

asserts that since the Commission found the second surgery reasonable and necessary, but concluded the Claimant was not totally and permanently disabled, the issue of TTD/TPD benefits is now ripe. Claimant asks for benefits from March 2001 through July 19, 2004.

Defendants acknowledge it would be reasonable for Claimant to receive time loss benefits since the Commission found the second surgery reasonable. Defendants assert no evidence exists to support Claimant's contention as to the period for which she should receive TTD/TPD benefits but would pay seven months worth of benefits.

Claimant had the opportunity to argue TTD/TPD benefits in the alternative when asserting that she was totally and permanently disabled. Claimant did not pursue TTD/TPD benefits in the original briefing when she should have done so. Although the Commission has determined the issue of TTD/TPD benefits is waived, the Defendants have generously indicated a willingness to provide seven months of TTD benefits to Claimant. Defendants' willingness to pay a portion of TTDs is noted, but the Commission will not order such an award due to the untimely presentation of the issue and speculation on the length of the period of recovery from the second surgery.

2. Apportionment

Claimant contends the Commission was in error when it found Claimant's disability to be partially attributable to a pre-existing condition. Claimant argues she was able to function without limitation or restriction prior to the accident of February 14, 2000 and that the Commission made such a finding blaming the accident for aggravating the underlying condition and making it symptomatic. Claimant relies on the argument that she could perform all the functions of her job, prior to the accident, to demonstrate that she was asymptomatic until after February 14, 2000.

Defendants cite to the record and medical evidence asserting Claimant was symptomatic prior to February 14, 2000. Defendants argue it is unreasonable to find Claimant's cervical disk disease asymptomatic when she had sought medical treatment for pain and numbness, was diagnosed with cervical arthritis, and was suffering from osteophytes that interfered with her ability to swallow, all prior to the February accident.

The record clearly contains medical accounts confirming Claimant's cervical condition was symptomatic prior to the February 2000 accident. Claimant's ability to perform her job, without limitation, prior to the accident does not mean that Claimant's condition was asymptomatic before the accident, but means that the accident did indeed play a role in aggravating her condition. See: Conclusion of Law No. 53. Claimant does not raise any new arguments or bring any new facts to light regarding apportionment. Claimant rehashes facts and arguments that were previously considered in the Commission decision of April 11, 2005.

CONCLUSIONS

The arguments by Claimant were thoroughly reviewed and addressed in the Commission decision of April 11, 2005. The record fully supports the factual findings and legal conclusions made by the Commission.

Based upon the foregoing reasons, Claimant's Motion for Reconsideration should be, and is hereby, DENIED.

DATED this 6th day of July 2005.

INDUSTRIAL COMMISSION

/s/
Thomas E. Limbaugh, Chairman

_____/s/_____
James F. Kile, Commissioner

_____/s/_____
R. D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July 2005, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

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