

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506173/F510256

SANDRA BYRUM

CLAIMANT

KMJ MANAGEMENT dba
CLARKSVILLE CONVALESCENT HOME

RESPONDENT

FIRSTCOMP INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 10, 2008

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

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 27, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on August 21, 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 parties announced that stipulation #5 should be amended to reflect that the respondents have already paid the permanent partial disability benefits for a permanent physical impairment of 10 percent to the body as a whole. In fact, an additional stipulation was added to reflect that the respondents actually overpaid these benefits, in the amount of \$2,385.00. This overpayment occurred when the respondents erroneously paid 45 weeks of benefits at the total disability rate, rather than the permanent partial disability

rate. A copy of the pre-hearing order with these amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On January 25, 2005 and April 11, 2005, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$213.00 for total disability and \$160.00 for permanent partial disability.
3. On January 25, 2005 and April 11, 2005, the claimant sustained compensable injuries to her back.
4. There is no dispute over medical expenses incurred through the claimant's initial evaluation by Dr. Raben.
5. Respondents have paid permanent partial disability benefits for a permanent physical impairment of 10 percent to the body as a whole.
6. The respondents have made an overpayment of permanent partial disability for permanent physical impairment in the amount of \$2,385.00.

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 as recommended by Dr. Raben.
2. Controversion and attorney's fees on the permanent partial disability benefits for permanent physical impairment paid and being paid by the respondents.

In regard to these issues, the claimant contends:

“It is claimant’s contention that claimant sustained a compensable back injury arising out of and in the course of employment with the respondent on or about 1/25/2005. Claimant contends entitlement to workers’ compensation benefits as set forth in the issues response in the prehearing memorandum, and specifically reasonable, necessary, and related medical expenses; temporary total disability benefits; A.C.A.11-9-505 benefits; permanent partial/total disability benefits (reserved); and controverted attorney fees. All other benefits are reserved under the Act.”

In regard to these issues, the respondents contend:

“The claimant sustained a compensable injury which resulted in a HNP at L5-S1 on the left. The claimant underwent numerous diagnostic studies including a surgical procedure by Dr. Bruffett on June 8, 2005. As part of the diagnostic studies, Dr. Bruffett did a MRI on May 13, 2005. The claimant also underwent a myelogram, post myelogram CT and EMGs of the lower extremities. It should be noted that the EMG was within normal limits. Subsequent to the surgery, the claimant underwent another MRI that was performed on July 29, 2005. It showed primarily scar tissue and post operative changes. Thereafter, the claimant underwent a Functional Capacity Evaluation that showed unreliable effort and a positive Waddell’s. Dr. Bruffett noted that the test indicated that there was no limp while the claimant was outside the testing area, but would limp during the test. The claimant was then released with no restrictions.

In Dr. Bruffett’s last report of September 28, 2005, he indicated the claimant came in for a visit and had to be helped out of her chair in the waiting room and helped to the exam room by her husband. At the completion of the visit, the claimant got right up on her own and essentially stormed out of the office at a very quick pace without a limp or apparent pain or problem. It is the respondents’ position that any additional treatment,

including a MRI as recommended by Dr. Raben is not reasonable and necessary.”

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to additional medical services, as recommended by Dr. Cyril Raben. The burden rests upon the claimant to prove that these recommended medical services represent “reasonably necessary medical services”, as that term is used in the Act.

In order to constitute “reasonably necessary medical services”, the medical services must be necessitated by or connected with the compensable injury. Secondly, the medical services recommended must have a reasonable expectation of accomplishing their intended purpose or goal.

A review of the medical record shows that the only medical services recommended by Dr. Raben is an additional lumbar MRI, with and without contrast. The medical evidence shows that the claimant has had three prior lumbar MRI studies.

The last of these lumbar MRI studies was performed on July 29, 2005. This was approximately six weeks following the claimant's corrective surgery by Dr. Wayne Bruffett, on June 8, 2005. This study was interpreted as revealing the effects of a left hemilaminectomy at L5-S1 level. It also revealed a small amount of epidural scar formation and a soft tissue density in the floor of the left L5 neural foramen. The radiologist stated that such a postoperative change typically show progressive interval improvement during the first six postoperative months. He further

noted that a follow up study might be beneficial to further evaluate these changes. Apparently, this follow up study was not performed.

Instead, other testing was performed, at the direction of Dr. Bruffett. The purpose of these tests was to see if there was any objective evidence of continuing L5 nerve impingement or damage. These additional tests consisted of electroneurological testing on the claimant's lower extremity (an EMG) and a myelogram and post-myelogram enhanced CT.

The lumbar myelogram was interpreted as showing a minimal mass effect on the left ventral aspect of the thecal sac, at L5-S1, which was indicative of minimal scarring. There was nerve root impingement was shown. This study also revealed minimal broad-based disc bulging at the L3-4 level and mild diffuse broad-based disc bulging at the L4-5 level, but again no nerve root impingement. The accompanying lumbar enhanced CT study also revealed minimal mass effect on the left ventral aspect of the thecal sac at L5-S1, which extended into the left neural foramen, but did not cause any nerve root impingement. This defect was again attributed to minimal scar tissue formation. This study further showed the broad-based disc bulging at L3-4 and L4-5, but with no evidence of impingement on either the spinal canal or exiting nerve roots at these levels. The actual EMG results were not introduced, but Dr. Bruffett's clinic note of August 31, 2005 reveals that this testing showed improvement in her L5 nerve root (compared to its status prior to her surgery).

A myelogram with an accompanying enhanced CT scan is commonly recognized in the medical community as being more accurate than an MRI for diagnosing discal damage and nerve impingement. The effectiveness of the surgery by Dr. Bruffett in eliminating the claimant's prior nerve impingement is demonstrated by the improvement noted in the EMG study. On the basis of this testing, it was Dr. Bruffett's conclusion that the nerve impingement caused by the claimant's compensable injury had been alleviated and any residual nerve damage and resulting neurological complaints have become chronic.

In light of this evidence, a fourth MRI of the claimant's lumbar spine would likely show the same abnormalities and defects that were present on the July 29, 2005 MRI and the August 26, 2005 myelogram and enhanced CT scan. Thus, this test would not appear reasonably necessary to accurately diagnose the nature and extent of the claimant's compensable injury. If some new damage or defect were shown on this study, one would reasonably conclude that it was the result of some new trauma and would be unrelated to the claimant's compensable injuries in 2005.

I would further note that in his medical notes of March 9, 2007, Dr. Raben stated that his physical examination of the claimant showed her to be well appearing, well nourished, and in no distress. He further noted the claimant to be mentally oriented and exhibiting normal mood and effect. There were no abnormalities, including atrophy, cyanosis, edema, or abnormal pulses or reflexes

involving her lower extremities. Motor and sensory examinations were indicated to be normal.

The only evidence presented to substantiate the necessity of further testing, in the form of a fourth MRI study, is the claimant's continued extensive subjective complaints. However, these subjective complaints (according to the claimant) essentially have remained unchanged or have worsened over the course of the claimant's lengthy and exhaustive treatment. However, the severity of these subjective complaints is not substantiated by either the objective testing or the numerous physical examinations performed on the claimant. The validity of these subjective symptoms is further placed into question by the claimant's actions during her Functional Capacity Evaluation.

After consideration of all the evidence presented, it is simply my opinion that the greater weight of the credible evidence fails to show that the additional medical services recommended by Dr. Raben have a reasonable expectation of accomplishing any purpose or goal connected with the claimant's compensable injuries. Thus, this recommended testing would not represent "reasonably necessary medical treatment", under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, liability for the expense of this testing cannot be imposed upon the respondents herein.

II. CONTROVERSION OF PERMANENT PARTIAL DISABILITY FOR PERMANENT PHYSICAL IMPAIRMENT

The final issue to be addressed concerns the question of whether the respondents have controverted the claimant's entitlement to permanent partial disability benefits for permanent physical impairment, so as to entitle the claimant's attorney to a controverted attorney's fee on these benefits. Applicable case law has long held that the provisions of Ark. Code Ann. §11-9-715, are intended to place upon the respondent at least some of the expense incurred by the claimant in retaining the services of an attorney, when the actions of the respondent created the need for such legal services. Although the Courts have also recognized that the mere delay in paying benefits does not constitute controversion, per se, this does not mean that a delay in the payment of benefits is not a fact that can be considered in determining whether controversion has occurred.

Dr. Bruffett assessed a permanent physical impairment of 10 percent to the body as a whole, in his report of September 28, 2005. In this report he further stated that this degree of impairment was solely attributable to the effects of the claimant's compensable injury and that it was calculated in a manner that conformed to the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition. (This is the Commission's official rating guide). His report further noted that a copy was provided to the respondents' nurse case manager.

In his report of November 29, 2005, Dr. Brent Sprinkle recited the rating given by Dr. Bruffett and apparently concurred. Again, this report of Dr. Sprinkle indicated that a copy of his report was sent to the respondents' nurse case manager.

Thus, it would appear that the respondents were aware that the claimant had been assessed a 10 percent permanent physical impairment shortly after September 28, 2005. However, the record reveals that the respondents did not actually pay any amount toward this permanent physical impairment rating until May 1, 2006. Most importantly, the respondents have offered no explanation for this delay in payment. There is no evidence that the respondents were investigating the accuracy of the rating assessed by Dr. Bruffett. There is no evidence that would indicate that Dr. Bruffett's rating report and the subsequent report of Dr. Sprinkle was not brought to the attention of the respondents. There is not even any evidence that the respondents' failure to timely commence the payment of these benefits was the result of some clerical error or simple oversight. The only logical conclusion that can be reached from the respondents' failure to timely commence the payment of these benefits is that the respondents initially intended to controvert the claimant's entitlement to permanent partial disability benefits for the 10 percent permanent physical impairment rating.

On March 17, 2006, the claimant's attorney requested that this matter be set for hearing, and one of the issues set out was the claimant's entitlement to benefits for "permanency". However, the claimant's prehearing questionnaire appears to be generic, over

broad, and somewhat confusing. In this prehearing questionnaire, the claimant essentially asks for almost every conceivable type of benefit provided by the Act. Curiously, this document specifically requests that the issue of the claimant's entitlement to permanent disability benefits be "reserved". For the most part, this prehearing questionnaire is essentially worthless for ascertaining the exact benefits in dispute, at that time.

Nevertheless, after consideration of all the evidence presented, it is my opinion that the evidence shows the respondents effectively controverted the claimant's entitlement to permanent disability benefits for the 10 percent permanent physical impairment that resulted from her compensable injury. The evidence shows that the respondents did not pay these benefits in a timely manner, that the most likely reason for this failure was an initial intent to controvert these benefits, and that their failure to pay these benefits necessitated the services by legal counsel to obtain payment. The claimant's attorney would be entitled to the maximum statutory attorney's fee on the permanent partial disability benefits for the 10 percent permanent physical impairment rating. One-half of this fee to be paid by the respondents, in addition to such benefits. The remaining one-half of this fee to be paid by the claimant out of these benefits.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 25, 2005 and April 11, 2005, the relationship of employee-employer-carrier existed between the parties.

3. On the foregoing dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$213.00 for total disability and \$160.00 for permanent partial disability.

4. On January 25, 2005 and April 11, 2005, the claimant sustained compensable injuries to her lower back or lumbar spine.

5. There is no dispute over medical expenses incurred through the claimant's initial evaluation by Dr. Cyril Raben, on March 9, 2007.

6. The claimant has failed to prove by the greater weight of the credible evidence that the medical services recommended by Dr. Raben, in the form of a fourth MRI, represent reasonably necessary medical services for her compensable injury. Thus, the respondents would not be liable for the expense of this recommended procedure.

7. The respondents have paid permanent partial disability benefits for a permanent physical impairment of 10 percent to the body as whole.

8. The respondents have over paid permanent partial disability for permanent physical impairment with the amount of this overpayment being \$2,385.00. The respondents would be entitled to a credit for this overpayment against any future indemnity benefits to which the claimant may be found entitled.

9. The respondents have controverted the claimant's entitlement to permanent partial disability benefits for permanent physical impairment.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee on the permanent partial disability benefits for permanent physical impairment, which have previously been paid by the respondents.

ORDER

The respondents shall pay to the claimant's attorney one-half of the maximum statutory attorney's fee on the controverted permanent partial disability benefits previously paid for permanent physical impairment. This shall be in addition to such benefits. The claimant's attorney is hereby authorized to receive from the claimant the remaining one-half of this maximum statutory attorney's fee.

For the reasons heretofore set forth in this Opinion, the claimant's request for medical services that have been recommended by Dr. Cyril Raben (i.e. an MRI study) should be and hereby is denied.

All benefits herein 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