

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E910613

MELISSA CAROL THETFORD, EMPLOYEE	CLAIMANT
ELECTRIC COWBOY, INC., EMPLOYER	RESPONDENT NO. 1
FREMONT PACIFIC, TPA	RESPONDENT NO. 1
DEATH & PERM. TOTAL DIS. TRUST FUND	RESPONDENT NO. 2

OPINION FILED MARCH 9, 2006

Hearing before Administrative Law Judge J. Mark White on January 19, 2006, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Stephen T. Arnold, Attorney at Law, Texarkana, Texas.

Respondents represented by Mr. Jeremy Swearingen, Attorney at Law, Little Rock, Arkansas.

Death & Permanent Total Disability Trust Fund, represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas, waived its appearance.

STATEMENT OF THE CASE

On January 19, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on September 26, 2005, and a Prehearing Order was entered that same day. A copy of the September 26, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly

set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that claimant was assigned a permanent impairment rating of 19 percent to the body as a whole, which rating Respondents No. 1 have accepted and paid; and that the claimant reached the end of her healing period on November 25, 2003. This claim was the subject of a prior Full Commission Opinion filed April 5, 2001 and affirmed by the Court of Appeals on January 30, 2002. The stipulations, findings of fact, and conclusions of law set forth therein are incorporated herein by reference.

The parties agreed that the issues to be presented were whether the claimant is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of her assigned anatomical impairment rating; unpaid medical bills; whether the claimant is entitled to medical treatment; whether the respondents are entitled to credit for overpayment of benefits; the liability, if any, of the Death & Permanent Total Disability Trust Fund; whether respondents are entitled to a credit toward their \$75,000 maximum liability for permanent partial disability benefits paid; and controversion and attorney's fees.

The claimant contends that she is totally and permanently disabled by her anatomical and wage-loss disabilities.

Respondents No. 1 contend that the claimant is not permanently totally disabled, because she is able to earn meaningful wages in at least some capacity; that the claimant is not entitled to any wage-loss benefits, because she unreasonably has refused vocational rehabilitation and job placement assistance, per Ark. Code Ann. § 11-9-505(b)(3); that they claim credit for overpayment of benefits in the amount of \$8,783.13; and that if the claimant is found to be permanently totally disabled, that respondents are entitled to a credit against their \$75,000 cap for any payment of permanent partial disability benefits.

The Death & Permanent Total Disability Trust Fund contends that Respondent No. 1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits; and that Respondent No. 1 is not entitled to credit against its \$75,000 maximum for payment of the claimant's permanent partial anatomical ratings for the compensable injury.

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 failed to prove by a preponderance of the evidence that she is unable because of her compensable injury to earn any meaningful wages in the same or other employment.
4. The claimant has therefore failed to prove by a preponderance of the evidence that she is permanently totally disabled.
5. The Death & Permanent Total Disability Trust Fund has no liability herein.
6. The respondents have proven by a preponderance of the evidence that the claimant without reasonable cause refused to participate in or cooperate with rehabilitation and job placement assistance.
7. The claimant is therefore barred from receiving wage-loss disability benefits in excess of her permanent anatomical impairment ratings.
8. The claimant has proven by a preponderance of the evidence that all of the treatment provided on or after May 4, 2004, and reflected on page fourteen

of Joint Exhibit Two, has been reasonably necessary in connection with the compensable injury.

9. The claimant has therefore proven by a preponderance of the evidence that she is entitled to physician co-pay reimbursements in the amount of \$80, medical mileage reimbursements for 541 miles of travel, and prescription reimbursements in the amount of \$1,108.83.
10. The claimant has proven by a preponderance of the evidence that she is entitled to continued medical treatment by her authorized physicians, including management of her prescription medication.
11. The respondents have proven by a preponderance of the evidence that they are entitled to a credit in the amount of \$955.85 for overpayment of benefits to the claimant.
12. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant sustained a compensable injury to her back on May 1, 1999, while lifting a case of beer into a cooler. At the time of her injury she was working as a bartender for the respondent-employer. The respondents controverted her claim in its entirety, but in an opinion filed April 5, 2001¹, the Full Commission found her injury to be compensable and awarded her temporary total disability benefits from September 5, 1999, until she reached the end of her healing period or was released to return to work. *Thetford v. Electric Cowboy, Inc.*, A.W.C.C. E910613 (April 5, 2001), *aff'd*, CA 01-812 (Ark. App. Jan. 30, 2002).

The claimant has undergone three surgeries for her back. On October 15, 1999, Dr. Jeffrey DeHaan performed a two-level diskectomy at L4-5 and L3-4. The claimant then suffered a recurrent herniation at L4-5, and Dr. DeHaan performed a second diskectomy at L4-5 on April 14, 2000. When the claimant continued to complain of back and leg pain, Dr. DeHaan referred her to Dr. Edward Saer, who in turn referred her to Dr. Yeshwant Reddy. Despite her continuing symptoms, Dr. Reddy declared her to be at maximum medical improvement as of February 28,

¹ The Commission's decision bears a date of April 5, 2000, but the Commission's file makes clear the decision was actually rendered in 2001, not 2000.

2002, and he assigned her a permanent impairment rating of 14% to the body as a whole for three-level disc disease.

The claimant re-entered her healing period on July 3, 2002, when an MRI revealed another recurrent herniation at L4-5. Dr. Saer performed the third surgery, an excision of the herniation and a fusion, on January 29, 2003. As of August 1 the claimant was still complaining of severe back and leg pain. Dr. Saer confessed he was “not sure why she is having this much more pain.” He indicated the claimant was not “capable of returning to work” at that point, but he continued to hope she would reach maximum medical improvement within a year of the surgery. After sending her for an evaluation by Dr. Sunder Krishnan, Dr. Saer opined as of November 25, 2003, that she had reached the end of her healing period. He assigned an additional permanent impairment rating of 5% and referred her to her personal physician, Dr. Wallace Lee Tracy, for medication management.

The respondents retained a vocational rehabilitation counselor, Edie Nichols, to assist the claimant with rehabilitation and job placement. Nichols arranged for the claimant to undergo a functional capacity evaluation, the results of which indicated the claimant was capable of performing light-level work. After conducting an initial interview with the claimant, Nichols concluded the claimant could return to work in some capacity without retraining, but she also recommended that the claimant

consider pursuing a college education. Nichols provided her with information from a community college, but the claimant thought she would be unable to sit in a classroom all day. Nichols frequently attempted to contact the claimant, including providing her with job leads, but the claimant failed to follow up on those leads and eventually stopped returning Nichols' messages. On January 10, 2005, the claimant's attorney sent Nichols a letter objecting to her efforts:

I just want to explain to you that your dogged attempts to build your file out of this case are out of order in my opinion. You assume that Ms. Thetford is able to return to work and expect her to follow your directions pertaining to vocational rehabilitation accordingly, when that conclusion has not been determined according to the facts and the law, and has probably been refuted by a functional capacity evaluation which post-dates and is materially inconsistent with your assumptions.

Ms. Thetford is awaiting further evaluation from her orthopedic surgeon, Dr. Saer, which will occur on or about January 20, 2005. In the event that Dr. Saer does not believe that additional surgical intervention is necessary, then Bob White will logically follow with his vocational evaluation to my understanding. Any evaluation and recommendations for vocational rehabilitation that you have done in any manner up to this time are therefore wholly premature and inappropriate in my opinion.

The claimant's attorney asked vocational consultant Robert White to conduct a vocational assessment, but the claimant never returned White's phone calls or

otherwise attempted to contact White. The claimant testified she never called White because she could not afford to pay for his services.

The claimant testified that she still has severe pain in her low back, running down her leg to her ankle. She described the pain as worse than childbirth. She said the pain varies with her activities, and that she frequently has to lay down to rest. She testified she is unable to engage in any activities other than sewing, reading, and playing video games. She testified she cannot drive for extended periods of time without stopping, and that she often will lie down in the back seat while her husband drives. She testified that she is able to do only 10% of her family's housework, and that her daughter and husband must do the rest. She testified that her back has been getting worse over time. She takes narcotic medication on a daily basis to control her pain, and Dr. Tracy continues to monitor her medication. She last saw Drs. Krishnan and Saer in the spring of 2005, but neither doctor had any additional treatment to offer her.

II. Adjudication

A. Permanent Benefits

The claimant contends that she is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or

occupational disease, to earn any meaningful wages in the same or other employment.” Ark. Code Ann. § 11-9-519 (e). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a).

The claimant is young, only 34 years old, and she has her GED. A functional capacity evaluation found she was capable of performing light-level work. Edie Nichols, the rehabilitation counselor retained by the respondents, testified that the claimant is presently capable of earning at least \$18,000 per year working from home. Nichols identified at least one job within the claimant’s qualifications and restrictions which could be performed at home, though the claimant failed to follow up on the lead.

Dr. Saer recorded in his notes that he was “reluctant” to declare the claimant to be permanently totally disabled. Dr. Reddy noted that the claimant should not return to “her employment.” I take his statement to mean only that the claimant should not return to her old job; I do not read Dr. Reddy’s statement to mean that the claimant is totally disabled from any occupation. Finally, Dr. Tracy has explicitly opined that the claimant is permanently totally disabled. In his deposition, Dr. Tracy based this opinion on a “consensus” of the claimant’s various physicians, but Dr. Tracy later acknowledged he could not point to any other doctors offering a similar

opinion. Likewise, I am unable to locate any other similar opinion in the record. Dr. Tracy also based his opinion on the claimant's continued use of narcotic medication and her subjective reports of pain.

I have no doubt the claimant's ability to earn wages has been negatively impacted by her compensable injury and its continuing effects – in particular her long-term use of narcotic medication and her need to rest frequently. Nonetheless, given the evidence herein, I am not convinced that the claimant is unable to earn *any* meaningful wages in some other employment. I find that the claimant has failed to prove by a preponderance of the evidence that she is unable because of her compensable injury to earn any meaningful wages in the same or other employment. I therefore conclude that the claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled. I further conclude that the Death & Permanent Total Disability Trust Fund has no liability on this claim.

The claimant contends in the alternative that she is entitled to wage-loss disability benefits over and above her permanent anatomical impairment rating. An employee who without reasonable cause refuses to participate in or cooperate with rehabilitation or job placement assistance is barred by statute from receiving wage-loss disability benefits in excess of any permanent partial anatomical disability

sustained. Ark. Code Ann. § 11-9-505 (b)(3).

The record is clear that the claimant was offered rehabilitation and job placement assistance by the respondents through Edie Nichols. The claimant initially cooperated with these efforts, but by her own admission she ceased returning Nichols' messages. The claimant's attorney on January 10, 2005, sent Nichols a letter implicitly rejecting continued help, saying that the claimant would pursue rehabilitation at the appropriate time through another counselor, Bob White. But the claimant admitted she never followed up with White either.

The facts herein appear remarkably similar to those of *Ashcraft v. Headlee's Industrial Company*, A.W.C.C. F012942 (Feb. 16, 2005), *aff'd*, CA 05-432 (Ark. App. Nov. 9, 2005). Like Ashcraft, the present claimant was offered rehabilitation and job placement assistance which was initially accepted but then rejected. Like Ashcraft, the present claimant dismissed these efforts as unnecessary because no employer would hire her given her back condition. Like Ashcraft, the present claimant doubted she was physically capable of pursuing further education. The Full Commission, and the Court of Appeals, found unreasonable Ashcraft's rationale for rejecting rehabilitation, and the present claimant's rationale appears to be substantially the same.

I find that the respondents have proven by a preponderance of the evidence

that the claimant without reasonable cause refused to participate in or cooperate with rehabilitation and job placement assistance. The claimant is therefore barred from receiving wage-loss disability benefits in excess of her permanent anatomical impairment ratings.

B. Unpaid Medical Bills

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). Where a claimant personally pays for medical services later found to be compensable, the claimant is entitled to full reimbursement from the respondent. A.W.C.C. Rule 30, Part I § J (May 15, 2000).

The claimant seeks payment of certain medical bills, along with mileage and prescription expenses incurred for those visits. The specific amounts are set forth in pages fourteen through nineteen of Joint Exhibit Two. The claimant also sought payment for an MRI bill, but the record reflects that the MRI bill was in fact paid by the respondents.

The first visit identified by the claimant on her summary sheet, a visit with

Dr. Tracy of April 12, 2004, does not appear to be relevant. Dr. Tracy's note of that day makes no mention of the compensable injury nor of any medication refills, and there is no evidence beyond the claimant's suppositions to show that her acid reflux is a compensable consequence. However, a comparison of the claimant's handwritten summary with the corresponding treatment notes and pharmacy records reflects that all of the remaining doctor visits, mileage, and prescription expenses were for the claimant's compensable injury. I recognize that on some visits the claimant consulted with Dr. Tracy about unrelated conditions, but those visits were nonetheless necessary to refill the prescriptions related to the compensable injury.

I find that the claimant has proven by a preponderance of the evidence that all of the treatment provided on or after May 4, 2004, and reflected on page fourteen of Joint Exhibit Two has been reasonably necessary in connection with the compensable injury. I therefore conclude that the claimant has proven by a preponderance of the evidence that she is entitled to physician co-pay reimbursements in the amount of \$80, that she is entitled to medical mileage reimbursements for 541 miles of travel, and that she is entitled to prescription reimbursements in the amount of \$1,108.83.

C. Additional Medical Treatment

The claimant contends she is entitled to additional medical treatment, though she has not identified any specific treatment she seeks. Likewise, I am unable to identify from the record any specific recommendations of additional treatment, other than continued management of her prescription medication.

It is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). I find that the claimant has proven by a preponderance of the evidence that she is entitled to continued medical treatment by her authorized physicians, including management of her prescription medication.

D. Credit for Overpayments

In their prehearing questionnaire, the respondents contended they were entitled to a credit for overpayment of benefits as follows:

- On 2-28-02, the Claimant reached MMI date, and her 11% rating was assessed on 4-26-02. Respondents did not have the rating until 4-26-02 and paid TTD (rather than PPD) to 4-26-02. Respondents contend their liability for TTD should have ended on 2-27-02, and liability for PPD (at \$220/week) should have begun the following day. From 2-28-02 to 4-26-02, there are 57 days, which at an overpayment rate of \$73/week, would

yield an apparent overpayment of \$594.43.

- From 4-26-02 to 7-3-02 (date healing period re-entered), Respondents paid \$2,137.14 in PPD benefits.

- Under the terms of the Consent Order issued by the Administrative Law Judge, Respondents paid TTD benefits from 7-3-02 until the Claimant reached MMI again on 11-25-03.

- Respondents then re-commenced and paid PPD benefits from 11-25-03 through 6-20-05, during which time Respondents paid \$17,034.28 in PPD.

- Adding to that amount the apparent \$594.93 overpayment and the \$2,137.14 PPD payment yields a total PPD payment of \$19,765.85. The Claimant's 19% BAW impairment assessment is worth \$18,810.00. Subtracting that amount from the apparent total PPD payment of \$19,765.85 yields a net overpayment of \$955.85.

- Respondents further paid TTD and commensurate fees for the period of November of 2000 through May of 2001 (during which the Claimant worked as an apartment manager for Wayne Gruschow), and for at least 1 week in September of 2001 (when the Claimant drove a tractor for pay from Jared Seeman). Respondents' payment of TTD during that period (6 months, 1 week) at a TTD rate of \$293/week amounted to \$7,827.287.

- Adding that amount to the \$955.85 PPD overpayment, leaves a gross credit of **\$8,783.13**.

At the hearing, the parties stipulated to the accuracy of the dates and amounts listed in the above contentions, though the claimant disputes the

respondents' entitlement to credit. The claimant contends the respondents' claim for a credit is barred by *res judicata*. The doctrine of *res judicata* bars consideration of an issue when there has been a final adjudication on the merits of that issue by a court of competent jurisdiction. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003). The question is whether the party against whom it is invoked had a full and fair opportunity to litigate the issue in question. *Id.* A final order of the Commission deciding a question bars re-litigation of that same question. *O'Hara v. J. Christy Construction Company, A.W.C.C. E306806* (Jan. 13, 2005).

The parties entered into a Consent Order on May 30, 2003, signed by an administrative law judge, settling several disputed issues. However, none of the findings of the Consent Order address the credits which the respondents seek herein, so the Consent Order would not appear to bar these credits by *res judicata*. Since the parties stipulate to the accuracy of the dates and amounts, it is plain that the respondents overpaid the claimant's PPD benefits in the amount of \$955.85, and they are entitled to a credit of at least that amount. The only remaining question is whether the respondents are entitled to credit for the period of time in which the claimant allegedly worked for pay while receiving TTD benefits.

The Consent Order does not address the period of time in which the claimant allegedly worked – from November 2000 through September 2001, so it would not

appear to bar the credit. I note that the Full Commission's original order awarded TTD benefits to the claimant from "September 5, 1999, to the end of her healing period, or until such time as she is released to return to work," a period of time which would encompass the period for which respondents seek credit. However, the Commission's decision was from a hearing held March 2, 2000 – several months *before* the claimant's alleged work. The respondents could not have raised the issue of the claimant's working, because *it had not happened yet*. It cannot be said that the respondents had a "full and fair opportunity to litigate" this issue. *Cox v. Keahey, supra*. Therefore, I conclude that *res judicata* does not bar the respondents' request for a credit.

The claimant admitted in her testimony that she worked for Granada Apartments from November 2000 through May 2001, and that she was paid in the form of rent abatement amounting to \$425 per month. The claimant further admitted that she worked for Jared Seeman for several weeks in September 2001. The claimant admits she worked for wages in these periods of time. Nonetheless, when the Full Commission awarded indemnity benefits in its opinion of April 5, 2001, it noted the claimant had done some minor work for an engineering firm. The Commission expressly determined the claimant was entitled to temporary disability benefits even for the period of time in which she worked for the engineering firm.

The work for the apartment complex and Mr. Seeman appear to be in the same category as the work done for the engineering firm. Since the Commission found the previous work not to bar the claimant from temporary disability benefits, I am reluctant to reach a different conclusion as to these new instances of work. Therefore, I find that the respondents are not entitled to credit for the temporary disability benefits paid from November 2000 through September 2001.

Given the above discussion, I find that the respondents have proven by a preponderance of the evidence that they are entitled to a credit in the amount of \$955.85 for overpayment of benefits to the claimant.

AWARD

The claimant has proven by a preponderance of the evidence that she is entitled to continuing medical treatment; and that she is entitled to reimbursement of medical mileage expenses, physician co-pays, and prescription expenses, subject to a credit in the amount of \$955.85 for overpayment of benefits by the respondents. 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. Stephen Arnold, is hereby awarded the maximum statutory attorney's fee on the entire 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