

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F508639**

<b>ANNIE L. MILLER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>LENNOX INDUSTRIES, EMPLOYER</b>	<b>RESPONDENT</b>
<b>ESIS, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 11, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on December 12, 2007 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE BRUCE D. ANIBLE, Attorney at Law, Little Rock, Pulaski County, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, additional temporary total disability benefits, rehabilitation benefits, and attorney's fees.

At issue is whether or not additional medical treatment is reasonable, unnecessary and related to the compensable injury pursuant to Ark. Code Ann. §11-9-102 and §11-9-508; whether or not the respondents unreasonably refused to return the claimant to work pursuant to Ark. Code Ann. §11-9-505(a)(1); and whether or not the claimant is entitled to a change of physician pursuant to Ark. Code Ann. §11-9-514. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the claimant is entitled to §505 benefits.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on August 4, 2005 at which time the claimant sustained compensable injuries to her left shoulder and hip at a

compensation rate of \$255.00. Medical expenses and temporary total disability benefits (the last period was from July 12, 2006 to September 9, 2006) have been paid. The claimant received short-term disability benefits and unemployment benefits.

The claimant contends she remains symptomatic and in need of additional medical treatment with Dr. Christopher Mocek. The claimant also seeks additional temporary total disability benefits from May 25, 2006 to July 11, 2006. Furthermore, the claimant contends the employer unreasonably refused to return the claimant to work. She seeks payment of the difference between indemnity benefits paid and the claimant average weekly wages lost for the period of September 20, 2006 to September 20, 2007 pursuant to Ark. Code Ann. §11-9-505(a)(1).

The respondents contend all appropriate benefits have been paid. Additional medical treatment is unreasonable and unnecessary and unrelated to the compensable injury. Respondents also contend they have not violated Ark. Code Ann. §11-9-505(a)(1). The claimant's employment was terminated for cause. Alternatively, in the event of an award, the respondents seek an offset against benefits paid by third parties.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. The claimant's objection to reports characterizing Dr. Brent Sprinkle as an independent medical examiner is noted. Dr. Sprinkle was chosen by the respondents, not the Commission pursuant to Ark. Code Ann. §11-9-511. However, Dr. Sprinkle's reports will still be considered in reviewing the evidence. The claimant's objection to another report is sustained and proffered. The report is signed by nurse case manager Sheryl Johnson, not the doctor. The claimant's objection to the introduction into evidence of the Lennox policy manual is overruled. That information was exchanged during discovery and is relevant on the issue of 505(a) benefits.

The following witnesses testified at the hearing: the claimant and her father, emergency medical technician Tim Brown, and supervisor, Mike Strabala. Mr. Strabala presented himself as just a messenger of bad news – the decisions were all made by the human resource department (HR).

He smiled and held his hands up in the air as to deflect blame throughout his testimony. Of course, no one from HR was called to testify. The claimant was a poor historian and contested the accuracy of the medical records.

The claimant, age 31 (D.O.B. June 16, 1976) has a criminal record. Her health history includes prior injuries to her upper back, a August 4, 2005 right shoulder, right foot injury, and a October 31, 2005 right foot injury a March 21, 2006 left foot injury and a cyst on her left wrist in 2002 and 2006. She began work for the respondent-employer in June 2005 as a material handler removing parts from storage to stock the assembly line, using a forklift.

The claimant injured her left shoulder and lower back six weeks later on August 4, 2005 when she slipped and fell. She missed some time in August and September before returning to work with lifting restrictions of 15 pounds. Dr. Safman and Dr. Mocek treated her lumbar injury while Dr. Bowen treated her shoulder.

In April, 2006, Dr. Mocek excused the claimant from work for two days. In May, 2006, Dr. Mocek excused the claimant from full-time work due to fatigue. The claimant testified that her fatigue was caused by sleep disturbance from pain in her shoulder and back. However, this explanation does not appear in the Doctor's reports until October, 2007.

The claimant was informed by Tim Brown and Mike Strabala that part-time work was not available and she should apply for short-term disability benefits. Initially, her claim was denied but about a month later, the claim was approved. She drew \$216.00 per week for one month until her workers' compensation benefits were reinstated on July 12, 2006, when she had surgery on her shoulder.

The claimant's first day of absence was May 25, 2006. At that time, the claimant had two "incidents" at work. After four incidents, the attendance policy required that an employee be "put on a last chance for termination," (Tr. p. 23). If an employee works a month without being late or missing a day, the "incident" can be removed from the employee's attendance record. The claimant received a "work-off" for the month of April, but on June 6, 2006, that credit was reversed. The

claimant was not notified of this change. On June 12, 2006 the claimant was charged with an incident based on her short-term disability benefits.

On September 20, 2006 Dr. Bowen released the claimant to return to work despite the fact that she remained symptomatic, unable to raise her left arm. Mike Strabala informed her that she was being terminated because she incurred four incidents, two during her absence, while she was under medical care. She was not given an opportunity to challenge the calculation of incidents, nor was she given an explanation why she wasn't given at least a "last chance".

The claimant testified she remains symptomatic and wishes to continue treating with Dr. Mocek. The case manager refused to let her see Dr. Mocek after May and sent her to see Dr. Sprinkle, an osteopath in June, 2006. He asked her some questions but did not physically examine her. After she was terminated, Sheryl Johnson informed her that the carrier would no longer pay for medical treatment.

At her own expense, the claimant returned to Dr. Mocek in October, 2007 after her deposition in September. He made recommendations for diagnostic testing that the claimant would like to pursue as she still suffers back pain.

On cross-examination, respondents noted that the claimant denied any prior back injuries in her deposition, however medical records show the claimant was treated for a back injury in 1993 following two motor vehicle accidents. The claimant denied being in any motor vehicle accidents, (Tr. p. 40-42).

The claimant also denied prior shoulder injuries, however, medical records show she was treated for right shoulder pain in November, 2003, and December 2004 (Tr. p. 43-44). The claimant also complained to Dr. Safman about right shoulder pain after lifting a box on March 20, 2006, (Tr. p. 46).

The claimant received a change of physician through the Medical Cost Containment Division from Dr. Safman to Dr. Mocek. Dr. Mocek recommended an orthopaedic consult with Dr. Bowen for bilateral shoulder pain. Diagnostic testing (MRI, EMG/NCV) for the claimant's back injury

proved normal.

The claimant testified that after she was terminated from Lennox, she received unemployment benefits and worked at Alps Grocery and the Tobacco Outlet. She also receives occasional child support and financial assistance from her boyfriend. The claimant did not disclose her employment with Alps in the deposition and did not report all of her earnings to ESD although there was no finding of fraud.

The claimant gave inconsistent answers about whether or not she was able to work at Lennox (Tr. p. 55, 61-62).

Tim Brown and Mike Strabala explained the attendance policy at Lennox (Tr. p. 63- 103). Basically, employees accumulate “incidents” if they are late (½ incident) or absent (1 incident). They may “work off” the incidents to clear their record with a month of perfect attendance unless they miss more than 16 hours in one month. Although an incident is given for leave on workers’ compensation and short-term disability, they are not entitled to “work off” these incidents. Warnings are given to the employees after 2-1/2 incidents if they are at work. No warnings are mailed to employees on leave. After 4 incidents the employee may be terminated. There is a “last” chance policy that appears to be discretionary with the supervisor.

Mr. Brown and Mr. Strabala testified that this “last chance” policy applied to only those employees who had worked for the company for one year although neither of them were able to cite that passage in the supervisor’s handbook. Mr. Strabala testified the claimant had been given warnings about her attendance and her job performance.

As of January 24, 2006, the claimant had 2-1/2 incidents. By February 6, 2006, she had 3-1/2 incidents. She was warned about her job performance in March 2006. These warnings were made known to the claimant. The claimant took leave beginning on May 25, 2006. While the claimant was on leave, she was assessed another incident for short-term disability on June 12, 2006. When she returned to work in September, 2006, she was allowed to work about an hour before being called into the office, notified she had over 4 incidents, and was terminated. Mr. Brown and Mr. Strabala testified she was not offered a “last chance” because she had not been with the company for at least year.

#### **MEDICAL EVIDENCE**

Pages 5, 6, 9, 10-11, 16-21, 26-35, 37-46, 85-86, 91-96, 103-111, 128, 162, 207-218 of the respondents’ exhibits are irrelevant.

Medical records beginning in May, 1993 show the claimant was treated for a whiplash-type injury of the thoracic spine at T-5, 6, and 7 following a MVA. She was given medication and diagnosed with a sprain after negative x-rays. A July, 1993 report mentions muscle spasms after two MVAs. She was diagnosed with a back strain due to a lack of “significant findings” other than pain.

An emergency room record dated August or September, 1993 mentions low back pain after being thrown around in the back of a pick-up truck, however, the copy is degraded and difficult to read. It appears that diagnostic testing was negative.

In 1997, the claimant also complained of back pain during her pregnancy, but it does not appear that she was diagnosed or treated for this condition.

In 2001, the claimant was treated with medication for a backache again during pregnancy,

In 2003, the claimant was treated with medication for right shoulder pain due to overuse syndrome from her job at Riceland.

In 2004, the claimant reported right arm pain due to lifting. She was diagnosed with bursitis.

After the 2005 fall at work in the case at bar, the claimant complained of low back and left shoulder pain. Contusions were noted on the back and shoulder and the claimant was prescribed medication and physical therapy after negative x-rays of the back, left shoulder and left hip.

The claimant continued to complain of pain and could not tolerate physical therapy. A August 23, 2005 total body bone scan was negative.

In August, 2005, Dr. Safman performed trigger point injections based on his diagnosis of lumbar sacroiliac strain, left piriformis syndrome and left-shoulder soft tissue injury.

A September 28, 2005 MRI scan of the left shoulder found fluid in the subacromial bursa and tendonosis of the supraspinatus tendon. The claimant stopped her medication and requested an MRI scan of her back which the carrier refused on November 8, 2005.

In letters dated November 21, 2005 and November 7, 2005, Dr. Safman released the claimant with no work restrictions or impairment.

The claimant returned to Dr. Safman, complaining of right shoulder pain after lifting a box

at work on March 8, 2006. He repeated the trigger point injections and diagnosed chronic lumbar strain, tendinitis of the left shoulder, and tendinitis of the right rotator cuff. Dr. Safman released the claimant in April, 2006 with a 25 pound lifting restriction until an MRI could be performed on her shoulder. His diagnosis was tendinitis of the right shoulder and chronic lumbar pain.

The claimant began treating with Dr. Mocek in April, 2006. His notes record trouble sleeping at night with back spasms. The claimant complained of back and left leg pain and bilateral shoulder pain as a result of her work-related injury. Dr. Mocek recommended an MRI scan of the shoulder and back and referred the claimant to Dr. Bowen for follow-up of the shoulder pain. He renewed the claimant's 25 pound weight restrictions. An April 12, 2006 MRI scan of the lumbar spine was normal.

Dr. Mocek's note of April 18, 2006 indicates a 3% chance of an occult tear in the L4/5 disc. He recommended a EMG/NCV study and if this proved negative, he planned a single level percutaneous discogram.

Dr. Scott Bowen saw the claimant on April 28, 2006 for the August 4, 2005 left shoulder injury and the March 8, 2006 right shoulder injury. His physical examination revealed scapular dyskinesia and protraction of the scapula on the left; positive O'Brien's test; and mildly positive impingement syndrome in both shoulders. He prescribed medication, steroid injections, physical therapy and continued work restrictions.

An EMG/NCV study conducted May 3, 2006 was negative.

In a May 19, 2006 report Dr. Bowen returned the claimant to Dr. Mocek for her lower leg problem. For her shoulder, he recommended Aleve and physical therapy. He continued her work restrictions.

The claimant returned to Dr. Mocek on May 25, 2006. He felt that standing on concrete 8 hours a day at work contributed to her back pain. He noted that the claimant only went to one physical therapy session and he would want her to complete physical therapy before proceeding with a discogram. Dr. Mocek noted that the claimant slept only 4 hours a night so he recommended that

she take time off (work 4 hours per day for one month due to fatigue, advance to 6 hours per day next month, and 8 hours per day the third month). He also recommended medication and Z-coil shoes.

The claimant saw Dr. Brent Sprinkle on June 27, 2006. Dr. Sprinkle was chosen by the respondents to evaluate the claimant's back injury. He diagnosed a lumbar strain and disagreed with Dr. Mocek's recommendations. Dr. Sprinkle opined that the claimant's need for special shoes was unrelated to the compensable injury. Dr. Sprinkle also disagreed with Dr. Mocek's recommendation for further diagnostic testing because a discogram can cause pain and is a controversial procedure. Neither of these reasons is persuasive. Dr. Sprinkle also felt the percutaneous disc decompression was contraindicated because it would accelerate degenerative disc disease and would not provide long term benefits for a lumbar strain. Because she benefitted from a trigger point injection, the source of her pain was not an "invisible annular tear."

Dr. Sprinkle opined that the claimant's fatigue and insomnia were unrelated to her injury. He recommended that she be evaluated for hypothyroidism, depression and sleep apnea.

Dr. Sprinkle did recommend a TENS unit and two trigger point injections. The claimant declined further treatment from Dr. Sprinkle. The claimant returned to Dr. Bowen in June, 2006 and he performed surgery (shoulder manipulation with resection) on her left shoulder on July 12, 2006. She was diagnosed with minimal adhesive capsulitis and mild subacromial bursitis. The claimant was then sent to physical therapy.

Dr. Bowen released the claimant on September 20, 2006 with no restrictions and no impairment rating.

The claimant returned to Dr. Sprinkle in October, 2006, for trigger point injections.

The claimant returned to Dr. Mocek at her own expense on October 16, 2007. He commented that it was obvious that her fatigue "is at least partly caused by the pain in the back and leg interrupting her sleep patterns.

#### **DOCUMENTARY EVIDENCE**

The claimant's short-term disability claim was denied by MetLife in a letter dated June 1,

2006 because her condition was work-related. The letter also contains information on appealing the decision. On June 12, 2006, the claimant was notified that MetLife accepted the claim effective June 2, 2006 to July 23, 2006.

Due to the claimant's shoulder surgery, covered by workers' compensation, MetLife sent the claimant a letter on July 18, 2006 denying benefits after July 11, 2006.

## **FINDINGS AND CONCLUSIONS**

Employers must promptly provide medical services which are “reasonably necessary in connection with” the compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Commission opinion February 14, 2003 (E906565). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers’ Compensation Commission, December 13, 1989 (Claim No. D511255).

The claimant has complained of back and left leg pain since 2005. An MRI scan and EMG/NCV study was negative. According to the physician appointed by the Commission, Dr. Mocek, there is a 3% chance the claimant is suffering from an annular tear and discography is needed to make that assessment. If the test is positive, the claimant would then need a percutaneous disc procedure.

The respondents sent the claimant to Dr. Sprinkle who disagrees with Dr. Mocek and recommends trigger point injections.

Neither Dr. Mocek nor Dr. Sprinkle have assessed impairment, however, both agree the claimant is in need of additional medical treatment and that she remains under work restrictions.

The Commission has the duty of weighing medical evidence as it does any other evidence,

and the resolution of any conflicts in the medical evidence is a question of fact for the Commission. Bartlett v. Mead Containerboard, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

The claimant's credibility is called into question because her testimony was at odds with the medical records and deposition testimony. She also failed to report earnings and has a criminal record. The claimant has demonstrated an ability to work and based upon Dr. Mocek's estimate of 3%, I find the discography is unnecessary. The claimant has received adequate medical care for a back strain.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. For an injury to the body as a whole, a claimant is entitled to temporary total disability compensation during the period of time that the employee is within the healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The purpose of Ark. Code Ann. §11-9-505 is to emphasize the importance of returning an injured employee to work. The attendance policy as applied in this case is at odds with the legislative intent. Therefore I find the claimant is entitled to one year of benefits.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 4, 2005 at which time the claimant

sustained compensable injuries at a compensation rate of \$255.00.

2. The claimant has failed to prove that she is entitled to temporary total disability benefits for fatigue and insomnia.
3. The respondents are directed to pay one year of benefits pursuant to Ark. Code Ann. §11-9-505.
4. All appropriate medical expenses have been paid. The claimant has failed to prove that additional medical treatment is reasonable and necessary.
5. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
6. Dr. Mocek was the claimant's one-time change of physician under Ark. Code Ann. §11-9-514 and she is not entitled to another.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above. 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 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge