

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304608

DEBRA L. EDINGTON,
EMPLOYEE

CLAIMANT

HART'S MANUFACTURING COMPANY,
SELF-INSURED EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
TPA

RESPONDENT

OPINION FILED AUGUST 17, 2007

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

Claimant appears Pro Se.

Respondents represented by the HONORABLE DAVID LANDIS,
Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed April 17, 2007. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The within claim is not barred by time. Specifically, the claimant filed a claim for additional benefits on or about January 6, 2005, which was within one (1) year from the date of last payment of benefits.

4. The claimant has proven, by a preponderance of the credible evidence, that she sustained a fifteen percent (15%) wage-loss disability as the result of her June 8, 2002, admitted compensable injury.

5. The claimant has proven, by a preponderance of the credible evidence, that respondents remain responsible for reasonably necessary follow-up care by the claimant's authorized treating physician, Dr. Maurice Smith with the Semmes Murphy Neurologic and Spine Institute in Memphis, Tennessee.

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

We therefore affirm the April 17, 2007 decision 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 on appeal.

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).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a 15% wage loss disability and finding the respondents remain liable for the follow-up care by claimant's authorized treating physician. While I do not dispute that the respondents are liable for all reasonable and necessary medical treatments, I must respectfully dissent from the finding that the treatment the claimant is presently receiving is related to her compensable injury.

The claimant sustained a compensable injury on June 8, 2002. In his office note dated March 19, 2003, Dr. Maurice Smith interpreted the MRI as revealing "a disc herniation at L5-S1 paracentral and on the left which does abut the S1 nerve root. There is a central

disc bulge at L4-5 without significant nerve root or spinal stenosis. There is also a far lateral disc bulge at L3-4 on the left." Dr. Smith likewise interpreted a subsequent MRI performed in August of 2004 as revealing "a left sided L5-S1 disc herniation which abuts the S1 nerve root on the left side and does not cause any significant spinal stenosis. At L4-5, there is a small disc bulge but no significant disc herniation at L3-4. The left-sided far lateral disc has subsided significantly. There is no right-sided nerve root compression." The medical records clearly reflect that the claimant sustain a new herniated disc at L4-5 as the result of bending at home on October 18, 2004. Dr. Smith reviewed the claimant's November 16, 2004, MRI and compared it to the claimant's previous MRI's. In doing so he noted:

MRI obtained today shows the far lateral disc protrusion at L3-4 on the left side. In comparing this to the previous MRI obtained 3-19-03, this appears to be somewhat smaller than it was, and at 4-5 the central disc protrusion really is about the same, but there is new inferior migration of a disc fragment paracentral and on the left side which was not present in the previous MRI. The left sided central disc bulge at L5-S1 is without change from previous MRI.

After describing the findings on the MRI, Dr. Smith specifically stated in his November 16, 2004, office visit report; "Herniated disc L4-5 which appears new." Obviously, this new herniated disc, that was not present after the claimant's compensable injury in June of 2002, is not related to her compensable injury. After this incident the claimant only worked one day for respondents on March 8, 2005. On March 30, 2006, the claimant experienced yet another new injury. Although there are no diagnostic studies after this March 30, 2006, incident to determine if new objective findings exist, the lapse of time from the original injury and the intervening injury resulting in a new disc herniation L4-5 make it highly unlikely that the new complaints after March 30, 2006 are related to the 2002 compensable injury.

As noted by the Court of Appeals in Davis v. Old Dominion Freight Line Inc., 69 Ark. App. 74, ___ S.W.2d ___ (January 26, 2000):

the overriding issue in cases involving subsequent injury of disability is 'whether there is a *causal connection* between the primary injury and the subsequent disability,' and only if such a connection exists does the question of the claimant's conduct need to be addressed.

An aggravation is defined as "a new injury resulting from an independent incident." Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is defined as "a natural and probable consequence fo a prior injury." Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Arkansas Court of Appeals has repeatedly held:

The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result fo the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

A review of the medical records clearly reveals that the claimant's new herniation at L4-5 is not the natural and probable result of her compensable injury. The claimant candidly admitted that she developed new pain upon bending to place something into her refrigerator. The claimant did not have "the inferior migration of a disc fragment paracentral and on the left" at the L4-5 level until after this incident at home. Granted the incident at home was minor, but a disc herniation may occur from something as minor and innocuous as rolling over in bed or bending to pick something up off a desk. Although Dr. Smith characterized the claimant's condition as an "exacerbation" this medical terminology does not equate to the natural and probable result of the claimant's compensable injury. Webster's Collegiate Dictionary 10th Ed. defines the verb "exacerbate" as "to make more violent, bitter or severe." Accordingly, this term connotes a change in the claimant's condition which was more severe than that caused by her compensable injury. This severe change was the new disc herniation at L4-5.

Therefore, while I agree that the respondents remain liable for all reasonable and necessary medical treatment in connection with the claimant's compensable

injury, I cannot find that the medical treatment sought and obtained by the claimant after her new injury in October of 2004, is causally related to her compensable injury.

Furthermore, I must respectfully dissent from the finding that the claimant has proven by a preponderance of the evidence that she sustained a 15% wage loss disability. At the time of her injury, the claimant was only 46 years old. She obtained her GED and has a strong work history working in three factories. The claimant sustained a compensable back injury that was treated non-surgically. She was released to return to work, first with restrictions, and later without restrictions. Prior to sustaining the non-compensable aggravation on October 18, 2004, the claimant had returned to work and was working 40 hours per week, with minimal restrictions. After her second incident in October of 2004, the claimant was later released to return to work without any restrictions.

Since the claimant's compensable injury occurred after July 1, 1993, this claim is subject to the provisions of Act 796 of 1993. As under the law that existed prior to the passage of Act 796, when determining the degree of permanent disability sustained

by an injured worker, the Commission must determine the degree to which the worker's future wage earning capacity is impaired. In addition to medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors, such as the worker's age, education, work experience, and any other matters reasonably expected to affect the worker's future earning capacity. Ark. Code Ann. § 11-9-522(b)(1) (Repl. 1996). The Arkansas Workers' Compensation Law also provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Act 796 amended the Arkansas Workers' Compensation Law to provide the following:

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. If any compensable injury combines with a preexisting disease or condition or the natural

process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Ark. Code Ann. § 11-9-102(5)(F)(ii) (repl. 1996).

"Major cause" is defined by the amended law as follows:

Major cause means more than fifty percent (50%) of the cause. A finding of major cause shall be established according to the preponderance of the evidence.

Ark. Code Ann. § 11-9-102(14) (Repl. 1996).

"Disability" is defined by the amended law as follows:

Disability means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.

Ark. Code Ann. § 11-9-102(9) (Repl. 1996).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the

major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained any decrease in her wage earning capacity. If anything, the claimant's second and third back injuries, which I find not to be causally related to the claimant's compensable injury, are the major cause of any decrease in earning capacity. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to any wage loss disability benefits.

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

KAREN H. MCKINNEY, Commissioner