

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608616

VERONICA MURRAY, EMPLOYEE	CLAIMANT
STANT MANUFACTURING, INC., EMPLOYER	RESPONDENT
GALLAGHER BASSETT, CARRIER	RESPONDENT

OPINION FILED JUNE 9, 2009

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

Claimant represented by HONORABLE TERRENCE CAIN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed May 30, 2008.

The Administrative Law Judge entered the following findings:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 20, 2006.

2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

3. The claimant sustained a temporary exacerbation of a preexisting condition which resolved, allowing her to return to work. The claimant has failed to prove that treatment recommended by Dr. Chakales is causally related to the compensable injury.

4. The respondents are directed to pay for Dr. Alexander's treatment within thirty days pursuant to Rule 30, along with temporary total disability benefits from August 7, 2006 to August 23, 2006.

5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 12, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1002) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney fees on medical benefits and services for injuries after July 1, 2001.

6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

7. Respondent's request for a Ark. Code Ann. §11-9-411 credit is deferred until Anthem Blue Cross Blue Shield can be given an opportunity to file a lien. Respondents are entitled to a credit against short-term disability payments.

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.

Thus, we affirm and adopt the 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 AND DISSENTING OPINION

After my de novo review of the entire record, I concur with the majority opinion that the claimant proved that she sustained a compensable injury, that the respondents were responsible for Dr. Alexander's treatment, that the claim was controverted and that the claimant's attorney is entitled to a fee. However, I must respectfully dissent from the majority opinion finding that the claimant sustained a temporary exacerbation of a pre-existing condition and that the claimant failed to prove that Dr. Chakales' treatment was causally related to the compensable injury. I would award the claimant additional

medical benefits for Dr. Chakales' treatment and proposed treatment.

REASONABLE AND NECESSARY TREATMENT

Under Arkansas workers' compensation law, the employer takes the employee as she is found, and circumstances which aggravate preexisting conditions are compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990). Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Further, when the primary injury is shown to have arisen out of and in the course of employment, the employer

is responsible for any natural consequence that flows from that injury. Wackenhut, supra. The basic test is whether there is causal connection between the two episodes. Id. A causal connection is established when the compensable injury is found to be "a factor" in the resulting need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment.

Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Treatment intended to reduce, or enable a claimant to cope with, chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. Sec. 11-9-508. Billy Chronister v. Lavaca Vault, Full Commission Opinion filed June 20, 1991 (D704562).

The compensable injury in this claim occurred on July 20, 2006, when a forklift ran into the table near where the claimant was working, causing her to fall backwards, striking her hip. The majority found that the claimant's injury arising out of the July 20, 2006 accident resolved and that the problems for which she sought treatment from

Dr. Chakales were not related to the compensable injury but stemmed from degenerative changes.

The claimant's need for Dr. Chakales' treatment was the compensable injury, on July 20, 2006 which caused the degenerative changes and disc bulging in her lumbar spine to become symptomatic. This claim is similar to the claim in Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167(2000), in that the claimant undisputedly suffered a compensable injury and in that there is a dispute as to whether there is a causal connection between the injury and the medical treatment. As the court in Estridge explained, the claimant does not have to prove that the injury is the major cause of the need for treatment in the case of an accidental injury. Ark. Code Ann. §11-9-102(4)(A)(i). While the claimant does have degenerative problems and a brief history of lower back pain, the medical records and the claimant's testimony show that the accidental injury at work on July 20, 2006 either caused or precipitated the need for medication and surgery. As in Estridge, "that is clear." Estridge, 343 Ark. at 282.

The majority, in affirming and adopting the Administrative Law Judge's opinion, found that the claimant had been treated on and off for back pain since 1983. There is little in the medical record to support this finding. Chronologically, the first medical records reflect a cervical muscle strain in 1983 and a thoracic muscle strain in 1987. The next record documents cervical problems after a ten-year gap in treatment in 1997. The claimant presented in 1999 with a lumbar strain, low back pain and a urinary tract infection. Only one visit for this problem is reflected in the record. In 2000, the claimant underwent a cardiac evaluation due to left neck and arm pain. In March 2001, the claimant was treated for a cervical and lumbar sprain after a motor vehicle accident. One month later, the claimant reported complete recovery from that sprain and was released. In October 2001, she suffered a lumbar strain with no radicular symptoms, which resolved in a matter of weeks. The next record of treatment is four years later when she again underwent cardiac evaluation with a resulting diagnosis of musculo-skeletal chest pain. The next medical record is more than a year later when the claimant saw

Dr. Alexander after the accident which is the subject of this claim. The medical records reflect a total of three episodes of low back pain, the most recent of which was approximately five years prior to the accident. Far too much time has passed between any of those episodes and her current issues to infer that the current issues are related to them.

The medical records and her testimony substantially support the conclusion that her accident caused her degenerative changes to become symptomatic and to remain symptomatic up through the date of the hearing. There is no indication in the record that she experienced relief from physical therapy or other conservative care by the doctors. The record does reflect that in the past the claimant enjoyed full recovery from her lumbar episodes in 1999 and 2001. Her complaints were consistent from the date of her first treatment forward, increasing in severity and duration. Dr. Bruffett, in his independent medical evaluation found that, while she did have a positive Waddell's sign, there was a causal relationship between the accident at work, her pain and her injury. While the

degenerative changes and disc bulging were likely pre-existing, Dr. Bruffett stated that the accident could have exacerbated by the accident, rendering her symptomatic.

Of note is the fact that the claimant never had radicular symptoms during those lumbar episodes which the claimant experienced in 1999 and 2001. Radicular pain, in her right hip and leg, was noted in the treatment of the claimant's current injury in August 2006, within one month of the accident. From the first record of treatment, the claimant reported right hip pain.

The claimant experienced a gap in treatment between October 2006 and March 2007. The claimant explained at the hearing that Dr. Alexander would not give her a referral to a specialist. She went to her primary care physician, Dr. Lewis, who sent her to physical therapy but did not actively treat her, because she needed a specialist. She testified that she could not get an appointment with a specialist without a referral. The medical records show that Dr. Alexander encouraged the claimant to follow up with her family doctor and stated that he did not refer her to a specialist because of the problems she was having with her

workers' compensation claim. Dr. Lewis referred the claimant to Dr. Chakales on March 28, 2007. The gap in treatment was not indicative of her recovery but rather her difficulties in arranging treatment during the controversion of this claim by the respondents.

The majority, in affirming and adopting the Administrative Law Judge's opinion, adopted the judge's suggestion that the claimant was unduly influenced by the claim of another employee injured in the same accident, which is not supported by the record and is at best mere speculation, which cannot take the place of proof. Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The medical records and testimony do not provide any support for such a conclusion. The record does support a finding that the claimant suffered pain as a direct result of the accident on July 20, 2006, that the conservative treatment she underwent has not resolved her problems, that she did not recover from her injury, and that she did not suffer an intervening injury, without regard for any other claimant's claim for benefits.

Dr. Chakales reviewed her MRI, performed examinations, a discography and CT scans, and found degenerative problems at L5-S1 and disc bulging at L4-5. A claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). It is undisputed that the claimant had a pre-existing condition. However, the 2006 accident aggravated the pre-existing condition and is a compensable injury.¹ The 2006 compensable injury is a factor in the need for treatment and under Williams, supra, the claimant is entitled to the treatment provided by Dr. Chakales.

Dr. Alexander encouraged the claimant to continue treatment with her family doctor, who referred her to Dr. Chakales. Dr. Chakales followed the claimant for approximately five months, determining that her condition and symptoms warranted surgery. The claimant's cardiologist cleared her for surgery. Dr. Bruffett agreed with the

¹ The only other conclusion would be that this is a recurrence, which it cannot be due to the independent intervening cause of falling because of the forklift. In fact, the parties stipulated that the claimant suffered a compensable injury.

treatment up to the date of his independent medical evaluation, but disagreed with the surgical proposal. Dr. Chakales, who followed the claimant for a much longer period than Dr. Bruffett's single examination, was in the better position to balance the benefits and risks of surgical treatment in the claimant's case. I find that Dr. Chakales' treatment and proposed treatment are both reasonable and necessary.

The claimant has proven by a preponderance of the evidence that the accident, her injury and her need for treatment are causally related and that Dr. Chakales' treatment and proposed treatment are reasonable and necessary medical treatment of her compensable injury.

TEMPORARY TOTAL DISABILITY

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 & Transp. 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).

The claimant seeks temporary total disability benefits from August 7, 2006 to August 23, 2006, and July 27, 2007 to a date yet to be determined. Dr. Alexander took the claimant off work on August 7, 2006 through August 23, 2006. Dr. Chakales took the claimant off work on July 27, 2007, not to return until after she had recovered from the proposed surgery, no earlier than 90 days after the surgery. She has not had the surgery. There is no record that she attained maximum medical improvement, and she remains under Dr. Chakales' active care. The claimant has proven that she is entitled to temporary total disability benefits from August 7, 2006 to August 23, 2006 and July 27, 2007 to a date yet to be determined.

CONCLUSION

The claimant has proven that Dr. Chakales' treatment and proposed treatment was reasonable and necessary medical treatment of her compensable injury. Her need for treatment was caused by the accident of July 20,

2006. The claimant is entitled to temporary total disability benefits from August 7, 2006 to August 23, 2006, and July 27, 2007 to a date yet to be determined. I concur with the majority opinion that the claimant proved that she sustained a compensable injury, that the respondents were responsible for Dr. Alexander's treatment, that the claim was controverted and that the claimant's attorney is entitled to a fee. However, I must respectfully dissent from the majority opinion that the claimant sustained a temporary exacerbation of a pre-existing condition and that the claimant failed to prove that Dr. Chakales' treatment was causally related to the compensable injury. I would award the claimant additional medical benefits for Dr. Chakales' treatment and proposed treatment. For the foregoing reasons, I respectfully concur, in part, and dissent, in part.

PHILIP A. HOOD, Commissioner