

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102505

MICHELLE ALLEN,
EMPLOYEE

CLAIMANT

HORNER ENTERPRISES,
EMPLOYER

RESPONDENT

ARKANSAS GUARANTY FUND on behalf of
RELIANCE INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 21, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE BILL WIGGINS, Attorney at
Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE WILLIAM C. FRYE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on January 15, 2004.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The stipulation agreed to by the
parties at the pre-hearing
conference conducted on August 27,
2003, and contained in a pre-

hearing order filed August 29, 2003 is hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that her current back problems are causally related to her compensable low back injury. Therefore, the surgery recommended by Dr. Chakales and the MRI are reasonable and necessary in relation to claimant's compensable injury.
3. Claimant's healing period for her compensable back injury has not ended. Claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits beginning August 1, 2003, and continuing through a date yet to be determined.
4. Respondent has controverted claimant's entitlement to unpaid disability and medical benefits.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 15, 2004 opinion of the Administrative Law Judge, including all findings of

fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion. Based upon my de novo review of this claim, I find that the claimant's surgery and MRI are not necessary and reasonable in connection with her compensable back injury. I further find that the claimant has failed to prove entitlement to temporary total disability benefits beginning August 1, 2003, to a date yet to be determined.

On February 18, 2001, the claimant sustained an admittedly compensable injury to her back when she slipped on a wet floor and fell while employed as a commercial cleaner for the respondent employer. The first medical treatment that the claimant received after her injury was on February 19, 2001, at the emergency room of St. Mary's Hospital in Rogers, Arkansas. An MRI scan taken during the claimant's emergency room visit showed disc space desiccation and mild circumferential bulge at L5/S1, and the anterior aspect of the inferior end plate of L5 in showed possible edema and modic-type (or, degenerative) changes, possibly including a Schmorl's node. Also, a minimal disc bulge at L4-5 showed no significant narrowing of the spinal canal and neural foramina. The claimant was seen thereafter on February 23, 2001, by Dr. Cyril A. Raben. Based upon his

examination of the claimant and the results of the emergency room MRI, Dr. Raben assessed the claimant with disc derangement and/or end plate fracture at L5/S1, for which he prescribed medications and physical therapy, and he released the claimant back to work with restrictions. The claimant saw Dr. Raben again on March 19, 2001, April 2, 2001, and May 1, 2001, with little reported improvement to her condition. On May 11, 2001, in a letter from Dr. Raben to Ms. Deborah Wilson, the doctor made the following comments regarding the claimant's condition and prognosis:

We had last seen her [claimant] on May 1, 2001, at which point she still had persistent low back pain. Most certainly, she would be able to return to work; however, as stated, should she return to her usual and customary duties, she most certainly will undergo relapse; that is, I think that this end plate fracture and/or disc derangement will cause her significant problems and/or complaints. In fact, the most important treatment modality for Ms. Allen would be to get her back to gainful employment; however, at present, I cannot accurately estimate maximum medical intervention.

I believe that within three to six months should conservative care be beneficial for this woman - conservative care including, of course, back to gainful employment - that she will know whether or not she is at a stage where she can assume any type of duties close to her usual and customary activities.

On June 25, 2001, Dr. Vincent B. Runnels of the N.W. Ark. Neurosurgery Clinic diagnosed the claimant with degenerative disc disease, for which he declined to assign her an impairment rating. On August 14, 2001, Dr. Raben gave the claimant a return to work slip, restricting her to light duty. Due to continuing complaints of pain and numbness in her low back and thigh, Dr. Raben scheduled the claimant for a disc space injection on November 20, 2001. When this injection brought minimal relief to the claimant, Dr. Raben scheduled her for a discogram and follow-up appointment with Dr. Chakales. This discogram, which was performed on December 27, 2001, revealed a left-sided disc herniation with fissure at L5-S1. In a clinic note dated January 8, 2002, Dr. Raben stated:

She has pressure sensation only. She rates her pain level at a 6 out of 10. It is in her low back and left sided.

Based upon his reading of the discogram and his physical examination of the claimant, Dr. Raben recommended that the claimant see Dr. Chakales for intradiscal electrothermoplasty. Doctor Raben did not recommend surgery for the claimant at that time due to her age. The next reported examination of the claimant was by Dr. Chakales on

May 29, 2002, during which visit he took X-rays of the claimants's lumbar spine. Doctor Chakales' diagnosis of the claimant's condition was that of lumbar disc syndrome with internal disc derangement, L5-S1, primarily on the left side. In a clinic report dated June 26, 2002, Dr. Chakales stated the following:

Ms. Allen comes in. She is still having low back pain and sciatica. I felt she was a suitable candidate for IDET at L5-S1, primarily on left side. Apparently her Worker's Compensation Commission has approved this. She is still having low back pain. I will take her off work and put her on temporary total disability.

As of November 6, 2002, Dr. Chakales reported that the claimant's IDET procedure had been successful, he scheduled her for three more weeks of physical therapy, and stated that she was not yet ready to return to work. On December 16, 2002, the claimant returned to Dr. Chakales with reports of "severe sciatica on the left side," and some "left- and right-sided pain." During her visit with Dr. Chakales of March 17, 2003, the claimant reported a "recurrence of some of her sciatica on the right side." Additional X-rays conducted during this examination revealed "no evidence of any discitis, etc." Therefore, Dr. Chakales prescribed pain medications and muscle relaxers, recommended

a series of lumbar ESI's to be conducted in the claimant's hometown. The claimant returned to Dr. Chakales on June 24, 2003, complaining of worsening pain, for which the doctor prescribed more pain medications. In a letter dated July 31, 2003, regarding an independent examination and evaluation of the claimant, Dr. John L. Wilson, made the following remarks:

Ms. Allen currently has complaints of pain on her right side. She does not have neurological deficit and has negative straight leg raising on that side. I am unable to connect all of her subjective complaints with her objective finding. Ms. Allen takes Mepergan regularly and I do not understand the indication for this. According to the AMA Guideline, with a report of a bulging disc at 5-1 on the left[,] Her impairment at this time would be 5% to the body. Her complains [sic] now are on the right and, quite frankly, I don't know the reason for these complaints; according to the MRI the right side was clear. [B]ulging disc at 501 on the left.

On October 10, 2003, the claimant underwent an electrodiagnostic study which yielded the following impression:

Normal examination. There is no evidence of right lumbosacral radiculopathy or plexopathy or right lower extremity mononeuropathy.

On October 27, 2003, the claimant underwent an MRI which revealed large rightward disc protrusion at L5-S1. In a letter dated October 27, 2003, Dr. Chakales opined that the claimant suffered from "acute herniation which most likely is extruded at the lumbosacral level on the right," and he recommended that the claimant would be a suitable candidate for decompression and excision of the herniated disc. On December 5, 2003, Dr. Chakales consulted with the claimant about her on-going symptoms. In his report from an examination of the claimant on December 5, 2003, Dr. Chakales stated that the claimant's clinical examination and MRI findings were consistent with "a right lumbosacral radiculopathy."

In final comparison to Dr. Chakales' opinion, Dr. Wilson's assessment of the claimant's condition and prognosis differed somewhat, in that he felt further testing was the most appropriate course of treatment for the claimant. In a response letter dated December 9, 2003, to the claimant's case manager at Rehabilitation Management, Dr. Wilson made the following comments:

1. The films provided to me today reveal an HNP, probably extruded, at L5-S1 on the right.

2. Do the objective findings of the film correlate with Ms. Allen's complaints. Yes, but they do not correlate with her physical findings. (Emphasis added)

3. Are there additional diagnostic studies that you would recommend to determine an appropriate treatment plan for Ms. Allen? Yes.

Dr. Wilson further stated that his review of the above referenced films did not alter his opinion regarding impairment. He recommended that a selective nerve block might be beneficial in alleviating some of the claimant's complaints.

After her admittedly compensable injury of February 18, 2001, the claimant was treated, rather extensively, for problems associated with a left-sided disc herniation at L5-S1. From the time of her injury up until December of 2002, the claimant's symptoms were notably due to "left-sided disc derangement." After she began complaining of pain on the right side, doctors seemed puzzled as to the exact cause of the claimant's pain. For example, in his letter of July 31, 2003, Dr. Wilson stated:

Ms. Allen currently has complaints of pain on her right side. She does not have neurological deficit and has negative straight leg raising on that side. I am unable to connect all of her

subjective complaints with her objective finding.

An electrodiagnostic study in mid-October, 2003, revealed a "normal examination," with "no evidence of right lumbosacral radiculopathy or plexopathy or right lower extremity mononeuropathy." It was not until October 27, 2003, that another MRI indicated the presence of "large rightward disc protrusion at L5-S1." This "rightward" protrusion occurred nearly two years after the claimant's compensable "left-sided" disc injury, for which the respondent provided all necessary and reasonable medical treatment. By all indications, the claimant's original injury was alleviated with conservative treatment by November 6, of 2002, when Dr. Chakales reported that the claimant's IDET procedure had been successful. The claimant even testified that the IDET procedure had offered her "temporary" relief from her leg pain. Specifically, the claimant stated, "I didn't have the pain in my leg anymore."

Accordingly, I cannot find based upon this record that the claimant's current condition is causally related to her compensable injury. On July 31, 2003, Dr. Wilson assessed the claimant at 5% impairment to the body. Furthermore, based upon the results of a previous MRI,

Dr. Wilson could not connect the claimant's right-sided pain to her original injury at that time. Therefore, it is reasonable to assume that the claimant's original compensable injury, namely her left-sided disc derangement, had stabilized by July 31, 2003, and nothing further in the way of treatment would improve it. Accordingly, I find that the claimant is not entitled to additional temporary total disability beginning August 1, 2003, and continuing through a date yet to be determined. Only for very limited periods of time throughout her recovery period, i.e., after a surgical procedure, was the claimant ever totally restricted from work. Otherwise, the claimant has consistently been released to return to work with restrictions. Therefore, I find the claimant has failed to establish by a preponderance of the evidence that she is totally incapacitated from earning wages.

Based upon the above and foregoing, I find the claimant has failed to establish that her right-sided disc herniation is causally related to her compensable injury of 2001. Therefore, additional medical benefits specifically the surgery and MRI recommended by Dr. Chakales, are not reasonable and necessary medical treatments in connection with the claimant's compensable injury. Finally, I find the

claimant has failed to prove that she is totally incapacitated from earning wages, and additional temporary total disability benefits beginning August 1, 2003, and continuing through a date yet to be determined.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner