

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207551

RICHARD L. BRINKLEY, EMPLOYEE	CLAIMANT
GATEWAY INDUSTRIAL SERVICES, INC., EMPLOYER	RESPONDENT
ZENITH INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 29, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on September 10, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. J. Matthew Mauldin, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted September 10, 2004, to determine whether the claimant is entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on August 18, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employee/employer relationship existed at all

relevant times, including January 18, 2002; that the claimant sustained a compensable back injury on said date; that he earned sufficient wages to entitle him to compensation rates of \$399.00 per week for temporary total disability and \$299.00 per week for permanent partial disability; that respondents have paid appropriate temporary total disability, to date, as well as a five percent (5%) whole body impairment assigned by Dr. Rebecca Barrett-Tuck; together with various medical and related expenses, including an initial evaluation by Dr. Edward Saer pursuant to a change of physicians Order filed March 19, 2004; and that respondents have controverted claimant's entitlement to additional medical treatment.

By agreement of the parties, the primary issue for determination concerned respondents' responsibility for additional diagnostic testing and treatment.

Claimant contended, in summary, that he was entitled to additional diagnostic studies recommended by his authorized, treating physician, Dr. Ed Saer, together with any future treatment recommended by Dr. Saer following completion of the recommended MRI studies.

The respondents contended that it has paid all appropriate benefits and that the additional MRI tests is not reasonably necessary in relation to the admitted injury.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the September 10, 2004, hearing containing several medical exhibits.

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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has established, by a preponderance of the credible evidence, that he is entitled to repeat diagnostic studies, specifically, MRI studies recommended by his authorized treating physician, Dr. Edward H. Saer, III, to determine whether additional treatment is reasonably necessary.
4. Additional issues not addressed herein are specifically reserved for further determination.

DISCUSSION

The facts in this case are uncontroverted. On and before January 18, 2002, the claimant was employed by respondent to perform general plant maintenance, as well as welding and fabrication. On January 18, 2002, while

lifting a frame made of angle iron and placing it on a table to be welded, the claimant felt a pop in his back at which time he experienced pain, radiating down his right leg. The claimant promptly reported the injury to his supervisor, Mark Lloyd, at which time an accident report was filed out and the claimant was sent to the company doctor, Dr. Roger Troxel. The claimant testified that he has not returned to gainful employment since his admitted injury. The claimant has been examined and evaluated by numerous physicians, and has undergone extensive testing and treatment, as will be set out further below.

Although the parties agreed that the issue concerned respondents' responsibility for additional diagnostic testing and treatment, it must be noted that no treatment has been currently recommended. As reflected by the medical reports, at one time further treatment was recommended; however, for some unexplained reason, was never carried out. Rather, following an extensive interruption in medical services, the claimant requested and obtained approval to change treating physicians to Dr. Edward Saer, an orthopedic surgeon with the Arkansas Spine Center in Sherwood, Arkansas. Dr. Saer reviewed previous diagnostic studies, conducted a physical examination on April 22, 2004, at which time he recommended repeating the MRI films to see if there were any changes that were not apparent on the original studies. Respondents controverted the recommended testing, as well as any further treatment, while

acknowledging that the proposed MRI was the only “treatment” recommended, maintaining that it was not reasonably necessary in relation to the admitted injury. (Tr.5-8)

MEDICAL HISTORY

The record reflects that the claimant sustained a prior cervical injury in June, 1989, for which he was treated by Dr. Rebecca Barrett-Tuck who has also been one of his primary treating physicians for the within claim. There is no medical evidence of record following the claimant’s discharge by Dr. Tuck on June 15, 1989, and her neurosurgical consultation conducted on June 28, 2002. I feel compelled to point out that although prior to seeing Dr. Tuck on June 28, 2002, the claimant had previously been examined and treated for his injury by both the company physician and his family doctor, Darlene Antosh, for some unexplained reason, neither of said physicians’ findings, progress notes, and/or reports were submitted by either party. It must be noted that in Dr. Tuck’s history of patient information, she indicates that the claimant has continued working, which was inconsistent with the claimant’s testimony. Her report states, in part:

HPI: This is a pleasant 37-year-old gentleman who reports that January 18th he was lifting a frame he had put together at work, felt a pop, and pain in the right side of his back radiating down the right leg. He reported the incident but felt that in all likelihood that it would simply improve. However, as time has passed, it has not improved. He has continued to work and has continued to have pain. In fact, he feels that the pain has increased rather than decreased and after being

placed on light duty, most of his work was done crawling around on the floor doing a lot of reaching and twisting. He reports that the last few weeks his back has been so stiff and tight that he has hardly been able to walk after work. He has not responded to a steroid dose pack. He is using pain medications and muscle relaxants. He has not had any physical therapy or other treatment. He is allergic to Ibuprofen and has not been able to take either Vioxx or Celebrex due to nausea.

* * * * *

Dr. Tuck's findings reflect the following:

CT scan of the lumbar spine shows very, very, tiny, disc protrusion at L5-S1 on the right. It does not appear to cause nerve root compromise. This is so tiny I really feel that conservative treatment should be exhausted before surgery is even considered if it even would be a consideration. I am scheduling Mr. Brinkley for some physical therapy utilizing back rehab exercises, ultrasound, massage, heat, and interferential treatment, as needed. I have also asked for an appointment with a pain management clinic. I will see Mr. Brinkley back in about 4-6 weeks. Will keep him off work until then. I have instructed him to walk on a daily basis twice a day if possible. Do the exercises as instructed. To avoid any yard work, bending, lifting, stooping whatsoever. (Jt. Ex. A, pp.4-5)

_____Dr. Tuck subsequently referred the claimant to Dr. Calin A. Savu, a pain management specialist in Jonesboro. Dr. Savu treated the claimant with epidural steroid injections, as well as a course of physical therapy. The physical therapist, Keith Johnson, indicated that the patient was regressing rather than improving with physical therapy, indicated a need for psychological assessment, and referred the claimant back to Dr. Savu for further evaluation. (Jt. Ex. A, pp.6-12)

The claimant returned to Dr. Tuck for follow-up on August 26, 2002, whose narrative report is set out in its entirety below:

Mr. Brinkley returned for follow-up. He is still having a tremendous amount of pain in his back and in fact reports that he is worse. He feels that the exercises at physical therapy may have worsened him. He does report that the conservative treatments for [sic] helping including the interferential, ultrasound, and massage, however these were stopped by Dr. Savu only a week after they were started. He did not get to have his injection last week as he didn't have a driver but is scheduled for it next week. I am going to resume the conservative measures that I was treating him with as they were seeming to help. He will go ahead with his appointment with Dr. Savu next week and follow-up with me thereafter, and if he still fails to improve, we may need to consider surgical intervention even though this disc rupture is very, very small. (Jt. Ex. A, p.13)

The claimant returned to Dr. Tuck on September 25, 2002, at which time she recommended additional diagnostic studies, as well as resumption of physical therapy at SBRMC Outpatient Rehab Services which were administered by physical therapist Shelle Waleszonia. The claimant returned to Dr. Tuck on November 12, 2002, reporting continued, severe back pain radiating into the left leg, as well as popping in his back. Dr. Tuck again reported that the CT scan from May showed a small disc protrusion at L5-S1 on the left. Because of the claimant's significant complaints, she ordered an MRI of the lumbar spine while opining that EMGs and nerve conduction studies showed no acute radiculopathy, but signs of chronic L5 irritation on the EMGs. (Jt. Ex. A, p.19)

Following the MRI of the lumbar spine, the claimant returned to Dr. Tuck on January 9, 2003. It is apparent from Dr. Tuck's narrative report that the claimant was upset because of her inability to determine the source of his complaints. Dr. Tuck suggested that the claimant obtain a second opinion by

another neurosurgeon of choice by either his family doctor or the workers' compensation insurance company. However, Dr. Tuck did recommend an MRI of the thoracic spine to be absolutely sure that something wasn't being missed in the thoracic area. She noted that the claimant had an MRI of his thoracic spine in 1989 that was normal. Dr. Tuck further opined that the claimant was not a surgical candidate, that she would not be giving him any further medications or notes keeping him off work beyond February 1, 2003, and that she had exhausted treatment options. (Jt. Ex. A, p.22)

The claimant underwent a thoracic MRI on January 14, 2003, which was interpreted as essentially negative. The claimant returned to Dr. Antosh on January 17, 2003, requesting pain medication which was apparently given for 15 days. The claimant then returned to Dr. Antosh on January 27, 2003, at which time the claimant was referred to Dr. Braden upon approval of the insurance company. In addition, Dr. Antosh discontinued further medications. (Jt. Ex. A, pp.23-26)

The medical evidence is clouded concerning the referral to Dr. Braden. Rather, the record reflects that the claimant was next evaluated by Dr. W. Craig Clark for second neurosurgical opinion at the request of Dr. Antosh. I am unclear as to Dr. Clark's specialty which indicates that he is an M.D., Ph.D. Following Dr. Clark's examination, he diagnosed the claimant as having sustained a chronic

lumbar strain, together with a herniated nucleous pulposis, C6-7 right, asymptomatic. Dr. Clark recommended physical therapy and work hardening with no narcotics and to follow-up with Dr. Antosh. (Jt. Ex. A, pp.27-28)

As reflected by the stipulations, as well as Dr. Tuck's final reports, she found that the claimant had reached maximum medical improvement as of February 1, 2003, at which time she assessed a five percent (5%) permanent impairment which has apparently been paid. (Comm. Ex. 1)(Jt. Ex. A, pp.30-31)

The claimant was ultimately examined and evaluated by Dr. K. Dewayne Eubanks for a neurosurgical consultation on March 4, 2003. In addition, Dr. Eubanks reviewed the MRI studies previously performed. Some of his observations and recommendations are set out below:

I reviewed very carefully his MRI scan of his thoracic and lumbar spine. I see the radiologist says something about an osteophyte at T8-9, but I simply do not see it. To me, his MRI scan looks absolutely pristine. The lumbar spine film also looks pristine. I do not see any evidence of root compression, canal stenosis, lateral recess stenosis, etc. The only hint of an abnormality is that the disc bulges a little bit on the right at L5-S1, although the root itself looks like it exits without compromise. This would be the correct side and perhaps even the correct level for his pain, but it certainly is not a marked finding.

IMPRESSION: Thoracic pain and lumbar spine pain.

I do not see a clear-cut neurologic etiology for this. This may be facet pain and perhaps referred myotomal pain down his leg. I note that he has not tried chiropractic treatment. I think he would be the ideal candidate for that. We are going to get him to try a course of treatment with Dr. Barnett. If that does not help, I would like to get Dr. Terence Braden to see him for an evaluation and see if he has better ideas. Otherwise, I am really at a loss to see any clear-cut treatment at this point. I did tell him that if it were to worsen or continue to

bother him badly, to please call us back and I would be happy to see him again. (Jt. Ex. A, p.32)

Interestingly, the claimant was also seen on the same day by Dr. Eubanks' certified physician assistant, Misty Shatley, who also commented on Dr. Eubanks' plan, as well as some of the claimant's comments as follows:

PLAN: Since there was nothing particularly worrisome on his MRI scans, we are going to get a consult with Dr. Barnett to evaluate him for thoracic back pain as well as his hip pain and right lower extremity pain. We will send him to Dr. Braden, if Dr. Barnett is not able to help him. We did give him a Medrol Dosepak. He cannot take NSAIDs, but has taken a Medrol Dosepak in the past and states he did well on that. We were going to give him an LSO to wear for his posture; however, he refused to take it. When he found out that he was not going to get any medicine besides the Medrol Dosepak, **he told the office staff that he was 'already suing Dr. Tuck and Dr. Antosh, and would just add Dr. Eubanks to the list for neglect.'** We will see him back on a p.r.n. basis. (Jt. Ex. A, p.34)(Emphasis supplied)

The record reflects that the claimant did not receive any further treatment between March 4, 2003, and April 22, 2004. Respondents failed and/or refused to provide the treatment recommended by Dr. Eubanks. Following a Petition for a Change of Treating Physicians, an Order was entered, authorizing a change of physicians to Dr. Edward H. Saer, III, an orthopedic surgeon in Sherwood, Arkansas. Rather than conduct an exhaustive analysis of Dr. Saer's report, suffice it to say that he agreed with the prior medical providers and did not see anything surgical while noting that the prior MRI studies of the thoracic area were negative and that the MRI of the lumbar showed a very small, right-sided disc protrusion at L5-S1. Dr. Saer recommended repeating the MRI films to

determine if there was any problem that may be apparent now that was not at the time of the original scans. Respondents controverted Dr. Saer's recommendations. (Jt. Ex. A, pp.35-37)

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greetings Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydrophonics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

When assessing 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. The employee has the burden of proving, by a preponderance of the evidence, that the medical treatment is reasonably necessary. *Deborah Jones vs. Seba, Inc.*, Full Commission Opinion filed December 13, 1989, (AWCC #D512553); *Wal-Mart Stores, Inc., vs. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

Admittedly, respondents have provided the claimant with significant medical treatment, including examinations and evaluations by several specialists. However, all of the claimant's treatment has apparently been directed by the respondents. Following a failed course of conservative treatment by multiple providers, the claimant ultimately requested, and received, a change of treating physicians to a physician selected by someone other than the respondents, specifically, Dr. Edward H. Saer. Although respondents paid for the one-time examination and evaluation by Dr. Saer, it has refused to pay for additional diagnostic studies ordered by the authorized treating physician. While arguments can be made that respondents have previously provided MRI film studies in the past, Dr. Saer had reviewed the imaging studies of November 30, 2002, and January 14, 2003, and still felt that repeating the studies to see if there had been any change was warranted. It would seem only reasonable that if the claimant is entitled to an examination and evaluation by an new physician, that said physician be allowed to complete his evaluation to include diagnostic studies which he deems reasonably necessary in order to ascertain the true nature and extent of the claimant's condition.

Respondents could have chosen to cross-examine Dr. Saer. It did not. Respondents could have obtained medical opinion from prior medical providers, opining that repeat MRIs were not reasonable or necessary. It did not. The

credible evidence of record reflects that the claimant is entitled to repeat studies to determine whether additional medical treatment, if any, is necessary.

I recognize that the medical evidence aforementioned reflects that the claimant may be part of the problem due to his lack of understanding that his condition is permanent. In addition, it appears that the claimant may be dependent upon prescription medication. However, the record also reflects that prior medical providers, specifically, Dr. Antosh and Dr. Eubanks, have made recommendations for additional treatment which respondents failed and/or refused to follow through. Rather, after more than a one-year period without further treatment, the claimant requested and obtained a change of treating physicians. Accordingly, I find that the claimant has shown, by a preponderance of the credible evidence, that he is entitled to the additional diagnostic studies recommended.

AWARD

Respondent, Zenith Insurance Company, is hereby directed and ordered to pay for the additional diagnostic studies recommended by Dr. Edward H. Saer, claimant's authorized treating physician, together with continued treatment, if warranted.

Since this is a medical only claim, no attorney's fees are warranted pursuant to Ark. Code Ann. §11-9-715 as amended.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge