

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211057

CAROLYN E. CONNER

CLAIMANT

**BAPTIST HEALTH
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED JANUARY 9, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on October 26, 2005. A prehearing conference was held on August 16, 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:

1. There was a compensable September 10, 2002, injury.
2. The compensation rates are \$280/210.
3. Respondents accepted a 5% permanent impairment rating to the shoulder.

The claimant contends that she is entitled to wage loss disability benefits over and above the impairment rating. The claimant also contends she is entitled to additional medical benefits and attorney's fees.

Respondents contend that the claimant is not entitled to any wage loss benefits. Respondents contend it has not controverted reasonable and necessary medical care; however, there is an issue as to the extent to which only pain medication is reasonable and necessary. Respondents contend the claimant was non-compliant with medical recommendations as of May 5, 2005.

ISSUES TO BE LITIGATED

1. Wage loss.
2. Additional medical benefits.
3. Attorney's fees.

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 September 10, 2002, injury.
2. The compensation rates are \$280/210.
3. Respondents accepted a 5% permanent impairment rating to the shoulder.
4. The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonable and necessary.
5. Respondents are liable for all reasonable and necessary medical the claimant

has pursued.

6. The preponderance of the evidence supports the claimant's contention that the medical was controverted in May 2005.

7. The claimant has proven by a preponderance of the evidence that she has sustained a 20% diminished wage earning capacity over the 5% impairment rating.

8. The claimant's attorney is entitled to the maximum attorney's fee provided by Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rule 10.

DISCUSSION

The claimant, 50 years old, began her employment with the respondent employer on April 5, 2002, as a CNA. The claimant sustained a compensable left shoulder injury on September 10, 2002, when she was pulling a patient up in her bed. The claimant immediately reported the injury and began medical treatment and ultimately had shoulder surgery performed by Dr. John Yocum on January 13, 2003. Before the surgery, the claimant took a series of injections, participated in physical therapy and took medication. The claimant also took physical therapy following the surgery, as well as injections. The claimant followed up with Dr. John Adametz, a neurosurgeon, and Dr. Steven Cathey, a neurosurgeon, in an effort to determine if anything further could be done for the pain she was experiencing in her shoulder and neck. According to the claimant, she continues to have sharp pain in her shoulder and neck and going down to her finger tips and this has continued daily since her surgery.

Dr. Yocum referred the claimant to Dr. Annette Meador and she recommended some injections. The claimant had undergone injections by Dr. Ashfaq Hasan in her shoulder and back and Dr. Juan Firnhaber-Burgos had given her injections in her low

back and shoulder. According to the claimant, the injections had not alleviated her pain. Once the claimant did not follow through with the injections recommended by Dr. Meador, medication was controverted by the respondents. The claimant sought some treatment through a free clinic and used a different pharmacy where she paid for medications out of her pocket. The last doctor the claimant has seen was at the free clinic where she had to pay only \$10 and she saw Dr. Rueben Goss. The claimant has been prescribed three drugs, Trazodone, Tramadol and Baclofen, and she contends these help her deal with pain.

The claimant contends that she is entitled to additional medical treatment and prescription medications. Respondents have contended the claimant was non-compliant with medical recommendations and medical was controverted in May 2005.

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.

The last medical report in evidence is the progress report dated May 5, 2005, from Dr. Annette Meador. Dr. Meador stated in her report that the claimant advised that

she was not interested in any kind of injection therapy; therefore, trigger point injections were not provided. Dr. Meador advised that for trigger point injections to be successful, the patient must have an attitude of hopefulness and continue her exercising. The claimant advised Dr. Meador that she was not willing to do those things. Dr. Meador did find the claimant's range of motion was improved in the supine position over the seated position and it was noted the "lack of atrophy," which would suggest the claimant uses the arm more than she thinks she does. Dr. Meador did feel the claimant had reached maximum medical improvement and continued the same limitations that Dr. Yocum imposed. There was no indication that additional pain management or follow-up care was not warranted. 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).

On March 14, 2005, the claimant was seen at UAMS by Dr. Juan Firnhaber-Burgos and he had prescribed Northriptyline, Topamax and Tramadol and the claimant indicated this medication helped her control her pain and to rest. Even Dr. Meador's report lists the medications the claimant was taking and there was no indication that these medications were not to be continued. While Ms. Wetzel from the respondent testified that the UAMS doctors were still authorized, the claimant testified that she was advised by UAMS that her employer would not pay for the June 2005, appointment nor

the medication. Respondents have also asserted that the claimant was non-compliant with treatment. There may have been some misunderstanding somewhere in the medical community about payment; however, I found the claimant's account of this situation to be plausible. She was forced to seek medical attention from a free clinic and pay for her own medication. If treatment remained available to her, I am not persuaded the claimant would not continue to see the approved physician and get medication. I find that respondents did controvert medical treatment in May 2005, and find that the claimant has proven by a preponderance of the evidence that additional medical treatment and medication is reasonable and necessary and the responsibility of respondents.

The claimant next contends that she is entitled to wage loss benefits. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co., Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his

wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

In the present case, the claimant has proven by a preponderance of the evidence that she has sustained a 20% diminished wage earning capacity. The claimant sustained a compensable shoulder injury resulting in a 5% permanent anatomical impairment along with some permanent restrictions of no lifting greater than five pounds and no overhead activities and no repetitive duties with the left arm. Dr. Yocum has assigned these restrictions and Dr. Meador agreed with these as well. The claimant, 50 years old, has a high school diploma, some college courses in secretarial studies, is a licensed barber and was a certified CNA. The claimant has a home computer she uses for personal business but has indicated that she did not want to pursue any secretarial positions. The claimant's work experience has been factory work and home health care as well as being a CNA. The claimant is also the primary caretaker for her three grandchildren, ages 2, 3 and 6. The claimant has failed to demonstrate any motivation to return to work in any capacity. First, she attempted for only one day the wrapping silverware position where the respondent employer placed her with her restrictions. The claimant testified that she had to lift in that position and it also caused her neck to hurt. I was not persuaded that she accurately described the lifting requirements of this position. Even if she experienced problems the first day, she sought medical treatment and never returned to attempt the position again. Ms. Joann Crowe, work injury case manager, testified that the job of wrapping silverware was routinely used for injured workers and that lifting was simply not required. The claimant also testified that she made no applications for employment elsewhere nor did

she actively seek positions within her restrictions from the respondent employer after she reached maximum medical improvement. I found the claimant lacked the proper motivation needed to seek and find employment opportunities within her limitations. I did find that the claimant has sustained some permanent restrictions that are limiting and a 20% wage loss disability was assigned.

ORDER

The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonable and necessary and the responsibility of the respondents. The preponderance of the evidence supports the claimant's contention that the medical was controverted in May 2005. The claimant has proven by a preponderance of the evidence that she has sustained a 20% diminished wage earning capacity over the 5% impairment rating.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**