

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502422

JANICE KEENE, EMPLOYEE	CLAIMANT
ARKANSAS DEPARTMENT OF HEALTH, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 30, 2008

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 RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

This matter is currently before the Full Commission on remand from the Arkansas Court of Appeals. In an opinion delivered June 4, 2008, the Arkansas Court of Appeals reversed and remanded the decision of the Full Commission which had affirmed and adopted the decision of the Administrative Law Judge. The Court reversed the finding that there were no objective findings and remanded this case to the Full Commission to consider causation and objective findings separately. Pursuant to the Court's

remand, and based on our de novo review of the entire record, the Full Commission finds that the claimant proved she sustained a compensable injury to her back on January 20, 2005, and is entitled to medical treatment and temporary total disability benefits related to her compensable injury.

I. HISTORY

The claimant worked as a personal care and home health worker for the respondents. The claimant testified that on January 20, 2005, while vacuuming a client's home, she was bending over to pick up the end of a table, when she felt pain across her back and down her leg. The claimant testified that the pain was immediate, and that her back muscles spasmed. The claimant testified that she continued to work, but that she iced her back that night and also used an ice-pak at work the following Monday. The claimant testified that on January 27, 2005, she went to Dr. Jeffrey Holt, a chiropractor, for treatment. The claimant testified that she reported the injury to the respondent on January 28, 2005.

The claimant sought treatment from her family doctor, Dr. Ron Simpson, on January 28, 2005. X-rays were taken and indicated that the claimant had:

1. Mild grade 1 spondylolisthesis of L4 anterior to L5 secondary to degenerative changes of the facet joints. No spondylolysis defect is seen.
2. Mild disk space narrowing at the L4-L5 level.
3. No compression fracture identified.

An MRI report dated February 10, 2005, states:

FINDINGS: The marrow signal appears unremarkable. There is a mild anterolisthesis of L4 on 5 of less than 25% (grade 1). The conus medullaris terminates at the T12-L1 disk space. The disk spaces at L1-2, L2-3, and L3-4 appear unremarkable. At L4-5, a broad disk bulge is identified, which extends to the left slightly. No encroachment over the left-sided nerve root is appreciated. In addition, at this level facet hypertrophy and ligamentum flavum hypertrophy are present, which contribute to spinal stenosis. Below this, the disk space opens back up with an essentially negative L5-SI disk noted.

On March 6, 2005, Dr. Patrick Chan stated:

I am the neurosurgeon that has treated Ms. Janice Keene. I am writing to you in response to

your letter dated 3-3-05. The MRI findings that you cited are related to degenerative changes. However, clinically Mrs. Keene may have sustained aggravation of pre-existing condition following work related injury.

On March 28, 2005, Dr. Chan gave the claimant the following work release:

May return to work 4-02-05
with restrictions for 8 weeks.
1) No lifting more than 5 lbs.
2) No excessive bending
turning twisting at waist.

On March 30, 2005, Dr. Chan took the claimant completely off work until May 16, 2005. On May 10, 2005, Dr. Chan took the claimant off work until June 27, 2005.

On July 29, 2005, Dr. Ron Simpson wrote to Dr. Wayne Bruffett:

Mrs. Keene is a patient seen in our clinic. She presented on 01-28-05 with complaints of injuring her back lifting a patient at work on 01-20-05. Her diagnoses at that time were: 1) left lumbosacral radiolopathy and 2) left sciatica. She has requested referral to your clinic for evaluation of her continued left lower back pain, which radiates to her left foot.

On August 8, 2005, the claimant was treated by Dr. Wayne Bruffett. Dr. Bruffett noted the claimant had been treated with chiropractic treatment and had previously had two shots and undergone physical therapy under the direction of Dr. Chan. Dr. Bruffett noted the claimant's x-rays showed spondylolisthesis at L4-5 and that the MRI showed, "severe stenosis at L4-5 with the spondylolisthesis." Finally, Dr. Bruffett indicated that he believed it was, "pretty clear that she was injured on the job.", and prescribed the claimant Darvocet and Flexeril, "as needed for muscle spasm."

On January 23, 2006, Dr. Bruffett indicated that the claimant denied any problems with her back prior to the January 20, 2005 injury. He also indicated that he believed it was difficult to identify a structural change, but that he suspected that the injury caused her disc to bulge more or that her facet joints lost stability, thereby causing an increase in symptoms.

A hearing was held on March 3, 2006. An Administrative Law Judge found, in pertinent part:

6. Claimant did not sustain her burden of proving by a preponderance of the evidence that her January 20, 2005 incident is a compensable

injury, because the record does not contain objective findings in support of Claimant's medical evidence as required by Ark. Code Ann. §11-9-102(4)(D). Claimant's self-report of muscle spasms and a muscle relaxer prescription does not constitute an objective finding. Claimant's two studies point to degenerative changes, not a specific incident. And, Dr. Bruffet's August 8, 2005 prescription of Flexeril, occurring almost seven months after the January 20, 2005 incident, is not connected to the incident by a preponderance of the evidence.

The claimant appealed to the Full Commission, which affirmed and adopted the findings of the Administrative Law Judge. The Arkansas Court of Appeals has reversed and remanded for further proceedings.

II. ADJUDICATION

The workers' compensation statutes provide that "[a] compensable injury must be established by medical evidence supported by objective findings...." Ark. Code Ann. 11-9-102(4)(D) (Supp. 2007). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102(16)(A)(i) (Supp. 2007). Here, as noted by the Arkansas

Court of Appeals, the claimant presented an MRI showing spinal stenosis, which satisfies Ark. Code Ann. §11-9-102 (16) (A) (i).

However, a claimant must prove a causal connection between his employment and the injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002).

Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W. 2d 263 (1962). The court has stated that if "months" have passed between an accident and the manifestation of an

injury, reasonable men might disagree about the existence of a causal connection, See Kivett v. Redmond Co., 234 Ark. 855, 355 S.W. 2d 172 (1962); Wentz v. Servicemaster, 75 Ark. App. 296, 57 S.W. 3d 753 (2001).

While the claimant had previously received treatment for a back sprain in 2002, and has also been diagnosed with fibromyalgia, the last medical record prior to the incident in question is dated June 30, 2003, which would be over a year and a half before the claimant's work-related injury. There is no evidence of record indicating that the claimant was actively seeking treatment for her back, or for fibromyalgia, prior to the work injury. The claimant credibly testified that she was not experiencing back problems at the time of her work related injury. Dr. Bruffett opined the claimant's condition was due to her work injury.

As the claimant had been working prior to this incident without difficulty, the preponderance of the evidence dictates a finding that the specific incident at work, the occurrence of which has not been disputed by the respondent, aggravated the claimant's pre-existing degenerative back condition. A pre-existing disease or infirmity does not disqualify a claim if the employment

aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Furthermore, the medical record shows that after the accident no physician related the claimant's use of muscle relaxers to her fibromyalgia, or any other pre-existing condition. Therefore, it would required conjecture and speculation to relate the claimant's medical treatment and disability to anything other than the specific incident at work on January 20, 2005. Conjecture and speculation, which, 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).

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); American Greeting Corp. v. Garey, 61 Ark. App. 17 963 S.W.2d 613 (1998). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Here, the preponderance of the evidence of record shows that the testing and treatment the claimant has received from Dr. Holt, Dr. Simpson, Dr. Chan and Dr. Bruffett has been reasonably necessary not only to diagnose the nature and extent of the compensable injury, but also to reduce and

alleviate symptoms. Furthermore, the preponderance of the evidence of record indicates that Dr. Bruffet has discussed further reasonably necessary surgical and non-surgical treatment options with the claimant, which would also be a liability of the respondents.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). 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).

Here, the claimant testified that she has not worked since January 27, 2005. She testified that she is still under a physician's care and has not been released to return to work. The record contains several physician's reports indicating the claimant was restricted from working during the time period in question. On March 28, 2005, Dr. Chan issued a note providing that the claimant could return to work as of April 2, 2005, with restrictions. However, on March 30, 2005, Dr. Chan issued a note indicating the

claimant could not return to work until May 16, 2005. Likewise, Dr. Chan continued issuing notes, thereby corroborating the claimant's testimony that she remains in her healing period and unable to work. The preponderance of the evidence of record shows that, not only has the claimant remained in her healing period since the date of injury, she has also been totally incapacitated to earn wages, and is entitled to temporary total disability benefits until a date yet to be determined.

III. CONCLUSION

Based on our de novo review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant proved that she sustained a compensable injury to her back on January 20, 2005, and is entitled to past and future reasonably necessary medical treatment and temporary total disability benefits from the date of injury until a date yet to be determined.

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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.