

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306806

THOMAS FLATT

CLAIMANT

LA Z BOY ARKANSAS

RESPONDENT

CRAWFORD & COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 31, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by NEAL HART, Attorney, Little Rock, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 9, 2004, in Springdale, Arkansas. A pre-hearing order was entered in this case on November 25, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the claimant withdrew (without objection) his request for a determination of his entitlement to permanent disability benefits for permanent physical impairment. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On March 11, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. On March 11, 2002, the appropriate weekly compensation rates were \$425.00 for total disability and \$319.00 for permanent partial disability.
3. On March 11, 2002, the claimant sustained a compensable injury to his back.
4. There is no dispute over the payment of medical expenses incurred through June 30, 2003.

5. There is no dispute at present over temporary disability benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to the payment of medical expenses incurred after June 30, 2003.
2. Attorney's fees.

In regard to these issues, the claimant contends:

"Claimant is entitled to payment of additional medical expenses. Claimant is entitled to payment of a statutory attorney's fee on all controverted benefits."

In regard to these issues, the respondents contend:

"Respondents contend that all appropriate benefits have been paid with regard to this matter. Respondents contend that the claimant has suffered an independent cause which accounts for his current need for medical treatment. Further, respondents contend that claimant's problems are pre-existing and that his need for medical treatment is associated with the pre-existing condition and not any work related incident."

DISCUSSION

_____The sole issue presented for resolution is the claimant's entitlement to the payment of expenses incurred for medical services that were provided after June 30, 2003. In order to be entitled to the payment of these expenses, the claimant must prove that the expenses were incurred for "reasonably necessary medical services", under Ark. Code Ann. 11-9-508. In order to represent "reasonably necessary medical services", under this subdivision, the medical services must first be necessitated by or connected with the compensable injury. Secondly, the services must have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

The medical record reveals that, prior to the disputed medical services, the only medical treatment the claimant had received for his compensable injury was provided him by and at the direction of Dr. Rebecca Lewis. Dr. Lewis is a general practitioner and

appears to be the respondent's company physician.

The reports and records of Dr. Lewis show that in her initial evaluations, she suspected that the claimant's compensable injury was in the form of a herniated lumbar disc. To investigate this possibility, she ordered a CT scan of the claimant's lumbar spine. This study was performed on April 8, 2002. The results of this CT scan were interpreted by the radiologist as showing:

"A rather large herniation of disc material into the right foramina at L5-S1".

After this study Dr. Lewis has consistently diagnosed the cause or the etiology of the claimant's continuing back and right leg difficulties as a herniated disc or HNP at L5-S1. This remained her diagnosis at the time of the claimant's last visit on June 3, 2003.

The reports and records of Dr. Lewis show that she repeatedly considered a neurosurgical evaluation as being medically necessary or appropriate for proper treatment of the claimant's compensable injury. However, she never actually obtained such an evaluation because of her belief that a neurosurgeon "would not touch him for surgery with the current body weight he has". Instead, she elected to treat the claimant, herself, using conservative modalities (anti-inflammatories, pain medication, and physical therapy/exercises), until the claimant lost what she felt was sufficient weight for a neurosurgical evaluation.

However, the evidence reflects that the claimant experienced an initial dramatic improvement in his symptoms with this conservative treatment. With this improvement and with a change in his employment position with the respondent, he returned to regular employment with the respondent and remain so employed until he quit for reasons unrelated to his injury.

However, the evidence shows that the claimant continued to experience some degree of chronic symptoms with periodic flare ups or episodes of increased symptoms. Dr. Lewis continued to treat the claimant for his persistent or chronic complaints and the

periodic flare ups or exacerbations in his symptoms through September 10, 2002. At that time, the claimant had been under relatively continuous treatment by Dr. Lewis for a flare up of his symptoms that had occurred in August of 2002. The treatment he was being provided for this flare up was essentially that provided right after his initial compensable injury (i.e. anti-inflammatories, pain medication, and physical therapy, including electroneurological nerve stimulation, heat, exercises, massage). Dr. Lewis also continued to counsel the claimant to lose weight.

The office notation of Dr. Lewis, dated September 10, 2002, contains several unusual and somewhat conflicting statements. Dr. Lewis again observed that the various forms of treatment received by the claimant in physical therapy (particularly the electroneurological stimulation) had helped the claimant's symptoms "immensely". Both the claimant and the physical therapist had requested her to authorize a trial of such device for the claimant's home use. However, she again refused to prescribe, on a trial basis, the claimant's use of a TENS unit (an electroneurological stimulation device). She also refused to continue the claimant's physical therapy regiment. The reason she gives for refusing to prescribe, on a trial basis, the use of a TENS unit, was that she did not believe that it would be a "permanent fix" for the claimant's continuing difficulties. She notes the claimant's continuing complaints and his request for further treatment, but merely categorizes the claimant's condition, as "stable", refills his narcotic pain medication, and directs him to return on an as needed basis. Clearly, her own observations, noted in this report, in the form of an "increased lordic curve" (indicative of muscle spasms) is also supportive of the claimant's continued subjective complaints and inconsistent with her opinion that his condition is now stable and he requires no further medical care. After opining that the claimant's condition is "stable" and that he does not require further treatment Dr. Lewis then makes the cryptic statement:

"At some point in time, if he does not have adequate weight loss, we may need to refer him for a second opinion to get some kind of decision on his case one way or another."

However, the most curious statement made by Dr. Lewis, in her report of September 10, 2002, is the statement:

“We did review his MRI with him once again, which shows no neural impingement of the lumbar spine.” (Emphasis mine)

There is absolutely no evidence that the claimant had undergone an MRI study prior to September 10, 2002. The only diagnostic radiological study found in the medical evidence is the CT scan that was performed on April 8, 2002. As previously noted, this study was interpreted as showing a “large herniation of disc material in the right foramina at L5-S1”. This would be the exact area where the nerve roots exit the spinal canal and would be an indication of possible impingement on these exiting nerve roots. Clearly, it was this study that led Dr. Lewis to believe that surgery might be ultimately necessary to relieve the claimant’s continuing complaints.

The record reflects that the claimant did not return to Dr. Lewis, for further treatment of his back difficulties, until May 6, 2003 (the claimant had seen Dr. Lewis for an upper respiratory tract infection, bronchitis, and sinusitis in February and March of 2003). In this visit, Dr. Lewis notes that the claimant has had several episodes of “significant discomfort” since his last visit similar to those he had experienced prior to September of 2002. Dr. Lewis again diagnosed the claimant’s difficulties, as recurrent ongoing back pain with a history of a herniated disc. However, instead of providing the claimant with any treatment for these difficulties, she gives the claimant the following instructions.

“The patient will need to get in and talk with his company to talk about where we want to go with this. Tom does have such an on and off nature to his pain it is difficult to determine what to do. He has not yet been to see a neurosurgeon.”

The claimant again returned to see Dr. Lewis for complaints of back pain on May 27, 2003. At that time, he informed Dr. Lewis that he had been mowing and weed eating the grounds of a church, as a second job. However, he specifically advised her that this activity did not cause any flare up or increase in his back difficulties. In this report, Dr. Lewis again

noted that the claimant has not seen a “spinal surgeon” or neurosurgeon, but again showed no inclination to refer him to one (apparently because he had not lost the weight, as she directed). She again diagnosed the claimant’s difficulties as “recurrent low back pain with history of herniated disc”. Again, Dr. Lewis apparently provided the claimant with no treatment, but merely sent him back to the respondent, she concluded this report by stating:

“The patient will need to get with his company and see where he stands on this. It may not help his case any if he is doing a second job of mowing and weed eating. Since we did a final report on his case, he does need to get in with Gary Kramer.” (Emphasis mine. The medical evidence reveals that the “final report” mentioned by Dr. Lewis, was made by her back on June 11, 2002, which was prior the majority of her treatment).

The claimant’s last visit with Dr. Lewis was on June 3, 2003. At that time, Dr. Lewis noted that the claimant was returning for a follow up of his back pain. She erroneously indicated that these complaints were the result of a workers’ compensation claim made “in the year of 2001” (rather than March of 2002). She also noted that she did a “final report” on this injury some months back (June of 2002) and that the claimant must not have had any problems “needing medication or pain pills” (since her last refill on September 10, 2003). She further referred to a telephone conversation between the claimant and the “Workers’ Compensation Commission” wherein the “Workers’ Compensation Commission” purportedly refused to “reopen” the claimant’s case because he had a second job mowing the lawn at Harvard Avenue Baptist Church. Clearly, this conversation was not with the Arkansas Workers’ Compensation Commission, but was most likely with the adjusting firm (Crawford & Company) for the self insured respondent. At the time of this visit, Dr. Lewis again does not appear to have provided any treatment or even examined the claimant. Instead, she merely made a referral of the claimant, at his insistence, for a neurosurgical evaluation by Dr. Luke Knox. She felt it necessary to expressly state that this is with the understanding that the claimant was not eligible for workers’ compensation nor would his workers’ compensation case be “reopened”.

The claimant was ultimately seen for a neurosurgical evaluation by Dr. Martin

Greenburg, an associate of Dr. Knox, on September 5, 2003. At the request of Dr. Greenburg, an MRI of the claimant's lumbar spine was performed on that same date. The claimant was seen for a follow up visit by Dr. Greenburg on September 11, 2003. It is these medical services that are currently in dispute.

In his initial evaluation, Dr. Greenburg notes a history of a course of symptoms (involving low back pain, right sided sciatica, and a right S1 radiculopathy) that mirrors that recorded in the reports and records of Dr. Lewis. He also recited the results of the prior CT scan. He records a history of a significant initial improvement in the claimant's symptoms with conservative care and periodic episodes of increased difficulties that have also improved with conservative treatment. His findings on physical examination are consistent with those previously made by Dr. Lewis.

The MRI study of the claimant's lumbar spine was interpreted by the radiologist as showing:

"Some discation (dissication?) of the L5-S1 disc but no evidence of disc herniation or other compromise of the canal or foramina."

However, in his report of September 11, 2003, Dr. Greenburg disagrees with this interpretation. He states that his review of this study "shows persistent right L5-S1 central HNP".

As a result of his evaluation of the claimant, his review of the MRI study and his review of the claimant's prior records and tests, Dr. Greenberg recommended continued conservative care for the claimant's discal injury and resulting chronic difficulties with periodic exacerbation of his symptoms. This recommended treatment consists of long term use of non steroidal anti-inflammatories and non narcotic pain medication (as needed). He does state that there is a minor (10-20%) chance that the claimant may ultimately require a microdiscectomy or open discectomy with instrumentation at some future date. Until then, he recommends essentially the same treatment that had previously been provided to the

claimant by and at the direction of Dr. Lewis.

In handwritten notations on correspondence from the claimant's counsel dated October 8, 2003, Dr. Greenburg expresses the opinion that the claimant's continuing need for periodic conservative care is related to the compensable injury of March 11, 2002. In a handwritten notation on a letter from claimant's counsel, dated November 24, 2003, Dr. Greenburg appears to indicate that it is his opinion that the claimant has not achieved MMI (maximum medical improvement) from his compensable injury of March 11, 2002.

Although the claimant conceded that he had had previous back symptoms, he testified that he had never experienced radicular symptoms with his leg or symptoms similar to those he experienced after the employment related incident of March 11, 2002. It was his testimony that following this incident, his symptoms initially improved. However, he has continued to experience minor chronic complaints and periodic reoccurrence of radicular symptoms involving his right leg and substantial increases in the magnitude of his back pain. However, these increases or exacerbations in his symptoms have continued to return to their chronic state with conservative treatment. He admits that at the time of the exacerbation of his symptoms in April of 2003, he had just began working part time with the help of his family clearing property, building fences, cutting grass, moving wood, chimney sweeping, landscaping, and other odd jobs. However, he does not personally believe that his performance of these activities were the cause of his increase in symptoms in April of 2003.

I find the claimant to be a credible witness and his description of the initial onset of his lower back and radicular symptoms with their subsequent chronic and recurrent nature to be accurate. In reaching this decision, I would note that I have not only considered the claimant's demeanor at the hearing, but also I have also considered the fact that his testimony in this regard to these matters is supported by the medical record. I have also considered that he is a longtime employee of the respondent and that, according to the testimony of Gary Kramer (the respondent's safety manager) the claimant has a reputation

for being a good, honest employee, and not a complainer. Clearly, the claimant appears to be well motivated. He returned to employment with the respondent, shortly after his compensable injury and continued his employment with the respondent for a substantial period of time. After he discontinued his employment with this respondent, he has continued to be gainfully employed.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the employment related accident on March 11, 2002, produced a herniation of the claimant's L5-S1 intervertebral disc. In reaching this decision, I have relied on the fact that the greater weight of the evidence shows that the claimant first experienced the onset of symptoms, which were clearly indicative of the occurrence of such a disc herniation, contemporaneously and clearly within a reasonable period of time following the employment related accident on March 11, 2002. Unquestionably, this accident as described by the claimant, could have reasonably produced such a disc herniation. There is no evidence of any other trauma that would logically explain the occurrence of this objectively documented defect. The medical evidence presented shows the actual presence of the claimant's herniated L5-S1 disc shortly after the employment related incident on March 11, 2002.

Disc herniations, such as that experienced by the claimant in the employment related incident on March 11, 2002, are a permanent injury. While appropriate medical treatment may to some degree improve the symptoms produced by such a defect, no form of medical treatment can return the disc to its preinjury state. Some degree of physical damage will always remain. This fact is clearly recognized by the American Medical Association's Guide to the Evaluation of Permanent Impairment, (Fourth Edition), the official rating guide of this Commission. This treatise provides a permanent physical impairment rating for a disc herniation, regardless of whether it is symptomatic or asymptomatic. This type of permanent injury is also susceptible to periodic, but usually temporary, aggravations and increases in symptomology from even relatively minor traumatic events or activities, many

of which are so minor that they go unnoticed. However, were it not for the existence of the original disc herniation, there would be no condition to be aggravated and no periodic exacerbations or increases in symptoms.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the medical services provided to the claimant by and at the direction of Dr. Greenburg were necessitated by or connected to the claimant's compensable injury of March 11, 2002, which was in the form of a herniated disc at L5-S1, in this area. Such a neurosurgical evaluation is standard medical practice for injuries of this nature (as repeatedly recognized by Dr. Lewis). In most instances, this evaluation would have taken place shortly after the CT scan revealed the nature of the claimant's injury. Further, the medical services provided the claimant by and at the direction of Dr. Greenburg not only had a reasonable expectation of accomplishing their intended purposes or goals of accurately ascertaining the nature and extent of the claimant's compensable injury and developing an appropriate program of treatment, but did in fact do so.

Clearly, the claimant may have been motivated to return for medical treatment by Dr. Lewis on May 5, 2003, by the exacerbation of symptoms beginning in April of 2003, just as he had returned to Dr. Lewis for care on previous exacerbations of symptoms. It is also quite possible that this particular temporary exacerbation or increase in symptoms, was related to physical activities he was performing outside of his employment with this respondent. However, this increase or exacerbation of symptoms would not have occurred, had the claimant not experienced a herniated disc, in the employment related accident of March 11, 2002. Even if the claimant's temporary increase in difficulties in April of 2003, was related to his non employment related activities, these activities would not constitute an independent intervening cause sufficient to relieve the respondent from further liability. There is no evidence that these non employment activities would represent negligence or misconduct on the part of the claimant. There is no evidence that any of the claimant's non

employment related activities violated any physical restrictions imposed upon the claimant by Dr. Lewis or any other physician. In fact, there is no evidence that Dr. Lewis placed any physical limitations or restrictions on the claimant. Most importantly, there is no evidence that such activities caused any actual increase in or additional physical damage to the claimant's previously damaged intervertebral disc at L5-S1.

In summary, I find that the medical services provided to the claimant by and at direction Dr. Martin Greenburg, and the services recommended by Dr. Greenburg, in the form of the long term use of non steroidal anti-inflammatories and mild pain medication (as needed) represents reasonably necessary medical services, as that term is used in Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services provided to the claimant by and at the direction of Dr. Greenburg, subject to the medical fee schedule established by this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 11, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On March 11, 2002, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$425.00 for total disability and \$319.00 for permanent partial disability.
4. On March 11, 2002, the claimant sustained a compensable injury to his lower back in the form of a herniated intervertebral disc at the L5-S1 level.
5. There is no dispute, over the payment of expenses incurred for treatment of this compensable injury through June 30, 2003.
6. The medical services provided to the claimant, after June 30, 2003, by and at the direction of Dr. Martin Greenburg constitute "reasonably necessary medical services" for the claimant's compensable injury of March 11, 2002.

Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of such services, subject to the medical fee schedule established by this Commission.

7. There is no dispute, at the present, over the payment of temporary total disability benefits, and all such benefits have been paid.
8. The respondents have controverted the claimant's entitlement to the payment of any medical expenses incurred after June 30, 2003.
9. As the only controverted benefits herein awarded are in the form of the payment of medical services, no controverted attorney's fee can be awarded from the respondents.

ORDER

The respondents are liable for the medical services rendered and currently recommended to the claimant for his compensable back injury by and at the direction of Dr Martin Greenburg. Such liability is controlled by the medical fee schedule established by this Commission.

All benefits which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge