

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401342

LINDA C. ENSLEY, EMPLOYEE	CLAIMANT
SOUTHWEST ARK. DEV. COUNCIL, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED FEBRUARY 18, 2005

Hearing before Administrative Law Judge J. Mark White on January 13, 2005, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Ms. Betty Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 13, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on October 11, 2004, and a Prehearing Order was entered that same day. A copy of the October 11, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including January 29, 2004; that on January 29, 2004, the claimant sustained a compensable injury; that respondents accepted the January 29, 2004, injury as compensable and paid benefits; that on or about June 8, 2004, the respondents paid the claimant temporary total disability benefits for the period from February 27, 2004, through June 8, 2004; and that the claimant earned wages sufficient to entitle her to a compensation rate of \$391 for total disability benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether additional medical treatment is reasonably necessary in connection with the compensable injury; and controversion and attorney's fees.

The claimant contends that she should be paid temporary total disability benefits from June 9, 2004, to a date yet to be determined; that the medical treatment she has received since January 29, 2004, has been reasonable, necessary and related to her compensable injuries including the treatment recommended by Dr. Buono which includes a TENS Unit; that the mileage expense and prescription expense she has incurred since January 29, 2004, has been reasonable, necessary and related; that respondents should be ordered to pay an attorney's fee on the temporary total disability benefits for the period from February 27, 2004, through June 8, 2004, which

were not paid until June 8, 2004; and that respondents should be ordered to pay attorney's fees as permitted by law.

The respondents contend that the claimant has been provided all appropriate benefits to which she is entitled; and that any additional benefits sought by the claimant are not causally related to the January 29, 2004, work-related injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment after June 8, 2004, was reasonably necessary in connection with the compensable injury.

4. The claimant's healing period ended no later than June 8, 2004.
5. The claimant has therefore failed to prove by a preponderance of the evidence that she was entitled to temporary total disability benefits after June 8, 2004.
6. The claimant has proven by a preponderance of the evidence that the respondents controverted her entitlement to the temporary total disability benefits voluntarily paid in lump sum for the period from February 27, 2004, through June 8, 2004, and that she is entitled to attorney's fees on those benefits.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a nurse's aide providing in-home assistance to patients. On January 29, 2004, while traveling between patient homes, she was injured when a propane truck backed into her stationary vehicle. The claimant described her injuries as follows:

Q. When that happened, what physical complaints did you have of injury?

A. My neck popped and I was like having trouble with my neck.

Q. After the accident happened that day, were you treated somewhere for medical care?

A. Yes. I went to Hope Hospital and they treated me and sent me home.

Q. Okay. Now, the day of the accident, were there any other complaints that you had other than your neck?

A. I had high - my blood pressure was up high.

Q. Have you had a history of high blood pressure in the past?

A. I have previous, but I wasn't having any trouble with my blood pressure before this accident. I wasn't having any medical problems.

[...]

Q. Did you develop any other physical problems other than the neck pain and the high blood pressure problems?

A. I started having trouble out of my back and it traveled down the side of my right leg and I'm not having good use of it. I'm having trouble out of it. I have severe pain down it and sometimes I can't use it and it goes out on me.

The respondents accepted the injury as compensable and paid benefits. The claimant has not returned to work since the accident.

The claimant was treated at Medical Park Hospital in Hope the day of the accident. The hospital records reflect that she complained of neck pain and headache, but there is no indication she complained of back pain. The claimant then

saw Dr. Sherri Diamond on February 4, again complaining of neck pain and headache, with no indication of back complaints. Dr. Diamond noted the presence of spasms in the claimant's neck; she also noted that the claimant's blood pressure was "very elevated" and described her situation as "HTN emergency". Both the neck spasms and the high blood pressure were treated with medication, and Dr. Diamond also recommended physical therapy.

The claimant continued with her physical therapy through February. On February 18, her physical therapist sent her to the hospital because her blood pressure was again dangerously high. Dr. Diamond then put the physical therapy "on hold" until the claimant could bring her blood pressure under control. Dr. Diamond saw her again on March 3 and 10. On March 13, the claimant went to the hospital again, this time complaining of headache, neck and back pain. This appears to be the first notation of back pain made in the medical records. The claimant returned to Dr. Diamond on March 26; Dr. Diamond diagnosed low-back pain with radiculopathy and recommended an MRI, which was initially denied by the respondents.

An MRI was finally performed on April 20, revealing "severe disk degeneration with posterior spurring and facet disease at the L4-5 level causing moderate to severe spinal stenosis and bilateral L4 foraminal compromise." The

report added that “a left paracentral extrusion cannot be excluded.”

The claimant continued her physical therapy and her treatment with Dr. Diamond over the following months. By May 12, the physical therapist reported that the claimant’s neck pain only “occasionally bothers” her; by May 17 she was “not hurting much at all.” On May 26 Dr. Diamond noted the claimant was “not having much pain in her neck now” but was still complaining of back pain.

Dr. Diamond referred the claimant to a neurosurgeon, Dr. Lee Buono. Dr. Buono saw her on June 16; he recorded that the claimant’s headache and neck problems had “resolved” but that she continued to experience back pain. He observed the presence of lumbar spasms, but it must be noted that no other medical provider before then had recorded an observation of lumbar spasm. Dr. Buono recommended medication and a TENS unit, which was provided for a short while before the respondents denied further treatment. In November Dr. Buono recommended aqua therapy, but the respondents denied this treatment as well.

II. Adjudication

A. Additional Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by

the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The question herein is whether the claimant's medical treatment after June 8, which was primarily for her low back, was causally related to the compensable injury. Though Dr. Diamond did express the opinion that the claimant's neck problems were causally related, I cannot find any indication that Dr. Diamond ever expressed an opinion as to the low-back problems. Dr. Buono expressed an opinion, saying that the claimant's condition was "degenerative but could have flared up from work." I cannot give great weight to Dr. Buono's opinion, for it is based on an inaccurate history. Specifically, Dr. Buono's understanding as noted in his June 16 letter was that the claimant's low-back pain "has not changed since its onset during the accident." However, the claimant testified at the hearing that her low-back pain developed after her accident, consistent with the complete lack of mention in her medical records of back pain prior to March 13. One can only speculate whether knowing the low-back pain developed a month after the accident, rather than contemporaneously, would change Dr. Buono's opinion as to the "temporal relationship," and speculation can never take the place of proof. *Ark. Dept. of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Moreover, it is well

established that the commission is not bound by a doctor's opinion which is based largely on facts related to him by a claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. *See, e.g., Roberts v. Leo-Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

The record shows that the claimant's neck problems had resolved by June 8. Because the low-back pain did not develop until a month after the injury, and because there is no credible medical opinion establishing a causal connection, I am not convinced that the claimant's low-back problems are causally related to the compensable injury. I note that twice before this accident the claimant sustained similar neck injuries in separate car accidents, yet these prior accidents did not result in complaints of low-back pain.

I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment after June 8, 2004, was reasonably necessary in connection with the compensable injury.

B. Additional Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which she suffers a total incapacity to earn wages. *Arkansas State Highway &*

Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

As noted above, I find that the claimant has failed to prove that additional medical treatment after June 8, 2004, was reasonably necessary. I therefore find that the claimant's healing period ended no later than June 8, 2004. I conclude that the claimant has failed to prove by a preponderance of the evidence that she was entitled to temporary total disability benefits after June 8, 2004.

C. Controversion

Attorney's fees may be awarded "on the amount of compensation for indemnity benefits controverted and awarded." ARK. CODE ANN. § 11-9-715(a)(2)(B)(ii). The object of the attorney's fee statute is to place the burden and expense of litigation upon the party which made it necessary. *Cleek v. Great S. Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). Whether or not a claim has been controverted is a question of fact. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998).

The respondents initially paid the claimant two weeks worth of temporary

total disability benefits but stopped the benefits as of February 26. The claimant then retained her attorney, and the record contains a series of letters dated March 23 and later from the claimant's attorney to the respondents seeking these and other benefits. On June 8, the respondents voluntarily paid the claimant temporary total disability benefits in a lump-sum for the period from February 27 through June 8.

The evidence herein is similar to that of *Wal-Mart Stores v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001). There, the Court of Appeals found that an award of attorney's fees was appropriate where the respondents initially controverted indemnity benefits, forcing the claimant to retain counsel in order to present and protect her claim for benefits, even though respondents later voluntarily agreed to pay the controverted benefits one month before a full hearing was to have been held. *Id.* I cannot find that the present matter is substantially different.

Given the Full Commission's finding as affirmed by the Court of Appeals in *Wal-Mart Stores v. Brown, supra*, and the claimant's uncontradicted testimony, I find that the claimant has proven by a preponderance of the evidence that the respondents controverted her entitlement to the temporary total disability benefits voluntarily paid from February 27, 2004, through June 8, 2004, and that she is entitled to attorney's fees on those benefits.

AWARD

The claimant has proven by a preponderance of the evidence that the respondents controverted her entitlement to the temporary total disability benefits voluntarily paid from February 27, 2004, through June 8, 2004, and that she is entitled to attorney's fees on those benefits. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge