

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207885

EDWARD GASTON, EMPLOYEE	CLAIMANT
WATSON CHAPEL SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED OCTOBER 17, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH HOGAN on July 23, 2003, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE ZAN DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and attorney's fees.

At issue is whether or not the claimant received treatment from an authorized medical provider pursuant to Ark. Code Ann. §11-9-508 and §11-9-514.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on February 4, 2002, at which time the claimant sustained a compensable back injury at a compensation rate of \$387.00/\$290.00. The claimant first sought treatment with Dr. Armstrong on February 11, 2002. Dr. Armstrong referred the claimant to Dr. Adametz. The school district is affiliated with First Source as their managed care organization (MCO).

The claimant contends that although he reported an injury, his employer did not offer medical care until after the claimant saw his family physician, Dr. Armstrong. He was then directed to the company physicians at Health Care Plus before being referred to neurosurgeon, Dr. P. B. Simpson. Although surgery was recommended in a report dated March 4, 2002, Dr. Simpson refused to treat

the claimant because of his preexisting cardiac condition. The claimant returned to Dr. Armstrong on June 20, 2002 and was referred to Dr. Adametz. Surgery was performed on July 22, 2002.

The respondents contend the claimant initially refused to go to the company physician, preferring instead to be treated by his friend, Dr. Armstrong. Treatment by Drs. Armstrong and Adametz in June and July, 2002, is unauthorized.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant; his supervisor, Lee Bruce; the supervisor's assistant, Mary Ann Parrish; the superintendent's assistant, Debbie Stone and the insurance adjuster, Brenda Sellers. Testimony was allowed regarding Darrell Donaldson based on the claimant's statement that Mr. Donaldson was his immediate supervisor. As other witnesses testified, however, it became evident that Mr. Donaldson as shop foreman, only supervised repairs. Mr. Bruce was the claimant's supervisor for purposes of reporting injuries requesting medical treatment or leave time.

The claimant, age 51 (D.O.B. July 30, 1951), has a high school education and two years of automotive training. He works as a mechanic for the respondent-employer. The claimant's health history includes surgery for a heart condition which he says adversely affected his memory. The claimant missed time from work for his heart condition between March and July of 2002, and received short term disability benefits.

The claimant injured his back on Monday, February 4, 2002 lifting a barrel of trash. He mentioned the incident to his foreman, Mr. Donaldson. He then called his family physician and friend, Dr. Armstrong, to make an appointment. According to the medical records, the claimant first saw Dr. Armstrong on February 11, 2002.

The claimant completed an AR-N form, advising him of his change of physician rights on Monday, February 11, 2002. The claimant was sent to Dr. Simpson on March 4, 2002, but treatment was delayed pending resolution of the claimant's heart condition. The cardiologist, Dr. Alshami

cleared the claimant for back surgery in a report dated May 14, 2002. Dr. Simpson released the claimant on May 17, 2002 to return to work at light duty. On the advice of a friend, the claimant sought treatment with Dr. Schlesinger on June 17, 2002 but the carrier declined to authorize him as a treating physician.

Dr. Armstrong referred the claimant to Dr. Adametz who began treating the claimant on June 21, 2002. Surgery was performed for an herniated nucleus pulposus (HNP) at L5-S1 on July 22, 2002. The claimant is now seeking payment of this treatment from Drs. Armstrong and Adametz.

Mary Ann Parrish, assistant to the transportation director, Lee Bruce, stated she had observed the claimant holding his back and he had complained his back was hurting "all week". The claimant told her he had an appointment with Dr. Armstrong, his family physician. In the claimant's presence, Ms. Parrish called Debbie Stone, office manager with the superintendent's office on Monday, February 11, 2002, and relayed the message to the claimant that he would need to fill out some paperwork and use Health Care Plus as the authorized medical provider if he wanted the workers' compensation carrier to pay for the treatment. The transportation and maintenance director, Lee Bruce, delivered the accident report forms from Ms. Stone to Ms. Parrish. Ms. Parrish then conveyed the forms and information to the claimant.

Lee Bruce, transportation and maintenance director and thirty three year employee with the district, stated he learned about the claimant's injury on February 11, 2002 when Debbie Stone asked him to take the accident report forms to Ms. Parrish. Mr. Bruce testified he was the claimant's immediate supervisor and Mr. Donaldson was the shop foreman. Mr. Donaldson has no responsibilities concerning the reporting of injuries or the authorization of medical treatment and he has no obligation to report accidents to Mr. Bruce. Mr. Bruce stated that postings around the office notified employees how to report an injury.

Debbie Stone, is the secretary and office manager to the superintendent, Mr. Knight. She is in charge of filing claims with the carrier. Mary Ann Parrish called her on February 11, 2002 and told her the claimant had hurt his back. Ms. Stone advised that Health Care Plus was the company

physician and that the claimant would have to complete some paperwork that she would send over with Mr. Bruce. Ms. Parrish told her that the claimant was in so much pain he wanted to see Dr. Armstrong.

Brenda Sellers, an adjuster since 1981, testified that the claim was initially reported as a “medical only”. She understood that back surgery was cancelled because the claimant’s cardiac surgery took precedence. On June 5, Dr. Schlesinger’s office called for authorization to treat the claimant which she declined. Ms. Sellers called the claimant and told him that he could petition the Commission for a change of physician if he disagreed with her position. She never received a change of physician order from the Commission. On August 12 she learned from the school district that the claimant had undergone back surgery, however, Dr. Adametz’s office never called her for authorization.

MEDICAL EVIDENCE

The claimant saw his physician, Dr. Simmie Armstrong, a general practitioner, on February 11, 2002 with complaints of back pain of unknown origin. The claimant also complained of chest pain.

Patient in the office as a work-in. Having trouble with his low back for about 2 weeks now. He does not remember anything that he did or lifting, twisting or turning type injury. He works at the PB School District in the Bus Dept. at this time. Does not remember anything in this area.

Dr. Armstrong prescribed medication and ordered an MRI scan which revealed a herniated disc. In a report dated February 20, 2002, Dr. Armstrong referred the claimant to cardiologist, Dr. Alshami and neurosurgeon, Dr. P. B. Simpson.

On February 25, 2002 the claimant was examined by general practitioner, Dr. Levy at Healthcare Plus.

This patient is a 50-year old male who presents as an initial Workman’s Comp injury from Watson Chapel School District who requests a release for ortho referral as previously recommended by his PCT (primary care physician) when he developed back pain after lifting a 55 gallon drum on February 4, 2002 as he was dumping trash

in a dumpster... Patient states he had an MRI via Dr. Armstrong who allegedly told the patient that this was a herniated disc and that he should have a referral to Dr. Simpson for further eval after release from occupational medicine clinic.

Dr. Levy diagnosed a lumbar strain with radiculopathy, discharged the claimant to return to work at light duty, and released him to the care of Dr. Simpson.

Dr. Simpson's March 4, 2002 information sheet shows the following history of injury:

States on 2-4-02 he was at work emptying 55 gal. trash barrels & felt pop & sting in LB & also went ↓ (down) both legs to the knees. Has reported it is not a definite W/C but may change over.

Dr. Simpson's report indicates that if Dr. Alshami clears the claimant for surgery, Dr. Simpson plans to perform a lumbar laminectomy for a large HNP at L5-S1. He was then released for light duty.

Dr. Alshami examined the claimant and performed surgery for his heart condition. The claimant was cleared for back surgery on May 14, 2002 and returned to Dr. Simpson.

In his report of May 17, 2002, Dr. Simpson indicated the claimant's radicular pain had improved and commented, "I'm not going (to) subject this gentleman to surgical intervention. He said he could return to work, and I'm going to let him try to do so... I will release Mr. Gaston from my care and see him back on an as needed basis." The claimant was given light duty (25 lb. weight limitations) work restrictions.

Dr. Alshami's office took the claimant off work for two more weeks from June 20 to July 8, 2002 due to lower extremity edema. He was then released to light duty (10 lb. weight limitation, frequent periods of sitting).

The claimant saw Dr. Adametz on June 21, 2002 on referral from Dr. Armstrong. Surgery was performed for a large disc herniation at L5-S1 on the right with a free fragment under the right S1 nerve root. In a report dated August 21, 2002, Dr. Adametz recorded improvement with back pain but the claimant still felt some pain and stinging.

He says that he does not really feel like he is able to return to work yet as a diesel mechanic. The other problem is that he says his heart is

bad enough that his heart doctors told him not to lift over about 10 or 15 lbs. and so he was planning on retiring anyway from that and trying to get on disability. I told him I thought that just from the back itself that there would be some limitations on him, although I would not say that he was completely disabled from it...

Dr. Adametz released the claimant in a report dated September 18, 2002 with graduated lifting restrictions (up to 50 lbs.).

DOCUMENTARY EVIDENCE

The claimant completed an AR-N form on February 11, 2002 showing a date of injury of February 4, 2002 at 10:00 a.m. after lifting a 55 gallon drum of trash out of the back of a pickup truck.

A memo from Office Manager Debbie Stone to Risk Management Resources dated February 25, 2002 indicates the claimant had previously declined medical treatment and the school district was sending him to Health Care Plus on February 25, 2002. The adjuster with Risk Management sent a letter on March 27, 2002 authorizing treatment with Dr. Simpson.

The claimant wrote the Commission on June 17, 2002 requesting a change of physician from Dr. Simpson to Dr. Schlesinger. The adjuster filed an objection on June 19, 2002. It doesn't appear that the file was assigned to anyone at the Commission (either the Legal Advisor Division, Medical Cost Containment or an Administrative Law Judge) for follow-up. Eventually, the case was assigned to this examiner's office after claimant's counsel requested a hearing.

FINDINGS & CONCLUSIONS

The evidence of record shows that the respondents accepted this claim as compensable and paid for treatment with Dr. Simpson. Dr. Simpson confirmed that the claimant was suffering from a herniated disc that required surgery. The claimant also suffers from a heart condition and Dr. Simpson postponed treatment until the claimant could consult a cardiologist. However, even after the cardiologist cleared the claimant for back surgery, Dr. Simpson was no longer willing to offer the claimant surgical intervention and returned him to work. The claimant then requested a change of physician which the carrier refused. At this point the claim for additional medical treatment was

controverted. The claimant returned to his general practitioner, Dr. Armstrong who referred him to Dr. Adametz who performed the operation.

The change of physician rules do not apply during a controverted period. Kenny v. Siloam Springs School District, Full Commission opinion August 31, 2001 (E907076), Barnett v. Daniel, Full Commission opinion May 25, 2001 (E600078) and Clements v. Shoney's, Full Commission February 12, 1998 (E604632).

Accordingly, I find the treatment provided by Drs. Armstrong and Adametz occurred during a controverted period. The claimant was free to consult a doctor of his choosing. The treatment provided was reasonable and necessary to alleviate pain from a compensable injury, (large herniated disc and free fragment at the nerve root) and respondents remain liable for medical care necessary to treat the injury pursuant to Ark. Code Ann. §11-9-508.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on February 4, 2002 at which time the claimant sustained a compensable back injury at a compensation rate of \$387.00/\$290.00. Some medical expenses (Dr. P. B. Simpson) have been paid.
2. The claimant requested a change of physician when Dr. Simpson reversed his decision to operate on the claimant's herniated disc. The respondents objected to a change of physician and additional medical treatment, thereby controverting the claim on June 19, 2002. The change of physician rules do not apply during controversion.
3. Treatment provided by Drs. Armstrong and Adametz during the controverted period was reasonable and necessary for the compensable back injury and remain the liability of the respondents pursuant to Ark. Code Ann. §11-9-508.
4. This claim for additional medical expenses has been controverted. and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge