

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F501680

KIMBERLY BRASEL, Employee	CLAIMANT
HOME DEPOT, Employer	RESPONDENT
SEDGWICK CMS, Carrier	RESPONDENT

OPINION FILED AUGUST 29, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by JEREMY SWEARINGEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 1, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 16, 2007, and a pre-hearing order was filed on May 17, 2007. 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 relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to her low back on December 21, 2004.

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

1. Claimant's entitlement to additional medical treatment, including surgery.
2. Penalty pursuant to A.C.A. §11-9-802 for failure to timely pay temporary total disability benefits.

3. Attorney fee.

At the time of the hearing the parties agreed to withdraw and reserve the issue of a penalty for failure to timely pay temporary total disability benefits and a corresponding attorney fee. The parties also agreed to reserve as an issue the respondent's claim of a credit for overpayment of temporary total disability benefits. Finally, the parties agreed to add as an issue the claimant's entitlement to temporary total disability benefits beginning June 4, 2007.

The claimant contends her initial primary care physician, Richard Kyle, recommended surgery for the treatment of her L4-L5 disc herniation on February 14, 2005. The respondents immediately changed physicians and the claimant has been treated conservatively. A change of physician request was submitted and the claimant was ordered to see Dr. Blankenship. Dr. Blankenship also has requested surgery and the respondents have refused the reasonable and necessary medical treatment. Claimant contends that she is entitled to temporary total disability benefits beginning June 4, 2007.

The respondents contend that L4-5 decompression, discectomy, and internal fixation surgery is not reasonable in relation to the claimant's compensable injury. The respondent contends that claimant is not entitled to any additional temporary total disability benefits. Respondents contend that attorney's fees are not payable on controverted medical benefits.

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 their 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 May 16, 2007, and contained in a pre-hearing order filed May 17, 2007, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable back injury. This includes surgery which has been recommended by Dr. Blankenship.

3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to any additional temporary total disability benefits subsequent to June 4, 2007 through the date of the hearing.

FACTUAL BACKGROUND

The claimant is a 41-year-old woman who graduated from high school and has attended some community college. Claimant is currently enrolled at Crowder College.

The claimant became employed by the respondent in April 2001 at a store in Illinois. In June 2004 claimant and her family moved to Cassville, Missouri, and she transferred to the respondent's store in Fayetteville beginning on July 19, 2004. Before and after her transfer she worked for the respondent as a head cashier. In addition to performing cashier duties claimant's job duties also required her to make sure that each cashier's cash drawer was set up, made sure cashiers took breaks in a timely fashion, and she handled some situations with customers that required a manager.

The parties have stipulated that claimant suffered a compensable injury to her low back on December 21, 2004 when she bent over to adjust a gallon of paint in a box. Claimant reported this incident and completed an accident report.

When claimant's low back complaints continued she was sent for evaluation by Dr. Wilson and Dr. William Kendrick. At that time the claimant had complaints of low back pain radiating into her left leg. Claimant was treated with medication, work restrictions, and an MRI scan was ordered. An MRI scan taken on January 25, 2005 revealed

degenerative disc disease and a far lateral disc herniation at the L4-5 level. Based upon the findings of the MRI scan, Dr. William Kendrick referred claimant to Dr. Kyle, neurosurgeon, for an evaluation.

Claimant's initial evaluation with Dr. Kyle occurred on February 14, 2005 and he noted that the claimant's MRI scan revealed the lateral disc herniation at L4-5. He further noted that these types of disc herniations usually require surgical repair and "that seems to be the case here."

When claimant next returned to Dr. Kyle on May 5, 2005, she continued to have complaints of low back pain. However, her radicular complaints of pain involving her left leg were gone and Dr. Kyle indicated that he no longer felt that surgery was necessary. Instead, Dr. Kyle recommended that the claimant receive follow-up treatment with Dr. William Kendrick and also noted that claimant might benefit from a trigger point injection.

Claimant returned to Dr. William Kendrick who ordered a repeat MRI scan which was read as showing no significant changes since the prior study in January 2005. Dr. William Kendrick also referred claimant to Dr. Carl Kendrick, orthopaedic surgeon, for a second opinion.

Dr. Carl Kendrick's initial evaluation occurred on August 11, 2005. In his report of that date, Dr. Kendrick indicates that he does not believe that the claimant has a disc herniation, but rather suffers from facet syndrome. According to Dr. Kendrick this could be treated adequately with exercise. As a result, he sent the claimant to physical therapy for one visit to learn back exercises, continued her pain medication, and took claimant off work. Subsequent medical reports from Dr. Kendrick indicate that claimant's symptoms had improved and he released the claimant to return to work with no restrictions. However, Dr. Kendrick's report of September 21, 2005, indicates that claimant did not return to work because of increased back pain. Dr. Kendrick gave claimant new medication and took her off work for an additional two weeks. On October 11, 2005, Dr.

Carl Kendrick released the claimant to perform light duty work and on October 25, 2005, Dr. Carl Kendrick indicated that claimant had no neurological deficit, that he could find no objective findings which would account for her complaints, but instead indicated that claimant needs to "get on with her life." Despite this statement, he also on that same date completed a work slip indicating that claimant would need to be allowed to work only one-half a day until further notice.

Claimant subsequently returned to Dr. Kyle who in a report dated January 23, 2006 again indicated that claimant had no surgical lesions or complaints. He did recommend that claimant see Dr. Cannon for a potential trigger point injection. Claimant was evaluated by Dr. Cannon on February 21, 2006. He opined that most of claimant's pain was coming from the facet arthropathy/spondylosis or disc degeneration. Dr. Cannon did not believe a trigger point injection would give adequate relief, but instead recommended an epidural injection. This epidural injection was not given until July 6, 2006 and it was the only injection from Dr. Cannon.

Claimant again returned to Dr. Kyle on September 14, 2006, at which time she continued to have left-sided hip and back pain. Dr. Kyle noted in his report of that date that claimant's leg pain had resolved and that her hip pain would resolve in the next 12 to 15 months. He indicated that claimant would be expected to have reached maximum medical improvement at that time (12-15 months).

Claimant subsequently was evaluated by Dr. Blankenship on March 12, 2007. Dr. Blankenship ordered a new MRI scan and plain films. It was Dr. Blankenship's opinion that claimant does have radicular findings and that additional conservative treatment would not afford long term benefit. As a result, Dr. Blankenship has recommended surgery.

Claimant has filed this claim contending that she is entitled to additional medical treatment for her compensable injury; including, the surgery as recommended by Dr. Blankenship. She also requests payment of temporary total disability benefits beginning

June 4, 2007 and continuing through a date yet to be determined.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact to be determined by the Commission. *White Consolidated Industries v. Galloway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injury. This includes surgery as recommended by Dr. Blankenship.

A review of the medical records as well as the deposition testimony of Drs. Blankenship and Kyle indicates that there is medical evidence in support of the contentions of both parties in this case. It is the opinion of Dr. Kyle that surgery is not reasonable and necessary for treatment of claimant's compensable injury. A review of his deposition testimony indicates that the primary basis for his opinion is the fact that claimant does not suffer from radicular symptoms; therefore, surgery on the claimant's herniated disc at the L4-5 level is not necessary. I also note that Dr. Carl Kendrick has not recommended a surgical procedure. In contrast to both Dr. Kyle and Dr. Blankenship, Dr. Kendrick did not believe that the claimant suffered from a disc herniation, but instead indicated that in his opinion the claimant suffered from facet syndrome. In contrast to Dr. Carl Kendrick's opinion, even Dr. Kyle testified in his deposition that in his opinion the main source of claimant's underlying symptoms is the far lateral disc herniation.

Dr. Blankenship has opined that claimant is in need of additional medical treatment in the form of surgery for her compensable low back injury. Dr. Blankenship's opinion is

based upon his review of a third MRI scan as well as plain films taken at the time of his first visit on March 12, 2007. While Dr. Kyle indicates that claimant is not in need of surgery because of the lack of radicular complaints, it is Dr. Blankenship's opinion that the claimant does have radicular complaints. Dr. Blankenship testified in his deposition that the claimant's posterior hip pain was deep enough and low enough in her buttock that "I felt like it probably was radicular." Dr. Blankenship also noted that the claimant had numbness in her leg and that she had a diminished ankle reflex on the left. Both Dr. Blankenship and Dr. Kyle admit that the diminished ankle reflex is related to the S1 nerve root and that claimant has no significant disc space pathology at the L5-S1 level. However, Dr. Blankenship testified that an individual can get radicular pain in an S1 distribution from the L4-5 level. In his opinion, the claimant's deep buttock pain is caused by the lateral recess stenosis of the S1 nerve root at the L4-5 level.

I find based upon the evidence presented in this case that Dr. Blankenship's opinion is entitled to great weight. In reaching this decision, I acknowledge the fact that claimant did not see Dr. Blankenship for an evaluation until March 12, 2007, more than two years after her compensable injury. However, a review of the medical evidence indicates that claimant has continued to suffer from low back and hip complaints since the time of her original injury. In addition, Dr. Blankenship's opinion is based upon his review of a third MRI scan and plain films taken by him at the time of his visit on March 12, 2007. While Dr. Kyle did review the MRI scan from March 12, he did not review the plain film as did Dr. Blankenship. In reaching this decision, I also believe it is important to note that even Dr. Kyle was surprised that claimant did not have more findings given the MRI scan revealing the herniated disc at the L4-5 level. In his deposition, Dr. Kyle stated that: "I am still amazed she doesn't have radicular pain myself." According to Dr. Blankenship, it was his opinion that the claimant did have radicular pain.

In summary, I find that the opinion of Dr. Blankenship is credible and entitled to

great weight. Based upon the opinion of Dr. Blankenship as well as a review of the remaining evidence presented, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment. This includes surgery as recommended by Dr. Blankenship.

The final issue for consideration involves claimant's contention that she is entitled to additional temporary total disability benefits beginning June 4, 2007 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, there is no question that claimant remains within her healing period for her compensable injury. However, I find that claimant has failed to prove by a preponderance of the evidence that she has suffered a total incapacity to earn wages since June 4, 2007. Following her compensable injury, the claimant was taken off work from her job with the respondent for a period of time before she was released to return to work with restrictions. Claimant returned to work for the respondent working a half day at a credit desk in the respondent's store. Claimant continued performing this job for the respondent until she was informed that the job was no longer available because she had been on short-term disability for one year. Claimant testified that she was last employed by the respondent on February 7, 2007. She also testified that she has not looked for employment since that time. According to claimant's testimony she could have continued working for the respondent at the credit desk had she not been terminated. She also admitted that there were probably other companies which had jobs similar to the respondent's credit desk but she had made no effort to look for those types of jobs. Instead, in August 2006 the claimant enrolled full time in community college where she took 12 hours of classes in four days per week.

While Dr. Blankenship has recommended that the claimant undergo surgery, he did not indicate in his report of March 12, 2007 that claimant was totally incapacitated from working. In fact, Dr. Blankenship testified at his deposition that his office notes do not contain any indication as to the claimant's functional abilities in March 2007. Significantly, Dr. Blankenship did not indicate in either his report or at the time of his deposition that claimant was totally incapacitated from earning wages.

In summary, while claimant remains within her healing period for her compensable injury, she has failed to prove by a preponderance of the evidence that she suffers a total incapacity to earn wages. Obviously, this situation may change should Dr. Blankenship proceed with his recommended surgery. However, at this point in time claimant is not entitled to additional temporary total disability 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)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable back injury. This includes surgery as recommended by Dr. Blankenship. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits beginning June 4, 2007.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the

amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter’s charges for preparing the hearing transcript in the amount of \$449.75.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE