

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F101151

EDDIE BRAY, EMPLOYEE	CLAIMANT
INTERNATIONAL WIRE GROUP, INC., EMPLOYER	RESPONDENT
GENERAL ACCIDENT OF AMERICA, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 18, 2004, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE MICHAEL W. BOYD, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, a late payment penalty and attorney's fees.

At issue is the authorization of a physician pursuant to Ark. Code Ann. §11-9-508 and §11-9-514; the end of the healing period as defined by Ark. Code Ann. §11-9-102 and fees and costs associated with a previous Motion to Compel.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find Dr. Middleton was unauthorized; the healing period ended when Dr. Simpson released the claimant in 2002; and no fees are awarded on the Motion.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on January 4, 2001, at which time the claimant sustained a compensable back injury at a compensation rate of

\$299.00/\$224.00. Medical expenses, temporary total disability benefits (from January 4, 2001 to August 15, 2001 and from October 17, 2001 to February 7, 2002) and a 15% rating, assessed by Dr. P. B. Simpson on March 7, 2002, have been paid. This claim has been the subject of a previous hearing with Orders entered June 3, 2002, and September 18, 2003.

The claimant contends he received verbal permission from the insurance adjusters to receive treatment from general practitioner, Dr. Toni Middleton. He seeks payment of Dr. Middleton's expenses, temporary total disability from September 6, 2002 to September 20, 2002, September 23, 2002 to November 4, 2002, and November 5, 2002 to December 5, 2002, an 18% late payment penalty pursuant to Ark. Code Ann. §11-9-802(b) and attorney's fees, along with fees and costs (\$750.00) associated with the Motion to Compel Discovery.

The respondents contend all appropriate benefits have been paid and Dr. Middleton is unauthorized. The healing period ended February 7, 2002, and there has been no change in his physical status. The assessment of the healing period was determined in the Administrative Law Judge's opinion of June 3, 2002, and is now barred by the doctrine of res judicata. Furthermore, the respondents argue that Dr. Simpson's opinion is entitled to more evidentiary weight than the opinion of Dr. Middleton.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript, along with the Motion to Compel Order. Incorporated by reference are the previous hearing transcripts dated May 8, 2002 and June 20, 2003 and the depositions of Dianne Hicks and Donna Criswell, taken January 15, 2003.

In a decision filed June 3, 2002, the claimant was found to have sustained a compensable back injury and the respondents were directed to pay medical expenses, temporary total disability benefits from January 4, 2001 to August 15, 2001 and from October 17, 2001 to February 7, 2002 and a 15% permanent impairment rating as assessed by Dr. P. B. Simpson on March 7, 2002.

A second hearing was conducted on a Motion to Compel. The claimant was seeking information from the adjuster's file to support his contention that the carrier's employees had orally authorized a change of physician. The claimant's Motion was granted, however, the period of time was limited to communications between July and October 2002, and excluded privileged communications between the adjusters and their attorney. The claimant requested the hearing on the Motion, incurring attorney's fees and expenses when he deposed the adjusters. Although Mr. Boyd requested an award of fees and expenses, he did not specify an amount, provide an accounting of services rendered or documentation of expenses, so the Order filed September 18, 2003 made no finding of fact on that issue. In subsequent correspondence, Mr. Boyd requested \$750.00.

The claimant contends that after his surgery and release by Dr. P.B. Simpson, he orally received permission from the adjuster around July or August 2002 to change physicians to general practitioner, Dr. Toni Middleton. The claimant explained that because he prevailed at the compensability hearing, he did not think he needed to return to his attorney for help in changing physicians. The claimant stated that he was given a code number (his Social Security number and date of injury) to use when he had his prescriptions refilled. The bills were incurred in August and September, 2002.

There is no evidence to support the claimant's contention that Dr. Middleton was authorized. Although this claim has been handled by three different adjusters, (Ms. Pruitt, Ms. Crisswell and Ms. Hicks) through three different carriers, (One Beacon, General Accident Insurance and ESIS), the claimant's contentions could not be corroborated by the adjuster or their files. There is also no evidence that the claimant was given permission to use a special code number. The carrier does not use that type of code and the code does not appear on the prescriptions. The Wal-Mart Pharmacy receipts do not show who paid all the bills. It appears some were paid by cash, (see exhibits in Hick's deposition). Surprisingly, there is no evidence that Dr. Middleton's office contacted the carrier to confirm authorization before expenses were incurred. There is also no evidence that Dr. Simpson refused to see the claimant. Accordingly, I find the respondents are not liable for Dr. Middleton's expenses. Barton v. J.A. Riggs Tractor Company, 13 Ark. App. 177, 681 S.W.2d 397 (1984).

The claimant also contends that he is entitled to additional temporary total disability benefits. Even if a doctor is unauthorized, his opinion can still be considered when assessing disability. Markham v. K-Mart Corporation, 4 Ark. App. 310, 630 S.W.2d 550 (1982), Revere Copper & Brass v. Talley, 7 Ark. App. 234, 647 S.W.2d 477 (1983). The respondents contend additional benefits are barred by res judicata, however it is possible to re-enter the healing period, making the claimant eligible for additional benefits. Elk Roofing Company v. Pinson, 22 Ark. App 101, 737 S.W.2d 661 (1987).

The evidence shows that Dr. Simpson rated and released the claimant in March 2002. Subsequently, the claimant returned to general practitioner, Dr. Middleton complaining of back pain

and received medication. The claimant contends he is entitled to additional temporary total disability benefits in September, October, November and December 2002.

The claimant visited Dr. Middleton in June, July and August 2002, complaining of chronic back pain and right leg pain and denying any heavy lifting. The doctor gave him prescriptions for medication. As of October, 2002, the adjuster had communicated with the claimant and his attorney controverting Dr. Middleton's care. The claimant returned to the doctor on September 6, September 23, October 14, and November 5, 2002. Each time he complained of chronic pain and each time Dr. Middleton tried him on different medications to see if the pain could be relieved.

Although there is no difference in the June - August visits and the September - December visits, Dr. Middleton wrote out work excuse slips for the visits in the fall of 2002, (September 6, 2002 to September 20, 2002/September 23, 2002 to October 14, 2002, November 5, 2002 to December 5, 2002/October 14, 2002 to November 4, 2002).

The persistence of pain does not extend the healing period, making the claimant eligible for additional temporary total disability benefits Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant's condition has stabilized and Dr. Middleton's treatment is "maintenance". No additional treatment has been recommended that would improve the claimant's condition. Therefore, the respondents have paid all appropriate temporary total disability benefits and no late payment penalty is owing.

The claimant returned to Dr. Simpson on January 31, 2003. Although he continued to complain of back pain, Dr. Simpson found nothing wrong with the claimant. His physical examination was normal and he declined to give the claimant any pain medication, commenting, "I

will let his regular physician take care of that.” Dr. Simpson also released the claimant from his care to see him back on an as needed basis, indicating the claimant could return to work. This is the same language used almost a year earlier when Dr. Simpson rated and released the claimant in March 7, 2002.

I interpret Dr. Simpson’s January 31, 2003 report to be merely reiterating his conclusions of March 7, 2002, and referring the claimant to his family physician, Dr. Middleton as of February, 2003. Of course, by this time the case had been controverted.

In a report dated October 15, 2003 Dr. Middleton explains that the claimant was mistakenly taking Vioxx and Celebrex at the same time. She indicates the claimant obtained the medications through “PAP” (prescription assistance - ?). The claimant also mentioned at the hearing that he received assistance with his bills, (Tr. p. 15). It is unclear when PAP began paying the bills or which bills they paid. The claimant returned to Dr. Middleton on January 27, 2004 with continued complaints. Although this visit is no different than the previous ones, the doctor did not excuse the claimant from work.

Dr. Middleton authored a report dated June 15, 2004 indicating the claimant was “referred” back to her in June 2002 for treatment of pain associated with post-surgical scarring. Dr. Middleton does not explain who referred the claimant nor the significance of the date. The claimant was released by Dr. Simpson on March 7, 2002 on a return as needed basis and did not return to him until January 31, 2003. The date does however, coincide with the date of the opinion filed June 3, 2002, awarding compensability of this claim.

Dr. Middleton also prescribed medication for depression and mentions the claimant received treatment at a mental health facility. These records could not be located in the exhibit packet and

the claimant has never filed a claim for a psychological injury.

SURVEILLANCE EVIDENCE

The claimant was under surveillance during April, 2003. He was observed driving a car, walking, shopping, lifting a boxed vacuum cleaner, and carrying a bag from the store to his home.

No physician has been asked to comment on the claimant's activities and it is unclear how events in April 2003 have any bearing on the claimant's request for disability benefits in September, October, November and December 2002. It should also be noted that the claimant was released by Dr. Simpson with no work restrictions. Therefore the claimant could not violate any lifting restrictions.

The claimant's physical abilities might affect his need for future treatment or disability if that becomes an issue.

MOTION

Basically, the claimant asked for telephone logs to try and confirm his contention that he contacted the adjuster about a change of physician. The respondents answered that there were no such conversations in the telephone log. The respondents were directed to provide those logs to the claimant with certain restrictions. Indeed, the logs do not confirm the claimant's contentions.

The telephone logs could easily have been addressed in an Order to Compel without the associated costs of a hearing.

While the hearing request may not have been frivolous, it was a needless increase in the cost of litigation. Ark. Code Ann. §11-9-717, §11-9-714. Additionally, there is no provision for this type of award under Ark. Code Ann. §11-9-715 where fees are calculated on the indemnity benefits controverted and awarded. Since the Motion grew out of a dispute over a change of physician, if I

were inclined to grant an award, it would be limited to the flat rate of \$200.00 pursuant to Ark. Code Ann. §11-9-715(c)(1).

FINDINGS AND CONCLUSIONS

I find the evidence shows that once the claimant received an award of compensability in June, 2002, he returned to his general practitioner, Dr. Middleton for prescription pain pills. He did not return to his authorized physician, Dr. P.B. Simpson even though the doctor's last report of March 7, 2002 invites him to return on an "as-needed" basis.

The claimant did not receive permission from either the carrier nor the Commission to change physicians from Dr. Simpson to Dr. Middleton. Although Dr. Middleton considered herself a "referral" as of June 2002, that could not be verified by Dr. Simpson.

The claimant saw Dr. Middleton on several occasions. On some of those visits, Dr. Middleton excused the claimant from work even though he was unemployed. All of the visits appear to be the same – experimenting with different medications to alleviate the claimant's complaints of pain.

I find the claimant's condition had stabilized after his recovery from surgery, assessment of permanent impairment and release from Dr. Simpson. There was nothing more that could be done to improve his condition. Dr. Middleton's treatment for pain management and her work excuse slips did not extend the healing period and the claimant is not eligible for additional temporary total disability benefits.

Finally, I find no authority to grant attorney's fees for a discovery motion and hearing.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties

on January 4, 2001 at which time the claimant sustained a compensable back injury at a compensation rate of \$299.00/\$224.00. Medical expenses, temporary total disability benefits (from January 4, 2001 to August 15, 2001 and from October 17, 2001 to February 7, 2002) and a 15% rating assessed by Dr. P. B. Simpson on March 7, 2002 have been paid.

2. The claimant has failed to prove by a preponderance of the evidence that he received permission to change physicians. The change could not be verified by the adjuster, their files, Dr. Simpson or Dr. Middleton. Dr. Middleton was an unauthorized physician and respondents are not liable for expenses associated with her treatment including mileage, prescriptions, office visits, and medical records.
3. The claimant's healing period ended with his release from Dr. Simpson. His injury had stabilized and there was no further treatment to improve his condition. Dr. Middleton's treatment was designed for pain management. Her notes, excusing the claimant from work when he was unemployed, do not extend the healing period. The respondents have paid all appropriate temporary total disability benefits.
4. There is no proof Dr. Simpson refused to see the claimant after his release in March 2002. There is no proof that Dr. Simpson referred the claimant to his general practitioner until February, 2003, after the claim was controverted.
5. There is no authority for an award of attorney's fees on a discovery matter.

This claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge