

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F404485

TAMMY HEMPEL, Employee	CLAIMANT
GENERAL PARTS, Employer	RESPONDENT #1
LIBERTY MUTUAL INSURANCE CO., Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MARCH 22, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by R. GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 27, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 28, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed between the claimant and respondent #1 at all relevant times.
3. The claimant sustained a compensable injury to her low back on May 1, 2004.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$202.00 for temporary total disability benefits and \$154.00 for permanent partial disability benefits.
5. Respondent #1 has accepted and is paying permanent partial disability benefits

based upon a 7% impairment rating.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent benefits in excess of the 7% rating.
2. Whether respondent #1 is liable for medical treatment provided by Dr. Arthur Johnson and Dr. Michael Norwood.
3. Temporary total disability benefits from February 19, 2005 through May 5, 2005.
4. Attorney fee.
5. Second Injury Fund liability.

The claimant contends that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Arthur Johnson. Claimant also requests payment of additional medical treatment from Dr. Norwood. The claimant also seeks payment of temporary total disability benefits beginning February 19, 2005 and continuing through May 5, 2005. Alternatively, in the event claimant is not entitled to the recommended surgery, claimant contends that she is entitled to permanent partial disability benefits in excess of the 7% impairment rating.

Respondent #1 contends that the proposed surgery by Dr. Johnson is not reasonable and necessary and that medical treatment from Dr. Norwood is unauthorized.

Respondent #1 also denies liability for any additional temporary total disability benefits, as well as any permanent partial disability benefits in excess of the 7% previously paid. In the event claimant is awarded additional permanent partial disability benefits, respondent #1 contends that the Second Injury Fund is liable for payment of those benefits.

The Second Injury Fund contends that it has no liability in this case.

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 witness and to observe her demeanor, the following findings of fact and

conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 28, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance that the surgery recommended by Dr. Johnson is reasonable and necessary for treatment of her compensable injury.

3. Claimant has also failed to prove by a preponderance of the evidence that additional medical treatment from Dr. Norwood is the liability of respondent #1.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning February 19, 2005 and continuing through May 5, 2005.

5. As a result of her compensable injury the claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole.

6. The Second Injury Fund is not liable for payment of permanent partial disability benefits; therefore, payment is the responsibility of respondent #1.

7. Respondent #1 has controverted claimant's entitlement to unpaid temporary total disability benefits and permanent partial disability of 10% to the body as a whole.

FACTUAL BACKGROUND

The claimant is a 43-year-old woman who graduated from high school and obtained 25 to 30 hours of college credit while studying computers at what is now known as the University of Arkansas - Fort Smith. Prior to going to work for respondent #1 the claimant worked as a nurse's aide in a rest home, as a waitress, and bussed tables at a restaurant.

In 2000 the claimant went to work for respondent #1 delivering auto parts which

weighed up to 50 pounds. In addition to delivering parts, the claimant also worked behind the counter waiting on customers, stocking shelves, and keeping inventory.

On May 1, 2004, the claimant was driving to Randall Ford to deliver wiper blades when she stopped at a traffic signal and her vehicle was struck from behind by another vehicle. The parties have stipulated that claimant suffered a compensable injury to her low back as a result of this accident.

Claimant first sought medical treatment for her work related injury from Dr. Norwood, her personal physician. According to claimant's testimony Dr. Norwood prescribed medication, physical therapy, and ordered an MRI scan. Dr. Norwood eventually referred claimant to Dr. Standefer for a neurological evaluation.

Claimant was evaluated by Dr. Standefer on August 2, 2004 and his report of that date notes that claimant's MRI scan is only minimally abnormal. Dr. Standefer indicated that in his opinion the claimant's condition was non-surgical in nature. He recommended medication, a walking program, exercise program, and a cessation of cigarette smoking.

Following her evaluation by Dr. Standefer, claimant requested a change of physician to Dr. Arthur Johnson. This change of physician request was granted by the Commission and claimant was evaluated by Dr. Johnson on January 6, 2005. Based upon his evaluation of the claimant Dr. Johnson recommended that claimant undergo surgery to repair a herniated disc at the L5-S1 level.

Subsequent to Dr. Johnson's evaluation, respondent #1 sent claimant to Dr. Blankenship, neurosurgeon, for a second opinion. In a report dated May 5, 2005, Dr. Blankenship noted that claimant had a normal neurologic examination. Dr. Blankenship indicated that he would not recommend that claimant undergo any surgery for her condition. Dr. Blankenship did recommend that the claimant receive a full battery of neuropsychological testing as well as a program of aggressive physical therapy.

Claimant underwent her neuropsychological evaluation and in a report dated June

17, 2005, Dr. Walz stated that claimant's profile suggested somatoform disorder, or exaggeration of complaints. Dr. Walz' report also noted that claimant had been taking the medication Zoloft for depression for approximately four years.

Following her neuropsychological evaluation the claimant underwent a functional capacities evaluation on August 11, 2005. That evaluation indicated that claimant could not return to her pre-injury job, but instead indicated that claimant was capable of performing sedentary-type work. The evaluation report also noted that the claimant gave a sub-maximal physical effort during testing. After reviewing the neuropsychological evaluation as well as the functional capacities evaluation, Dr. Blankenship in a letter dated October 3, 2005 stated that in his opinion the claimant had reached maximum medical improvement. He assigned the claimant work restrictions and stated that claimant had a permanent physical impairment rating in an amount equal to 7% to the body as a whole.

Claimant has filed this claim contending that she is entitled to additional medical treatment; specifically, surgery as recommended by Dr. Arthur Johnson. Claimant also seeks payment for additional medical treatment from Dr. Norwood. Alternatively, claimant contends that she is entitled to permanent partial disability benefits in excess of her 7% impairment rating.

ADJUDICATION

The first issue for consideration involves claimant's request for additional medical treatment in the form of surgery as recommended by Dr. Arthur Johnson. Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *White Consolidated Industries v. Galloway*, 73 Ark. App. 13, 45 S.W. 3d 396

(2001). In this particular case, after reviewing the evidence presented, I find that claimant has failed to prove by a preponderance of the evidence that the proposed surgery by Dr. Johnson is reasonable and necessary for treatment of her compensable injury. As previously noted, claimant initially sought medical treatment from her family physician, Dr. Norwood. After some initial medical treatment, Dr. Norwood referred claimant to Dr. Standefer for a neurosurgical evaluation. Dr. Standefer reviewed the claimant's MRI scan and conducted an evaluation on August 2, 2004. In his report of that date he noted that the claimant's MRI scan was only minimally abnormal and indicated that claimant's condition was non-surgical. Instead, he indicated that the claimant's treatment should consist primarily of medication and exercise.

Following this visit to Dr. Standefer the claimant requested and received a change of physician to Dr. Arthur Johnson who recommended surgery in his report of January 6, 2005, and reiterated that opinion in his deposition of January 24, 2006.

Subsequent to Dr. Johnson's evaluation of the claimant, respondent #1 sent claimant to Dr. Blankenship for a third neurosurgical opinion. Dr. Blankenship opined that claimant did not need surgery but instead ordered aggressive physical therapy, a neuropsychological evaluation, and a functional capacities evaluation. As previously noted, that neuropsychological evaluation was performed by Dr. Walz who in her report of June 17, 2005 indicated that claimant's profile was suggestive of somatoform disorder. Dr. Walz's medical report also indicates that claimant had been taking the medication Zoloft for depression for approximately four years.

Claimant also underwent a functional capacities evaluation which revealed that she gave sub-maximal physical effort during the testing. Even with that sub-maximal effort it was determined that claimant was capable of performing sedentary-type work.

Based upon the results of the neuropsychological testing and the functional capacities evaluation, Dr. Blankenship in a report dated October 3, 2005 found that

claimant was at maximum medical improvement and assigned a permanent physical impairment rating in an amount equal to 7%.

In summary, claimant has been evaluated by three different neurosurgeons. Claimant has seen each of these neurosurgeons only one time. While Dr. Johnson has recommended surgery, both Dr. Standefer and Dr. Blankenship have opined that surgery is not necessary. I note that Dr. Blankenship's opinion is not based solely upon his evaluation and his review of the MRI scan, but it is also based upon the results of the neuropsychological testing and the functional capacities evaluation. Based upon this evidence, I find that the opinions of Drs. Standefer and Blankenship are entitled to greater weight than that of Dr. Johnson and therefore find that claimant has failed to meet her burden of proving by a preponderance of the evidence that the surgery recommended by Dr. Johnson is reasonable and necessary.

Claimant has also requested additional medical treatment from Dr. Norwood; specifically, payment for prescription medication. I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that respondent is liable for payment of any additional medical treatment or prescription medication from Dr. Norwood. First, I note that the last medical report from Dr. Norwood submitted into the record is dated January 7, 2004. There are no medical reports from Dr. Norwood subsequent to that date indicating what treatment or medication he may have prescribed for claimant's compensable injury. Furthermore, claimant admitted on cross examination that Dr. Norwood is her personal physician and that he had her on many of these same medications prior to her accident. Specifically, claimant testified that she was taking Soma, Zoloft, and Scolaxin, a muscle relaxer, prior to her work-related injury. There is insufficient evidence that Dr. Norwood has prescribed any new medications for claimant's compensable work-related injury. Finally, although Dr. Norwood was originally recognized as claimant's authorized treating physician, claimant subsequently filed a request to

change physicians to Dr. Arthur Johnson. Therefore, any medical treatment claimant received from Dr. Norwood subsequent to her change of physician was unauthorized. To the extent that claimant contends that respondent #1 did not provide additional medical treatment, I note that respondent #1 did provide additional medical treatment from Dr. Blankenship as evidenced by the medical records. Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Norwood for her compensable injury.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning February 19, 2005 and continuing through May 5, 2005. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

Respondent #1 apparently paid temporary total disability benefits until February 18, 2005 and reinstated temporary total disability benefits as of May 5, 2005, the date she was first evaluated by Dr. Blankenship. I find that claimant has met her burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages from the date respondent #1 last paid temporary total disability benefits on February 18, 2005, through the date of Dr. Blankenship's evaluation on May 5, 2005. Claimant had obviously been within her healing period and had suffered a total incapacity to earn wages prior to February 19, 2005. There is no indication that claimant's healing period ended as of that date or that she no longer suffered a total incapacity to earn wages subsequent to that date. This is supported by a review of Dr. Blankenship's letter dated May 5, 2005, wherein he indicates that before even returning to light-duty work the claimant should undergo the neuropsychological testing as well as the functional capacities evaluation. Dr. Blankenship also indicates that

claimant has not reached maximum medical improvement given his recommendations for further testing. I do not interpret Dr. Blankenship's opinion as indicating that claimant had re-entered a healing period or that she had begun suffering a total incapacity to earn wages as of May 5, 2005. Instead, I believe that Dr. Blankenship's opinion supports a finding that those conditions had continued to exist before that date; therefore, I find that claimant remained within her healing period and suffered a total incapacity to earn wages between February 19, 2005 and May 5, 2005. Therefore, she is entitled to payment of temporary total disability benefits for that period of time.

Having found that claimant is not entitled to the surgery recommended by Dr. Johnson, the next issue for consideration involves claimant's request for benefits in excess of her permanent physical impairment rating of 7%. In considering a claimant's entitlement to permanent partial disability benefits in excess of their permanent physical impairment, the Commission may take into account various factors including the percentage of permanent impairment itself, as well as a claimant's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

As previously noted, this claimant is 43 years old. She is a high school graduate and has obtained 25 to 30 hours of college credit studying computers. Prior to working for the respondent she worked as a nurse's aide in a rest home, as a waitress, and she bussed tables at a restaurant. Claimant testified that her daily activities include some light housework, watching television, crocheting, needlepoint, and reading.

After reviewing the functional capacities evaluation, Dr. Blankenship in his report of October 3, 2005 indicated that claimant was capable of working and should be encouraged to return to work. He assigned claimant permanent restrictions of no lifting more than 25 pounds. He also indicated that claimant should not engage in any prolonged stooping or bending or significant twisting at the waist. Dr. Blankenship stated that claimant could

perform a sedentary-type job as long as she was allowed a one to two minute break every hour for stretching and an extra 15 minute break in addition to her normal lunch break for exercises and stretching. Claimant testified that she has not looked for any employment, but has instead applied for social security disability.

After consideration of all the relevant wage loss factors presented in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole. While claimant has had physical limitations placed upon her ability to return to work by Dr. Blankenship, the evidence indicates that claimant is a high school graduate and has obtained some college credit. In addition to the work she has performed physically, claimant has also worked behind the counter for respondent #1 waiting on customers and performing some inventory control. Based upon my review of the evidence, I find that claimant is capable of performing sedentary-type work and accordingly find that she has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole.

The final issue for consideration involves respondent #1's contention that the Second Injury Fund is liable for payment of any benefits awarded for wage loss. In order for the Second Injury Fund to have liability, three elements must be shown. First, the claimant must have suffered a compensable injury at their present place of employment. Second, prior to the most recent injury the claimant must have had a permanent partial disability or impairment. Thirdly, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. A.C.A. §11-9-525(b); *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988).

Here, claimant did suffer a compensable injury at her current place of employment. However, I find that the second and third elements of Second Injury Fund liability have not been met. While claimant suffered from depression and was being prescribed medication

for her neck and shoulders prior to her work-related injury, I find insufficient evidence that either of those conditions resulted in permanent partial disability or impairment as required for Second Injury Fund liability. There is no indication that claimant had ever been assigned any impairment for those conditions and no evidence that claimant was physically limited in any way from performing her job prior to the motor vehicle accident.

Furthermore, even if the second element of Second Injury Fund liability had been met, I find insufficient evidence that her pre-existing conditions combined with her recent low back injury to produce her current disability status. To the contrary, I find that claimant's loss in wage earning capacity is solely attributable to her low back injury, not to a combination of pre-existing conditions and the low back injury. Therefore, I find that the Second Injury Fund has no liability for payment of wage loss benefits.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery recommended by Dr. Johnson or treatment from Dr. Norwood. Claimant is entitled to temporary total disability benefits beginning February 19, 2005, and continuing through May 5, 2005. As a result of her compensable injury, claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole. Respondent #1 has controverted claimant's

entitlement to permanent partial disability benefits in excess of her permanent physical impairment rating. Finally, the Second Injury Fund has no liability for permanent partial disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE