

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H007624

THERESA MASON, Employee	CLAIMANT
HOBBY LOBBY STORES, INC., Employer	RESPONDENT
INDEMNITY INS. CO. OF NO. AMERICA, Carrier/TPA	RESPONDENT

OPINION FILED DECEMBER 3, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CHRISTOPHER MOBERG, Attorney, Springfield, Missouri.

STATEMENT OF THE CASE

On November 8, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 1, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on June 26, 2020 when she suffered a compensable injury to her back.
3. The claimant was earning an average weekly wage of \$584.96 which would entitle her to compensation at the weekly rates of \$390.00 for total disability benefits and

\$293.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to surgery as recommended by Dr. Foxx.
2. Payment of unpaid physical therapy treatment.
3. Temporary total disability benefits.
4. Attorney's fee.

Subsequent to the pre-hearing conference the respondent agreed to accept liability for physical therapy expenses; therefore, payment of those expenses is no longer in issue.

The claimant contends that she is entitled to surgery recommended by her authorized physician, Dr. Foxx. The claimant contends that she is entitled to temporary total disability benefits while recovering from the recommended surgery. The claimant contends that her attorney is entitled to an appropriate attorney's fee regarding temporary total disability benefits and any permanent disability associated with an impairment rating arising out of the surgery.

The respondents contend that claimant is seeking additional treatment, and temporary total disability benefits, based upon the opinions and report of Dr. Foxx dated May 5, 2021. Respondents contend that Dr. Foxx does recommend surgery intervention in that report. However, respondents further contend that there are significant disparities and inaccuracies contained within that report. Dr. Foxx finds that "she has never had any back pain or leg pain prior to the incident in June of last year." Dr. Foxx further contends that "the work injury is in fact the cause of her pain and significant weakness of the left foot. I do think that the disc herniations at L4-5 and L5-S1 are directly related to the

mechanism of the work-related injury and are acute in nature.” However, respondents further contend that claimant has suffered from low back pain, previously qualified as both chronic and severe, as well as left lower extremity radicular and neuropathic complaints, since at least 2013. Medical records from Good Samaritan Clinic produced below document chronic low back pain, radicular complaints into the left lower extremity, a diagnosis of peripheral neuropathy in the left lower extremity, and recommendations for an MRI of the lumbar spine, EMG, and x-rays of the lumbar spine and left knee, as far back as July 2013.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on September 1, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Foxx.
3. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits up to the date of the hearing.

FACTUAL BACKGROUND

Claimant is a 65-year-old woman who began working for respondent in its sewing department in October 2014. Claimant's job duties included ordering stock, unloading boxes, placing product on the shelf, waiting on customers, and cleaning.

Claimant suffered an admittedly compensable injury to her back on June 26, 2020 when she was putting a basket of fabric over her head and felt pain in her back which radiated down her left leg. Claimant reported this incident and was sent for treatment at MedExpress where she was evaluated by Dr. Grimm. Dr. Grimm diagnosed claimant's condition as sciatica of the left side and prescribed medication.

On August 19, 2020, claimant was evaluated by Dr. Cheyne who took x-rays which were interpreted as showing severe degenerative disc disease at L5-S1, moderate changes at L3-4, and mild changes at other levels. Dr. Cheyne diagnosed claimant's condition as left-sided sciatica with underlying degenerative disc disease. He prescribed claimant medications and ordered an MRI scan.

Claimant underwent an MRI scan and returned to Dr. Cheyne on September 3, 2020. Dr. Cheyne stated in his report of that date:

She had her MRI scan done, which, according to the radiologist, indicated a small left foraminal disc protrusion at L4-5 causing left foraminal stenosis, which I would agree with. I think this is likely the source of her symptoms.

Dr. Cheyne went on to recommend treatment in the form of physical therapy, medication, and epidural steroid injections. Claimant underwent epidural steroid injections on October 8, 2020 and November 12, 2020. In his report of December 3,

2020, Dr. Cheyne noted that claimant's two epidural steroid injections had provided some definite improvement, but noted that claimant was still symptomatic. He recommended additional injections and also recommended that claimant continue with her physical therapy.

In his note of March 26, 2021, Dr. Cheyne noted that claimant had only undergone one additional injection since December 3, 2020 because other injections had not been approved by the respondent. He noted that claimant was not improving significantly with the injections and continued to have numbness as well as mild foot drop on the left. Dr. Cheyne recommended that claimant be evaluated by a neurosurgeon, undergo a second MRI scan, and ordered another steroid injection.

Claimant underwent a second MRI scan on April 5, 2021, with the following impression:

Mild to moderate degenerative changes of the lumbar spine as described above. Epidural soft tissue in the left lateral recess above the L4-5 disc level is no longer visualized with resolved mass effect likely representing improved disc extrusion.

Thereafter, claimant returned to Dr. Cheyne on April 8, 2021, and he noted the new MRI scan indicated that the disc extrusion had likely improved since her prior scan. He also noted that he continued to believe that claimant had definite neuroforaminal narrowing. He again indicated that claimant should undergo an epidural steroid injection and be evaluated by a neurosurgeon in May.

Claimant underwent a neurosurgical evaluation by Dr. Foxx on May 5, 2021. Dr. Foxx indicated that she had reviewed claimant's MRI scan and stated:

It demonstrates moderate-to-severe spondylotic changes with facet arthropathy at L3-4, L4-5, and L5-S1. There is also evidence of a likely acute broad-based disk herniation at L4-5 with far lateral component on the left causing severe lateral recess and foraminal narrowing bilaterally left more than right. Similarly, at L5-S1, there is a likely acute disk herniation causing severe lateral recess and foraminal narrowing, left more than right.

Compression of the L4, L5, and S1 nerve roots very well explained the acute onset of the left leg weakness, especially the foot drop.

Dr. Foxx went on to recommend a lumbar laminectomy procedure. Dr. Cheyne in his report of May 27, 2021, agreed with Dr. Foxx's recommendation. Respondent has denied surgery recommended by Dr. Foxx. Claimant has continued to undergo epidural steroid injections with the most recent injection occurring on August 12, 2021.

Claimant has filed this claim contending that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Foxx.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Company v. Randall*, 12 Ark. App. 358, 676 S.W. 2d 750 (1984).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met her burden of proving by a

preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Foxx.

As previously noted, Dr. Foxx recommended in her report of May 5, 2021 that claimant undergo a lumbar laminectomy for a disc herniation at the L4-5 and L5-S1 levels. In response to Dr. Foxx's recommendation, respondent had claimant's medical records reviewed by Dr. J. Michael Calhoun. In a letter report dated August 22, 2021, Dr. Calhoun stated that the claimant's L4-5 disc herniation along with her left leg weakness and foot drop was directly related to her injury of June 26, 2020. However, it was Dr. Calhoun's opinion that surgery would not be of benefit to the claimant stated:

When a "foot drop" is noted with a L5 radiculopathy and an L4-5 disc herniation, that requires urgent surgical intervention. Even then, the acute L5 radiculopathy does not always recover. The patient's pain, numbness, and weakness will be permanent. The disc herniation resolved on the April 5, 2020 MRI, but the patient's symptoms and numbness and weakness did not. Surgery for the previously documented degenerative changes at L3-4, L5-S1, and not the residual at L4-5 will be of not benefit. Unfortunately, the patient will continue to have the same problems because surgical intervention was not performed in a timely fashion.

Significantly, Dr. Calhoun noted in his report that Dr. Cheyne had reported the claimant suffered from a "complete left foot drop."

Dr. Foxx addressed Dr. Calhoun's opinion in a note dated September 27, 2021:

Worker's comp neurosurgeon notes that the herniated disc has improved and therefore per his logic the pain should improve as well. I respectfully disagree with his assessment. At the L4-5 level there still appears to be a far lateral compression

of the L4 nerve root as well as some degree L5 nerve. Although the degree of stenosis improved it is by no means mild, in fact I would call still severe.

Finally, I'd like to address his comment that the pain has been going on for too long to improve. My personal and professional experience with lumbar radiculopathy is that the pain often improves even years after the symptoms onset with surgical treatment. There are multiple studies showing that the pain can go on for years and it will improve after lumbar laminectomy.

In addition, Dr. Cheyne also addressed the opinion of Dr. Calhoun in a letter dated October 25, 2021 stating:

With regard to question #3, the opinion of Dr. Foxx, I am not a spine surgeon, and the necessity of surgery is ultimately to be determined by the surgeons themselves. Dr. Foxx did a very thorough history and physical exam on this patient and I have no reason to specifically disagree with her in any regard, although the ultimate decision to perform surgery is ultimately up to her. With regard to Dr. Calhoun's opinion in question #4, I would not argue with his opinion either again because I am not a spine surgeon; however, in reading through his report, he stated that I reported "a complete left footdrop." I did not use the term complete, but was simply indicating that there was a degree of weakness in dorsiflexion on the left as compared to the right. In fact, later in the course of Ms. Mason's treatment. I stated on 03/26/2021 that she had "a mild footdrop on the left" and reading through Dr. Foxx's note of May 5, 2021, it is noted that the degree of weakness in dorsiflexion was mild at that time as well. It is noted in Dr. Calhoun's report that he thought urgent surgical intervention was required from the beginning and then ultimately the numbness and weakness and pain would be permanent and that no further treatment would be of benefit to this patient. It is interesting that he gives

these opinions having never spoken to the patient or seen the patient or physically evaluated the patient himself. I will leave the surgery recommendation up to the surgeon himself, but I would tend to lean toward a surgeon who has actually examined the patient and has done an onsite evaluation not only of the patient but of the medical images themselves.

I find that the opinion of Dr. Foxx is entitled to greater weight than the opinion of Dr. Calhoun. Dr. Foxx did physically examine the claimant whereas Dr. Calhoun only reviewed medical records. In addition, I note that Dr. Calhoun seems to base a large part of his opinion upon a belief that Dr. Cheyne had observed a complete left foot drop whereas according to Dr. Cheyne he specifically stated that the foot drop was mild.

Based upon the opinions of Drs. Foxx and Cheyne which I find to be credible and entitled to great weight, I find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Foxx.

In reaching this decision, I note that there is some evidence that claimant sought medical treatment for low back pain in 2013 and that an MRI scan and EMG were recommended at that time. However, claimant testified that she never underwent an MRI scan or EMG. Nor is there any indication that claimant continued to have complaints of low back pain. Medical records from Good Samaritan Clinic where claimant sought medical treatment for her prior low back complaints from 2014, 2015, 2016, and 2017 do not mention any continued complaints of low back pain. Furthermore, the parties have stipulated that claimant suffered a compensable injury to her low back on June 26, 2020. Therefore, respondent is liable for all reasonable and necessary medical treatment

attributable to that compensable injury. Here, even Dr. Calhoun has acknowledged that claimant's disc herniation, left leg weakness, and foot drop are directly related to the injury which occurred on June 26, 2020.

The final issue for consideration involves temporary total disability benefits. At the hearing claimant acknowledged that there were no unpaid temporary total disability benefits; instead, claimant is simply requesting temporary total disability benefits with respect to the surgery recommended by Dr. Foxx. Obviously, a claimant who suffers a non-scheduled compensable injury is entitled to temporary total disability benefits so long as they remain within their healing period and suffer a total incapacity to earn wages. While claimant may become totally incapacitated at some point in the future, as of the time of the hearing she was not totally incapacitated from earning wages and it would be speculative to award temporary total disability benefits at this time. Any ruling on future temporary total disability benefits would be speculative and not based upon the evidence of record. Therefore, no temporary total disability benefits are being awarded.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Foxx. Claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as of the date of the hearing.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been

awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

Respondent is responsible for paying the court reporter's charges for preparation of the hearing transcript in the amount of \$515.65.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE