

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F011344

DEBBRA DICK,
EMPLOYEE

CLAIMANT

CONLEY TRANSPORT,
EMPLOYER

RESPONDENT

VIRGINIA SURETY COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 23, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

The respondents were represented by HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 28, 2006 in Little Rock, Arkansas. A prehearing order was entered in this case on January 10, 2006. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulation was submitted by the parties and is hereby accepted:

1. The findings in the opinion filed by ALJ Michael White on February 11, 2003 are binding on the parties and constitute the law of the case.

At the request of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional temporary total disability compensation since May 2005.
2. The claimant's entitlement to additional medical treatment, including surgery proposed for the C4-5 level of her cervical spine.

The record consists of the March 28, 2006 hearing transcript and the exhibits contained therein. In addition I am incorporating into the record by reference, and have retained under separate cover in the Commission file, the transcript of ALJ Michael White's November 14, 2002 hearing and the "blue-backed" briefs made part of the record subsequent to the hearing conducted on November 14, 2002 by ALJ White.

DISCUSSION

1. Evidentiary Objections.

On page 13 of the hearing transcript, Mr. Walmsley objected as hearsay to the claimant testifying to her

knowledge as to why her father required back surgery when she was approximately five or six years old. On page 18 of the hearing transcript, Ms. Brooks objected as hearsay to the claimant testifying regarding whether or not Dr. Greenberg performed any surgery to the C4-5 level of her spine on December 9, 2004. Each hearsay objection is sustained.

2. Compensability of Proposed C4-5 Cervical Fusion.

The claimant sustained an admittedly compensable injury on September 3, 2000 while employed by the respondents as an over-the-road truck driver. On that date, she slipped and fell backwards while getting out of her truck causing her to fall to the ground. By February 20, 2001, neurosurgeon James Blankenship recommended a two level cervical discectomy and fusion at the C4-5 and C5-6 levels of Ms. Dick's spine. This surgery was not performed.

On or about October 23, 2003, the claimant came under care of neurosurgeon Martin Greenberg. At that time, Dr. Greenberg likewise proposed a two level microdiscectomy and fusion surgery at the C4-5 and C5-6 levels. After further delays related to insurance liability, Dr. Greenberg performed an x-ray on October 15, 2004 from which he concluded that the C4-5 disk exhibited 2-3 millimeters of

subluxation which reduces on extension. Dr. Greenberg also observed anterior/posterior osteophyte at the C5-C6 level with posterior widening. Dr. Greenberg concluded that Ms. Dick had "clear-cut instability at C4-C5 and C5-C6." His clinical examination that day indicated profound left deltoid and left biceps weakness associated with C4-C5 and profound C5-C6 radicular pain with weakness. Dr. Greenberg again proposed a two level fusion, which the respondents ultimately agreed to pay for and which was scheduled for December 9, 2004.

However, when Dr. Greenberg performed surgery on December 9, 2004, he determined that Ms. Dick had a "massive" left C5-C6 herniated nucleus pulposus with marked instability at C5-6, and that the C4-5 disk interspace appeared intact. Based on his surgical observations, Dr. Greenberg proceeded with microdiskectomy and fusion surgery at the C5-C6 level, and did not perform microdiskectomy or fusion at the C4-C5 level.

Dr. Greenberg's office notes indicate that Ms. Dick's symptoms improved following the December 9, 2004 surgeries, and Dr. Greenberg released Ms. Dick to return on an as needed basis as of May 18, 2005.

On July 15, 2005, Dr. Greenberg performed x-rays which indicated a solid fusion at C5-6 and no movement at C4-5 or at C6-7. However, the claimant presented that day with neck pain and what Dr. Greenberg diagnosed as left C6-7 radiculopathy improving partially postoperatively. On August 12, 2005, the claimant underwent a new MRI which Dr. Greenberg interpreted in an August 17, 2005 report as indicative of "new ligamentous buckling at C4-5 with central disk herniation at C4-5". On that date, Dr. Greenberg again proposed a C4-5 fusion surgery. The respondents have denied any liability for the proposed C4-5 disk fusion. The respondents deny that the claimant's present need for C4-5 surgery is causally related to either the claimant's injury of September 3, 2000 or to the claimant's compensable surgery performed on December 9, 2004.

The Full Commission has summarized the law regarding proving causation in a workers' compensation case recently in Julia Cooper v. Textron, Full Workers' Compensation Commission, Opinion filed February 14, 2005 (F213354) as follows:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment, Wal-Mart v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation,

the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. See, Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. Crudup v. Regal Ware, Inc., 341, Ark. 804, 20 S.W.3d 900 (2000); KII Construction Company v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

In the present case, I note that on September 7, 2005, Dr. Greenberg issued a written opinion on causation in this case in which he stated as follows:

Ms. Dick now has a herniated central disk with spinal stenosis at C4-5 above the previous fusion at C5-6. Again, this is clearly related to the underlying treatment [sic] injury of September 3, 2000 and subsequent surgery of December 9, 2004, which did address the C5-6 disc. Clearly the patient needs a micro ACDF C4-5 instrumentation ASAP.

Again, this is related to the original injury which occurred on September 3, 2000.

Notwithstanding the conviction with which Dr. Greenberg made his statement on September 7, 2005, I note that when the parties took Dr. Greenberg's deposition on January 9, 2006, Dr. Greenberg answered several questions in terms of "possibilities" or his own "speculation".

During the course of his January 9, 2006 deposition, Dr. Greenberg explained that, during the course of his planned surgery to C4-5 and to C5-6 on December 9, 2004, he probed and tested the C4-5 disk and concluded that "it looked pretty solid and fairly stable" [R. Exh. 1 p. 7]. The C4-5 disk was observed to be quite calcified. [R. Exh. 1 p. 29]. By comparison, the C5-6 disc was massively herniated with instability and movement. [R. Exh. 1 p. 7].

Dr. Greenberg testified that on February 23, 2005, Ms. Dick was making a good recovery and her arm was feeling better, so that Dr. Greenberg did not feel that he would need to perform surgery on C4-5 [R. Ex. 1 p. 8]. Dr. Greenberg testified that Ms. Dick was still making a good post-op recovery when he saw her and assigned an impairment rating on May 18, 2005, and that she was still doing well when he next saw her on July 15, 2005. [R. Exh. 1 p. 9].

Dr. Greenberg testified that Ms. Dick called his office to relate that her left arm was bothering her again. [R.

Exh. 1 p. 10]. Dr. Greenberg ordered a new MRI which was performed on August 12, 2005. [R. Exh. 1 p. 9].

Dr. Greenberg testified that when Ms. Dick called about her left arm bothering her again, he was worried because a fusion at one level can disrupt the level above and below and cause problems down the arm. [R. Exh. 1 p. 10]. Dr. Greenberg testified that he interpreted the August 12, 2005 MRI as indicating ligamentous buckling at C4-5 and a central disc herniation at C4-5. [R. Exh. 1 p. 10].

At one point in his testimony, Dr. Greenberg seemed to testify that the C4-5 ligamentous buckling was present during his December 9, 2004 surgery. [R. Exh. 1 p. 10]. However, Dr. Greenberg testified later that he did not see buckling of the ligament during surgery. [R. Exh. 1 p. 30]. Dr. Greenberg testified that a disc and ligaments can become calcified due to arthritis, and it was calcification which he observed during the December 9, 2004 surgery. [Id.]

With regard to the C4-5 disk itself, which Dr. Greenberg interpreted as herniated on the August 12, 2005 MRI, Dr. Greenberg testified that he believes the claimant had a disk bulge at C4-5 originally, and then after the C5-6 fusion surgery on December 9, 2004, Ms. Dick developed progressive problems at C4-5. [R. Exh. 1 p. 30].

Based on Dr. Greenberg's December 9, 2004 surgical observations and his interpretation of the subsequent August 12, 2005 MRI, I find that Dr. Greenberg's testimony establishes as a preponderance of the evidence that Ms. Dick's C4-5 disk herniated and her calcified C4-5 ligament buckled after her December 9, 2004 surgery.

In many other respects, especially regarding causation, however, I again note that Dr. Greenberg testified only in terms of "possibilities" and referred to his own "speculation". For example, when questioned by the respondent's attorney at one point as to whether the C4-5 disk was not herniated during the 2004 surgery, Dr. Greenberg replied that "It's possible to say that." [R. Exh. 1 p. 8]. Likewise, when questioned about the cause of the conditions for which he now proposes additional surgery, Dr. Greenberg testified in the affirmative when asked whether it is as likely that the C4-5 disc herniation is the result of the normal degenerative process of aging as from trauma on September 3, 2000. [R. Exh. 1 p. 21]. Dr. Greenberg likewise agreed that, while the injury of September 3, 2000 could have caused the calcification of the ligament at C4-5, it is equally true that the mere process of aging could also have caused it. [R. Exh. 1 p. 30].

Dr. Greenberg further testified that, based on the literature, and based on the timing and nature of the claimant's onset of symptoms after surgery, it is "very possible" that the C5-6 fusion accelerated the arthritis at the C4-5 level or caused the spontaneous fusion at that level [R. Exh. 1 p. 27]. However, Dr. Greenberg shortly before that testified that his opinion regarding surgery causing ligamentous buckling was just speculation on his part. [R, Exh. 1 p. 26].

Finally, Dr. Greenberg testified as follows on pages 31-32 of the deposition regarding his conclusions in this case:

- Q. While the injury of September 3, 2000, could have caused the calcification at the ligament in C4 and 5, it is equally true that the mere process of aging could also have caused it; isn't that correct?
- A. Yes that's correct.

MR. WALMSLEY: That's all I have.

BY MS. BROOKS:

- Q. And, of course, that would be true if it was a person you knew no history about, because it could be caused by aging, it could be caused by the progression of the calcification, but in someone whose history you know is having a traumatic injury in September of 2000, would you not say that it's more likely than not that the calcification and problems she was having had

been caused by that trauma, since she had no previous history?

- A. Yes. Again, it would be, again, an underlying disc problem that would be brought on or caused by the trauma. We often - - because she had - - she reported [sic] previous problem before her on the job injury in 2000, and this happen - - I see this pretty commonly. Patients have no history of cervical radicular problems before a traumatic injury.

After reviewing the record in its entirety, I find that the claimant has established by a preponderance of the evidence that her currently proposed C4-5 surgery is causally related to and reasonably necessary for her compensable September 3, 2000 injury for the following reasons.

Clearly, Dr. Greenberg hoped on December 9, 2004, that surgery to treat only the massive C5-6 disc herniation that became apparent during surgery would eliminate Ms. Dick's arm symptoms in the future. However, the record is equally clear that both Dr. Blankenship and Dr. Greenberg had proposed C5-6 and C4-5 surgery based on objective medical findings and clinical symptoms, including but not limited to, profound muscle weakness associated with C4-5 and sbluxation confirmed at C4-5 less than two months prior to the December 2004 surgery. Furthermore, Dr. Greenberg

acknowledged that had the C5-6 herniation not been so massive, he would have also performed the planned surgery at C4-5 as well. I note that when Dr. Greenberg proposed C4-5 surgery again on August 17, 2005, Ms. Dick again exhibited the same 1-2 millimeters of instability at L4-5 and the same deltoid muscle weakness which she previously exhibited when Dr. Greenberg proposed surgery in October of 2004.

The new objective findings at C4-5 beginning in August of 2005 are the buckled ligament and the disk herniation. However, as Dr. Greenberg's deposition indicates, Dr. Greenberg was aware that fusion surgery at C5-6 could disrupt either C4-5 or C6-7. Notably, on July 12, 2005, over six months after the C5-6 surgery, and shortly before Ms. Dick's deltoid muscle symptoms returned, Dr. Greenberg stated in a letter that Ms. Dick still had a 10% chance that she would require C4-5 surgery in the future.

In summary, the similarity of the claimant's deltoid muscle symptoms/radiculopathy in October of 2004 and August of 2005, the multiple recommendations for C4-5 surgery since 2001, and the known risks of C4-5 disk disruption following C5-6 surgery, persuade me as a preponderance of the evidence that the claimant's current need for C4-5 disk surgery is

related to her admittedly compensable September 3, 2000 injury.

3. Temporary Total Disability.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. 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).

Dr. Greenberg proposed the additional surgery discussed above. Dr. Greenberg has opined that Ms. Dick re-entered her healing period on August 20, 2005 and that she is not able to return to work. [C. Exh. 1 p. 14]. Consequently, I find that the claimant has established by a preponderance of the evidence that she is entitled to additional temporary total disability from August 20, 2005 through the date of the March 28, 2006 hearing and continuing to a date yet to be determined.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The findings in the opinion filed by ALJ Michael

White on February 11, 2003 are binding on the parties and constitute the law of the case.

2. The claimant has established by a preponderance of the evidence that the surgery proposed for the C4-5 level of her spine is reasonably necessary and causally related to her September 3, 2000 injury.

3. The claimant has established by a preponderance of the evidence that she is entitled to additional temporary total disability compensation from August 20, 2005 through the date of the March 28, 2006 hearing and continuing to a date yet to be determined.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's injury occurred before July 1, 2001. The claimant's attorney is hereby awarded the maximum

allowable statutory attorney's fee on all benefits awarded herein, one-half of which is to be paid by the claimant and one-half 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).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge