

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. E712283

DIANA VAUGHAN, EMPLOYEE	CLAIMANT
APS SERVICES, LLC, EMPLOYER	RESPONDENT
HARTFORD UNDERWRITERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 8, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on December 8, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. A. Gene Williams, Attorney at Law, Little Rock, Arkansas.

A hearing was held on December 8, 2005, to determine claimant's entitlement to additional benefits, including past and future medical treatment, with referral to Dr. Amad, reinstatement of temporary total disability (TTD) indemnity benefits, and attorney's fees.

The parties stipulated that claimant sustained a compensable injury on September 17, 1997. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$173.00 for TTD and \$154.00

for permanent partial disability (PPD) benefits. The parties also stipulated that benefits were stopped on or about May 5, 2005.

Claimant stated her contentions at the hearing as follows: that her weekly indemnity benefits were terminated some time on or about May 5, 2005, and should be reinstated; that certain medical bills have remained unpaid, in spite of the Commission's orders; and, that no attorney's fees have been paid since May of 2005. Specifically, claimant contends that she is entitled to the replacement of her stimulator, which was denied in January of 2005, and that in regard to future medical, she contends she is entitled to a cubital tunnel release proposed by Dr. Hixson, as well as elbow injections proposed by Dr. Hixson. Further, she contends that she is entitled to follow-up by Dr. Ackerman (or whomever Dr. Ackerman or the Commission refers her to, as Dr. Ackerman has moved to Ohio), in regard to the treatment for her reflex sympathetic dystrophy (RSD).

Respondents contend that the claimant has been provided all benefits to which she is entitled; that her healing period should be at an end; and, that she is simply not entitled to any further TTD benefits or any medical benefits, as she cannot prove that any medical treatment is reasonably necessary or related to her compensable injury of September 17, 1997.

STATEMENT OF THE CASE

The facts of this case have been well-documented in previous opinions issued by Administrative Law Judges Don Curdie on July 27, 2000, and Dail Stiles on October 29, 2003, and are incorporated by reference herein.

In ALJ Stiles' opinion of October 29, 2003, it was found that claimant had not reached maximum medical improvement, according to her treating physician Dr. William Ackerman, and that efforts were continuing in an attempt to improve claimant's condition of reflex sympathetic dystrophy (RSD). As such, ALJ Stiles found that claimant was entitled to a reinstatement of TTD benefits.

Since the issuance of that opinion, medical records and claimant's testimony reflect that claimant continued to see Dr. Ackerman approximately every three months for evaluation, for myofascial trigger point injection therapy, and for medication checks and refills until April 4, 2005. Sometime after seeing Dr. Ackerman for the last time in April, Dr. Ackerman apparently moved out of state. Claimant testified that he was the only physician who was actively treating her at that time and that she had no idea he was leaving or that he had moved until she attempted to return to see him in July of 2005. His records do not indicate that claimant was released from his care; however, he did not issue a referral to another physician to claimant before leaving his practice in Arkansas. Claimant testified that she somehow found out that

Dr. Ackerman was referring his RSD patients to Dr. Amad and requests that she be referred to him, also.

Dr. Ackerman's notes of his last visit with claimant on April 4, 2005, indicate that he wanted to start claimant on a new course of treatment. His notes state as follows:

PLAN: Rather than constant injections of her trapezius muscle, it is my medical opinion that RS muscle stimulator could cause less trauma to the muscle. She was advised that repetitive injections with a needle can cause muscle trauma. With her history of reflex sympathetic dystrophy and the fact that she may need further surgery, I would like to minimize any invasive procedures and proceed with a less invasive modality, such as the RS stimulator.

Claimant testified that she does have the stimulator from RS Medical, but she does not know whether it has been paid for; she knows *she* has not paid for it.

Claimant testified that her left extremity is tolerable at present, but that she mainly has problems now with the lower right side of her neck, where it connects with the shoulder, and across the shoulder blade into the back. She testified that she has these symptoms "all the way down to my fingertips."

Claimant had been referred for consult by Dr. Ackerman to Dr. Hixson on August 5, 2004, for ulnar neuropathy symptoms at the right elbow. Dr. Hixson found on October 12, 2004, that claimant may have cubital tunnel syndrome and may need surgical release of the right ulnar nerve at the elbow. Dr. Hixson's notes gave no

opinion as to the etiology of these problems. However, in her deposition of October 3, 2005, Dr. Hixson opined that she could not tie the problem for which she was treating claimant into the RSD. She testified that she “thought it was probably idiopathic.”

Claimant testified that before she got her internal stimulator, introduced by Dr. Jordan in October of 2002, her pain was “constant nonstop.” She testified that she has been able to gain relief from the internal stimulator and that it helped her get off a lot of her medications, particularly the narcotics. She testified, and the medical records reflect, that in January of 2005 claimant had to have the internal stimulator revised, as the generator had exhausted. She also testified that the external stimulator, recommended by Dr. Ackerman, which has not been paid for by respondents, helps as well.

Incorporated by reference by respondents at the hearing were the depositions of Dr. Ackerman, given in May of 2000, which was an exhibit to a hearing transcript from June 2, 2002, as well as a deposition of Dr. Ackerman given in September of 2003, which was an exhibit to the hearing transcript of October 3, 2003. Dr. Ackerman stated in his September 2003 deposition that the claimant had made great strides in progress in resolving her symptoms of RSD since the implantation of the dorsal column stimulator by Dr. Jordan in the fall of 2002. Dr. Ackerman further stated that the claimant was showing progress in her physical therapy regimen and

actually was showing some increase in the circumference of her muscular extremities. He states at the time his deposition was taken that he felt the claimant was nearing the end of her healing period and had just about reached maximum medical improvement (MMI). He felt that she would reach MMI soon, and he felt that the claimant could return back to gainful employment. Despite this testimony from his September 2003 deposition, however, medical records do not indicate that Dr. Ackerman ever did actually release claimant as having reached MMI.

Claimant testified that, over all, she is better now than she was two years ago, but she is not symptom-free. She testified that, as far as she knows, no doctor has released her to return to work or indicated that she has reached the end of her healing period. She testified that she is able to do most of her household chores if she takes her own time. She testified that she does not know if there is any work that she could do for a living and has not looked for employment.

Claimant submitted to an independent medical evaluation (IME) by Dr. John Lytle on January 26, 2005. Dr. Lytle found, in part, as follows, in response to questions submitted to him:

What is the diagnosis?

Neuropathic pain to the RUE; weakness of the RUE NOS; pain in the LUE; weakness of the LUE; s/p carpal tunnel release bilaterally; cubital tunnel syndrome bilaterally with surgery on the L. She is postop spinal cord stimulator for pain control.

All of these problems that seem to have evolved over time with Ms. Vaughan are related by her to her original problem as this developed while working in the bread store on 9/17/97. Without the rather constant and continuous medical involvement, it would be difficult to relate her current condition to her seemingly benign injury at that time.

Does injured worker suffer from any other medical condition not related to the injury?

Not that is evident to me at this time.

* * *

What would be a medically reasonable and necessary plan for future treatment? Indicate use of medication use in your answer.

Seeing how that she has just recently undergone surgery for revision of her implanted spinal cord stimulator, *I think that it is reasonable to continue to support that implant as necessary, including future battery changes.*

Medication seems to be stable. *I would anticipate the continuous use of anti-inflammatory medicine and obviously the occasional and as needed use of narcotic pain medicine for which she seems to have become accustomed.*

Does the injured worker need any additional diagnostic testing?

I see no reasonable diagnostic testing that would assist this woman in becoming pain-free and returning to her normal functional position in life.

Please state whether the effects of the injury will ever resolve?

No. I do not see any chance that this problem will resolve in her lifetime.

Is the injured employee able to work, and if so, in what capacity?

This is a most difficult question. I see no reason she could not do cognitive work and at this point some work with her L hand. I think the functional use of her R hand is extremely limited, even from the seemingly benign activities such as answering the phone.

This is a most confounding and frankly bizarre progression of subjective symptoms without objective physical findings. *This has escalated to the point now where she is truly a functional invalid.* There are in my opinion significant psychological and physical dependencies on her treatment and medication at this point.

[Emphasis added.]

Claimant seeks the payment by respondents of past and future medical expenses, including revision of her internal stimulator, which was denied in January of 2005, medication and equipment rental for an external stimulator, recommended by Dr. Ackerman, as well as a cubital tunnel release and elbow injections proposed by Dr. Hixson. She also seeks a referral for follow-up treatment for her RSD to Dr. Amad in North Little Rock, since Dr. Ackerman has moved out of state. Finally,

claimant seeks reinstatement of TTD benefits from on or about May 5, 2005, and continuing to a date yet to be determined, as well as attorney's fees.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. Claimant has proven entitlement to additional medical treatment, both past and future, including revision of her internal stimulator, which was denied in January of 2005, medication and equipment rental for an external stimulator, as well as a cubital tunnel release and elbow injections proposed by Dr. Hixson;
3. Claimant has proven entitlement to follow-up treatment with Dr. Amad in regard to the treatment of her reflex sympathetic dystrophy (RSD), as her treating physician, Dr. Ackerman, is no longer practicing in this State and did not release claimant from care prior to moving;
4. Claimant has proven entitlement to reinstatement of TTD indemnity benefits commencing on or about May 5, 2005, and continuing to a date yet to be determined;
5. Respondents have controverted indemnity benefits since on or about May 5, 2005.

DISCUSSION

In this case, this examiner gives greater weight to the opinion of Dr. Ackerman, claimant's longtime treating physician, rather than to the opinion of Dr. Lytle, who saw claimant one time for an IME. However, even Dr. Lytle opined that he did not believe claimant's problem would ever resolve in her lifetime and that she has become a "truly functional invalid."

In regard to claimant's cubital tunnel syndrome, Dr. Hixson stated in her deposition that she "*thought it was probably idiopathic.*" [Emphasis added.] However, Dr. Hixson made no mention of this opinion in her office notes or medical reports. The law is clear that medical opinions must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Our Supreme Court has held that expert opinions based upon "could," "may," or "possibly" lack the definiteness required to establish a reasonable degree of medical certainty. *See Huffly Service First v. Ledbetter*, 76 Ark. App. 533, 69 S.W.3d 449 (2002); *Francis v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra; Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra; Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

It is this examiner's opinion that Dr. Hixson's opinion that she "thought" that this was "probably" idiopathic lacks the definiteness required to establish a reasonable degree of medical certainty that claimant's cubital tunnel syndrome is unrelated to her compensable injury of September 17, 1997. Moreover, Dr. Lytle, in his IME report, answered the question "Does injured worker suffer from any other medical condition not related to the injury?" as follows: "Not that is evident to me at this time."

With regard to claimant's follow-up treatment with Dr. Amad, Dr. Ackerman clearly did not release claimant prior to moving out of State or refer her to another physician. However, there is evidence that Dr. Ackerman has referred some of his other RSD patients to Dr. Amad in North Little Rock and that Dr. Amad is "a physician trained at Yale University and has a fellowship in pain medicine and is an expert in reflex sympathetic dystrophy." In Dr. Lytle's IME, he opined that some future medical care would be reasonable and necessary. As such, claimant has proven entitlement to follow-up care with a physician trained to treat her condition and is, hereby, referred to Dr. Amad for future treatment.

With regard to claimant's request for reinstatement of her indemnity benefits, the law is clear that temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and *nothing in the way of treatment will improve that condition*. [Emphasis added.] *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.*

These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

In this case, it is this examiner's opinion that claimant was and is continuing to be referred for treatment to improve her condition. Further, no medical evidence exists that claimant has been released to return to work by her treating physicians or that she has reached MMI. As such, claimant has proven entitlement to a reinstatement of TTD benefits, effective from the date they were stopped, on or about May 5, 2005, and continuing to a date yet to be determined.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay all past and future reasonable, necessary, and related medical expenses the claimant has incurred and may incur as a result of her compensable injury in accordance with the findings of fact herein.

Respondents are directed to reinstate claimant's TTD indemnity benefits commencing on or about May 5, 2005, and continuing to a date yet to be determined.

Respondents are directed to pay the claimant's attorney, Mr. Kenneth E. Buckner, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge