

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106463

KAREN ASHCRAFT, EMPLOYEE

CLAIMANT

ARVEST BANK GROUP, EMPLOYER

RESPONDENT

**CLARENDON NATIONAL INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MAY 8, 2006

Hearing before Administrative Law Judge Barbara W. Webb on February 7, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above-styled claim came on for hearing in Little Rock, Arkansas, on February 7, 2006. An Opinion was filed in this case on August 19, 2003, following a hearing before Administrative Law Judge Karen McKinney, held June 27, 2003, in which the Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee-employer-carrier relationship existed between the parties on or about January 26, 2001.

3. Claimant earned an average weekly wage of \$500.00, which computes to a temporary total disability rate of \$334.00 per week.

4. Claimant has proven by a preponderance of the evidence that the medical treatment she has received from Dr. Richard Peek and through his referrals has been reasonable and necessary in connection with her compensable injury.

5. Claimant has proven by a preponderance of the evidence that Dr. Peek was her authorized treating physician upon Dr. Yeshwant Reddy's departure from practice in Arkansas.

6. Claimant was ordered to undergo a psychological evaluation by Dr. Winston Wilson on December 5, 2002, pursuant to an Order dated November 26, 2002.

7. The November 26, 2002, Order specifically stated: "It is further ordered that no further medical procedures shall be considered 'authorized' until such time as claimant presents for the examination as ordered herein."

8. Claimant underwent a spinal fusion performed by Dr. Richard Peek on December 3, 2002.

9. Pursuant to the November 26, 2002, Order, the spinal fusion performed by Dr. Peek was unauthorized medical treatment and in violation of the November 26, 2002, Order.

10. Claimant has failed to prove by a preponderance of the evidence that she is entitled to medical benefits for the medical treatment she received from November 26, 2002, through December 5, 2002.

11. Claimant has proven by a preponderance of the evidence that she remains within her healing period and totally incapacitated from earning wages from the date such benefits ceased and continuing through a date yet to be determined.

12. Claimant has proven by a preponderance of the evidence entitlement to temporary total disability benefits from the date such benefits ceased and continuing through the end of her healing period, a date which is yet to be determined. Respondents are given a credit for any permanent partial disability benefits paid.

13. Respondents have controverted claimant's entitlement to additional medical benefits and temporary total disability benefits.

14. Claimant is entitled to the maximum attorney's fee on the benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

In an Opinion dated May 19, 2004, the Full Commission affirmed the August 19, 2003 Opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopted the Opinion as the decision of the Full Commission. The Full Commission's decision was affirmed in an unpublished Arkansas Court of Appeals' decision (CA04-971) on May 11, 2005.

The Mandate affirming on direct appeal and on cross-appeal was filed on June 1, 2005. A prehearing telephone conference was held in connection with this claim on November 17, 2005. By agreement of the parties, the stipulations applicable to this claim are as follows:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee/employer/carrier relationship existed between the parties on or about January 26, 2001.
3. That claimant's compensable injury was a low back injury, which included a herniated disk at L4-L5 and L5-S1.
4. That claimant's average weekly wage was \$500; temporary total disability rate is \$334; and permanent partial disability rate is \$250.
5. That Dr. Richard Peek is an authorized treating physician.
6. That the treatment referral and surgery performed by Dr. Peek are reasonable and necessary medical procedures in connection with the claimant's compensable injury; that the medical treatment that claimant received between November 26, 2002 and December 5, 2002, including the fusion surgery, was not the responsibility of respondents because it contradicted a previous Order.
7. That the claimant was awarded temporary total disability benefits from the date such benefits ceased, and continuing through the end of her healing period.

A hearing was held in this case on February 7, 2006. At the hearing, the parties agreed to the following additional stipulations:

1. That temporary total disability was paid through June 28, 2003.
2. That respondents have paid permanent partial impairment based on a 13 percent (13%) rating.
3. That claimant reached maximum medical improvement as of November 4, 2005.

The issues presented at the hearing were:

1. Whether claimant is entitled to temporary total disability from June 29, 2003 until November 4, 2005.
2. Whether medical treatment consisting of a placement of a trial spinal cord stimulator, injections, a permanent spinal cord stimulator and resulting treatment, and treatment by Dr. Peek, Dr. Hart, and Dr. Adametz was reasonable and necessary medical treatment.
3. Whether claimant's entitled to additional medical expenses, including out of pocket expenses for medical treatment, prescriptions, mileage, a walker, back brace, hot tub, and gym membership; and whether such items are reasonable and necessary.
4. Whether claimant is entitled to a 25 percent (25%) permanent impairment rating as opposed to the 13 percent (13%) impairment rating paid by the respondents.

All other issues were either waived or reserved. The record consists of a transcript of the February 7, 2006 hearing, containing the witness testimony of Mike and Karen Ashcraft, the Pre-hearing Order, Claimant's exhibits 1-5, and

Respondents Exhibits 1-2. In addition, Joint Exhibits 1-3, consisting of the Hearing transcript of June 27, 2003, depositions of Dr. Peek and Dr. Adametz, and Respondent's Exhibits 3-4, consisting of Depositions of Karen Ashcraft dated February 19, 2003, and January 5, 2006, are incorporated into the record by reference. Joint Exhibit No. 4 consisting of 34 pages of medical records are blue-backed and incorporated into the record by reference.

DISCUSSION

1. Additional Medical Treatment

The claimant argues that the medical treatment received after the second surgery, including the placement of and subsequent removal of a spinal cord stimulator, was reasonable and necessary medical treatment. Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonable and necessary. Winslow v. D & B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). In the instant case, the medical opinion of Dr. Peek, Dr. Adametz, Dr. Hart, and Dr. Bracey all support the reasonable and necessary treatment of the claimant, including the placement of the spinal cord stimulator. Dr. Peek,

claimant's treating physician, testified "[I]t is a standard treatment for failed back syndrome, arachnoiditis, residual pain after back surgery or back injury and they are reasonable and necessary. Dr. Hart's trial gave her relief. She passed psychological examination to get it and Dr. Adametz thought it was reasonable and necessary to perform the surgery, or he wouldn't have. And it's my opinion, too, that it was reasonable and necessary."

Dr. Adametz testified, "While I think for a period of time it was successful, and then she, you know, best case scenario, got to the point where she really didn't need it very badly anymore." When questioned after the removal of the stimulator, Adametz testified, "I know, I think it was beneficial to her, and again, I pain is a very subjective thing, and you have to speculate a little bit, but, again, my best speculation is that it helped her legs enough that it kind of got her on her feet and got her going, and she was able to build herself up to sort of work through some of her pain and problems, and that's why she got better over time."

Dr. Bracey testified, "She is cleared for the procedure with good prognosis. She appears to have good psychological resource and a positive attitude toward life that will help facilitate the effectiveness of the procedure." This medical evidence in this case is substantiated by the testimony of the claimant. The claimant testified at the hearing that she continued to have pain in her legs following the second surgery. She testified that after placement of the permanent stimulator, her left foot woke up and she was able to begin exercising, including walking approximately a mile two to three times a week. She further

indicated that she was able to decrease her pain medication treatment, including taking herself off of Morphine, Neurontin, and reducing her need for Mepergan.

The claimant's testimony was further substantiated by the testimony of her husband of 31 years. He testified, "Prior to the stimulator, she was limited on her motion, ability to walk, exercise, do anything such as that degree. After they put the stimulator in her, it was able to curb the pain where she could walk and exercise and begin to do some physical type walking, exercising, and that helped her along with her recovery after the two-level fusion that she had." He continued, "I saw immediate improvement pretty much in her conduct and her ability to do things and become more mobile after the stimulator was placed, yes, sir."

The only medical doctor who did not believe the stimulator was reasonable or necessary was Dr. Peoples. However, Dr. Peoples did not ever see or treat the claimant and rendered his opinion based on his review of the medical records. Respondents contend that the treatment involving the trial stimulator and the subsequent placement of a permanent stimulator and removal thereof was an expensive and unnecessary medical treatment. They contend that the stimulator did not provide any lasting relief and, in fact, caused no change in claimant's physical condition. They point to inconsistent patterns of complaints and a lack of objective findings from medical testings to support claimant's complaints of pain. Dr. Peoples summed up his conclusions as to the reasonableness of further treatment as follows:

She has had from the very start to the tail end of her treatment, that I understand, procedure after procedure and procedure thrown at her and she continues to hurt. When physicians that are competent do procedures that are established as proper procedures, fusions, discectomy, epidural steroid injections, and there is continued failure to respond, then one must look carefully at the patient. If a whole series of procedures do not produce improvement, maybe what you're treating is not what's causing the problem.

In addition, he pointed to instances where claimant reported she was subjectively better at times when exams reflected decreased sensation and would have objectively been expected to have caused an increase in problems. He attributed this to secondary gain derived from the approval of Social Security benefits. He further testified that he felt the spinal cord stimulator was a "misadventure" in light of the history of repeated failures of treatment and the fact that it did not provide permanent relief, pointing to the fact that claimant continues to remain on a strongly addictive pain medical, Mepergan Fortis.

Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the medical treatment following the fusion surgery, including the spinal cord stimulator, was reasonable and necessary. In addition, claimant seeks reimbursement for the purchase of a hot tub, her one-year membership to a gym as prescribed by Dr. Peek, out of pocket expenses for a back brace, walker and Swiss medicine ball, prescriptions, mileage, and co-pays. While I find that the mileage, prescriptions, and co-pays for medical treatment were incurred as a result of the compensable injury and resulting care, I do not find that claimant should be reimbursed for the purchase of the hot tub or the exercise equipment consisting of a Swiss ball. I find that the

purchase of the hot tub and Swiss ball were for the convenience of the claimant and were not reasonable nor necessary.

The claimant testified that she had access to a hot tub and Swiss ball through her membership to the gym as prescribed by Dr. Peek. Her only complaint was that the hot tub might not be available when she was at the club due to use by other club members. I find that claimant is entitled to reimbursement for her out of pocket expenses for her back brace, walker, mileage, prescriptions, and co-pays. I further find that she is entitled to reimbursement for her 13-month members to Fitness Unlimited. However, I do not find that she is entitled to reimbursement for the hot tub, Swiss medicine ball, or any other purchases made for her own convenience.

2. Additional Indemnity Benefits

Claimant is contending that she is entitled to additional temporary total disability benefits from June of 2003 until November 4, 2005. She further contends that she is entitled to an additional 12 percent (12%) impairment above the 13 percent (13%) paid by the respondents. The claimant is entitled to temporary total benefits if they can satisfy a two-prong test: (1), claimant must be within her healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). Dr. Peek testified that claimant had reached her maximum medical

improvement for her back injury on November 4, 2005. However, Peek testified that claimant is still not able to be employed as of December 28, 2005, due to the fact that she has to lay down frequently, has nights she cannot sleep, and is limited in her lifting and standing. He has assigned her a 25 percent (25%) impairment rating to the body as a whole.

Respondents contend that this is a claim involving an injury that occurred in 2001, and that claimant's continued complaints of pain, in and of themselves, do not establish that the healing period has not ended. Respondents point to testimony of claimant and her husband which was substantiated by Dr. Peoples, that her condition stabilized approximately six months after the fusion surgery. In addition, the functional capacity evaluation reported that claimant could return to sedentary type work. As of the hearing held in this case, claimant testified that she was ready and willing to seek part-time employment, but did not believe she was physically able to return to full-time employment at this time. Based on a preponderance of the evidence, I find that the claimant is entitled to temporary total disability for the time period from June 29, 2003 through November 4, 2005.

Claimant contends that she is entitled to a permanent impairment rating of 25 percent (25%). Dr. Peek testified that her rating for her work-related low back injury would be a 25 percent (25%) partial impairment rating based on her loss of motion segment, integrity, and residual radiculopathy as set forth in the 4th Edition of the AMA Guides. Dr. Peoples indicated that based on his training, he would agree that when considering the two-level fusion for the lumbar spine in

addition to the other treatment, he would find a 20 percent (20%) impairment to the body but could agree that factors could be present that would account for a 25 percent (25%) rating when considering certain nerve changes and arachnoiditis. Based on the preponderance of the evidence, I find that the medical and other credible evidence in the case supports the 25 percent (25%) permanent impairment rating assessed by Dr. Peek and that said rating conforms with Table 75 of the *AMA Guides, 4th Edition*.

3. Controversion

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of all additional medical and temporary total disability benefits since June 28, 2003. I further find that Respondents controverted payment of permanent partial disability benefits in excess of the permanent impairment of 13 percent (13%) to the body as a whole paid by the Respondents. I find that the claimant's attorney is entitled to a maximum statutory attorney's fee on the benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. That the employee/employer/carrier relationship existed between the parties on or about January 26, 2001.

3. That claimant's compensable injury was a low back injury, which included a herniated disk at L4-L5 and L5-S1.

4. That claimant's average weekly wage was \$500; temporary total disability rate is \$334; and permanent partial disability rate is \$250.

5. That Dr. Richard Peek is an authorized treating physician.

6. That the treatment referral and surgery performed by Dr. Peek are reasonable and necessary medical procedures in connection with the claimant's compensable injury; that the medical treatment that claimant received between November 26, 2002 and December 5, 2002, including the fusion surgery, was not the responsibility of respondents because it contradicted a previous Order.

7. That the claimant was awarded temporary total disability benefits from the date such benefits ceased, and continuing through the end of her healing period.

8.. That temporary total disability was paid through June 28, 2003.

9. That respondents have paid permanent partial impairment based on a 13 percent (13%) rating.

10. That claimant reached maximum medical improvement as of November 4, 2005.

11. That claimant has proven by a preponderance of the evidence entitlement to additional temporary total disability from June 29, 2003 until November 4, 2005.

12. That claimant has proven by a preponderance of the evidence that medical treatment consisting of a placement of a trial spinal cord stimulator, injections, a permanent spinal cord stimulator and resulting treatment, and treatment by Dr. Peek, Dr. Hart, and Dr. Adametz was reasonable and necessary medical treatment and causally related to her compensable injury.

13. That claimant has proven by a preponderance of the evidence entitlement to reimbursement of additional medical expenses, including out of pocket expenses for medical treatment, prescriptions, mileage, a walker, back brace, and a one-year gym membership; and that such items constituted reasonable and necessary treatment.

14. That claimant has failed to prove by a preponderance of the evidence entitlement to reimbursement for the purchase of a hot tub and exercise equipment, including a Swiss ball.

15. That claimant has proven by a preponderance of the evidence that she is entitled to a 25 percent (25%) permanent impairment rating as opposed to the 13 percent (13%) impairment rating paid by the respondents.

16. Respondents have controverted claimant's entitlement to additional medical benefits, additional temporary total disability benefits from June 29, 2003

until November 4, 2005, and an additional twelve percent (12%) permanent partial impairment rating.

17. The respondents are entitled to an offset for benefits paid by group health or disability insurance, per Ark. Code Ann. § 11-9-411.

18. Claimant is entitled to the maximum attorney's fee on the benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge