

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F303972

PAUL W. BULLARD, EMPLOYEE	CLAIMANT
SEARCY MACHINING & FABRICATION, EMPLOYER	RESPONDENT
CINCINNATI INDEMNITY COMPANY, CARRIER	RESPONDENT

OPINION FILED JANUARY 5, 2005

A hearing in this case was conducted on October 12, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 7, 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 three stipulations, all of which were set forth in the Prehearing Order and were confirmed by the parties at the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed on December 23, 2002, and at all other relevant times.
2. Claimant suffered a compensable injury on December 23, 2002.
3. Respondents paid medical expenses through August 25, 2003.

At the October 12, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the sole issue to be litigated and resolved is as follows:

1. Whether Claimant is entitled to reasonably necessary medical treatment in connection with his injury.

Although Claimant's entitlement to an attorney's fee is also listed as an issue in the Prehearing Order, Claimant's counsel conceded that, under the current state of the law, Claimant would not be entitled to an attorney's fee on medical benefits.

Claimant contends that he is entitled to continuing reasonably necessary medical treatment in connection with his compensable injury sustained December 23, 2002. This treatment includes, but may not be limited to, surgery as recommended by Dr. Patrick Chan. Respondents argue that Claimant's present problems are not related to his December 2002 compensable injury. If a connection is found between Claimant's compensable injury and his current need for treatment, Respondents argue that a selective nerve block should be considered as recommended by Dr. John Wilson, and that the fusion surgery recommended by Dr. Chan is not reasonably necessary.

DISCUSSION

Claimant's trade is welding and metal fabrication. At the hearing, he explained how he sustained a compensable injury on December 23, 2002.

I was standing in front of a rack that has different layers of sheet metal in it. And I reached and got a sheet of metal out and pulled it out, bent my knees to let it - you know, because I was going to pull it out and let it come down and slap me. And you bend your knees a little bit so it'll contact your knees first and not your whole body, and then just raise it up all in one motion. And in that motion is where it hurt.

Claimant explained that he felt “kind of a dull pop or a dull something.”

At the time of his compensable injury, Claimant was employed by Respondent, Searcy Machining & Fabrication. After returning from his Christmas break, Claimant learned that the owner of the business intended to close the company. After working elsewhere for a couple of weeks, Claimant successfully sought financing to purchase the business, renaming it Searcy Fabrication.

The medical records reflect that Claimant experienced incidents of back pain on May 9, 1990 and February 20, 1992. Claimant confirmed that he had experienced back strains prior to his injury, but these incidents had always resolved. He noted, “I’ve never felt these symptoms before in my life,” and that he had never previously had to seek the type of treatment he sought after December 23, 2002.

Claimant first sought medical treatment for his compensable injury on January 14, 2003, at the office of Dr. Timothy Killough. One form notes that Claimant complained of “pain after lifting piece of sheet metal” and describes his injury as “low back pain radiative (R) leg.” Claimant was diagnosed with a lumbar back strain and scheduled for an MRI. However, a radiology report dated January 31, 2003 notes the absence of “annulus bulging or disc protrusion” and records “degenerative disc changes with no disc protrusion.”

Dr. Killough treated Claimant with medications, but he continued to experience pain. Claimant was referred to Dr. Chan; the records reflect that Claimant first presented to Dr. Chan on March 17, 2003. Dr. Chan disagreed with the impression recorded in the January 31, 2003 radiology report.

Now, when I look at the MRI myself, when I first saw Mr. Bullard on 3/17/03, I interpreted the MRI as a mild degenerative disk at L5-S1, because there was some collapse of the disk space at that level, and there was some

discoloration on the MRI of that disk. More importantly, there is an annular tear, which in some physician's mind will equate as early or mild herniated disk, or bulging disk.

Dr. Chan explained why his interpretation was different from the radiologist's: "So when I look at the MRI, as a surgeon I look for things that sometimes the radiologists don't look for, or may not be so evident to them."

Following the March 17, 2003 examination, Dr. Chan recommended treating Claimant with physical therapy, an epidural steroid injection, and certain medications. Claimant testified at the hearing that he was hurting so bad he could not walk straight, so that he could not go through the physical therapy at that time. Claimant never undertook physical therapy. When Dr. Chan saw Claimant a second time on April 16, 2003, he recommended medications and epidural steroid injections. Claimant undertook two such injections, on April 29, 2003 and June 10, 2003. Claimant recalled: "It seemed like the first one made me feel pretty good, but then the second one just didn't seem like it changed anything." As to the medications prescribed by Dr. Chan, Claimant confirmed that they did relieve his pain, but that he could not function at work: "I couldn't take them at work at all. There's no way."

Claimant again presented to Dr. Chan on August 25, 2003. Claimant reported that his low back pain seemed to improve with activity. Nonetheless, Claimant complained of back pain going into his right leg. Dr. Chan testified that, apart from his degenerative disc disease and an annular tear, Claimant's exam was normal. Dr. Chan prescribed physical therapy and medications, and advised Claimant if he was not better in a month's time, "then we may consider what we call a percutaneous discectomy or nucleoplasty, which means, you know, sticking a needle into the disk and burn the disk, and in the process of

burning, also remove some of the disk....”

Dr. Chan did not see Claimant again until April of 2004. Claimant testified that he missed an appointment after the August 2003 examination, and failed to get back in for another visit. Claimant confirmed that nothing Dr. Chan had prescribed or recommended to that point actually helped his condition. Nonetheless, between August 2003 and April 2004, Claimant testified to experiencing pain: “[I]t would just be different from day to day. Some days I could do more than other days. Some days I could sit at my desk all day. Some days I couldn’t sit there until noon and then go home.” Claimant testified that he did not have any accidents at home or work between August 2003 and April 2004. When “[t]he pain got so bad till I couldn’t stand it anymore,” Claimant returned to Dr. Chan.

Some of Claimant’s statements concerning this August 2003 to April 2004 gap, made upon cross-examination, should be noted. He testified that the pain would come and go: “It’s hurt bad, and then it’s lightened up, and it’s hurt....” Nonetheless, Claimant did not seek treatment during this gap, and he continued to work full time. Claimant also reviewed or explained of number of incorrect or inapplicable explanations for not seeking treatment during this time, previously given to Respondent’s counsel. Dr. Chan confirmed that he allowed Claimant to continue working, and did not prescribe any more medications, from August 2003 to April 2004.

Claimant again presented to Dr. Chan on April 7, 2004. Dr. Chan testified that there was a change in Claimant’s examination, which he summarized as “more concrete neurological findings consistent with the original MRI diagnosis.” Claimant underwent a second MRI on April 14, 2004; this study was interpreted by the same radiologist that interpreted the first MRI. His radiology report reflects an impression of: “Annulus bulging

and localized disc protrusion in the right paracentral aspect at L5-S1 with indentation upon the right S1 nerve root as it exits from the thecal sac.” Dr. Chan commented: “Reading the radiologist’s report, the two reports, certainly the radiologist has indicated a change, i.e., further progression of the degenerative disk, with a larger herniated disk, and that would be consistent with my examination and interpretation of the MRI films as well.”

Dr. Chan next examined Claimant on April 19, 2004.

On that encounter, Mr. Bullard stated that he has persistent low back pain, and the back pain was, you know, intermittent, coming and going for about a year since the work injury, as we stated earlier. And, again, his pain was going down his right leg. The pain recently got worse. In fact, the pain started going to his left leg in addition to the right leg. He also reported numbness and tingling in the right leg.

Dr. Chan attributed Claimant’s left leg pain to a progression of his disease, regardless of its cause. Dr. Chan recommended surgery, “and because of the findings on the [second] MRI, the appropriate choice at that time would be a fusion and decompression.”

In the course of his deposition, Dr. Chan was very careful in choosing his language and in qualifying his statements. For example, he noted that “the progression of [Claimant’s] symptoms certainly could be consistent with the degenerative process or because of the injury that predisposed the spine to accelerated or further deterioration.” Nonetheless, the following testimony by Dr. Chan is instructive.

Q. Is this surgical procedure you’ve recommended, Doctor, reasonable in your mind?

A. Yes, sir.

Q. Why?

A. Because of the duration of the symptoms, that he had progressed, and the symptoms were affecting his activities of daily living, and the fact that MRI shows compatible findings with the symptoms, and the fact that he had

failed all the non-operative treatments that we could render to him.

Q. Do you think it's necessary?

A. As I told Mr. Bullard, if his pain is bad - - we don't operate just because of MRI findings. I offered it because of his symptoms in the presence of appropriate MRI findings, and I told Mr. Bullard that if his pain is bad enough to interfere with his activities of daily living, his quality of life, his work, then in his setting surgery certainly is appropriate.

Q. Dr. Wilson, Dr. Chan, when we deposed you the last time, you indicated you weren't familiar with Dr. John Wilson?

A. I'm still not familiar with him.

Q. Still not familiar. He is an orthopedic surgeon practicing in Little Rock, and he indicates in his IME report of September 16, 2004, and I quote, "Mr. Bullard on December 23, 2002 had degenerative disk disease with a superimposed bulging disk at L5-S1. It is my opinion that more than 50 percent of this gentleman's problem is due to his injury rather than his degenerative disk disease." Do you concur?

A. Yes, sir, because as I stated earlier, his symptoms and what I call annular tear, which he called bulging disk, are certainly compatible with the history that he gave me. Now, we're talking about two different things again. We're talking about the second MRI finding and the worsening of his symptoms, whether that, you know, stems from the first injury or the progressing symptoms, is because of the progression of the natural disease, which is the degenerative changes. So, again, I'm trying to be specific at the point in time what you are talking about, whether you're talking about the first MRI and the first symptoms or you're talking about the second MRI.

Q. Well, I understand that, Doctor, but just for a second I want you to take a stand. Okay? I want you to tell us whether it's more likely than not that his symptoms now and his need for surgery are related to the work injury, more likely than not?

A. Mr. Bullard is a very honest person, and I believe in what he told me, i.e., his back pain got worse. And Mr. Bullard has been working all his life. I mean, he's got minor back pain here and there that always settled down with non-operative treatments until he had a work injury in December of '03. Then things seems to get worse, to the point he was requiring medical treatment rather than something that he could treat himself. And based on the fact that the findings on the MRI certainly are compatible with the progression from the first MRI findings, I will conclude a more than 50

percent chance that the progression of his symptoms are related to the first - or the work injury that he had in December 2003. Again, I'm trying to be very careful and selective in choosing a term, not to say definitively it is, but I'm using the term more likely it is related to the injury that he had in 2003.

Q. His burden of proof, Doctor - -

A. Or 2002.

Dr. Chan conceded that "it's very possible that the progression of his symptoms and the MRI... could be because of the natural history of the degenerative changes or could be because of the progression from the initial injury, but, again, you have to put everything together."

Reference has been made to Dr. Wilson's September 16, 2004 independent medical evaluation. As noted, after examining Claimant and his studies, Dr. Wilson opined "that more than 50% of this gentleman's problem is due to his injury rather than his degenerative disc disease." However, Dr. Wilson was not prepared to recommend surgery. He noted that Claimant had not had physical therapy, "so he has not had an adequate trial of conservative management." Dr. Wilson also suggested consideration "of a selective nerve block at L5-S1 on the right to find out his response." Dr. Chan does not think a selective nerve block procedure is entirely accurate in diagnosing problems: "I think the patient's clinical symptoms, the MRI findings and so on are more - - and the physical examination, of course, all combined are more accurate than relying on just a single test alone."

At the hearing, Claimant testified that his condition has remained the same; his problems "come and go." Certain activity makes his problems worse.

Riding in a vehicle, oh, just exerting myself in any way, shape, form, or fashion. Walking too much. If I have a day that I walk a lot in the factories,

it's going to hurt that night. Just movement of that above my tailbone and any twisting action, any walking, bending over. I don't know if it's just bending over, but probably lifting things, bending down picking things up, sitting.

Claimant testified that he will undergo surgery if additional medical treatment is awarded:

"I want to be able to work again, yes, sir."

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). Medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Lewis v. WSD Turner, Full Workers' Compensation Commission Opinion filed July 12, 2004 (F212623) (citations omitted). Claimant need not establish that his compensable injury is the major cause for his need for medical treatment; rather, it is sufficient if his compensable injury is a factor in his resulting inability to work and need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, ___ S.W.3d ___ (2004); Ballance v. K. C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392).

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 additional medical treatment in connection with his injury is reasonably necessary. As to causation, Claimant’s credible testimony, taken together with the opinions offered by Dr. Chan and Dr. Wilson, establish that Claimant’s December 23, 2002 compensable injury is a factor in his inability to work and need for additional medical treatment. Claimant sustained an injury; he has experienced pain since the injury that has increased in intensity; this pain affects his ability to work. The doctors’ testimony establishes that Claimant’s compensable injury is at least a factor in his current condition and need for medical treatment. The evidence of greater convincing force establishes that Claimant’s current condition is causally related to his December 2002 compensable injury.

I specifically find that the course of treatment recommended by Dr. Chan, including fusion and decompression, is reasonably necessary. I note Respondents’ argument based upon Dr. Wilson’s independent medical examination. However, Dr. Chan’s deposition testimony convincingly establishes that the procedure he recommends, as Claimant’s treating physician, is both reasonable and necessary. Dr. Chan satisfactorily explained why a diagnostic nerve block is not needed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The employee-employer-carrier relationship existed on December 23, 2002, and at all other relevant times.

3. Claimant suffered a compensable injury on December 23, 2002.

4. Respondents paid medical expenses through August 25, 2003.

5. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to additional reasonably necessary medical treatment in connection with his compensable injury. Claimant's compensable injury continues to cause him pain which affects his ability to work; the testimony of both doctors establishes that Claimant's compensable injury is at least a factor in his need for medical treatment. Further, Dr. Chan's testimony establishes that the procedures he recommends are reasonably necessary to treat Claimant.

6. As conceded at the hearing, Claimant is not entitled to an award of an attorney's fee, because applicable law does not permit such awards on medical benefits or services.

AWARD

Respondent's are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law as set forth herein.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml