

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214260

HEATHER BABB

CLAIMANT

DELTA PLASTICS, INC.

RESPONDENT EMPLOYER

FIREMAN'S FUND

RESPONDENT CARRIER

ORDER AND OPINION FILED JULY 19, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE RICHARD S. MUSE, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE WENDY S. WOOD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 17, 2004. A prehearing conference was held on April 6, 2004 and a prehearing order was filed on April 8, 2004 and the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on October 5, 2001.
2. The compensation rates are \$203/154.

The claimant contends that she is entitled to additional medical treatment with Dr. Thomas Hart after being referred by Dr. Andrew Prychodko, the authorized treating physician. The claimant also contends that she is entitled to temporary total disability benefits from November 19, 2002 to a date to be determined, as well as controverted attorney's fees.

The respondents contend that additional medical treatment is not reasonable and necessary for the claimant's compensable injury. The respondents contend that Dr. Jim Moore released the claimant in November 2002 and deemed her at maximum medical improvement and assigned an impairment rating that respondents began paying. The respondents contend the claimant is no longer in her healing period and, therefore, not entitled to temporary total disability benefits.

ISSUES TO BE LITIGATED

1. Additional medical benefits.
2. Additional temporary total disability benefits.
3. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable injury on October 5, 2001.
2. The compensation rates are \$203/154.
3. The claimant has proven by a preponderance of the evidence that additional medical treatment is both reasonable and necessary and related to her compensable injury.

4. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from February 27, 2002 through a date to be determined.

DISCUSSION

The claimant, 32 years old, began her employment with the respondent employer in November 1999 and last worked for the respondent on February 27, 2002. The claimant worked as a machine operator and in quality control with all the jobs requiring her to be on her feet and carrying material. According to the claimant, on October 5, 2001, she was in a hurry to get boxes made for her product and after making some boxes, she stood up and felt a pop in her back and her back really hurt when she walked. The claimant stated that she had no back problems up until the October 5, 2001, incident following her recovery from the 1994 back surgery. The claimant testified to having a previous back injury in 1994 with a ruptured disc at L4-L5 requiring surgery.

According to the claimant, on October 5, 2001, she reported the back injury to her supervisor, Peachie Hair, and left work around 12:00 or 12:30 and sought medical attention with Dr. Roy Puen. She selected him through her group health provider book and paid the co-pay. The claimant testified to having low back pain with sharp shooting muscle spasm pains going down the right leg to the foot. The claimant returned to work Monday and saw her family doctor, Dr. Richard Finch, was referred for a MRI and was referred to a back specialist, Dr. Pace. The employer sent the claimant to Dr. Bruce Smith, who ordered a MRI or CAT scan with contrast and steroid injections. Dr. Smith performed back surgery in April 2002; however, he took the claimant off work on

February 27, 2002. Between October 2001 and February 2002, the claimant worked light duty at a job where she could sit or stand with no lifting.

According to the claimant, she did not get a good result from the surgery. The claimant discussed her pain:

From the day I got released from the hospital, I knew something wasn't right. The pain I feel in my leg today and that I have felt from the day I got that surgery is nothing that I have ever experienced in the past or even before this last injury in October. It feels like a constant charleyhorse. If anyone has ever had a charleyhorse in their calf, it feels like a constant charleyhorse in my right thigh. From the time I wake up until the time I go to bed, no matter what I do or how I sit or stand or lay down, it hurts. (T., p. 26, lines 1-9.)

The claimant testified that Dr. Smith suggested another surgery was needed and the insurance company sent her to Dr. Jim Moore for a second opinion. Dr. Moore ordered an electrodiskectomy and a TENS unit and prescribed medicine and a leg brace. The claimant testified that the brace did not help and hurt her to even try it. The last time the claimant saw Dr. Moore was December 2002, after he assigned an impairment rating. According to the claimant, Dr. Jim Moore released her to light-duty work and ordered a functional capacity test.

The claimant sought a change of physician from the Commission. On February 13, 2003, the Commission issued a change of physician order naming Dr. Andrew Prychodko as the authorized treatment physician and the claimant began seeing Dr. Prychodko who recommended pool therapy. The therapy provided no permanent benefits. Dr. Prychodko also increased her pain medication.

The claimant testified that on a typical day she rinses the dishes and with the help of her children, she puts the dishes in the dishwasher but is unable to carry the

trash out, carry groceries from the car to the house, mop or sweep the floors. The claimant testified to being able to sit for about 15 minutes before being in pain. At home, she is able to sit, stand and lay down. The claimant can only sleep three to four hours at night without medication. Dr. Prychodko has referred the claimant to Dr. Thomas Hart for pain management care, which has been denied by the respondents. The claimant testified to being unable to work because the job would have to allow her to sit, stand and lay down and her medication makes her drowsy.

Under cross examination, the claimant verified that she can sometimes get clothes out of the dryer and does some cooking and shopping for her family. The claimant verified that she smokes about a pack of cigarettes per day and that she does not want another surgery.

According to the claimant, she cannot take her medication and drive her children to school. She delays taking her medication if she must drive. The claimant currently takes 800 milligrams of Neurontin to help numb the pain in her back and leg; 100 milligrams of Zoloft for depression; 350 milligrams of Soma up to three times per day and 800 milligrams of ibuprofen.

Dr. Prychodko referred the claimant to Dr. Hart in January 2004 and respondents denied any further treatment with Dr. Hart. The respondents contend further medical is unreasonable and unnecessary and not related to the claimant's compensable injury.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 1996). However, injured employees 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 Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we 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. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonable necessary medical treatment within the meaning of Ark. Code Ann. §11-9-508(a). See, *Chronister v. Lavaca Vault*, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 849 (1983).

The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonable and necessary and related to the compensable injury. The claimant presented credible testimony about her injury and her treatment and her current problems. The claimant, although a young woman, has held a number of jobs since high school. She began her employment with the respondent employer in June 1998 and had no significant problems with her back until the October 2001 incident. The claimant, while testifying at the hearing, sat in her seat at an angle seeming to

relieve pressure on one leg, she moved about while testifying and stood after sitting for a while. She presented noticeable signs of an individual in physical distress. The claimant has followed the requirements of the respondent as to doctors they have selected for her to be treated or for second opinions.

On February 13, 2003, the Commission issued a Change of Physician Order for the claimant to treat with Dr. Andrew Prychodko and the claimant began seeking treatment with him. Dr. Prychodko treated her with medication and physical therapy. On January 14, 2004, Dr. Prychodko referred the claimant to Dr. Thomas Hart for some additional pain management treatment and specifically mentions his diagnosis of the claimant's arachnoiditis. Dr. Prychodko, in his June 10, 2004, deposition, stated that he was hoping to get some assistance for this condition with an interventional pain physician, Dr. Thomas Hart. Dr. Prychodko provided some additional insight as to arachnoiditis:

That's a scarring that takes place inside the spinal canal. I'm sorry, inside the spinal cord. The spinal cord as delineated by the dura mater, which is the outside sheath of the spinal nerve or the spinal cord. Outside of the dura mater scarring might be called episcleritis, or epidural scarring, or, whatever, postsurgical scarring, let's say. Within the dura mater, if there is scarring changes affecting the nerves, affecting the contents of the spinal nerve, that's often referred to as arachnoiditis, reflecting one of the layers of supportive or protective tissue around the nerves. (D., p. 13, pages 6-17.)

Dr. Prychodko was asked how arachnoiditis can occur and he explained this typically happens because of an external event and went on to explain, in part:

In the old days, i.e., in the 1970s and before, they used to use oil-based contrast dyes for myelogram studies, which myelogram is the injection of a dye into that dura, into the

spine, and imaging the spinal nerves by means of a dye that sort of contrasts against the nerves. Nowadays, they use a water-based dye, which is much more easily tolerated by the spine. But previously they used an oil-based medium, which was often implicated in this arachnoiditis.

But also things like a surgical procedure that involves a small nick into the dura and possibly some bleeding back into the spinal cord, spinal nerve, that can be associated with arachnoiditis. As the article says, it's not extraordinarily well understood as a condition, but those are kind of the leading culprits. (D., p. 14, lines 13-25; p. 15, lines 1-4.)

Dr. Prychodko was asked if he opined that the arachnoiditis was related to the surgery and if it was a medical possibility or probability. He responded:

In the absence of other factors that could explain it, which right now I don't really have another factor. Looking at the presurgical MRI and then the postsurgical progression, I would say that there's a medical probability. (D., p. 16, lines 7-11.)

The last report from Dr. Jim Moore is a February 4, 2003, report and at that time, he had prescribed medication and suggested the claimant continue her exercises and scheduled her for a follow-up visit after diagnosing her with lumbar radiculitis and arachnoiditis. I did not find a medical opinion in evidence that indicated the claimant was not in need of further medical care for her condition. In fact, the authorized treating physician, Dr. Prychodko, was very clear that he needed further assistance with a pain management physician and specifically referred the claimant to Dr. Thomas Hart. I find the claimant has presented credible testimony and has presented credible medical evidence to support her contention that additional medical treatment by Dr. Thomas Hart is both reasonable and necessary and remains the responsibility of the respondents.

The claimant next contends that she is entitled to temporary total disability

benefits from the last day she worked to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from February 27, 2002, to a date to be determined. The respondents rely on Dr. Moore's November 19, 2002, report following the functional capacity evaluation, which suggests light-duty work. Dr. Moore assigned a 10% permanent impairment rating and scheduled a follow-up visit in three months and suggested a return to work on a trial basis if light-duty work was available. The case manager was instrumental in getting this information from the doctor, according to the claimant, and Dr. Moore's report substantiates this as well. According to the claimant, there was no contact made to her by the employer for light-duty work. The claimant admitted she had not attempted any work since Dr. Moore's release. She testified her condition is worse than before the surgery and she knows of no job that will allow you to stand, sit and lay down as needed and take pain medication. After reviewing the results of the functional capacity evaluation, Dr. Prychodko suggests sedentary work might be more appropriate for the type activities the claimant was able to perform during her functional capacity evaluation and her attempts were considered valid. Dr. Prychodko's report of January 14, 2004, took the claimant off work from January 14, 2004 through March 26, 2004, while he was treating her for pain. The sheer volume and number of prescription medications the claimant has been taking would suggest that performing in the

workforce was not realistic. The claimant testified to being unable to drive when she took some of her pain medication. If she was unable to drive, it stands to reason she would be unable to fulfill meaningful work activities. I was persuaded by the claimant's credible testimony and the supportive medical reports that the claimant remained in her healing period and unable to earn wages from February 27, 2002, through a date to be determined. With the respondents' reliance on Dr. Moore's November 19, 2002, report suggesting that a trial basis of light-duty work might be appropriate, there was no indication that respondents made such work available to the claimant or assisted the claimant in finding such work.

ORDER

The claimant has proven by a preponderance of the evidence that additional medical treatment is both reasonable and necessary and related to her compensable injury. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from February 27, 2002, through a date to be determined.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**