

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F400140

MALISSIA STARK, Employee	CLAIMANT
KENNAMETAL/RTW, Employer	RESPONDENT
ZURICH-AMERICAN INSURANCE CO., Carrier	RESPONDENT

OPINION FILED DECEMBER 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 E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On December 2, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 29, 2004, and a pre-hearing order was filed on that same date. 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 employee-employer relationship existed on or about October 20, 2003.
3. The claimant sustained a compensable injury on October 20, 2003.

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

1. Claimant's entitlement to additional medical treatment; specifically, surgery recommended by Dr. Danks.
2. Attorney fee.

The claimant contends that as a result of her compensable injury she "is currently being treated by Dr. Danks who has recommended surgery. Surgery was set for August 30<sup>th</sup>; however, prior to the surgery it was denied by the respondent. Claimant needs

surgical intervention for her work-related injury.”

The respondents contend they accepted this claim “as a medical only compensable injury and have paid all benefits to which the claimant is entitled. Claimant had pre-existing cervical problems including degenerative disc disease. She previously had a cervical fusion prior to her employment with the respondent employer. It is the respondent’s position that claimant’s current condition and her request for surgery relate to the pre-existing condition and not this work-related injury. Further, controverted attorney’s fees are not paid on medical expenses for injuries which were sustained when the claimant sustained her injury in this case.”

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 September 29, 2004, and contained in a pre-hearing order filed that same date, 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 for her compensable injury; specifically, surgery as recommended by Dr. Danks.

#### FACTUAL BACKGROUND

Prior to her employment with the respondent as a press operator, claimant had a prior injury to her cervical spine which resulted in a surgical fusion being performed by Dr. Williams in Little Rock. On October 20, 2003, claimant was walking upstairs when she

struck an open cabinet door that had been left open. The door struck her on the top of the head just above the hairline and caused claimant to fall down, landing on her buttocks. Claimant reported this incident to Steve, her lead operator, and went to the emergency room later that day. The emergency room physician noted that claimant was complaining of neck pain following her fall. Claimant was prescribed medication and told to seek additional medical treatment from a physician of her choice.

Claimant was sent by the respondent to the Arkansas Occupational Health Clinic in Lowell. At that clinic claimant was evaluated by Max Beasley, a nurse practitioner. Beasley's medical report of October 22, 2003 contains a history of claimant's injury. Beasley diagnosed the claimant as suffering from (1) head trauma and neck strain; (2) degenerative disc disease, cervical spine. Beasley noted that the x-rays revealed degenerative disc disease at the C5-6 and C6-7 levels. He also noted that there was a mild reversal of the normal lordosis of claimant's cervical spine which he attributed to muscle spasm. Beasley recommended that claimant continue the medication given to her at the emergency room and that she remain off work until a follow up appointment.

Claimant was next evaluated by Beasley on October 24, 2003. At that time the claimant was some better and had near full range of motion of her neck. Beasley also noted no spasm on his examination. Beasley recommended that claimant continue with medication and that she return to work without restriction.

Claimant's next visit with Beasley occurred on October 31, 2003. Beasley noted that claimant was improving, but noted that she still had occasional paresthesias. He recommended that claimant continue with her restrictions and that she follow up with Dr. Gary Moffitt in one week.

Claimant was evaluated by Dr. Moffitt on November 7, 2003. Dr. Moffitt was of the opinion that claimant's condition was muscular in nature; therefore, he recommended that claimant undergo physical therapy. He also indicated that claimant could continue to work

without restrictions.

The medical reports indicate that claimant underwent physical therapy on several occasions with the exception of two no shows and one missed appointment due to her father's illness. In a report dated November 19, 2003 from Jon Lee, physical therapist, he notes that the claimant is having significant spasms consistent with nerve root irritation. He indicated that claimant would benefit from continued physical therapy.

On February 6, 2004, claimant sought medical treatment from Dr. Janelle Potts, her family physician. Dr. Potts' medical report indicates that claimant cannot turn her neck without pain. At claimant's request, Dr. Potts agreed to refer claimant to a neurologist.

Following this visit with Dr. Potts claimant filed a request for a change of physician with the Commission. The Commission granted claimant's change of physician request to Dr. Michael Morse, a neurologist, who ordered an MRI scan. According to Dr. Morse's medical report of August 10, 2004, the MRI scan showed a disc herniation at the C4-5 level. As a result, Dr. Morse diagnosed claimant as suffering from a cervical disc herniation secondary to an on-the-job injury. He then referred claimant to a physician in Dr. Knox's office.

Claimant was evaluated by Dr. Kelly Danks of Dr. Knox's office on August 18, 2004. After his examination and review of x-rays and claimant's MRI scan, Dr. Danks stated that claimant suffered from cervical spondylosis, neuroforaminal narrowing with radiculopathy. It was Dr. Danks' opinion that claimant would need a three level fusion at C4-5, C5-6, and C6-7. Before Dr. Danks could proceed with the surgery respondent controverted claimant's entitlement to the surgical procedure. As a result, claimant has filed this claim contending that she is entitled to additional medical treatment for her compensable injury; specifically, the surgery recommended by Dr. Danks.

### 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). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *White Consolidated Industries v. Gallaway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

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 the surgery recommended by Dr. Danks is reasonably necessary for treatment of her compensable injury. As previously discussed, claimant did have a pre-existing cervical spine condition which resulted in a fusion in June 2002. However, I find that claimant's pre-existing condition was aggravated by her injury in October 2003; therefore, the resulting surgery is reasonable and necessary for claimant's compensable injury.

Claimant testified that following her cervical fusion her problems were alleviated. According to claimant's testimony she underwent no additional treatment following her release by Dr. Williams until after her injury on October 20, 2003. The documentary evidence contains no medical records indicating that claimant sought any additional medical treatment during this period of time.

In support of its contention that claimant continued to have problems associated with her pre-existing condition prior to October 20, 2003, respondent relies in part upon a history contained in the notes of Max Beasley, the nurse practitioner, dated October 22, 2003. Although Beasley noted that the claimant had minimal numbness and tingling in her right hand since the time of her injury, Beasley also recorded the claimant's prior cervical condition and noted that claimant "states she has had residual numbness and tingling in

her right arm at times.” Likewise, in a note dated October 31, 2003, Beasley stated that claimant “is now having only occasional paresthesias, as she was having before the incident on October 21, 2003.”

Claimant denies that she informed Beasley that she had numbness and tingling in her right arm subsequent to her release by Williams and before her injury of October 20. However, even if the claimant were having some occasional numbness and tingling prior to October 20, the evidence indicates that claimant’s injury aggravated her pre-existing condition. I believe that this is evidenced by the significant muscle spasm claimant was having following her injury. According to Beasley’s initial medical report of October 22, 2003, claimant’s muscle spasm was the probable cause of the mild reversal of her normal lordosis which was present on x-rays.

In contrast to the history contained in Beasley’s notes is the history contained in the physical therapist’s notes dated November 19, 2003. That note indicates that claimant had a cervical surgery performed in June 2002 and that claimant had had a complete resolution of her pain since then. Thus, this history supports claimant’s testimony that she did not have any additional symptoms until after October 20, 2003.

Obviously, this case is complicated somewhat by the fact that Dr. Morse interpreted claimant’s MRI scan as revealing a herniated disc in the cervical spine which he believed was secondary to claimant’s on-the-job injury. On the other hand, Dr. Danks does not mention a herniated disc in his report of August 18, 2004. To the contrary, Dr. Danks mentions claimant’s cervical spondylosis and neuroforaminal narrowing with radiculopathy. However, given the evidence which has previously been discussed, I find that the claimant’s injury of October 20, 2003 resulted in an aggravation of her pre-existing cervical spine condition. Therefore, the medical treatment recommended by Dr. Danks is reasonable and necessary for treatment of claimant’s compensable injury. According to claimant’s testimony she did not have any additional cervical problems following her

release by Dr. Williams until her injury of October 20, 2003. While Beasley's notes could be interpreted as indicating that claimant did in fact have those problems, I also note that the physical therapist's note contains a history indicating that claimant did not have any additional problems. Furthermore, there are no medical records indicating that claimant sought any medical treatment for any problems with her cervical spine subsequent to her release by Dr. Williams. This evidence coupled with the findings of muscle spasm throughout the medical reports following claimant's compensable injury leads me to conclude that the medical treatment recommended by Dr. Danks is reasonable and necessary medical treatment for her compensable injury.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

#### AWARD

Claimant has met her burden of proving by a preponderance of the evidence that the proposed surgery by Dr. Danks is reasonable and necessary in relation to her compensable injury. Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the

medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE