

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F008686 & F100390**

<b>BATHEL A. CUPPLES, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>ROLLISON SEED COMPANY, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AG-COMP SIF FUND, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 20, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 20, 2004 at Jefferson County, Pine Bluff, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, 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 additional medical treatment, a change of physician and attorney's fees.

At issue is whether or not additional treatment is reasonable and necessary as defined by Ark. Code Ann. §11-9-508 and whether or not a change of physician is barred by the doctrine of res judicata.

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 does not preponderate in favor of the claimant and benefits must be denied.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship during June, 1998 (F100390) and July, 2000 (F008686) when the claimant sustained compensable back injuries at the maximum compensation rates for the date of injury. Medical expenses, temporary total disability benefits and a 5% impairment rating to the body as a whole have been paid. This claim has been the subject of previous hearings with orders entered September 6, 2001 by Judge Curdie (granting an independent medical evaluation with Dr. P. B. Simpson) and November 19, 2002 by Judge Curdie (awarding 5% impairment and 5% wage loss) and July 29, 2003 by the Full Commission (affirming

and adopting the Administrative Law Judge's opinion).

The claimant contends that he remains symptomatic and in need of additional medical treatment, with a physician chosen by the Commission.

The respondents contend all appropriate benefits have been paid and further treatment is unreasonable, unnecessary and unrelated to the compensable injury. The claimant has been rated and released by his physicians.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the February 20, 2004 hearing transcript. Opinions from the previous hearings in 2001 and 2002 and the transcripts and depositions are incorporated by reference.

The claimant, who seemed sincere, was the only witness to testify at the hearing. He uses a cane, as recommended by chiropractor, Dr. Doss, to keep his balance and he wears a back brace occasionally to control pain. The claimant is 5'11" and weighs 300 pounds. He stated his leg goes out on him and he has fallen on occasion.

The claimant, age 45 (D.O.B. March 20, 1959) has a 7<sup>th</sup> grade education. At the 2002 hearing, he testified he had a learning disability, had repeated the third grade and had difficulty reading newspapers. The claimant is able to drive, hunt, fish, and help out at church. His claim for Social Security Disability benefits is pending.

Mr. Cupples injured his back at work on two occasions. In the first incident in June, 1998, he was trying to cover bags of grain stacked 8 feet high on pallets with heavy plastic when he fell and struck his back against concrete. The claimant reinjured his back in July, 2000 when he twisted his leg while dumping grain over a pit.

The claimant came under the care of the company physician, Dr. Burleson, an orthopedic surgeon, Dr. Pollard, Dr. Anthony Russell and Dr. Jim Moore. Dr. Moore treated him conservatively with medication and injections and released him in September, 2001.

After a hearing, Judge Curdie ordered the claimant to undergo an independent medical

evaluation with Dr. P. B. Simpson who ordered diagnostic testing. Dr. Simpson saw the claimant on two occasions, opined that he was not a surgical candidate and released him.

The claimant testified he remains symptomatic with severe low back pain, and a sensation of pins and needle in both legs. He obtains relief with over the counter medications, and chiropractic adjustments from Dr. Doss, paid by the claimant.

### **MEDICAL EVIDENCE**

Exhibits for the latest hearing include seventy pages from the respondent. Many of these pages appear to be irrelevant. For reasons unknown, these irrelevant records were not eliminated from the exhibit packet; instead they were abstracted.

After the claimant's first compensable back injury on June 19, 1998, an MRI scan of the lumbar spine was interpreted as negative in a report dated July 8, 1998.

After the second compensable injury on July 11, 2000, the general practitioner found no evidence of abnormality but referred the claimant to Dr. Pollard because of continued complaints. A second MRI scan performed August 10, 2000 was interpreted as showing three bulging discs. There was no evidence of herniation.

The claimant was examined by Dr. Anthony Russell on September 6, 2000. He opined that the claimant was not a surgical candidate and recommended that he lose weight. Dr. Russell imposed no work restrictions. Dr. Russell compared the two MRIs and commented:

The patient was accompanied by an MRI lumbar spine which was done on August 10, 2000. He was noted to have bulging discs at several levels but no evidence of frank herniation, stenosis or nerve root compression at the foramen. This essentially normal study is basically unchanged from one that was done two years ago.

The claimant was examined by neurosurgeon, Dr. Jim Moore on September 13, 2000. Dr. Moore opined that the claimant was not a surgical candidate. He recommended a muscle stimulating device and strengthening program along with medication.

On October 31, 2000 Dr. Miles performed EMG/NCV studies which confirmed irritation and partial denervation at the L4-5 nerve root on the right side.

The claimant returned to Dr. Moore who administered trigger blocks providing only temporary relief. Dr. Moore recommended the Williams' flexion program of exercises and a LESI.

Dr. Moore's Report of 2-6-01:

I have been requested to review some MRI's on this patient. An MRI study.. dated August 20, 2000 and also a study dated July 8, 1998... Both of these studies show degenerative changes in the lower diskal elements especially at L4/5 and L5/S1; some mild prominences on sagittal views; very little, if anything, on the axiel views. The only changes I see on either study would be that of disk degenerative changes L4/5 and to a greater extent L5/S1.

The claimant continued his physical therapy and returned to Dr. Moore in March 2001 who recommended that the claimant stop truck driving due to lumbar lordosis and try operating a fork-lift. Dr. Rutherford repeated the EMG/NCV test showing improvement over the previous study despite the claimant's complaints. Dr. Moore assessed a 5% impairment rating based on Table 75 II B and work restrictions of no prolonged sitting, bending, stooping, straining or lifting over 50 pounds.

In September, 2001, the claimant reported increased symptoms after squatting to retrieve an item from the refrigerator. Dr. Moore recommended a repeat MRI scan despite a normal examination.

In October, 2001, the claimant was examined by Dr. Simpson. He recommended repeat diagnostic studies which were performed in December, 2001. The lumbar myelogram was interpreted as essentially normal. A post myelogram CT scan showed mild disc bulging at L3-4 on the left, and a spur at L5 encroaching on the foramen below the root alcove. There were arthritic changes of the facet joints noted at L4-5 and S-1 with arthritic changes in the sacroiliac joints, on the right. Dr. Simpson offered the claimant an Functional Capacity Evaluation which he declined. Dr. Simpson released the claimant to return to work with no restrictions or impairment as of January 7, 2002.

Dr. Simpson commented:

He does not have any gross evidence (of a) back problem of an organic nature and in my estimation he has no evidence of any permanent impairment.

The claimant began chiropractic treatment with Dr. Doss on January 16, 2002, with adjustments and physical therapy.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, February 17, 1989 (Claim No. D612291). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

Based on the evidence of record, I find the respondents have provided the claimant with reasonable and necessary medical treatment. The claimant has been examined and treated by specialists (orthopedic surgeons and neurosurgeons). He has had repeated diagnostic testing (MRI, EMG/NCV studies, x-ray, CT scans, myelograms). He has received treatment (medication, TENS unit, physical therapy, trigger point injections). All of his physicians agree he is not a surgical candidate but he is overweight and would benefit from weight loss and Williams' exercises to strengthen his back. His present symptoms are related to progressive degenerative changes. I think all the options of medical treatment have been exhausted and an award of additional medical treatment would be unproductive.

The doctrine of res judicata was reviewed by the Court of Appeals in the case of Castleberry v. Elite Lamp Company, 69 Ark. App. 359, 13 S.W.3d 211 (2000).

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. Believ v. Stuttgart Rice Mill, 64 Ark. App. 334 (1998); Perry v. Leisure Lodge, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of res judicata is applicable to decisions of the Commission. Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996); Tuberville v. International Paper Company, 18 Ark. App. 210, 711 S.W.2d 840 (1986). The key question regarding the application of res judicata is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. Cater v. Cater, 311 Ark. 627, 846 S.W.2d 173 (1993); Pine Bluff Warehouse v. Berry, 51 Ark. App. 139, 912 S.W.2d 11 (1995).

Res judicata bars relitigation of that determination unless there is evidence of change following the previous order. Cariker v. Ozark Opportunities, 65 Ark. App. 60, 987 S.W.2d 736 (1999); Tuberville, supra.

The evidence of record shows the claimant's request for a change of physician is barred by res judicata. That issue was litigated before Judge Curdie in his opinion dated September 6, 2001. Although the Judge ultimately awarded an independent medical evaluation with Dr. Simpson, the claimant had a full and fair opportunity to litigate the issue of a change of physician at that hearing.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties in June 1998 and July 2000, at which time the claimant sustained compensable back injuries.
2. Claimant's request for a change of physician is barred by the doctrine of res judicata as that issue was previously litigated in an opinion filed September 6, 2001 by Judge Curdie.
3. Respondents have fulfilled their duty to provide reasonable and necessary medical treatment by giving the claimant an opportunity to consult with specialists, obtain diagnostic testing, and try different treatment regimes. The claimant is not considered a surgical candidate, he has not responded to treatment and he has been unable to comply with the doctor's recommendations of weight loss. Further treatment is unlikely to provide any different results.

4. Respondents have paid all appropriate benefits and expenses.

This claim for additional medical treatment is hereby denied and dismissed.

IT IS SO ORDERED.

---

ELIZABETH W. HOGAN  
Administrative Law Judge