

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701984

SHIRLEY BAKER,
EMPLOYEE

CLAIMANT

FAMILY MARKETS,
EMPLOYER

RESPONDENT

CONTINENTAL WESTERN INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 26, 2009

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

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

Respondents represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed July 24, 2008. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. There was a January 1, 2007, compensable
injury.
2. The compensation rates are \$173/154.
3. The claimant has proven by a preponderance of
the evidence that the medications for pain and
muscle spasms she has been prescribed are
reasonable and necessary and are the
responsibility of respondents.

4. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from May 11, 2007, to a date to be determined.

5. No indemnity benefits have been awarded here. An attorney's fee may be awarded only on indemnity benefits owed and controverted.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the July 24, 2008 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur with the majority's finding that there was a January 1, 2007 compensable injury. I also concur with the majority's finding that the claimant has proven by a preponderance of the evidence that the medications for pain and muscle spasms she has been prescribed are reasonable and necessary and are the responsibility of the respondents. However, based on a de novo review of the record, as I find that the claimant has proved by a preponderance of the evidence that she remained in her healing period and totally unable to earn wages from May 11, 2007 until a date yet to be determined and would award temporary total disability benefits and an attorney fee accordingly, I must respectfully dissent on this issue.

HISTORY

On January 1, 2007, the claimant was unloading heavy produce boxes from a truck when she began to feel pain in her back and legs, so great that she could not sit down. The claimant began seeing Dr. C.W. Koch, who diagnosed a lumbar strain, prescribed muscle relaxers

and ordered an MRI. The claimant underwent an MRI on February 5, 2007. The MRI report states:

FINDINGS: Vertebral alignment is within normal limits. No intrinsic intrathecal abnormality found. Disc bulge and disc herniation are found at L4-5 causing indentation of ventral aspect of thecal sac with what appears to be significant indentation on left neural foramen and moderate indentation on the right neural foramen. Hypertrophic degenerative changes of facet joints exacerbate the process on the left neural foramen at this level. IMPRESSION: Herniation of disc at L4-5 as described.

A February 8, 2007 note from Dr. Koch's office states:

...Dr. Koch seen her recently and ordered a MRI of her lower back after injuring her back in January at work. Her MRI reveals herniation of the disc at L4-5 level per Dr. Mark White. I recommend to her that we send her down to Dr. Steve Cathey in North Little Rock along with her actual MRI films. She will follow-up then with Dr. Koch after that. She recently has been called in Methocarbamol and Hydrocodone for her pain. She should be off of work until she see Dr. Cathey. Treatment plan discussed.

Despite Dr. Koch's referral to Dr. Cathey, the respondent instead sent the claimant to Brent Sprinkle, DO, on February 26, 2007. Dr. Sprinkle stated:

PLAN:

1. Get an L4-5 epidural.
2. Switch her voltaren to Mobic....
3. Stop the hydrocodone.
4. Switch her mehocarbamol to Neurontin....
5. I will see her back in 3-4 weeks to assess her response to the epidural.
6. She will return to work with no pushing or pulling over 15 pounds, and she can not stand over 2 hours without a 10-minute break. No repetitive bending or stooping motion.
7. [omitted]

After having the epidural steroid injection, the claimant returned to Dr. Sprinkle on March 27, 2007.

On this date Dr. Sprinkle stated:

PLAN:

1. Get L4-5 #2 since the 1st one definitely helped.
2. Continue her current work restrictions. She said she has trouble going up and down the steps all day. Limit that to 20 steps per day total. Continue the other restrictions.
3. I will see her back in 3-4 weeks.

On April 17, 2007 Dr. Sprinkle stated:

PLAN:

1. Will get her into therapy.
2. Get her back on the Mobic.
3. The 2nd epidural if anything may have made her worse so we will defer that.
4. She can return to work no pushing, pulling or lifting over 20 pounds.
5. I will see her back in 3-4 weeks.

The claimant testified that she had followed Dr. Sprinkle's previous work restrictions, returning to work for the respondent employer on April 19, 2007, working light duty but then voluntarily terminating her position. However, the claimant testified that she has been physically unable to work since May 11, 2007. She testified that she cannot bend over to do anything, she cannot do housework, she cannot do dishes and she cannot cook. The claimant testified that she has to move from standing to sitting to laying. The claimant testified that she has continuous pain and numbness in her toes and feet with the left leg hurting worse. The claimant returned to Dr. Sprinkle on May 15, 2007. After this visit Dr. Sprinkle stated:

The physical therapy did not really help her. She still has diffuse low back pain. She has diffuse leg pain in no discernable radicular pattern. Her MRI describes a disc herniation at L4-5 only causing indentation of the thecal sac. There is some foraminal components to either side, but she does not have pain in the classic L4 nerve root distribution.

Dr. Sprinkle also stated:

PLAN:

1. I recommend that we get an EMG of both lower extremities to see if I

- can find any objective evidence of true focal radiculopathy.
2. The patient's mother is here who had surgery by Dr. Saer. They seem quite convinced that Dr. Saer can surgically cure this patient's back pain. I discussed the risks and benefits of considering surgery in a patient with the MRI findings that she has. I think the prognosis of that would be guarded.
 3. Will see if I can find anything detectable on the EMG.
 4. If not, we may ultimately just need to get an opinion from Dr. Saer as to whether or not he feels like surgery would be warranted.
 5. [omitted]
 6. [omitted]
 7. We discussed a 3rd epidural. She really declined to pursue that today.
 8. I will see her back to perform the EMG.

Unlike in previous office notes, Dr. Sprinkle did not address the claimant's work restrictions, or give any type of work release to the claimant. The claimant, apparently frustrated, did not return to Dr. Sprinkle. Instead, the claimant requested a Change of Physician, which was granted, back to Dr. Koch. On May 25, 2007, Dr. Koch stated:

Patient with history of back pain, back injury. MRI had shown disc. she was sent to Dr. Saer. Saw Dr. Sprinkle. Workman's comp dictating. has had two epidural steroid injections. Has not helped. Still having significant pain. Some radicular pain. Feels she needs to

be seen by neurosurgeon. Will make appointment with Dr. Burson and give Ultram for pain.

Dr. Koch did not address the claimant's work status in the May 25, 2007 office note. On August 20, 2007, Dr. Koch stated:

Patient with workmen's comp back injury. She has been unable to see a neurosurgeon. Workers' Comp will not allow. Does have disc problems on her MRI. Patient is on Robaxin, Mobic and Ultram. Has had an episode of coughing, bronchitis. Increased back pain. Toradol is not relieving...Tenderness in the back, paraspinal spasm. Acute lumbosacral strain. Workmen's Comp injury. Patient will be given Lortab. Hopefully she will be allowed to see a neurosurgeon in the not too distant future. Treatment plan discussed.

On September 18, 2007, Dr. Koch stated:

Patient who had had a back injury. Continues to have problems. MRI showed herniated disc. Patient wanted to be referred to a neurosurgeon. Workmen's comp has refused. Saw a non-surgical person at the spine center. [Who] states she did not need to see a neurosurgeon. Patient continues with significant pain. Has had epidural injections. Workmen's comp continues to refuse neurosurgical evaluation. Patient continues to have pain. Needs to go back to pain management. Workmen's comp will have to decide. Having hearing about seeing a neurosurgeon.

Patient is given Robaxin, Mobic, Ultram. Reluctant to give pain Meds, but since the patient has been basically abandoned by workmen's comp, feel we can give Ultram #60, 1q6h. Suggested that her lawyer visit with workmen's comp about getting her back to pain management. Still think she needs to see a neurosurgeon. Treatment plan discussed.

Again, Dr. Koch did not address the claimant's work status. On October 24, 2007, Dr. Koch stated:

Patient who has had back injury in the first part of the year, last part of last year. Had significant pain. Pain persisted, MRI showed disk, was sent by workman's comp to spine surgeon assistant who said she didn't need to see a surgeon, has been fighting with workman's comp since, about seeing neurosurgeon. Patient finally given permission to see neurosurgeon, appointment with Dr. Burson in November...Hopefully she will have some answers from Dr. Burson at that time. If patient does not have a surgical problem, suspect need to get to a pain center. Treatment plan discussed.

Again, Dr. Koch, did not discuss the claimant's work status. Finally, on November 15, 2007, the claimant was seen by Dr. Tim Burson, a neurosurgeon. Dr. Burson ordered a CT myelogram. Dr. Burson did not address the claimant's work status. After significant delay on the part of the respondent, the requested test

was run on March 13, 2008. On April 3, 2008, Dr. Burson stated:

CHART NOTE: Ms. Baker returns and still has back pain and leg pain to the ankles.

STUDIES REVIEWED: Her CT myelogram shows significant thecal sac compression at L4-5 and nerve root cutoff.

DECISION-MAKING: We discussed a laminectomy and fusion. The risks and benefits were discussed with her. We have her scheduled for an L4-L5 fusion and L4 laminectomy on May 12, 2008 at Baptist Medical Center.

Dr. Burson did not address the claimant's work status. The respondent refused to pay for the surgery.

DISCUSSION

As stated above, the majority has affirmed the Administrative Law Judge's finding that all of the medical treatment the claimant has received has been reasonably necessary and is the responsibility of the respondents. I agree with the majority on this issue. However, the majority's decision to affirm the Administrative Law Judge's denial of temporary total disability benefits after May 11, 2007 is clearly in error and, therefore, I must dissent. I find that the claimant has proved by a preponderance of the evidence her entitlement to temporary total disability benefits

from May 11, 2007 until a date yet to be determined. 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). See Searcy Indus. Laundry, Inc. v. Ferren, 92 Ark. App. 65, 211 S.W. 3d 11 (2005). Here, the medical evidence clearly shows that the claimant has remained in her healing period. As seen by the medical records outlined above, she has been receiving, despite the efforts of the respondents, almost continual care for her compensable back injury. She has required pain medications, steroid injections, physical therapy, and ultimately, after finally being allowed to see a neurosurgeon, fusion and laminectomy surgery has been recommended.

As for the claimant's ability to work, the claimant credibly testified that she has been unable to work since May 11, 2007. The respondents have introduced

no evidence to contradict the claimant's testimony. The medical record clearly corroborates the claimant's testimony. The only evidence that the Administrative Law Judge cites as proof that the claimant can work is the fact that since April of 2007 none of the claimant's doctor's have addressed the claimant's work status. However, the absence of an opinion on the claimant's work status is not proof of anything other than proof of the fact that none of the claimant's doctors have opined on her work status. To use this fact in any other fashion essentially requires the claimant to prove a negative, a logical fallacy which cannot be allowed to stand. The claimant's credible testimony, corroborated by the medical evidence, in the absence of any evidence to the contrary, satisfies the claimant's burden of proving her "total incapacity to earn wages" as required by Breshears, Supra.

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

PHILIP A. HOOD, Commissioner