

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009966

VICKIE S. WARWICK, EMPLOYEE	CLAIMANT
MICHAEL A. FRAIS, M.D., EMPLOYER	RESPONDENT NO. 1
STATE FARM FIRE & CASUALTY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 30, 2009

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

Claimant represented by the HONORABLE C. BURT NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID SIMMONS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed July 20, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. There was a March 27, 2000, compensable foot injury.
2. The compensation rates are \$330/240.

3. The respondents have accepted a 19% impairment rating to the foot.
4. The claimant has proven by a preponderance of the evidence that the additional medical treatment, to include the surgery as recommended by Dr. Nguyen, is reasonable and necessary and related to her compensable injury.
5. Temporary total disability benefits are not awarded; however, if the claimant pursues the surgery, she will be entitled to temporary total disability if she remains in her healing period and has not returned to work.
6. No indemnity benefits have been awarded here. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 20, 2009, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and

adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant sustained an admittedly compensable injury on March 27, 2000, when an examination table was put on her left foot. The respondents accepted the injury and paid medical as well as indemnity benefits. The claimant has had multiple surgeries on her foot. At this time, she is requesting an additional surgery and temporary total disability benefits.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably

necessary for the treatment of a compensable injury, we must 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. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The medical evidence demonstrates that the claimant has had at least eight previous surgeries on her left foot. The evidence reveals that she had a traumatic neuroma removed; a corrective surgery due to the first not healing properly; a reconstructive surgery for a hallux varus deformity; pins placed in her second toe and later removed due to infection; a neuroma revision resection of the third and fourth toes; a PIP resection with arthroplasty and pinning of the fourth toe; hardware placed in the big toe and later removed; a second metatarsal osteotomy, a metatarsal osteotomy on the second, third and fourth toes; an MTP fusion of the big toe; and a surgery involving neuromas of the fourth and fifth toes and a clawtoe of the fourth toe. The proposed surgery would be a second attempt at the same surgery to her second toe.

In my opinion, a review of the evidence fails to demonstrate that the proposed surgery is reasonable and necessary. The claimant has eight previous surgeries to her left foot including the procedure she is currently requesting. Dr. Larry Nguyen performed that surgery but the hardware had to be removed due to infection. The claimant has a history of infection and on several occasions has had to have hardware removed. This surgery is the same type of surgery that did not previously work yet the claimant insisted that it be performed. Dr. Nguyen advised that amputation of the second toe was a better option with no risk for recurrence. The claimant preferred the revision surgery even with the higher risk associated with it and no guarantee of relieving the pain. In fact, the claimant tried to explain that this surgery would remove a joint in her toe. No where in the medical records is it noted. It is only noted that the proposed surgery is the same surgery the claimant has previously undergone and it failed.

The evidence shows that the claimant has a history of insisting on surgery. The claimant was previously treated by Dr. Jason Stewart. Dr. Stewart's deposition was offered into evidence. His deposition was taken on January 21, 2004, and at that time the

claimant was insisting on surgery as her only treatment. The following testimony from Dr. Stewart's deposition is enlightening:

Q. Okay. And we've already talked about the recommendation to Dr. Richardson and that was because she wanted another opinion; is that right?

A. Yes. I don't think she liked my opinion. She wanted me to perform surgery when I didn't feel comfortable that that would improve her situation. And you know, I don't want to just do a surgery to be doing it. If I don't feel good about it - if your surgeon doesn't feel good about doing the surgery, then I don't think you're going to have a good chance of success.

So she may not be happy with me now, but I sure didn't want to make her even more unhappy by doing an unnecessary surgery - one that I thought would cause more harm than good.

It is clear from this testimony that the claimant insisted that Dr. Stewart perform surgery and he was not comfortable recommending surgery. The claimant changed physicians soon after.

Dr. Nguyen expressed concern with the fact that the claimant had undergone so many surgeries. He explained the risks:

Q. Tell me, besides that, besides the possibility of scar tissue, what are the other risks involved in too many surgeries on a toe?

A. Too many surgeries on the feet will develop scar tissue that can pinch the nerves and cause pain. The scar tissue can also contract and develop further deformities. Also with several surgeries on the feet, there is disruption of the arterial flow or capillaries that potentially could develop a loss of circulation, loss of the toes, infection and stiffness.

Q. I imagine you've probably gone over these risks with Ms. Warwick?

A. Each time, yes.

The claimant has had at least eight surgeries to her left foot so arguably scar tissue must be present. Further, the claimant is a smoker who has been told repeatedly to stop smoking so that she can heal better. In fact, Dr. Nguyen indicated that the claimant's smoking has contributed to her inability to heal.

Moreover, Dr. Nguyen stated that surgery was necessary only if the claimant's pain was severe and debilitating. The evidence demonstrates that the pain is not. The claimant's testimony is that she is able to do all her normal activities other than play sports. When questioned about whether the surgery was reasonable and necessary, Dr. Nguyen stated:

Q. Can you state that the surgery is reasonable and necessary?

A. If the pain is severe and debilitating, yes.

Q. Only under those circumstances?

A. Yes.

Therefore, when I consider the fact that there is no evidence of record demonstrating that the claimant's pain is severe and debilitating, the claimant's history of insisting on surgery, the fact that Dr. Nguyen thought the better option was amputation, the fact the claimant has a history of failed surgeries, the fact this is the exact same surgery the claimant had previously which failed, the fact that the claimant is a smoker and has not quit smoking in contravention of her doctor's recommendation, and the fact that scar tissue is present which makes success less likely, I cannot find that the claimant has proven by a preponderance of the evidence that the proposed surgical procedure is reasonable and necessary medical treatment. Therefore, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner