

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E903202

VIRGINIA L. KING, EMPLOYEE

CLAIMANT

**BIRDNEST, INC., d/b/a WILLOW OAKS ACRES,
EMPLOYER**

RESPONDENT

FREMONT PACIFIC, CARRIER

RESPONDENT

OPINION FILED MARCH 17, 2006

Hearing before Administrative Law Judge J. Mark White on April 7, 2005, in Hope, Hempstead County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Paul Gehring and Mr. J. Matthew Mauldin, Attorneys at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 7, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. An Interim Opinion was filed May 16, 2005, directing the claimant to undergo an independent medical evaluation (IME) by Dr. Ron Williams. After initially agreeing to perform an IME, Dr. Williams subsequently refused to see the claimant. On June 28, 2005, an Order was entered directing the claimant to instead undergo an independent medical evaluation (IME) by Dr. Reza Shahim. Rather than perform a one-time evaluation, Dr. Shahim chose to extensively treat the claimant, culminating in surgery on December 16, 2005.

The parties now agree that the only remaining issues to be decided are

whether the claimant is entitled to additional temporary total disability benefits, and controversion and attorney's fees.

Since the original hearing, two telephone conferences have been conducted, on December 19, 2005, and February 27, 2006, and the Orders resulting from those conferences are hereby incorporated into the record as Commission exhibits. In addition, the parties have submitted letter briefs and amended exhibit packets, which will likewise be incorporated into the record as exhibits. The above shall be blue-backed and retained in the Commission's file along with the transcript of the April 7, 2005, hearing.

The claimant contends that she is entitled to temporary total disability benefits from November 1, 2001, through October 14, 2002, and from July 7, 2003, through a date yet to be determined; that she was not at maximum medical improvement; that she was unable to work because of the severe pain and limitations she was experiencing with her injuries; that she was in need of additional medical treatment, and that the treatment being recommended by Dr. Fred Contreras was reasonable, necessary, and related; that her attorney's fees should be awarded and paid on all benefits that were controverted; that respondents should be ordered to pay attorney's fees on benefits that were initially controverted but subsequently accepted and paid for as of December 16, 2005, when respondents

decided to go ahead and reinstate her TTD benefits after she had surgery; and that Dr. Shahim's independent medical evaluation report was issued on July 21, 2005, and respondents did not accept and begin paying any TTD benefits until she actually had surgery. I note that in her contentions the claimant also mentions the issue of unpaid medical bills, but in the two telephone conferences held after the original hearing, the parties stated the respondents had paid those bills and that the bills were no longer at issue.

Respondents contend that TTD benefits paid beginning on December 16, 2005, were not controverted; that such benefits stemmed from the requested, and granted, evaluation with Dr. Shahim; that respondents requested the IME for a second opinion on the claimant's surgery; that after the IME, Dr. Shahim proposed surgery which was not identical to Dr. Contreras' recommendations; that respondents readily and voluntarily accepted not only the surgery but also the TTD that began on the surgery date; that it would be improper to find that respondents controverted additional medical treatment when (1) the respondents requested and were granted an IME to evaluate the reasonable necessity of Dr. Contreras' recommendations, (2) when Dr. Shahim's treatment was accepted by the respondents, and (3) when the surgery performed by Dr. Shahim was quite different than that originally proposed by Dr. Contreras (i.e., the levels upon which the

operation occurred as well as the fact that no fusion was involved); and that accordingly, respondents have not controverted Dr. Shahim's treatment for purposes of awarding attorney's fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she was within her healing period from November 1, 2001, through October 14, 2002.
4. The claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages from November 1, 2001, through October 14, 2002.

5. The claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 1, 2001, through October 14, 2002.
6. The claimant has proven by a preponderance of the evidence that she was and remains within her healing period from July 7, 2003, through a date yet to be determined.
7. The claimant has proven by a preponderance of the evidence that she was and remains totally incapacitated from earning wages from July 7, 2003, through a date yet to be determined.
8. The claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 7, 2003, through a date yet to be determined.
9. The respondents have controverted only the claimant's entitlement to temporary total disability benefits from November 1, 2001, through October 14, 2002; her entitlement to temporary total disability benefits from July 7, 2003, through December 16, 2005; and her entitlement to payment of the unpaid medical bills and expenses raised at the hearing and later paid by the respondents.

DISCUSSION

I. History

This claim was the subject of an Interim Opinion entered May 16, 2005, and the history of the claim to that point is contained therein. At the request of the respondents, the claimant was directed to submit to an independent medical evaluation (IME) for the purpose of giving a second opinion as to the recommendation of Dr. Freddie Contreras that the claimant undergo a lumbar fusion at L3-4 and L5-S1. In a subsequent Order, Dr. Reza Shahim was appointed to perform the IME. At the time of this appointment, the respondents were paying no indemnity benefits to the claimant.

Dr. Shahim first saw the claimant on July 21, 2005. He concluded:

Ms. King has right S1 radiculopathy, which has been very chronic in nature. She needs to have a CT lumbar myelogram to assess any nerve root compression. She has not had any epidural steroid injections or bracing recently. I would recommend lumbar epidural steroid injections, depending on findings of her myelogram. A recommendation has been made previously to her to undergo a lumbar interbody fusion, but if she has any evidence of myelographic nerve root compression, she may only need a re-do lumbar discectomy.

A myelogram was performed August 5 revealing a "prominent ventral epidural defect" at L3-4 and "less prominent defects at L2-3 and L4-5 levels." The subsequent CT scan revealed "prominent degenerative changes at L3-4 and L4-5"

as well as “a post-surgical laminectomy defect on the right at the L5-S1 level.”

With the respondents’ authorization, Dr. Shahim began a course of treatment with the claimant. He initially provided conservative treatment, including a series of epidural steroid injections, but this treatment provided only temporary relief to the claimant’s symptoms. On November 10, Dr. Shahim recommended that the claimant undergo surgery again:

She has severe degenerative disc disease at L3-4. She has canal stenosis at 2-3 and 3-4. I have given her the option of undergoing decompression at L2-3 and L3-4 with the understanding that surgery will not eliminate all of her symptoms. Since she has had very chronic symptoms of many years surgery at best would reduce her symptoms. She has multi-level spondylosis and although fusion is an option it should be the last resort for treatment of her disc disease. If she chooses surgery we will do decompression at L2-3 and L3-4.

The claimant agreed with Dr. Shahim’s recommendation, and with the respondents’ authorization surgery was performed December 16. After some initial complications requiring another surgical procedure, as of January 17, 2006, the claimant reported “doing much better since the surgery. She denies any significant leg pain.”

II. Adjudication

A. Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas 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).

The first period of time for which the claimant seeks indemnity benefits is from November 1, 2001, through October 14, 2002. This is the period of time between Dr. Contreras' initial recommendation of neck surgery and the eventual performance of that surgery. The delay was apparently caused by communication failures between and among the respondents, the claimant, and/or their attorneys, but the record is insufficient for me to determine whether any one party was at fault. There was a pending recommendation of surgery, and the respondents did eventually authorize and pay for the surgery, so I therefore find that the claimant has proven by a preponderance of the evidence that she was within her healing period from November 1, 2001, through October 14, 2002.

The record contains no medical opinion as to the claimant's work capabilities during this period of time. However, I note that the claimant's physicians have consistently kept her off of work throughout the course of her treatment over the last seven years. No doctor placed her on light duty at any point in this period of time nor in her course of treatment. Given the evidence before me, I find that the claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages from November 1, 2001, through October 14, 2002. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from November 1, 2001, through October 14, 2002.

The next period of time for which the claimant seeks indemnity benefits is from July 7, 2003, through a date yet to be determined. It is agreed that the respondents resumed payment of indemnity benefits with the claimant's December 2005 surgery, and that such benefits are still being paid. Throughout this period of time there was additional treatment recommended by the claimant's treating physician that had not yet been performed – Dr. Contreras had recommended additional treatment as of May 20, 2003. Dr. Bud Dickson specifically opined as of June 2, 2004, that the claimant remained in her healing period for her lumbar injury. And of course, Dr. Shahim recommended additional treatment for the lumbar injury

which was authorized and provided. I find that the claimant has proven by a preponderance of the evidence that she remained in her healing period from July 7, 2003, through a date yet to be determined.

Dr. Contreras opined as of November 18, 2003, that the claimant was not capable of returning to work. The respondents specifically asked Dr. Dickson whether the claimant could return to work, but Dr. Dickson pointedly omitted any mention of the claimant's work capabilities from his report. There is no evidence to show that at any point in this period of time the claimant's condition improved enough to allow her to work. I find that the claimant has proven by a preponderance of the evidence that she was totally incapacitated from earning wages from July 7, 2003, through a date yet to be determined. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from July 7, 2003, through a date yet to be determined.

B. Controversion

For injuries sustained prior to 2001, attorney's fees may be granted on the entire award, including both medical and indemnity benefits. Ark. Code Ann. § 11-9-715(a)(2)(B). The object of the attorney's fee statute is to place the burden and

expense of litigation upon the party which made it necessary. *Cleek v. Great S. Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). Whether a claim has been controverted is a question of fact. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998).

It appears undisputed that the respondents have controverted the claimant's entitlement to temporary total disability benefits from from November 1, 2001, through October 14, 2002, and from from July 7, 2003, through December 16, 2005. The question, then, is whether the respondents have controverted the medical treatment provided by Dr. Shahim or the temporary total disability benefits paid since the claimant underwent surgery on December 16.

When Dr. Contreras recommended additional lumbar surgery, the respondents refused to authorize the surgery until the claimant had seen another specialist for a second opinion. This hearing resulted in part because the claimant objected to the request for a second opinion. While the claimant's opposition to an IME is understandable, given how long it has been since her original injury, the fact remains that the respondents promptly authorized the treatment recommended by Dr. Shahim, and that the surgery performed by Dr. Shahim was substantially different from the surgery proposed by Dr. Contreras. On these facts, I cannot find that the respondents controverted the claimant's entitlement to the treatment

provided by Dr. Shahim. In addition, the respondents reinitiated indemnity benefits with the claimant's surgery. Again, I cannot find that the respondents controverted the claimant's entitlement to these benefits.

I find by a preponderance of the evidence that the respondents have controverted only the claimant's entitlement to temporary total disability benefits from November 1, 2001, through October 14, 2002; her entitlement to temporary total disability benefits from July 7, 2003, through December 16, 2005; and her entitlement to payment of the unpaid medical bills and expenses raised at the hearing and later paid by the respondents. The claimant is entitled to a statutory attorney's fee on all of these controverted amounts.

AWARD

The claimant has proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits from November 1, 2001, through October 14, 2002, and from July 7, 2003, through a date yet to be determined. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on the controverted portion of the Award pursuant to Ark.

Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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 Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge