

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705942

LAGINA OLIVER

CLAIMANT

GREENHURST, INC.

RESPONDENT

CMSI,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED **APRIL 25, 2008**

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

Claimant represented by JAMES EDWARDS, III, Attorney, Ozark, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 8, 2008, in Fort Smith , Arkansas. The deposition of Dr. Joseph Dunaway was taken on October 25, 2007, and has been admitted as Claimant's Exhibit No. 3.

A pre-hearing order was entered in this case on October 1, 2007. The pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the issues were amended to reflect that the claimant was contending that she sustained not only a compensable injury to her neck or cervical spine, but also to her low back or lumbar spine, and left hip. A copy of the pre-hearing order with this amendment noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On June 6, 2007, the relationship of employee-employer-carrier-TPA existed between the parties.

2. The appropriate weekly compensation benefits are \$242.00 for total disability and \$181.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. Whether the claimant sustained a compensable injury to her neck or cervical spine, low back or lumbar spine, and left hip, on June 6, 2007.
2. The claimant's entitlement to the payment of medical expenses and temporary total disability from June 7, 2007 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant is entitled to all benefits."

In regard to these issues, the respondents contend:

"A. The claimant was not injured on the job. There are no new objective medical findings. An MRI before the accident is the same as an MRI after the incident."

DISCUSSION

I. COMPENSABILITY

The central issue in this case is whether the claimant sustained compensable injuries to her cervical spine, lumbar spine, and left hip in an employment related accident on June 6, 2007. The burden rests upon the claimant to prove these compensable injuries.

In order to meet this burden, the claimant must first show that these alleged injuries satisfy the statutory requirements of Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove, by medical evidence, the actual existence of the physical injuries alleged to be

compensable. Further, this subsection requires that the actual existence of these physical injuries must be based upon or supported by "objective findings", as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

_____When the claimant was initially seen by Dr. Jason Richey, on June 7, 2007, she was complaining of pain in her left hip that radiated down her left leg. Dr. Richey's assessment or diagnosis was simply that of "left hip pain". Dr. Richey's physical examination fails to reveal any objective findings of physical injury or damage to the claimant's left hip, such as bruising, redness, swelling, etcetera. X-rays that were performed on the claimant's left hip, at that time, also failed to reveal any objective evidence of physical injury or damage. Subsequent medical records do not note any objective findings of physical injury or damage to the claimant's left hip. In fact, these records do not even note any subjective symptoms or complaints in this area.

Therefore, I find that the claimant has failed to establish by medical evidence, which is supported by objective findings, the actual existence of any physical injury or damage to her left hip. As a result, she has not satisfied the statutory requirement of Ark. Code Ann. §11-9-102(4)(D) for a "compensable injury" to this portion of her body. Her claim for any benefits attributable to this alleged injury must be denied and dismissed.

In his initial report of June 7, 2007, Dr. Richey made no mention of any complaints involving the claimant's lumbar spine or low back. His physical examination of the claimant also does not reveal any abnormalities in this area, either objective or subjective.

The first mention of any low back or lumbar complaints is not found until Dr. Richey's report of June 13, 2007. In this report he recorded complaints of "back pain". His physical examination showed some tenderness to palpitation

in the area of both sacroiliac joints. However, he noted no observation of any "objective findings" to support the existence of an injury in this area. His assessment or diagnosis of the claimant's low back complaints is simply that of "low back pain". The claimant's complaints of low back pain no longer appear in Dr. Richey's subsequent notes of June 21, 2007 and July 5, 2007.

The records of Dr. Joe Dunaway, the claimant's family physician, reveal that the claimant was complaining of back pain, when she was seen on July 3, 2007. However, his physical examination, too, failed to note any objective findings to support an injury to this portion of the claimant's body. In his deposition, Dr. Dunaway stated that he had not found any injury to the claimant's low back that was caused by her employment related accident on June 6, 2007 (D. 41).

After consideration of all the evidence presented, it is again my opinion that the claimant has failed to prove by medical evidence, which is supported by objective findings, the actual existence of any physical injury or damage to her lumbar spine or low back. Thus, she has not satisfied the statutory requirement of Ark. Code Ann. §11-9-102(4)(D) for a "compensable injury" to this portion of her body. Her claim for any benefits attributable to this alleged injury must also be denied and dismissed.

In his initial records, Dr. Richey recorded complaints of neck or cervical pain. On physical examination, he noted moderate tenderness to palpitation over the neck and limited range of motion secondary to pain. X-rays, which were taken, on that same date and at the request of Dr. Richey, showed significant physical damage or defects that were in the form of disc space narrowing at C4-5 and to a greater degree at C5-6 and C5-7, with anterior osteophyte formations (spurs) involving the C4,5,6, and 7 vertebra. Mild

straightening of the normal cervical curve or lordosis was also noted. This latter finding would be compatible with the presence of muscle spasms in the cervical area.

Throughout the period of treatment by Dr. Richey, the claimant continued to voice complaints with her neck or cervical spine. He also recorded the onset of possible radicular complaints and symptoms involving the claimant's upper extremities.

On June 19, 2007, a cervical MRI was performed at the request of Dr. Richey. This test was interpreted as showing:

"Extensive degenerative disc disease changes, almost of all intervertebral disc spaces visualized of the cervical or upper thoracic spine region with multiple bulging annuli with central protrusions at C3-C4, C4-C5, C5-C6, and C6-C7 levels. No signal abnormality within the thoracic spine or cervical spinal cord. Bilateral neuroforaminal encroachment from C3-C7 levels also suspected by osteophytes.

IMPRESSION:

CERVICAL SPONDYLOSIS WITH MODERATE STENOSIS AND MULTILEVEL DISC HERNIATION OR PROTRUSION."

In his subsequent reports, Dr. Richey indicated that he reviewed the prior MRI report of August 2, 2006 (based upon the August 1, 2006 study) and that this report showed many of the same defects that were noted on the subsequent MRI study. However, he did state that the claimant's recent fall could have definitely aggravated her pre-existing arthritic condition.

Dr. Dunaway also recognized that the claimant was experiencing extensive defects involving her cervical spine prior to her employment related fall. However, he stated that, upon his review of the interpretations by the radiologists of the two MRIs (the MRI on August 1, 2006, and the MRI on June 19, 2007), there were differences noted in the interpretations of these two

studies specifically the most recent study was interpreted as showing spondylosis with moderate stenosis, whereas the prior study showed only spondylosis. He is more emphatic in his opinion that the claimant's recent difficulties were the result of an aggravation of her pre-existing condition by the employment related fall of June 6, 2007.

It is apparent that neither Dr. Richey nor Dr. Dunaway reviewed and compared the actual MRI films. Instead, they simply reviewed the written reports made by the radiologists. Even had Dr. Richey and Dr. Dunaway reviewed the actual films, both of these physicians are general or family practitioners and have no particular expertise in the interpretation of MRI films. Neither party has seen fit to have these studies reviewed by a radiologist or other specialist to determine if there are any differences and what these differences might signify.

The respondents argue that these studies are essentially identical. Therefore, they contend that there is no "objective findings" to support a "new" injury, as required by Ark. Code Ann. §11-9-102(4)(D). However, the evidence presented does not establish that the "objective findings" noted on the June 19, 2007 MRI are identical with those noted on the August 1, 2006 MRI. The respondents have also overlooked an "objective finding" shown on the June 7, 2007 plain x-rays. This finding was a straightening of the normal lordosis or curvature of the cervical spine, which is usually indicative of the presence of cervical muscle spasms.

After consideration of all the medical evidence presented, it is my opinion that the claimant has "established" by medical evidence, which is supported by "objective findings" (i.e. the independent observation of findings beyond the claimant's voluntary control), the actual existence of the physical injury to her

cervical spine, which she alleges to be caused by the June 6, 2007 employment related accident. Thus, in regard to her neck or cervical difficulties, the claimant has satisfied the statutory requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(D).

Next, the claimant must prove that her medically established and objectively documented cervical injury meets the definitional requirements for a "compensable injury" that are found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The injury arose out of and occurred in the course of the employment.
- (2) The injury was caused by a specific incident.
- (3) The injury is identifiable by time and place of occurrence.
- (4) The injury caused internal or external physical harm to the claimant's body.
- (5) The injury required medical services or resulted in disability.

In order to prove the first three of these requirements, the claimant must show the existence of a causal relationship between a specific employment related incident and the physical injury. However, the claimant need not prove that the employment related incident was the sole or even "major" cause of the physical injury. It is only necessary that the employment related incident contribute to the ultimate injury. Clearly, aggravations of pre-existing conditions may still constitute "compensable" injuries. Further, it is not necessary that the claimant prove the existence of this causal relationship by medical evidence. The existence of such a relationship can be derived from the record as a whole. The Appellate Courts have consistently held that the required causal relationship has been established when the claimant proves:

- (1) The occurrence of a specific employment related incident or accident.
- (2) The appearance of the physical injury within a reasonable period of time following the employment related incident or accident.
- (3) The injury is logically and reasonably attributable to the trauma that was produced by the specific employment related incident or accident, and
- (4) There is no evidence of any other equally or more probable cause of the injury.

In the present case, the greater weight of the credible evidence clearly shows that the claimant was involved in a specific employment related incident on June 6, 2007. The claimant testified that on that date she attempted to sit down on a stool or chair, that the stool or chair collapsed with her, and she fell backward onto the floor. The claimant's testimony in regard to all of these facts, is corroborated by the testimony of Heather McCool, a co-employee. The claimant's testimony, in regard to this accident, also coincides with the various histories she related to her medical providers. Further, this testimony coincides with the history that she related to Mr. Martin Schaffer, the co-owner and administrator of the respondents when she reported the accident and injury on June 6, 2007.

There is no question that the claimant had extensive defects and damage to her cervical spine, prior to her fall on June 6, 2007. This consisted of extensive arthritic changes to the vertebral bodies from her systemic arthritis and extensive degenerative changes to her intervertebral discs. The evidence further reveals that the claimant had previously experienced episodes of pain and other symptoms in her neck and upper extremities that were of the same type and nature as those she experienced after her fall. However, these facts, do not, in and of themselves, prevent a finding that the claimant experienced

a compensable injury to this same portion of her body in the employment related fall of June 6, 2007. In fact, the very existence of these defects would act to make the claimant more susceptible to an injury to this portion of her body in the employment related fall. It is a long standing rule in workers' compensation cases that an employer takes the employee "as is" with all pre-existing weaknesses and propensities for injury.

Clearly, the employment related fall could reasonably and logically have resulted in an aggravation of the claimant's pre-existing condition so as to cause or precipitate her episode of cervical difficulties, on and after June 6, 2007. This possibility is clearly recognized by both Dr. Richey and Dr. Dunaway.

On the other hand, the claimant's cervical difficulties, on and after June 6, 2007, could also represent merely a continuation of her previous symptoms and complaints. Due to the very nature of the claimant's pre-existing condition, her cervical complaints, on and after June 6, 2007, could also represent only the natural progression of her degenerative systemic condition.

The claimant's own testimony comprises the primary evidence she has offered to prove that her cervical difficulties, on and after June 6, 2007, were the result of an entirely "new" injury or, at least, an aggravation of her pre-existing condition that resulted from the employment related fall. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded.

At the hearing, the claimant acknowledged that, prior to June 6, 2007, she had experienced episodes of pain in her neck, pain radiating into her upper extremities, and numbness and weakness in her upper extremities. However, she stated that none of these prior episodes of difficulties were as severe or as

long standing as those she experienced after June 6, 2007. It was her further testimony that after December of 2006, her prior complaints had become minimal. It was her testimony that, on or shortly after June 6, 2007, the symptoms in her neck and upper extremities reappeared and were substantially more severe than she had previously experienced.

In regard to this testimony, the claimant appears a credible witness. The record shows that she is a long time employee of the respondent and has an outstanding record in her position as a CNA. The administrator of the respondent, Mr. Schaffer, clearly acknowledged that the claimant was an excellent employee.

The claimant's testimony concerning the substantial resolution of her prior cervical complaints is substantial by the fact the claimant sought no medical treatment for complaints or difficulties with her cervical spine from December 28, 2006 until June 7, 2007. During this time, the claimant continued to perform, on a regular basis her regular physically demanding duties as a CNA for the respondent. Nor is there any evidence that during this time, the claimant was experiencing any complaints or limitations that involved her neck or cervical spine. Her testimony concerning the substantial increase in her cervical difficulties, after June 6, 2007, is supported by the x-ray finding, on June 7, 2007, of the likely presence of muscle spasms in the cervical area that resulted in the loss of the normal lordosis or curvature of the cervical spine. I would also note that neither Dr. Richey nor Dr. Dunaway in any way appear to question the validity of the claimant's increased symptoms with her cervical spine, after the June 6, 2007 accident.

Clearly, it is possible that the claimant's difficulties, on and after June 6, 2007, are merely a continuation or progression of her prior difficulties from her

pre-existing conditions with her cervical spine. However, after consideration of all the evidence presented, it is my opinion that the greater weight of the evidence shows that the most likely or probable cause of the claimant's cervical difficulties, on and after June 6, 2007, is an aggravation of this pre-existing condition by her employment related fall on June 6, 2007. Thus, I find that the claimant has proven the existence of a causal relationship between this specific employment related accident on June 6, 2007 and her subsequent episode of cervical difficulties. This would be sufficient to satisfy the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

The magnitude of the claimant's symptoms with her cervical spine and upper extremities, together with the physician's clinical findings are sufficient to prove that the employment related aggravation of the claimant's pre-existing condition caused internal physical harm to her body (at least temporarily) and reasonably required medical services. Thus, the claimant has proven the final two definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has proven by the greater weight of the credible evidence that, on June 6, 2007, she sustained a "compensable injury" to her cervical spine that was in the form of an aggravation of a pre-existing condition. As a result, she would be entitled to appropriate benefits under the Act for this aggravation.

II. BENEFITS

Clearly, the claimant would be entitled to reasonably necessary medical services for her compensable injury. The burden rests upon the claimant to prove that the specific medical services, which have been actually provided and/or recommended, represent "reasonably necessary medical services" for her compensable injury.

Medical services are reasonably necessary when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

After consideration of the evidence in the present case, I find that the medical services that were actually provided to the claimant by Dr. Jason Richey were provided at the request of the respondents. Thus, the respondents would have been liable for the expense of these services, even had the claimant not proven that she sustained a "compensable injury".

However, I find that the medical services rendered and recommended to the claimant for her cervical difficulties by and at the direction of Dr. Richey and Dr. Dunaway do constitute "reasonably necessary medical services" for the claimant's compensable injury. This would include not only the medical services, which these physicians have actually rendered, but would also include the recommended neurosurgical evaluation. I find that this recommended medical service is appropriate to reasonably insure an accurate diagnosis of the nature and extent of the claimant's compensable cervical injury and to develop any appropriate treatment programs.

The final matter concerns the claimant's entitlement to temporary total disability benefits. Again, the burden rests upon the claimant to prove that her compensable cervical injury has rendered her temporarily totally disabled.

In order to meet this burden, the claimant must show that she continued within her healing period from the effects of her compensable injury. She must also show that she has been rendered totally disabled from performing regular gainful employment, as a result of this injury.

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 continues until the actual physical damage caused by the compensable injury has resolved or at least stabilized, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement.

In the present case, I would note that the medical evidence presented shows that the claimant continued under the treatment of Dr. Richey from June 7, 2007 through July 5, 2007. She appears to have seen Dr. Dunaway for her compensable cervical injury only on July 3, 2007.

When the claimant last saw Dr. Richey, on July 5, 2007, there is no indication that he released her from further active treatment for her cervical difficulties. In fact, his reports and records indicate that he had referred the claimant for further evaluation and possible treatment by neurosurgical specialists. The claimant's lack of continued medical treatment for her compensable cervical injury, after July 5, 2007, is the result of the respondents' refusal to provide this additional medical evaluation or treatment and the claimant's financial inability to obtain such an evaluation and treatment on her own.

After consideration of the medical evidence presented, it is my opinion that the medical evidence shows that the claimant has continued within her healing period from the effects of her compensable cervical injury from June 6, 2007 through a date yet to be determined. Thus, she has satisfied the first requirement for her entitlement to temporary total disability benefits during this period.

The evidence shows that the claimant is 39 years old. She has a ninth grade education and a CNA license. Since January of 2000 or 2001, the claimant has only worked as a CNA for the respondent. The only evidence of

any other prior employment appears to be in that of a line worker in the poultry processing field for Cargill.

The claimant testified that since June 7, 2007, she has not performed any regular gainful employment. She testified that since June 6, 2007, she has experienced severe pain in her neck or cervical area and pain into her upper extremities. She stated that this pain was sometimes so severe that it kept her awake at night. She also described experiencing continuous and progressive weakness in her upper extremities that caused her to drop things and prevented her from opening bottles or jars.

I find the claimant's testimony concerning her physical limitations to be credible. The claimant is obviously well motivated to work, having continued her employment with this respondent throughout her previous episodes of cervical difficulties. Her limitations are also consistent with the injury she has sustained.

Due to the claimant's limited education and prior work experience, she would be limited to such employments as a CNA, janitorial work, or production/processing line work. None of these various positions could be performed by an individual with the claimant's current physical limitations and restrictions. The fact that she continues in need of further medical evaluation and possible treatment would also significantly reduce the likelihood of her obtaining employment on the open job market. Thus, I find that the claimant has proven that her compensable injury has rendered her totally disabled, at least temporarily. Thus, she has proven the second requirement for her entitlement to temporary total disability benefits from June 7, 2007 through a date yet to be determined.

I recognize that the claimant's period of temporary total disability may have been unnecessarily extended by her inability to obtain appropriate medical care for her compensable injury in a timely manner. However, this has occurred through no fault of the claimant. As the respondents have failed to timely provide the claimant with reasonably necessary medical services for her compensable injury, it cannot complain that the period of temporary total disability may have been unnecessarily extended.

Therefore, it is my opinion that the claimant has proven that she is entitled to temporary total disability benefits for her compensable cervical injury from June 7, 2007 through a date yet to be determined. She would be entitled to appropriate weekly benefits for this disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On June 6, 2007, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On June 6, 2007, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$ 242.00 for total disability and \$181.00 for permanent partial disability.

4. On June 6, 2007, the claimant sustained a compensable injury to her cervical spine in the form of an aggravation of a pre-existing condition. Specifically she has established by medical evidence, which is supported by objective findings, the actual existence of this physical injury. She has further proven that this injury arose out of and occurred in the course of her employment, was caused by a specific incident, is identifiable by time and place

of occurrence, caused internal physical harm to her body, required medical services, and resulted in disability (at least temporarily).

5. The claimant has failed to prove that, on June 6, 2007, she sustained a compensable injury to her lumbar spine or her left hip. Specifically, she has failed to establish by medical evidence which is supported by objective findings, the actual existence of such a physical injury.

6. The claimant is entitled to reasonably necessary medical services provided and recommended to her for her compensable cervical injury by Dr. Jason Richey and Dr. Joseph Dunaway. This specifically includes a neurosurgical evaluation, as recommended by Dr. Richey. The respondents' liability for the expense of these services is subject to the Commission's medical fee schedule.

7. The claimant has proven that she was rendered temporarily totally disabled as a result of the effects of the compensable cervical injury, for the period of June 7, 2007 through a date yet to be determined.

8. The respondents have denied the occurrence of compensable injuries to the claimant's neck or cervical spine, to her low back or lumbar spine, or to her left hip. The respondents have controverted any and all benefits attributable to such injuries.

9. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on all indemnity benefits herein and herein awarded to the claimant.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period commencing June 7, 2007 and continuing through a date yet to be determined.

The respondents shall be liable for all reasonably necessary medical services required by the claimant for her compensable injury, which includes the services already provided to the claimant by Dr. Richey and Dr. Dunaway and the neurosurgical evaluation recommended by Dr. Richey. Liability for these expenses is subject to the medical fee schedule established by this Commission. The respondents are also entitled to credit for any of these medical expenses previously paid by the respondents.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the temporary total disability benefits herein awarded. One-half of this fee is to be in addition to these benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from these benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

For the reasons heretofore set forth in this Opinion, any and all claims for benefits attributable to an injury to the claimant's low back or lumbar spine and left hip are hereby denied and dismissed.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE