

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105594

LINDA KAY JOBE, EMPLOYEE

CLAIMANT

ST. VINCENT NORTH/SHERWOOD, EMPLOYER

RESPONDENT

PREFERRED PROF. INS., CARRIER

RESPONDENT

AMENDED OPINION FILED DECEMBER 13, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on April 15, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

_____A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On March 2, 2004, a prehearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission's Exhibit No. 1.

The testimony of Linda Kay Jobe, the claimant, coupled with medical reports and other documents comprise the record in this claim. Subsequent to the filing of the July 7, 2004, Opinion in this claim it was found that the hearing record, which served as the basis for the ruling, did not include each of the medical reports identified in the index of Claimant Exhibit #1.

By joint motion of the parties the matter was remand for the purpose of completing the record. According, a complete numbered medical packet comprising each of the documents identified on the index of Claimant Exhibit #1 has been provided, and, to avoid confusion, is blue-backed and herein designated a part of the record as Claimant Exhibit #1A.

DISCUSSION

Linda Kay Jobe, the claimant, with a date of birth of September 6, 1963, commenced here employment with respondent as an LPN on October 30, 2000. Claimant is a high school graduate with a year and a half of post-secondary education.

Claimant acknowledged that prior to April 2001, she had suffered some strains to her back, however nothing serious. The compensability of the claimant's April 26, 2001, injury to her low back is not disputed. Claimant testified regarding the mechanics of her compensable injury:

I was helping to assist a paralyzed patient back into the bed. They picked him up out of the wheelchair and his legs crossed backwards. I had to hold across him and then raise him up to the bed. (T.11)

As a result of the afore maneuver claimant sustained an injury to her back and notified the charge nurse of the injury. Claimant, while off work over the weekend, rested her back and attempted to return to work. When claimant returned to work she was only able to work a partial day before having to seek medical treatment as a result of the injury to her back.

Claimant was sent to the emergency room of St. Vincent by her supervisor to receive treatment relative to the injury. The credible evidence in the record reflects that after a period of treatment by physicians in the emergency room of St. Vincent Hospital, claimant was referred by

same to Dr. Richard McCarthy, a Little Rock orthopedic physician.

After the initial evaluation by Dr. McCarthy, claimant was referred by same to Dr. Yashwant Reddy, for treatment relative to the April 26, 2001, compensable injury. Claimant underwent a course of treatment under the care of Dr. Reddy, to include diagnostic studies as well as other treatment modalities. However on March 21, 2002, claimant underwent surgery under the care of Dr. McCarthy, in the form of a spinal fusion at L5-S1. Following the surgery claimant experienced some relief from her symptoms of low back, but not from her low extremity pain and numbness. Later, claimant was referred back to Dr. Reddy by Dr. McCarthy for her pain complaints.

The credible testimony of the claimant reflects that after a period of treatment under the care of Dr. Reddy, which included medication, she was referred for further treatment with Dr. Bruce L. Safman. Claimant explained that while Dr. Reddy authored correspondence recommending a referral of to Dr. William Ackerman for pain management, she was contacted by the claim adjuster for a third-party administrator and the evaluation scheduled with Dr. Safman for further treatment.

A September 19, 2002, report of Dr. Safman reflects that the claimant was referred to him by respondent for an evaluation and treatment of lower lumbar pain. The report further reflects, in pertinent part:

. . . She apparently had disc herniation at L5-S1. This subsequently was treated conservatively. She has had numerous blocks and other conservative measures without success and ultimately had surgery at L5-S1 by Dr. McCarthy on 3/21/02. The patient relates that she has some temporary benefits, however, she developed pain in her right gluteal

region, which was to site of the donor graft for a fusion. She had severe burning and radicular pain down the right lower extremity subsequent to surgery and relates that she has been in much more severe pain subsequently than she was prior to the surgical procedure. The lower lumbar pain, however, has improved. The pain that radiates down the left leg has improved. (CX 1, p19)

Dr. Safman's impression of the claimant's complaints, following his initial evaluation was that of failed back syndrome with possible residual right S-1 radiculopathy. A review of the medical in the record reflects while claimant treated with Dr. Safman subsequent to September 19, 2002, she also received treatment under the care of Dr. Stephen A. Kulik, Jr., a Little Rock orthopedic physician.

A December 19, 2002, report of Dr. Kulik reflects that claimant was referred by Dr. McCarthy and Dr. Safman relative to complaints of bilateral foot pain. Dr. Kulik's assessment of claimant's complaint was bilateral tarsal tunnel syndrome. On December 26, 2002, claimant underwent a left tarsal tunnel release under the care of Dr. Kulik. On March 31, 2003, claimant was released from the care of Dr. Kulik back to the care of Dr. McCarthy since she was continuing to have complaints relative to her low back. The March 31, 2003, report of Dr. Kulik, relative to the claimant, reflects, in pertinent part:

Ms. Jobe is a follow up today. She is not any better. She said that she is having significant pain in her back. She reports that her surgery did not help. She felt a little bit of initial improvement but it is unchanged since the surgery on her foot.

The medical history sheet was reviewed. It is essentially unchanged and is in the chart.

* * *

ASSESSMENT:

1. Postop tarsal tunnel, no significant improvement.
2. Continued low back condition.

RECOMMENDATIONS:

1. Ms. Jobe has reached maximum medical improvement. She does have permanent restrictions, minimal activity.
2. Follow up with Dr. McCarthy since she is still continuing to have back problems. (CX 1, p45)

A April 18, 2003, report of Dr. Safman relative to the claimant, after noting the results the physical examination conducted during the visit and treatment rendered to the claimant concluded:

She is being treated very comprehensively without a great deal of benefit. I will see her again in 2 weeks. She has seen Dr. McCarthy is 2/03. He did not have anything additional to offer her.

DIAGNOSIS: Failed back syndrome. (CX 1, p46)

The credible testimony of the claimant reflects that each time she received medical treatment relative to her compensable injury, she contacted the claims adjuster for the third-party administrator for respondent to obtain authorization for said visits. The record reflects a February 19, 2003, visit of the claimant to Dr. McCarthy at Arkansas Spine Center. The February 19, 2003, clinic note, which is authored by Lynn McCullough, RNP [registered nurse practitioner] at the Arkansas Spine Center, reflects, in pertinent part:

Ms. Jones returns today, 11 months after undergoing posterior spinal fusion, PLIF and instrumentation at L5-S1. She is actually doing better today. In the interim since we have last seen her, she has had some tarsal tunnel surgery done by Dr. Kulik.

* * *

RECOMMENDATIONS:

Because of all the difficulties that she has had, she has not really been able to get into a good physical therapy program, and we have referred her for that today. We are going to work with strengthening. We have asked that she return in six months, at which time we will get a repeat standing AP and lateral x-ray of the lumbar spine as well as a Ferguson view. We do not feel that she is at maximum medical improvement yet. It may be at our next visit that she will have reached this.

She was seen and evaluated by Dr. Richard McCarthy, who determined her plan of care. (CX 2. p3)

In accordance with the February 2003, visit, the evidence reflects that claimant was seen at Arkansas Spine Center on August 6, 2003, by Dr. McCarthy. The August 6, 2003, clinic note reflects, in pertinent part:

. . . She states that she is not doing well as continues to have lower back pain with stinging and burning down both legs. She states that she has trouble walking on them and cannot stand or walk for a long period of time. She complains of pain in her tail bone and pelvic area, and this has been worse for the last one month.

PHYSICAL EXAMINATION:

On examination, straight-leg-raise elicits pain in her lower back region and down her legs on both sides. Her range of motion is still good. She does

have slightly diminished sensation in both feet.

RADIOGRAPH REPORT:

X-RAYS taken today including standing AP, lateral and Ferguson views of the lumbar spine. These show maintained hardware with good alignment of the motion segment at L5-S1. Ferguson view, however, shows that she may not have completely consolidated that interbody fusion at that level.

DISCUSSION/PLAN:

Dr. McCarthy wishes to have the MRI repeated. We will also obtain a CT scan of the L5-S1 segment with reconstructions in the sagittal plane to evaluate for evidence of a pseudoarthrosis. If this is positive for a pseudoarthrosis, we will recommend an external bone stimulator. For the tingling and numbness down her legs, we would like for her to once again try Neurontin, however at an increased dose of 900mg 3 times a day. She will callus in 3 weeks to see if this has helped with her burning and tingling type pain down her legs. She will follow up after the MRI and CT scan is complete.

The patient was seen and examined by Dr. McCarthy, who formulated the impression and plan.(CX 2, p4)

Claimant did in fact undergo the CT lumbar spine and MRI scans pursuant to the directions of Dr. McCarthy on September 11, 2003. (CX 21 p1-2)

On September 15, 2003, claimant was again seen and evaluated by Dr. McCarthy relative to her April 26, 2001, compensable injury. The credible testimony of the claimant reflects that while she was seen by Dr. Safman subsequent to the September 15, 2003, visit of Dr. McCarthy, due to the recommendation of additional surgery, she was returned to the care of same by Dr. Safman. Claimant was not given a return appointment to be seen by Dr. Safman at the time of her

last visit with same, which occurred in either late September 2003 or early October 2003. The last medical report in the record evidencing a visit by the claimant to Dr. Safman is a report of May 1, 2003. The May 1, 2003, report of Safman clearly reflects that claimant was continuing to relay complaints attributable to her compensable injury. Further, the report reflects that Dr. Safman was continuing to provide active medial treatment to address the claimant's complaint. (CX. #1A, p. 47).

The credible testimony of the claimant reflects that because blood work was required prior to the surgical procedure recommended by Dr. McCarthy, she notified the respondent of same. Claimant was later contacted by the office of Dr. McCarthy and by the claims adjuster and notified that authorization for the lab work had been approved. As a consequence of the afore, claimant preceded to St. Vincent Medical Center where the blood work was done.

The credible testimony of the claimant reflects that following notice that the authorization for the blood work had been approved, when she next contacted the claims adjuster relative to authorizing the surgical procedure she was informed that they were in the process to talking to Dr. McCarthy and getting some additional information. Claimant contacted Dr. McCarthy's office in an attempt to schedule the surgery, however was informed that the same could not be scheduled because approval had not been received from respondents.

The September 15, 2003, clinic note of Arkansas Spine Center, relative to a visit of the claimant on said date is corroborative of the claimant's testimony:

Linda returns today to go over the results of her new CT scan and MRI. She reports she is still having the same symptoms. She has complaints of pain and paraesthesias in both lower extremities. She also has pain into her peroneum after walking. She

continues to walk with a very antalgic gait.

* * *

RADIOGRAPH REPORT:

CT scan and MRI are both reviewed today. It does appear as though her fusion is not solid. This could explain her symptoms. Leakage of substance from within the disc at the site of the nonunion could explain the burning that she has down into her feet. There is also a question as to whether or not she has a low-grade infection. We know that she had some problems with wound healing after surgery, and it could be that this has resulted in a low-grade infection which has been persistent.

RECOMMENDATIONS:

Basically, it appears that she has a pseudoarthrosis with possible infection, so the recommendation is going to be for further surgery to remove her spinal instrumentation and regraft the area. We would like to use BMP as allograft. This would be a relatively short hospitalization. Cultures would be taken at the time of the surgery as well and treatment of the infection would be done with antibiotics if indicated. we also need to get some lab work as soon as we can get authorization from workers' comp that would consist of a CBC, ESR, total protein and albumin. We need to look at the CBC and sedimentation rate for possible signs of infection and also assess her nutritional status for postoperative healing. We will get these things scheduled as soon aa we can get authorization.

She was seen and evaluated by Dr. Richard McCarthy, who determined her plan of care. (CX 2, p5)

Claimant testified that she was unaware that Dr. Safman had issued a 10% permanent physical impairment rating relative to her compensable injury at the time of her last visit to same.

The claimant was referred back to Dr. McCarthy by Dr. Safman at the time of her last visit with

same, for further treatment, to include the recommend surgical procedure, as reflected in the September 15, 2003, clinic note.

Claimant last received temporary total disability benefits or any indemnity benefits in November 2003. Claimant has attempted to scheduled follow up treatment with Dr. McCarthy, however she has been unsuccessful because authorization for same has not been forthcoming from respondents. The last sanctioned treatment provided to the claimant at the expense of respondents was approval for the lab work, which was done pursuant to the September 15, 2003, recommendation of Dr. McCarthy.

After a thorough review of all of the evidence in this record, to include the testimony of the witness, review of the medical reports, application of the appropriate statutory provision, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 26, 2001, the relationship of employee-employer-carrier existed among the parties.
3. On April 26., 2001, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$246.00, for temporary total disability.
4. On April 26, 2001, the claimant sustained an injury arising out of and in the course of her employment.
5. The claimant was temporarily totally disabled for the period beginning May 2, 2001, and continuing through the end of her healing period, a date to be determined.
6. The respondent shall pay all reasonable hospital and medical expenses arising out

of the injury of April 26, 2001.

7. The respondents have controverted the payment of temporary total disability benefits subsequent to November 2003, and the payment of medical benefits subsequent to September 30, 2003.

CONCLUSIONS

The compensability of the claimant's April 26, 2001, low back injury in the employment of respondent is not disputed. Claimant asserts as a result of the April 26, 2001, compensable injury she continues to require medical treatment, to include an recommended repeat of the fusion under the care of Dr. McCarthy as well as corresponding temporary total disability benefits. While respondents acknowledged that the claimant is entitled to further medical treatment, the evidence in the record reflects that they have refused to authorize treatment under the care of Dr. McCarthy relative to the claimant's April 26, 2001, compensable injury. Respondents ceased paying temporary total disability benefits to the claimant in November 2003. (Commission's Exhibit No. 1)

The present claim is one governed by the provision of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

The parties stipulated to the compensability of the claimant's April 26, 2001, low back injury. Further, the evidence in the record discloses that medical treatment rendered to the claimant relative to the April 26, 2001, injury has been authorized by respondents. Specifically, claimant's initial treatment relative to her compensable injury was had at the emergency room of respondent-employer. Claimant was referred by the attending emergency room physician to Dr.

Richard McCarthy.

The medical evidence reflects that claimant received treatment under the care of Dr. McCarthy, who referred her to Dr. Yashwant Reddy, for treatment relative to her compensable injury. Claimant was subsequently referred back to Dr. McCarthy by Dr. Reddy. On March 21, 2002, claimant underwent surgery under the care of Dr. McCarthy in the form of a fusion at L5-S1. Claimant was later again referred by Dr. McCarthy to Dr. Reddy to address her residual complaints of pain.

The evidence reflects that when a recommendation for pain management was identified as an appropriate treatment measure for the claimant's April 26, 2001, injury and residuals, respondents scheduled and referred the claimant to Dr. Bruce Safman. While under Dr. Safman's care and treatment, claimant was referred to Dr. Steven Kulik, to address her bilateral tarsal tunnel syndrome. Claimant ultimately underwent surgery under the care of Dr. Kulik relative to her left tarsal tunnel. The medical preponderates that the claimant's tarsal tunnel complaints grew out of the April 26, 2001, compensable injury such that respondents are liable for the cost of said treatment. At the time Dr. Kulik concluded that the claimant had reached maximum medical improvement relative to her tarsal tunnel complaint on March 31, 2003, she was referred back to Dr. McCarthy for further treatment relative to her low back complaint. (CX 1, p45)

Each time claimant was seen for medical treatment relative to her April 26, 2001 compensable injury, she sought and obtained authorization from respondents. Claimant was seen in February 2003, by Dr. McCarthy relative to her complaints regarding her low back. Respondents were fully aware of the claimant's treatment under the care of Dr. McCarthy. Dr. Safman, in his April 18, 2003, clinic note relative to the claimant reported that she had been seen

by Dr. McCarthy in February 2003. The April 18, 2003, and May 1, 2003 clinic notes of Dr. Safman reflect that Beth Nolan, the claim adjuster for the third-party administrator for respondent-carrier, was faxed a copy of each report. (CX 1, p46) (CX 1A, p47).

The credible evidence further reflects that claimant was seen by Dr. McCarthy on August 6, 2003, six months subsequent to the February 19, 2003, prior visit. In addition to the August 6, 2003, visit, claimant was also seen by Dr. McCarthy on September 15, 2003. Further, the evidence preponderates that respondents authorized the blood work which was recommended by Dr. McCarthy during the September 15, 2003, visit. Claimant in fact underwent the blood work which was drawn at the lab of respondent. Following the blood lab work respondents ceased to authorize medical treatment for the claimant relative to her April 26, 2001, compensable injury. The respondents ceased paying temporary total disability benefits to the claimant in November 2003. While respondent was furnished a March 7, 2003, responsive correspondence by Dr. McCarthy, which of necessity could only attest to the claimant's status as of the last visit [February 19, 2003], as of the date of the termination of claimant's workers' compensation benefits respondents were in possession of more recent medical reports and diagnostic studies.(CX. 1A, p. 81), (CX 2).

The evidence preponderates that medical treatment rendered to the claimant has been reasonable, necessary, and related to the claimant's compensable injury. Dr. Richard McCarthy is an authorized treatment physician relative to the claimant's April 26, 2001, compensable injury. Pursuant to Ark. Code Ann. Section 11-9-508(a), medical benefits owed under the workers' compensation act are only those that are reasonable necessary in connection with the compensable injury sustained by the employee. Dalton v. Allen Engineering Company. 66 Ark.

App. 201, 989 S.W.2d 543 (1999); GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Further, claimant does not have to support a continuing need for medical treatment with “objective medical findings”. Chamber Door, Inc. v. Graham, 59 Ark. App. 224,956 S.W. 2d 196 (1997).

The claimant does, however, bear the burden of proving by a preponderance of the evidence, that additional medical treatment is reasonably necessary in connection with her compensable injury. In the instant claim, claimant has sustained her burden of proof. The evidence preponderates that Dr. Richard McCarthy is an authorized treatment physician of the claimant. Dr. McCarthy performed the first surgical procedure relative to the claimant’s compensable injury, on March 21, 2002, in the form of a fusion relative to herniated disc at L5-S1. Claimant has continued to experience debilitating symptoms and complaints attributable to the compensable injury. Following additional diagnostic studies, to include CT scan and MRI , Dr. McCarthy on September 15, 2003, recommended removal of instrumentation and another fusion at the site.

There is no evidence to reflect that the claimant has suffered another accidental injury relative to her low back since the April 26, 2001, compensable injury sustained in the employment of respondent. The evidence preponderates that the medical treatment recommended by Dr. McCarthy relative to the claimant’s April 26, 2001, compensable injury is reasonable, necessary, and related to the treatment of the injury. Respondents have controverted claimant’s entitlement to medical treatment relative to her compensable injury of April 26, 2001, subsequent to September 30, 2003, following claimant’s final visit to Dr. Safman. More importantly, the evidence preponderates that the respondents have controverted the recommended surgical

procedure of Dr. McCarthy as reflected in the September 15, 2003, clinic note of Arkansas Spine Center.

Claimant last received indemnity benefits from respondents in November 2003. The evidence preponderates that the claimant has not reached maximum medical improvement relative to her April 26, 2001, compensable injury, and that she has remained totally incapacitated from engaging in gainful employment since May 2, 2001.

Ark. Code Ann. §11-9-102(13) define healing period as that period of healing of an injury resulting from an accident. The healing period ends when the employee is as far restored as the permanent character of the injury will permit. If nothing further in the way of treatment will improve the underlying condition and if the underlying condition has become stable then the claimant has reached the end of her healing period. Conversely, if further treatment modalities are available to address the underlying condition causing the claimant's disability and if the same has not become stable, then the claimant remains within her healing period. The evidence in the record preponderates that further treatment is available relative to the claimant's April 26, 2001, compensable injury. Specifically, as of September 15, 2003, Dr. McCarthy has recommended further surgery in the treatment of the claimant's compensable injury. Claimant has been unable to return to work because of residuals of the compensable injury. Claimant remains totally incapacitated from engaging in gainful employment as a result of the compensable injury and has been so since May 2, 2001. Respondents have controverted the payment of temporary total disability benefits as of November 2003, or the last date that temporary total disability benefits were paid to the claimant.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$246.00, for the period beginning May 2, 2001, and continuing through the end of her healing period, a date yet to be determined. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of April 26, 2001.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable Phillip M. Wilson, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W. 2d 345 (1990). It is noted that the current claim was sustained by the claimant prior to July 1, 2001, and as such, is not governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge