

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F112353

JOHN PINSON, Employee

CLAIMANT

USA TRUCK, INC., Self-Insured Employer

RESPONDENT

OPINION FILED OCTOBER 31, 2003

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

Claimant represented by LAWRENCE FITTING, Attorney, Fort Smith, Arkansas.

Respondents represented by J. RODNEY MILLS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On September 29, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 11, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked 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 relationship of employee-employer existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his lumbar spine on October 23, 2001.
4. Respondent paid some compensation benefits, including surgery on March 4, 2002.
5. The claimant was earning sufficient wages to entitle him to the maximum compensation rates of \$410.00 for total disability benefits and \$308.00 for permanent partial disability benefits.

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

1. Whether surgery recommended by Dr. Knox is causally related to claimant's compensable injury.
2. Additional temporary total disability benefits.
3. Attorney fee.

At the time of the hearing claimant withdrew his request for temporary total disability benefits and requested that that issue be reserved. Furthermore, in addition to the surgery which has been recommended by Dr. Knox, claimant is also asking for payment of Dr. Kraus' medical treatment. Respondent has controverted medical treatment provided by Dr. Kraus since October 2002 with the exception of Dr. Kraus' medical treatment to remove a bone growth stimulator.

The claimant contends that at respondent's direction, he underwent a medical evaluation by Dr. Luke Knox on or about July 10, 2003 at which time Dr. Knox determined there to be a cracked or broken screw in the hardware that was placed in claimant's spine as a result of this injury. Dr. Knox has recommended additional surgery to correct same. In addition, claimant also requests payment for unpaid medical treatment received from Dr. Kraus.

The respondents contend that the broken or cracked screw is the result of an independent intervening cause and therefore is not causally related to claimant's compensable injury. Respondent also contends that it is not liable for payment of Dr. Kraus' medical treatment subsequent to October 2002, with the exception of treatment provided in connection with removal of the bone growth stimulator.

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 his 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 the pre-hearing conference conducted on August 11, 2003, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that the surgery recommended by Dr. Knox is causally related to his compensable injury. There is insufficient evidence that the surgery is the result of an independent intervening cause.

3. Claimant has also met his burden of proving by a preponderance of the evidence that medical treatment provided by Dr. Kraus subsequent to October 2002 is reasonable, necessary and causally related to claimant's compensable injury.

FACTUAL BACKGROUND

The claimant is a 43-year-old man who has primarily lived in the West Virginia and Ohio area. Claimant began working for the respondent as a truck driver in June 2001. On October 23, 2001, the claimant suffered a compensable injury to his low back while he was jerking on a stuck pin lever in Marietta, Ohio. Following his compensable injury the claimant was initially evaluated by Dr. Couch in Vandalia, Ohio. Dr. Couch eventually referred claimant to Dr. Kraus, a neurosurgeon in Kettering, Ohio. After testing revealed a herniated disc at the L5-S1 level Dr. Kraus performed surgery on March 5, 2002. This included a lumbosacral fusion at the L5-S1 level which involved placement of a bone growth stimulator and pedicle screws.

At some point after claimant's surgery, he came to Arkansas where he performed light duty work in the respondent's office and also attended physical therapy and work hardening at Healthsouth Rehabilitation Hospital in Fort Smith. The records indicate that claimant began his physical therapy on June 25, 2002. Claimant was referred to

Healthsouth by Dr. Ross, a physician in Van Buren to whom claimant was sent when he came to Arkansas. After several weeks of rehabilitation claimant was released by Dr. Ross to return to work with a 55-pound lifting restriction on July 30, 2002. While the Department of Transportation has a 50-pound lifting requirement, the respondent has a 75-pound lifting requirement. Claimant wanted to return to work for the respondent as a truck driver and respondent wanted claimant to return to work. As a result, it was agreed that claimant would undergo additional physical therapy and work hardening in order to increase his lifting limitation to 75 pounds. Notes from Healthsouth indicate that on August 15 and August 16 the claimant indicated that he was feeling uncomfortable and fearing re-injury. Claimant also complained of additional pressure in his low back while lifting. August 16, 2002 was a Friday and on that night according to the claimant he went out with his girlfriend and danced two slow dances. Claimant testified that he was unable to continue dancing and that he spent that night at his hotel with his girlfriend.

One of claimant's physical therapists was Lesli France at Healthsouth. After August 16, 2002, France next saw the claimant on Tuesday, August 20, 2002. According to her notes of that date and her testimony by deposition, the claimant reported more pain than normal in his back and right hip. According to France, the claimant indicated to her that on Friday he had a "wild night of dancing and activity with two women."

Because of claimant's continued complaints of back pain, he returned to Ohio and underwent additional evaluation by Dr. Kraus, including additional objective testing in the form of MRI scans and CT myelograms. While undergoing these evaluations by Dr. Kraus, Dr. Kraus performed a surgical procedure in March 2003 to remove the bone growth stimulator. Respondent has accepted liability for payment of medical treatment related to the removal of the bone growth stimulator, but controverts the remainder of Dr. Kraus' medical treatment subsequent to October 2002.

Dr. Kraus treated claimant conservatively and claimant eventually was sent to Dr.

Luke Knox by the respondent for an independent medical evaluation on July 10, 2003. In his report of that date, Dr. Knox after reviewing the radiographic testing opined that claimant had a broken pedicle screw at the S1 level which was the source of his continuing complaints of pain. Dr. Knox recommended a surgical procedure to repair the broken screw.

Claimant has filed this claim contending that the surgical procedure recommended by Dr. Knox is reasonable and necessary and causally related to his compensable injury. He also seeks payment for unpaid medical treatment provided by Dr. Kraus.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291); *Robin Hill v. Rushing and Mason Equipment*, Full Commission Opinion filed January 14, 1987 (D500190). In determining whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. SEBA, Inc.*, Full Commission Opinion filed December 13, 1989 (D512553). A respondent is only responsible for medical services which are causally related to the compensable injury. Benefits are not payable for a condition which results from a non work-related independent intervening cause which causes or prolongs disability or the need for medical treatment. A.C.A. §11-9-102(4)(F)(iii). The question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W. 3d 326 (2000). An employer is

responsible for every natural consequence that flows from a compensable injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W. 2d 897 (1996).

In this particular case, I find that the broken pedicle screw discovered by Dr. Knox for which surgery has been recommended was the natural consequence of claimant's compensable injury. This finding is based in part upon the report of Dr. Knox dated July 11, 2003, following his visit with the claimant on July 10. Dr. Knox's medical report indicates that his review of the lumbar myelogram and post-myelogram CT scan from February 5, 2003, reveals a broken pedicle screw at the S1 level. Dr. Knox went on to state that it was his belief that the claimant's L5-S1 fusion was not solid as indicated by the broken pedicle screw. Dr. Knox went on to recommend additional surgery to correct this condition. Additional language in Dr. Knox's medical report would indicate that broken screws are not unusual and that the company manufacturing the screw generally assumes the cost to repair fusions which have failed as a result of screw failure.

Of note, Dr. Crouse [sic] dictates in his Operative Summary, dated 03/05/02 that he used the EBI System associated with a bone growth stimulator. It is my recollection that the SpineLink Company and EBI stimulator, historically, would guarantee the fusions and assume any cost in repair of patients not achieving solid fusion.

It is claimant's belief that he caused an additional injury to his back while lifting heavy weights while undergoing work hardening in mid-August 2002. Claimant testified that he had additional low back pain after an incident of increased weight lifting. In support of that contention I note that the notes from Healthsouth Rehabilitation indicate that on Thursday, August 15, the claimant indicated to Lesli France that his back felt uncomfortable and he feared re-injury. She also noted that claimant's pain increased with increases in activity. In fact, France testified that the day before claimant had obtained a lumbosacral support to wear. On the next day, Friday, August 16, the claimant was still complaining of pressure in his low back while lifting.

It was on the night of August 16 that claimant went dancing with his girlfriend. As previously noted, France testified that on Tuesday, August 20, claimant reported more pain than unusual in his back and right hip. France attributed this to claimant's dancing and activity with two women on the prior Friday night. However, claimant testified that he performed only two slow dances with his girlfriend on that night. Furthermore, the notes from the week before prior to the dancing incident indicate that claimant was complaining of additional pressure and uncomfortableness in his low back. In fact, claimant had obtained a lumbosacral support while performing his work hardening activities. Furthermore, on Monday, August 19, after the dancing incident and before claimant was seen by France on August 20, claimant was seen by another physical therapist. There is no mention in the notes of August 19 that claimant was having additional back pain which was attributable to a dancing incident.

I also believe it is important to note that Dr. Kraus addressed this issue following his evaluation of the claimant on February 28, 2003.

At this point Mr. Pinson feels he was doing very well with no back pain until he lifted sixty-five pounds while at therapy. He had a question about whether or not dancing might have caused the injury, but upon discussing this with him further he had just gone slow dancing, no excessive twisting or lifting, and I don't feel dancing was likely to be causative.

In summary, I find that the preponderance of the evidence indicates that the broken screw in claimant's lumbar spine is causally related to his compensable injury. This finding is based on the medical reports of Drs. Knox and Kraus as well as an absence of evidence indicating that the screw was broken while claimant was engaged in dancing or any other activity.

Accordingly, for the foregoing reasons, I find that the broken screw in claimant's spine is causally related to claimant's compensable injury.

Having found that claimant's broken screw is causally related to his compensable injury, I find that there is insufficient evidence that the broken screw is the result of an independent intervening cause. As previously noted, in order for there to be an independent intervening cause, the claimant must be engaged in activity which is unreasonable under the circumstances. Here, according to claimant's testimony, he performed two slow dances with his girlfriend on the night of August 16, 2002. On the other hand, France testified that claimant told her that he had a wild night of dancing and other activity with two women. First, I do not find that dancing itself was unreasonable under the circumstances. At the time of this dancing on August 16, 2002, claimant had been released to return to work by Dr. Ross with only a 55-pound lifting restriction. No other restrictions had been placed on claimant at that time. Furthermore, and more importantly, as previously noted, there is no evidence that claimant's dancing or activities on the night of August 16, 2002 caused a broken screw. Absent any evidence as to causation involving this activity, there can be no independent intervening cause.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that the broken pedicle screw is causally related to his compensable injury. There is insufficient evidence that the broken screw is the result of an independent intervening cause. Therefore, surgery recommended by Dr. Knox to repair the broken screw is reasonable and necessary and causally related to claimant's compensable injury.

The final issue for consideration involves payment of unpaid medical treatment claimant received from Dr. Kraus subsequent to October 2002. With the exception of payment for medical treatment related to the removal of the bone growth stimulator, respondent has not paid for any of Dr. Kraus' medical treatment subsequent to October 2002. Presumably, this is based upon a belief that treatment subsequent to that date is causally related to an independent intervening cause, not to claimant's compensable injury.

For the reasons previously discussed, I find that the medical treatment provided to claimant by Dr. Kraus subsequent to October 2002 was causally related to claimant's compensable injury, not to an independent intervening cause. Therefore, respondent is liable for payment of Dr. Kraus' medical treatment and testing performed at his request.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. 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).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that his broken pedicle screw is causally related to his compensable injury. Therefore, surgery recommended by Dr. Knox is reasonable, necessary and causally related to claimant's compensable injury. In addition, medical treatment provided by Dr. Kraus subsequent to October 2002 was also reasonable, necessary and causally related to claimant's compensable back injury. Therefore, respondent is liable for all unpaid medical treatment provided by Dr. Kraus in connection with claimant's back injury.

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).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE