the St. Edwards Mercy Medical Center emergency room or by and at the direction Dr. Carl Covey represented active medical treatment or medical treatment directed toward the resolution, reduction, or stabilization of the actual physical damage caused by the compensable injury. Rather, the medical treatment provided was directed toward only the management or relief of chronic symptoms voiced or exhibited by the claimant. Applicable case law provides that medical services or treatment directed solely toward the management or reduction of chronic symptoms are not sufficient, in and of themselves, to extend the healing period.

Clearly, surgical intervention and even the intradiscal electro thermal therapy (IDET) that was mentioned by Dr. Covey would constitute active medical treatment directed toward the improvement or correction of the actual physical damage caused by the compensable injury. However, for the reasons heretofore given in this Opinion, I find that such medical treatment has not been shown to be appropriate or necessary. Thus, it cannot be considered in determining if the claimant has reached the end of her healing period.

After consideration of the medical evidence presented, it is my opinion that the greater weight of this evidence establishes that the claimant had achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the physical damage caused by her compensable injury and nothing further in the way of time and medical treatment offered a reasonable expectation of improvement by April 17, 2007. Thus, the claimant cannot be awarded temporary total disability benefits after that date.

III. ATTORNEY'S FEES

In the present case, no controverted benefits have been awarded directly to the claimant. Therefore, no controverted attorney's fees can be awarded to her attorney.

IV. CREDIT FOR GROUP BENEFITS UNDER ARK. CODE ANN. §11-9-411

The final issue concerns the respondents' entitlement to a credit against any benefits awarded for any similar benefits that may have been paid under a group policy of insurance. As no additional benefits have been awarded, the respondents' entitlement to any credit for similar benefits paid under a group policy of insurance would be moot.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including September 25, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$200.00 for total disability and \$154.00 for permanent partial disability.

4. On September 25, 2006, the claimant sustained a compensable injury to her low back.

5. There is no dispute over the payment of medical expenses incurred through October 22, 2007, and all such benefits have apparently been paid.

6. The claimant has failed to prove by the greater weight of the credible evidence presented that the medical services recommended or rendered to her by and at the direction of Dr. Covey, after October 22, 2007, represent "reasonably necessary medical services" for the claimant's compensable injury. Specifically, the claimant has failed to prove that such services were medically appropriate, were necessitated by or connected with the claimant's compensable injury, or had a reasonable expectation of accomplishing the purpose or goal for which they were intended. Therefore, the respondents are not liable for the expense of these medical services.

7. There is no dispute over temporary total disability benefits accruing through April 17, 2007.

8. The claimant has failed to prove by the greater weight of the credible evidence that she continued to be temporarily totally disabled, as the result of the effects of her compensable injury, after April 17, 2007. Specifically, she has

failed to prove that she continued with her healing period from the effects of her compensable injury after that date.

9. The respondents have controverted the claimant's entitlement to any temporary total disability benefits that accrued after April 17, 2007 and her entitlement to any additional medical services provided or recommended to be provided after October 22, 2007.

10. As no controverted benefits have been awarded to the claimant, no controverted attorney's fee can be awarded to her attorney.

11. As no additional benefits have been awarded, no credit can be given the respondents for any similar benefits paid under a group policy of insurance, under Ark. Code Ann. §11-9-411.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the present claims for additional benefits.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE