

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402414

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| CARLA F. TABIEROS, EMPLOYEE | CLAIMANT |
| NORTHWEST AIRLINES, INC., EMPLOYER | RESPONDENT |
| LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER | RESPONDENT |

OPINION FILED MAY 12, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE SILAS H. BREWER, JR., Attorney at Law, Pittsboro, North Carolina.

The respondent was represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 27, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on January 15, 2008. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at that time. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or during the hearing on March 27, 2008, and are hereby accepted:

1. The compensation rates are \$453/\$340.

2. A controverted attorney's fee is owed on any temporary total disability awarded herein. (T. 10)
3. The claimant's long-term disability payments fit within one of the categories of insurance payments for which a credit/offset is provided under Arkansas Code Annotated § 11-9-411. (T. 14)

The following stipulation was submitted by the parties in the Prehearing Order, appears to contain a typographical error on the date, and is not accepted:

1. There was a March 30, 2004, specific incident injury.

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

1. Entitlement to additional medical benefits provided by Dr. Jordan beginning on October 26, 2004, and continuing through September 7, 2007.
2. Entitlement to TTD benefits from August 3, 2004, until September 6, 2007.
3. Entitlement to a 45% permanent impairment rating to the upper extremity for reflex sympathetic dystrophy issued by Dr. Jordan on September 7, 2007.

4. The respondents' entitlement to an offset for long-term disability benefits pursued by the claimant.

The record consists of the March 27, 2008, hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant, Carla Tabieros, sustained an admittedly compensable injury to her left elbow on January 30, 2004, when she struck her elbow on an airplane while unloading the airplane at work. Through a course of treatment and referrals, Dr. Edward Weber performed ulnar nerve neurolysis surgery on March 29, 2004.

After additional treatment, Ms. Tabieros came under the care of Dr. Richard Jordan through a Change of Physician Order. In his first examination on October 26, 2004, Dr. Jordan assessed Ms. Tabieros with a diffuse pain syndrome (reflex sympathetic dystrophy) for which Dr. Jordan proposed implantation of an epidural stimulator. During the course of follow-up treatment after implanting a stimulator, Dr. Jordan determined that the stimulator stopped working properly and performed a surgical procedure to repair the stimulator on April 11, 2006. At the time of the March 27,

2008, hearing Ms. Tabieros continued to receive stimulation from the April 11, 2006, implant.

Ms. Tabieros was last capable of performing her job for Northwest Airlines on August 3, 2004. She has received benefits at the rate of \$2550 per month from a long-term disability policy which began six months after she was last able to work. Her medical treatment has been paid through Medicare and her ex-husband's TriCare military insurance.

At the hearing held on March 27, 2008, the parties agreed that the benefits currently at issue include (1) Dr. Jordan's course of medical treatment in the record from October 26, 2004, through September 7, 2007; (2) the duration of the claimant's temporary total disability beginning on August 3, 2004; and (3) the claimant's appropriate impairment rating. During a post-hearing telephone conference conducted April 30, 2008, the attorneys agreed that the permanent impairment issue presented at the hearing is limited to permanent impairment associated with the claimant's diagnosed complex pain syndrome/reflex sympathetic dystrophy.

1. Reasonable Necessity Of Dr. Jordan's Course Of Treatment From October 26, 2004 Through September 7, 2007

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a) (3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Medical treatment intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the present case, the preponderance of the evidence establishes that Dr. Jordan's course of treatment, including both procedures for epidural stimulator implant, has been reasonably necessary for treatment of the claimant's compensable reflex sympathetic dystrophy in her left upper extremity.

In this regard, I am persuaded by Dr. Jordan's explanation that complex regional pain syndrome, otherwise known as reflex sympathetic dystrophy, progresses in phases. The first phase manifests in subjective complaints. The second phase is characterized by differences in sweat patterns, swelling, coloration and temperature. The third or late phase causes finger tapering and tight skin. The treatment goal is to stop the progression. Dr. Jordan explained that Ms. Tabieros' condition included swelling in the arm and fingers and early trophic changes in the fingers.

Dr. Jordan explained that prior to the use of stimulators for treatment, physicians tried interscalene blocks, sympathetic blocks, and stellate ganglion blocks with temporary relief. Physicians also performed stellate ganglionectomies and ganglionotomies which did not work well and did not last long. Dr. Jordan explained that the

stimulator is the best treatment presently for Ms. Tabieros' condition. Dr. Jordan explained that he chose the stimulator for treatment because the stimulator is the one and only treatment shown to stop the progression of the syndrome. Dr. Jordan explained that he surgically replaced the stimulator's electrode on April 11, 2006, because the electrode connections had developed a short and were not functioning properly.

The only physician to render an expert medical opinion addressing Dr. Jordan's course of treatment was Dr. James Adametz, who evaluated Ms. Tabieros on December 12, 2005. Dr. Adametz concluded that the claimant's course of treatment for reflex sympathetic dystrophy had been appropriate and his report anticipated future treatment with the stimulator. Therefore, the information provided by both Dr. Jordan and Dr. Adametz supports a conclusion that Dr. Jordan's course of treatment has been reasonably necessary for Ms. Tabieros' compensable reflex sympathetic dystrophy.

2. The Claimant's Period Of Temporary Total Disability Beginning August 3, 2004

At the start of the March 28, 2008, hearing, the parties agreed to reserve for future resolution the issue of whether the claimant's reflex sympathetic dystrophy is a scheduled injury or an unscheduled injury. Temporary total

disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

For a scheduled injury, a claimant is entitled to temporary total disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002).

In the present case, Ms. Tabieros last worked on August 3, 2004. Mr. Brewer contended at the hearing that Ms. Tabieros' healing period ended on September 6, 2007, when Dr. Jordan authored an impairment rating. Mr. Ryburn contended that it took the parties a long time to obtain a rating from Dr. Jordan and that Ms. Tabieros' healing period ended no later than Dr. Adametz's independent medical evaluation on December 12, 2005.

Dr. Jordan explained during his February 27, 2007, deposition that fewer than five percent of patients developing reflex sympathetic dystrophy get better and that the cases that spontaneously resolve do so early. In the vast majority of cases, the condition does not go away. The condition progresses, and the stimulator is used to slow the progression as best as possible.

Dr. Jordan opined in his deposition on February 27, 2007, that since Ms. Tabieros' condition had existed for three years without evidence of going away, she had a permanent condition in her left arm. Dr. Jordan indicated that he had at that time performed all of the invasive procedures for treating the condition until the stimulator's battery dies. However, Dr. Jordan testified that he did not know when Ms. Tabieros got as good as she was going to get. Dr. Jordan testified that he might need to see Ms. Tabieros again to make that determination.

In a prior August 16, 2006, report, Dr. Jordan indicated that Ms. Tabieros remained within her healing period. I accord that conclusion great weight to the extent that the report establishes that Ms. Tabieros remained within her healing period until August 16, 2006. However, I do not see in the documentary record before me any report

indicating that Dr. Jordan ever examined Ms. Tabieros between August 16, 2006, and the hearing conducted on March 27, 2008. Based on Ms. Tabieros' testimony regarding her inability to drive except in emergency situations; Ms. Tabieros' undisputed testimony that she has not worked since August 3, 2004; my observation of the claimant's demeanor at the hearing; and Dr. Jordan's August 16, 2006, report indicating that the claimant remained at that time within her healing period and unable to return to her prior work, I find that Ms. Tabieros has established by a preponderance of the evidence that she remained within her healing period and totally disabled from returning to work for the period from August 3, 2004, through August 16, 2006.

However, Ms. Tabieros has failed to establish by a preponderance of the evidence that she remained within her healing period for any time after August 16, 2006. To the extent that Mr. Brewer contends that the claimant's healing period did not end until Dr. Jordan authored an impairment rating on September 7, 2007, I note that Dr. Jordan in that letter conceded that he had been delayed in responding to Mr. Brewer's request for an impairment rating. Nothing in that letter persuades me that the delay was because Ms. Tabieros remained within her healing period, and as

discussed, I cannot determine on this record that Dr. Jordan even saw Ms. Tabieros for any type of treatment after August 16, 2006.

3. Impairment Rating For Reflex Sympathetic Dystrophy

The Arkansas Court of Appeals thoroughly discussed the requirements necessary to establish an entitlement to benefits for a permanent anatomical impairment in Excelsior Hotel v. Squires, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

First, benefits for permanent impairment must be based on an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). The Commission may review the Guides even if the Guides are not in the record, and the Commission may determine its own impairment rating under the Guides, rather than simply assessing the validity of impairment ratings assigned by doctors. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

Second, benefits for permanent anatomical impairment shall be awarded only if the claimant's compensable injury is the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The provisions of Ark. Code Ann § 11-9-102(4)(F)(ii)(b) do not apply in determining a claim for permanent anatomical impairment. Michael v. Keep

& Teach, Inc., 87 Ark. App. 48, 185 S.W.3d 158 (2004).

Major cause means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

Third, a determination of the existence and extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i). When determining the permanent physical impairment, neither a doctor nor the Commission may consider complaints of pain. For purposes of assigning impairment ratings to the *spine*, straight-leg-raising tests and range-of-motion tests do not qualify as objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii).

On at least four occasions the Full Commission has concluded that we are without the means under the Fourth Edition of the Guides to assign an impairment rating for reflex sympathetic dystrophy based on objective findings. See generally, Wal-Mart Sotres Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 882 (2000); Donna Key v. Owens Corning Corporation, Full Workers' Compensation Commission, Opinion filed October 14, 2005 (F108142); Terry Potocki v. St.

Edward Mercy Medical Center, Full Workers' Compensation Commission, Opinion filed February 3, 2004 (F004149); Racquel Henderson v. Riverside Furniture, Full Workers' Compensation Commission, Opinion filed June 3, 2003 (F104235). In Henderson, the Full Commission reasoned as follows:

On the record before us, we are once again constrained to conclude, as the Full Commission concluded under the circumstances in Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000), that we have no evidence in the record before us with which to assign the claimant an impairment for her RSD under the AMA Guides (4th edition) based on objective physical findings, as the term objective findings has been defined in Ark. Code Ann. § 11-9-102(16). In reaching this decision, we note, as did the Administrative Law Judge, that Dr. Gary Moffitt has calculated a 16% impairment to the claimant's lower extremity under the AMA Guides (4th edition) for her reflex sympathetic dystrophy based on procedures identified on page 3/56 of the AMA Guides and based on Table 11(a) on page 3/48 of the AMA Guides. The text on page 3/56 and the text on page 3/48 accompanying Table 11(a) indicate that the calculation methods relied on by Dr. Moffitt determined an impairment rating which is not based on objective medical findings, but that is instead based on patient pain or sensory deficit. Moreover, the various ratings assigned are graded based on the subjective degree to which the pain or sensory deficit are perceived to interfere with the patient's activities of daily living. Therefore, the grading criteria can come within the voluntary control of the patient. Because Dr. Moffitt's method for determining the existence and extent, if any, of the claimant's physical impairment caused by RSD under Table 11(a) is not based on or supported by objective physical findings, we are constrained to conclude, as the

Commission previously concluded in Wal-Mart Stores, Inc. v. Connell, supra, that we are without a means on this record to determine the existence and extent of the claimant's physical impairment, if any, from RSD consistent with the requirements of Ark. Code Ann. § 11-9-704(c)(1)(B). Therefore, we find that the Administrative Law Judge's award for a 6% permanent impairment rating to the body as a whole must be reversed.

In the present case, Dr. Jordan on September 7, 2007, calculated the claimant's impairment rating citing tables and page numbers which clearly do not correspond with the Fourth Edition of the Guides. Dr. Jordan apparently applied the Fifth Edition of the Guides, and did so based on sensory impairment and motor impairment. The Full Commission has previously indicated that determinations of sensory impairment and motor impairment are subjective factors which come under the voluntary control of the patient. Donna Key v. Owens Corning Corporation, Full Workers' Compensation Commission, Opinion filed October 14, 2005 (F108142). I see nothing in Dr. Jordan's September 7, 2007, report which would indicate that Dr. Jordan's determinations of sensory impairment and motor impairment were based on objective criteria. I therefore find that the claimant has failed to prove by a preponderance of the credible evidence that she is entitled to benefits for a permanent anatomical impairment for her diagnosed reflex sympathetic dystrophy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant sustained an admittedly compensable injury to her left elbow on January 30, 2004.
2. The appropriate compensation rates are \$453/340.
3. A controverted attorney's fee is owed on the temporary total disability awarded herein.
4. The claimant's long-term disability fits within one of the categories of insurance payments for which a credit/offset is provided under Arkansas Code Annotated § 11-9-411. The respondents are therefore entitled to an appropriate dollar-for-dollar offset under Ark. Code Ann. § 11-9-411(a) for long-term disability benefits already received by the claimant for the period of temporary total disability compensation awarded herein.
5. The claimant proved by a preponderance of the evidence that Dr. Jordan's course of medical treatment from October 26, 2004, through September 7, 2007, has been reasonably necessary for treatment of her compensable reflex sympathetic dystrophy/complex pain syndrome.
6. The claimant proved by a preponderance of the evidence that she is entitled to temporary total

disability benefits from August 3, 2004, through August 16, 2006, but failed to prove by a preponderance of the evidence that she remained within her healing period after August 16, 2006.

7. The claimant has failed to prove by a preponderance of the credible evidence that she is entitled benefits for a permanent anatomical impairment for her diagnosed reflex sympathetic dystrophy.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact and conclusions of law set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the temporary disability benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code

Ann. § 11-9-715, in accordance with Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002); and in accordance with Goodwin v. Phillips Petroleum Co., 72 Ark. App. 302, 37 S.W.3d 644 (2001).

Payment of the 25% attorney's fee is subject to an amicable resolution among Mr. Brewer, Ms. Tabieros, and Mr. Philip Wilson of Mr. Wilson's attorney's lien previously filed in this matter.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge