

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F012053

KERRI D. HILLARD, EMPLOYEE	CLAIMANT
POCAHONTAS NURSING & REHAB., EMPLOYER	RESPONDENT
WAUSAU, CARRIER	RESPONDENT

OPINION FILED AUGUST 4, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE M. JOSEPH GRIDER, Attorney at Law, Pocahontas, Arkansas.

Respondent represented by HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed August 11, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. There was a compensable back injury on June 19, 2000.
2. The claimant's average weekly wage is \$213 and the temporary total disability rate is \$142.
3. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment of surgery is

reasonable and necessary and pursuant to the claimant's compensable June 19, 2000, injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority finding that claimant failed to prove by a preponderance of the evidence that the back surgery recommended by Dr. McCarthy would be reasonably necessary in connection with the compensable injury. The opinion of the Administrative Law Judge should be reversed.

Injured workers have the burden of proving by a preponderance of the evidence that medical services or treatment is reasonably necessary in connection with the compensable injury. Ark. Code Ann. § 11-9-508(a) (Supp. 2003). Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). In my opinion, claimant has met her burden of proof.

Claimant was a CNA for the employer, which is a nursing home facility. Claimant began working for the employer in August 1999, when she was 19 years old.

Claimant had experienced two prior lower back injuries while working for this employer. As is quite typical for this type of employment, each of her injuries occurred while trying to maneuver or position a patient.

The first of these injuries occurred in September 1999 while assisting a patient from a wheelchair. A back strain was diagnosed and she was placed on light-duty work for approximately one week. The second injury occurred in November 1999 while assisting a patient into a shower chair. Claimant testified that her back pain was not as bad as a result of this incident as it was after the September injury. Claimant was again placed on light duty and returned to work without restrictions following a period of physical therapy.

The present injury occurred on June 19, 2000, when a patient fell on claimant. Claimant felt a pull in her lower back and down her left lower extremity. Claimant described "extremely bad pain." This pain was greater than any she experienced after the other two injuries and has lasted much longer. Further, she has persistent symptoms in her left lower extremity. She has been examined by several doctors and has tried almost every conceivable conservative treatment plan without any appreciable improvement in her condition. Dr. McCarthy has recommended a lumbar fusion and I would certainly agree that most conservative types of management of her lower back difficulties should be tried prior to this extensive, invasive surgery. A thorough and

impartial review of the medical records supports a finding that all conservative efforts have failed and that claimant should be considered a candidate for surgery.

Again, claimant was injured in June 2000. She came under the care of Dr. Guntharp at the direction of respondent. Muscle spasms were documented. Claimant was placed on light-duty work and prescribed various medications. When this treatment plan was unsuccessful, Dr. Guntharp referred claimant to Dr. Braden for a second opinion in July 2000.

Dr. Braden prescribed medications, a round of physical therapy, and scheduled an MRI scan. The scan's most important finding was a broad-based left posterolateral herniated disc at L5-S1. Dr. Braden noted that claimant had showed some improvement with physical therapy, but if she did not continue such improvement, a consideration would be given for epidural steroid injections. On 9/12/2000, Dr. Braden noted a recurrence of claimant's symptoms, and that these symptoms corresponded with an L5 radiculopathy. Accordingly, Dr. Braden thought epidural steroid injections was indicated.

On September 18, 2000, claimant returned to Dr. Guntharp, who noted continued recurrences as a result of

performing her work duties and stated that unless claimant wanted to undergo surgery, she should try the epidural steroid injections.

Dr. Braden made the referral for such injections to Dr. Soeter. Claimant received two lumbar epidural steroid injections without relief, and Dr. Soeter ordered another MRI scan. Dr. Braden saw claimant on October 24, 2000, prior to the MRI scan, and reported that claimant needed a surgical referral.

The MRI scan was done on November 6, 2000, and still revealed a herniated nucleus pulposus on the left at L5-S1. Dr. Braden again recommended a surgical referral and respondent sent claimant to Dr. Russell, a neurosurgeon.

Dr. Russell saw claimant on January 16, 2001. Dr. Russell noted that the MRI scan revealed a bulge/herniated disc at L5-S1 that appeared to abut the left S1 nerve root. Dr. Russell added that such a finding was not a clear cut disc rupture or mandate for surgery at that time. Dr. Russell was reluctant to perform surgery on claimant because of her young age. Dr. Russell then made a referral to Dr. Valentine for consideration of an IDET procedure.

Dr. Valentine examined claimant on February 19, 2001. Dr. Valentine noted that previous treatments included electrical stimulation, exercise, physical therapy, massage, traction, epidural steroid injections, and various medications, such as opiates, anti-inflammatories, and antidepressants. Dr. Valentine scheduled a discogram with a post-discogram CT scan. These tests were performed on April 5, 2001. Dr. Valentine reported an abnormal discogram at L5-S1 ("painful disruption of the L5-S1 disc") and that the CT scan suggested a mild protrusion to the left of the L5-S1 disc.

Claimant apparently had another MRI scan in August 2001. Dr. Russell interpreted the results as showing a left paracentral disc protrusion at L5-S1, which "approximates the left S1 nerve root."

Ron Gangouff, Claims Manager with Wausau, referred claimant to Dr. Baskin, who saw claimant on September 25, 2001. Dr. Baskin noted muscle spasms and symptoms consistent with radiculopathy. Dr. Baskin stated that surgery would entail a discectomy and fusion, but it would be a "large surgery in somebody of this size." (Claimant is 6 feet 1 inch tall and weighs approximately 230 pounds.) Dr. Baskin recommended continuing conservative treatment consisting of

a therapy program with dynamic stabilization, various modalities, a TENS unit, a back brace, and a change in medications. Dr. Baskin kept claimant on light-duty status at work.

On November 9, 2001, claimant presented to Dr. Janson, a physician in the same clinic as Dr. Guntharp, complaining of an exacerbation since falling two days ago. Dr. Janson continued claimant's light-duty status, prescribed Darvocet, Flexeril, and a Medrol Dosepak, and instructed claimant to return to the clinic in three days to see Dr. Guntharp.

On November 20, 2001, claimant was again seen by Dr. Baskin. Dr. Baskin documented that claimant had made no progress with conservative treatment and that he wanted to refer claimant to Dr. Reddy "for further evaluation of IDET procedure versus possible discectomy." Dr. Baskin also noted that Dr. Russell believed claimant was too young for surgery.

Claimant saw Dr. Reddy on December 11, 2001. Dr. Reddy wanted to try epidural steroid injections again and if she failed to respond, then he believed claimant would be a surgical candidate. Dr. Reddy noted that an MRI scan showed left-sided disc herniation at L5-S1 compromising

the exiting nerve root and that the discogram was also positive at L5-S1. The epidural steroid injections, which were performed in January 2002, provided only transient relief. Dr. Reddy then referred claimant to a surgeon, Dr. McCarthy, primarily because Dr. McCarthy specializes in performing surgery on young patients. Claimant saw Dr. McCarthy on February 27, 2002. He apparently ordered another MRI scan, which was performed on March 16, 2002. Dr. McCarthy interpreted it as showing a left paramedian disc extrusion at L5-S1. Dr. McCarthy has recommended that claimant undergo a lumbar fusion, especially since conservative treatment had been tried for almost two years without success.

Respondent relies on the opinion of Dr. Russell that claimant did not need surgery. However, Dr. Russell reported in June 2002 that he had not seen claimant since August 2001. There is no evidence that claimant returned to Dr. Russell for any additional evaluations.

Respondent also relies on the opinion of Dr. Simpson from Pine Bluff. Dr. Simpson did see claimant a second time on May 14, 2001 and acknowledged that the IDET procedure was again being considered. Dr. Simpson stated that if this procedure was done and claimant did not

improve, she would be a candidate for open operative intervention. Dr. Simpson continued to believe claimant needed conservative treatment.

In fact, respondent had specifically authorized Dr. McCarthy to perform the recommended surgery in the spring of 2002. However, during a pre-operative visit discussing the surgery with Dr. McCarthy, Mr. Gangouff faxed a statement retracting the carrier's authorization for the treatment, seemingly because he believed claimant was still smoking cigarettes. Dr. McCarthy was quite aggravated at Gangouff's arbitrary, unilateral, and unjustifiable position as can be seen by his note dated April 22, 2002. Further, claimant testified that she had quit smoking cigarettes for at least a week prior to this pre-operative visit. Claimant even submitted to a urine test, which came back negative. However, at that time, Gangouff was entrenched in his position and would not accept any reasonable proposals that included surgery.

Respondent even presented the testimony of Patricia Murphy, administrator for the employer, to somehow prove that claimant was still smoking cigarettes during the week before Gangouff retracted authorization for the surgery. However, Murphy could only testify that she saw

claimant smoking cigarettes some time in April 2002 but could not state the date or time she saw this. Thus, her testimony is worthless on this issue.

In my opinion, the greater weight of the evidence indicates that the proposed treatment/surgery recommended by Dr. McCarthy is reasonably necessary in connection with the compensable injury. Claimant is seeing numerous physicians and has tried almost every conceivable conservative treatment measure. She has had consistent symptoms which have failed to resolve to any measurable degree. Several of the doctors to examine claimant acknowledged that surgery would be indicated once conservative treatment had been exhausted. In my opinion, conservative treatment has been exhausted, thereby leaving surgery as the only remaining viable option. Accordingly, I find that claimant has met her burden of proof and the opinion of the ALJ should be reversed.

SHELBY W. TURNER, Commissioner