

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F404328

GARY BORCHERT, Employee	CLAIMANT
MERCY HEALTH, Employer	RESPONDENT
AIG CLAIMS SERVICES, Carrier	RESPONDENT

OPINION FILED JULY 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by RONALD M. MCCANN, Attorney, Fayetteville, Arkansas.

Respondents represented by MELISSA ROSS CRINER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 8, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 19, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed on December 3, 2002 when claimant suffered a compensable injury.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$233.00 for total disability benefits and \$175.00 for permanent partial disability benefits.
4. Respondent paid benefits through June 13, 2003.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment, including surgeries in

2004.

2. Claimant's entitlement to temporary total disability benefits after June 13, 2003.
3. Attorney's fee.

The claimant contends he is entitled to additional medical treatment including surgeries in 2004 as well as temporary total disability benefits after June 13, 2003, and an attorney fee.

The respondents contend that claimant is not entitled to any additional compensation benefits. Specifically, respondents contend that claimant's current need for medical treatment is associated with a pre-existing condition, not a work-related injury. Alternatively, in the event claimant is entitled to additional compensation benefits, respondents request a credit for short and long-term disability benefits as well as group medical benefits. Finally, respondent contends that claimant suffered an independent intervening cause on March 17, 2004, which would preclude him from compensation benefits subsequent to that date.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 19, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable back injury. This includes the surgeries which were performed by Dr. Gallaher.

3. Claimant is entitled to temporary total disability benefits beginning February 20, 2004, and continuing through a date yet to be determined.

4. Pursuant to A.C.A. §11-9-411 the respondent is entitled to a credit for benefits paid to claimant for short and long-term disability as well as any medical benefits paid by a group health provider.

5. Respondent has controverted claimant's entitlement to all indemnity benefits subsequent to February 20, 2004.

FACTUAL BACKGROUND

_____ The claimant is a 57-year-old man with a high school education and some additional education in broadcasting. Claimant worked in the broadcasting field for several years before becoming employed by the respondent in December 1999. The claimant was employed by the respondent as a courier, transporting equipment and supplies between the respondent's various medical clinics.

On December 3, 2002, the claimant slipped and fell while in the process of unloading a truck of equipment supplies. Claimant testified that he felt immediate pain but finished unloading the truck and later reported the incident to Michael Wiggins, an administrator for the respondent. Wiggins instructed claimant to complete an accident report on that date and he did so. Claimant testified that he believed he had only pulled a muscle so he did not seek any medical treatment until February 2003, almost two months later. Claimant testified that during this interim period of time his pain had worsened and had begun radiating down his leg. As a result, claimant was referred by respondent to the Lowell Medical Clinic where he was evaluated by Max Beasley, a nurse practitioner, on February 14, 2003.

In a report dated February 14, 2003, Max Beasley assessed claimant's condition as a lumbar strain with radiculopathy, left lower extremity. Beasley prescribed medications

and placed claimant on work restrictions. Claimant followed up with Beasley on February 21, 2003, and his report of that date notes that claimant continues to have pain radiating down his left leg. Beasley ordered physical therapy along with continued medication and work restrictions. On February 7, 2003, claimant was evaluated by Dr. Berestnev who diagnosed claimant's condition as lumbar strain with radiculopathy, healing. Dr. Berestnev changed claimant's medications and continued his physical therapy and work restrictions. In a report dated March 25, 2003, Dr. Berestnev noted that the claimant was getting better but had developed some low back pain again with parasthesias in his lower extremities and some pain radiating down to his lower extremities. Dr. Berestnev ordered another round of physical therapy, again switched claimant's medications, and continued his work restrictions. In his report of April 7, 2003, Dr. Berestnev noted that the claimant's condition had improved and indicated that claimant should be gradually released to return to his regular duties with continued exercises and medications.

An MRI of the claimant's lumbar spine was performed on June 3, 2003, and in a report dated June 4, 2003, Dr. Moffitt at the Lowell Medical Clinic indicated that the MRI scan had approximately the same changes as a prior MRI scan. Dr. Moffitt noted that claimant's primary problem was degenerative disc disease with a pinched nerve at the L4-5 level on the left. Dr. Moffitt released the claimant to return to work with no restrictions. In a letter dated June 18, 2003, Dr. Moffitt noted that the claimant continued to have pain mostly in his leg, but indicated that no further treatment was necessary. Dr. Moffitt released claimant to full duty with no permanent impairment.

Following his release by Dr. Moffitt, the claimant on his own sought medical treatment from Dr. Smith, a chiropractic physician. In a report dated July 28, 2003, Dr. Smith diagnosed the claimant as suffering from sciatica, neuralgia, low back pain, and disc derangement. Dr. Smith recommended treatment two times per week for two months along with modified work duties.

The claimant apparently continued to receive medical treatment from Dr. Smith before he was eventually referred to Dr. Gallaher, neurosurgeon, for a neurosurgical consultation. In a report dated February 11, 2004, Dr. Gallaher states that claimant's MRI scan reveals a left L5-S1 disc herniation superimposed upon foraminal stenosis. Dr. Gallaher recommended surgery on the L5-S1 level and the surgical procedure was performed on March 4, 2005. Dr. Gallaher performed a second procedure on July 6, 2004, to repair a recurrent disc herniation. Finally, Dr. Gallaher also performed a third surgical procedure to remove a pedicle screw which had migrated from the time of the second operation.

Respondent initially accepted claimant's injury as compensable and paid compensation benefits through June 13, 2003. Claimant has filed this claim contending that he is entitled to additional medical treatment for his compensable injury, including the surgeries which have been performed by Dr. Gallaher. In addition, claimant seeks payment of temporary total disability benefits subsequent to June 13, 2003.

ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). A respondent is only required to provide medical services that are reasonably necessary for treatment of a compensable injury. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *White Consolidated Industries v. Gallaway*, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

In this particular case, the respondent contends that even though it originally accepted claimant's injury as compensable, there are no objective findings which would support additional medical treatment. However, I note that an injured worker is not

required by law to establish a need for ongoing medical treatment through evidence of objective findings. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W. 2d 1 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury subsequent to June 13, 2003. This includes the surgeries which were performed by Dr. Gallaher.

The evidence does indicate that claimant has an extensive history of prior low back pain. In fact, the medical evidence indicates that claimant sought chiropractic treatment for his back as early as 1986 from Dr. Richard Waldie, a chiropractic physician. Dr. Waldie's reports basically contain dates of treatment only, not claimant's specific complaints or the treatment provided.

It was claimant's testimony that although he did have prior low back pain which radiated into his leg, those complaints involved his right side whereas his most recent complaints involve claimant's left side. As a result of these prior complaints claimant underwent an MRI scan on November 20, 2003. According to a report from Dr. Mertz dated November 21, 2000, the MRI showed a protruded disc of mild to moderate degree on the left of L4-5 and L5-S1. That MRI scan was subsequently reviewed by Dr. Kendrick, an orthopaedist, who in a report dated July 20, 2001 noted that claimant's complaints were on the right side, not on the left as demonstrated by the MRI scan. In fact, the medical reports do not indicate claimant making any complaints of left-sided radiation prior to his December 2003 compensable injury.

Furthermore, it was the opinion of three physicians that claimant suffered either an aggravation or a new injury as a result of the December 2002 injury. In his report of June 4, 2003, Dr. Moffitt indicated that it was his belief that claimant's main problem was degenerative disc disease with a pinched nerve at the L4-5 level. While Dr. Moffitt noted

that that condition had been present prior to December 2002, Dr. Moffitt also stated that “I suspect the injury probably aggravated this condition.”

Furthermore, it was also the opinion of Dr. Smith, the chiropractic physician who treated claimant both before and after the December 2002 injury, that the claimant’s complaints subsequent to December 2002 were the result of a new condition, not the prior condition. In his report of July 28, 2003, Dr. Smith stated that claimant had previously been seen in his office for an unrelated issue back in October 2001. Dr. Smith noted that at that time the claimant’s complaints were on his right side. Dr. Smith went on to state: “This condition [right side complaints] was totally resolved prior to the development of this [left side complaints] condition. This new condition is separate and distinct.”

More importantly, it was the opinion of Dr. Gallaher, the neurosurgeon who performed the surgical procedures on the claimant, that claimant’s pre-existing condition had at the least been aggravated by the injury in December 2002.

Review of his MRI in June of 2003 reveals an etiology for his left-sided leg pain and which a severe left-sided L5-S1 foraminal stenosis combined with a shallow disc bulge extending into his foramen. This is the etiology of his left-sided leg pain.

Although there is not radiographic evidence of marked changes between his MRIs from 2000 to 2003, the patient definitely became clinically symptomatic. This is often the case when you have a slow degenerative process, which has been exacerbated by an acute event causing the patient to become symptomatic.

Thus, it was the opinion of both Drs. Moffitt and Gallaher that claimant’s December 2002 injury aggravated or exacerbated a pre-existing condition. On the other hand, it was the opinion of Dr. Smith that claimant’s most recent symptoms were a new injury since they were on his left side, not his right side as previously treated. Regardless of whether one considers claimant’s new complaints an aggravation of a pre-existing condition or a new injury all together, the evidence indicates that the medical treatment subsequent to June

16, 2003 was provided for claimant's compensable injury of December 2002, not for a pre-existing condition. Specifically, the surgeries performed by Dr. Gallaher were for symptoms relating to the December 2002 injury, not claimant's pre-existing condition.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proof by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury of December 2002. This includes the surgeries performed by Dr. Gallaher.

Respondent contends that claimant is not entitled to additional medical treatment subsequent to March 17, 2004 due to an independent intervening cause. Claimant testified that on March 18, 2004 he was in the process of getting out of a Jacuzzi at his home when his foot slipped causing additional pain in his leg. Claimant went to the emergency room and eventually returned to Dr. Gallaher who diagnosed claimant as suffering from a recurrent herniated disc. Respondent contends that the activity of stepping out of the Jacuzzi and slipping constituted an independent intervening cause so that claimant is not entitled to additional medical treatment resulting from that incident. However, I note that there can be no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W. 3d 326 (2000); *Georgia Pacific Corporation v. Carter*, 62 Ark. App. 162, 969 S.W. 2d 677 (1998); *Guidry v. J & R Eads Construction Company*, 11 Ark. App. 219, 669 S.W. 2d 483 (1984).

Here, there is no evidence that claimant's activity of getting out of the Jacuzzi at his home was unreasonable under the circumstances. There are no medical reports from Dr. Gallaher indicating that claimant should refrain from getting in or out of a Jacuzzi. In fact, claimant testified that Dr. Gallaher had recommended sitting in a Jacuzzi as therapy for his condition.

In summary, absent evidence that claimant's activity was unreasonable under the

circumstances, I do not find that the incident of March 18, 2004 constituted an independent intervening cause such that claimant would be barred from compensation benefits subsequent to that date.

The final issue for consideration involves claimant's request for temporary total disability benefits. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant is entitled to temporary total disability benefits beginning February 20, 2004 and continuing through a date yet to be determined.

As previously noted, claimant was evaluated by Dr. Gallaher, neurosurgeon, on February 11, 2004. At that time, Dr. Gallaher recommended surgery on the claimant's lumbar spine. According to claimant's testimony he continued to work for the respondent until February 20, 2004, just a few days prior to his first surgical procedure. Claimant testified that by February 20, 2004, he could hardly walk. Following that first surgery on March 4, 2004, claimant underwent two other additional surgeries. In a report dated February 28, 2005, Dr. Gallaher indicated that claimant was in the process of recovering from his third surgical procedure and noted that it might take six months to a year for claimant to completely recover.

Based upon the evidence presented, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning February 20, 2004, and continuing through a date yet to be determined.

Finally, I note that claimant testified that he received both short term and long term disability benefits while off work. Pursuant to A.C.A. §11-9-411, respondent is entitled to

a credit for the disability benefits received by the claimant. Respondent is liable for the difference between the disability benefits paid to claimant and benefits payable for temporary total disability benefits. Furthermore, to the extent that any of claimant's medical bills have been paid by group health insurance, respondent is also entitled to a credit pursuant to A.C.A. §11-9-411.

Despite the fact that respondent is entitled to a credit for short and long term disability benefits paid, respondent has nevertheless controverted claimant's entitlement to all indemnity benefits subsequent to February 20, 2004.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury of December 2002. This includes the surgical procedures which were performed by Dr. Gallaher. Claimant is also entitled to temporary total disability benefits beginning February 20, 2004, and continuing through a date yet to be determined. Respondent is entitled to a credit for disability benefits and group medical benefits pursuant to A.C.A. §11-9-411. Respondent has controverted claimant's entitlement to all indemnity benefits subsequent to February 20, 2004.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE