

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E911422

DeANN E. DURHAM, EMPLOYEE	CLAIMANT
AEGON INSURANCE USA, EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED APRIL 17, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on March 10, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gail O. Matthews, Attorney-at-Law, Little Rock, Arkansas.

Respondent #1 represented by Mr. Andy L. Caldwell, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear.

STATEMENT OF THE CASE

A hearing was conducted March 10, 2008, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on October 31, 2007, and a Prehearing Order was filed on said date. In addition, this claim has a lengthy and complicated procedural history and has been the subject of multiple hearings. Following the prehearing conference, the claim was scheduled for a hearing on the issues set out further below. The hearing was rescheduled in order to obtain the evidentiary deposition of Dr. Butchaiah Garlapati, taken at the instance of

respondents. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record of the March 10, 2008, hearing.

At the prehearing conference, it was stipulated that the claimant sustained a compensable injury arising out of and during the course of her employment with Aegon Insurance USA on February 11, 1998; that all prior decisions were final and the law of the case; that the claimant had been determined to be permanently totally disabled; and that respondents #1 had controverted additional prescription medication after the claimant was involved in an accident on or about May 16, 2006. At the hearing, the parties agreed that the accident occurred on April 4, 2006, rather than May 16, 2006. May 16, 2006, appears to be the date that the claimant returned to Dr. Garlapati for prescription medication. Again, the parties stipulated that the independent intervening accident occurred on April 4, 2006.

At the prehearing conference, the parties agreed that the following issues would be presented for determination:

- 1) Whether respondents #1 were responsible for additional medical treatment, specifically, continued prescription medication after April 4, 2006.
- 2) Claimant's entitlement to statutory penalties.

Claimant contended, in summary, that respondents #1 had refused to pay for the same medications that she had been taking for several years following the accident on April 4, 2006; that the medications were reasonably necessary, as well as related to the February 11, 1998, admitted injury; that respondents #1 were not justified in terminating medical benefits; and that the claimant was entitled to a

statutory penalty because of its late payment and failure to pay prior awarded medical treatment.

Respondents #1 contended that all appropriate benefits had been paid and that any unpaid medical was due to the claimant's independent intervening accident, specifically, the April 4, 2006, incident at which time the claimant was struck by a vehicle while walking in a Wal-Mart parking lot, sustaining injuries to her low back, right leg, and ankle injuries. At the hearing, respondents argued that it thought the issue with regard to statutory penalties had been dismissed based upon the claimant's amended prehearing filings submitted February 22, 2008, maintaining that they did not have testimony to offer in response to this issue. Conversely, claimant stated that she was not waiving the claim for a statutory penalty and attorney's fees. As will be set out further below, I do not find penalties to be appropriate at this time in the instant claim. Nevertheless, said issue was identified during the prehearing conference and will be addressed.

The claimant testified in her own behalf. The record is composed solely of the transcript of the March 10, 2008, hearing containing numerous exhibits, together with the evidentiary deposition of Dr. Butchaiah Garlapati which was introduced as "Joint Exhibit 1" and retained in the Commission file in bound form. Both parties submitted letter briefs subsequent to the hearing.

Because the claimant raised the issue of statutory penalties, it is necessary to consider the prior Opinions and Orders filed of record in this claim. Accordingly,

the transcripts of the prior hearings, as well as all prior Opinions and Orders, are incorporated by reference and made a part of the record herein.

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 claimant and to observe her 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that her need for prescription medication after April 4, 2006, was reasonably necessary, as well as related to her February 11, 1998, injury and that said medications remain the responsibility of respondents #1.
4. The claimant has failed to show that she is entitled to statutory penalties for failure to pay a previous Award.
5. Respondents #1 are responsible for a statutory attorney's fee pursuant to, and limited by, Ark. Code Ann. §11-9-715 on all outstanding and unpaid prescription medications, and respondents #1 remain responsible for a statutory attorney's fee on all future medical treatment, including, but not

limited to prescription medications for treatment of the claimant's compensable injury.

DISCUSSION

A procedural history of this claim is helpful in addressing the issues presented for determination. Again, it is undisputed that the claimant sustained a compensable injury on February 11, 1998. Respondents #1 initially exercised good faith in meeting its obligations under our workers' compensation laws by paying the claimant appropriate temporary total disability, as well as appropriate medical treatment until the later part of 1999, at which time Dr. Robert G. Valentine, Jr., at the Arkansas Pain Center, recommended a new treatment called an intradiskal electrothermal therapy (IDET) which was resisted by respondents. A hearing was conducted on January 31, 2000, to determine whether the claimant was entitled to the requested procedure. The record of the initial hearing reflected that the claimant continued to work for the respondent employer following her injury while missing less than thirty (30) days of work; however, the claimant was required to take significant pain medication in order to keep working, including narcotic morphine which prompted Dr. Valentine to recommend the IDET. An Opinion was filed February 29, 2000, by this Administrative Law Judge approving the procedure recommended by Dr. Valentine. At that point, respondents had not controverted any other workers' compensation benefits, to date. Respondents appealed this decision which was subsequently affirmed by the Full Workers' Compensation

Commission in an Opinion filed September 27, 2000.

The claim was subsequently reassigned after respondents #1 controverted additional temporary total disability. A second hearing was conducted on March 5, 2001, to determine claimant's entitlement to additional temporary total disability. An Opinion was filed by this Administrative Law Judge on April 12, 2001, awarding the additional temporary total disability requested, specifically, additional temporary total disability for the period beginning April 4, 2000, and continuing through the date of the hearing and until such time that the claimant's healing period was determined to have ended. No appeal was taken from the April 12, 2001, decision.

Thereafter, respondents apparently paid all appropriate benefits. The Commission file does reflect that additional issues were raised which required the claim to be reassigned for adjudication; however, the parties amicably resolved their differences without the necessity of further litigation until a dispute arose concerning the extent of claimant's permanent disability, as well as the respective liability for permanent disability benefits. In the interim, the Second Injury Fund, as well as the Death and Permanent Total Disability Trust Fund had been joined as party respondents. The claimant was ultimately accepted as being permanently and totally disabled and the Special Funds created by the State of Arkansas accepted liability in the claim. A third hearing was conducted on April 19, 2004, to determine the amount of claimant's permanent impairment attributable to the February 11, 1998, admitted injury, as well as to determine the extent of controversion of the

respective parties, specifically, the extent of controversion by both respondents #1 and the Second Injury Fund. The issues raised at the April 19, 2004, hearing were ultimately resolved by an Agreed Order filed on August 4, 2004. Thereafter, Special Funds continued to pay the claimant appropriate indemnity benefits, and St. Paul Travelers Insurance Company continued to pay the claimant's related medical treatment until the claimant was involved in an independent intervening accident on April 4, 2006, at which time respondents #1 controverted all additional medical treatment. Again, the primary issue presented for determination concerns respondents #1 responsibility for additional medical treatment, specifically, continued prescription medication. The only remaining issue concerned claimant's entitlement to statutory penalties.

Respondents contended that pursuant to Ark. Code Ann. §11-9-102(4)(F)(iii) the claimant's accident on April 4, 2006, eliminated its liability for any additional medical of any nature or kind. (Tr.36)

Ark. Code Ann. §11-9-102(4)(F)(iii) (Supp. 2007) provides:

Under this subdivision, (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

Respondents' reliance upon the language set out above is simply misguided and totally without merit.

Admittedly, the record reflects that the claimant was involved in an accident

which temporarily exacerbated her pre-existing condition. However, it is clear that the claimant, at all times, both before and after April 4, 2006, required prescription medication in order to maintain her overall physical condition resulting from the February 11, 1998, injury. The April 4, 2006, incident did not cause or prolong the claimant's disability or need for treatment. The claimant was already permanently totally disabled at the time of the incident. Further, the record reflects that the work-related injury required her to continue to need prescription medication. The Commission is not required to abandon common sense. The claimant was permanently and totally disabled before April 4, 2006. As a logical extension to respondents #1 argument, respondent #2 could have terminated its liability for permanent total disability based upon the independent intervening accident. Respondents #1 were not justified in unilaterally terminating all medical treatment.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200,

649 S.W.2d 845 (1983).

The claimant's credible testimony, as well as the testimony of Dr. Garlapati, supports the claim for continued medical treatment. The claimant's testimony is set out, in part, below:

Q Ms. Durham, other than this aggravation to your whole body, which I assume was a significant shock in April of '06, is that right?

A Yes, sir.

Q Your emergency room visit for that trauma, was that paid by workers' comp or by health insurance?

A United Healthcare.

Q And your initial office visits for that incident paid by health insurance?

A Yes, sir.

Q At the time of the incident you were taking all of these medications?

A Yes, sir.

Q Has the frequency of taking the medications changed any as we sit here today as opposed to what you were taking in March of '06?

A No, sir, except he's taken me off the Celebrex and kept the Skelaxin.

Q When was it that Dr. Garlapati's office protocol changed to require you to come in on a monthly visit?

A 2006, the year.

Q What month?

A I don't have the exact date.

Q Was it before this incident?

A No, it was after.

Q It was after the incident?

A Yes, sir. That's why we decided to do where I would come in and charge workers' comp one month and United Healthcare one month, so they wouldn't have to –

Q Before that, before he changed his protocol, how often were you going to his office?

A Every two to three months. It was according to how he decided.

Q Every two to three months?

A Yes, and that all went to workers' comp.

Q Now you are going monthly?

A Yes, sir.

Q And other than an office – I assume this is an office visit to regulate your medications primarily?

A Yes, because the regulations being so strict on the pain doctors, they –

Q But you're not taking or you're not receiving active medical treatment other than through medications?

A No, sir, workers' comp won't pay for anything else.

Q And you've not received any of that type treatment for a number of years?

A No, sir.

Q Are you taking any new medications that you weren't taking before April 6 of '06?

A The hydrocodone and the Skelaxin, which now Dr. Butch took the Celebrex which I've took all these years off.

Q So –

A But the hydrocodone we're not counting for workers' comp, we're doing that on United Healthcare for my neck. So, actually, no, nothing has changed that I've taken all these years, except he's taken me off of Celebrex and I'm now taking Skelaxin, but everything else –

Q As a substitute for the Celebrex?

A Yes, yes. I was having real bad stomach problems with the Celebrex.

MR. MATTHEWS: We deliberately did not mark the hydrocodone, Your Honor. Originally, when we first sent it in, we marked it, and that's the reason – one of the main reasons I filed the amended and took the hydrocodone out after we deposed Dr. Garlapati.

JUDGE GREENBAUM: Obviously, I haven't read his deposition, but I assume he's addressed all these issues in his deposition, is that correct?

MR. MATTHEWS: Yes, sir.

MR. CALDWELL: I'll agree. (Tr.30-33)

Dr. Garlapati, the claimant's primary treating physician, confirmed the claimant's need for medications pre-dated the nonwork-related incident and continued thereafter. (Jt. Ex. 1, pp.47-48)

Respondents cannot unilaterally terminate medical treatment based upon a flawed interpretation of the subsection of the Act without supporting medical evidence reflecting that the claimant's need for medical was altered by an intervening accident. It has failed to offer any such credible evidence.

The only remaining issue concerns respondents responsibility for a statutory penalty. Based upon my review of the prior Opinions of record in this claim, prescription medication was never raised as a specific issue. In fact, with the exception of the IDET procedure which was the subject of the initial hearing,

respondents #1 apparently exercised good faith in meeting its obligations by providing the claimant with reasonably necessary medical treatment until the April 4, 2006, nonwork-related incident. Accordingly, I cannot find that respondents have specifically failed to pay benefits previously awarded. Accordingly, the claim for a statutory penalty for non-payment of an Award must be denied.

AWARD

Respondent, St. Paul Travelers Insurance Company, is hereby directed and ordered to pay continued reasonably necessary medical treatment provided by Dr. Butchaiah Garlapati, including, but not limited to all outstanding prescription medications, and respondents remain responsible for continued reasonably necessary medical treatment, specifically, continued prescription medications to treat the claimant's compensable injury.

Additionally, claimant's attorney, Mr. Gail O. Matthews, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to, and limited by Ark. Code Ann. §11-9-715.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge