

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E910613

MELISSA CAROL THETFORD,  
EMPLOYEE

CLAIMANT

ELECTRIC COWBOY, INC.,  
EMPLOYER

RESPONDENT NO. 1

FREMONT PACIFIC,  
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED APRIL 19, 2007

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

Claimant represented by the HONORABLE STEPHEN T. ARNOLD,  
Attorney at Law, Texarkana, Texas.

Respondents No. 1 represented by the HONORABLE JEREMY  
SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as  
Modified and Adopted.

OPINION AND ORDER

Claimant appeals and Respondents No. 1 cross appeal  
an opinion and order of the administrative law judge  
filed March 9, 2006. 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 of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she is unable because of her compensable injury to earn any meaningful wages in the same or other employment.
4. The claimant has therefore failed to prove by a preponderance of the evidence that she is permanently totally disabled.
5. The Death & Permanent Total Disability Trust Fund has no liability herein.
6. The respondents have proven by a preponderance of the evidence that the claimant without reasonable cause refused to participate in or cooperate with rehabilitation and job placement assistance.
7. The claimant is therefore barred from receiving wage-loss disability benefits in excess of her permanent anatomical impairment ratings.
8. The claimant has proven by a preponderance of the evidence that all of the treatment provided on or after May 4, 2004, and reflected on page fourteen of Joint Exhibit Two, has been reasonably necessary in connection with the compensable injury.
9. The claimant has therefore proven by a preponderance of the evidence that she is entitled to physician co-pay reimbursements in the amount of \$80, medical mileage reimbursements for 541 miles of travel, and prescription reimbursements in the amount of \$1,108.83.
10. The claimant has proven by a preponderance of the evidence that she is

entitled to continued medical treatment by her authorized physicians, including management of her prescription medication.

11. The respondents have proven by a preponderance of the evidence that they are entitled to a credit in the amount of \$955.85 for overpayment of benefits to the claimant.

12. The respondents have controverted all benefits sought herein.

After reviewing the entire record de novo, the Full Commission finds that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be affirmed as modified.

The claimant testified that she worked for Granada Apartments from November 2000 through November 2001, and that she was paid in the form of rent abatement in the amount of \$425.00 monthly. We find that the monthly rent abatement provided the claimant may be defined as "wages" pursuant to Ark. Code Ann. § 11-9-102(19). An administrative law judge previously found that the claimant earned wages sufficient to entitle her to weekly compensation of \$293.00 for temporary total disability. The Full Commission therefore finds that the respondents proved they were entitled to a credit for the time the claimant earned wages from November 2000 through May 2001.

The Full Commission thus affirms as modified the March 9, 2006 opinion of the administrative law judge, including all findings of fact and conclusions of law therein, and we adopt the administrative law judge's 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).

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 in part 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.

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OLAN W. REEVES, Chairman

Commissioner McKinney concurs and dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's findings that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled; the finding that the claimant, without reasonable cause, refused to participate in or cooperate with rehabilitation and job placement assistance; a finding that the claimant was barred from receiving wage loss disability benefits in excess of her permanent anatomical impairment ratings; and the finding that the respondents were entitled to a credit for the time the claimant earned wages from November 2000 through May 2001, as well as the credit in the amount of \$955.85 for the overpayment of benefits to the claimant. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to continuing medical treatment. In my opinion, the claimant has failed to meet her burden of proof.

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.

The evidence demonstrates that the claimant's orthopedic surgeon, Dr. Saer, has repeatedly reiterated that he has concerns about ceasing long term narcotic pain medication for the claimant. In his follow up exam on March 4, 2003, he stated:

She did not get a prescription for Soma, but [Dr. Hestir] told her to cut back to one b.i.d., with the plan to get off it all together at some point... I will refill her Soma, but agree that she ought to try to limit that to 2 a day and I agree with the plan to taper her off that.

On April 22, 2003, Dr. Saer stated "I will refill pain medicine but indicated to her today that we are going to need to get off of that within the next couple of months. I do not recommend continuing the narcotic past six months following a surgery, so she needs to start tapering down." Again on May 27, 2003, Dr. Saer stated that he would refill the claimant's pain medicine, but he talked to her about coming off of that medication. He stated that she could not continue taking that medication on an indefinite basis.

Dr. Saer released the claimant on August 1, 2003, with a 5% permanent anatomical impairment rating. After her release, the claimant's family physician, Dr. Hestir, refused to continue the claimant's narcotic pain medications. The claimant sought out another family physician, Dr. Tracy, for medication management. Since October of 2003, Dr. Tracy has prescribed narcotic pain medication in the form of the average of 150 Hydrocodones and 90 Somas per month. He testified via deposition that he did not have a plan to reduce the amount of medication that he was providing to the claimant and he had not been making any clinical findings to support the claimant's subjective complaints of pain. He was simply renewing her prescriptions.

Additionally, Dr. Tracy testified because he was family physician, he could not state without resorting to conjecture and speculation whether the claimant's problems are the result of her 1999 work injury or the result of her progressive disk disease and degeneration at other levels. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

In light of the foregoing evidence, I cannot find that the claimant is entitled additional medical treatment. Accordingly, I must dissent from the majority's opinion awarding additional medical treatment.

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KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the finding that the claimant is entitled to

additional medical treatment. However, I must respectfully dissent from the balance of the decision.

\_\_\_\_\_After a de novo review of the record, I find that the Administrative Law Judge improperly excluded evidence and that the claimant had good cause for refusing vocational rehabilitation. As such, she should not be barred from receiving wage loss benefits or permanent and total disability benefits. Finally, I find that the preponderance of the evidence shows that the claimant is permanently and totally disabled and that the respondents are not entitled to a credit as awarded by the Majority.

I first address the issue of whether the documents proffered by the claimant were properly excluded. Those documents consist of the July 20, 1994, FCE Report and the opinions of Chiropractor Stacy Warner and Assistant Janet Levasseur. After reviewing the record, I find that to exclude the documents was in error.

Ark. Code Ann. §11-9-705 (d) provides,

Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments, that is, *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S.579 (1993), and *Kumbo Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

In addition, a party failing to observe the requirements of Arkansas Code Ann. § 11-9-705, may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the commission. Ark. Code Ann. § 11-9-705(c) (3).

Based on these provisions, the Administrative Law Judge and now the Majority, find the FCE documents and testimony of Janet Levasseur did not satisfy the provisions of Daubert and were therefore inadmissible. They further find that the testimony of Dr. Stacy Warner is irrelevant. I find these decisions are in error. Certainly, if the proffered documents and testimony were not considered "expert testimony" under §11-9-705(d), then they should have been admitted as lay testimony and then given the appropriate weight.

It is well established that the Commission has broad discretion with reference to admission of evidence. Potlatch Forests, Inc. v. Funk, 239 Ark. 330, 389 S.W.2d 237 (1965). Moreover, in making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure. Ark. Code Ann. § 11-9-705(a) (1).

However, the Court of Appeals has indicated the Commission is to be more liberal rather than more stringent. Bryant v. Staffmark, 76 Ark. App. 64, 61 S.W. 3d 856, (2001). Furthermore, in the case of Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989), the Supreme Court of Arkansas indicated as follows,

As we stated in Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W. 2d 863 (1968), the Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony, and the testimony of the claimant himself.

I find that the aforementioned case law demonstrates that there is precedent to be more permissive in allowing evidence rather than more restrictive. Furthermore, it is clear that the Commission should consider all evidence, including medical and lay testimony. In fact, the bulk of the evidence considered by the Commission in any particular case is not simply comprised of only expert opinions. Rather, it is comprised of a multitude of various reports and testimony from persons, including those that are clearly not experts in medicine. As such, I find

that the Administrative Law Judge should not have excluded the proffered documents. Rather, he, at a minimum, should have allowed the documents to be introduced and then given them the appropriate weight.

Next, I find the weight of the evidence shows that if the claimant refused rehabilitative services, it was only because any expectation that she return to work was unreasonable. I note that initially the claimant was cooperative with Nichols. During the initial vocational evaluation, Nichols indicated that the claimant was, "cooperative and pleasant during the evaluation." She noted the claimant had interest in various areas of employment, including that of being a bookkeeper. Nichols noted that the claimant had a limited education in that she had completed the ninth grade and had a GED. Likewise, she had limited work experience and had worked as a waitress, bartender, cashier, cook and as an apartment manager. The report from that date also provides that the claimant reported having difficulty in standing or sitting for long periods of time due to pain. The claimant also reported she was taking medications in the form of Soma, Hydrocodone, Effexor, and Temazepam.

At the time of the hearing, the claimant provided testimony regarding her physical condition and

abilities. She said that she currently takes Hydrocodone every four to six hours as needed for pain and Soma three times a day. The claimant said that her pain increases with activity and said she has to sit or lay down after cooking or cleaning. She said when cleaning she has to stop throughout the activity and that after 15 or 20 minutes of washing dishes she has to go lay down. The claimant indicated that she can drive for approximately 20 to 30 minutes without hurting and being unable to continue. The claimant said that while the medication helps her, there is a limit to the effectiveness. She said,

A. Within a couple of hours after I take my medicine, if I'm up doing a lot then it wears off and then I have to lay down.

Q. What does the medicine itself make you feel (sic) like? Does it have - are you able to move around well because of the medicine are you still restricted somehow?

A. Sometimes it makes me real sleepy and groggy like, you know, right now I'm groggy because I had to take it - I took it at 11:00 and sometimes, you know - I don't think it hinders my thinking, I can still think, but it just - the grogginess and making me tired.

The claimant testified that she did not go through with vocational rehabilitation because she did not feel she would be able to return to work due

to pain. The claimant further indicated that she talked to Dr. Tracy about returning to work, and that he told her he did not believe she would be able to return to the workforce. When asked why she did not at least attempt to return to work, the claimant testified that her pain was more severe than it had been at her last job as an apartment manager, and that she had been discharged from that job.

I note that medical records largely corroborate the claimant's claim that she will be unable to return to work. As early as April of 2002 Dr. Reddy indicated that he did not believe the claimant would be able to return to her employment. I note that this opinion was given in advance of the claimant's last surgery, which resulted in her receiving an additional impairment rating.

Likewise, on August 1, 2003, Dr. Saer noted the claimant was not able to return to work at that point. After that visit the medical records indicate that the claimant's symptoms never subsided and do not reveal any change in the claimant's condition. On November 25, 2003, Dr. Saer placed the claimant at MMI but indicated the claimant might need additional medical management. This illustrates that the claimant had legitimate complaints of pain which interfered with her

ability to work. Finally, I note that Dr. Tracy has specifically expressed his opinion that the claimant will be unable to return to work due to her opinion. Certainly, as Dr. Tracy is the claimant's treating physician, I find that he is in the best position to assess the claimant's ability to return to work.

Likewise, the Majority opinion in this case supports a finding that the claimant's pain is severe enough to warrant the ongoing use of narcotic pain medication corroborating the claimant's claim that she suffers from pain enough to interfere with her ability to work. It is undisputed that the claimant takes muscle relaxers and pain medication on a daily basis. It is also undisputed that these medications cause the claimant to be groggy and tired and do not alleviate all of the claimant's pain. Likewise, while the FCE report indicated that the claimant was able to return to light duty work, there is no evidence that the claimant's pain was considered in determining the claimant's ability to return to work. As pain is an appropriate consideration in determining entitlement to wage-loss disability benefits, I find that it is only logical that a claimant should not be penalized in refusing rehabilitative or vocational services because of their inability to work due to pain.

For the aforementioned reasons, I respectfully  
concur in part and dissent in part.

PHILIP A. HOOD, Commissioner