

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F201121

JAY L. RUTZ, EMPLOYEE

CLAIMANT

WASTE SERVICES, INC., EMPLOYER

RESPONDENT

ZENITH INSURANCE COMPANY, CARRIER

RESPONDENT

OPINION FILED DECEMBER 17, 2004

A hearing in this case was conducted on September 29, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent was represented by Andrew Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on May 18, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to two stipulations, both of which are set forth in the Prehearing Order and were confirmed by the parties at the hearing. The stipulations that follow are hereby accepted:

1. The relationship of employee-employer-carrier existed on January 29, 2002, the date upon which Claimant sustained a compensable injury.

2. Claimant's compensation rate for temporary total disability is \$206.00 per week; his compensation rate for permanent partial disability is \$155.00 per week.

At the September 29, 2004 hearing, the parties discussed the issues set forth in the

Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to additional medical treatment.
2. Whether Claimant is entitled to an attorney's fee.

Claimant contends that the procedures recommended by Dr. Harold Chakales should be provided by Respondent. Respondent contends that any additional medical treatment is not reasonably necessary, and that it is not related to Claimant's compensable injury.

DISCUSSION

A. Additional Medical Studies

Claimant sustained a compensable injury on January 29, 2002. He had been cleaning hazardous material out of a tunnel-like space while dressed in protective clothing.

And I was in the tunnel and filled up my buckets so they could retrieve them, come get up the ladder to get them. This was probably about 15 or 16 feet high. And then they said, okay, your time is up. You need to come down, so I said okay.

And I removed my respirator, and Jamie was holding the ladder. So I didn't have to carry the respirator when I come down, I handed it down, tossed it down to him. So he went ahead and took it.

I was getting ready to turn around so I could come down the ladder, because you back down the ladder, and I was just getting ready to go. And I leaned down the ladder, and he took my respirator and set it over here by like where our tools and stuff was. And the ladder went out from underneath me, I went straight down, I landed on two pumps between my two shoulders.

.....

And I shattered my right heel. I took like 45 or 50 stitches, it seems like - I don't know the exact number at this time - in my left heel. Both my knees were just in horrible shape. My back was killing me. I sustained injuries even on my arms, so there was like not a part of my body that wasn't affected from the fall and the impact in coming straight down like that.

Later that day, Claimant underwent a series of studies to determine the extent of his injuries. An x-ray of Claimant's "os calcis-calcaneus-right" produced an impression of "[c]omminuted fracture of the calcaneus...." Studies of Claimant's femur, right leg, left forearm, and "os calcis-calcaneus, left" produced normal impressions. A study of Claimant's lumbar spine produced an impression of "[n]egative five views lumbar spine." A CT scan of Claimant's lower extremity without contrast, including right calcaneus, dated January 31, 2002, confirmed a "[c]ompound fracture of the calcaneus with comminution of the tubercle and small fracture lines passing into the calcaneocuboid joint and involving a small portion of the posterior subtalar facet."

Claimant presented to Dr. Steven Kulik on February 4, 2002. Following a physical examination and review of Claimant's studies, Dr. Kulik assessed the following:

1. Right comminuted calcaneus, fairly good alignment according to the Broden view. The CT scan was not available but the report was and it appeared minimally displaced, no significant diastasis.
2. Left heel ulcer.
3. Right low back contusion and sprain.

Dr. Kulik did not believe Claimant needed surgery, but recommended that an orthopedic surgeon assume responsibility for his care.

The medical records reflect that Claimant's complaints somewhat consistently include pain in his heels, knees, and low back. An MRI of Claimant's right knee taken March 4, 2002 produced an impression of "1. Medial meniscus horizontal tear involving the middle to posterior aspects.... 2. Small joint effusion. 3. Severe anterior cruciate ligament strain versus partial tear." Claimant underwent an arthroscopy and partial medial meniscectomy on March 18, 2002. However, in a note dated April 15, 2002, Dr. Thomas

Rooney recorded Claimant's complaint that his "right knee is about the same or worse than it was preoperatively." That same note records tenderness in both heels, pain in Claimant's left knee, and that "[h]is back pain is about the same...."

Claimant underwent physical therapy. He also presented for an independent medical examination by Dr. Earl Peeples on April 30, 2002; Dr. Peeples' report is somewhat inconclusive, but notes that Claimant "continues to have complaints of pain in his back, both knees and his feet." An "outside film interpretation... whole body bone scan" was performed by Dr. Martin Robinson on May 13, 2002, at the request of Dr. Peeples. This study produced the following impressions:

1. Diffuse abnormal activity around the right calcaneus which would be consistent with the stated clinical history of a right calcaneal fracture recommend correlation with anatomic bony imaging for bony detail.
2. Peripheral osteoarthritic activity is present most notably involving the shoulders and medial compartment of the right knee.
3. The activity about the spine and SI joint is nearly symmetric and there is only mild, slightly increased activity suspected at the inferior most aspect of the left SI joint.

Dr. Rooney released Claimant to return to regular work effective June 10, 2002. On that same date, Dr. Rooney noted that Claimant "still has complaints of severe low back pain, pain in both knees and pain in both heels, more on the right side." Dr. Rooney opined that Claimant had reached the end of his healing period.

I would estimate his permanent impairment to be 5% of the right lower extremity secondary to his subtalar limited motion following the calcaneal fracture, and 2% of that lower extremity as a result of the partial medial menisectomy, for a combined total of 6% of that lower extremity.

On January 15, 2003, Dr. Rooney informed Respondent's attorney that he "did not recommend any further treatment other than continued exercises, which he can do on his

own.” Dr. Rooney noted “the possibility of developing traumatic arthritis in the knee from his menisectomy....” Concerning Claimant’s back pain, Dr. Rooney added:

Also, on reviewing his chart, I note that he had a MRI of the lumbar spine on 03-04-02, which showed disc degeneration at L4-5 with a far left posterolateral annular tear. It is possible this could continue to cause him problems in the form of chronic back pain. However, it is difficult to definitely relate the MRI finding to the accident. It is also difficult to tell whether or not the described annular tear is actually symptomatic. However, he gives no previous history of back trouble, so I must assume that his symptoms were caused by the fall.

Dr. Chakales began to treat Claimant on June 2, 2003. He noted Claimant’s “chief complaint today is back and bilateral knee pain. The pain extends to the heel on the right, and down to his knee on the right.” Dr. Chakales diagnosed “1. History of lumbar spine injury. 2. Injury to both knees and both ankles. 3. Fracture of the right os calcis. 4. Chondromalacia, right knee.” Dr. Chakales subsequently reviewed Claimant’s records in greater detail, and recorded the following diagnoses in a note dated July 1, 2003: “1. Comminuted fracture, right foot, involving the subtalar and calcaneal cuboid joint. 2. Internal derangement of the knee with subsequent arthroscopic surgery.”

Claimant presented to Dr. Chakales on July 16, 2003, complaining of “pain in his back, right knee, and right heel.” Dr. Chakales opined that Claimant “should probably have a repeat MRI or CT scan of his knee and os calcis, and repeat MRI of the lumbar spine. He should have a discogram as well.”

Dr. Chakales further explained this last statement in a letter to Claimant’s attorney dated September 26, 2003. He provided a brief history of his treatment of Claimant, including that on August 27, 2003, Claimant “continued to complain of pain in three areas: his low back and right hip, right knee, and right heel where he had the fracture....” Dr.

Chakales offered the following diagnoses: “1. Healed fracture, right os calcis. 2. Post op arthroscopic surgery of the right knee with symptoms of chondromalacia. 3. Lumbar disc syndrome with an annular tear at the L4-5 level.” Then, touching upon the purpose for the September 29, 2004 hearing, Dr. Chakales wrote:

At this time, I would recommend a CT scan of the right os calcis to determine the degree of trauma in that area, and whether there is any arthritis involving the calcaneal cuboid or subtalar joint. As he remains symptomatic in his knee, I would also recommend we obtain an MRI of his right knee. My third recommendation would be to obtain a lumbar discogram with a CT scan to follow to determine whether or not he has internal disc derangement or a disc syndrome.

In order to rate his anatomical impairment correctly, I feel it is necessary these diagnostic studies be performed.

Dr. Chakales was deposed on June 7, 2004. Going to the issue before the Commission, the following exchange occurred:

Q. Okay. Doctor, am I correct in stating that based on your review of the claimant and his medical records, you recommended additional diagnostic studies, including a discogram and a repeat MRI of the lumbar spine and an MRI or CT scan of the knee and right foot?

A. Correct.

Q. Am I correct in stating, Doctor, your reason for recommending additional diagnostic studies of the right heel and foot, is to determine whether the claimant has any arthritis in the os –

A. No –

Q. – in the os calcis?

A. The purpose of getting a current MRI is to determine the state of each individual condition. He had an injury of the fracture of his os calcis. An MRI or CT scan would be able to give you the current status, because this is 2000 -- that was September, 2003, and now it's 2004. In order to know where you stand, because people who have had a fracture, will undergo traumatic degeneration of a joint. And he can develop traumatic arthritis, especially in the os calcis. In regard to his knee being that he had a meniscectomy, he

can develop post-traumatic chondromalacia of the joint. And the fact that the radiologist read it as an annular tear on the MRI, provocative discography, and he indicated the CT scan, to determine whether or not that was a symptomatic internal disc derangement, whether there was a disc herniation or not. In order to evaluate the patient's condition and give you an exact status where he is to date, and rating an anatomical impairment, I don't think you can rate an anatomical impairment unless you have these accessory studies.

Q. So basically, Doctor, what you're saying is, the reason for your requesting these specific studies is to determine the anatomic impairment for his conditions?

A. One of the things. I mean, you want to see where he stands clinically, and whether or not he needs any further treatment.

Q. Doctor, what did you mean by internal disc derangement or disc syndrome?

A. Well, internal disc derangement is a condition that exists in spinal conditions that where people whose CT scans, MRI's, myelograms that are relatively not normal, however, when we do discography, we see that there is annular degeneration. And we can do what we call a provocative discogram, which is used to create the pain. That's an indication that there is internal disc derangement or that the disc space is incompetent, which often requires decompression and stabilization by an arthrodesis or a fusion.

Dr. Kenneth Rosenzweig produced an eighteen-page independent medical examination report dated August 9, 2004. He physically examined Claimant, and conducted an extensive review and summary of Claimant's medical records and studies. Dr. Rosenzweig recorded that Claimant "is not particularly interested in starting up any active medical care regarding his injuries and is of the opinion that this is a formality for case closure." Dr. Rosenzweig confirmed that Claimant was at maximum medical improvement "as a result of his injuries from 31 months ago." He opined that Claimant "is not seeking any active care regarding his injuries and has not seen a physician in over one year, and further medical management does not appear to be required." Going to the

issue before the Commission, Dr. Rosenzweig further opined:

If there is concern regarding his lumbar spine, based on his residual stiffness, updated diagnostics with a repeat MRI may be helpful to see if there has been progression beyond normal expectation regarding any spinal disease in the lumbar spine. There is no evidence of any radicular finding, but mechanical back pain due to advance in degenerative disc disease may be appropriate for further consideration. As long as the claimant does not require further treatment or desire further intervention, it is not medically necessary to proceed with further diagnostics for administrative purposes only.

Dr. Rosenzweig was not certain Claimant was a candidate for any additional impairment rating over and above that previously awarded.

Claimant testified at the hearing on September 29, 2004. He continues to experience pain in his heels, knees, and back; before his injury, “there was nothing ever wrong with [him].” Claimant expressed his desire to undergo the studies recommended by Dr. Chakales. Upon cross-examination, Claimant denied stating to Dr. Rosenzweig that he was not interested in seeking additional medical treatment for his problems. Claimant admitted that he had not seen any physician since seeing Dr. Chakales, but he explained why: “The VA is not going to pay for it. I don’t have insurance. You [Respondent] ain’t going to pay for it.”

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508. Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation

Commission Opinion filed February 14, 2003 (E906565) (citations omitted). Whether a medical procedure is reasonably necessary is a question of fact to be determined by the Commission. Jennen v. Diamondhead Property Owner's Association, ___ Ark. App. ___, ___ S.W.3d ___ (September 29, 2004). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (May 19, 2004). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that the three studies recommended by Dr. Chakales are reasonably necessary in connection with his admittedly compensable injury. Since the date of his injury, Claimant has consistently complained of pain in his right heel, right knee, and low back. The testimony of Dr. Chakales establishes that the recommended studies are reasonably necessary, not only to rate Claimant's anatomical impairment, but to diagnose his current condition in contemplation of further treatment of these three areas. Claimant's history, as consistently reported in the medical records, establishes the connection between his compensable injury and the requested studies.

I acknowledge that Claimant already has a number of studies to his credit. Nonetheless, as Dr. Chakales noted, these studies are somewhat dated. Further, Dr. Chakales explained in some detail how his recommended studies will assist in Claimant's treatment. Notwithstanding the prior studies, the evidence of greater convincing force establishes that these studies are reasonably necessary at this time.

Respondent notes Dr. Rosenzweig's observation that Claimant does not seek additional medical treatment at this time. Claimant, who I find to be a credible witness, disputed that he stated as much to Dr. Rosenzweig; the medical records indicate that Claimant has consistently sought treatment for his condition. Claimant satisfactorily explained his failure to seek treatment in the recent past as due to an inability to pay. Claimant's credible assertion of a continuing desire for medical treatment undercuts the basis for Dr. Rosenzweig's recommendation of no "further diagnostics." And, the issue is whether Claimant is entitled to reasonably necessary medical services, not his reason for seeking those services. See Georgia-Pacific Corp. v. Dickens, 58 Ark. App. 266, 271, 950 S.W.2d 463, ___ (1997).

B. Attorney's Fee

Since Claimant's compensable injury occurred after July 1, 2001, his request for an attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. See Ballance v. K. C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392). As amended, the statute does not permit an award of an attorney's fee to Claimant. This opinion only awards Claimant medical benefits - the three recommended procedures - pursuant to Ark. Code Ann. § 11-9-508(a). However, as amended, Ark. Code Ann. § 11-9-715(a)(1)(B) provides that "[a]ttorney's fees shall not be awarded on medical benefits or services," with an exception not applicable here.

_____ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.

2. The relationship of employee-employer-carrier existed on January 29, 2002, the date upon which Claimant sustained a compensable injury.

3. Claimant's compensation rate for temporary total disability is \$206.00 per week; his compensation rate for permanent partial disability is \$155.00 per week.

4. Claimant sustained his burden of proving by a preponderance of the evidence that the three studies recommended by Dr. Chakales are reasonably necessary in connection with Claimant's compensable injury. Dr. Chakales' testimony establishes that these recommended studies are needed to diagnose Claimant's condition, in contemplation of treatment of his continuing, consistent complaints of pain in his right heel, right knee, and low back.

5. Claimant is not entitled to an award of an attorney's fee, because the applicable statute does not permit such awards on medical benefits or services.

AWARD

Respondent is directed to pay benefits in accordance with the Findings of Facts and Conclusions of Law as set forth herein.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml