

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F304722

RONNIE C. HUDSON, EMPLOYEE	CLAIMANT
CITY OF LITTLE ROCK, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 15, 2004

Hearing conducted on April 7, 2004, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by The Honorable Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by The Honorable Betty J. Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 7, 2004, in Little Rock, Arkansas. Although Administrative Law Judge Don N. Curdie conducted this hearing, he left the Arkansas Workers' Compensation Commission before an opinion could be prepared. After notice to the parties, and without objection, I reviewed the transcript and exhibits in order to prepare this Opinion as Judge Curdie's successor.

A Prehearing Order was entered in this case on January 17, 2004. This Prehearing Order set out the stipulations offered by the parties, and outlined the issues to be litigated and resolved at the present time.

The following agreed stipulations are set forward in the Prehearing Order, were confirmed by the parties at the start of the hearing, and are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.

2. The claimant sustained a compensable injury on June 1, 2002.

_____By the terms of the Prehearing Order, and by agreement of the parties at the hearing, the issues to be litigated and resolved at the present time are limited to the following:

1. Is Claimant's need for additional medical treatment a result of his compensable injury or a result of a new injury? (Was there an independent intervening cause?)

2. Is Claimant entitled to an attorney's fee?

3. Is Claimant entitled to a change of physician?

Claimant contends that his continuing disability subsequent to his compensable June 1, 2002, injury is causally connected to that injury. Claimant denies the existence of a new injury or an independent intervening cause. Therefore, Claimant contends that he is entitled to a change of physician to Dr. William Hefley, and that since this matter has been controverted by Respondents, he is also entitled to an attorney's fee.

Respondents argue that Claimant received all appropriate benefits to which he is entitled, and that his claim for additional benefits and medical treatment is not causally related to his June 1, 2002, compensable injury. Therefore, Respondents deny that Claimant is entitled to additional benefits and a change of physicians.

DISCUSSION

A. EXISTENCE OF A CAUSAL CONNECTION

On June 1, 2002, Claimant was employed by Respondent, City of Little Rock, as a fire fighter. While engaged in fire fighting duties, a ceiling collapsed upon Claimant and two other fire fighters. The ceiling struck Claimant's head and right shoulder, but primarily his right shoulder. Claimant reported the injury to his supervisor.

After initially being examined by Dr. Kevin Roberts, Claimant was examined by Dr. David N. Collins on June 4, 2002. Dr. Collins logged the following impressions: "1. Occupation related injury, right shoulder. 2. Rule out occupation related full thickness rotator cuff tear, right." Dr. Collins noted that Claimant was presently off work; Dr. Collins anticipated that an MRI would be completed in time to define Claimant's status before he returned to work. However, a chart note dated June 6, 2002, states as follows:

Mr. Hudson came in this am to have MRI, but was unable due to clau[s]trophobia. He states that his shoulder is almost 100% better since his appointment on Tuesday. He has been taking Bextra and thinks that this has helped greatly. He will check back with us if he has any further problems, but for now the MRI has been cancelled.

Claimant testified that the Bextra helped for about six weeks, but then ceased to provide relief. This time frame coincides with the next note from Dr. Collins, dated July 12, 2002. The note states in part:

He reports bilateral shoulder pain, worse at night. It is difficult to account for his symptoms as there has been no event of injury. I have reviewed synopsis of surveillance tapes for this gentleman with Melissa Morgan. This shows him engaged in what appears to be very heavy activities.

Dr. Collins noted that Claimant's motion and power were satisfactory. He could not

account for Claimant's pain based on a structural lesion. Dr. Collins then stated:

If his symptoms persist, I would suggest that he be evaluated by a primary care physician to rule out all possible extrinsic and systemic causes of shoulder pain bilateral. From my standpoint, he can return to work without restrictions. It would not be necessary for me to see him again.

A note dated July 12, 2002, signed by Dr. Collins, marks the following entry: "Return To Work/School At Full Duty." Claimant testified that he did return to his regular fire fighting duties. He also testified that, from June until November, 2002, he worked for approximately forty hours a week as the president of a baseball field on Highway 10, performing such activities as cleaning up and stocking the concession stands. Claimant was also able to engage in his hobbies, such as hunting and fishing; in November, 2002, Claimant went camping.

Despite continuing to perform his job and engage in these other activities, Claimant testified that he continued to experience right shoulder pain from the date of his compensable injury through November, 2002, and beyond. He testified that he did not suffer a new accident or injury to his right shoulder after June 1, 2002. Despite his pain, Claimant testified that he simply adjusted in order to perform his job. From July 12, 2002 until November 4, 2002, Claimant did not see any doctor concerning his right shoulder.

On November 4, 2002, Claimant returned to Dr. Collins. A note of that date signed by Dr. Collins states:

Mr. Hudson reports a new injury with the right shoulder. Concern exists for the presence of a re-tear. There seems to be pain, weakness and crepitation. He will undergo arthrography and we will proceed accordingly.

Claimant underwent a right shoulder arthrogram on November 7, 2002. The radiology

report concerning this procedure concludes: "Moderately osteoarthritis of the AC joint is present. Exam is positive for a tear of the rotator cuff." A note dated December 18, 2002, signed by Dr. Collins, states that Claimant was advised that he has a positive rotator cuff tear. Dr. Collins placed Claimant on a therapy routine and did not change his work status.

Claimant testified that he continued to perform his regular job duties, those of a captain, until he transferred into the engineer's position he held at the time of the hearing. Claimant confirmed that even after the November 4, 2002, visit, he has been able to continue to work and do all of his activities with respect to his right shoulder. Nonetheless, Claimant testified that the shoulder continued to bother him as of the date of the hearing.

Roger Light, a fire fighter who worked with Claimant, testified that from June, 2002 to the end of the year, he observed Claimant having problems with his right shoulder. Light testified that Claimant had these problems during this whole time period. Although Light testified that he was not aware of any other injuries to Claimant's right shoulder during this time period, he also acknowledged that he did not know what activities Claimant engaged in during his off-work hours.

Thomas David Hensley worked with Claimant on June 1, 2002, and was one of the other fire fighters struck by the collapsing ceiling. He worked with Claimant from the date of his compensable injury through the end of the year, and observed Claimant having troubles with his right shoulder during that whole period of time. Although Hensley testified that he was not aware of any other incident that would have caused Claimant trouble with his right shoulder, he also acknowledged that he did not

socialize with Claimant and was not aware of his activities during his off-work hours.

At the conclusion of the hearing, Judge Curdie asked Claimant to explain Dr. Collins' use of the term "new injury" in his November 4, 2002 note. Claimant denied telling Dr. Collins that he experienced a new injury, and insisted that his disability related to the "existing injury." A note dated June 9, 2003, signed by Dr. Collins, also addresses this question. Dr. Collins had no idea what Claimant's status was between June 4, 2002 and November 4, 2002. Dr. Collins stated:

The purpose of the visit on 11/4/02 was apparently for an aggravation of the right shoulder. I used the terminology new injury for lack of a better term and not knowing his interval status since 6/4/02.

The parties framed the issue substantially as follows: whether Claimant's need for additional medical treatment is causally connected to his compensable injury, or whether his need for additional medical treatment results from an independent intervening cause. The issue is not stated in terms of Ark. Code Ann. § 11-9-508(a), that is, the parties did not ask whether Claimant's need for additional medical treatment is reasonably necessary in connection with the injury. The issue will be addressed as framed by the parties.

Benefits are not payable for a condition which results from a non-work-related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(F)(iii). "[T]he question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances." Broadway v.

B.A.S.S., 41 Ark. App. 111, 114, 848 S.W.2d 445, ___ (1993) (citation omitted). The enactment of Act 796 of 1993 did not change the prior existing law regarding independent intervening causes; Broadway's test for when an independent intervening cause relieves an employer from liability is still the law. See Hislip v. Helena/West Helena Schools, 74 Ark. App. 395, 399, 48 S.W.3d 566, ___ (2001) (citations omitted).

I find that Claimant has proven, by a preponderance of the evidence, the existence of a causal connection between his June 1, 2002, compensable injury and his subsequent disability. Particularly telling are Dr. Collins' note dated June 4, 2002, and the radiology report concerning the right shoulder arthrogram dated November 7, 2002. Dr. Collins' note at the very least indicates that he considered whether Claimant's compensable injury could have caused a full thickness rotator cuff tear in Claimant's right shoulder. An MRI was not completed at that time. However, the possibility of a tear was confirmed by the November 7, 2002, radiology report, which notes that the "Exam is positive for a tear of the rotator cuff." These documents demonstrate a causal connection between the June 1, 2002, compensable injury and Claimant's subsequent disability and need for additional medical treatment.

Other proof supports this finding. Claimant testified to continual right shoulder problems from the date of the injury to the date of the hearing. Although the medication Bextra did provide some relief, that was temporary. Claimant's continuing right shoulder problems are verified by the testimony of Roger Light and Thomas David Hensley, two fire fighters working with Claimant and in a position to see and hear about his condition. Claimant's continuing right shoulder problems are further verified by continuing reports to physicians of those problems, including notes dated June 4, 2002,

July 12, 2002, November 4, 2004, and following.

Since the requisite causal connection exists, the question then becomes whether the subsequent disability was triggered by activity on the Claimant's part which was unreasonable under the circumstances; this would give rise to an independent intervening cause. Broadway, 41 Ark. App. at 114, 848 S.W.2d at _____. The record does not support a finding that Claimant acted unreasonably under the circumstances. There is no proof that Dr. Collins or anyone else limited Claimant's activities after his June 1, 2002, compensable injury. Indeed, a note dated July 12, 2002, and signed by Dr. Collins is marked "Return To Work/School At Full Duty." If Claimant was released to return to full duty as a fire fighter, then it is not unreasonable for Claimant to believe that he could continue hunting, fishing, camping, and working at a baseball field. There is no proof Claimant was directed not to engage in any of these, or any other, activities. Cf. Broadway, 41 Ark. App. at 114-15, 848 S.W.2d at _____ (affirming that the claimant acted unreasonably by ignoring a doctor's advice).

There is a causal connection between Claimant's June 1, 2002, compensable injury and his subsequent disability and need for additional medical treatment. The Claimant did not act unreasonably under the circumstances; the record does not support a contrary finding. Therefore, in terms of the issue framed by the parties, Claimant's need for additional medical treatment is a result of his compensable injury, and he is entitled to reasonable and necessary medical treatment.

B. CHANGE OF PHYSICIAN

Claimant seeks a change of physicians to Dr. William Hefley. Claimant would like to have surgery on his right shoulder, but does not want it performed by Dr.

Collins. Dr. Collins previously operated upon Claimant's left shoulder; Claimant described the results of that surgery as "terrible." Dr. Hefley then performed a second surgery on Claimant's left shoulder, and in Claimant's opinion, the second surgery improved his condition. Claimant testified that Dr. Collins was "highly displeased" when he learned about Claimant's request to see another doctor.

Change of physician requests are governed by Ark. Code Ann. § 11-9-514(a)(3). This section provides Claimant with an absolute one-time right to a change of physicians. See Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 308-09, 75 S.W.3d 204, ___ (2002). In Collins, the issues originally litigated before the administrative law judge included the claimant's right to continuing medical treatment and right to a change of physicians. Id. at 306, 75 S.W.3d at ___. On appeal, the Arkansas Court of Appeals focused upon the change of physicians issue. The Court found that, upon request, a one-time change of physicians is mandatory, with the only discretion available to the Commission resting in its authority to determine the method by which a claimant effects a change. Id. at 309, 75 S.W.3d at ___. In light of Collins, Claimant is entitled to apply to the Commission's Medical Cost Containment Division to avail himself of a change of physicians pursuant to Ark. Code Ann. § 11-9-514(a)(3).

C. ATTORNEY'S FEES

I find that Respondents have controverted Claimant's need for additional medical benefits and request for a change of physicians. At trial, Respondent's Counsel stated: "[S]ince we have controverted the additional benefits, then our position on change of physician is, it would not be appropriate either." The record demonstrates that Respondents challenged Claimant's need for additional medical treatment, whether

by Dr. Collins or any other physician.

Since Claimant's injury occurred after July 1, 2001, Claimant's attorney's fee request is governed by the provisions Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. For prevailing on the issue of change of physicians, Claimant's attorney should be awarded a fee of \$200.00 pursuant to Section 11-9-715(c)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed between the parties at all relevant times.
2. Claimant sustained a compensable injury on June 1, 2002.
3. Claimant has proven by a preponderance of the evidence that his need for additional medical treatment for his right shoulder is causally connected to his compensable injury of June 1, 2002. Specifically, Dr. Collins' June 4, 2002 impression of a possible rotator cuff tear in Claimant's right shoulder is consistent with the November 7, 2002 radiology report following Claimant's right shoulder arthrogram which noted "Exam is positive for a tear of the rotator cuff."
4. The record fails to establish the existence of an independent intervening cause which caused or prolonged Claimant's disability or need for treatment of his right shoulder.
5. Claimant is entitled to a one-time change of physicians by following the procedures prescribed by Ark. Code Ann. § 11-9-514 and the Commission.
6. Respondents controverted Claimant's request for a change of physicians.
7. Claimant's attorney is entitled to an attorney's fee in the amount of

\$200.00 under Ark. Code Ann. § 11-9-715(c)(1) for prevailing on the issue of change of physicians.

AWARD

Respondents are directed to provide or pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml