

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER D804265**

**LINDA MARIE GAVIN CLOWERS,  
EMPLOYEE**

**CLAIMANT**

**DILLARDS, INC.,  
EMPLOYER**

**RESPONDENT**

**LIBERTY MUTUAL INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED SEPTEMBER 26, 2003**

Hearing conducted July 1, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. J. Gary Davis, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. J. C. Baker, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This is a dispute over the claimant's request for additional medical benefits for her admittedly compensable 1988 back injury.

The claimant contended that she should be awarded additional medical and related expenses for implantation of a spinal cord stimulator as recommended by Dr. Thomas Hart; \$33.00 for reimbursement of medical mileage expenses; and payment for three emergency room visits, one on September 12, 2002, another October 6, 2002, and the third, October 8, 2002.

The respondents contended that the spinal cord stimulator is not reasonably necessary in connection with the claimant's compensable injury and is also barred by res judicata because a similar request was denied by the Commission following a hearing on February 23, 1998. However, the respondents conceded that the claimant's mileage calculations were correct and the underpayment occurred as the result of a mathematical error. Finally, the respondents contended that

the emergency room visits by the claimant were not reasonably necessary because she was under the care of Dr. Thomas Hart and had medication available for pain, such as morphine.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed on February 18, 1988, when the claimant sustained a compensable injury.

3. The preponderance of the evidence shows that the claimant's request for the procedure to implant a spinal cord stimulator is reasonably necessary in connection with her compensable injury.

4. As a result of a mathematical error, the claimant's medical mileage expense has been underpaid in the amount of \$33.00 which should be paid by the respondents.

5. The preponderance of the evidence shows that the claimant's emergency room treatment on September 12, October 6, and October 8, 2002, was reasonably necessary in connection with her compensable injury and should be the responsibility of the respondents.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

**DISCUSSION**

On February 18, 1988, the claimant injured her low back while pushing trollies at the Dillards Distribution Center. Since that time, she has been treated or examined by several physicians and has received a variety of medication and treatment, including a percutaneous diskectomy at L5-S1 on August 2, 1990, and on February 26, 1992, an anterior lumbar fusion, neither of which provided significant relief.

Her early treatment was largely with Dr. H. Austin Grimes. Later, in 1994, she began treatment at the Little Rock Pain Clinic with Dr. Robert Hardin who provided epidural steroid injection therapy from September, 1994, through January 3, 1995. She then continued her care at the pain clinic with Dr. John Conklin who performed an epidural diagnostic differential block in May, 1997, which provided no pain relief. In September, 1995, she started treatment with Dr. Susan Samlaska, an anesthesiologist with the pain clinic, whose treatment included lumbar facet blocks, a lumbar facet radiofrequency denervation procedure, and medication. Her notes, beginning in January, 1996, mentioned that the claimant also received some benefit from the use of a TENS unit. Her April 5, 1996, note indicated that a request for the claimant to receive biofeedback and stress management was denied by the insurance carrier. By July, 1996, Dr. Samlaska was considering a dorsal column stimulator, which was also denied by the insurance carrier.

On February 23, 1998, a hearing was conducted to consider the claimant's first request for a diagnostic differential test, a preliminary step to implantation of a dorsal column stimulator, the claimant's current request. On May 28, 1997, before that hearing, the claimant had been examined by Dr. Jim J. Moore, a respected Little Rock neurosurgeon, who wrote that he did not think she would be a candidate for "any consideration for a surgically implantible device." He recommended

supportive and symptomatic treatment and hoped that biofeedback and some psychologic support might reduce the claimant's need for her extensive medication program. Even though the respondents agreed with his skepticism about the dorsal column stimulator, there is no indication that they offered biofeedback, which had also been recommended by Dr. Samlaska.

Following the hearing, the previous administrative law judge denied the claimant's request, specifically finding that, in light of her testimony that she had not benefitted substantially from the use of a TENS unit, which also gives out electrical impulses, there was no reason to believe that she would benefit substantially from the implantation of a dorsal column stimulator. On de novo review, a majority of the previous members of the Commission adopted that finding in a September 14, 1998, Opinion and also denied the claimant's request.

Since that time, the claimant's treatment has continued primarily with Dr. Thomas Hart whose notes indicate his interest in avoiding any type of implantable device, unless as an absolute last resort. However, by June 18, 2002, he wrote that since she was already on narcotic analgesic medications, including morphine, an option would be reconsideration of a spinal cord stimulator. He noted that the claimant was not a surgical candidate, had failed conservative care, and needed psychological evaluation and clearance so that a trial of a spinal cord stimulator would be attempted and, if it overrode her pain, then a permanently placed spinal cord stimulator would be of benefit. In an August 8, 2002, report psychologist Dr. Lewis F. Bracey described his evaluation of the claimant and cleared her for the procedure. Since that time, she was seen at the emergency room on three occasions and also by Dr. Hart, who wrote in March, 2003, questioning the insurance carrier's denial of the spinal cord stimulator trial while continuing to pay for her narcotics and emergency

room visits. The claimant has requested, again, that the Commission consider the issue of a spinal cord stimulator now recommended by Dr. Hart.

The respondents contend that the doctrine of res judicata bars consideration of the claimant's request. That doctrine, applicable to decisions of the Commission, forbids the reopening of matters once judicially determined by competent authority. See, e.g., Tuberville v. International Paper Co., 18 Ark. App. 210 (1986). However, it does not bar a determination that a subsequent period of complications may entitle the claimant to additional medical benefits, as in Cariker v. Ozark Opportunities, 65 Ark. App. 60 (1999). In that case, the claimant's request for further evaluation or treatment for reflex sympathetic dystrophy and causalgia was denied after a June, 1995, hearing, but then awarded after a 1996 hearing, where additional physicians later concurred in the request for the treatment, in spite of the argument that res judicata barred the issue. Similarly, here, res judicata should not bar the claimant's second request, given her additional treatment, the worsening of her symptoms, and the additional opinion of Dr. Hart that a spinal cord stimulator is appropriate treatment.

The current testimony of the claimant and her husband showed that even though she underwent fusion surgery in February, 1992, she has continued to suffer pain in her back and right leg to the point that sometimes she was unable to walk and, if she tried to walk, her stomach hurt and she became nauseated. She testified that she has taken medication since the time of her injury and that her current medication included Kadian, a form of morphine. The claimant further testified that she hurts everyday and that, about three times a month her back pops for reasons unknown to her, and then the medication does not give her relief. She stated that she would like to take less medication, primarily because of the side effects, such as constipation and dry mouth, and that she

had to have all of her teeth pulled because of the side effects of her medication. As to her 2002 emergency room visits, it was her testimony that they were associated with an increase in her symptoms so that she was “ready to kill myself” and that they occurred in the evening so that Dr. Hart was not available and that Dr. Hart also required appointments in advance. She also stated that at the time of the previous hearing in 1995 she had symptoms that were similar, but not as bad, and that she could bear it back then.

Ark. Code Ann. §11-9-508 requires the respondents promptly to provide additional medical care as may be reasonably necessary in connection with the claimant’s compensable injury. The current record shows that the claimant’s condition has worsened since the previous denial of the spinal cord stimulator, in spite of additional care and treatment by Dr. Hart. The record also shows that Dr. Hart, although not initially inclined to use an implantable device, has come to the conclusion that the spinal cord stimulator should be considered. Dr. Moore’s opinion of 1997 is not current; was rendered without the benefit of a review of the years of intervening treatment and the claimant’s current condition; and is now entitled to less weight. Moreover, the reasoning of the previous administrative law judge would permit respondents forever to bar the use of a spinal cord stimulator simply by giving the claimant a TENS unit. If the TENS unit provided substantial relief, there would obviously be no need, or request, for a spinal cord stimulator. Where, as here, the TENS unit gave less than full relief, then the spinal cord stimulator would be denied as it was in the previous opinion.

The claimant’s three emergency room visits were also reasonably necessary since her pain had reached the level that her narcotic medication gave her no relief and her treating physician was not available since he required appointments and the need for treatment occurred after business hours.

**AWARD**

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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RICHARD B. CALAWAY  
Administrative Law Judge