

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607089

RATRY XAYSANASY, EMPLOYEE	CLAIMANT
SIMMONS FOODS, EMPLOYER	RESPONDENT
S.B. HOWARD & COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 17, 2009

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 12, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the prehearing conference conducted on February 26, 2008, and contained in a pre-hearing order filed February 27, 2008, are hereby accepted as fact.
2. The claimant failed to prove beyond a preponderance of the evidence that she is entitled to additional medical treatment for her lower back.

3. The additional medical treatment sought by the claimant is not reasonable and/or necessary.

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 dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion affirming and adopting the opinion of the Administrative Law Judge. I would award the claimant the additional medical treatment recommended by Dr. Capocelli.

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).

The basic test is whether there is causal

connection between the two episodes. Id. 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). Reasonable and necessary medical services may include those necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). 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).

There is no question that the claimant had pre-existing degenerative changes in her back which caused her some pain prior to her compensable injury. The claimant sought treatment for vertigo and right-sided back pain in February 1997. She was diagnosed with vertigo and a muscle

strain on the right with myofascitis on the right side of her back due to overuse. Despite the claimant's apparent report to Dr. Phomakay that she experienced low back pain for a year or more, she only sought treatment for her low back pain once after 1997, in March 2006, when she sought treatment for low back pain with occasional radiation down her right leg. The diagnosis was lumbar osteoarthritis, mild scoliosis, osteoporosis, and mild anterior hypertrophic changes at L2-3 and L4-5. The record does not reflect that the claimant required regular treatment prior to that fall. The claimant did have several prescriptions for pain relievers which is consistent with her testimony and the medical records that she did have some low back pain prior to her fall.

After her March visit with Dr. Phomakay, three months passed before she sought care again, on June 13, 2006 when she suffered a significant fall at work. The claimant testified that the pain she experienced was different than her prior aches and pains, that she could manage her prior "aches and pains" with medications, but that her pain after the fall was more severe and unresponsive to her medications. Only after her fall, did she require regular

medical attention for her low back pain.

At a minimum, the claimant suffered an aggravation of pre-existing back problems, but the record supports a finding that the claimant actually suffered a new injury. As noted, her prior diagnosis was of degenerative problems, which is quite logical, given the claimant's age and work history. However, after the compensable injury, when she fell from her work station against a wall and to the floor, her pain became more severe and became unmanageable. On the date of injury, a herniated nucleus pulposus was suspected, and on July 6, a CT scan revealed a broad based bulge in her lumbar spine. Neither a herniated disc nor a disc bulge were suggested prior to the compensable injury.

The majority opinion finds that Dr. Capocelli's statement in his February 18, 2008 letter was detrimental to her claim for additional medical treatment. Capocelli stated that he believed it was "possible" that the compensable injury caused a significant exacerbation of her pre-existing lumbar problems, "as well as possible disc protrusion and annular tear of multiple levels within the lumbar spine at L4-5 and L5-S1." However, a finding of causation does not need to be expressed in terms of a

reasonable medical certainty when there is supplemental evidence supporting the causal connection. Heptinstall v. Asplundh Tree Expert Co., 84 Ark. App. 215, 222, 137 S.W.3d 421, ___ (2003). While his opinion, as stated in February 2008 letter alone, may not be sufficient to establish a causal connection, there is sufficient evidence to establish a causal connection otherwise. As discussed above, the claimant's testimony and the medical records indicate a significant change in the claimant's condition upon the incident of her compensable fall. Additionally, Dr. Capocelli made an earlier statement relating to causation. On June 8, 2007, Dr. Capocelli wrote that he recommended further evaluation of the claimant's condition, in particular her hip and its relationship to her low back pain, "which I do believe with a reasonable degree of certainty is related to her original injury and should be evaluated as such." Dr. Capocelli clearly drew a causal connection among the compensable injury, her ongoing problems and her continued need for treatment. In his February 2008 letter, Dr. Capocelli also stated that she was not a maximum medical improvement and outlined the next steps in her care. The causal connection is well

demonstrated by the claimant's testimony, the medical records and by Dr. Capocelli's statements.

I respectfully dissent from the majority opinion. I would award the claimant additional medical treatment as recommended by Dr. Capocelli. The evidence does not support a finding that she merely suffered an aggravation which resolved by August 2006. The evidence shows that the claimant had low back pain which she was able to manage with no interference with her ability to work before the accident, but that after the accident she experienced pain which she has been unable to manage and which has prevented her return to work. The claimant has shown by a preponderance of the evidence that the recommended medical treatment is reasonable and necessary treatment of her compensable injury.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner