

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304749

WILLIAM D. BUSBY, EMPLOYEE	CLAIMANT
MONTICELLO SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED JULY 12, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on April 14, 2004, at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, anatomical impairment and attorney's fees.

At issue is whether or not additional benefits are causally related, reasonable and necessary treatment for the compensable injury, as defined by Ark. Code Ann. §11-9-508.

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 and benefits are hereby awarded.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on August 19, 2002 at which time the claimant sustained a compensable injury at a compensation rate of \$425.00/\$319.00. Some medical expenses were paid before the claimant was controverted.

Other expenses have been paid by the claimant's group carrier, Blue Cross Blue Shield.

The claimant contends he is entitled to payment of medical expenses, temporary total disability benefits from June 30, 2003 to August 19, 2003, and a 12% rating to the body as a whole as assessed by Dr. Cathey in his reports of November 19, 2003 and December 9, 2003.

The respondents contend all appropriate benefits have been paid. The claim was accepted as a temporary aggravation of a preexisting condition. Additional medical treatment is not reasonable necessary and is not causally related to the August 19, 2002 compensable injury. Additional expenses and benefits are also not causally related.

The claimant and his wife, whose testimony was corroborative, were the only witnesses to testify at the hearing. Both witnesses appeared to be credible.

The claimant, age 47 (D.O.B. May 29, 1957), has a Master's Degree. He has been employed as a teacher for the respondent-employer for the last ten years. The claimant is paid by contract for 205 days or 41 weeks (5 days per week) paid out over a 12 month period. Eleven weeks are unpaid.

The claimant's health history includes a diagnosis of lupus (1997), three back surgeries (1990, 1991, 1994), two surgeries to the right knee, including total knee replacement (2002, 2003), two left knee surgeries, and two right elbow surgeries.

On August 19, 2002 the claimant re-injured his back moving tables, chairs and books while setting up his computer classroom. He reported the injury and filled out an injury report form, listing two witnesses. The claimant was accepted as an aggravation of a preexisting condition.

The claimant came under the care of Drs. McKiver, Cathey, Vora, Ackerman, and Baskins. The claim was controverted on May 2, 2003. The claimant underwent surgery for the

fourth time on July 16, 2003. He was released on August 19, 2003 with a 12% rating for “failed back syndrome.”

MEDICAL EVIDENCE

The claimant came under the care of Dr. McKiver with a history of acute back pain and radiating bilateral leg pain after moving tables at school in August, 2002. An MRI scan and EMG/NCV study were positive. The MRI showed multi-level post surgical degenerative changes with extrusion at L3-L4 and nerve root compromise at L4-L5.

Dr. McKiver referred the claimant to Dr. Ackerman who prescribed medication to treat “pain...related to previous back surgery and generalized joint pain related to lupus.” Dr. Ackerman prescribed injections and medication and the claimant continued to teach with difficulty.

On March 18, 2003, the claimant was examined by Dr. Baskin who summarized the claimant’s medical history in his report. Dr. Baskin reviewed the August 26, 2002 MRI scan and opined that the claimant needed a surgical consultation for what appeared to be a recurrent disc herniation at L3-4 and post surgical and degenerative changes at L4-5 and L5-S1 levels.

After the claim was controverted, the claimant continued to see Dr. Ackerman at his own expense. The claimant then sought a second opinion from Dr. Steven Cathey. Dr. Cathey ran additional testing (myelogram, CT scan) confirming a recurrent disc herniation at L4-L5 with right L5 nerve root compression. Surgery was performed on July 16, 2003. The surgery completely relieved his right sided sciatica and he was able to decrease or discontinue some of the medications prescribed by Dr. Ackerman. Dr. Cathey released the claimant to return to Dr. McKiver in a report dated August 19, 2003. The claimant returned to Dr. Cathey on December 23, 2003 with increased pain which the doctor attributed to degenerative disc disease and the

altered spinal mechanics from the fusion. Repeat testing showed a solid fusion.

While there are degenerative changes noted on either side of the fusion, there is certainly no sign of recurrent disc herniation, spinal stenosis, nerve root impingement, etc. A midline disc protrusion at L3-L4 is again noted. Although this is much less pronounced now than it was at the time of his initial visit in June of 2003.

MEDICAL EVIDENCE

In his deposition, Dr. Steven Cathey, neurosurgeon, testified the claimant reported a back injury after moving supplies in the classroom in August, 2002. He developed radiating right leg pain. An MRI scan confirmed a ruptured disc at L3-L4 with narrowing of the nerve opening at L4-L5. Surgical changes were also evident from Dr. Simpson's prior treatment.

Dr. Cathey attributed the narrowed nerve opening (lateral recess stenosis) to a combination of the herniation at L4-L5 on the right and degenerative spurring or arthritic changes in the joint holding the fourth and fifth vertebrae together. He does not believe that scarring from the previous surgeries caused the narrowing.

A June 30, 2003 myelogram and CT scan showed healing at L3-L4, but the L4-L5 nerve compression on the right remained problematic. Dr. Cathey attributed the nerve compression to a recurrent disc herniation.

Surgical fusion was performed on July 16, 2003 at L4-L5.

ATTORNEY DEMORY:

Okay. Had he just had a herniated disc without prior surgery, would you have recommended the fusion?

DR. CATHEY:

If he had come to me and had never had a history of back surgery and this had been the first time he'd ruptured a disc and it was just at one level, I would not have performed a fusion.

ATTORNEY DEMORY:

So was the fusion more due to his degenerative disc disease and the

prior surgery as opposed to the new findings of the herniated disc?

DR. CATHEY:

No. It's a combination; it really is. If he had not had a new ruptured disc, we wouldn't have done any kind of surgery on him; but I believed it would be inadequate to do a simple discectomy based on what he'd done previously. So there was – it was related to both the new disc rupture superimposed on a previously operated disc.

Dr. Cathey opined that certain risk factors predisposed the claimant to re-herniations without any causative activity or incident, including prior surgical repair, lupus, and the steroids used to treat lupus. Prior surgical repair mechanically weakens the spine, putting pressure on surrounding disks. Lupus, a collagen vascular disease and steroids have an adverse effect on the connective tissue of the body, if used over a three month period.

Dr. Cathey released the claimant on August 19, 2003 and assessed a 12% rating which did not include the claimant's three previous surgeries. The surgery improved the claimant's hip and leg pain but he still suffers chronic low back pain. Repeat testing (MRI scan, x-rays) showed a solid fusion with some degenerative changes at other levels. Dr. Cathey recommended consultation with a pain specialist, Dr. Ackerman.

Dr. Cathey did not have the claimant's prior medical records. He dated the herniation based on the claimant's history of injury in August 2002.

Dr. Cathey: I would state to a reasonable degree of medical certainty that it happened in August of 2002, based on the history given by Mr. Busby....it fit best with the description of pain radiating down the leg that developed subsequent to that injury, since as I've already testified, you can't look at a static image of an MRI or an x-ray and have any idea about when something develops without some type of history.

FINDINGS AND CONCLUSIONS

_____The evidence of record shows the claimant has a health history which predisposes him to reinjury. This preexisting condition does not disqualify the claim if his employment aggravated, accelerated, or combined with the preexisting condition to produce disability. The claimant must also show that the compensable injury is the major cause of his permanent disability and need for treatment. Williams v. L & W Janitorial, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (2004).

There is no dispute that the claimant suffered an injury on August 19, 2002. Objective medical testing performed immediately after the accident confirmed problems at L3-L4 and L4-L5. Dr. McKiver chose to treat the condition conservatively with pain management which did not alleviate the claimant's symptoms. It was not until the claimant consulted with Dr. Baskin and Dr. Cathey that surgical intervention was recommended. Surgery at L4-L5 was performed almost a year later on July 16, 2003 and this treatment successfully addressed the claimant's symptoms. Based on the claimant's credible history, the recommendation of Dr. Baskin, the opinion of Dr. Cathey and the successful surgery, I find a causal connection between the claimant's injury, need for treatment and permanent disability. The surgery was reasonable and necessary to treat the nerve root compression and relieve the claimant's leg pain.

Although the temporary total disability statutes contemplate payment of wages during the same period the claimant is physically incapable of working, the mutually convenient pay plan between school employees and school districts allows accrued earnings to be dispersed during a time (summer vacation) unrelated to the claimant's physical capabilities. Therefore, I find a school employee may still draw temporary total disability benefits during a time he is receiving accrued

salary. Ark. Code Ann. §6-17-1405.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 19, 2002 at which time the claimant sustained a compensable back injury at a compensation rate of \$425.00/\$319.00.
2. Medical treatment provided by Dr. Cathey was causally related to the compensable injury, verified by objective testing and the claimant's history of injury. The treatment was reasonable and necessary for alleviation of symptoms.
3. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.
4. The claimant is entitled to temporary total disability benefits from June 30, 2003 to August 19, 2003, as he remained in his healing period totally incapacitated from working.
5. The claimant is entitled to permanent partial disability benefits equivalent to 12% to the body as a whole as the compensable injury is the major cause of his disability.
6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
7. This claim 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