

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F114221

KATHY MILLER, Employee	CLAIMANT
FRED'S INC., Employer	RESPONDENT
ONE BEACON INSURANCE, Carrier	RESPONDENT

OPINION FILED APRIL 12, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL E. RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 22, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 26, 2004, and a pre-hearing order was filed on January 27, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to her cervical and lumbar spine on March 23, 2001.
4. Respondent has paid temporary total disability benefits at the rate of \$121.00 per week.
5. Respondent has accepted and is paying permanent partial disability benefits based upon a 5% impairment rating to the body as a whole.
6. Dr. Saer is recognized as claimant's authorized treating physician as of January

26, 2004.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensation rate.
2. Additional temporary total disability benefits from July 2, 2003 through a date yet to be determined.
3. Claimant's entitlement to payment for Dr. Saer's treatment prior to January 26, 2004.
4. Attorney fee.

At the time of the hearing the parties also agreed to litigate claimant's entitlement to temporary total disability benefits beginning on or about September 19, 2002 and continuing through April 7, 2003.

The claimant contends that she is entitled to additional temporary total disability benefits beginning on or about September 19, 2002 and continuing through April 7, 2003, and again from July 2, 2003 through a date yet to be determined, and that her compensation rate should be \$143.00 per week. Claimant contends that respondent is liable for payment of Dr. Saer's medical treatment retroactive to the time the change of physician was requested. Alternatively, claimant contends that since respondent initially controverted the claim that the change of physician rules do not apply; therefore, respondent is liable for payment of Dr. Saer's treatment.

The respondents contend this claim was accepted and all benefits have been paid including a 5% rating to the body. In addition, claimant was not a full time employee who worked according to her schedule and the compensation rate of \$121.00 is correct. Respondents contend that it is not liable for payment of Dr. Saer's medical treatment prior to January 26, 2004.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on January 26, 2004, and contained in a pre-hearing order filed January 27, 2004, are hereby accepted as fact.

2. Claimant earned an average weekly wage of \$214.00 which would entitle her to compensation at the rate of \$143.00 per week. Respondent is liable for the difference between the correct rate of \$143.00 and compensation paid at the rate of \$121.00 per week.

3. Claimant is entitled to payment for temporary total disability benefits beginning the date benefits were last paid to her on or about September 19, 2002, and continuing through April 7, 2003.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning July 2, 2003 and continuing through a date yet to be determined.

5. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for payment of medical treatment received from Dr. Saer prior to January 26, 2004.

6. Respondent has controverted claimant's entitlement to all unpaid compensation benefits.

FACTUAL BACKGROUND

The claimant went to work for the respondent as a part-time employee sometime in 1999 before becoming a full-time employee in July 2000. Claimant suffered a

compensable injury to her cervical and lumbar spine while working for respondent on March 23, 2001.

Following her compensable injury the claimant came under the care of Dr. John R. Pace who eventually performed a surgical fusion on claimant's cervical spine in March of 2002. Following that surgical procedure the claimant continued to complain of cervical symptoms. As a result, Dr. Pace referred claimant to Dr. Abraham who provided claimant with cervical and lumbar epidural steroid injections. Claimant was released by Dr. Pace on April 7, 2003 and assigned a permanent physical impairment rating in an amount equal to 5% to the body as a whole. Subsequent to that date the claimant sought medical treatment from her family physician who referred her to Dr. Edward Saer. Dr. Saer has evaluated the claimant on two occasions in July of 2003. Dr. Saer has recommended that claimant undergo nerve root blocks at the C5 level in an effort to avoid further surgery. The respondent recognized Dr. Saer as claimant's authorized treating physician as of January 26, 2004.

Following claimant's compensable injury the respondent accepted and paid some compensation benefits including temporary total disability benefits. Claimant has filed this claim contending that the respondent improperly calculated her compensation rate for disability benefits. Claimant also contends that she is entitled to additional periods of temporary total disability benefits and payment for medical treatment received from Dr. Saer prior to January 26, 2004.

ADJUDICATION

COMPENSATION RATE.

The law governing the determination of a claimant's average weekly wage is codified at A.C.A. §11-9-518. Subsection (a)(1) of that statute states that compensation shall be computed on the average weekly wage earned by the employee under the

contract of hire in force at the time of the accident.

In this particular case, the respondent apparently calculated claimant's average weekly wage based upon the wages included on Commission Form W which was made an exhibit at the hearing. First, I note that Form W completed by the respondent is incomplete in that it lists only 15 weeks of wages to the claimant. The evidence indicates that claimant had worked for respondent since 1999 and that she had been a full-time employee since July 2000. Because the wage statement setting forth only 15 weeks of wages is incomplete, I find that it does not accurately portray claimant's true average weekly wage.

Instead, I find that claimant earned an average weekly wage of \$214.00 per week which would entitle her to compensation at the rate of \$143.00 per week. As previously noted, an employee's average weekly wage is to be determined based upon the contract of hire in force at the time of the accident. Here, claimant testified that when she became a full-time employee she was informed by the respondent that she would be required to be available for 40 hours of work per week. In fact, claimant testified that she signed paperwork indicating that she would be available to work 40 hours per week at the rate of \$5.35 per hour. Although the claimant may not have worked 40 hours per week every week for the respondent, the contract of hire in force at the time of claimant's accident was that she would be available for work for 40 hours per week at the rate of \$5.35 per hour. Multiplying claimant's hourly rate of \$5.35 per hour by 40 hours per week results in an average weekly wage of \$214.00. This results in a compensation rate of \$143.00 per week.

According to the parties' stipulation that respondent paid claimant compensation benefits at the rate of \$121.00 per week. Respondent is liable for payment of the difference between the claimant's compensation rate of \$143.00 per week and the paid rate of \$121.00 per week.

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant contends that she is entitled to additional temporary total disability benefits for two periods of time. The first period of time begins on or about September 19, 2002 and continues through April 7, 2003. In order to be entitled to temporary total disability benefits the claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I find that claimant has met her burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages from the date she last received temporary total disability benefits on or about September 19, 2002 and continuing through April 7, 2003.

The medical evidence indicates that claimant first came under the care of Dr. Pace in December 2001. At that time claimant was taken off work by Dr. Pace as a result of her compensable injury and she underwent a cervical fusion which was performed by Dr. Pace in March 2002. Dr. Pace's medical reports indicate that subsequent to that date the claimant continued to have additional complaints. As a result, Dr. Pace eventually referred claimant to Dr. Abraham for epidural steroid injections.

Claimant testified that respondent was paying temporary total disability benefits but ceased paying those benefits sometime in August or September 2002. Claimant testified that the cessation of these benefits coincided with a non-work related injury to her knee which required surgery. Although claimant had suffered a non-work related injury to her knee which required surgery, there is no indication that absent that knee injury the claimant was no longer within her healing period or that she had ceased to suffer a total incapacity to earn wages as a result of the compensable injuries to her cervical and lumbar spine. To the contrary, the medical evidence indicates that claimant continued to remain under the care of Dr. Pace. It was not until April 7, 2003 that Dr. Pace opined that claimant had

reached maximum medical improvement as a result of her March 2001 compensable injury.

Accordingly, based upon the evidence presented, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages from the date temporary total disability benefits were last paid by respondent on or about September 19, 2002 and continuing through April 7, 2003, the date of Dr. Pace's opinion stating that claimant had reached maximum medical improvement.

Claimant also contends that she is entitled to additional temporary total disability benefits beginning July 2, 2003 and continuing through a date yet to be determined. Following her release by Dr. Pace claimant sought medical treatment on her own from her family physician who referred claimant to Dr. Edward Saer. Dr. Saer first evaluated claimant on July 1, 2003 and ordered additional testing. Claimant was next evaluated by Dr. Saer on July 29, 2003, at which time Dr. Saer recommended that the claimant undergo nerve root blocks at the C5 level.

Even if one were to assume that claimant remained within her healing period subsequent to July 2, 2003, I find that claimant has offered insufficient evidence that she remained totally incapacitated from working subsequent to that date. While claimant testified that she felt that she was unable to work subsequent to that date, Dr. Saer's medical reports do not indicate that he took claimant off work or that he was of the opinion that claimant was totally incapacitated from earning wages.

Furthermore, with respect to the end of claimant's healing period, I note that Dr. Saer in a letter dated February 4, 2004 stated that he would agree that claimant's healing period from her surgery had ended prior to the time of his first visit with claimant. Dr. Saer noted that Dr. Pace had assigned April 7 as the date of claimant's maximum medical improvement and indicated that he would defer to Dr. Pace as to that issue.

In short, I find that claimant has failed to prove by a preponderance of the evidence

that she is entitled to additional temporary total disability benefits subsequent to July 2, 2003. Even if one were to assume that claimant remained within her healing period subsequent to that date, I find that claimant has offered insufficient evidence proving that she remained totally incapacitated from working.

PAYMENT FOR DR. SAER'S MEDICAL TREATMENT PRIOR TO JANUARY 26, 2004.

As previously noted, claimant sought medical treatment from Dr. Saer on two occasions in July 2003. Claimant contends that respondent should be liable for payment of those two medical visits to Dr. Saer along with the testing which he ordered.

The procedure for changing physicians is codified at A.C.A. §11-9-514. Subsection (b) of that statute states that treatment furnished or prescribed by a physician which is not selected according to A.C.A. §11-9-514 will be at the claimant's expense. Here, claimant contends that because respondent initially controverted the claim the change of physician rules do not apply. I find no merit to this argument. While the respondent may have initially controverted claimant's injury as compensable, the respondent did subsequently accept liability for the claim and paid compensation benefits. In that regard, claimant was provided Form N notifying her of the procedures to change physicians which she signed on October 5, 2001.

Claimant admittedly did not follow the change of physician rules and did not ask for permission to see Dr. Saer prior to doing so. In fact, a review of Dr. Saer's medical reports indicates that claimant was not attempting to have her medical treatment covered by workers' compensation at the time of her initial visits.

At the time of claimant's visit to her family physician and to Dr. Saer, there is no indication that the respondent was refusing to provide claimant with additional medical treatment from Dr. Pace or any other physician. Instead, claimant simply sought medical treatment on her own from a physician of her own choosing without following the proper

change of physician rules.

Although claimant contends that payment of Dr. Saer's medical treatment should be retroactive to the time the change of physician was requested, I find no evidence that claimant requested a change of physicians to Dr. Saer prior to July 2003, the only time she received medical treatment from Dr. Saer prior to January 26, 2004.

In summary, at the time claimant sought medical treatment from Dr. Saer, respondent had accepted claimant's injury as compensable and had paid some compensation benefits. Despite having received a copy of Form N, the claimant did not follow the change of physician procedure but instead sought medical treatment on her own from her family physician and from Dr. Saer. Having failed to follow the change of physician procedure, treatment provided by Dr. Saer and the treatment prescribed by him prior to January 26, 2004 is not the liability of respondent.

ATTORNEY FEE.

Respondent has controverted claimant's entitlement to all unpaid compensation benefits. This includes the additional period of temporary total disability benefits awarded as well as the difference between claimant's compensation rate of \$143.00 per week and the paid rate of \$121.00 per week.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she earned an average weekly wage of \$214.00 per week which would entitle her to compensation at the rate of \$143.00 per week for disability benefits. Claimant has also proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning from the date last paid by respondent on or about September 19, 2002 and continuing through April 7, 2003. Claimant has failed to prove by a preponderance

of the evidence that she is entitled to temporary total disability benefits subsequent to July 2, 2003 or that respondent is liable for payment of Dr. Saer's medical treatment prior to January 26, 2004. Respondent has controverted claimant's entitlement to all unpaid compensation benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE