

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501764

PAULA ARD, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICES, EMPLOYER	RESPONDENT
ALTERNATIVE INSURANCE MANAGEMENT, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 27, 2009

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

Claimant represented by the HONORABLE STEVEN MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE WALTER MURRAY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded
for further proceedings. *Ard v. St. Vincent Health
Services*, CA08-838 (April 1, 2009). In accordance with 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. We find that the

claimant proved she was entitled to reasonably necessary medical treatment and temporary total disability benefits.

I. HISTORY

The testimony of Paula Jeanette Ard, age 53, indicated that she was hired as a home care nurse for St. Vincent Health Services in September 2004. The parties stipulated that an employment relationship existed on January 31, 2005. The claimant testified that she felt a pop in her lower back while picking up a patient. The claimant testified that she gradually began suffering from severe pain in her lower back and pain down her right leg. The claimant testified that she reported the accident to her supervisor. The parties stipulated that the claim was initially accepted. The claimant treated with Dr. William Warren on February 2, 2005, for an injury date of January 31, 2005: "Patient states 'doing drssing chgs on bedbound pt moving her to center of bed had to reach over rails wouldn't go down hurt lower back.'...The patient suffered an axial load injury of bilateral lumbar region." Dr. Warren diagnosed Lumbar Strain and assigned modified activity back restrictions: "Weight limitations of 20 pounds pushing, pulling, or lifting. No stooping. No reaching above shoulders. No

climbing stairs or ladders. Cannot operate machinery or company vehicles."

The claimant testified that she did not work for St. Vincent or any other employer after February 2, 2005. The claimant treated with a physical therapist beginning February 2, 2005. The claimant testified that she began using a walker on February 3, 2005 because she could not walk without assistance. The claimant informed the physical therapist on February 3, 2005 that her low back symptoms were worsening, and that she was not working because her employer was "unable to accommodate modified activity."

Dr. Warren administered a sacroiliac joint injection on February 4, 2005. The claimant informed the physical therapist on February 7, 2005 that her right lower extremity had been "going out." The therapist noted on February 8, 2005 that the claimant had back pain "radiating down the posterior of both lower extremities. To the calf on the right and posterior thigh on the left."

According to a Physician Activity Status Report dated February 9, 2005, Dr. Warren returned the claimant to work on February 9, 2005 with the following restrictions: "No repetitive lifting over 20 lbs. No pushing and/or pulling over 20 lbs. of force....Actual Date of Maximum Medical

Improvement: 02/02/2005." Yet a note on an Injury Recheck Encounter dated February 9, 2005 indicated, "No light duty available."

An MRI of the claimant's lumbar spine was taken on February 10, 2005, with the following findings:

There is marked degenerative disk change at L4-5. On a sagittal STIR additional sequence with fat-suppression there is some signal within the marrow adjacent to the L4-5 disk which I suspect is degenerative related. There is a large disk herniation at L4-5 on the right in a paracentral location. There is inferiorly migrated free fragment measuring nearly 1 cm diameter which I suspect severely impinges the right L5 nerve root. Remaining lumbar disks show only a small Schmorl's nodule in the superior end-plate of L4 with some additional small Schmorl's nodules. The foramina are intact. The conus appears normal and signal marrow spaces is otherwise unremarkable. The paraspinal soft tissues are unremarkable.

Conclusion:

There is a large right paracentral disk herniation at L4-5 where there is an inferiorly migrated extruded fragment of nearly 1 cm size, severely impinging the L5 nerve root on the right. Degenerative associated marrow changes are present adjacent to the L4-5 disk.

Dr. Warren noted on February 14, 2005, "Patient has not been working because no light duty available. The pain is located on the right leg." Dr. Warren assessed "Herniated disc" and referred the claimant to Dr. Cathey. Dr. Steven L. Cathey examined the claimant on February 24, 2005 and

opined that the claimant was not a candidate for lumbar disc surgery.

The parties agreed at hearing that benefits were paid through February 27, 2005, and that the respondents controverted the claim after that date. The record indicates that Dr. Warren returned the claimant to regular duty on March 2, 2005. A claim coordinator wrote to the claimant on March 11, 2005: "I am writing to advise you that we are now denying your claim under Workers' Compensation as of March 2, 2005. This decision was based upon medical information from Dr. Warren. I have paid you your lost time benefits through March 2, 2005. No further benefits will be payable under workers' compensation."

An administrator for Visiting Nurse Administration informed the claimant on May 19, 2005, "As you have been unable to return to work, we have terminated your employment with us effective May 19, 2005. Once you are able, we encourage you to reapply for a position with VNA. We wish you well and look forward to hearing from you soon."

Dr. Richard D. Peek examined the claimant on October 13, 2005 and diagnosed "Herniated nucleus pulposus L4-5, large." Dr. Peek and Dr. Michael M. Pollock performed surgery on February 9, 2006: "Anterior lumbar debridement of

disc, inner body fusion and stabilization with machine femoral ring as well as bone morphogenic protein (Infuse).” The claimant underwent a posterior fusion on February 14, 2006. Dr. Peek noted on March 16, 2006, “Her back pain is better, as well as radicular pain, than preoperatively.” Dr. Peek diagnosed “Status post L4-5 anterior interbody fusion.” Dr. Peek noted on June 22, 2006, “She is not working....She is disabled for two months, at which time she will return for followup.” Dr. Peek signed the following note on June 24, 2006: “Should Not Return To Work Until 2 months.”

The claimant followed up with Dr. Peek on October 30, 2006: “It looks like she has developed a T7 compression fracture....She is temporarily disabled secondary to her back.” An MRI of the claimant’s thoracic spine was done on November 21, 2006, with the following impression: “Subacute compression fractures of T11 and T12 suspected. Multilevel degenerative disk disease. Mottled appearance suggesting osteopenia. Prominent degenerative changes anteriorly at T10.”

Dr. Peek corresponded with the claimant’s attorney on April 30, 2007:

I further reviewed the depositions of Dr. David Phelan and Dr. Jonathan Fravel. After reviewing the depositions, as well as the records which have been reviewed, as well as examining and operating on Ms. Ard, it is my medical opinion that she had a herniated disc and developed subsequent discitis at the L4-5 interspace, necessitating a discectomy and interbody fusion related to traumatic herniation. An atypical course developed with discitis after herniation. However, there is clear evidence that it did.

A pre-hearing order was filed on May 17, 2007. The claimant contended that she injured her back in a specific incident at work on January 31, 2005. The claimant sought payment of medical expenses with Dr. Holland, Dr. Pollard, and Dr. Peek. The claimant contended that she was entitled to temporary total disability benefits from February 28, 2005 until a date yet to be determined. The respondents contended that the claimant did not sustain an injury arising out of and in the course of her employment.

The parties agreed to litigate the following issues: "Compensability; medical expenses; temporary total disability benefits; contempt and attorney's fees."

The respondents' exhibits include an undated questionnaire from Medical Case Management of Arkansas, Inc. to Dr. Scott Schlesinger. Dr. Schlesinger opined that the surgery performed on February 9, 2006 was not required as a direct result of the alleged injury sustained on January 31,

2005, and that the claimant did not develop diskitis as a result of the alleged injury. Dr. Schlesinger wrote that if the January 31, 2005 injury was found to be compensable, then the claimant would have reached maximum medical improvement "6-9 mos post injury." Dr. Schlesinger wrote that the claimant had sustained a 7% impairment rating "for the L4-5 herniation" based on the AMA Guides.

A hearing was held on June 27, 2007. The claimant testified that she no longer used a walker but instead relied on canes for ambulation: "I have a very erratic walking gait, and I have a tendency to take a step and then I just sort of lose my balance when I'm walking, so I use the two sticks to sort of brace me out there so that I can walk fairly straight." The claimant testified that Dr. Peek's surgery greatly reduced her pain symptoms.

An administrative law judge filed an opinion on September 25, 2007. The administrative law judge found, among other things, that the claimant proved she sustained a compensable injury. The administrative law judge ordered the respondents to pay medical expenses and temporary total disability benefits. The respondents appealed to the Full Commission, which reversed the administrative law judge's decision. The Full Commission found that the claimant did

not prove she sustained a compensable injury. The Court of Appeals has reversed and remanded.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission finds that the claimant proved she sustained a compensable injury. The claimant testified that she felt a pop in her lower back

while performing employment services on January 31, 2005. The claimant testified that she began feeling severe pain in her lower back which radiated down her right leg. Dr. Warren treated the claimant and diagnosed lumbar strain. Beginning February 7, 2005, a physical therapist noted that the claimant's right leg had been "going out" and that the claimant felt pain radiating down both lower extremities. An MRI on February 10, 2005 showed a right paracentral disk herniation at L4-5. Dr. Warren subsequently assessed "herniated disc." Dr. Peek began treating the claimant in October 2005 and diagnosed a large herniated nucleus pulposus at L4-5.

The Full Commission finds that the claimant proved she sustained an accidental injury causing physical harm to the body and arising out of and in the course of employment. The injury to the claimant's lower back and lumbar spine required medical services and resulted in disability. The injury was caused by a specific incident, identifiable by time and place of occurrence on January 31, 2005. The claimant established a compensable injury by medical evidence supported by objective findings, which objective findings included a herniated disk at L4-5. The evidence shows that the L4-5 herniated disk was caused by the January

31, 2005 accidental injury. We therefore affirm the administrative law judge's finding that the claimant proved she sustained a compensable injury.

B. Medical Treatment

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 requested medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment 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 claimant proved she sustained a compensable injury to her lower back and lumbar spine. The claimant proved that the medical treatment of record, including visits with Dr. Holland, Dr. Pollard, and Dr. Peek, was reasonably necessary in connection with the compensable injury. The record indicates that Dr. Peek and Dr. Pollard performed surgery in February 2006. Dr. Peek noted in March 2006 that the claimant's back pain and radicular pain had diminished following surgery. Dr. Peek

opined in April 2007 that the surgery he performed was causally related to a traumatic disc herniation. The claimant testified that surgery from Dr. Peek had greatly reduced her pain symptoms. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D & B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The record in the present matter shows that surgery performed by Dr. Peek and Dr. Pollard was reasonably necessary.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). If the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition, the healing period has ended. *Id.* The determination of when the healing period has ended is a question of fact for the Commission. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

In the present matter, the claimant proved she sustained a compensable injury to the lower back and lumbar spine on January 31, 2005. Dr. Warren diagnosed lumbar strain and restricted the claimant's physical activities beginning February 2, 2005, but the record indicates that light work for the claimant was not available with the respondent-employer. The claimant testified that she did not work after February 2, 2005. A physical therapist noted on February 3, 2005 that the respondent-employer was unable to accommodate modified work activity for the claimant. A follow-up report on February 9, 2005 also showed that light duty with the respondent-employer was not available. An MRI on February 10, 2005 showed a large herniated disc at L4-5. The claimant underwent surgery from Dr. Peek in February 2006.

Dr. Peek opined in an October 30, 2006 follow-up visit that the claimant was still temporarily disabled secondary to her back injury. The claimant testified at hearing that she still relied on canes in order to walk. We recognize that Dr. Warren and Dr. Schlesinger attempted to find that the claimant had reached maximum medical improvement and the end of her healing period at various dates. There is no evidence before us that the treating surgeon, Dr. Peek, had

found that the claimant reached the end of her healing period. The Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability benefits from February 28, 2005 until a date yet to be determined.

In accordance with the remand from the Arkansas Court of Appeals, 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 low back and lumbar spine on January 31, 2005. The Full Commission finds that the claimant proved the medical treatment of record, including surgery from Dr. Peek and Dr. Pollock, was reasonably necessary in connection with the claimant's compensable injury. Based on the current record and evidence before us, the Full Commission finds that the claimant proved she was entitled to temporary total disability benefits from February 28, 2005 until a date yet to be determined. We therefore affirm the administrative law judge's findings with regard to compensability, reasonably necessary medical treatment, and temporary total disability benefits. We affirm the administrative law judge's finding which directs the respondents to reimburse Unum and Healthcare Recoveries for any benefits or expenses

paid on the claim. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

PHILIP A. HOOD, Commissioner