

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F903051

ELVA TOPE, EMPLOYEE	CLAIMANT
PREVENT, INC., EMPLOYER	RESPONDENT
TWIN CITY FIRE INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED APRIL 30, 2010

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

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

Respondent represented by the HONORABLE TOM HARPER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the
Administrative Law Judge filed August 27, 2009.

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

1. The claimant sustained a compensable injury to her right shoulder on July 24, 2008.
2. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$522.00 for total disability benefits and \$392.00 for permanent partial disability benefits.

3. The claimant has failed to prove by a preponderance of the evidence that the respondents are liable for payment of medical benefits provided subsequent to February 6, 2009.

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. I would award the claimant additional medical benefits including the treatment of the claimant's shoulder and clavicle from the date of her motor vehicle accident to the date of the hearing and the treatment performed and recommended by Dr. Arnold.

HISTORY

The claimant testified that she was injured on July 24, 2008, in a fall at work. The respondents provided medical treatment of her resulting rotator cuff tear. She underwent arthroscopic rotator cuff repair, subacromial decompression and distal clavicle resection by Dr. Sites on November 12, 2008. Physical therapy began the following day. Dr. Sites projected a six-month period of recovery. The claimant testified that she did not progress at the normal rate in physical therapy, and that she was unable to add resistance training to her therapy sessions. The physical therapy notes showed that the claimant had improvements in range of motion but consistent complaints of pain throughout her pre-motor vehicle accident therapy. In December 2008 and January 2009, the therapist noted pain in

her shoulder and clavicle and that the claimant's targeted muscles were "very weak" (emphasis in the original). She testified that prior to February 6, 2009, she was not at her pre-injury strength and that she was "in no way, shape or form healed."

The claimant testified that, on February 6, 2009, she had a motor vehicle accident. She drove her car into her parking space at home when her car accelerated or her brakes failed, despite her foot being on the brake pedal, causing her to hit a fence and tree. The car was moving slowly, so that the air bags did not deploy. She was gripping the steering wheel with both hands, and she was wearing her seatbelt. She went to the emergency room later in the day to get checked out since she already had a shoulder injury. The emergency record reflects that she had mild diffuse shoulder pain and no pain in her clavicle area. The claimant testified that her shoulder symptoms were the same immediately after the accident as they were before the accident. Two or three weeks after the accident, her symptoms began to change. She had increasing discomfort in the back of her shoulder where the rotator cuff repair was and in the front of her shoulder where the clavicle resection was. She recalled sitting at home after therapy,

approximately two or three weeks after the motor vehicle accident, when she felt a lump at the base of her neck on the right side, and she "knew that that was not a good thing." She reported this lump to her physical therapist and Dr. Sites at her next opportunity. Her other swelling was the same.

The claimant continued to undergo physical therapy and was seen by Dr. Sites who noted her pain and lack of progress in physical therapy. On April 2, 2009, Dr. Sites commented that it was "more-likely-than-not that her current right shoulder difficulties are a result of her low-speed MVA she sustained." The claimant was not able to obtain another visit with Dr. Sites.

The claimant saw Dr. Arnold on May 26, 2009, reporting that "her shoulder was not normal prior to the accident but it was improving, and the accident really seemed to aggravate it." On examination, he noted right shoulder pain, limited range of motion, weakness, a prominence of her clavicle, and that the clavicle was anteriorly subluxated. Dr. Arnold discussed causation in his report:

I told her it is difficult to determine due to the fact that she had an injury. I would think some of this may be from the car wreck; however, due to

the fact that she did not recover completely from her cuff repair, I think this is some aggravation of the pre-existing.

Dr. Arnold's diagnostic testing revealed a recurrent rotator cuff tear and sternoclavicular subluxation.

DISCUSSION

The claimant has proven by a preponderance of the evidence that her need for treatment of her right shoulder and clavicle after her motor vehicle accident was causally connected to her compensable injury. Under Arkansas workers' compensation law, 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). 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).

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).

The issue in this claim is whether the claimant's entitlement to benefits is barred by Ark. Code Ann. Sec. 11-9-102(4)(F)(iii):

Under this subdivision (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

In Davis v. Old Dominion Freight Line, Inc., 341 Ark. 751, 20 S.W.3d 326 (2000), the Arkansas Supreme Court determined that Act 796 of 1993 incorporated the existing case law regarding independent intervening cause, in particular Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984). Under the Guidry test, "if there is a causal connection between a primary compensable injury and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity of the claimant that is 'unreasonable under the circumstances.'" Davis, supra at 755-6, citing Guidry, 11 Ark. App. at 223, 669 S.W.2d at 485 (1984). The determination of whether there is a causal connection between the injury and the disability is a

question of fact for the Commission to determine. Carter v. Flintrol, Inc., 19 Ark.App. 317, 720 S.W.2d 337 (1986).

In Davis, supra, the claimant had a compensable ankle injury which was repaired surgically. However, while still healing, the claimant stepped awkwardly to avoid stepping on a child, causing disruption of the original surgical repair. The Arkansas Supreme Court remanded the claim to the Full Commission to determine whether the necessary causal connection existed, and whether or not the disruption of the healing process of Davis's primary injury was caused by unreasonable conduct. In Davis v. Old Dominion Freight Line, Full Commission Opinion filed August 14, 2000 (WCC No. E616249), the Full Commission awarded benefits, finding that there was a causal connection between the original compensable injury and subsequent disability, and that the claimant's attempt to avoid stepping on his toddling niece was not unreasonable under the circumstances.

In K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002), the claimant suffered an admittedly compensable back injury and, while within his healing period, experienced an increase in pain lifting a one and one-half gallon gas can. The claimant's symptoms were

consistently reported since the occurrence of the original injury. The Court affirmed the finding that there was no independent intervening cause to prevent the claimant's recovery of benefits.

Here, the claimant suffered a compensable injury to her right shoulder for which she had surgery and physical therapy. Less than three months into her projected six-month healing process, the claimant was in a motor vehicle accident caused by a system failure in the car. Subsequent to this accident, the claimant's symptoms increased to pre-surgical levels, and eventually, a recurrent rotator cuff tear and a sternoclavicular subluxation were diagnosed. These facts are remarkably similar to both the Davis and K II cases.

The claimant's testimony and her medical records show that she was not fully healed, and that she suffered from pain and weakness in her shoulder and clavicular area. She testified that it was her understanding as a registered nurse that the tendons and ligaments would take six or seven months to recover from the surgery. Her accident was less than three months into her recovery period.

A compelling piece of evidence is the fact that the claimant did not suffer any other injury in the

accident, in particular any injury to her left shoulder or clavicle across which her seatbelt lay, restraining her. Her healthy shoulder and clavicle survived the accident intact, while her healing shoulder was damaged in the same areas previously damaged.

I note that Dr. Sites stated in his February 19, 2009 report that the claimant was having "essentially no shoulder pain" prior to her February motor vehicle accident, which is in direct conflict to the physical therapy records which show that the claimant consistently reported shoulder pain from November 12 up to the date of the motor vehicle accident, as well as in direct conflict with the claimant's testimony.

On April 2, 2009, when Dr. Sites attributed her current right shoulder problems to her motor vehicle accident, he did not elaborate or discuss the relationship between her previous injury, her healing - but not healed - condition and the accident. Dr. Sites' comments do not conflict with Dr. Arnold's opinion that the accident aggravated the pre-existing injury. It is patently clear that her motor vehicle accident is a factor in her current problems, and it cannot be argued otherwise. However, the fact that her accident was a factor in her problems does not

prevent the finding of a causal connection between the compensable injury and the current need for treatment of her shoulder and clavicle. The claimant's shoulder was in a weakened and healing condition, due to her compensable injury, at the time of the motor vehicle accident, and that weakened part of her body sustained the only injury in the accident.

I find that the claimant has proven by a preponderance of the evidence that there was a causal connection between her compensable injury and her current need for treatment. I also find that the treatment rendered by Dr. Arnold, including the diagnostic studies and the physical therapy, were reasonable and necessary treatment of her compensable injury.

As to whether the motor vehicle accident was unreasonable, the claimant testified that she was sure that her foot was on the brake as her car rolled out of her control as she attempted to park, that she had successfully slowed to enter her parking place but could not stop the car, that this had not happened before the February 2009 accident, and that subsequently her car went under more than one repair before the braking problem was resolved. Furthermore, there is no evidence that the claimant's

behavior in driving was outside of her medical restrictions. I find that the claimant's accident was not unreasonable under the circumstances.

In conclusion, I would reverse the decision of the Administrative Law Judge. I would award the claimant additional medical benefits for the treatment of her recurrent rotator cuff tear and her sternoclavicular subluxation.

For the foregoing reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner