

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307640

VICKI ROBERTS, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICE, INC., EMPLOYER	RESPONDENT NO. 1
PREFERRED PROFESSIONAL INS. CO., INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 13, 2010

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,
Attorney at Law, Benton, Arkansas.

Respondent No. 1 represented by the HONORABLE WALTER A
MURRAY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas. Respondent No. 2
was dismissed from the claim and Mr. Pake did not appear.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

This claim is presently before the Commission on
Remand from the Court of Appeals. In its opinion delivered
March 3, 2010, the Court of Appeals held that Full

Commission erred in failing to make specific findings on the issue of claimant's entitlement to temporary total disability benefits. Accordingly, the Court remanded this claim for the Commission to address this issue. The respondents appeal and the claimant cross appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that all of the medical treatment that the claimant had for her cervical spine was reasonable and necessary and related to her compensable neck injury, a finding that the claimant has proved by a preponderance of the evidence that she was entitled to additional medical treatment in the form of pain management for her cervical problems, a finding that the claimant proved by a preponderance of the evidence that she was entitled to temporary total disability benefits from August 15, 2003, through June 7, 2004, a finding that the claimant was entitled to permanent partial disability benefits in the form of an 11% permanent anatomical impairment rating, a finding that the claimant was entitled to wage loss disability benefits in excess of her 11% permanent anatomical impairment rating in the amount of 10% and finally, a finding that the claimant was not made whole

by the proceeds of a third-party settlement. Based upon our de novo review of the record, we find, that the claimant has failed to meet her burden of proof that she was entitled to the medical treatment she received for her cervical spine; that she has failed to prove she was entitled additional medical treatment; that she has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as she has failed to prove by a preponderance of the evidence that she remained within her healing period and was totally incapacitated from earning wages after July 15, 2003; that she has failed to prove that she was entitled to an 11% permanent anatomical impairment rating, and; that she has failed to prove she is entitled to 10% in wage loss disability benefits. However, we affirm the finding that the claimant was not made whole by the proceeds of the third-party settlement. Therefore, the respondents were not entitled to a statutory lien.

The claimant was employed by the respondent employer as a home health care LPN. On June 24, 2003, the claimant was in an automobile accident where she was rear-ended. The respondents accepted this accident as being

compensable. The claimant went to the emergency room after the accident as she was instructed to do by her employer. The emergency room released the claimant and told her if she was not better the next morning to see her family physician. The claimant testified that she was still having problems with her neck and shoulders and she went to see Dr. Scott Carle. Dr. Carle requested an MRI of the claimant's cervical spine and referred the claimant to Dr. Stephen Cathey. Dr. Cathey reviewed the claimant's MRI, examined the claimant and found that he did not have anything to offer the claimant surgically. Dr. Cathey stated in his July 14, 2003, letter to Dr. Carle:

...On examination, the patient is extremely anxious and tremulous. Her neurological examination is otherwise negative. She specifically has no sign of cervical myeloradiculopathy. She did, however, exhibit exquisite pain with passive range of motion of the cervical spine. There was resulting restriction of the movement and mild paraspinous muscle spasm.

An MRI scan of her cervical spine shows straightening of the cervical lordotic curve secondary to degenerative changes within multiple cervical discs. She has a very small midline disc protrusion at C4-C5, and a left paracentral osteophyte disc protrusion at C6-C7. At C5-C6 there is a fairly prominent, midline disc

herniation, although I don't see significant cord or nerve root compression.

Scott, I have reassured Ms. Roberts that her pain is well explained on the basis of a musculoskeletal injury (i.e. whiplash). It is entirely possible that the degenerative changes noted in her cervical spine are preexisting despite the fact that she denies any prior neck trouble. At any rate, I do not see an indication for cervical disc surgery or other neurosurgical intervention. I believe the patient should be managed with conservative measures including physical therapy, medication, etc. I also discussed the roll of comprehensive pain management if her symptoms become chronic. For the time being, I have switched her from Darvocet to hydrocodone for pain (Anexsia 7.5/325 #30). I am also switching her from Soma to Skelaxin 800 mg t.i.d. The patient says she is to see you tomorrow in follow-up so her conservative treatment can be initiated. As always, I stand ready to reevaluate Ms. Roberts, particularly should her pain change in character or location.

The claimant returned to Dr. Carle who returned the claimant to regular duty and released her from his care on July 15, 2003. The claimant was offered trigger-point injections but she declined that modality of treatment. The claimant was told to return to the clinic if she needed any treatment. The claimant return to see Dr. Carle on July 23,

2003. She again chose to hold off on any soft tissue injections at that time.

The claimant sought treatment from her family physician who referred her to Dr. Zachary Mason. Dr. Mason performed a cervical fusion at C5-6 and C6-7 on August 15, 2003. Dr. Mason released the claimant from his care on July 7, 2004. The claimant returned to work for the respondent employer and worked through March of 2005, when she quit and went to work for Hospice Home Care. The claimant testified that she quit working for the respondent employer because she would have a desk job and better pay.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed

procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

Our review of the evidence demonstrates that the claimant is not entitled to additional medical treatment in the form of surgery that the claimant underwent by Dr. Zachary Mason nor is she entitled to the additional treatment with regard to the pain management. The evidence demonstrates that the claimant was treated conservatively for a strain from the car accident. Dr. Cathey stated that the claimant was not a surgical patient. The medical records from Dr. Carle of July 23, 2003, demonstrate that there was no neurological deficit when the claimant was examined a month after the June 24, 2003, accident. Dr. Carle's notes state that the claimant was still having symptoms and was not working "because she chose not to work." The claimant refused to have any sort of inter-muscular injections. In fact, when Dr. Cathey examined the claimant on July 14, 2003, he noted "she is not presently experiencing any radicular arm pain. Her pain has been refractory to a brief

trial of physical therapy as well as Soma. She was started on Vioxx but could not tolerate the medication due to GI upset." Dr. Cathey did not see any significant cord or nerve root compression. Dr. Cathey noted that he told the claimant that her pain was due to whiplash and while she denied prior neck trouble, he noted the degenerative changes and he did not see any need for surgery. He noted that the claimant should continue conservative treatment with Dr. Carle.

When we consider the medical records of Dr. Carle and Dr. Cathey, we cannot find that the claimant's need for surgery by Dr. Mason was related to the June 24, 2003, car accident. The claimant had a whiplash type strain injury and was not a surgical candidate. Accordingly, we reverse the decision of the Administrative Law Judge.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). When an injured employee is totally incapacitated from earning wages and remains within her healing period, she is entitled to temporary total disability. Id.

The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his/her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. McWilliams, supra; Mad Butcher, supra. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

In Palazzollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his/her healing period and that he suffered a total incapacity to earn wages (citing Breshears, supra.)

As previously noted the claimant has failed to prove by a preponderance of the evidence that the surgery performed by Dr. Mason was reasonable and necessary in connection with her compensable injury. Accordingly, any period of healing associated with this surgery is not causally related to the claimant's compensable injury. Dr. Cathey opined that the claimant was not a surgical candidate. Moreover, Dr. Cathey specifically advised the claimant that the degenerative findings demonstrated on her MRI were pre-existing and not related to her compensable injury. Dr. Cathey noted that conservative treatment was warranted and returned the claimant to Dr. Carle. Dr. Carle administered conservative treatment, offered the claimant trigger point injections which she declined, and eventually released her to regular duty on July 15, 2003. Accordingly,

we find that the claimant has failed to prove by a preponderance of the evidence that remained within her healing period and totally incapacitated from earning wages after she was released to regular duty by her treating physician on July 15, 2003.

Since we find that the claimant has failed to prove by a preponderance of the evidence that the surgery by Dr. Mason was reasonable and necessary, we find that the claimant has likewise failed to prove entitlement to a permanent anatomical impairment rating. The rating awarded by the Administrative Law Judge was based upon Table 75 for the surgery performed by Dr. Mason. Since the surgery was not reasonable and necessary, any rating based upon the surgery is, likewise, not compensable.

Similarly, the treatment by the pain management specialist is also not reasonable and necessary medical treatment and we find that the claimant is not entitled to the treatment. The unrelated fall that the claimant sustained directly correlates with the exacerbation of the claimant's symptoms and the respondents are not responsible for the treatment associated with the fall.

The claimant has also requested wage loss disability benefits in addition to her permanent anatomical impairment. The claimant requested 80% and has appealed the Administrative Law Judge's award of 10%. As we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to a permanent anatomical impairment, we are constrained to find that the claimant is not entitled to wage loss disability. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998).

The respondents have requested a statutory lien on the settlement proceeds from the third-party claim that resulted due to the claimant's compensable event. It is uncontroverted that the claimant received \$25,000.00 in settlement from the third party who was driving the vehicle which struck her on June 24, 2003. The law firm that handled the third party claim for the claimant kept \$6,250.00 as

attorney's fees for their settlement efforts, thereby leaving \$18,750.00 in trust until a determination could be made as to the respondents' request for subrogation.

Ark. Code Ann. § 11- 9-410(a)(2)(B) states that, "In every case, one-third of the remainder shall belong to the injured employee or his or her dependents, as the case may be." Therefore, no matter what, the claimant is entitled to \$6,250.00 of the proceeds. Therefore, that leaves \$12,500.00 in controversy.

The claimant has contended that the respondents are not entitled to any of the third party proceeds because she has not been "made whole." Under the provisions of Ark. Code Ann. §11-9-410, the respondent is only entitled to a statutory lien if it is determined that the claimant has been "made whole" by the third-party action. General Accident Ins. v. Jaynes, 343 Ark. 143, 33 S.W.3d 161 (2000). The respondent can receive reimbursement only for the amount of which the sum received in the third party action exceeds the total amount of damages incurred. In this particular case, after taking in all facts outlined in McDonald v. Logan Co., Full Commission Opinion filed June 17, 2004 (F103875) and Gerald James v. Phillip Morris, Full

Commission Opinion filed October 24, 2001 (E713687), we find that the sums received by the claimant in the third party action do not exceed the total amount of damage incurred by the claimant and therefore the respondents are not entitled to any of the proceeds of the third-party settlement.

Therefore, for all the reasons set forth herein, we affirm in part and reverse in part the decision of the Administrative Law Judge.

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 opinion. The majority, on remand from the Court of Appeals, again finds that the claimant merely sustained a "strain" injury in the June 24, 2003 car accident and that the claimant did not prove that the

surgery performed by Dr. Zachary Mason was causally related to the June 24, 2003 car accident. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that she sustained more than a mere "strain" injury in the June 24, 2003 car accident; in fact, she suffered two herniated discs at the C5-6 and C6-7 levels which required surgery. Therefore, I must respectfully dissent from the entirety of the majority opinion denying benefits stemming from the claimant's herniated disc injury. I concur in the finding that the claimant has not been made whole by the proceeds of the third party settlement.

As for the TTD determination specifically requested by the Court of Appeals, the claimant has requested temporary total disability benefits from August 5, 2003 through July 7, 2004. In order to be entitled to temporary total disability benefits, the claimant has the burden of proving by a preponderance of the evidence that she remains in her healing period and that she suffers a total incapacity to earn wages. Ark. State Hwy & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find that the claimant remained in her healing period from

August 15, 2003 through June 7, 2004. The medical reports clearly show that the claimant underwent a two-level cervical fusion on August 15, 2003 and was not released from her treating physician, Dr. Mason, until June 7, 2004. I further find that the medical evidence, as well as the claimant's credible testimony, shows that the claimant was unable to earn wages during the period of August 15, 2003 through June 7, 2004. The claimant did not work for any employer between those dates and was not released to return to work by Dr. Mason until June 7, 2004. As such, I find that the claimant is entitled to temporary total disability benefits from August 15, 2003 until June 7, 2004, and must respectfully dissent from the majority on this issue.

HISTORY

On June 24, 2003, the claimant, a nurse, and another nurse were driving to see a patient. They were stopped at a red light at University Avenue and Asher when another car struck her car from behind. The claimant testified that her head hit the back of the head rest and then bounced forward. The claimant testified that she told the police officer at the scene that her neck was hurting. The claimant testified that prior to June 24, 2003, she had

not had any problems with neck pain, shoulder pain or arm pain. The claimant reported the injury to her employer and was sent to the St. Vincent's Hospital Emergency Room. The claimant was seen at the ER and advised to follow up the next day. The next day the respondent sent the claimant to Dr. Carle at Concentra. The claimant testified that she was experiencing pain in her neck and both shoulders radiating down into her arms to the elbow. Dr. Carle ordered physical therapy but the claimant was not able to do it as it was making the pain worse. Dr. Carle ordered an MRI. After receiving the MRI results, Dr. Carle put the claimant in a soft neck collar and referred her to Dr. Cathey, who saw the claimant on July 14, 2003:

...As you well know she was rear ended in a motor vehicle accident on June 24, 2002, while on the job as a home health nurse for St. Vincent Home Care. Since then, she has complained of pain in her neck and upper back with associated suboccipital headaches. She is not presently experiencing any radicular arm pain....

On examination the patient is extremely anxious and tremulous. Her neurological examination is otherwise negative. She specifically has no sign of cervical myeloradiculopathy. She did, however, exhibit exquisite pain with passive range of motion of the cervical spine. There was resulting restriction of

movement and mild paraspinous muscle spasm.

An MRI scan of her cervical spine shows straightening of the cervical lordotic curve secondary to degenerative changes within multiple cervical discs. She has a very small midline disc protrusion at C4-C5, and a left paracentral osteophyte/disc protrusion at C6-C7. At C5-C6 there is a fairly prominent, midline disc herniation, although I don't see significant cord or nerve root compression.

Scott, I have reassured Ms. Roberts that her pain is well explained on the basis of a musculoskeletal injury (i.e. whiplash). It is entirely possible that the degenerative changes noted in her cervical spine are preexisting despite the fact that she denies any prior neck trouble. At any rate, I do not see an indication for cervical disc surgery or other neurosurgical intervention. I believe the patient should be managed with conservative measures including physical therapy, medication, etc. I also discussed the roll of comprehensive pain management if her symptoms become chronic. For the time being, I have switched her from Darvocet to hydrocodone for pain... I am also switching her from Soma to Skelaxin 800 mg t.i.d. The patient says she is to see you tomorrow in follow-up so her conservative treatment can be initiated. As always, **I stand ready to reevaluate Ms. Roberts particularly should her pain change in character or location.**

[Emphasis added]

Unfortunately, Dr. Cathey's assessment of the claimant's condition turned out to be overly optimistic.

The claimant returned to Dr. Carle on July 15, 2003, reporting that the pattern of symptoms is worsening. On July 23, 2003 the claimant again returned to Dr. Carle reporting that her pattern of symptoms is no better, and also reporting some right arm/hand numbness since she saw Dr. Cathey. Dr. Carle advised her to let Dr. Cathey know of her new symptoms.

After being informed by respondent that they would no longer pay for any medical treatment, the claimant went to see her family physician, Dr. James Cooper, who wrote:

This is a 48-year-old who had an MRI of the cervical spine done recently. She was involved in a motor vehicle accident on 06/24/2003. She has an obvious disc herniation, and we are going to get her referred up to Zach Mason as rapidly as we can.

On August 5, 2003, Dr. Zachary Mason stated:

Ms. Roberts is a 48 year old home health nurse who was involved in a motor vehicle accident when she was rear-ended on 6/24/03. She complains of neck pain, headaches, occasional nausea and vomiting, radiation into the bilateral shoulders and down the left arm, with numbness into the third and fourth fingers. She states that her pain occasionally travels down her back. She has attempted physical therapy, but it greatly increased her pain and discomfort, and reports that pain

medications cause her nausea. She has had a recent MRI scan which confirms cervical disc herniations with nerve root compromise at C5-6 and C6-7.

On August 15, 2003, Dr. Mason performed a partial corpectomy at C5-6 and C7 with placement of dowel graft for cervical disc herniation and spondylosis. The Operative Report indicates that there was significant cord compression at both the C5-6 and C6-7 levels.

DISCUSSION

The majority's decision appears to be based solely on the conclusion that the claimant only suffered a "strain" injury in the June 24, 2003 car accident. Based on this false premise, the majority finds that the fusion surgery performed by Dr. Mason on the two herniated discs was unrelated to the "strain" injury. To reach this conclusion, the majority had to arbitrarily disregard the fact that MRI imaging showed the claimant, who had never complained of neck problems prior to the car accident, now had two herniated cervical discs. The majority also had to arbitrarily disregard the fact that the treatment provided by Dr. Carle and Dr. Cathey for a "strain" injury was ineffective, and that the claimant's treating physicians

ultimately determined that her injury required cervical surgery.

The claimant testified that she had never had neck problems before the car accident, nor had she ever received any treatment for neck problems. The medical record corroborates her credible testimony. The claimant's credible testimony and the medical record also shows that, after the car accident, the claimant had significant pain in her neck, and an MRI confirmed herniated discs at C5-6 and C6-7. The majority fails to explain why it has not considered the presence of the two herniated discs when making its finding that the claimant only sustained a "strain" injury. While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, 97 Ark. App. 338, 249 S.W.3d 149 (2007). Here, even Dr. Cathey, upon whose opinion the majority opinion is ostensibly based, noted the presence of the herniated discs.

Furthermore, the treatment provided to the claimant by Dr. Carle and Dr. Cathey for a "strain" injury, did not provide the claimant with any relief. At her last visit with Dr. Carle, Dr. Carle advised the claimant to return to Dr. Cathey to inform him of right arm/hand numbness symptoms. Dr. Cathey had stated in the July 14, 2003 report that he "stand[s] ready to reevaluate Ms. Roberts particularly should her pain change in character or location." Although even Dr. Carle appeared to be of the opinion that the claimant required further treatment, and Dr. Cathey was "stand[ing] ready" to provide it, the respondent did not allow the claimant to pursue any further treatment, instead informing her that it was controverting her claim for any additional medical treatment. The first doctor the claimant saw after the respondent controverted her claim stated that she "has an obvious disc herniation" and immediately referred her to a neurosurgeon, Dr. Mason, who immediately scheduled her for surgery.

There is no evidence in the record to indicate that the herniated discs which required cervical surgery came from anything other than the car accident. Arkansas law has long recognized that a causal relationship may be

established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962). Considering all of the evidence of record showing that the claimant immediately complained of neck pain after the car accident, that she had never had neck pain in the past, the fact that MRI imaging shows two herniated discs, plus the fact that the treatment provided by Dr. Carle and Dr. Cathey for a "strain" injury was ineffective, for the majority to characterize the claimant's injury as a mere "strain", not only arbitrarily disregards the preponderance of the evidence of record, but also flies in the face of common sense.

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

PHILIP A. HOOD, Commissioner