

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601643

CASSANDRA (RICHARDS) WILSON	CLAIMANT
ST. EDWARD MERCY MEDICAL CENTER	RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM, SELF INSURED/TPA	RESPONDENT

OPINION FILED DECEMBER 17, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by RANDY MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 9, 2007, in Fort Smith, Arkansas. The deposition of Dr. John Swicegood was taken on September 11, 2007. The deposition has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was filed in this case on July 11, 2007. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the issue of the claimant's entitlement to benefits for permanent disability was withdrawn. A copy of the pre-hearing order, with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations have been offered by the parties and are hereby accepted:

1. On January 26, 2006, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$293.00 for total disability and \$220.00 for permanent partial disability.
3. On January 26, 2006, the claimant sustained a compensable injury to her low back.
4. There is no dispute over the payment of medical expenses for the claimant's low back difficulties through February 24, 2007.
5. There is no dispute at present over temporary disability benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services by Dr. Swicegood for her back complaints.
2. Whether the claimant sustained a compensable mental injury, as a consequence of her compensable back injury.
3. The claimant's entitlement to medical services for her alleged mental injury.
4. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"Claimant suffered an accidental injury to the lumbar spine which arose out of and in the course of her employment on January 26, 2006. Workers' compensation benefits have been denied since February 25, 2007, despite the fact that claimant remains in need of treatment recommended by her authorized treating physician, and she has suffered from

a mental injury in the form of depression as a compensable consequence of the lumbar injury.”

In regard to these issues, the respondents contend that claimant has received all the benefits to which she is entitled.

DISCUSSION

I. COMPENSABILITY OF ALLEGED MENTAL DIFFICULTIES

The first issue to be addressed is whether the claimant has sustained a “compensable” mental or psychological injury, as a consequence of the admittedly compensable physical injury to her lower back. The burden rests upon the claimant to prove that she has sustained such a mental injury or illness. In order to meet this burden, the claimant must establish the existence of a mental injury that satisfies all of the statutory requirements of Ark. Code Ann. §11-9-113.

After consideration of the evidence presented, I find that the claimant has failed to meet her burden. Specifically, I find that she has failed to prove the existence of any mental injury or illness in the manner required by Ark. Code Ann. §11-9-113(a)(2). The claimant has failed to show that she has experienced a mental injury or illness that has been diagnosed by a licensed psychiatrist or psychologist, using the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. In fact, no medical reports or records of any licensed psychiatrist or psychologist have been tendered. The mere opinion of Dr. Swicegood, an anesthesiologist and pain management specialist, that the claimant has “depression” is not sufficient to satisfy §11-9-113(a)(2).

The claimant's failure to establish the existence of a mental injury or illness, in the manner required by Ark. Code Ann. §11-9-113(a)(2) clearly prevents a finding that she sustained a "compensable" mental injury, as that term is defined by the Act. Her claim for benefits attributable to such an injury must be denied in its entirety.

II. ADDITIONAL MEDICAL SERVICES BY DR. JOHN R. SWICEGOOD

The next issue concerns liability for the expense of additional medical services rendered to the claimant for her continuing lumbar difficulties, by or at the direction of Dr. Swicegood. Based upon the stipulations, these disputed medical services only deal with medical services that have been or will be provided by Dr. Swicegood, after February 24, 2007. This includes medical services that have been recommended by Dr. Swicegood, but have not yet been provided.

The last medical records of Dr. Swicegood, which have been introduced into evidence, are his records of January 23, 2007 (Claimant's Exhibit No. 1, pages 37-39 and Respondents' Exhibit No. 1, pages 54-59). In these records, Dr. Swicegood recommends continued treatment, which is in the form of continuing medication (Klonopin and Celebrex), continuing physical therapy, and a second disc decompression at L3-L4 and L4-L5. Thus, the claimant must prove that these recommended medical services represent "reasonably necessary medical services", as that term is used in Ark. Code Ann. §11-9-508.

In order to represent “reasonably necessary medical services”, these medical services must be necessitated by or connected with the compensable injury. The services must also have a reasonable expectation of accomplishing their intended purpose or goal, at the time the services are actually rendered. However, there is no requirement that the medical services actually be successful.

The record shows that the January 26, 2006, a compensable injury to the claimant’s low back was initially diagnosed as a thoracolumbar strain. However, after subsequent testing, including a lumbar MRI on February 17, 2006, the claimant’s compensable injury was ultimately diagnosed as being in the form of disc protrusions or herniations at L3-L4 and L4-L5. At that point, the claimant was referred to Dr. Swicegood for appropriate treatment of these injuries.

The initial treatment by Dr. Swicegood took the form of epidural steroid injections of the lumbar spine in the area of these two damaged discs. This treatment appears to have significantly alleviated the claimant’s symptoms, particularly the radicular symptoms that involved her lower extremity. Ultimately, Dr. Swicegood performed a percutaneous decompression of the lumbar discs at L3-L4 and L4-L5. This procedure was performed on June 2, 2006.

The June 15, 2006 office record of Dr. Swicegood noted that the claimant experienced a 100 percent improvement in functional and pain relief, immediately following the arthroscopic decompression. The claimant’s testimony at the hearing confirms

that she was pain free for a period after this arthroscopic decompression.

However, the claimant testified that her pain and difficulties with her lower back slowly returned. However, these symptoms remained significantly less than those that she was experiencing prior to the arthroscopic decompression. The July 3, 2006 physical therapy records confirm that the claimant was once again complaining of pain across her lower back, which she graded at a current level of 2 out of 10 and a 3 out of 10 at its worse. A history was also recorded that the pain increased in the mornings and decreased with heat. The claimant's physical examination, which was performed at that time, was essentially normal, but noted some decrease in flexibility of the lumbar region due to muscle tightness. Physical therapy was continued for three times per week for the following two weeks. Subsequent physical therapy notations recorded complaints by the claimant of her back tightening up at times throughout the day.

In his report of August 1, 2006, Dr. Swicegood's nurse noted the claimant's chief complaint of hip or right upper buttock pain. The nurse further stated:

"Doing well post perc discectomy until moved coffee table one week ago."

Clearly, the claimant reported pain was in the same area and was of the same type as she reported immediately following her compensable injury. Dr. Swicegood's nurse also recorded that the claimant felt that her current hip or buttock pain was not as intense as what she experienced following the compensable injury.

In his portion of the report, Dr. Swicegood stated that the claimant had experienced an acute exacerbation of her pain “causing setback in treatment plan.”

Dr. Swicegood’s next report is dated August 7, 2006. In this report he related that the claimant was complaining of back pain. He also stated that the claimant was “pain free”, until a lifting or twisting incident two weeks prior to this visit. Clearly, this history would be inconsistent with the claimant’s testimony and the records and reports of the physical therapist to whom the claimant had been referred by Dr. Swicegood for continuing treatment. Both the claimant’s testimony and the physical therapy reports indicate that in early July of 2006, the claimant had experienced significant improvement, but not total relief or resolution of her difficulties. In fact, Dr. Swicegood notes in this report that the claimant had still maintained a 99 percent improvement in her pain, as compared to that following her compensable injury and prior to her arthroscopic disc decompression. At the time of this visit, Dr. Swicegood stated his diagnosis of the claimant’s difficulties remain unchanged from the diagnosis made prior to the subsequent exacerbation of her symptoms. His recommended treatment also remained the same as that which the claimant had been receiving prior to the increase in her symptoms.

The claimant’s next visit with Dr. Swicegood occurred on October 6, 2006. At that time, Dr. Swicegood’s nurse noted the claimant’s complaints of back pain and stated that these symptoms occurred “possibly” as the result of a lifting injury. Again, this

nurse inaccurately recorded that the claimant was “pain free”, until she moved a coffee table two months ago prior to this visit. Again, Dr. Swicegood’s diagnosis remained the same as his diagnosis following the claimant’s compensable injury. Again, he continued the claimant’s regular treatment plan with the exception of a recommendation of a repeat epidural steroid injection of the lumbar spine. This injection was performed on October 26, 2006.

The claimant was next seen at Dr. Swicegood’s office on November 21, 2006. At that time, a history recorded by Dr. Swicegood’s nurse would appear to be somewhat contradictory. Initially, the history indicated that the claimant received significant relief from the previous injection, but was now hurting again. However, it later noted that the lumbar epidural steroid injection (LESI) did not help. However, Dr. Swicegood’s diagnosis of the etiology of the claimant’s complaints still remained unchanged. His recommended treatment also remained the same, with the exception that he ordered another lumbar MRI. Another epidural steroid injection was performed at the time of this visit (November 21, 2006).

The second lumbar MRI study was performed on November 30, 2006. This lumbar MRI was interpreted as again showing focal disc protrusions at the L3-L4 and L4-L5 levels with some “mass effect” on the anterior aspect of the thecal sac. However, no significant canal or foraminal stenosis was observed. This report observed that there was no significant change or evidence of increased damage to

this portion of the claimant's lumbar spine since the prior MRI on February 17, 2006.

The claimant was apparently last seen by Dr. Swicegood on January 23, 2007. At that time, Dr. Swicegood's nurse noted that the MRI study shows disc herniations of L3-L4, L4-L5 "after reinjury". This is clearly a misleading statement. These same disc protrusions or herniations were noted on the lumbar MRI that was performed shortly after the compensable injury and prior to any "reinjury". Further, the radiologist, who interpreted the most recent MRI (Dr. Adam Gold), expressly opined that there was no change in the discal defects at L3-L4 and L4-L5 from those present on the initial MRI of February 17, 2006. Again, Dr. Swicegood's diagnosis of the etiology of the claimant's difficulties remained unchanged. Again, his recommended treatment remains essentially the same, with the exception of a recommendation of a repeat arthroscopic or percutaneous disc decompression of L3-L4 and L4-L5.

Dr. Swicegood subsequently sent a copy of his January 23, 2007 office record together with a note to the respondent's case manager. This note stated:

"Cassandra was seen in my office. I appreciate the opportunity to care for this patient. My opinion is that she has redeveloped pain that is related to her herniated disc at L3-L4 and L4-L5. She had received 6/2/06 minimally invasive disc decompression and did well without further pain until in the normal course of her ADL's (activities of daily life) she lifted something and reinjured her disc. I tried to manage this conservatively hoping physical therapy, medications, and epidural steroids would improve this, but she has not improved substantially at all. I repeated her lumbar

MRI and her disc are a bit worse and now with some degeneration. I think she would benefit from repeating the percutaneous disc decompression with a technique that would help with the disc degeneration as well.”

Again, this notation by Dr. Swicegood appears to be inconsistent and in conflict with the other evidence presented. The claimant’s testimony, which is corroborated by the physical therapy records, show that the claimant was not pain free and her difficulties had not totally resolved, prior to her moving of the coffee table in late July of 2006. Dr. Swicegood’s conclusion that the repeat MRI study showed that her disc herniations were worse is also contradicted by the radiologist’s interpretation of this most recent study.

In his deposition, Dr. Swicegood testified that the claimant’s moving of the coffee table may have precipitated some additional damage to the claimant’s previously damaged lumbar discs at L3-L4 and L4-L5, but that this activity would not have caused any damage or symptoms from these discs had they not already been damaged by the prior compensable injury (D.16-18). In this deposition, he opined that the damage to these discs looked a little worse on the second MRI study, but stated that some change would be a natural consequence of the prior trauma or injury and that this prior injury would make degenerative changes more likely to occur (D.20-21).

After consideration of all the evidence presented, it is my opinion that the additional medical services recommended by Dr. Swicegood for the claimant’s lumbar difficulties were necessitated

by or connected with her initial lumbar injury of January 26, 2006. The greater weight of the evidence presented shows that the claimant has continued to experience essentially the same type of symptoms and difficulties with her lumbar spine since her compensable injury. Although these difficulties appear to have periodically waxed and waned, the greater weight of the evidence fails to show that the claimant ever completely recovered from the damage caused by the initial compensable injury. Throughout the claimant's course of treatment, the diagnosis of the etiology of the claimant's complaints has also remained essentially unchanged. It is clearly questionable whether the coffee table incident caused any additional physical damage to her lumbar spine. At most, the moving of the coffee table in late July of 2006, represented only an aggravation of the claimant's initial compensable injury by her day to day activities of normal life. It would in no way represent a new or independent intervening injury that would be sufficient to relieve the respondents from continued liability for appropriate medical care for the initial compensable injury. Rather, it would simply be a natural and probable consequence of the initial compensable injury.

Next, it is my opinion that the evidence establishes that the continued medical services have a reasonable expectation of accomplishing the intended purpose. Dr. Swicegood is clearly of the opinion that the medical services he has recommended for the claimant have a reasonable expectation of accomplishing the purpose for which he intends these services. It cannot be presumed that

Dr. Swicegood would recommend medical services that were inappropriate or had no reasonable expectation of success. Dr. Swicegood has particular expertise in the area of medicine associated with the treatment of injuries such as that experienced by the claimant. His expert opinion is entitled to substantial weight and credit. I would further note that the respondents have offered no expert medical evidence to indicate that the services recommended by Dr. Swicegood are in any way inappropriate or unreasonable. The services recommended by Dr. Swicegood are of a type and nature commonly recognized in the general medical community as being appropriate for the treatment of injuries to the lumbar spine, such as was experienced by the claimant. In fact, these same services have been successful in substantially reducing the claimant's difficulties from those which she was experiencing immediately following her compensable injury.

As the medical services recommended by Dr. Swicegood have been proven to be necessitated by or connected with the claimant's compensable lumbar injury of January 26, 2006, and have been shown to have a reasonable expectation of accomplishing their intended purpose, such services would represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents would be liable for the expense of these services, subject to the medical fee schedule established by this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On January 26, 2006, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On January 26, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$293.00 for total disability and \$220.00 for permanent partial disability.

4. On January 26, 2006, the claimant sustained a compensable injury to her low back or lumbar spine, in the form of protrusions or herniations of the L3-L4 and L4-L5 intervertebral discs.

5. The claimant has failed to prove by the greater weight of the credible evidence that she has sustained a compensable mental injury, as a consequence of her admittedly compensable lumbar spine injury. Specifically, she has failed to prove the existence of any mental injury or illness that has been diagnosed by a licensed psychiatrist or psychologist and that meets the criteria set out in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders, as required by Ark. Code Ann. §11-9-113(a)(2).

6. There is no dispute over the payment of medical expenses incurred as a result of the claimant's compensable injury through February 24, 2007.

7. The additional medical services recommended by Dr. John R. Swicegood for the claimant's continuing lumbar difficulties represent reasonably necessary medical services for her compensable

injury. Specifically, these recommended medical services are necessitated by or connected with her compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

8. There is no dispute, at the present time, over temporary disability benefits.

9. The respondents have controverted the claimant's entitlement to any benefits attributable to the alleged mental injury or illness and have controverted her entitlement to additional medical services by and at the direction of Dr. Swicegood, after February 24, 2007.

10. As no controverted benefits, which are herein awarded, represent installments of compensation payable to the claimant, no controverted attorney's fee can be awarded to the claimant's attorney.

ORDER

The respondents shall be liable for continued medical services provided to the claimant for her compensable lumbar injury, after February 24, 2007, by and at the direction of Dr. John Swicegood. This expressly includes the medical services recommended by Dr. Swicegood in his report of January 23, 2007. This liability shall be subject to the medical fee schedule established by this Commission.

All benefits awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE