

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E911807

**ROBERTA J. BUSBEA,
EMPLOYEE**

CLAIMANT

**ST. VINCENT INFIRMARY
MEDICAL CENTER,
EMPLOYER**

RESPONDENT

**ALTERNATIVE INSURANCE
MANAGEMENT SERVICES, INC.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 22, 2005,

Pursuant to a hearing conducted January 26, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Steven McNeely, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for additional medical and temporary total disability benefits for her admittedly compensable low back injury.

The claimant contended that she should be awarded additional temporary total disability benefits from April 1 through April 6, 2004, and additional medical benefits for maintenance by medication and trigger point injection therapy recommended by Dr. Jim J. Moore, as well as payment of medical treatment received from Dr. John L. Wilson.

The respondents denied that the claimant was entitled to the benefits requested.

The parties also differ over the payment of the witness fee owed to Dr. Moore for his testimony at the hearing.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to her low back August 5, 1999; her average weekly wage was \$361.44; and Dr. Jim J. Moore and Dr. John L. Wilson are authorized treating physicians for the claimant's compensable injury.

3. The record fails to show that the claimant was in a healing period from April 1 through April 6, 2004, and, consequently, she is not entitled to benefits for temporary total disability for that period.

4. The medical care suggested by Dr. Moore is reasonably necessary for her compensable injury as has been the treatment received by Dr. John L. Wilson, both of which are the responsibility of the respondents.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant, 60 years of age at the time of the hearing, injured her low back during her employment as a certified nursing assistant on August 5, 1999, when she felt pain as she helped to lift and reposition a heavy patient back toward the head of her bed. The patient unexpectedly

grasped the claimant on the back of her neck to try to help pull herself up and the claimant heard a sound in her low back indicating injury.

Before this incident, in 1996, the claimant had suffered a back injury in a motor vehicle accident where her car was struck from the rear, causing injuries that required her to undergo two surgeries performed by neurosurgeon Dr. Thomas Fletcher. Claimant testified that after she recovered from these surgeries she did not have any more problems with her back until the incident in August, 1999, when she was helping to lift and reposition the patient. However, since this injury, the claimant has continued to have problems with her back. Surgery was suggested by Dr. John Wilson but postponed because of physical problems the claimant experienced. After Dr. Wilson had asked Dr. Moore to evaluate the claimant, he began giving her epidural steroid injection therapy and medication which usually benefitted her for two to three months and allowed her to keep working. Eventually, after an office visit in October, 2003, the respondents denied additional treatment by Dr. Moore and suggested that the claimant continue with Dr. Wilson. Eventually, the respondents also refused to allow the claimant to continue to see Dr. Wilson. In his deposition testimony, Dr. Wilson explained that the claimant herniated disc at L3-4 on the right, has persistent residuals, and that her condition waxes and wanes since the 1999 injury. He also explained that the claimant's anomalous dura or arachnoid which leaks when the claimant is given a myelogram caused him to be fearful of doing epidural steroid injections. Dr. Moore was called in for the claimant's pain management while Dr. Wilson continues her orthopedic care. He stated that although a person with a herniated disc normally reaches maximum medical improvement the claimant can suffer an exacerbation without a lot of provocation.

However, the record does not show that the claimant was in a healing period from April 1 through April 6, 2004, when she missed work and did not receive temporary total disability benefits. The claimant is entitled to temporary total disability benefits when totally incapacitated to earn wages during a healing period. Thus, her request for temporary total disability benefits, is not supported by the record.

On the other hand, the claimant has received reasonably necessary medical care from Dr. Wilson and has been offered additional pain management care from Dr. Moore, both of whom are authorized physicians. The fact that this particular care has not been authorized does not change their status as authorized physicians. The opinion of the doctor hired by the respondents that the claimant was doing well when they observed her is not inconsistent with Dr. Wilson's opinion that the claimant's condition waxes and wanes.

Rule 45 of the Arkansas Rules of Civil Procedure governs the issue of subpoenas. It provides for token compensation for witnesses subpoenaed to trial, hearing, or depositions in the amount of \$30.00 per day and \$.25 per mile. However, Subpart P of Commission Rule 30 makes special allowance for certain deposition witness fees which, while quite modest when compared with the value of a physician's time, is nevertheless usually preferred to the fee owed to a witness subpoenaed to a hearing. If a party wishes to rely on the opinion of a physician, the physician must be made available for cross-examination. Here, the respondents attempted to depose Dr. Moore without success and requested that claimant's counsel subpoena him to the hearing so that he would be available for cross-examination. Counsel for the claimant complied and it is the claimant's responsibility to pay the witness fee pursuant to Rule 45 of the Arkansas Rules of Civil Procedure.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge.