

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F804641

JOAN DRIVER,  
EMPLOYEE

CLAIMANT

FAYETTEVILLE SCHOOL DISTRICT,  
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 28, 2009

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

Claimant represented by the HONORABLE ADRIENNE K. MURPHY,  
Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE CONSTANCE G. CLARK,  
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed June 24, 2009. The administrative law judge found that the claimant proved she sustained a compensable injury, and that the respondents were liable for unpaid reasonably necessary medical treatment. The administrative law judge found that the claimant proved she was entitled to temporary total disability benefits beginning July 18, 2008

and continuing through a date yet to be determined. The administrative law judge found that the respondents were not entitled to a credit for Social Security disability benefits received by the claimant or medical benefits paid the claimant by Medicare.

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved she sustained a compensable injury. The claimant proved that her medical treatment of record was reasonably necessary, but the claimant did not prove surgery recommended by Dr. Nasr was reasonably necessary. The claimant proved she was entitled to temporary total disability benefits beginning July 18, 2008 and continuing through February 26, 2009. The respondents did not prove they were entitled to an offset pursuant to Ark. Code Ann. §11-9-411(a).

#### I. HISTORY

Joan E. Driver, now age 53, underwent an anterior cervical fusion performed by Dr. D. Luke Knox in January 1994. Dr. Knox stated in March 1995, "she's had a recent set back with marked worsening of her neck and arm pain due

to a recurrent disc herniation. I recommend she qualify for social security disability benefits as she is unable to pursue gainful employment." Dr. Knox performed an anterior cervical fusion at C6-7 in March 1995. Dr. Knox recommended an injection in October 1995 in order to relieve the claimant's "SI joint discomforts." Dr. Knox performed a posterior cervical fusion at C6-7 in March 1996. Dr. Knox reported "recent developments with her lumbago, right buttock pain" in February 2000. Dr. Knox subsequently noted, "Joan E. Driver was seen in the Neurosurgery Clinic on 02-17-2000 to follow up her MRI scan. Her MRI scan for the most part was quite unrevealing showing no evidence of compressive pathology."

Dr. R. David Cannon examined the claimant in February 2002: "She has a history of connective tissue disorder, arthritis, myositis and pain consistent with fibromyalgia. She has a history of inflammatory bowel disease and bilateral sacroileitis. She has been having pain in her lower back with a popping and stretching sensation when she bends or twists that shoots pain down into the legs....MRI of the lumbar spine dated 2/15/00 shows left L5-S1 disc protrusion/herniation with pressure upon the left L5-S1

nerve roots. There is disc protrusion at L4-5 with multi-level degenerative change and spondylytic changes detected." Dr. Cannon planned to treat the claimant with bilateral SI joint injections and he planned additional MRI scans of the lumbar spine. Dr. Knox reported in April 2002, "We reviewed Joan's MRI scan which indeed showed the lateral recess stenosis at 4-5 and a bit less so at 5-1. Her symptoms are certainly compatible with the 4-5 level....I would be inclined to recommend that she avoid surgery at this point."

The claimant testified that she became employed as a substitute teacher for Fayetteville Public Schools in about 2002-03. Dr. Knox stated in part in August 2004, "She fell recently landing on her buttock. This occurred a few months ago. She has previously been noted to have a lumbar degenerative scoliosis....She had a rather marked list to the right with pelvic obliquity and marked paraspinal muscle spasm....While in clinic, I had Joanie go ahead and redo her lumbar spine films which, indeed, showed her progression of her lumbar degenerative scoliosis that appears to be centered at L3." Dr. Knox planned conservative treatment.

Dr. John L. Furlow noted in February 2005:  
"Unfortunately she slipped on a wet spot on the floor at

Wal-Mart straining her back. She did not fall all the way down. She has had a numbness and a lot of pain down her left leg. She has history of severe degenerative disc problems and is seen regularly by Dr. Knox and has been on chronic pain medicines for this. She also has a connective degenerative tissue disorder with fibromyalgia as well." Dr. Furlow's impression was "She does have lower back pain with recent strain."

Dr. Knox reported in May 2005, "she had an incident at Wal-Mart when she slipped on a wet floor resulting in her doing the splits and hitting her shopping cart. She states that she did not fall to the ground but she certainly contorted her lumbar spine....She had marked paraspinal muscle spasm with a pronounced list associated with her severe thoracolumbar scoliosis."

Dr. Knox reported in June 2005 that the claimant had recently undergone a lumbar MRI scan: "She has been found to have progressive lumbosacral scoliosis but more importantly, there is a significant component of lateral recessed stenosis that appears to be at 4-5 and 5-1 on the left which is probably a significant component of her left leg, buttock, thigh pain, etc." Dr. Knox recommended treatment

with "the usual conservative measures." Dr. Knox noted in March 2006 that an MRI scan showed "severe lateral recess stenosis at L4-5, with an underlying disc herniation." Dr. Furlow stated during a May 2008 follow-up visit, "There is not anything operable on her back at this point." Dr. Furlow assessed "1) Pain. 2) Disc disease. 3) Myalgias."

The parties stipulated that the employment relationship existed on May 9, 2008. The claimant testified, "I was actually subbing at the high school half a day that morning as a teacher....And as I was walking back to the class, a girl said, 'Ms. Driver.' And I stopped to see what she wanted....And my right foot did not stop when I stopped. It slid forward and wrenched my backside to the right. And I immediately felt pain and had to have help getting back to the desk....It was very severe and radiated down my right leg immediately. And made it difficult for me to walk and stand upright." The claimant testified that she notified the school office that there had been an accident, and "I went straight from the school to the doctor's office." The record shows that a clinic note was entered by an LPN on May 9, 2008: "Pt. called & said she 'threw out her back.' JLF said to give her a steroid."

The claimant testified that the respondent-employer asked her to see the company physician, Dr. Berestnev. Dr. Konstantin V. Berestnev signed a Form AR-3, Physician's Report, on May 12, 2008: "Pt states she was walking in the hall and slid injuring her low back. C/O low back pain." According to the Physician's Report, Dr. Berestnev diagnosed "Low back pain." Dr. Berestnev recommended conservative treatment, and he returned the claimant to restricted work on May 12, 2008.

An x-ray of the claimant's lumbar spine was taken on May 12, 2008: "No acute fractures or dislocations. Severe lumbar scoliosis. Extensive degenerative changes of the lumbar spine with the associated anterior and lateral bone spurring at all levels." An x-ray of the claimant's sacrum and coccyx was also done on May 12, 2008: "No acute fractures or dislocations. Severe lumbar scoliosis."

Dr. Berestnev corresponded with the respondents on May 12, 2008:

At the request of and authorization of Fayetteville Public Schools, we are seeing Ms. Joan Driver. Ms. Driver presents today for the injury from 05-09-08. The patient states that she was walking in the hall and slid injuring her low back.

She states that her right foot went up and she slid and immediately experienced significant low back pain which is constant and severe. She is having difficulty walking....Her past medical history is significant for 100% social security disability per patient's report. She said that Dr. Dykman submitted the paper work and she was not working up until just a few years ago, six years ago, where she started to supplement her income with some work as a school nurse....She says that the previous MRI which was done on 03-06 shows some extensive degenerative disc disease. The report from that MRI states that in addition to this she has multi level facet arthropathy and levoscoliosis of the lumbar spine. She also has eccentric diffuse annular disc bulging on the left L5-S1 resulting in narrowing of the left lateral recess and moderate to severe left foraminal narrowing. She has mild central canal stenosis and moderate bilateral foraminal narrowing at L4-5. She also states that she has a moderate right foraminal narrowing at L3-4. This is what is present in the report from her previous MRI....

The x-ray of her back revealed no acute fractures or dislocations. It revealed extensive lumbar scoliosis with extensive degenerative changes throughout the lumbar spine with anterior bone spurring present.

Dr. Berestnev assessed "Low back pain and also there are other conditions affecting her health status that are numerous including severe scoliosis, degenerative disc disease, undifferentiated connective tissue disorder, 100% social security disability per her rheumatologist." Dr. Berestnev planned to treat the claimant with an injection and stretching exercises and stated, "We are going to

recommend that the patient avoid lifting, pushing or pulling of more than 20 pounds."

The claimant testified that, despite Dr. Berestnev's release to restricted work duties, "I could barely get around my apartment....And so I just took that week off. And then the nursing supervisor needed me the following week. And I felt - felt somewhat better by then and wanted to try to work. So I did as a nurse."

Dr. Berestnev's assessment on May 16, 2008 was "Low back pain which is worse." Dr. Berestnev planned to obtain an MRI of the lumbar spine, and he recommended that the claimant "avoid lifting more than ten pounds and avoid pushing or pulling more than ten pounds." An MRI of the claimant's lumbar spine was done on May 16, 2008, with the following impression:

1. Moderate levoscoliosis of the lumbar vertebral column.
2. Multilevel severe degenerative disc disease most pronounced at L1-2, L4-5 and L5-S1 with moderate annular disc bulging as well as moderate to marked degenerative facet arthropathy at all levels.
3. There is moderate central canal narrowing at L4-5. There is moderate neural exit foraminal narrowing and lateral recess stenosis at L4-5.
4. Neural exit foraminal stenosis on the left-hand side at L5-S1 secondary to facet arthropathy and asymmetric disc bulging.

5. No focal disc protrusion or extruded disc fragment.
6. The conus medullaris is not enlarged. There are scattered areas of discogenic marrow change but no pathologic marrow signal intensity that would suggest bony metastatic disease or healing trauma at this time.
7. In comparison with the patient's older study of 03-06-06, there has been no significant interval progression.

The claimant followed up with Dr. Berestnev on May 20, 2008:

The patient states that she is here to follow up on the MRI results and states that she feels a lot better. She is bright and cheerful during the examination. Her MRI was done on 05-16-08. It shows no significant interval progression in comparison with the patient's older study on 03-06-06.

Dr. Berestnev assessed "Low back pain. Also, there is associated medical conditions such as severe scoliosis, severe degenerative disc disease of the lumbar area. There is also undifferentiated connective tissue disorder and 100% social security disability. Treatment plan: The patient states that she is back to her preinjury status. We are going to recommend that the patient go back to her regular duties of a school nurse and consult Dr. Knox for the future management of her condition. The patient can be referred to Dr. Knox." Dr. Berestnev signed a Physician's Report on May

20, 2008 which stated, "Back to regular duties. Consult Dr. Knox for the management of the pt."

However, Dr. Berestnev signed another Physician's Report on May 21, 2008 which indicated, "Pt states she was crawling around on the floor to get a pill for a child and felt pain in her back then when she was getting into her car she went to set purse on the seat on felt pain again only worse." An x-ray of the claimant's lumbar spine was taken on May 21, 2008: "No acute fractures or dislocations. Extensive scoliosis and degenerative changes throughout the L-spine - unchanged compared to the previous study."

Dr. Berestnev informed the respondents on May 21, 2008, "Ms. Driver presents today for the injury from 05-09-08. She comes here to follow up on her low back pain. She was released on 05-20-08, but she was crawling around on the floor to get a pill for a child which she dropped and then she hyperextended her back trying to stand up from the four points she was crawling on. Then she was getting into her car and twisted her back trying to put her purse on the passenger seat and the patient reaggravated her back pain. She states that now it is worse. The patient states that she is having a significant amount of pain radiating down to

her right leg. The patient states that she doesn't think she is able to do anything now. The patient states she can't even walk for a significant distance....Follow up x-ray of her lower back today reveals no significant interval changes compared to the previous x-ray. Reveals significant sclerosis with significant degenerative changes over the facet joints. Significant degeneration in the lumbar spine with anterior bone spurring and loss of intervertebral disc height."

Dr. Berestnev's assessment was "The patient has low back pain....I want the patient to keep her appointment at Dr. Knox's office and until she is seen at his office I don't think the patient will be able to work safely."

The claimant testified that she did not work for the respondents after May 21, 2008. The parties stipulated that the respondents paid temporary total disability benefits beginning May 23, 2008. The record indicates that the claimant began treating at Northwest Arkansas Neurosurgery Clinic beginning May 29, 2008. The handwritten diagnosis appeared to be severe lumbar scoliosis, diffuse lumbar spondylosis, and acute myofascial trauma with exacerbation.

The claimant was treated conservatively and was taken off work until follow-up with Dr. Knox.

Dr. D. Luke Knox provided an x-ray report on May 29, 2008:

Flexion and extension and oblique views, four-view lumbar spine study, demonstrating what appear to be five non-rib-bearing lumbar vertebrae. There is probable severe lumbar scoliosis, degenerative in nature, with severe degenerative disc changes noted throughout the lumbar spine. It extends from L1 through S1. There appears to be an ever-so-slight anterolisthesis at L4 on 5 with a rather prominent anterior osteophyte formation, with a MacNab traction spur at L5-S1. Although I see no evidence of overt instability, I question the possibility of a compression abnormality of what appears to be L1, although it is so far out of the plane that the oblique views certainly do not confirm such. There is marked disc space collapse and probably a rather prominent lateral tilt. There certainly seems to be no evidence of pedicle architecture abnormality noted on the oblique views. Rather prominent MacNab traction spur inferior endplate of L1.

Tana M. White, PA-C, a representative of Dr. Knox, examined the claimant on May 29, 2008 and informed Dr. John Furlow, "She has marked spasms of the paralumbar spine and demonstrates a list to the right." Tana White's impression was "1. Severe lumbar scoliosis. 2. Diffuse lumbar spondylosis. 3. Acute myofascial trauma with exacerbation." Ms. White's treatment plan included a

recommendation that the claimant remain off work until she followed up with Dr. Knox. Dr. Knox signed a note dated May 29, 2008 indicating that the claimant should remain off work until a follow-up appointment scheduled for July 15, 2008. The record indicates that the claimant began physical therapy and pain management for her lumbar spine.

The claimant followed up with Dr. Knox on July 15, 2008: "She is improving with her physical therapy. She is requiring Neurontin and Methadone. I reviewed her radiographic workup. It is imperative that she have a good supportive Aspen brace with an LSO attachment. She also needs an electrical-stim unit to help with her pain. In the face of her more recent improvement, I will plan to have her continue with her physical therapy program. She is to return to see me in two months for further evaluation." The parties stipulated that the respondents paid temporary total disability through July 17, 2008.

Dr. Furlow noted in part on July 18, 2008, "She really is limited extensively in what she can do as far as work, particularly nursing work. She is continuing with physical therapy and has seen Dr. Knox for her lower back which has been quite bad for sometime just manageable at this

point....Overall she is doing very well but very kind of upset about physical limitations that she now has because of her pains. She has no other new complaints toady (sic) but is overall getting better." Dr. Furlow's impression was "1) Severe back pain and osteoarthritis of the knees."

Dr. Furlow stated on August 6, 2008, "Ms. Driver has been my patient for several years. She has been followed for a long time for her complex back issues with Dr. Knox. She needs referral back to see him. She needs continued management for her back issues. She is having worsening back pain and is going to see Dr. Knox soon but I recommended that she stay off work until her evaluation with Dr. Knox is complete."

Dr. Knox signed a note dated August 21, 2008 indicating that the claimant could return to work at light duty. However, Dr. Knox corresponded with Ann Goodbar of Risk Management Resources on September 4, 2008 and stated in part, "At this time, she appears to be temporarily totaled (sic) disabled from her teaching job due to her work-related injury where she has had a temporary aggravation of her preexisting condition."

The claimant followed up with Dr. Knox on September 11, 2008:

I had asked that she remain off work until she returned to see me today. She continues to require significant Methadone for her pain management. She is on Neurontin and Vicodin. She has been released from physical therapy, and she is doing her home exercise program. Again I reviewed her radiographic studies demonstrating the severe thoracolumbar scoliosis. While in clinic today, her examination today was remarkable for diffuse hyporeflexia in the lower extremities with positive straight leg raising tests bilaterally. She had diminished sensation over her right foot. Her motor exam was felt to be good. She had severe stooped posture with right lateral tilt and marked paraspinal muscle spasm.

Joan continues to be plagued with significant lumbago and sciatica following her work-related injury this past May when she was working as a teaching substitute at Fayetteville High School and her right foot slipped on a dirty floor, stretching her right leg and resulting in torsional injury to her lumbar spine. Apparently she reinjured her back on the 21<sup>st</sup> when she was sent back to work. I do not believe she is in any shape to return to work at this point. She is to remain off work. I will have her return to see me at the six-month anniversary of her injury at which point we will close out her workers' compensation claim. I do not believe it would be prudent for her to undergo a functional capacity evaluation, as I believe her thoracolumbar scoliosis and resulting pain syndrome would probably be significantly worsened by her underlying anatomical abnormalities.

ADDENDUM: Apparently, there was a report filed by my clinic dated 8/21/08 at which point we released her to a light duty schedule. I believe this was

inappropriate. As I see Joan today, she is absolutely in no condition to pursue gainful employment.

Dr. Knox signed a note dated September 11, 2008 indicating that the claimant should remain off work through November 18, 2008.

The parties stipulated that the respondents paid for the claimant's medical treatment through September 22, 2008.

The claimant followed up with Dr. Knox on December 8, 2008: "She continues to be plagued with severe back and leg pain. I want her to continue with her walking program. I do not believe it would prudent for her to return to work. I do not believe it would be prudent for her to pursue a functional capacity evaluation. She is to return to see me in two months, at which time, we will redo her x-rays. I want to follow the severe thoracolumbar degenerative scoliosis to make certain that it is not worsening. She has been fitted for a good Aspen brace."

A pre-hearing order was filed on January 15, 2009. The claimant contended that she was "entitled to additional medical treatment for the injury she sustained to her lumbar spine in the course and scope of her employment while working for the Fayetteville School District on May 9, 2008.

Additionally, claimant contends she is entitled to additional temporary total disability benefits as she is still within her healing period and has not reached maximum medical improvement."

The respondents contended that they "initially accepted as compensable a back injury which the claimant contends she sustained on May 9, 2008, while in the course and scope of her employment with the Fayetteville Public Schools. The respondents paid the claimant TTD benefits for the period from May 23, 2008 through July 17, 2008 and also paid her medical expenses through September of 2008. However, after reviewing the claimant's past medical records and learning that the claimant has a number of pre-existing injuries and conditions (including prior back problems) and was undergoing treatment for her pre-existing back problems as recently as May 8, 2008 (the day prior to the incident which gave rise to this claim), the respondents controverted all further benefits in this case. It is now the respondents' contention that any incident which may have occurred while the claimant was employed by the Fayetteville Public Schools does not constitute a compensable injury under the Arkansas Workers' Compensation Act. The respondents further contend

that the claimant's current medical difficulties and any disability from which she may suffer are not causally related to any incident which may have occurred while she was in the scope or course of her employment for the Fayetteville School District and, thus, are not the responsibility of the respondents...."

The parties agreed to litigate the following issues:

1. Compensability of injury to claimant's lumbar spine on May 9, 2008.
2. Temporary total disability benefits.
3. Related medical.
4. Attorney fee.

Dr. Knox signed an x-ray report dated February 26, 2009: "Six-view lumbar spine study demonstrates severe thoracolumbar scoliosis that appears to be centered at L3-4, convexity to the left without evidence of overt instability on flexion and extension views. There is no evidence of bony abnormality...."

Dr. Knox evaluated the claimant on February 26, 2009:

She continues to be plagued with significant back and bilateral leg pain. She is still requiring Neurontin, Methadone, Vicodin, Flexeril, and Soma. She is wearing her brace when she is up for long periods of time. She has had good benefit with her TENS unit. She is doing her home exercises. She has lost 14 pounds on Weight Watchers. She still is unable to return to her work....

It appears that Joan continues to suffer from her work-related injury occurring on May 19, 2008. It is most definite that she exacerbated her preexisting condition. We redid her x-rays while in clinic today. She has had progression of her thoracolumbar scoliosis when compared to x-rays done several years ago. She may very well have created a new injury in addition to her preexisting condition; however, it is so difficult to distinguish on structural studies i.e. MRI scanning that it would be difficult to discern any new injury relative to her preexisting condition. Her work-related exacerbation of her preexisting condition continues to be the cause of her necessary medical treatment. In view of the more recent progression of her thoracolumbar scoliosis, I discussed with Joan that she probably should consider surgical stabilization. I am going to refer her to Dr. Nasser in Oklahoma City for further evaluation.

Dr. Fadi F. Nasr examined the claimant and corresponded with Dr. Knox on March 20, 2009:

I had the pleasure of seeing Joan Driver in the clinic today. As you know she has a fairly significant thoracic and lumbar scoliosis that on my measurements today are fairly significant with her thoracic curve being approximately 45 degrees from L1 to L4 and 42 degrees from T8 to T12 with her lumbar curve being convex left and her thoracic curve being convex right. I think correction of her curve would likely require a T4 to the ilium fusion to stabilize it as I think that her curve has been quite progressive over the past five years beginning, based on my measurements of her lumbar x-rays from five years ago that she brought with her, at 29 degrees. I think she could also, at the same time, undergo decompression of her nerves at her lumbosacral junction which would give her relief of her radiculopathy. Unfortunately I think that only

decompressing her lumbar nerve roots would be a bad idea as her curve has been progressive. I did talk with her about surgical intervention. She would like a little bit of time to think about it and I am going to see her back in a few months with another set of scoliosis x-rays so we can see how things go. I told her if she does get worse that she needs to come back and see me sooner so that we could potentially proceed with surgical intervention.

The parties deposed Dr. Knox on April 10, 2009. The respondents' attorney questioned Dr. Knox:

Q. Now, is it still your opinion that what Ms. Driver sustained was a temporary aggravation of a pre-existing condition?

A. Possibly.

Q. Can you explain your answer?

A. Well, it depends on how she does from the standpoint of her follow up and down the road. Obviously, we're not dealing with a normal person, a normal spine. She has a miserable spine. She may not ever get over this. So at this time, hopefully, it's temporary but if she doesn't get over it I guess it would be permanent.

Q. So at this point you're saying that you can't tell yet if it is temporary or not.

A. Temporary versus permanent.

Q. It's too early to tell that?

A. Yes....

Q. Do you believe - what do you believe would be the major cause, and I know we're kind of getting into a legal term here, but major cause, meaning

more than 50 percent of the cause, of her current need for continued medical treatment? Would it be the preexisting condition or anything she might have done while working at Fayetteville High School?

A. I have real concerns that it was related to her injury at the high school that resulted in the exacerbation of her preexisting condition. I think that there's over a 50 percent chance that resulted in the need for her current treatment at this time.

Q. Even given the serious severity of her condition beforehand, the severity of her degenerative disc disease and her scoliosis, you still feel that the incident she describes at the high school would be more than 50 percent of the cause?

A. I do, yes.

Q. What do you base that opinion on?

A. My impression of having taken care of her for many years....

Q. Do you agree that she may have very well have gotten to the point of needing surgery and being in the condition that she is now in even without any kind of incident at Fayetteville High School?

A. Correct.

Q. There's just really no way to know for sure, is there?

A. Correct....

The record indicates that Dr. Furlow referred the claimant to a neurological surgeon, Dr. James R. Adametz, who reported on April 10, 2009:

I reviewed her MRI scan and it does show terrible degenerative disc disease and scoliosis with multiple disc problems, including sort of a broad based disc herniations at L2-3 and especially at L4-5 on the right with some far lateral extensions. There is even a bulge of the disc on the left at L5-S1.

MDM: I talked to her about this at some length. It's a little unclear to me exactly what all has been going on. Apparently she has been recommended for this scoliosis surgery. I do agree that her scoliosis has progressed and gotten worse, although I don't know that I can directly blame all of her scoliosis on this injury where she twisted her back or certainly on the injury where she just was reaching for her purse. I think she does have some problems with her lumbar spine, including some nerve root compression down in the mid to low lumbar area, which might be related to that injury, but she's sort of gotten by with that and apparently isn't planning on having surgery on it.

She wanted to know if the scoliosis had progressed, and I agree that it has. Apparently the doctor that she had gone to see is supposed to be a specialist in scoliosis, but what he has planned certainly sounds kind of like overkill to me, and I don't understand how it would all be from this one injury. Certainly, she does have a bad back and has multiple problems and for that reason hasn't worked in awhile and probably does have adequate reason not to be able to return to her full time job.

Dr. Adametz provided an addendum on May 5, 2009:

I received a request to answer some specific questions if there is different problems with her back that might or might not be covered. The new objective findings that Ms. Driver has is that her scoliosis has worsened and she does have some disc protrusions, which probably also have worsened. The incident of May the 9 and May 21, 2008 probably did exacerbate her lumbar spine problem with the bulging and somewhat protruding disc that she has there. I don't believe those exacerbated her scoliosis. At this point, she may well need additional medical treatment on her lumbar spine, but so far no surgery has been recommended and she's had appropriate treatment as of this time. Naturally, something else may have to be done depending on her symptoms and her problems. I don't think the two injuries are the major cause of her need for scoliosis surgery. They probably were the major cause of some of her treatment, including physical therapy, etc. that she has received for her lumbar spine to date.

A hearing was held on May 27, 2009. At that time, the respondents contended that if there was an award of workers' compensation benefits, then the respondents were entitled to a statutory credit for medical or disability benefits the claimant had received from other sources.

The claimant testified that following the May 9, 2008 accident, "I have severe low back pain all the time that radiates into my right buttock and down to my right ankle - down through my knee and my right ankle. Standing aggravates my left - the left side. Sitting aggravates the

right side. But it's constant now. It never goes away."

The claimant was questioned by her attorney:

Q. Do you feel like your condition is somewhat stabilized?

A. I guess it's as stable as it's going to get. I hope it doesn't get any worse. I mean, it's - I've pretty much stayed about the same the last few months.

Q. When you say "the last few months" -

A. Oh, probably when I saw Dr. Knox in February, I was probably about the way I am now.

Q. Have you returned to work anywhere?

A. No.

Q. Are you on Social Security disability?

A. Yes, I am.

Q. And how long have you been on Social Security disability.

A. It started in 1990. But they - retroactively, 1988 is when I was declared disabled.

Q. And what were you declared disabled for?

A. My connective tissue disease....

Q. Do you feel like you could be working part time today?

A. No, I don't. I'm sorry.

An administrative law judge filed an opinion on June 24, 2009. The administrative law judge found that the

claimant proved she "suffered a compensable injury to her back in the form of an aggravation of a pre-existing condition." The administrative law judge found that the respondents were liable for unpaid reasonably necessary medical treatment, including treatment provided by Dr. Knox and Dr. Nasr. The administrative law judge found that the claimant proved she was entitled to temporary total disability benefits beginning July 18, 2008 and continuing through a date yet to be determined. The administrative law judge found that the respondents were not entitled to a credit for Social Security disability benefits received by the claimant or for medical benefits paid by Medicare.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

\_\_\_\_\_ Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

(A) "Compensable injury" means:

(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).

The burden of proof of a compensable injury shall be on the employee, and the 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).

An administrative law judge found in the present matter, "2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back in the form of an aggravation of a pre-existing condition." An aggravation is 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 temporary aggravation of a pre-existing condition can be a compensable injury. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996), citing *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

The Full Commission finds that the instant claimant proved she sustained a compensable injury. The parties stipulated that the employment relationship existed on May 9, 2008. The claimant testified that she slid at work and "wrenched my backside to the right....It was very severe and radiated down my right leg immediately." The claimant was sent for treatment with the company physician, Dr. Berestnev, beginning May 12, 2008. Dr. Berestnev diagnosed low back pain and treated the claimant conservatively. The claimant treated with Dr. Knox beginning May 29, 2008. Tana M. White, a PA-C for Dr. Knox, examined the claimant on May 29, 2008 and noted "marked spasms of the paralumbar spine." Dr. Knox noted "marked paraspinal muscle spasm" on September 11, 2008. Muscle spasms constitute objective medical findings. *Kimbrell v. Arkansas Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999).

The Full Commission therefore finds that the claimant proved by a preponderance of the evidence that she sustained

a compensable injury to her low back. The claimant proved she sustained an accidental injury causing physical harm to her low back, that the accidental injury arose out of and in the course of employment, and that the injury required medical services and resulted in disability. The injury was caused by a specific incident and was identifiable by time and place of occurrence on May 9, 2008. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely, the post-injury reports of spasm by Tana White and Dr. Knox. We therefore affirm the administrative law judge's finding that the claimant proved she sustained a compensable injury to her back.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the compensable injury. Ark. Code Ann. §11-9-508(a) (Repl. 2002). An employee has the burden of proving by a preponderance of the evidence that requested medical treatment is reasonably necessary. *Fayetteville School Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). 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).

An administrative law judge found in the present matter, "3. Respondent is liable for payment of all unpaid reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes, but is not limited to, medical treatment provided by Dr. Knox and Dr. Nasr." The Full Commission finds that the claimant has proven that the medical treatment she received following her compensable injury was reasonably necessary. However, the claimant did not prove that she was entitled to surgery as recommended by Dr. Nasr.

The Full Commission has determined *supra* that the claimant proved she sustained a compensable injury to her low back on May 9, 2008. The claimant treated for her compensable injury with Dr. Berestnev beginning May 12, 2008. An x-ray of the claimant's lumbar spine taken May 12, 2008 showed extensive degenerative changes and severe lumbar scoliosis but no acute fractures or dislocations. Dr. Berestnev treated the claimant conservatively. An MRI of the claimant's lumbar spine on May 16, 2008 revealed

numerous findings including degenerative disc disease, central canal narrowing, and foraminal stenosis. However, there was no focal disc protrusion or extruded disc fragment and it was noted, "7. In comparison with the patient's older study of 03-06-06, there has been no significant interval progression."

The claimant began treating for her compensable injury with Dr. Knox on May 29, 2008. Dr. Knox arranged physical therapy, an Aspen brace, and an electrical stimulation (TENS) unit. Dr. Knox reported on September 11, 2008, "Joan continues to be plagued with significant lumbago and sciatica following her work-related injury this past May when she was working as a teaching substitute at Fayetteville High School and her right foot slipped on a dirty floor, stretching her right leg and resulting in torsional injury to her lumbar spine....I will have her return to see me at the six-month anniversary of her injury at which point we will close out her workers' compensation claim." The parties stipulated that the respondents paid for the claimant's medical treatment through September 22, 2008.

Since September 22, 2008, the claimant has seen Dr. Knox, Dr. Nasr, and Dr. Adametz. The Full Commission finds that the evaluations by these physicians were reasonably necessary in order to assess the claimant's continued symptoms and physical condition following the claimant's May 9, 2008 compensable injury. The claimant has not proven, however, that she is entitled to low back surgery as recommended by Dr. Nasr on March 20, 2009. First, the record does not demonstrate that the claimant suffered an acute herniated disc or any other structural abnormality to her lumbar spine as a result of the May 9, 2008 compensable injury. An x-ray taken May 12, 2008 showed severe scoliosis and extensive degenerative changes but no acute fractures or dislocations. There were several abnormalities shown on an MRI performed May 16, 2008, but there is no probative evidence demonstrating that the May 9, 2008 accident was the cause of any of the abnormalities shown on MRI. The record does not demonstrate that the "surgical intervention" suggested by Dr. Nasr on March 20, 2009 would be in any way reasonably necessary in connection with the May 9, 2008 compensable injury. Dr. Adametz, an experienced neurological surgeon, reported in April 2009 that MRI showed

"terrible degenerative disc disease and scoliosis with multiple disc problems" in the claimant's lumbar spine. Dr. Adametz opined, however, that a proposed surgery "sounds kind of like overkill to me, and I don't understand how it would all be from this one injury."

An employee may be entitled to ongoing medical treatment after her healing period has ended, if the medical treatment is geared toward management of the employee's compensable injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). In the present matter, the Full Commission finds that the treatment and evaluations provided the claimant after September 22, 2008 were reasonably necessary in connection with the compensable injury. The claimant did not prove, however, that she was entitled to surgery as recommended by Dr. Nasr. The claimant did not prove that any type of surgery would be reasonably necessary in connection with her compensable injury, and the respondents are not liable for the costs of same.

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 is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway and Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993). The determination of when the healing period ends is a question of fact for the Commission. *Breakfield v. In & Out, Inc.*, 79 Ark. App. 402, 88 S.W.3d 861 (2002).

An administrative law judge found in the present matter, "4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning July 18, 2008 and continuing through a date yet to be determined." The Full Commission finds that the claimant proved she was entitled to temporary total disability benefits beginning July 18, 2008 and continuing through February 26, 2009. We have determined *supra* that the claimant proved she sustained a compensable injury to her low back on May 9, 2008. Dr. Berestnev's assessment on May 12, 2008 was low back pain. Dr. Berestnev took the claimant off work on May 21, 2008,

and the respondents paid temporary total disability benefits beginning May 23, 2008. The claimant subsequently began treating with Dr. Knox, who kept the claimant off work. The claimant was provided physical therapy and pain management treatment for her lumbar spine, and Dr. Knox noted improvement with physical therapy on July 15, 2008. However, Dr. Knox essentially opined as of September 4, 2008 that the claimant was still temporarily totally disabled. Dr. Knox continued to keep the claimant off work.

The Full Commission has determined *supra* that the claimant is not a candidate for surgery to her low back as a result of the May 9, 2008 compensable injury. The claimant's last treatment of record with Dr. Knox took place on February 26, 2009, when Dr. Knox noted, "She continues to be plagued with significant back and bilateral leg pain." However, the claimant agreed at the May 27, 2009 hearing that her condition had "stabilized," testifying, "I guess it's as stable as it's going to get. I hope it doesn't get any worse. I mean, it's - I've pretty much stayed about the same for the last few months....when I saw Dr. Knox in February, I was probably about the way I am now."

The Full Commission finds that the claimant reached the end of the healing period for her compensable injury no later than February 26, 2009, the date of the claimant's last treatment of record with Dr. Knox. Although the claimant continues to complain of pain, persistent pain does not itself prevent a finding that the healing period has ended, provided that the underlying condition has stabilized. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). In the instant matter, we find that the claimant's underlying condition stabilized no later than February 26, 2009.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved she sustained a compensable injury. The claimant proved that the medical treatment of record she received following the compensable injury was reasonably necessary, but the claimant did not prove surgery recommended by Dr. Nasr was reasonably necessary. The claimant proved she was entitled to temporary total disability benefits beginning July 18, 2008 and continuing through February 26, 2009. The claimant reached the end of

her healing period for the compensable injury no later than February 26, 2009. The claimant's attorney is entitled to fees for legal services in accordance with 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). Ark. Code Ann. §11-9-411 does not allow the respondents an offset for Social Security disability and Medicare benefits received by the claimant.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs & dissents.

**DISSENTING OPINION**

I must respectfully concur in part, and dissent in part, from the majority opinion. The Administrative Law Judge found that the claimant has met her burden of proving by a preponderance of the evidence that she suffered a

compensable injury to her back in the form of an aggravation of a pre-existing condition and is entitled to temporary total disability benefits to a date yet to be determined. I agree, and therefore, I must respectfully dissent from the portion of the majority opinion setting the end of the claimant's healing period at February 26, 2009.

On February 26, 2009 Dr. Knox stated:

Joan Driver was seen in the Neurosurgery Clinic for follow up on February 26, 2009, for further evaluation. She continues to be plagued with significant back and bilateral leg pain. She is still requiring Neurontin, Methadone, Vicodin, Flexeril and Soma. She is wearing her brace when she is up for long periods of time. She has had good benefit with her TENS unit. She is doing her home exercises. She has lost 14 pounds on Weight Watchers. She still is unable to return to work. I understand that she is undergoing a workers' compensation hearing on March 12, 2009. It appears that Joan continues to suffer from her work-related injury occurring on May 19, 2008. It is most definite that she exacerbated her preexisting condition. We redid her x-rays while in clinic today. She has had progression of her thoracolumbar scoliosis when compared to x-rays done several years ago. She may very well have created a new injury in addition to her preexisting condition; however, it is so difficult to distinguish on structural studies i.e. MRI scanning that it would be difficult to discern any new injury

relative to her preexisting condition. Her work related exacerbation of her preexisting condition continues to be the cause of her necessary medical treatment...

In Dr. Knox's deposition, taken April 10, 2009, when asked to weigh in on whether or not the claimant's condition was temporary or permanent, Dr. Knox stated:

A: Well, it depends on how she does from the standpoint of her follow up and down the road. Obviously, we're not dealing with a normal person, a normal spine. She has a miserable spine. She may not ever get over this. So at this time, hopefully, it's temporary but if she doesn't get over it I guess it would be permanent.

Q: So at this point you're saying that you can't tell yet if it is temporary or not.

A: Temporary versus permanent.

Q: It's too early to tell that?

A: Yes.

As the claimant's treating physician opined as of April 10, 2009 that the claimant had not yet reached the end of her healing period, and as the February 26, 2009 report also clearly indicates that the claimant is still actively treating for her compensable injury, it is my opinion that the majority's determination that the claimant reached the end of her healing period on February 26, 2009 is in error.

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

PHILIP A. HOOD, Commissioner