

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407848

CYNTHIA G. POWELL, EMPLOYEE	CLAIMANT
ARLINGTON HOTEL CO., INC., A SELF-INSURED EMPLOYER	RESPONDENT
ARKANSAS HOSPITALITY WORKERS' COMPENSATION TRUST; CROCKETT ADJUSTMENT BENEFITS ADMINISTRATOR	RESPONDENT

OPINION FILED JULY 22, 2005

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

Claimant represented by HONORABLE SHERRI ARMAN R. McDONOUGH, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision filed by an Administrative Law Judge on December 9, 2004. The Administrative Law Judge found, in relevant part that the claimant has proven by a preponderance of the evidence that she sustained a compensable back injury on June 7, 2004. In addition, the Administrative Law Judge found that the claimant is entitled to disability benefits including

temporary partial disability benefits for the period beginning June 8, 2004, and continuing through September 7, 2004, and for the period beginning September 18, 2004, continuing through October 20, 2004, and to temporary total disability benefits for a one week period beginning on September 10, 2004. Finally, the Administrative Law Judge found that the claimant has proven by a preponderance of the evidence that the medical treatment she received under the direction of Dr. Michael Atta, Dr. Ross Hardy, and her family physician, was reasonably necessary for the treatment of her compensable injury.

Our carefully conducted de novo review of this claim reveals that the claimant sustained a minor compensable injury for which she has received all appropriate medical and temporary total disability benefits to which she is entitled.

The claimant testified that she was pulling the sheets off of a patron's bed at approximately 9:30 a.m. on June 7, 2004, when she felt a pop in her left hip with a knot swelling at the site. The claimant denied feeling any pain at the time of this alleged incident, but stated that she experienced gradually increasing pain as the day went

on. The claimant finally reported the incident to her supervisor, Maria Viertbauer, at around 12:30 that afternoon. The claimant testified that, per Ms. Viertbauer's instructions, she went home and applied heat to the affected area. The following day, June 8, 2004, the claimant filled out an injury report and was thereafter seen for medical treatment by Dr. Atta at the St. Joseph's Business Health Clinic. In his report of that initial visit, Dr. Atta noted that the claimant showed no obvious redness, swelling, or ecchymosis. Palpation of the claimant's back revealed tenderness along her left SI joint region with some muscular swelling in that region as well. Based upon his examination, Dr. Atta diagnosed the claimant with left SI joint strain for which he prescribed Vioxx and Darvocet. Further, Dr. Atta referred the claimant for three physical therapy sessions, gave her a TENS unit, and he returned the claimant to restricted work duty.

During the claimant's follow-up on June 16, 2004, Dr. Atta noted that her pain had reportedly improved. Dr. Atta continued the claimant on a conservative course of treatment and on restricted work duty. By the time of her examination on June 24, 2004, however, the claimant reported

that her pain had sharply increased, rating it at 10 on a scale of 10. In addition, the claimant reported that she was experiencing a "grinding sensation in her back associated with numbness of her left hip and thigh," with radiating pain down her left thigh and hip. The claimant also reported occasional cramping in her left calf. A physical examination of the claimant's back, however, revealed no redness, swelling, or ecchymosis. Furthermore, palpation of the claimant's back revealed no area of swelling or ecchymosis. Only very mild erythema was seen on the claimant's back at that time. Therefore, Dr. Atta referred the claimant for an MRI and he continued her on work restrictions. An MRI conducted on June 28, 2004, revealed mild degenerative disc changes at L4-L5 and L5-S1, and no evidence of significant disc bulges or herniations. Based upon a review of these findings and a subsequent physical examination, Dr. Atta referred the patient for more physical therapy and continued her on restricted work duty. The claimant continued under the care of Dr. Atta until August 4, 2004, at which time he discharged her from his care in "stable condition." Due to her persistent complaints of pain, however, Dr. Atta referred the claimant to Dr. Ross Hardy for further

evaluation. In addition, Dr. Atta continued the claimant on restricted work duty. Per authorization by the respondent, the claimant was seen again by Dr. Atta on August 13, 2004, for complaints of persistent low back pain. As with previous examinations, the claimant's August 13th examination revealed no erythema, edema, ecchymosis, or redness, although palpation continued to show some slight tenderness along the claimant's left posterior SI spine. Dr. Atta continued the claimant on restricted work duty.

On September 1, 2004, the claimant was seen by Dr. Annette Parchman, of the Heritage Physician Group, who assessed the claimant with lumbar strain. On September 10th the claimant was seen by Dr. Marni Keck of the Heritage Group, who took the claimant off of work for one week. The claimant was evaluated by Dr. Hardy at the Hot Springs Physical Medicine and Rehabilitation Clinic on September 28, 2004. Based upon his physical findings and a review of the records, Dr. Hardy assessed the claimant with sacroiliitis, for which he recommended continuing physical therapy, anti-inflammatory medications, and an SI girdle.

The claimant returned to Dr. Atta on October 5th and again on October 19th, at which time he stated that she

would probably require long-term use of anti-inflammatory medications, which reportedly were giving her "some relief." Dr. Atta stated further that "If the patient does not seem to improve after two to four weeks of restricted activity and physical therapy an FCE should be considered because at that point the patient may have plateaued in terms of her recovery." An FCE was scheduled for October 21st, but subsequently canceled by the claimant on the day before the examination. According to the record, the claimant has not sought additional medical treatment for her condition since October of 2004.

Based upon the above and foregoing we find that the claimant has presented sufficient objective medical evidence to prove by a preponderance of the evidence that she sustained an injury in the form of a back strain on June 7, 2004, while discharging employment duties for the respondent employer. While minor, Dr. Atta's observation upon his initial examination of the claimant of "some muscular swelling" in the SI region is sufficient to establish objective medical evidence of a compensable injury.

However, we find that the claimant has failed to establish by a preponderance of the evidence that the medical treatment she received from physicians with her family medical group, and any additional medical treatment that she may receive after October 19, 2004, is reasonable and necessary in connection with her compensable injury. It is well established that 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). Furthermore, the healing period is defined as the period necessary for the healing of an employee's injury

resulting from an accident. Ark. Code Ann. §11-9-102(6). The healing period continues until the employee is as far restored as the permanent character of her 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. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 852 (2001); citing, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission. Id.; citing, Carroll Gen. Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

The claimant was diagnosed with a back strain for which she received all necessary and appropriate medical treatment under the direction of Dr. Atta, including medications and physical therapy. In spite of no apparent physical reason, however, the claimant continued to complain of worsening pain and other symptoms. By her last appointment with Dr. Atta in October of 2004, he opined that she had probably plateaued in terms of her recovery, and that aside from long term use of anti-inflammatory medications, further medical treatment would probably not

improve her condition. Dr. Atta then referred the claimant for an FCE, which she voluntarily chose not to take because of her concern that the steroids she was taking would skew the results. Although the claimant sought treatment with her family medical group and with Dr. Hardy after Dr. Atta released her from his care on August 4, 2004, their individual assessments of the claimant's condition and their treatment recommendations were consistent with Dr. Atta's.

In conclusion, the preponderance of the evidence demonstrates that Dr. Atta provided the claimant with all appropriate and necessary medical treatment associated with her injury, and that the claimant's condition had plateaued under his care. Therefore, any medical treatment that the claimant did not receive under the direction of Dr. Atta was not reasonable and necessary to the treatment of the claimant's compensable back strain.

Finally, the claimant was awarded temporary partial disability benefits for June 8, 2004 through September 7, 2004, and again for September 18, 2004 through October 20, 2004. However, the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary partial disability benefits for that time awarded.

Temporary partial disability is that period within the healing period within which an injured employee suffers a decrease in her capacity to earn the wages she was receiving at the time of the injury. Arkansas State Hwy. & Transp. Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

Based upon his examination of the claimant on June 8, 2004, Dr. Atta did not deem it necessary to take her off of work. Rather, Dr. Atta placed the claimant on restricted work duty, for which the respondent employer undisputedly made appropriate accommodations. For example, in order to comply with Dr. Atta's original restrictions of light duty, the respondent employer allowed the claimant to clean the lobby rather than the rooms. Later, when the claimant was instructed not to bend or twist, the claimant was assigned to fold towels and run errands. In spite of Dr. Atta's medical opinion suggesting otherwise, the claimant insisted that she was not able to perform these duties, therefore, the claimant was assigned phone duty in the beauty shop. Clearly the respondent employer went above and beyond its duty to supply appropriate work for the claimant. And the record reflects that at no time during the course of her treatment did Dr. Atta believe the claimant was not capable

of working with restrictions. Moreover, the claimant never advised Dr. Atta that she was not capable of performing the work assigned to her by the respondent employer per Dr. Atta's instructions. The claimant elected to take time off during the weeks for which she has been awarded partial disability benefits. Furthermore, the claimant's contention that she was working less hours due to her inability to cope with her pain is simply not supported by objective medical findings. The preponderance of the evidence indicates that the claimant was capable of working with restrictions, that she was given work within those restrictions, and that her ability to earn wages was not diminished during those weeks for which she was granted temporary partial disability benefits; therefore, those benefits are hereby denied.

Finally, the claimant was awarded temporary total disability benefits for that week which she was taken off of work in September of 2004 by her family physician. Temporary total disability is that period within the healing period during which a claimant is totally incapacitated to earn wages. Breshears, supra. Although it is arguable that the claimant was still within her healing period during that time, the medical record offers no explanation as to why the

claimant's family physician took her off of work that week. Records of examinations by Dr. Atta shortly before her two visits with her family medical group, and records from both Dr. Atta and Dr. Hardy after her visits with her family medical group reveal that the claimant's condition had certainly not worsened during that period; nor had the claimant's symptoms changed. After the claimant was seen again by Dr. Atta subsequent to these visits with her family doctors, Dr. Atta continued the claimant on work restrictions, but he did not take her off of work completely. Therefore, especially without a medical explanation as to why the claimant was totally incapacitated during the week beginning September 10th, 2004, there is no reason to believe that the opinion of Dr. Atta, specifically that the claimant was able throughout the course of her treatment to work with restrictions, should not be given more consideration than the opinion of a physician within her family medical group.

Accordingly, based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that medical treatment received after October 19, 2004, is reasonable and necessary

or that she is entitled to any indemnity benefits. Therefore, the decision of the Administrative Law Judge awarding additional medical treatment and as well as temporary partial disability and temporary total disability is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ In her appeal the claimant is requesting temporary partial disability benefits from June 8 to September 7, 2004, and from September 18 to October 20, 2004. She is also requesting temporary total disability benefits for the time period of September 10 to September 17, 2004. The Majority finds that the claimant is not entitled to receive the aforementioned benefits and opines that she was able to return to work during that period. The Majority further

finds that the claimant's ongoing medical treatment was not reasonably necessary because her condition had "plateaued". I find that the claimant remained in her healing period during the time for which she is requesting benefits, that her earning ability diminished during the time period for which she is requesting temporary partial disability benefits, and that she was unable to work during the time period in which she is requesting temporary total disability benefits. For these reasons, I respectfully dissent from the Majority opinion.

The claimant sustained an admittedly compensable injury when she injured her back while pulling a sheet. The injury occurred on June 7, 2004, and the claimant reported the injury the same day. The claimant's job was such that she was paid an hourly rate for cleaning 15 rooms in eight hours. She was also given \$1.50 for each room she cleaned that was in addition to the 15 assigned rooms. The claimant estimates that she cleaned between 18 to 21 extra rooms per day, entitling her to approximately \$30 extra pay for each shift.

After her injury the claimant was placed on light duty. Originally she was assigned tasks of cleaning the

lobby, folding towels, running errands, and supervising other maids. After approximately six weeks, the claimant told Dr. Atta she was washing tables. He told her that she should not be twisting. As a result, her job was changed to folding towels and running errands. The claimant's doctor subsequently advised her that she needed to do only, "seated work". Accordingly, the claimant was assigned to answer phones in the respondent's beauty shop.

On occasion the claimant would be in pain and would receive permission from management to go home. Around September 2004, the respondent's business declined and the claimant's hours were reduced to working four days per week. After being transferred the claimant was still unable to consistently perform the tasks assigned to her without pain. On September 1, 2004, the claimant was treated by Dr. Annette Parchman and was taken off work for a period of one week. The claimant was treated by Dr. Hardy on September 24, 2004. She was diagnosed with sacroiliitis. Dr. Hardy recommended continuing physical therapy, anti-inflammatory medication, and a SI girdle. By that point the respondent had controverted the claim and as a result, the claimant

stopped going to the physical therapy that Dr. Atta had previously prescribed for her.

On October 19, 2004 Dr. Atta indicated he did not know of how he could further help the claimant and scheduled her for an FCE. The claimant had received three steroid shots during the week the FCE was scheduled. She feared it would skew her results and declined to have the FCE. Since that time the claimant has declined to have additional treatment.

_____The Majority, in denying additional benefits, opined that the claimant was not restricted totally from working and argues that the employer complied with the claimant's restrictions. I find that the claimant was incapacitated to work and remained largely unable to earn the same wages that she was earning at the time of the injury.

An injured employee is entitled to temporary partial disability compensation during the period that she is within her healing period and suffers only a decrease in her capacity to earn the wages that she was receiving at the time of the injury. Arkansas State Highway and

Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

The Majority supports its finding that the claimant should not be entitled to receive additional temporary total disability benefits in part on the finding that the employer allegedly provided the claimant with suitable work for her restrictions. I find that the claimant attempted to perform the work, but due to her back, was simply unable to perform the tasks assigned to her. I note, in support of this contention, that the claimant was initially placed on light duty and was responsible for cleaning the lobby and folding towels. Some six weeks later the claimant told her physician that she was washing tables and he advised her not to twist. The claimant was then running errands and folding towels for the employer. The doctor again restricted her and told her she only needed to do seated work. This is indicative that the claimant was attempting to perform the light duty work assigned to her and that her doctor felt the work assigned to her did not comply with her restrictions. Later when the claimant was assigned to answer phones, she attempted to perform the task and was unable. The claimant said she would go home early on

these occasions and that her supervisors gave her permission to do so. There is no indication in the record that the employer believed she was being dishonest in her requests to go home. In fact, the record seems to indicate that the claimant was a good employee with a good work ethic and that the employer had no reason to think she was trying to get out of working or lying about her back.

While I note the respondent contends that the claimant's reduction in hours was due to a decline in business rather than due to her medical condition, I find such an argument to be unpersuasive. All parties agree that the claimant would ask to go home due to her back pain, indicating that she attempted to work. Furthermore, I note that the benefits coordinator for the employer, Maria Viertbauer, testified that while business slowed, they would shift employees to different positions so they would not lose hours, indicating that if the claimant's hours were reduced, it was due to a lack of work complying with her medical restrictions rather than due to a decline in business.

Additionally, I note that the record is devoid of any indication that the claimant's work in the light duty

positions allowed her to earn additional monies in addition to her hourly wage, whereas her previous position paid an hourly rate and extra money for cleaning extra rooms. This apparent inability to earn the same amount of money she was earning at the time of the injury is also indicative that the claimant's capacity to earn was diminished.

The claimant contends she should be entitled to additional temporary total disability benefits for that week. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. See Breshears. The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo

Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984).

With regards to the Majority's contention that the claimant should not be entitled to receive benefits for the week of September 10, 2004, I find that the doctor's note restricting the claimant from working should be sufficient to indicate she was unable to work. While the note does not indicate why the claimant could not work, it is apparent that she was restricted from working. Since there is no evidence indicating any reason other than her compensable injury for the restriction, I find that the work restriction was likely due to the claimant's back.

The claimant was treated by Dr. Parchman on September 1, 2004, and her complaints were regarding her admittedly compensable injury. There is no indication of any other reason for the claimant's visit. The claimant was again seen by Dr. Parchman on September 10, 2004, and the notes indicate the claimant was assessed with a lumbar strain. The same day she was restricted from working for one week. As such, I find that the claimant's restriction from working was, in fact, due to her compensable injury. Additionally, I find the fact that Dr. Parchman restricted

the claimant from working to be persuasive in finding that the claimant was unable to work during the other time period for which she is requesting temporary total disability benefits, as there is no indication that her condition worsened during the time period in which Dr. Atta and Dr. Parchman treated her.

_____I further find that the claimant's treatment for her condition is reasonably necessary for treatment of her compensable injury. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Supp. 2003). However, injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989, (D612291). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it seeks to remedy. Deborah Jones v. Seba, Inc., Full Commission Opinion filed December 13, 1989, (D513553).

Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. § 11-9-508. Billy Chronister v. Lavaca Vault, Full Commission Opinion filed June 20, 1991, (D704562). While the results obtained may be a consideration in some cases, the primary considerations are the nature of the service in relation to the compensable injury. Tonnie Crisp v. Weyerhaeuser Corporation, Full Commission Opinion filed July 27, 1993, (D812922). Moreover, the compensability or non-compensability of medical services is not dependent on a retrospective evaluation of the results obtained from the service. Joyce Hager v. St. Edward Mercy Medical Center, Full Commission Opinion filed July 25, 1990, (D408662).

The claimant's injury was substantiated by objective medical findings and it is admitted that up to October 19, 2004, the claimant remained on light duty due to her injury. Further, up until October 19, 2004, the claimant was still receiving treatment in the form of physical therapy, indicating that she was still within her healing period. While the Majority relies on Dr. Atta's reference to

the scheduled FCE to see if the claimant had plateaued, I note that the FCE was never performed and that up until October 19, 2004, the claimant was still on light duty and was still undergoing physical therapy to see if her condition would improve. On October 19, 2004, Dr. Atta indicated,

"At this point I feel that the patient would probably require long-term use of antiinflammatory medications. If the patient does not seem to improve after two to four weeks of restricted activity and physical therapy an FCE should be considered because at that point the patient may have plateaued with respect to her recovery. In the meantime the patient is being continued on her current medications of ibuprofen and also on her work restrictions."

The above language indicates that Dr. Atta still believed that it was possible for the claimant's physical therapy and restricted activities to alleviate her symptoms and condition, as such, I find that the claimant remained in her healing period and that any medical care provided was in fact reasonably necessary to treat her condition.

For these reasons, I respectfully dissent.