

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F014175

TAMMY ROBINSON, Employee	CLAIMANT
LOVE BOX COMPANY, Employer	RESPONDENT
IMA, Carrier	RESPONDENT

OPINION FILED JULY 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On June 16, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 21, 2004, and a pre-hearing order was filed on April 23, 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 back on November 1, 1999.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$268.00 for total disability benefits and \$201.00 for permanent partial disability benefits.

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

1. Additional medical from Dr. Knox.
2. Attorney fee.

The claimant contends she is entitled to additional medical from Dr. Knox.

The respondents contend the claimant is not entitled to additional medical treatment.

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 the pre-hearing conference conducted on April 21, 2004, and contained in a pre-hearing order filed April 23, 2004, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Knox for her compensable injury.

3. Respondent has controverted claimant's entitlement to additional medical treatment from Dr. Knox.

FACTUAL BACKGROUND

The claimant is a 34-year-old woman with a ninth grade education. The parties have stipulated that she suffered a compensable injury to her low back while working for respondent on November 1, 1999. After initially receiving medical treatment at the Lowell Medical Center, claimant was referred to Dr. Luke Knox, a neurosurgeon. Based upon testing which revealed a herniated disc at the L5-S1 level with nerve root involvement, Dr. Knox performed a hemilaminotomy with discectomy at the L5-S1 level on December 13, 2000. Although claimant's symptoms were initially relieved, in approximately one month

after her surgery she was complaining to Dr. Abernathy of a recurrence of pain in her left leg with paresthesia into the left leg and great toe. The medical records indicate that over the next three years claimant continued to have varying degrees of back and leg pain. Claimant has continued to be evaluated by Dr. Knox who is now considering a lumbar fusion.

While respondent accepted claimant's initial injury as compensable and paid some compensation benefits, the respondent at some point ceased paying for medical treatment from Dr. Knox. As a result, claimant has filed this claim contending that she is entitled to additional medical treatment from Dr. Knox including, but not limited to, the lumbar fusion.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of her compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Knox for her compensable back injury. While the medical evidence does indicate that some of claimant's symptoms were relieved following the surgery in December 2000, the medical evidence also indicates that claimant has consistently complained of additional left leg pain of varying degrees since January 22, 2001, less than one month after the surgical procedure. On January 22, 2001, claimant complained to Dr. Abernathy of a recurrence of pain in her left leg with paresthesia into the left leg and great toe. When claimant was next evaluated by Dr. Knox on February 16, 2001, he also noted that claimant had some occasional left hip and left leg pain.

In February of 2001 the claimant was released to return to work in a supervisory capacity for up to four hours per day. However, the medical reports indicate that claimant continued to suffer from left lower back and leg pain subsequent to that release. Dr. Green's office note of April 12, 2001 indicates that claimant had continued left lower back pain and leg pain and that she was unable to work some days because of pain. Dr. Knox in his report of May 18, 2001 noted that claimant was having some difficulty with occasional back and leg pain and that claimant's legs had fallen out from under her on some occasions.

The medical reports indicate that claimant continued to seek medical treatment from Dr. Knox and continued to complain of left leg pain. Nevertheless, Dr. Knox and the claimant preferred to proceed conservatively without additional surgery at that time.

Dr. Knox released the claimant with an 11 percent permanent physical impairment rating on October 30, 2001. He did note that claimant had a neuroforaminal encroachment at the level above her old surgical site. He also noted that claimant was tolerating the discomfort and at that point did not believe claimant's pain was sufficient to warrant surgical intervention.

Subsequent to that release Dr. Knox was asked by the carrier to comment on claimant's need for future medical treatment. In a letter dated November 7, 2001 Dr. Knox stated that "[I]t is very probable that Tammy will require future medical needs from the standpoint of physical therapy, non-steroidal medication, and possible chiropractic management. I also suspect she may consider having a lumbar fusion in the future." (Emphasis added.)

Even after her release by Dr. Knox the medical evidence indicates that she returned to him shortly thereafter on February 21, 2002 complaining of severe left leg pain. Claimant again saw Dr. Knox in December 2002 and on several occasions in 2003 again complaining of additional back and leg pain. Despite claimant's complaints, claimant was

treated conservatively in an effort to avoid additional surgery. However, due to additional back and leg pain Dr. Knox's medical reports indicate that claimant is now ready to discuss other options, including surgery.

In connection with this case the parties have taken the deposition of Dr. Knox. My review of Dr. Knox's deposition reveals that while he cannot state with medical certainty the cause of claimant's need for additional medical treatment including the lumbar fusion, he is willing to state within a reasonable degree of medical certainty his opinion that the claimant's need for additional medical treatment is causally related to her original compensable injury.

Q. Is the fusion that you're recommending that she have related to the injury of November 1st of 1999? And just for your information, that's the date of injury of this workers' compensation claim.

A. I believe that is probably a fair statement. Yes.

Q. Well, I need to know whether or not it's your opinion that the fusion that you're recommending is related to that injury.

A. At this point, yes, it is.

Q. Is that to a reasonable degree of medical certainty?

A. As far as I can tell, yes, it is.

A. As I've recently been reminded, I had entertained this possibility several years ago. What complicates this matter is Tammy was so motivated to avoid this surgery after we had discussed it that she has apparently tried to do everything short of having this surgery which is what I really like my patients to do. As it has been recently reminded to me, we'd entertained this a couple of years ago, so it is my opinion that this, her original injury, is probably a major component of the reason that she needs this fusion.

Q. But we don't need a crystal ball giving your medical opinion, and in stating your medical opinion, it sounds to me as though you feel as though the fusion that you're

recommending is related to the original injury of November 1st of 1999. Is that a fair statement?

A. Yes.

Although Dr. Knox at times in his deposition used the word “probable” or “probably” in stating his opinion, I note that the Arkansas Court of Appeals in *Wackenhut Corporation v. Jones*, 73 Ark. App. 158, 40 S.W. 3d 333 (2001), stated that “probably” has been defined as “most likely” and a physician’s use of the word “probably” is sufficient to satisfy the requirement that a physician’s opinion be stated within a reasonable degree of medical certainty.

Finally, I note that following claimant’s release by Dr. Knox in 2001 she returned to work for the respondent for a period of time before going to work at Waffle House as a waitress working 20 to 30 hours per week. After working at Waffle House the claimant worked for Home Instead Senior Care which required her to go to homes of elderly individuals and act as a companion. Claimant’s job duties for Home Instead also included cooking and some light housework such as vacuuming. I find no evidence that claimant suffered a new injury or aggravation while working for Waffle House or Home Instead.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury from Dr. Knox. Claimant testified that although the initial surgical procedure alleviated her symptoms, those problems gradually returned. Claimant testified that she wanted to “hold off” from a second surgical procedure to see if she could handle the pain. The medical records of Dr. Knox and the other treating physicians in this case corroborate claimant’s testimony. In fact, Dr. Knox testified at his deposition that claimant tried to do everything she could to avoid having a second surgical procedure. The medical records of Dr. Knox indicate that a second surgical procedure was considered as a possibility as far back as November 7, 2001 when Dr. Knox indicated to the carrier that claimant might

need a lumbar fusion in the future. Finally, my review of Dr. Knox's testimony reveals that it is his opinion within a reasonable degree of medical certainty that claimant's need for continued medical treatment and lumbar fusion is causally related to her original compensable injury. I find that the opinion of Dr. Knox is credible and entitled to great weight.

Accordingly, for the foregoing reasons, I find that claimant has met her burden of proving by a preponderance of the evidence that she is in need of additional medical treatment for her compensable injury. Respondent has controverted claimant's entitlement to additional medical treatment from Dr. Knox.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Knox for her compensable injury. Respondent has controverted claimant's entitlement to additional medical treatment from Dr. Knox.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the respondents but with no fee forthcoming from the claimant since no benefits are being paid directly to the claimant.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE