

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213616

BRENDA BAILEY, EMPLOYEE	CLAIMANT
DUMAS NURSING CENTER, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 8, 2005

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal the decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment, including a discography. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was working for the respondent employer as a Certified Nursing Assistant (CNA). On November 13, 2002, the claimant sustained an admittedly compensable lower back injury. The claimant first sought treatment from Dr. Steve Asemota. Dr. Asemota took the claimant off work for approximately two weeks and then returned the claimant to light duty on December 2, 2002. The claimant had physical therapy as well. On December 6, 2002, Dr. Asemota returned the claimant to full duty effective December 18, 2002.

The claimant began seeking treatment from Dr. Asoobi for pain management. The claimant ultimately came under the care of Dr. Bruce Safman on February 6, 2003. Dr. Safman noted that the claimant's MRI demonstrated a small paracentral disk herniation at L4-5 but there was no impingement on the nerve root or the spinal cord. Dr. Safman diagnosed the claimant with lumbosacroiliac strain. Dr. Safman performed trigger point injections, started the claimant on Bextra and gave her Ultracet for pain. He also gave the claimant some licoderm patches. Dr. Safman, in his

note of that date, stated, "I suspect that she will be at maximum medical improvement very shortly."

The claimant returned to Dr. Safman on February 20, 2003. He noted that the claimant was no longer tender in the sacroiliac joints. He repeated the trigger point injections because they were helpful to the claimant. He also prescribed a sacroiliac belt for the claimant. On her next visit with Dr. Safman, he noted that he would have the claimant undergo instruction by the nursing home staff on how to transfer patients.

The claimant continued to see Dr. Safman through July 20, 2003. In a note dated June 12, 2003, Dr. Safman noted, "I believe depression is playing a role in her symptomology. I do not think this is a result of her injury." On July 24, 2003, Dr. Safman noted, "I related to the patient that I have done all that I can do for your subjective symptoms. There is no reason for her to continue to see me. She is at maximum medical improvement. There is a zero percent disability rating."

Dr. Safman also referred the claimant to Dr. Ackerman. The claimant went one time and did not show up again. There is some confusion regarding whether or not the claimant just did not show or that she did not know about the appointment.

On May 29, 2003, Dr. Scott Carle performed an independent medical evaluation on the claimant. Dr. Carle concluded that there were no objective clinical findings that correlated a neurological injury to the spine with the incidental finding on the claimant's earlier MRI study. He noted that other non-physiological factors were the significant cause of the claimant's pain and symptom probagation. He also concluded that the claimant was at maximum medical improvement.

The claimant worked full duty from May 2003 until January of 2004. At that time she requested a change of physician which was granted. The claimant then began seeing Dr. Andrew Prychodko. Dr. Prychodko first saw the claimant on January 15, 2004. At this point, the claimant had been working full duty for 8 months and it was approximately 14

months post-injury. After conducting one clinical evaluation of the claimant, Dr. Prychodko concluded that the claimant should be referred to a interventional pain management specialist while limiting her activity level. He reviewed the claimant's MRI and conceded that there was nothing objective on any diagnostic study which would indicate that there was damage to the facet joints. A note dated March 26, 2004, from Dr. Prychodko stated that the claimant's pain appeared to "involve a component of deconditioning." The claimant was referred by Dr. Prychodko to Dr. Thomas Hart. Dr. Hart has recommended discography. The respondents contend that the discography is not reasonable and necessary medical treatment. The claimant has not worked since January 19, 2004. At this point she began drawing unemployment benefits for approximately five months, and she also applied for social security disability. On the advise of her attorney, the claimant quit drawing unemployment benefits when she applied for Social Security Disability benefits.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury

will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. McWilliams, Parker, supra. In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total

incapacity to earn wages (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

A review of the evidence demonstrates that the claimant is not entitled to any additional temporary total disability benefits. The claimant was released at maximum medical improvement by Dr. Safman on July 24, 2003. The claimant worked for approximately eight months until she sought treatment from Dr. Prychodko in January of 2004. Dr. Safman saw the claimant approximately 12 times between February 6, and July 24, 2003. Dr. Prychodko only saw the claimant once.

The evidence demonstrates, that after extensive treatment, Dr. Safman released the claimant finding that she had reached maximum medical improvement without any permanent impairment on July 24, 2003. Dr. Safman released the claimant to full duty work. In fact, the claimant worked full duty for approximately 8 months and demonstrated an ability to perform the job functions.

The claimant has also been examined by Dr. Carle. He testified that the discography was not needed under the circumstances and that it was a subjective test. Further, Dr. Safman concurred and stated that no additional medical treatment was necessary. The only evidence that has been presented that the claimant has not reached maximum medical improvement is the one-time evaluation by Dr. Prychodko. Even though Dr. Prychodko found nothing objective, he based his observations on subjective complaints only. He also made a referral to Dr. Hart, who has only diagnosed the claimant with discogenic pain. Discogenic pain is a very controversial diagnosis and is somewhat of a catch all when nothing else fits. Simply put, we cannot find that the claimant is entitled to temporary total disability benefits from January 19, 2004 to a date yet to be determined. Accordingly, we reverse the decision of the Administrative Law Judge.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However,

injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

A review of the medical evidence demonstrates that the claimant is not entitled to additional medical treatment, including the discography. Dr. Safman, after consulting with the claimant over 12 times for a period of six months, concluded that the claimant had reached maximum medical improvement and that no additional medical treatment was necessary. Dr. Carle also concluded that the claimant

had reached maximum medical improvement and no additional medical treatment was necessary. Consequently, we find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment, including the discography, is reasonable and necessary medical treatment.

Therefore, based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority decision denies the claimant additional temporary total disability benefits for the time period of January 19, 2004 to a date yet to be determined and denies her additional medical treatment, including treatment in the form of a discography. In my opinion the claimant has proven by a preponderance of the evidence that she reentered her healing period on January 19, 2004 and was unable to work due to her admittedly compensable injury. Additionally, I find that the claimant's request for additional medical treatment in the form of a discography, is reasonable and necessary. For these reasons, I respectfully dissent.

The claimant suffered from an admittedly compensable injury on November 13, 2002 when she injured herself while attempting to transfer a patient in order to give her a bath. The claimant was subsequently diagnosed with a lumbosacral sprain and a "mild" disc herniation at L4-L5. The respondent initially accepted the claim as

compensable, but now argues that treatment in the form of a discography is not reasonably necessary for treatment of her compensable injury. The Majority has agreed with the respondent and finds that the claimant is not entitled to treatment in the form of a discography. In supporting their decision, the Majority opines that because Dr. Carle and Dr. Safman had previously concluded that she had reached maximum medical improvement and was not in need of additional medical treatment, the claimant should be denied additional benefits.

Dr. Prychodko and Dr. Hart were the last doctors to treat the claimant, and in my opinion, their opinions should be entitled to more weight than the opinions of Dr. Safman and Dr. Carle. The medical reports indicate that while Dr. Safman and Dr. Carle treated the claimant for a longer period of time, the claimant's condition never resolved under their care. The reports completed by Dr. Safman and Dr. Carle indicate the claimant did suffer from an injury and there is no evidence of malingering on the part of the claimant. Accordingly, I find that the

opinions presented by Dr. Prychodko and Dr. Hart should be controlling.

I also find the medical reports indicate that the claimant should be entitled to the discography and additional temporary total disability benefits. The medical records indicate that the claimant reentered her healing period and remained unable to work and that she needed the discography to determine her future course of treatment. However, the Majority opinion, has effectively denied the claimant from receiving future treatment in any form in relation to an admittedly compensable injury.

After sustaining her admittedly compensable injury, the claimant presented with throbbing pain in her back and leg. The claimant continued to complain of pain in her back throughout her treatment. Despite her ongoing complaints of pain and having been diagnosed with a lumbosacral sprain and herniated disc, on June 12, 2003, Dr. Safman indicated the claimant was at maximum medical improvement and attributed her ongoing complaints to depression. However, the medical reports from Dr. Safman

never explain what led him to the conclusion that the claimant was depressed.

Likewise, on May 29, 2003, Dr. Carle opined that there were, "no objective clinical findings to correlate a neurological injury to the spine with what appears to be an incidental finding on her MRI study." However, Dr. Carle went on to indicate that, "without electromyographic evidence, there is no ratable injury to the spine," and further indicated, "Her technical MMI date, without electromyographic evidence of radicular nerve root irritation, is now." This indicates that Dr. Carle was aware that other testing could reveal other problems with the claimant and virtually ignores her herniated disc.

Lastly, Dr. Carle suggested that the claimant's ongoing pain might be due to her own psychological condition indicating, "Her inability to tolerate discomfort appears to be the main provoking problem." During her visit with Dr. Carle, the claimant complained that she was dissatisfied with the treatment that she had received in treating her compensable injury.

After being released to return to work, the claimant attempted to return to work. When her symptoms did not subside she requested and was granted a change of physician. That physician, Dr. Prychodko, prescribed the claimant Celebrex. He also prescribed Chlorzoxazone for muscle spasms. He released her from working from January 19 to April 16, 2004 and referred her to see Dr. Hart. On March 26, 2004 Dr. Prychodko indicated that he believed the claimant's pain involved "a component of deconditioning". He continued prescribing muscle relaxants.

On April 12, 2004, Dr. Hart indicated treated the claimant. He indicated,

According to Ms. Bailey she only had one (sic) MRI performed and that was dated 12/6/02. This clearly demonstrated on the T2 weighted image a high intensity zone with a disc protrusion in the posterior portion indicating possible annular disruption, some slight disc desiccation, some minimal osteoarthritic changes of the facets. I did not see any extruded fragment. I also demonstrated to Ms. Bailey that in the axial cross section view that the disc at 3-4 also may have a slight disc protrusion on the left side laterally.

Dr. Hart further indicated,

As I discussed with Ms. Bailey I do not have Dr. Safman's noted (sic) but it makes, again, no common sense or medical sense to be told that nothing is wrong with you or nothing else can be done if you fail pharmacological management. According to national standards, that is the North American Spine Society's Protocol Commission, pain beyond 4 months not delineated by other imaging studies, discography should have been performed. This will allow us more information subjectively and objectively, which an MRI or a CT myelogram does not allow to help delineated does she or does she not have an IDD, intervertebral disc disruption.

He goes on to indicate,

My suggestions to Ms. Bailey, again, once and for all to help delineate her back pain complaints is perform discography. Do the 2-3 as a control, the 3-4 and 4-5 suspect levels, and the 5-S1 as a control. If that demonstrates an abnormal disc, we will inject intradiscal steroid followed by post CT imaging. If it demonstrates a surgical lesion, once and for all she needs a surgical consultation. If not, other modalities may be considered for example percutaneous discectomy. There (sic) Arkansas Insurance Commission recently had a mandated review by neurosurgeons in Boston that this is the standard of care.

This opinion indicates that Dr. Hart did a thorough examination of the claimant, including her MRI, and that he followed the usual standard of care within the medical field. While the Majority finds that Dr. Hart diagnosed the claimant with discogenic pain and that it is, "a very controversial diagnosis and is somewhat of a catch all when nothing else fits," I note that Dr. Hart, recommended the discography to determine whether the claimant did have a reason to need further treatment. Accordingly, the test could result in the claimant receiving more treatment or not, depending on the outcome. Furthermore, in the past the Court of Appeals has indicated that the results of a discography have an objective component and have relied on the results of discography in establishing a compensable injury. Smith v. County Market/Southeast Foods, 73 Ark. App. 333 (2001), 44 S.W.3d 737, (2001). Likewise, in my opinion, the Commission should not rule that a discography is not reasonably necessary treatment in a situation where the claimant suffered from an admittedly compensable injury, where she continues to

present the same symptoms, and there is a treatment available to determine whether and what type of treatment she needs.

Ultimately, I find the decisions of Dr. Prychodko and Dr. Hart regarding the claimant's need for a discography and potential further treatment, and regarding her inability to work due to her compensable injury to be persuasive. As such, I believe the Administrative Law Judge should have been affirmed. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner