

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E812752**

<b>KATHLEEN T. CORDRY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>HEALTHCOR HOLDING, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>CONTINENTAL CASUALTY CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 24, 2004**

Hearing before Administrative Law Judge J. Mark White on April 8, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Ms. Wanda Brown Hiebert, Attorney at Law, Texarkana, Texas.

Respondents represented by Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On April 8, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on March 1, 2004, and a Prehearing Order was entered that same day. A copy of the March 1, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including November 26, 1997; that on November 26, 1997, the claimant sustained a compensable injury; that the claimant earned sufficient wages to entitle her to the maximum compensation rates; and that this claim was previously the subject of an Opinion filed by the Commission on October 18, 2001, and affirmed by the Arkansas Court of Appeals on November 13, 2002.

The parties agreed that the issues to be presented were whether the claimant is entitled to permanent disability benefits; whether the claimant has sustained wage loss in excess of her assigned anatomical impairment rating; whether additional medical treatment is reasonably necessary in connection with the compensable injury; unpaid medical bills; and controversion and attorney's fees.

The claimant contends that her ability to perform the same or similar duties which she was able to perform prior to her injury has been impaired; that she has sustained permanent anatomical impairment attributable to her injury of November 26, 1997; that she is entitled to wage-loss disability benefits; that she is entitled to permanent partial disability benefits; and that she is entitled to an attorney's fee.

Respondents contend that the claimant is not entitled to any permanent impairment nor is she entitled to wage-loss benefits.

The record herein consists of the transcript of the April 8, 2004, hearing with

attached exhibits; the record of the prior hearing held May 3, 2001, with attached exhibits; the depositions of Dr. Freddie Contreras, Ellen Piche', Tina Harmon and William Hahn; and the post-hearing brief submitted by the respondents on April 27, 2004. It should be noted that the record of the May 3, 2001, hearing is on file with the Arkansas Court of Appeals (case no. CA 02-109) and is not contained within the Commission's file.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she has sustained permanent anatomical impairment of 5% to the body as a whole.

4. The claimant has proven by a preponderance of the evidence that the existence and determination of her permanent anatomical impairment is supported by objective and measurable physical findings.
5. The claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent anatomical impairment.
6. A preponderance of the evidence shows that the claimant is now employed and earning a higher average weekly wage than she earned before her injury.
7. The claimant is entitled to no wage loss benefits in excess of her anatomical impairment rating.
8. The claimant has proven by a preponderance of the evidence that additional medical treatment, specifically consultation with a neurosurgeon, is reasonably necessary in connection with her compensable injury.
9. The reasonableness, necessity, and causal connectedness of all unpaid bills submitted by the claimant for treatment prior to May 3, 2001, are moot issues, and the prior opinion is *res judicata* to them.
10. The claimant has failed to prove by a preponderance of the evidence that her medical treatment after May 3, 2001, was reasonably necessary in connection with her compensable injury.

11. The claimant has failed to prove by a preponderance of the evidence that the respondents should be held liable for the unpaid bills contained within the record, specifically those for treatment rendered after May 3, 2001.
12. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant is a registered nurse. On November 26, 1997, she sustained a compensable injury to her neck as a result of an auto accident which occurred in the course and scope of her employment. She was treated by a variety of physicians and eventually underwent surgery, an anterior cervical fusion at C5-6, by Dr. Freddie Contreras on January 22, 1999. Though the respondents accepted the claim itself as compensable, it appears they controverted most, if not all, of the claimant's medical treatment. Group health insurance and then private health insurance paid for much of the claimant's treatment, with the remainder paid by the claimant herself.

The claimant filed a claim for compensation with the Commission, and a hearing was held before a different administrative law judge on May 3, 2001. By an opinion entered June 14, 2001, the judge found that the medical treatment received by the claimant, including the surgery, was reasonably necessary in connection with

the compensable injury. The Full Commission and the Court of Appeals affirmed the original opinion, and it is now a final decision.

Since the entry of that opinion, the claimant has continued to treat with a variety of doctors. She testified that she continues to have pain, weakness and numbness in her neck and upper extremities.

## **II. Adjudication**

### **A. Permanent Impairment**

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether her earning capacity is diminished or not. *Id.* Any determination of permanent physical impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Where a compensable injury has combined with a preexisting disease or condition to cause or prolong disability or need for treatment, benefits for permanent impairment may be awarded only upon a showing that the compensable injury was the major cause

of the disability or impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(b).

The claimant has introduced into evidence a report from Dr. Roderick Mitchell purporting to assign the claimant a permanent anatomical impairment rating of 30% to the body as a whole. Dr. Mitchell's report, however, is based on the 3<sup>rd</sup> edition of the *AMA Guides*. Arkansas law requires that impairment ratings be made using the 4<sup>th</sup> edition. AWCC Rule 34 (July 1, 1995). Therefore, Dr. Mitchell's report may not be relied upon for an award of permanent impairment benefits.

The respondents assert in their brief that without a numerical impairment rating assigned by a physician, the Commission may not assign a numerical impairment rating on its own initiative and authority. The only authority cited for this proposition is "Act 793 in 1993," which is presumably an erroneous reference to Act 796. In any event, I can find nothing in either Act 796 or Act 793 which prohibits the Commission from assigning numerical impairment ratings on its own. More to the point, the courts have specifically held that the Commission has the authority to translate the medical evidence into a finding of permanent impairment using the *AMA Guides*. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001); *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The facts and conclusions of *Jones* are directly on point here. *Jones* was assigned an impairment rating by his physician which the Commission found to be invalid; the Commission

then assigned its own impairment rating, incorporating the relevant portions of the *AMA Guides* by judicial notice. *Id.* The Court of Appeals affirmed the decision. *Id.*

I hereby take judicial notice of the relevant contents of the *AMA Guides*, 4<sup>th</sup> Edition. The evidence establishes that the claimant has undergone a previous spine operation – an anterior cervical fusion, which was found to be reasonably necessary in connection with the compensable injury. The claimant has introduced no evidence to show that she exhibits radiculopathy or loss of motion segment integrity. Therefore, according to Tables 70, 72 & 73 of Chapter 3 of the *AMA Guides*, 4<sup>th</sup> Edition, the claimant is entitled to a permanent impairment rating of 5%. I find that the claimant has proven by a preponderance of the evidence that she has sustained permanent anatomical impairment of 5% to the body as a whole.

The respondents contend that the claimant has introduced no objective findings to support a finding of permanent impairment. To the contrary, the claimant's surgery is itself an objective and measurable physical finding, the existence and reasonable necessity of which was the subject of the prior opinion entered in this claim. As noted above, the impairment rating assigned herein is based solely on the claimant's surgery. Even so, the objective findings contained within the record of the prior hearing, which were incorporated herein by reference, also support a finding of permanent impairment. I therefore find that the claimant

has proven by a preponderance of the evidence that the existence and determination of her permanent anatomical impairment is supported by objective and measurable physical findings.

Although the claimant did have preexisting back and neck problems, the opinion entered after the prior hearing found a causal connection between the claimant's surgery and her compensable injury. That opinion accepted as credible the lay testimony in the prior hearing to the effect that the claimant had no symptoms or problems with her neck prior to her compensable injury. Dr. Contreras testified in his deposition that the ruptured disc on which he operated was responsible for "most" of the claimant's symptoms. The Court of Appeals has previously held that there is substantial evidence for a finding of major cause where there is no evidence of any other possible causes for a herniation, and no evidence that the claimant experienced any significant neck problems prior to a work-related accident. *Polk County v. Jones, supra*. Given the evidence outlined above, I find that the claimant has proven by a preponderance of the evidence that her compensable injury is the major cause of her permanent anatomical impairment.

### **B. Wage Loss**

The wage-loss factor is the extent to which a compensable injury has affected

the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). An employee is not entitled to permanent impairment benefits in excess of her assigned anatomical impairment percentage rating if she has returned to work at wages equal to or greater than her average weekly wage at the time of the accident. ARK. CODE ANN. § 11-9-522(b)(2).

In her testimony, the claimant acknowledged that she is working, and that she is earning substantially more in wages than she was at the time of her compensable injury. I find that a preponderance of the evidence shows that the claimant is now employed and earning a higher average weekly wage than she earned before her injury. I therefore conclude as a matter of law that the claimant is entitled to no permanent impairment benefits in excess of her anatomical impairment rating.

### **C. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The law does not require a claimant to establish her

entitlement to additional medical treatment with objective medical findings. *Williams v. Prostaff Temporaries*, 64 Ark. App. 128, 979 S.W.2d 911 (1998), *aff'd on other grounds*, 336 Ark. 510, 988 S.W.2d 1 (1999).

The record contains a letter from Dr. Charles Marrow, dated March 30, 2004, which says that the claimant "is waiting a consult with a neurosurgeon due to progressively getting weaker in the right upper extremities and complaining of neck and upper arm pain. She also suffers from numbness in the right hand and is unable to do IV's." The claimant testified in this hearing that she continues to have problems with her neck. She said she is unable to turn her head without turning her entire body; that she continues to have varying levels of pain in her neck; that she is experiencing numbness in the fingers of her right hand; and that she has weakness in her right arm. I found the claimant to be a credible witness, in that her testimony was plausible, internally consistent, and consistent with the medical records.

Given her testimony, the statement of Dr. Marrow, and the lack of any contradictory medical opinion in the record, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, specifically consultation with a neurosurgeon, is reasonably necessary in connection with her compensable injury.

## D. Unpaid Medical Bills

The claimant has introduced a multitude of unpaid bills which she contends should be paid by the respondents. For reasons to be explained below, I must separate the bill into two groups.

The first group consists of the bills for the claimant's surgery and related treatment incurred prior to the first hearing, held May 3, 2001. In the June 14, 2001, opinion, which is now a final decision, the administrative law judge found:

Claimant has proven by a preponderance of the evidence that the medical treatment she has received from Dr. Charles T. Marrow, Dr. Jeffery DeHaan, Dr. Freddie Contreras, Dr. Anthony Russell, St. Michael's Health Systems Hospital, and Wadley Regional Hospital, and more specifically, the fusion as recommended and performed by Dr. Freddie Contreras, is reasonable and necessary medical treatment related to claimant's compensable injury.

*Res judicata* applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001) (citations omitted). Even though the Workers' Compensation Commission is not a court, its awards are in the nature of judgments, and the doctrine of *res judicata* applies to its decisions. *Id.* The finding quoted above was affirmed by the Full Commission and Court of Appeals

and is therefore now *res judicata*.

The claimant asserted at the hearing, and the respondents did not dispute, that the bills for the surgery have not been paid by the respondents, despite the previous order of the Commission. Ordinarily, the issue of unpaid medical bills is resolved by determining whether the bills are for treatment that was reasonably necessary in connection with the compensable injury. This question does not apply to the bills incurred prior to May 3, 2001, for the reasonable necessity and causal connectedness of those bills has already been decided by the Commission. At no point prior to this hearing did the claimant identify as an issue the enforcement of the June 14, 2001, opinion. The law provides several options by which a respondent can be called to account for failure to pay medical bills it has already been ordered to pay. A claimant may file a motion asking that a prior order be enforced, or that the respondents be held in contempt. *See, e.g., Angell v. Cooper Tire & Rubber Co.*, AWCC E209797 (Nov. 25, 2003). A claimant may seek enforcement of the prior order via Ark. Code Ann. § 11-9-712. A claimant may seek penalties for nonpayment of benefits via Ark. Code Ann. § 11-9-802(e). The claimant has done none of these things, and for reasons of fairness I decline to raise these issues *sua sponte*. I conclude that the reasonableness, necessity, and causal connectedness of all bills submitted by the claimant for treatment prior to May 3, 2001, are moot issues, and that the

prior opinion is *res judicata* to them. In making this conclusion, I acknowledge that neither party raised the issue of whether these bills are subject to *res judicata*. However, judicial economy and fundamental fairness demand that I raise the *res judicata* issue *sua sponte*, and that I decline to rule on an issue which has already been conclusively decided by the Commission.

As for the remaining bills, the claimant has introduced pharmacy bills from 2001 to present, and an itemization of charges for treatment by Dr. Charles Marrow. The claimant has introduced no documentation or medical records establishing what treatment these bills are for, or whether the treatment was reasonably necessary in connection with the compensable injury. The only evidence in this regard is the claimant's own testimony regarding specific bills. It must be remembered that the testimony of an interested party is always considered to be controverted. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998).

On the pharmacy bills submitted by the claimant, the claimant has highlighted in yellow the drugs she claims are "related" to her compensable injury, and she testified regarding which specific drugs she contends are "related." The claimant likewise testified that the itemized charges from Dr. Marrow are for treatment "related" to her compensable injury. Though the claimant had already highlighted those prescription charges she contended were related, the claimant's

attorney offered to “go through every single prescription medication from page 40 to page 51 and determine which were related and which are not.”

Even if I were to accept the claimant’s testimony as sufficient to establish that all of these bills are for treatment related to her compensable injury, it would answer only half the question. The claimant must prove not only that the treatment was related, but also that it was reasonably necessary. ARK. CODE ANN. § 11-9-508(a); *see, e.g., White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Dalton v. Allen Eng’g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999). The claimant bears the burden of proof in establishing her entitlement to benefits under the Workers’ Compensation Act. *Dalton v. Allen Eng’g Co., supra*. The claimant herein has introduced no evidence whatsoever – in the claimant’s testimony or elsewhere – as to whether the treatment for which these unpaid bills were incurred was reasonably necessary. The only way I could find that this treatment was reasonably necessary is by conjecture and speculation, and such can never substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

Because the claimant has failed to introduce any evidence by which I can determine whether her treatment was reasonably necessary, I must find that the claimant has failed to prove by a preponderance of the evidence that her medical treatment after May 3, 2001, was reasonably necessary in connection with her

compensable injury. I must likewise find that the claimant has failed to prove by a preponderance of the evidence that the respondents should be held liable for the unpaid bills contained within the record for treatment rendered after May 3, 2001.

### **AWARD**

The claimant has proven by a preponderance of the evidence that she has sustained permanent anatomical impairment of 5% to the body as a whole, and that additional medical treatment is reasonably necessary in connection with the compensable injury. The respondents are directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Ms. Wanda Brown Hiebert, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge