

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E903202

VIRGINIA L. KING, EMPLOYEE	CLAIMANT
BIRDNEST, INC., d/b/a WILLOW OAKS ACRES, EMPLOYER	RESPONDENT
FREMONT PACIFIC, CARRIER	RESPONDENT

INTERIM OPINION FILED MAY 16, 2005

Hearing before Administrative Law Judge J. Mark White on April 7, 2005, in Hope, Hempstead County, Arkansas.

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

Respondents represented by Mr. Paul Gehring, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 7, 2005, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on January 31, 2005, and a Prehearing Order was entered that same day. A copy of the January 31, 2005, 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 February 4, 1999; that on February 4, 1999, the claimant sustained compensable injuries to her neck, back, right hip and right leg; that respondents accepted the February 4, 1999, injury as compensable and paid some benefits; and that the claimant earned wages sufficient to entitle her to a compensation rate of \$273 for total disability benefits and \$205 for permanent partial 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 a compensable injury; whether a second opinion evaluation is reasonably necessary; unpaid medical bills; and controversion and attorney's fees.

The claimant contends that she is entitled to temporary total disability benefits from November 1, 2001, through October 14, 2002, and from July 7, 2003, through a date yet to be determined; that the respondents have paid permanent partial disability benefits from June 2, 2004, through November 26, 2004; that the payment of permanent partial disability benefits was premature, in that she had not yet reached maximum medical improvement; that she is entitled to additional medical treatment, specifically surgery as recommended by Dr. Contreras; and that some medical bills remain unpaid.

Respondents contend that they are evaluating the reasonable necessity of further treatment of claimant's lumbar spine and request a second opinion with either Dr. Simpson in Pine Bluff, Dr. Ron Williams in Little Rock, or Dr. Cathey in North Little Rock.

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 claimant and to observe her 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 respondents have proven by a preponderance of the evidence that an independent medical evaluation, specifically for a second opinion of the surgery recommended by Dr. Contreras, is reasonably necessary in connection with the compensable injury.

4. Dr. Ronald Williams of Little Rock is hereby appointed to perform the independent medical evaluation at the respondents' expense, and he is authorized to conduct additional studies that he deems reasonably necessary to ascertain the nature and extent of the claimant's injury and to address the reasonableness of the proposed surgery.
5. All other issues are held in abeyance pending receipt of Dr. Williams' report.

DISCUSSION

I. History

The claimant worked as a groomer for the respondent-employer. On February 4, 1999, she sustained a compensable injury when a horse ran into her and knocked her down. The respondents accepted the injury as compensable and paid benefits. Initial MRI testing revealed a disc herniation at L5-S1, and later testing also revealed disc protrusions at C3-4 and T2-3. The claimant's treating physician, Dr. Freddie Contreras, ultimately performed surgery at L5-S1 on September 24, 1999. The claimant experienced some improvement from the surgery, but she developed renewed pain and symptoms the following December after a sneezing incident. A subsequent MRI revealed a "recurrent right paracentral disc protrusion at L5-S1." Dr. Contreras recommended surgery, but the respondents demanded a second

opinion evaluation before they would authorize surgery.

The claimant refused the second opinion, and the respondents asked the Commission to require an independent medical evaluation by Dr. Kevin McLeod in Arkadelphia. An Administrative Law Judge initially denied the request, but in an Opinion filed January 25, 2001, the Full Commission agreed an evaluation was reasonably necessary and appointed Dr. McLeod to perform the evaluation. Neither party appealed the decision, and it is now a final decision.

After the Commission's decision became final, the respondents for unknown reasons dropped their demand that Dr. McLeod evaluate the claimant. In May 2001, the claimant's former attorney and the respondents' current attorney exchanged letters agreeing that the respondents had authorized "back" surgery by Dr. Contreras. The claimant returned to Dr. Contreras on June 12 and then underwent another MRI. Based on the claimant's symptoms and the MRI results, Dr. Contreras determined that the claimant's neck problems were more serious than her back problems. He recommended on September 18 that the lumbar surgery be put off and that the claimant undergo neck surgery.

A treatment note from Dr. Contreras dated March 28, 2002, asserts that the neck surgery was never approved by the respondents. Yet, in an October 1, 2001, letter to the respondents' attorney, the respondents' adjuster expressed puzzlement

that she had not received a surgery date from Dr. Contreras. The record does not clarify with any certainty whether Dr. Contreras or his office actually requested approval for the neck surgery, or whether the respondents denied the neck surgery.

In a May 23, 2002, letter, the respondents' attorney stated in a letter to the claimant's former attorney that the respondents had "been willing to authorize [surgery] for the past year." For unknown reasons, one of the parties requested a hearing, and a Prehearing Order was entered by an Administrative Law Judge on October 11, 2002, scheduling a hearing on the issue of "medical benefits," with the claimant contending the respondents had "refused to authorize medical treatment/surgery by Dr. Contreras." The respondents' prehearing questionnaire, which was incorporated into the Order by the Judge, does not state a position on the neck surgery. The hearing was evidently cancelled, and the neck surgery was (again?) approved by September 12, 2002, with the claimant undergoing surgery on October 21, 2002.

Later treatment notes reflect that the claimant received considerable relief from the surgery. On May 20, 2003, Dr. Contreras wrote:

Ms. King comes in today. With regards to her neck, she is better. She is certainly not well, but she is much better. She has a long litany of complaints though. She is having a lot of low back pain and then some left hip and left calf pain. Her right hip and right leg bother her as well. She has a lot of pain in her mid back just a few

inches below her bra line. She gets up in the morning and it is not too bad, but as the day progresses, her low back and mid back really start to act up. At this point in time, she wants to go ahead and get all this worked up, so we will arrange that.

In a letter to the respondents' attorney of November 18, 2003, Dr. Contreras opined that the claimant had not yet reached maximum medical improvement for her back injury, but that she was "at or near" maximum improvement as to her neck injury. In an April 30, 2004, letter to the Commission, Dr. Contreras asked for approval to perform another MRI of the lumbar and thoracic spine. He wrote:

I would like to inform you that since 1999, my office has had difficulty getting approval from the insurance company with regards to performing testing and treating Ms. King.

Mrs. King is still under my care and is still considered temporarily and totally disabled. At no time has Mrs. King been uncooperative, nor has she failed to seek out appropriate medical care.

Dr. Contreras declined to assign an impairment rating for the neck injury, so the respondents sent the claimant to Dr. Bud Dickson for an independent medical evaluation on June 2, 2004. Dr. Dickson noted in the claimant's history: "She continues to have pain in her lower back with radiculopathy into the right lower extremity. She requires narcotics for pain relief for her right lower extremity." Dr. Dickson opined that the neck problems had resolved, and he assigned the claimant

an impairment rating of 10% to the body as a whole for the neck injury. Dr. Dicken further recommended an MRI and surgical consultation for the low back, though he noted surgery might not be indicated "since she has had documented nerve root compression now for over 4 years." He opined that the recurrence of the herniation at L5-S1 was "a continuing result of her accident of 02/04/99." He recommended either Dr. Ron Williams or Dr. Steven Cathey for the consultation. He opined that the claimant was not capable of returning to work with horses, and that she "is not able to sit, stand or lie down for any length of time."

Another MRI was performed for Dr. Contreras on August 12, revealing disc bulges at L3-4 and L4-5. When Dr. Contreras saw the claimant again on August 31, he termed Dr. Dickson's report "fair," and gave his impression:

Ms. King is completely debilitated by her pain. She is unable to tolerate the pain and is unable to function due to the severe nature of her pain. She has requested surgical intervention. I have indicated to her that all we would really have to offer her would be either an ALIF or a PLIF at both L3-4 and L5-S1. She is aware that these are major surgical interventions. We will go ahead and start the paperwork and see exactly what difficulties we might encounter when we request surgical intervention.

II. Adjudication

The Workers' Compensation Act grants the Commission power to order physical examination or treatment by a physician of the Commission's choosing at a location reasonably convenient to the claimant. ARK. CODE ANN. § 11-9-511. The granting of an IME is not automatic; the threshold question is whether it is reasonable and necessary. *King v. Willow Oaks Acres*, A.W.C.C. E903202 (Jan. 25, 2001). Whether a treatment is reasonably necessary is determined by weighing the probability a treatment will reduce disability by a significant amount, against the risk of the treatment to the claimant. *Id.*, citing *Larson's Workers' Compensation*, Desk Edition, § 13.22.

When the Full Commission previously ordered an IME, it was to evaluate Dr. Contreras' recommendation of a repeat lumbar surgery. After the Commission entered its 2001 opinion, Dr. Contreras determined that neck surgery was more urgently needed, and the repeat lumbar surgery was postponed. The surgery the claimant now seeks appears to be essentially the same surgery considered by the Full Commission in its 2001 opinion. If a second opinion IME was reasonably necessary in 2001, as the Commission found, I can see no reason why an IME would not be reasonably necessary now. Indeed, it appears to be of greater necessity, given the tremendous lapse of time since the claimant's original injury and surgery. Given

the Commission's decision in 2001, I find that the respondents have proven by a preponderance of the evidence that an independent medical evaluation, specifically for a second opinion of the surgery recommended by Dr. Contreras, is reasonably necessary in connection with the compensable injury.

In its 2001 opinion, the Commission appointed Dr. Kevin McLeod to perform the IME. However, Dr. McLeod's office has informed me that he will not perform an IME for a back injury. Dr. P.B. Simpson of Pine Bluff previously provided a second opinion evaluation of the claimant, but Dr. Simpson's office has declined to accept another IME appointment. I am unable to locate any other neurosurgeons in Texarkana or south Arkansas other than Dr. Contreras' partners. Therefore, I am compelled to choose a Little Rock neurosurgeon to perform the evaluation. Dr. Dickson has suggested that the claimant see either Dr. Cathey or Dr. Williams. I hereby appoint Dr. Ronald Williams of Little Rock to perform the independent medical evaluation. Dr. Williams is authorized to conduct additional studies that he deems reasonably necessary to ascertain the nature and extent of the claimant's injury and to address the reasonableness of the proposed surgery.

The respondents are directed and ordered to contact Dr. Williams to make the necessary arrangements and to schedule a mutually convenient appointment in cooperation with the claimant. The respondents are further directed and ordered to

provide Dr. Williams with the claimant's medical records and to provide transportation and lodging as necessary for the claimant to attend the IME. The respondents shall be responsible for the cost of the evaluation. The respondents shall ask Dr. Williams to specifically opine as to whether the surgery recommended by Dr. Contreras is reasonably necessary.

Because I have chosen Dr. Williams to offer a second opinion as to the surgery sought by the claimant, any finding on the reasonableness of the proposed surgery is premature. In addition, I find that Dr. Williams' report may be relevant in deciding the remaining issues. Therefore, all remaining issues, including temporary total disability and additional medical treatment, are held in abeyance, pending receipt of Dr. Williams' report.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge