

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F312628**

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| <b>SUE J. COURTNEY, EMPLOYEE</b>                             | <b>CLAIMANT</b>   |
| <b>SOUTHEAST ARKANSAS HUMAN DEVELOPMENT CENTER, EMPLOYER</b> | <b>RESPONDENT</b> |
| <b>PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER</b>              | <b>RESPONDENT</b> |

**OPINION FILED DECEMBER 14, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 15, 2005, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, temporary total disability benefits and attorney's fees.

At issue is whether or not a delay in payment constitutes controversion of benefits and whether or not additional medical treatment is reasonable and necessary.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on November 13, 2003 at which time the claimant sustained a compensable back injury at a compensation rate of \$210.00/\$158.00. Medical expenses, temporary total disability benefits (from November 15, 2003 to February 2, 2004 and from February 6, 2004 to April 1, 2005) and a 6% anatomical impairment rating as assessed by Dr. Scott Schlesinger on April 1, 2005, have been accepted.

The claimant remains symptomatic and wishes to undergo surgery as recommended by Dr. Ed Saer in his report of September 16, 2004. Dr. Saer diagnosed degenerative disc disease at L4-5 and L5-S1, and recommended spinal fusion L4 through S1 with a possible interbody fusion at L4-5.

The claimant seeks payment of additional medical treatment, temporary total disability from April 1, 2005 to a date yet to be determined, and attorney's fees. Additionally, the claimant contends she did not receive permanent partial disability payments until June, 2005. Therefore the rating has been controverted and attorney's fees are owed.

The respondents contend additional medical treatment is not reasonably related or necessary and rely on Dr. Schlesinger's report of November 1, 2004. They further contend that a delay in payment does not amount to controversion and rely on Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986).

The following were submitted without objection and comprise the evidence of record: The parties' prehearing questionnaires and exhibits contained in the transcript along with correspondence from Mr. Buckner dated October 4, 2005 and Mr. Smith dated December 6, 2005, concerning the compensation rate.

The following witnesses testified at the hearing: the claimant and her husband, James and the claims adjuster, Linda Amaden.

The claimant, age 56 (D.O.B. May 19, 1949), has a high school education. Her work experience includes grading lumber for Maxwell and factory work at Burlington. Her health history includes lumbar degenerative disc disease, depression, a July, 2002 back injury treated conservatively and surgery for bilateral carpal tunnel syndrome in the late '90's. She began work for the respondent-employer in 1999, taking care of children. She has not worked since 2003.

On November 13, 2003, the claimant was trying to restrain a patient in a straight jacket. She was kicked and fell against a wall, injuring her back. She developed pain in her right leg and difficulty walking. The claimant has been treated conservatively (medication, physical therapy, steroid injections, TENS unit, rigid corset) but remains symptomatic and wishes to undergo surgery as recommended by Dr. Saer.

Dr. Schlesinger disagreed with Dr. Saer's advice and rated the claimant at 6% to the body as a whole in a letter dated April 1, 2005. The claimant testified she did not receive permanent

partial disability benefits until June 10, 2005. The check was dated June 8, 2005 and covered the time period of April 2, 2005 to June 24, 2005.

The claimant's husband, James Courtney, is a special education teacher. He testified that a case manager was assigned to the claim and accompanied them to all the doctor visits. She was aware of the doctor's advice and rating. Mr. Courtney spoke with Linda Amaden about the delay in receiving benefits after Dr. Schlesinger's exam. Ms. Amaden made a settlement offer, and it was Mr. Courtney's understanding that if he did not call her back by Wednesday or Thursday before Ms. Amaden left for vacation, the settlement offer was withdrawn. The Courtney's decided not to settle and did not call Ms. Amaden again.

Mr. Courtney stated that Dr. Saer had explained the risks and benefits of the surgery and gave them some literature to read. Because his wife remains symptomatic, she decided to pursue additional medical treatment.

Linda Amaden testified she had experienced some difficulty in obtaining reports from Dr. Schlesinger. His report of April 1, 2005 was not received until May 6, 2005. Both the report and bill are forwarded to an outside company, Systemedic, for audit against the FCE Schedule. When Ms. Amaden received the report back on May 13, 2005, she spoke with her supervisor, Terry Lucy, about liability for the rating and settlement options. She then telephoned the claimant's husband on May 18, 2005 before taking vacation until May 31, 2005. It was her understanding that Mr. Courtney planned to discuss the offer with his wife and their attorney and call her back. She did not hear from Mr. Courtney again. Instead, Attorney Buckner wrote her a letter dated June 7, 2005, and she ordered the check on June 8, 2005, paying the claimant's permanent partial disability benefits in a lump sum.

### **MEDICAL EVIDENCE**

The claimant has been examined by general practitioners, Drs. Joe Wharton and Dr. Barry Baskin, a neurologist, Dr. David Reding, surgeons, Dr. Edward Saer, and Dr. Scott Schlesinger, and pain specialist, Dr. Thomas Hart.

Dr. Wharton's records show the claimant was diagnosed with extensive multilevel degenerative disc disease and traumatic sacroillitis but the work related injury produced different symptoms and he concluded that the claimant had sustained a new injury. Diagnostic testing indicated bulging discs but no herniation or nerve root compromise. The disc bulges contributed to stenosis. Dr. Wharton excused the claimant from work and prescribed medication and physical therapy. Dr. Wharton's report of March 15, 2005 indicates the claimant developed adverse side effects from the medication.

Dr. Reding saw the claimant on January 21, 2004 and prescribed epidural steroid injections for degenerative disc disease at L4-5, as well as a rigid lumbosacral corset and TENS unit. Dr. Reding mentions surgical intervention in his reports of March 22, 2004 and April 21, 2004. He concluded that because the claimant had not responded to treatment, she was not a surgical candidate. Presumably, the stability provided by a corset mimics the effects of fusion and if the corset was not beneficial then the surgery would not be effective either.

Dr. Baskin saw the claimant on May 13, 2004 and summarized her medical treatment in his report. He opined that her work-related injury exacerbated preexisting degenerative disc disease and recommended intradisk injections and changes in her medication.

Dr. Thomas Hart saw the claimant on July 20, 2004 performing the injections and discussing surgery with the claimant. The injection provided only temporary relief. Dr. Hart did find objective evidence of a leak, correlating with the claimant's pain.

The claimant returned to Dr. Baskin again on August 9, 2004 along with her "case worker", Maryann Cox, the nurse assigned by the carrier. Dr. Baskin reiterated that the work-related injury aggravated the claimant's preexisting degenerative disc disease and recommended surgery. He referred her to Dr. Ted Saer.

Dr. Saer's report of September 16, 2004, indicates the claimant is a candidate for surgery to address the pain caused by degenerative disc disease at L4-5 and L5-S1.

The claimant was seen by Dr. Schlesinger on November 1, 2004. He opined that the work-related injury aggravated, but did not cause, her preexisting degenerative disc disease. Dr. Schlesinger did not think surgery would be beneficial. He recommended traction and a TENS unit. In a follow-up report dated April 1, 2005, Dr. Schlesinger also recommended that the claimant discontinue her narcotic medication, tapering off the drugs under medical supervision, and use anti-inflammatory medication instead. He assessed a 6% rating to the body as a whole, commenting that her April 1, 2005 Functional Capacity Evaluation (FCE) displayed inconsistent and unreliable effort. The FCE found that the claimant was capable of performing a job with light physical demands.

### **CONTROVERSION**

Dr. Schlesinger assessed the rating on April 1, 2005. By letter dated June 7, 2005, Attorney Buckner filed a letter of representation with the Commission, noting that no permanent partial disability benefits had been received and advising that his client wished to return to Dr. Saer.

The adjuster responded by letter dated June 13, 2005 that the carrier was accepting the rating but controverting treatment with Dr. Saer. They did agree, however, that the claimant could return to Dr. Baskin. The respondents issued a check for the claimant's permanent partial disability benefits dated June 8, 2005 in the amount of \$1,896.00, covering the time period of April 2, 2005 to June 24, 2005.

### **FINDINGS AND CONCLUSIONS**

The claimant sustained a compensable back injury which aggravated a preexisting condition of extensive degenerative disc disease. She has been treated conservatively by several different physicians to no avail. Drs. Wharton, Baskin, Hart, and Saer have all recommended surgery. Dr. Schlesinger suggested repeating her conservative care.

Employers must promptly provide medical services which are "reasonably necessary in connection with" the treatment of compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical

treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Commission Opinion February 14, 2003 (E906565). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

While I realize surgical treatment for degenerative disc disease is controversial, Dr. Hart has documented objective evidence of a leak in the disc that is causing the claimant's pain. The respondents are liable for pain management and conservative treatment has failed. Dr. Saer has explained the risks of surgery to the claimant and she wishes to proceed with this course of treatment. I see no point in continuing the treatment recommended by Dr. Schlesinger which has all ready been tried in the past.

I find that there are only two options left: continuing treatment for chronic pain with Dr. Hart or surgical intervention with Dr. Saer. Accordingly, I find that Dr. Saer's treatment is reasonable and necessary in connection with the compensable injury.

The claimant has also complained about the delay in receiving her permanent partial disability benefits. For the carrier to link the payment of the rating with a settlement offer may be construed as oppressive conduct. To an injured employee who has been living on 66-2/3% of their average weekly wage, this is an enticement to accept the settlement offer and give up the claim for more medical treatment.

The determination of whether a claim is controverted is a question of fact. The purpose of a finding of controversion is to determine liability for the claimant's attorney's fees, placing the burden of litigation expense on the party which made it necessary. Aluminum Company of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). The Court has determined that failure to pay compensation or the dilatory payment of benefits is not controversion per se, but it does shift the burden to the carrier to justify their actions. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976), Hamrick v. Colson Co., 271 Ark. 740, 610 S.W.2d 281 (1981), Turner v. Trade Winds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980), Climer v. Drake's Backhoe, 7 Ark. App. 148, 644 S.W.2d 637 (1983).

There was a delay in payment of permanent partial disability benefits by a little over two months. The carrier has explained the delay on a miscommunication with the claimant's husband, a delay in receiving reports from Dr. Schlesinger and the delay created by sending both the report and the bill to their auditing company. I find the carrier had notice of the rating through their agent, the case manager assigned to accompany the claimant to all of her doctor's visits. The claimant had to engage the services of counsel in order to obtain the permanent partial disability benefits as well as continuing medical treatment. Accordingly, I find the delay in payment of permanent partial disability benefits constitutes controversion.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on November 13, 2003 at which time the claimant sustained a compensable back injury at a compensation rate of \$210.00/\$158.00. Medical expenses, temporary total disability benefits (from November 15, 2003 to February 2, 2004 and from February 6, 2004 to April 1, 2005) and a 6% anatomical impairment rating as assessed by Dr. Scott Schlesinger on April 1, 2005, has been accepted.
2. The claimant has proven by a preponderance of the credible evidence of record that Dr. Saer's course of recommended treatment is reasonable and necessary in connection with the compensable injury pursuant to Ark. Code Ann. §11-9-508.

3. Respondents are directed to pay the temporary total disability benefits from April 1, 2005 to a date yet to be determined as the claimant remains in her healing period, totally incapacitated from working.
4. The delay in payment of permanent partial disability benefits constitutes controversion.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge