

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213193

MARGARET RUCH

CLAIMANT

SMITH PALLET COMPANY,
SELF INSURED

RESPONDENT

COMPENSATION MANAGERS,
THIRD PARTY ADMINISTRATOR

RESPONDENT

OPINION FILED DECEMBER 31, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,
Sebastian County, Arkansas.

Claimant represented by NEAL HART, Attorney, Little Rock, Arkansas.

Respondent represented by ROBERT HENRY, III, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 4, 2003, in Fort Smith, Arkansas. A pre-hearing order had previously been entered in this case on September 9, 2003. This pre-hearing order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that they could agree on the appropriate compensation rates. A copy of this pre-hearing order with that amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On November 4, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$139.00 for total disability and \$139.00 for permanent partial disability.
3. On November 4, 2002, the claimant sustained compensable injuries to her neck and right shoulder.
4. There is no dispute over the payment of medical expenses incurred through April 10, 2003 and all such expenses have been paid.

5. There is no dispute over the claimant's entitlement to temporary total disability benefits through April 7, 2003 and such benefits were paid at the weekly rate of \$139.00.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services after April 10, 2003, her entitlement to additional temporary total disability from April 8, 2003 through a date yet to be determined, and appropriate attorney's fees.

In regard to these issues, the claimant contends:

"Claimant is entitled to payment of additional medical expenses, plus payment of additional TTD benefits from the date last paid through a date to be determined. Claimant requests a physician change. Claimant is entitled to payment of a statutory attorney's fee on all controverted benefits."

In regard to these issues, the respondent contends:

"Claimant failed to return for medical care, has failed to cooperate concerning medical care, has engaged in out of state travel, is capable of returning to work activities, and is not entitled to additional temporary total disability benefits."

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to additional medical services for her admittedly compensable injuries, on and after April 10, 2003. Under Ark. Code Ann. §11-9-508, the respondents are obligated to provide the claimant with all "reasonably necessary medical services" for her admittedly compensable injuries. However, the burden remains upon the claimant to prove that the medical services she now seeks constitute "reasonably necessary medical services" within the meaning of this subsection. In order to meet this burden, the claimant must show that the medical services in question were necessitated by or connected with her compensable injuries and have a

reasonable expectation of accomplishing the purpose or goal for which they are intended.

The stipulations and the evidence presented establish that the claimant sustained compensable injuries to her neck and right shoulder in a specific employment related incident on November 4, 2002. The claimant initially saw Dr. James Rogers, her family physician, for these injuries. The respondent then sent the claimant to Dr. Chris Young, an orthopaedic surgeon, for treatment of her admittedly compensable right shoulder injury. She was also referred by the respondent to Dr. Reginald Rutherford, a neurologist, for treatment of her admittedly compensable neck or cervical injury. The evidence reveals that the claimant submitted to the various tests and treatment modalities recommended by these physicians for her compensable injuries.

MRI studies of the claimant's right shoulder and cervical spine were performed at the direction of Dr. Young. The claimant's cervical MRI was interpreted as demonstrating a straightening of the curvature of the cervical spine or a loss of normal cervical lordosis. It further revealed the presence of some degenerative changes at C4-5 and C5-6, with a spondylosis at both these levels. Finally, this test showed the presence of a "moderate" subligamentous disc herniation at the C4-5 level with resulting "mild" central impingement of the spinal cord and degenerative changes at the C5-6 level with resulting "mild" impingement of the spinal cord. The MRI of the claimant's right shoulder was interpreted as showing the presence of an impingement syndrome with a possible undersurface rotator cuff tear and acromioclavicular joint arthritis.

On January 30, 2003, Dr. Young performed an initial arthroscopy of the claimant's right shoulder. This evolved into an "open" subacromial decompression with a excision of a portion of the claimant's distal clavicle.

The claimant was next seen by Dr. Young on February 6, 2003. At that time, Dr. Young noted that the claimant's surgical incision was healing with no evidence of infection. He directed the claimant to remain off work, to participate in physical therapy, and to return

in approximately one month. He also indicated that he was “hopeful” that the claimant would be able to return to work, from the standpoint of her right shoulder injury, at the time of her return visit. Apparently, the claimant was again seen by Dr. Young on March 11, 2003, although his office notation of this date has not been introduced. However, his report of October 17, 2003, indicates that on March 11, 2003, the claimant had reached the point where she could return to work (from the standpoint of her compensable right shoulder injury) or where she could be released from further treatment of this compensable injury. Another follow up appointment appears to have been scheduled for April 10, 2003.

There is no doubt that the claimant did not keep her scheduled appointment with Dr. Young on April 10, 2003. The claimant testified that she was unable to keep this appointment due to a respiratory infection and the necessity of a three day trip to accompany her husband to his father’s funeral. I find the claimant’s testimony in this regard to be credible. The claimant has not been able to return to Dr. Young, due to the respondent’s termination of her medical benefits and her lack of finances.

During this same period of time, the claimant was also under active medical treatment from Dr. Rutherford for her compensable neck or cervical injury. In his office notation of March 11, 2003, Dr. Rutherford notes that the prescribed program of cervical traction has not been beneficial and is discontinued. However, he continued the claimant’s medication and scheduled her for an epidural steroid injection at the level of the C4-5 herniated disc by a Dr. Ackerman. A follow up appointment was made for the claimant after the epidural steroid injection had been performed.

The claimant returned to Dr. Rutherford on April 4, 2003. At that time, Dr. Rutherford scheduled the claimant to undergo electrodiagnostic studies (EMG-NCV) and directed her to continue her medication. She was instructed to return for follow up, once the nerve tests had been performed. The claimant has been unable to have the recommended tests performed or to return to Dr. Rutherford, due to the respondent’s

termination of her medical benefits and her lack of finances.

The respondent's claims manager, Nick Jones, testified that when he was informed the claimant had failed to appear at her April 4, 2003 appointment with Dr. Young, he made one attempt (by phone) to contact the claimant and ascertain the reason for her failure to keep her scheduled appointment. He testified that he was advised by someone, who answered the claimant's phone, that the claimant had gone to California and that they did not know exactly when she would return. Based upon this one phone conversation, Mr. Jones concluded that the claimant had abandoned treatment and had left the area indefinitely. Therefore, he stopped authorization for the claimant to obtain any further medical treatment from Dr. Rogers or Dr. Rutherford, and terminated her temporary total disability benefits.

The claimant testified that when she returned from the funeral in California, she learned that the respondent was refusing to provide her with any further medical treatment by either Dr. Young or Dr. Rutherford. As a result of the respondent's action she has been unable to follow up with these physicians. She testified that she has attempted to obtain continuing treatment and the tests recommended by Dr. Rutherford through Dr. Rogers, her family physician. This fact is corroborated by the records of Dr. Rogers. However, she has been unable to obtain the recommended testing or any substantial continuing treatment for her injuries, due to limited finances.

The respondent has attempted to obtain from Dr. Young and Dr. Rutherford their expert opinion concerning the claimant's need for continuing medical services after April 10, 2003, and her ability to work. However, I would note that neither of these physicians were advised that the reason the claimant had not returned for further follow up was due to the respondent's failure to accept liability for or authorize their continued services. The failure to divulge this information could easily lead these physicians to assume that the claimant had simply abandoned further treatment, due to a lack of continuing difficulties.

Such a conclusion and assumption would clearly be contrary to the claimant's testimony and the medical reports and records of Dr. Rogers, all of which I find to be credible.

In his report of October 17, 2003, Dr. Young opines that the claimant had, at least by the date of the report, reached "maximum medical improvement" in regard to her compensable shoulder injury. He also indicates that the claimant has been released by him to return to work (from the standpoint of her compensable shoulder injury), but does not give any specific date for this release.

On the other hand, Dr. Rutherford clearly states that he is unable to express any opinion concerning the claimant's need for continued medical treatment for her compensable neck or cervical injury or her ability to return to employment (from the standpoint of her neck or cervical difficulties). He further states that it is impossible for him to express an opinion on these matters, with any degree of accuracy, until after the additional diagnostic testing he had previously recommended has been performed.

The medical evidence clearly shows that, as of the claimant's last visits with Dr. Young and Dr. Rutherford, she reasonably required further medical services for her compensable shoulder and cervical injuries. There is no credible evidence that the claimant has experienced a complete resolution or even substantial improvement of these compensable injuries, since her last visits with Dr. Young and Dr. Rutherford. In fact, the claimant's testimony and the medical reports of Dr. Rogers show otherwise. If, as Dr. Rutherford suspects, the claimant's cervical and right arm symptoms are attributable to nerve root impingement, such a condition and resulting symptoms would not reasonably be expected to simply resolve over time without appropriate medical intervention.

The evidence presented fails to show that the claimant has willfully refused or intentionally obstructed appropriate medical treatment or testing, necessitated by her compensable injuries. Her failure to keep only one scheduled appointment would not form a reasonable basis for reaching such a conclusion, particularly in light of the fact that the

claimant has shown good cause for her failure to keep this scheduled appointment. There is no basis in the Act on applicable case law to deprive a claimant from further benefits for a compensable injury, simply because they missed one scheduled appointment, particularly if there was a satisfactory cause for their action.

It is my opinion that the greater weight of the credible evidence establishes that at least one more visit or evaluation by Dr. Young would clearly constitute “reasonably necessary medical services” for the claimant’s compensable right shoulder injury. It is my further opinion that a greater weight of the credible evidence shows that the testing recommended by Dr. Rutherford and at least one more follow up evaluation by Dr. Rutherford (after the completion of this testing) would also clearly constitute “reasonably necessary medical services” for the claimant’s compensable neck or cervical injury. Pursuant to Ark. Code Ann. §11-9-508, the expense of such services rests upon the respondent herein (subject to the medical fee scheduled established by this Commission). A decision in regard to any further medical services by these providers, except those heretofore set forth, is reserved for future determination (if necessary), following these evaluations and testing.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant’s entitlement to additional temporary total disability benefits from April 8, 2003 through a date yet to be determined. Both of the compensable injuries involved in this case are to portions of the claimant’s body which are not “scheduled” under Ark. Code Ann. §11-9-521. Thus, in order to be entitled to the additional temporary total disability benefits she now seeks, the claimant must prove that she has continued within her healing period from the effects of one or more of her compensable injuries and has been rendered totally disabled as a result of the effects of one or more of these compensable injuries.

The duration of the healing period is a medical question, which must be resolved upon the basis of the greater weight of the credible medical evidence presented. Applicable case law provides that the healing period ends when the claimant has achieved the maximum benefit of time and medical treatment in the resolution or improvement of the actual physical damage caused by the compensable injury. Once any remaining damage becomes fixed, permanent, and ascertainable, then the healing period has ended.

As previously noted, the claimant was still under active medical treatment by both of her authorized physicians, when the respondent ceased providing her with reasonably necessary medical services for these compensable injuries. The evidence shows that since that time the claimant has made repeated attempts to obtain continued medical services for her compensable injuries through other means. However, due to a lack of finances and the respondent's refusal to provide her with any medical services, these attempts have been essentially unsuccessful.

After consideration of the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant has continued within her healing period from the effects of her compensable shoulder and neck or cervical spine injuries from April 8, 2003 through the present time. In reaching this decision, I am aware that the claimant's healing period may have been unduly extended by her inability to obtain appropriate reasonably necessary medical services. However, this situation was brought about by the respondent's hasty and unjustified refusal to provide medical services recommended by their own physicians. Thus, the respondent has no complaint that the claimant's healing period and possibly her period of temporary total disability has been unduly extended.

In regard to the claimant's actual "disability" during this period, the claimant testified that she felt herself incapable from performing any employment for which she was qualified, and has made no attempt to find other employment. She testified that since the

compensable injury she has experienced constant pain and loss of use of her right arm and shoulder. She also describes pain and a burning sensation in her neck and shoulder.

The record reveals that the claimant is forty-three years old. She has a tenth grade formal education with a GED. Although she has two years of experience in clerical work, while in the Air Force, this was a considerable number of years ago. Her subsequent work history is somewhat spotty, as she was a housewife for approximately seventeen years. She lists a three year history of employment managing café and a seven month period of employment as a deboner in a poultry processing plant. For two to three years preceding her injury, she was employed by the respondent in a general capacity. Her employment activities consisted of sweeping floors, stacking lumber, running saws, etc.

The medical evidence reveals that the claimant had not been released to return to work by either of her treating physicians, at the time her benefits were terminated by the respondent. There is no indication that she has been released to return to any type of employment by Dr. Rogers, her family physician, and the only physician that has seen her since her benefits were terminated.

Although it appears from the reports and records of Dr. Young that he was contemplating releasing the claimant to return to some type of employment, as early as February of 2003, the fact remains that he had not released her to return to any type of employment at the time of her last visit on March 11, 2003. Although, he appears to have released her from further care in his report of October 17, 2003, I find that, at the time of this report, he lacked sufficient information to form such an opinion with any degree of accuracy or certainty.

The respondent implies that Dr. Rutherford would have released the claimant to return to some type of employment on April 4, 2003, were it not for the fact that she had been restricted from working (due to her compensable shoulder injury) by Dr. Young. However, I do not interpret Dr. Rutherford's note of April 4, 2003, to so indicate. Instead,

it appears from this report that he is simply noting that since Dr. Young has already restricted the claimant from working, due to her shoulder injury, it is unnecessary for him to address the issue. This interpretation is further confirmed by Dr. Rutherford's report of September 12, 2003. In this report he clearly indicates that he cannot express an opinion on the claimant's ability to work, until the testing he recommended (on April 4, 2003) has been performed. This position by Dr. Rutherford is clearly supported by the evidence presented. This evidence demonstrates that the claimant's compensable neck or cervical injury has resulted in at least one cervical disc herniation with possible radicular symptoms involving her right upper extremity, due to impingement on either the spinal cord or exiting nerve roots. The purpose of the test, recommended by Dr. Rutherford, on April 4, 2003, was to evaluate the possibility or magnitude of any radicular symptoms. The results of this test would also have significant impact on developing an appropriate treatment program for the claimant's compensable neck or cervical injury. If this test confirms the presence of a cervical radiculopathy, there is a substantial possibility of surgical intervention. Until these various factors have been adequately investigated, it is highly doubtful that any competent specialist, such as Dr. Rutherford, would return the claimant to regular gainful employment.

Finally, it must be noted that the respondent has made no attempt, during the claimant's course of treatment, to return her to any light or limited duty type of employment. The likelihood of her obtaining employment in the open job market with the uncertainty as to the nature and extent of her compensable cervical injury and the possibility that she may require surgical intervention, would be non-existent.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant has continued to remain totally disabled from performing regular gainful employment, as a result of the temporary effects of her compensable injuries, particularly her compensable cervical injury. Thus, she

has satisfied both of the necessary requirements to entitle her to additional temporary total disability benefits for the period beginning April 8, 2003, and continuing until a date yet to be determined

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 4, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On November 4, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$139.00 for both total disability and permanent partial disability.
4. On November 4, 2002, the claimant sustained compensable injuries to her neck or cervical spine and to her right shoulder.
5. There is no dispute over the payment of medical expenses incurred through April 10, 2003, and all such expenses have been paid.
6. The claimant has proven that she is entitled to additional reasonably necessary medical services for her compensable injuries by Dr. Young and Dr. Rutherford, as heretofore described in this Opinion. Pursuant to Ark. Code Ann. §11-9-508, the expense of these services is the liability of the respondent herein (subject to the medical fee schedule established by this Commission).
7. There is no dispute over temporary total disability benefits accruing through April 7, 2003, and all such benefits has been paid.
8. The claimant has proven that she has continued temporarily totally disabled as a result of the effect of her compensable injuries from April 7, 2003 through a date yet to be determined. Specifically, she has proven by the

greater weight of the evidence that, during this period, she has continued within her healing period from the effects of her compensable injuries and has continued to be totally disabled from performing regular gainful employment as a result of these compensable injuries,

9. The respondent has controverted the claimant's entitlement to any additional medical services for her compensable injuries, after April 10, 2003. The respondent has also controverted the claimant's entitlement to any additional temporary total disability benefits after April 7, 2003.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded.

ORDER

The respondent shall pay to the claimant additional temporary total disability benefits for the period beginning April 8, 2003 and continuing through a date yet to be determined.

The respondent is liable for the expense of the additional reasonably necessary medical services to be rendered to the claimant by and at the direction of Dr. Young and Dr. Rutherford, as heretofore described in this Opinion. Such liability shall be subject to the medical fee schedule established by this Commission.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondent in addition to such benefits and the remaining one-half of this fee is to be withheld by the respondent from such benefits,

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge