

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F204178

JULIA JESTER,  
EMPLOYEE

CLAIMANT

FULTON COUNTY HOSPITAL,  
EMPLOYER

RESPONDENT

RECIPROCAL OF AMERICAN AND  
ARKANSAS PROPERTY & CASUALTY  
GUARANTY FUND, INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 5, 2006

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

Claimant represented by the HONORABLE FREDERICK S. SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE C. MICHAEL WHITE,  
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed February 17, 2006. The administrative law judge found that the claimant proved he was entitled to additional medical treatment beginning March 23, 2005. The administrative law judge found that "a lumbar MRI proposed by Dr. Bruffett is also reasonably necessary for treatment to the claimant's compensable lumbar injury." After

reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he was entitled to additional medical treatment or an additional MRI.

I. HISTORY

The parties stipulated that Julia Viola Jester, age 58, alleged she sustained an injury to her low back on April 8, 2002. The claimant testified that she felt "this horrible pain in my back" after trying to help a patient turn in his bed. The claimant sought emergency treatment on April 8, 2002, at which time she was diagnosed with lumbosacral strain and spondylolisthesis.

The parties stipulated that "Reciprocal of America was the workers' compensation carrier for Fulton County Hospital on April 8, 2002." The parties stipulated that the respondents accepted compensability of the claim, and that indemnity and medical benefits were paid.

Dr. Wayne L. Bruffett initially evaluated the claimant in May 2002. Dr. Bruffett noted, "X-rays reveal a degenerative spondylolisthesis at L4-5....Her MRI scan supports this and shows evidence also of stenosis. There is

some bulging at other levels." Dr. Bruffett's impression was "Degenerative spondylolisthesis L4-5 with spinal stenosis and bilateral leg pain, worse on the left side." Dr. Bruffett planned to exhaust nonoperative efforts before considering surgery. The claimant subsequently underwent an epidural steroid injection by Dr. Sunder Krishnan.

The claimant initially reported good results from Dr. Krishnan's treatment. However, Dr. Bruffett reported in July 2002:

Ms. Jester has a history of a work-related injury with a degenerative spondylolisthesis and severe spinal stenosis. She has back pain but more severely bilateral hip and leg pain. She has marked neurogenic claudication. She has been unable to return to her previous job. Her imaging studies have revealed degenerative spondylolisthesis with spinal stenosis. She has had extensive nonsurgical treatment by Dr. Krishnan without satisfactory relief....

I think she would benefit from decompression. Because of the instability imparted by the spondylolisthesis she would also need a concomitant fusion with instrumentation. I have stressed to her today the importance of smoking cessation. She would need an iliac crest bone grafting and a postoperative brace....

Dr. Bruffett's impression was "Degenerative spondylolisthesis with spinal stenosis and bilateral leg pain, worse on the left side."

Dr. Bruffett wrote in August 2002:

In reviewing the case of Ms. Julia Jester, I feel that her symptoms for which she is seeking medical attention and treatment are related to her work-related injury from early April 2002. Certainly some of her radiographic findings were preexisting, but I think they were rendered symptomatic from her injury at work, and she has consistently described this in her history. Therefore, I think 100% of her symptoms are related to her current injury. Certainly the radiographic findings are of a preexisting nature.

On August 20, 2002, Dr. Bruffett performed a "Decompression of L4-5, posterior spinal fusion L4-5, pedicle instrumentation L4-5, iliac crest bone graft (left) via separate skin incision."

Dr. Bruffett noted in September 2002, "Ms. Jester returns, two weeks status post decompression and posterior spinal fusion with instrumentation. She is doing quite well. She has noticed a marked improvement in her leg symptoms, and she seems to be very pleased with this....X-rays show her hardware to be in good position." Dr. Bruffett's impression was "Status post decompression and posterior spinal fusion."

The claimant continued to follow up with Dr. Bruffett following surgery.

The parties stipulated that "Reciprocal of America went into liquidation on June 20, 2003. The Arkansas Property

and Casualty Guaranty Fund has been handling the claim since that time."

Dr. Bruffett noted on June 25, 2003, "I think Ms. Jester has probably reached the point of MMI. I would recommend a functional capacity evaluation to see what her objective capabilities are. We will try to get this arranged on a Wednesday when her husband can bring her down, and then I will see her back the following Wednesday to review this with her. I can probably do her impairment rating at that time."

The parties stipulated that the respondents controverted any further treatment from Dr. Bruffett after June 25, 2003.

The claimant returned to Dr. Bruffett on July 9, 2003:

I reviewed the FCE, which appears to be a valid study. Ms. Jester gave excellent effort. It appears that she can function in a sedentary work position. I do not know if there is anything available at her previous place of employment in this category or not. If not, she may need to try to find some other type of employment. If she wants to apply for Social Security Disability, she can certainly use the results of her FCE as further documentation on this.

I have told her that I still do not have really "restrictions" to place on her. If she improves, she can do whatever she feels like doing. However, I think this gives a pretty good

assessment as to what she is capable of doing right now.

Based on the American Medical Association "Guides to the Evaluation of Permanent Impairment," fourth edition, I would assign to her an impairment rating of 12% of the whole person. I think she has really reached the point of MMI with regard to her work injury. She can come back and see me as needed.

The parties stipulated that the respondents "accepted and paid compensation for a twelve percent (12%) permanent physical impairment to the body as a whole."

The claimant returned to Dr. Bruffett on March 23, 2005:

Ms. Jester is a patient of mine who I operated on back in August of 2002. She had stenosis and spondylolisthesis at L4-5. She underwent a decompression, posterior spinal fusion with instrumentation. She was last seen on July 9, 2003 and I did her impairment rating. She now returns saying that she has had an increase in low back pain. She has applied for some different positions and she got one interview but she has been unable to return to any type of gainful employment. She has applied for disability. She says her back pain is extremely severe and it does radiate at times down her left leg to her knee. She really does not describe much pain past her knee. Her symptoms are getting worse and seem to be made worse with just about any type of activity....

X-rays show her instrumentation to be in stable position at L4-5 and there is evidence of her decompression. I think her fusion is probably solid out in the lateral gutters....

I think the best way to get an up-to-date picture of Ms. Jester would be an MRI scan. Her attorney sends along a functional evaluation form for me to fill out and I have given her a copy of her FCE. I think this is the most subjective evidence as to her capabilities. It was done back in July of 2003 but it is probably still relevant. I will see her back once the MRI scan is completed.

Dr. Bruffett's impression was "Status post decompression, posterior spinal fusion a few years ago."

A pre-hearing order was filed on October 25, 2005. The claimant contended that she "has not reached maximum medical improvement and is entitled to the medical treatment recommended by Dr. Bruffett on March 23, 2005 due to her compensable injury on April 8, 2002 sustained while in the course and scope of her employment with the respondent. Claimant is entitled to all related benefits."

The respondents contended that the claimant "had reached maximum medical improvement and her healing period had ended by June 25, 2003. The respondents were unaware that Dr. Bruffett had examined the claimant on March 23, 2005, until receipt of the claimant's prehearing filing and they have not received any medical reports related to any medical treatment provided by Dr. Bruffett or any other physician since July 9, 2003. Consequently, until the respondents receive a copy of Dr. Bruffett's March 23, 2005,

report, they are unable to state a position with regard to any recommendations made by Dr. Bruffett....The claimant has received all benefits that she is entitled to receive. The MRI requested by the claimant is not reasonably necessary medical treatment for her work related injury."

A hearing was held on December 7, 2005. The claimant testified on direct:

Q. What problems are you having that you had to go back to see Doctor Bruffett?

A. Well, Doctor Bruffett wanted me to sleep on my back with a pillow under my knees. And I got to where I couldn't do that. I'd turn over on my right side - I can't sleep on my right side anymore or on my back, no matter if I have a pillow under my knees. I can only sleep on my left side. And I thought something had gone wrong with the surgery, and that's why I went back to him to have this checked out. And that's when he told me I had spinal stenosis.

Q. And wanted you to do, have another MRI?

A. Another MRI to see if I may have another bulged disc....

Q. Where is the worst pain located?

A. It's in the lower part of my back, generating down my left leg.

Q. Okay. Is this pain a periodic come and go kind of pain or is it all the time?

A. It depends on what I did the day before....

Q. Now, but you've gone to Doctor Bruffett and he does want you to do an MRI?

A. Yes.

Q. And that's what you're asking for today?

A. Yes.

Q. And you also asking (sic) to be reimbursed for what you had to pay Doctor Bruffett this last visit?

A. Yes.

The administrative law judge found, in pertinent part:

8. The claimant proved by a preponderance of the evidence that Dr. Bruffett's additional treatment beginning March 23, 2005 is reasonably necessary for treatment to the claimant's compensable lumbar injury.

9. The claimant proved by a preponderance of the evidence that a lumbar MRI proposed by Dr. Bruffett is also reasonably necessary for treatment to the claimant's compensable lumbar injury.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores,*

*Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Whether or not proposed medical treatment is reasonably necessary pursuant to the statute is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the administrative law judge found that Dr. Bruffett's treatment after March 23, 2005 was reasonably necessary in connection with the compensable injury. The administrative law judge found that the claimant proved a proposed lumbar MRI was reasonably necessary. The Full Commission reverses these findings. According to the stipulations, the claimant alleged that she sustained a work-related injury on April 8, 2002, and the respondents accepted compensability of the claim. The claimant was diagnosed with lumbosacral strain and spondylolisthesis (of course a pre-existing degenerative condition). Dr. Bruffett ultimately performed surgery, a decompression at L4-5.

Dr. Bruffett pronounced maximum medical improvement on July 9, 2003 and assigned a permanent impairment rating. The claimant returned to Dr. Bruffett on March 23, 2005, at which time the claimant complained of increased low back

pain. The claimant was diagnosed with a lumbar strain on April 8, 2002. The preponderance of evidence does not demonstrate that the claimant's lumbar strain persisted after the finding of maximum medical improvement on July 9, 2003 and continued until the claimant returned to Dr. Bruffett on March 23, 2005. Dr. Bruffett did not opine that the claimant's need for treatment in 2005 was causally related to the 2002 injury. Further, even if a proposed new MRI did show any sort of abnormality in the claimant's lumbar spine, there is not a scintilla of evidence before the Commission indicating that such a condition would be causally related to the compensable injury. We note that Dr. Bruffett never opined that the claimant had sustained an acute herniated disc as a result of her lumbar strain and pre-existing spondylolisthesis. Following surgery in August 2002, x-rays in September 2002 showed that the surgical hardware was in good position. Even as late as March 23, 2005, Dr. Bruffett was still unable to detect any abnormality at L4-5, other than evidence of surgery being performed. Any determination that a proposed new MRI in 2005 was causally related to the claimant's 2002 lumbar strain would be based on conjecture and speculation.

Conjecture and speculation cannot supply the place of proof. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

Based on our *de novo* review of the entire record and pursuant to the provisions of Ark. Code Ann. §11-9-508(a), the Full Commission finds that the claimant did not prove she was entitled to additional medical treatment or an additional MRI. The decision of the administrative law judge is reversed, and this claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion denying the claimant additional medical treatment beginning March 23, 2005, including a lumbar MRI as proposed by Dr. Bruffett. After a de novo review of the record, I find that the claimant is entitled to the requested treatment. I further find that the treatment is directly

related to the claimant's admittedly compensable injury from April 8, 2002. As such, I would have affirmed the decision of the Administrative Law Judge.

\_\_\_\_\_The claimant sustained an admittedly compensable injury to her back on April 8, 2002. A note from the same date indicates the claimant complained of mid-to-lower back pain that radiated down both of her legs. The claimant was diagnosed with a lumbosacral strain and spondylolisthesis. The claimant continued to present with pain. On May 20, 2002, the claimant was noted to have pain radiating down her hips, which was worse on the left side and radiated down the back of her legs. She was also noted to have tingling in her left leg and to have pain described as, "severe, sharp and stabbing in nature." A doctor's note from May 24, 2002, indicates,

MRI lumbar spine dated 2-8-02 showed multilevel changes most prominently noted. At L2/3 there is diffuse disk bulging with facet joint arthropathy causing foraminal stenosis. At L4/5 there is mild broad based disk bulging with facet hypertrophy once again and ligamentum flavum hypertrophy with resultant foraminal stenosis.

The claimant was diagnosed with, "left lower extremity radiculitis," and, "Spinal canal stenosis."

On June 17, 2002, the claimant was noted to have, "Spinal stenosis L4-5 with degenerative spondylolisthesis and bulging disk." On July 25, 2002, Dr. Bruffett recommended the claimant undergo surgery. The surgery was performed on August 20, 2002, and consisted of a, "decompression of L4-5, posterior spinal fusion L4-5, pedicle instrumentation L4-5, iliac crest bone graft (left) via separate skin incision."

On September 4, 2002, the claimant received post-operative care, in which she reported "marked improvement in her leg symptoms." X-rays were also performed and revealed the claimant's hardware was in place. The claimant continued to receive care and report good results until March 5, 2003. At that time, she reported increasing problems, including pain in her back. The claimant was prescribed physical therapy and instructed to return in three months.

On June 25, 2003, the claimant returned to Dr. Bruffett and he reported that the claimant, "does have pain in her back when she does much bending or working her yard." Dr. Bruffett indicated that the x-rays showed the claimant's hardware was in a stable position and that her, "fusion is

continuing to consolidate." He indicated the claimant was probably at MMI and referred her for a functional capacity evaluation. On July 9, 2003, Dr. Bruffett again treated the claimant and reported there was no change in the examination. He also noted that the FCE had findings that the claimant could perform sedentary work. He further indicated that she was at MMI, gave her an impairment rating, and indicated that she could return for treatment as needed.

The claimant did not return to Dr. Bruffett until March 23, 2005. At that time, she indicated that she suffered from an increase in back pain. She also reported back pain that radiated down her left leg to the knee. She reported that the pain became worse with activity. Dr. Bruffett performed x-rays and opined that the claimant's fusion, "is probably solid out in the lateral gutters." He further recommended that the claimant undergo an MRI scan prior to further treatment.

At the time of the hearing, the claimant testified that after her surgery she did well until late 2004. She said, "Well I was doing good, you know. Like I still had to watch what I did, but I didn't hurt all the time. But then,

I got to where I couldn't sleep on my back or my right side." She said that after late 2004 her back symptoms increased and that she thought she had done something to interfere with the results of her surgery. At the time of the hearing, the claimant testified regarding her current symptoms. She indicated that she suffered from low back pain and said that it radiated down her left leg at all times. She further indicated that when she lays down she has pain in her right leg and that at times she suffers from headaches associated with her severe back pain.

On February 17, 2006, an Administrative Law Judge issued a decision finding that the claimant was entitled to ongoing medical care, including the MRI recommended by Dr. Bruffett in 2005. The Majority now reverses that finding, and instead denies the claimant benefits. In denying benefits, the Majority opines that the claimant only sustained a strain due to her compensable injury on April 8, 2002, and that she reached maximum medical improvement for that condition well before her visit with Dr. Bruffett in 2005. They further opine that the claimant's symptoms due to the surgery had resolved after the surgery and that x-rays failed to show any problems with the hardware

implemented because of the surgery. Finally, they reason that because Dr. Bruffett failed to indicate that ongoing treatment or the MRI test was due to the compensable injury in 2002, the claimant has not shown that the MRI is connected to her compensable injury in 2002.

Despite the reasoning of the Majority, I find that the evidence indicates the requested treatment is reasonably necessary and is directly related to the compensable injury in 2002. As the claimant has already been determined to have a compensable injury to her spine, the respondents should be liable for any recurrence or for the residual effects related to the surgery. In my opinion, the record is clear that the claimant's symptoms were directly related to that surgery. Therefore, she should have been awarded the proposed medical treatment.

The medical records show that the claimant's symptoms before the surgery and at the time of treatment by Dr. Bruffett in 2005 were the same. Additionally, the claimant has not returned to work and there is no indication that she has performed strenuous activities after her surgery. Considering the similarity in these complaints and the lack of any explanation indicating an independent

intervening cause, I find that the claimant has shown that the treatment performed by Dr. Bruffett was directly related to the admittedly compensable injury from 2002.

The Majority asserts that the claimant only sustained a sprain in 2002, and that any condition associated with that had resolved before 2005. However, in my opinion, this oversimplifies the claimant's prior condition and fails to consider that the respondents have already accepted liability for the surgery as an exacerbation of the claimant's pre-existing degenerative condition.

As noted by the Majority, Dr. Bruffett, in his August 14, 2002, note, provided that while the claimant had pre-existing radiographic findings, her symptoms were directly related to and caused by the admittedly compensable injury from April 8, 2002. As the respondents have paid for and accepted liability for that surgery, they are also liable for any symptoms or further problems associated with the performance of that surgery.

As noted above, the claimant's symptoms are virtually identical to her complaints prior to the surgery,

indicating that there is a connection between her compensable injury and her current need for treatment.

Immediately after the admittedly compensable injury in 2002, the claimant reported symptoms of left-sided radiculopathy and low back pain. The claimant continued to present with those symptoms until she had surgery. Though the Majority asserts that the claimant's symptoms had completely resolved after the surgery, I note that even after her surgery, the claimant continued to present with ongoing low back pain and was even prescribed physical therapy for treatment of her symptoms. In fact, the claimant reported back pain on March 3, 2003, and on June 9, 2003. Then, on July 9, 2003, the date the claimant was released, Dr. Bruffett noted there was no change in the claimant's examination, which would indicate that she had some ongoing residual pain.

Likewise, when the claimant presented for treatment in 2005, she was also noted to be suffering from low back pain with radiation into the left leg. The physician noted the claimant had not returned to work and noted her history of surgery in 2002. Though the physician did not indicate that the claimant's need for an MRI was

directly related to her admittedly compensable injury in 2002, he did perform x-rays of her spine, and made notations regarding the healing of that surgery. In my opinion, this illustrates that he believed the claimant's return of symptoms was related to the 2002 incident. Accordingly, I find that while the claimant was deemed to have reached maximum medical improvement as of July 2003, that does not preclude a finding that she was still suffering from residual effects due to the surgery. Additionally, I find that despite the claimant reaching her healing period in 2003, the record shows that the claimant had recurring symptoms that appear to be directly related to the surgery performed in 2002.

Finally, I note this Commission has previously awarded benefits in order to help delineate symptoms and see if the condition was causally related to a compensable injury. See, Gilbert v. Land O'Frost, Inc., Full Workers' Compensation Commission, Opinion filed February 7, 1997 (E115249); Edgerton v. Walker, Full Workers' Compensation Commission, Opinion filed May 20, 1999 (E804513); Hodge v. Benton Services Center, Full Workers' Compensation Commission, Opinion filed June 4, 1999 (E600814, E603961 &

E616815). As the claimant's symptoms remained the same before the surgery and at the time of her 2005 treatment, I find that, at a minimum, the claimant should have been entitled to receive the proposed test by Dr. Bruffett in order to evaluate her post-surgical situation. Accordingly, I must respectfully dissent.

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SHELBY W. TURNER, Commissioner