

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202021

HENRY GRUBER, JR., EMPLOYEE	CLAIMANT
MAVERICK TRANSPORTATION, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE, CARRIER	RESPONDENT

OPINION FILED May 11, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 27, 2004 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE M. KEITH WREN. Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to continuing medical treatment, additional temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant's healing period has ended pursuant to Ark. Code Ann. §11-9-102(12), and whether or not additional medical treatment is reasonably necessary pursuant to 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 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 on February 13, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$425.00/\$319.00. Medical expenses, and temporary total disability benefits were paid until April 11, 2003. The claimant receives disability benefits from the Veterans Administration and Social Security.

The claimant contends he remains symptomatic and in need of continuing medical treatment as recommended by Dr. Marinelli. The claimant seeks payment of medical expenses, temporary total

disability benefits from April 11, 2003 to a date yet to be determined and attorney's fees.

The respondents contend all appropriate benefits have been paid. This claim was accepted as a temporary aggravation of a preexisting condition. Benefits were stopped in reliance on Dr. Ward's report opining that the claimant was not a surgical candidate and was able to return to work as of March 25, 2003. Further medical treatment is unreasonable and unnecessary.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The claimant was the only witness to testify at the hearing.

The claimant, age 59 (D.O.B. September 17, 1945) has a high school education and work experience as a long-haul truck driver. He worked for the respondent-employer almost two years before he injured his back on February 13, 2002. The claimant was securing a load when he leaned over in an awkward position and felt a pop in his back. He developed stiffness and pain in his back and legs.

The claimant received treatment at the respondents' expense until April, 2003, when the claim was controverted based on Dr. Ward's opinion that the claimant was able to return to work. The claimant has been treated conservatively and no impairment rating has been assessed. The claimant has not returned to work or looked for work although he is willing to participate in vocational rehabilitation which has been offered by the respondents.

Presently, the claimant receives treatment at the VA Hospital. He wishes to return to Dr. Marinelli to receive the treatment recommended in his report of May 9, 2003.

MEDICAL EVIDENCE

The claimant has received treatment from several physicians out-of-state. These physicians are unknown to this examiner and no curriculum vitae were supplied. It is noted however, that Dr. Ward is associated with the university and his opinion has been given greater evidentiary weight. Dallas County Hospital v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

X-rays performed on February 26, 2002 revealed spondylosis and mild left scoliosis. An MRI scan conducted the same day was interpreted as showing a disc herniation at L3-4 with possible nerve root compression, a disc protrusion (milder left lateral) at L4-5 with degenerative disc disease and spondylosis at L4-S1 with disc narrowing spurring, and degenerative disc disease.

The claimant continued to complain of back and right leg pain. He was examined by neurosurgeon, Dr. Warren Boling on March 11, 2002:

My clinical impression is that this patient has lumbar spondylosis. He has disk bulging and no evidence of acute nerve root compression on the right side. There is no definite surgical lesion. Probably his pain is related to facet arthritis or disk degeneration.

The claimant then returned to his general practitioner for physical therapy. Progress notes dated March 29, 2002, April 18, 2002, and May 3, 2002, show improvement in the claimant's condition, however, he remained symptomatic and sought a second opinion.

The claimant came under the care of Dr. Richmond. A myelogram and CT scan conducted on June 27, 2002 revealed multilevel degenerative disc disease, a disc bulge with stenosis at L4-5 (more prominent than on the MRI scan suggesting the possibility of an HNP), left paracentral disc bulge/herniation at L5-S1, and left paracentral disc bulge/herniation at L3-4 with mild stenosis on the left.

Hank has an L3-4 disc herniation which I suspect is from his work injury that occurred in February. He also has a co-existent spinal stenosis at both L3-4 and L4-5 which is not work related. I believe that he should undergo epidural steroid injections which hopefully will alleviate his back and left leg pain. Mr. Gruber seems to feel that he would be unable to return to work. I would not recommend surgical intervention given the relatively mild degree of neuro compression present.

Dr. Richmond opined that the claimant was not a surgical candidate and sent the claimant to Dr. Sakla for pain management. Epidural steroid injections were unsuccessful in alleviating his pain. Dr. Sakla recommended referral to another specialist to discuss a discogram and intradiscal lesioning. Dr. Sakla's September 9, 2002 note indicates the claimant was also receiving treatment at the Veterans

Administration Hospital, however those records were not provided.

The claimant came under the care of Dr. Marinelli who ordered more diagnostic testing. An EMG/NCV study of the lower extremities conducted March 3, 2003 was negative.

Orthopaedic surgeon Dr. Ward, with the University of Pittsburgh, authored a report dated March 25, 2003 summarizing the claimant's history of injury and medical care.

While I believe that Mr. Gruber's low back pain is due to diffuse lumbar discogenic disease, he states that he had no low back pain prior to his twisting injury on February 13, 2002. The injury on that date did not produce the imaging findings seen on MRI but he does appear to have become symptomatic on that date according to him. In that sense there is at least a temporal relationship between his injury and the onset of pain. Exactly why the twisting mechanism would cause the onset of pain is not clear to me.

It is my feeling that the claimant is not disabled as a result of his low back pain. I see no evidence of a neurological deficit and see no evidence of segmental spinal instability.

From my standpoint the only thing keeping Mr. Gruber from being gainfully employed is the feeling on his part that he has too much pain to work.

My feeling is that further treatment should include weight reduction... I do not think that any further injections or any type of surgery would be of value.

...I would not be in favor of an invasive approach such as (nucleoplasty) as I do not believe that there is sufficient literature support to consider this a viable treatment option.

Dr. Ward returned the claimant to work on March 25, 2003 with no specific work restrictions.

The claimant then resumed treatment with pain specialist, Dr. Marinelli, but when the injections were unsuccessful, Dr. Marinelli suggested a surgical referral to discuss provocative diskography.

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.

An injured employee is entitled to temporary total disability during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and

Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive compensation regardless of his physical capabilities. The persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The evidence of record shows that neurosurgeon Dr. Bowling, orthopaedic surgeon, Dr. Ward and neurosurgeon, Dr. Richman all agree the claimant is not a surgical candidate. There is nothing they can do to improve his injury and his situation has been stable for some time now. Dr. Ward has released the claimant to return to work. Therefore, I find the claimant's healing period has ended and respondents have paid all appropriate indemnity benefits.

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).

The claimant has not responded to conservative treatment and epidural steroid injections. Pain specialist, Dr. Marinelli has recommended yet another surgical consult to discuss provocative diskography. I find the respondents have provided claimant with reasonable and necessary medical care with medication and treatment, diagnostic testing, and consultation with specialists. I see no need to consult a fourth surgeon. If Drs. Bowling, Ward or Richmond had felt additional consultation and testing was necessary, they could have made similar recommendations in their reports. Dr. Ward has specifically opined that no additional treatment is needed. Accordingly, I find the claimant has failed to prove that additional medical treatment, as recommended by Dr. Marinelli, is reasonable and necessary.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on February 13, 2002 at which time the claimant sustained a compensable injury at a compensation rate of \$425.00/\$319.00. Medical expenses and temporary total disability benefits were paid until April 11, 2003. The claimant receives disability benefits from the Veterans Administration and Social Security.
2. The claimant's healing period ended March 25, 2003 based on Dr. Ward's report. The claimant's injury is stable and cannot be improved surgically. Additionally, Dr. Ward has opined that the claimant is capable of working. Respondents have paid all appropriate temporary total disability benefits.
3. A fourth surgical consult as recommended by Dr. Marinelli is unreasonable and unnecessary. Respondents have paid all appropriate medical expenses.

This claim for additional medical treatment and temporary total disability benefits is hereby denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge