

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112391

WILLIAM GRAHAM

CLAIMANT

JENKINS ENGINEERING, INC.

RESPONDENT

FEDERAL INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 24, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,  
Sebastian County, Arkansas.

Claimant represented by M. KEITH WREN, Attorney, Little Rock, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 29, 2003, in Fort Smith, Arkansas. The deposition of Dr. Wilbur Giles was taken on February 24, 2003 and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on October 9, 2002. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On March 1, 1998, the relationship of employee-employer-carrier existed between the parties.
2. On March 1, 1998, the appropriate weekly compensation rates were \$240.00 for total disability and \$180.00 for permanent partial disability.
3. On March 1, 1998, the claimant sustained a compensable injury to his neck or cervical spine.
4. There is no dispute over benefits accruing through October 8, 2001.

By agreement of the parties, the issues to be resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services, particularly those by and at the direction of Dr. Wilbur Giles on and after October 9, 2001
2. Whether Dr. Giles' services are "unauthorized" medical services, within the meaning of Ark. Code Ann. §11-9-514.
3. The claimant's entitlement to temporary total disability benefits from December 7, 2001 through December 17, 2001 and permanent disability benefits for permanent physical impairment.
4. Controversion and appropriate attorney's fees.

In regard to these issues, the claimant contends that he sustained a compensable injury arising out of the course and scope of his employment which resulted in a central and left side disc herniation at C6-7. The claim was initially accepted as compensable, but was controverted in its entirety on October 31, 2001.

In regard to these issues, the respondents contend the claimant's current request for medical treatment is not associated with reasonable and necessary treatment for the claimant's compensable injury. Further, respondents assert that claimant suffered an independent intervening cause which aggravated his prior injury such to worsen claimant's condition which required additional medical treatment. Further, respondents contend that the treatment sought by the claimant is not by an authorized treating physician in the change of physicians for his original workers' compensation claim.

## DISCUSSION

### I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to the payment of expenses incurred for additional medical services rendered him for his neck or cervical complaints by and at the direction of Dr. Wilbur Giles, on and after October 9, 2001. This

includes the surgery ultimately performed on the claimant's cervical spine by Dr. Giles. In order to be entitled to the payment of these expenses, the medical services rendered by Dr. Giles must constitute "reasonably necessary medical services" for the claimant's admittedly compensable injury. The burden rests upon the claimant to prove this fact. In order to meet this burden, the claimant must establish by the greater weight of the credible evidence that the medical services were connected with or necessitated by his admittedly compensable injury of March 1, 1998, and that these medical services had a reasonable expectation of accomplishing the purpose or goal for which they were intended.

It is obviously the expert medical opinion of Dr. Giles that the medical services he provided the claimant for his neck or cervical difficulties, on or after October 9, 2001, were connected with or necessitated by the admittedly compensable injury of March 1, 1998. This opinion is expressed in a letter to claimant's counsel, dated January 10, 2003 (Claimant's Exhibit No. 1, page 43), and in his deposition ( Pages 8-11). Dr. Giles is a very competent neurosurgeon and has extensive expertise in the area of medicine associated with the treatment of neck or cervical injuries. The facts upon which he bases his opinion are amply supported by the greater weight of the evidence presented. I find his opinion to be persuasive and controlling on the issue of the existence of a connection between the medical services he provided the claimant and the compensable injury of March 1, 1998.

The respondents contend that the claimant's neck or cervical difficulties, which required the services of Dr. Giles, were the result of some "independent intervening cause", sufficient to relieve them of liability for the expenses of these additional medical services. However, this contention is simply not supported by the other evidence presented.

Instead, the greater weight of the credible evidence supports Dr. Giles' conclusion that the C6-7 intervertebral disc herniation with the free fragment, which required the additional service in 2001, were merely the result of the natural progression or deterioration of the initial physical damage to this disc that was caused by the compensable injury on

March 1, 1998. While the claimant's normal activities of day to day life may have played some contributory role in this progression or deterioration, there is no evidence of any particular new causal event or activity that would be attributable to the claimant's negligence or misconduct.

As noted by all of the claimant's treating physicians, the compensable injury of March 1, 1998, produced a protrusion or herniation of the C6-7 disc. The existence of this physical damage is clearly demonstrated on a CT scan and MRI study performed in March of 1998. While the conservative treatment provided the claimant for this initial injury (by Dr. Westbrook, Dr. Queeney and Dr. Ulmschneider), may have at least temporarily resulted in improvement of the symptoms caused by this physical damage, it is well recognized that such conservative treatment does not resolve or heal the actual physical damage to the annulus of the affected disc. This physical damage and the weakness it creates in the annulus is permanent. The continuing presence of this weakness is demonstrated by the fact that the claimant periodically experienced episodes of symptoms closely similar to, if not identical with, the symptoms he initially experienced immediately following the compensable injury. It must also be noted that the subsequent total tear of the annulus of the C6-7 intervertebral disc with the extrusion of a free fragment of the interior disc material (observed by Dr. Giles during surgery and demonstrated on the 2001 MRI study), involved the exact same area of the C6-7 intervertebral disc, which was noted to be protruding or herniated on the CT scan and MRI study performed shortly after the compensable injury. All of these facts support the conclusion of Dr. Giles.

In summary, it is my opinion that the claimant has proven by the greater weight of the credible evidence that his neck or cervical difficulties, which necessitated the treatment or services rendered by Dr. Giles on and after October 9, 2001, was causally related to his initial compensable injury of March 1, 1998. Thus, the medical services provided by Dr. Giles were related to and necessitated by this compensable injury. The evidence presented

fails to show that the claimant's difficulties with his neck or cervical spine, on and after October 9, 2001, had any independent intervening cause which was due to the claimant's negligence or misconduct.

The next question is whether the medical services provided the claimant by Dr. Giles, on and after October 9, 2001, had a reasonable expectation of accomplishing the purpose or goal for which they were intended. Clearly, these services were of a type and nature accepted by the general medical community as being appropriate for the evaluation and treatment of the cervical difficulties being experienced by the claimant on and after October 9, 2001. The evidence further shows that not only did these medical services have a reasonable expectation of success at the time they were provided, but were in fact actually successful in accomplishing their intended goals.

In summary, I find that the greater weight of the credible evidence proves that the medical services rendered to the claimant for his neck or cervical difficulties by and at the direction of Dr. Wilbur Giles on and after October 9, 2001, constitutes "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. Under the provisions of this subsection, liability for the expense of these services falls upon the respondents herein.

However, it still remains necessary to address the respondents' argument that the services provided by Dr. Giles represent "unauthorized medical services" within the meaning of Ark. Code Ann. §11-9-514. Thus, they argue that under the provisions of subdivision (b) of this subsection, they are not liable for the expenses of these services.

It appears that on October 9, 2001, the respondents had authorized the claimant to receive treatment for his compensable cervical injury by and at the direction of Dr. Michael Westbrook. Shortly after the compensable injury, the respondents also authorized the claimant to receive treatment from Dr. Joseph Queeney, a neurosurgeon.

It appears from the claimant's testimony that he consulted Dr. Giles, on his own, without obtaining the prior consent of the respondents or this Commission. The initial evaluation by Dr. Giles indicates that the claimant was referred to him by Dr. John J. Westwood, Jr. (there is no evidence concerning this physician's involvement in this case).

However, the evidence presented fails to show that the respondents ever provided the claimant with the appropriate notice advising him of his rights and obligations concerning a change of physicians, as required by Ark. Code Ann. §11-9-514(c). The providing of this notice is a prerequisite for the application of this subsection. Thus, by its very terms the provisions of Ark. Code Ann. §11-9-514 would not apply to the present claim.

I would further note that the evidence also shows that as of October 31, 2001, the claimant no longer had any "authorized" treating physician. On that date, the respondents expressly denied the claimant's entitlement to any further medical treatment at their expense. In fact, the respondents expressly controverted the claim in its entirety.

For the foregoing reasons, I find that the provisions of Ark. Code Ann. §11-9-514 are inapplicable to the present claim and do not act to bar the claimant's entitlement to the payment of the expenses incurred for the reasonably necessary medical services provided the claimant for his compensable injury by and the direction of Dr. Wilbur Giles, on and after October 9, 2001. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

## II. TEMPORARY TOTAL DISABILITY BENEFITS

The next issue concerns the claimant's entitlement to temporary total disability benefits from December 7, 2001 through December 17, 2001. Again, the burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, he must show that he continued within his healing period from the effects of his

compensable injury and was rendered totally disabled from performing gainful employment as a result of the injury.

The duration of the healing period is a medical question, which must be resolved upon the basis of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the underlying physical damage attributable to the compensable injury.

In the present case, the medical evidence clearly shows that the claimant continued within his healing period from the effects of his compensable injury during the period of December 7, 2001 through December 17, 2001. On December 7, 2001, the claimant underwent an anterior cervical discectomy and fusion at C6-7. As previously held, this procedure represented reasonably necessary medical services for the claimant's compensable injury. This is an extensive procedure, involving not only the surgical removal of the interior disc material, but also bone grafting to actually fuse the C6 vertebra to the C7 vertebra. The claimant's anticipated recuperation from this procedure would clearly extend beyond 10 days. The medical records of Dr. Giles indicates that the claimant's healing or recovery from this procedure continued for at least several months following the date of the surgery. Thus, the claimant has satisfied the first requirement for his entitlement to the temporary total disability benefits he now seeks.

The claimant testified that he only missed 10 days of work following the surgery. Although the claimant was self employed, at the time, this is still an exceptionally brief period of disability (in fact, the shortest I have seen in my 25 years in this position). I find the claimant's testimony in regard to this period of disability to be credible and consistent with the other evidence presented. Thus, it is sufficient to prove the second requirement for his entitlement to the temporal total disability he now seeks.

It is my opinion that the claimant has proven by the greater weight of the credible evidence that he was rendered temporarily totally disabled, as a result of the effects of his

compensable injury of March 1, 1998, for the period of December 7, 2001 through December 17, 2001. He is entitled to appropriate weekly compensation benefits for this period of temporary total disability.

### III. PERMANENT DISABILITY BENEFITS FOR PERMANENT PHYSICAL IMPAIRMENT

The final issue concerns the claimant's entitlement to permanent disability benefits attributable solely to permanent physical impairment, as provided by Ark. Code Ann. §11-9-522(a). The burden rests upon the claimant to prove both the existence and extent of permanent physical impairment.

Any medical evidence addressing the existence or extent of permanent physical impairment must be stated within a reasonable degree of medical certainty. The existence and extent of any permanent physical impairment must be calculated in a manner that conforms to the American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition). The existence and extent of permanent physical impairment must be supported by "objective and measurable physical findings". No consideration can be given to complaints of pain, the results of straight leg raising tests, or the results of range of motion tests. Finally, the compensable injury must be the "major cause" of the permanent physical impairment assessed (i.e. more than 50% of the cause).

In the present case, Dr. Giles has opined that the claimant experienced a permanent physical impairment of 10% to the body as a whole, as the result of the compensable injury and required surgery. The American Medical Association's Guides to the Evaluation of Permanent Impairment (Fourth Edition) provides for a 10% permanent physical impairment for a single level cervical fusion with decompression and "with residual signs or symptoms". This treatise provides for an 8% permanent physical impairment for a single level cervical fusion with decompression "without residual signs or symptoms". The records of Dr. Giles and even the claimant's testimony would indicate that the claimant falls into the category of a single level cervical fusion with decompression, but "without residual

signs or symptoms”. Thus, under the Guides, an 8% permanent physical impairment would be an appropriate rating,

This 8% permanent physical impairment is based solely upon the nature of the injury itself, and the fact that it required corrective surgery, without any consideration being given to pain, straight leg raising tests, or range of motion tests. This degree of permanent physical impairment is based solely upon the permanent damage or structural change to the claimant’s cervical spine by the compensable injury and resulting surgery. This damage is demonstrable on purely “objective” radiographic studies:. The evidence presented further shows that the claimant’s compensable injury was the “major cause” of the discal injury and resulting surgery. Thus, it would be the “major cause” of the 8% permanent impairment.

In summary, it is my opinion that the claimant has proven by the greater weight of the credible evidence that he has sustained a permanent physical impairment of 8% to the body as a whole as a result of his compensable cervical injury. He would be entitled to appropriate compensation fo this permanent physical impairment, as provided by Ark. Code Ann. §11-9-522(a).

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On March 1, 1998, the relationship of employee-employer-carrier existed between the parties.,
3. On March 1, 1998, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$240.00 for total disability and \$180.00 for permanent partial disability.
4. On March 1, 1998, the claimant sustained a compensable injury to the C6-7 intervertebral disc.

5. There is no dispute over the payment of benefits accruing through October 8, 2001 and all appropriate benefits have been paid.
6. The medical services provided the claimant by and at the direction Dr. Wilbur Giles, on and after October 9, 2001, constitute reasonably necessary medical services for his compensable cervical injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.
7. The respondents have failed to prove that the claimant was given appropriate notice of his rights and obligations regarding a change of physicians, as required by Ark. Code Ann. §11-9-514(c). Therefore, Ark. Code Ann. §11-9-514 is inapplicable to the present claim, and any medical services provided the claimant by and at the direction of Dr. Giles would not constitute "unauthorized medical services" within the meaning of this section.
8. The claimant was rendered temporarily totally disabled as a result of the effects of this compensable injury for the period of December 7, 2001 through December 17, 2001. Specifically the claimant has proven by the greater weight of the credible evidence that during this period he continued within his healing period from the effects of his compensable injury and was rendered temporarily disabled as a result of this injury.
9. The claimant has experienced a permanent physical impairment of 8% to the body as a whole as result of his compensable cervical injury. His compensable cervical injury of March 1, 1998, is the "major cause" of this degree of permanent physical impairment. This degree of permanent physical impairment is based upon and supported by objective and measurable physical findings. In calculating this percentage of permanent physical impairment, no consideration was given to pain, the results of

straight leg raising tests, or the results of range of motion tests. This degree of permanent physical impairment was calculated in accord with the methods provided in the American Medical Association's Guides to the Evaluation fo Permanent Impairment (Fourth edition).

10. The respondents have controverted the claimant's entitlement to any medical services on and after October 9, 2001, particularly those rendered to the claimant by and at the direction of Dr. Giles, his entitlement to any temporary total disability benefits accruing on after October 31, 2001, and his entitlement to any permanent benefits for permanent physical impairment.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all controverted benefits herein awarded.

#### ORDER

The respondents shall pay to the claimant additional temporary total disability benefits for the period of December 7, 2001 through December 17, 2001, at the weekly rate of \$240.00.

The respondents shall pay to the claimant permanent partial disability benefits for a permanent physical impairment of 8% to the body as a whole, at the weekly rate of \$180.00.

The respondents shall be liable for the expenses incurred as the result of the reasonably necessary medical services provided the claimant for his compensable cervical injury by and at the direction of Dr. Wilbur Giles on and after October 9, 2001. Such liability shall be subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all controverted benefits herein awarded. One-half of this attorney's fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from benefits herein awarded

to the claimant.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge