

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206258

KAREN D. WRIGHT

CLAIMANT

AIR TRANSPORT INTERNATIONAL

RESPONDENT EMPLOYER

LIBERTY MUTUAL

RESPONDENT CARRIER

ORDER AND OPINION FILED MAY 10, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on February 28, 2007. A prehearing conference was held on December 5, 2006 and a prehearing order was filed the same date. The prehearing order was introduced into evidence as Commission Exhibit No. 1 without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an April 10, 2002, compensable injury.
2. The compensation rates are \$425/319.

The claimant contends that she is entitled to temporary total disability benefits from September 3, 2003 through November 30, 2003, and from May 26, 2006, to a date to be determined. The claimant contends that she is entitled to additional medical treatment, to include a spinal fusion as recommended by Dr. Kevin Gill and Dr. Christopher Garrison. The claimant also requests attorney's fees.

Respondents contend the claimant's healing period has ended and she is not entitled to additional temporary total disability benefits. Respondents further contend the proposed surgery is not reasonable or necessary nor is the stabilization program that was proposed. Respondents are not aware of a period of time when temporary total disability was not paid but will abide by an award on temporary total disability. All medical benefits have not been controverted, only the surgery and the stabilization program. If the stabilization program is awarded, respondents will reinstate temporary total disability for the period required to complete the program.

ISSUES TO BE LITIGATED

1. Spinal surgery.
2. Other recommended medical.
3. Temporary total disability periods.
4. Attorney's fees.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann.

§11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an April 10, 2002, compensable injury.
2. The compensable rates are \$425/319.

3. The claimant has failed to prove by a preponderance of the evidence that a fusion surgery is reasonable and necessary relative to her compensable back injury.

4. The claimant has proven by a preponderance of the evidence that additional medical in the form of an aggressive stabilization program, as recommended by both Dr. Capello and Dr. Bruffett is reasonable and necessary.

5. Respondents are liable for the medical benefits associated with the back stabilization program.

6. Respondents are instructed to make the necessary arrangements for the trunk stabilization program within 45 days of the date of this order, if no appeal is taken.

7. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from September 3, 2003 through November 30, 2003, and from May 26, 2006, to a date to be determined.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 52 years old, worked for the respondent employer as a flight attendant since October 1996. The job required bending, lifting, assisting passengers with baggage, moving boxes from caterers and lifting and pulling coolers. The claimant has had one previous work injury in 2001, involving her left side and shoulder where she was moving a cooler. The injury resolved in 2001 and no further medical was needed. On April 10, 2002, the claimant was working and the plane hit some

turbulence causing her to hit the ceiling and then the floor. The claimant hit the back of her head on the ceiling and landed on her back on the floor. The claimant was able to see Dr. Benigno Buentipo upon the plane landing. The claimant had complaints of low back pain, tingling and numbness down both legs, left shoulder and arm pain. The claimant started with pain medication and physical therapy. The claimant next had a MRI, nerve conduction studies, and epidural steroid injections.

The claimant treated with a neurosurgeon, Dr. Christopher Michael, and was eventually referred to Dr. Richard Vera, a pain management specialist. The claimant has also seen Dr. Kathleen Sisler, a physical therapy specialist. The claimant described an evaluation by Dr. Wright Singleton (an IME as requested by respondents) as a most unpleasant experience. The claimant also underwent a functional capacity evaluation in Dr. Singleton's office and she found that experience to be unprofessional. The claimant testified that she performed the test as best as she could even though the results indicate she did not give full effort. Even though Dr. Singleton's records indicated that a work hardening was in order before she could be released back to work, that work hardening was not scheduled.

According to the claimant, her temporary total disability benefits stopped on September 3, 2003, with no explanation. The claimant's nurse case manager, Rhonda Ray, set up an evaluation by Dr. Christopher Michael for September 24, 2003; however, the claimant had to pay for that visit herself. Dr. Michael ordered a myelogram and CT scan of her neck and back. Again, the claimant's personal insurance paid for those tests. After the tests, Dr. Michael did not recommend surgery but did refer the claimant to Dr. Bruce Jenevein, a neurologist. Dr. Jenevein ordered nerve conduction studies of

the claimant's neck and back. The claimant testified that her temporary total disability benefits were reinstated on December 1, 2003, but she was never paid for the September 3, 2003 through November 30, 2003, benefits. The claimant testified she did not work nor was she able to work during that time frame.

Respondents made arrangements for the claimant to see Dr. Vera again on December 1, 2003 and he ordered a MRI of the low back but no work hardening program was set up. Dr. Vera referred the claimant to Dr. Christopher Garrison, a pain management specialist and he recommended another round of epidural steroid injections and these provided temporary relief. Dr. Vera and Dr. Garrison wanted the claimant to see Dr. Kevin Gill for a second opinion. Dr. Vera also ordered a discogram and that was accomplished in April 2005. Dr. Gill then recommended surgery. The insurance company made arrangements for the claimant to go to another IME with Dr. Juan Capello on September 12, 2005, to get another opinion on surgery. The claimant understood from Dr. Capello that he agreed with surgery and that she was not MMI. The claimant confirmed she was aware that Dr. Capello changed his mind one month later and he revised his report and did not recommend surgery. In Dr. Capello's second report, he recommended the claimant go through a PRIDE program, some sort of a focus on functional restoration rather than on pain. That was not arranged.

The claimant testified that Dr. Gill was her treating physician and he had recommended the surgery. Respondents set up another appointment with Dr. Garrison and he concurred with Dr. Gill that surgery was reasonable. The surgery was not approved by the insurance company and a third IME was set up with Dr. Bryan Drazner for May 6, 2006 and the claimant did not attend that appointment. Another appointment

for an IME was set with Dr. Bruffett in Little Rock. The claimant did attend that appointment and Dr. Bruffett did not recommend surgery but suggested the trunk stabilization program through Dr. Capello. The stabilization program was never set up. The claimant was approved to see Dr. Michael after the Dr. Bruffett IME; however, shortly thereafter all benefits were controverted. The claimant has continued to see Dr. Michael at her own expense.

The claimant testified that she understood that fusion surgery was very serious; however, she had always been a healthy person and active and she was desperate to have a life again. The claimant testified that she felt unable to return to work at this time and confirmed that all benefits ceased as of May 25, 2006. The claimant takes on an as needed basis, Celebrex, Hydrocodone and different muscle relaxers that she had when the insurance company was paying for medications.

Under cross examination, the claimant confirmed that she was unable to work because of pain. She testified that even minor activity can cause her to have to lay down for a period. The claimant did confirm that she would be willing to do work hardening under the supervision of a qualified therapist; however, she really wanted to proceed with the surgery. The claimant testified that she was willing to take the risk that her pain might not improve in her last effort to get better and be able to return to work and that was why she was considering the surgery. The claimant has undergone two MRIs, a myelogram, CT scans, EMG studies, discogram and x-rays.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2005). However, injured employees have the burden of proving by a preponderance of

the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy.

Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

In the present case, the claimant has been evaluated and treated with a number of specialty physicians, to include, Dr. Benigno Buentipo, Dr. Bruce Cheatham, Dr. Steven Eaton, Dr. Christopher Michael, Dr. Richard Vera, Dr. Kathleen Sisler, Dr. Wright Singleton, Dr. Bruce Jenevein, Dr. Richard Vera, Dr. Christopher Garrison, Dr. Kevin Gill, Dr. Juan Capello and Dr. Wayne Bruffett. To date, the claimant has received extensive conservative care, to include medication, physical therapy and epidural steroid injections, as well as a TENS unit. The claimant has had extensive diagnostic testing already identified as well as a couple IME evaluations at the respondents' request.

After considering the claimant's testimony and reviewing the extensive medical record, I find the claimant has failed to prove by a preponderance of the evidence that the fusion surgery she is requesting is reasonable and necessary and related to her compensable injury. I find that the trunk stabilization program, as recommended by Dr. Wayne Bruffett and Dr. Juan Capello, is reasonable and necessary and related to improving the claimant's condition relative to her compensable injury. I find respondents responsible for costs associated with this program and further instruct

respondents to make the necessary arrangements within 45 days of the date of this opinion and order. Dr. Capello stated in his October 18, 2005, report, “three-level spinal fusion surgery is notorious for a poor outcome. The probability that the examinee will be worse after a three-level fusion with instrumentation is rather high. There is no scientific evidence supporting the long-term effectiveness of fusion for degenerative lumbar spondylosis when compared to natural history, intensive interactive cognitive oriented rehab program or placebo.” (Jt. Exh. No. 1, p. 142.) Dr. Bruffett provides a similar opinion when he states, in part, on September 18, 2006: “I think she stands a better chance of returning to work without having a multilevel lumbar operation. If she has a purely single level problem, then I think it would be reasonable to give this a try. With two levels, there is still a chance that she would get better, but the results are not as good. Being that she has at least a three level problem, I do not think surgery would be worthwhile. I also think she has problems even higher up at L1-L2. . .I would recommend aggressive trunk stabilization exercises and more of a multidisciplinary approach.” (Jt. Exh. No. 1, p. 163.) Dr. Bruffett further opined that he did not think there was a way to make the claimant “pain free” nor “cure” her problems.

While Dr. Kevin Gill, on February 1, 2006, did recommend a TLIF at L4-5 and L5-S1 and a stabilization at L3-4 with Dynesys which would most likely end up being a three-level Dynesys, he recommended this surgery to help the claimant deal with pain. A February 14, 2006, report from Dr. Christopher Garrison indicates that he found Dr. Gill’s recommendation for surgery to be reasonable, but again pointed out that only partial relief would be obtained. I give greater weight to the opinions given by Drs. Bruffett and Capello.

The claimant next contends that she is entitled to two periods of temporary total disability, one being the period from September 3, 2003 through November 30, 2003 and then from May 26, 2006. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The claimant has proven by a preponderance of the evidence that she remains in her healing period and unable to earn wages from May 26, 2006, through a date to be determined. Both Dr. Capello and Dr. Bruffett have recommended the claimant pursue a functional restoration program and until that has been completed, the claimant remains in her healing period. Dr. Capello opined on October 28, 2005, that the claimant had not reached maximum medical improvement because he believed her condition could be improved further with the conditioning program. On September 18, 2006, Dr. Bruffett conducted his IME of the claimant and concurred with Dr. Capella that an aggressive trunk stabilization program was appropriate. With the aggressive program, Dr. Bruffett thinks her chances of gainful employment are more likely.

Respondents contend the claimant was paid all the temporary total disability benefits to which she is entitled. The claimant contends that temporary total disability benefits were stopped on September 3, 2003 and were not reinstated until December 1, 2003. I find the claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages during the period September 3, 2003 through November 30, 2003. Respondents are responsible for temporary total disability benefits during this period as well unless it can demonstrate payments were

made.

ORDER

The claimant has failed to prove by a preponderance of the evidence that a fusion surgery is reasonable and necessary relative to her compensable back injury. The claimant has proven by a preponderance of the evidence that additional medical in the form of an aggressive stabilization program, as recommended by both Dr. Capello and Dr. Bruffett, is reasonable and necessary. Respondents are liable for the medical benefits associated with the back stabilization program. Respondents are instructed to make the necessary arrangements for the trunk stabilization program within 45 days of the date of this order, if no appeal is taken. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from September 3, 2003 through November 30, 2003 and from May 26, 2006, to a date to be determined.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**