

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F214185**

**PATHY SELLARS**

**CLAIMANT**

**ST. VINCENT HEALTH SERVICE**

**RESPONDENT EMPLOYER**

**PREFERRED PROFESSIONAL INS. CO.**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED JULY 22, 2005**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on June 2, 2005. A prehearing conference was held on February 15, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on October 1, 2002.
2. The compensation rate is \$258.

The claimant contends that she is entitled to further additional reasonable and necessary medical treatment for her hip injury sustained on October 1, 2002. She further contends she is entitled to the permanent impairment rating of 10% to the body as a whole assigned by Dr. Kenneth Rosenzweig and a vocational rehabilitation

evaluation at respondents' expense. The claimant contends she is due temporary total disability benefits from September 1, 2003 through October 5, 2003 and from October 27, 2003 through October 5, 2004.

Respondents contend the claimant has been non-compliant and that she refused to return to her surgeon that did the original surgery on her hip. Because of the non-compliance, benefits were terminated. Respondents contend the claimant is not entitled to additional temporary total disability benefits and to the permanent impairment, since Dr. Rosenzweig speculated on the rating. The claim was controverted on July 31, 2004. Wage loss and vocational rehabilitation are premature issues and will be reserved.

#### **ISSUES TO BE LITIGATED**

1. Additional medical treatment.
2. Temporary total disability benefits.
3. Permanent impairment rating.
4. Attorney's fees.
5. Rehabilitation and wage loss are reserved.

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

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. There was a compensable injury on October 1, 2002.
2. The compensation rate is \$258.
3. The claimant has proven by a preponderance of the evidence that the additional medical the claimant has pursued is reasonable and necessary and the responsibility of respondents.
4. The claimant has also proven by a preponderance of the evidence that she remained in her healing period and was able to work only part-time from June 2003 through June 2004 and is entitled to temporary partial disability benefits for that period. Ark. Code Ann. §11-9-520.
5. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages after June 2004.
6. The claimant has proven by a preponderance of the evidence that she is entitled to a 10% permanent impairment rating as assigned by Dr. Rosenzweig.

**DISCUSSION**

The claimant, 34 years of age, worked as a LPN for the respondent employer. On October 1, 2002, the claimant slipped and fell on a wet floor while responding to a patient. The claimant reported to the emergency room where she was treated and released with medication and returned to work but eventually followed up with Dr. Cynthia Almond and ultimately was treated by Dr. Kenneth Rosenzweig. The claimant had surgery performed by Dr. James Tucker on February 20, 2003 and the claimant

underwent therapy for about two weeks. Dr. Tucker went off to war and the claimant next saw Dr. Rosenzweig.

According to the claimant, she attempted to return to work in July 2003 and worked in a light-duty capacity until July 7, 2004. The respondents terminated the claimant's light-duty position at that time. According to the claimant, she was not allowed to seek physical therapy until one year after it was ordered. The claimant asked to see another doctor; however, she was denied that request. All benefits were terminated July 31, 2004. The claimant sought another arthrogram from her primary care physician and received treatment until her insurance was canceled one year ago. The claimant has been taking hydrocodone for pain.

Vicki Howard, risk management coordinator for the respondent, testified that the claimant did not keep a couple of appointments with Dr. Tucker in 2003; however, respondents paid for Dr. Rosenzweig's treatment until June 10, 2004.

The claimant sustained a compensable hip injury, which was accepted by respondents and benefits were paid, to include a February 20, 2003, surgery performed by Dr. James Tucker to repair a large labrum anterior tear of the left hip. Because Dr. Tucker was called into active military duty, the claimant's care following the surgery was transferred to Dr. Kenneth Rosenzweig. The claimant continued under his care until June 10, 2004, when respondents controverted the claim.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores,*

*Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy.

*Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

In the present case, the claimant has testified to continued pain and problems associated with her left hip. The latest medical report in evidence from Dr. Rosenzweig dated June 10, 2004, refers the claimant for a second opinion to Dr. J. W. Thomas Byrd, a hip specialist. Dr. Rosenzweig, on May 6, 2004, had suggested that the claimant had exhausted her conservative care from his standpoint and should proceed with another surgery or be placed in a chronic pain management program. Dr. Byrd saw the claimant and reviewed her records and on July 22, 2004, did not recommend further surgery. Dr. Rosenzweig's medical records certainly have not indicated that the claimant did not need further medical care but, in fact, suggested that a pain management program might be beneficial.

After considering the claimant's testimony of the problems she continues to experience following her work injury and considering the medical reports and opinions, I find the claimant has proven by a preponderance of the evidence that additional medical care is reasonable and necessary and related to the compensable injury. Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. §11-9-508)a). See, *Chronister v.*

*Lavaca Vault*, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Respondents remain liable for reasonable and necessary medical treatment the claimant has pursued.

The claimant next contends that she is entitled to temporary total disability benefits from September 1, 2003 through October 5, 2003 and from October 27, 2003 until October 5, 2004. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant testified that she returned to work part-time and worked about three hours per day in medical records from July 2003 through July 2004. On June 16, 2003, Dr. Rosenzweig opined that the claimant could work up to three hours per day doing desk work. I find the claimant has proven by a preponderance of the evidence that she remained in her healing period and was able to work only part-time and, therefore, is entitled to temporary partial disability benefits from July 2003 through July 2004. Ark. Code Ann. §11-9-520. The claimant's part-time job ended in July 2004 and the claimant testified that she has not worked since. While there was no documentation from the doctor that the claimant's part-time limitations were lifted until the October 5, 2004, report from Dr. Rosenzweig when he assigned the impairment rating, the claimant also did not present any testimony that she had sought part-time work after the respondent ceased her employment. I find that the claimant did not

prove by a preponderance of the evidence that she remained in her healing period and remained totally unable to earn wages from July 2004 through October 5, 2004.

The claimant next contends that she is entitled to a 10% permanent impairment rating, as assigned by Dr. Rosenzweig on October 5, 2004. Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B) (Repl. 2002).

“Permanent impairment” has been defined as any permanent functional or anatomical loss remaining after the healing period had ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Further, the *AMA Guides* define “permanent impairment” as an “impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment.” The *AMA Guides* further qualify the definition by noting that “[a] permanent impairment is considered to be unlikely to change substantially and by more than [three percent] in the next year with or without medical treatment.” *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Further, the Commission was required to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the *AMA Guides* to be used in this assessment. Ark. Code Ann. §11-9-522(g)(1)(A) (Repl. 2002); W.C.C. Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the *AMA Guides*; the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings

assigned by physicians. *Avaya v. Bryant*, 83 Ark. App. 273, 105 S.W.3d 811 (2003).

Dr. Rosenzweig assigned a 10% permanent rating and noted that the *AMA Guides* were not perfectly clear on rating a hip injury with a documented labral tear with secondary reactive synovitis; however, he utilized Table 62 and arrived at a 10% rating. After a review of the *Guides* and considering the supporting medical documents in evidence, I find the 10% rating assigned by Dr. Rosenzweig is appropriate for the claimant's condition.

### **ORDER**

The claimant has proven by a preponderance of the evidence that the additional medical the claimant has pursued is reasonable and necessary and the responsibility of respondents. The claimant has also proven by a preponderance of the evidence that she remained in her healing period and was able to work only part-time from June 2003 through June 2004 and is entitled to temporary partial disability benefits for that period. The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages after June 2004. The claimant has proven by a preponderance of the evidence that she is entitled to a 10% permanent impairment rating as assigned by Dr. Rosenzweig.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**