

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403435

RICHARD GIBBS, EMPLOYEE	CLAIMANT
MOFFATT LOGGING, INC., EMPLOYER	RESPONDENT
CAPITOL CITY INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 23, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 27, 2005 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment and payment of attorney's fees.

At issue is whether or not the proposed medical treatment is reasonable and necessary in relation to the compensable injury, 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.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on February 28, 2004 at which time the claimant sustained a compensable back injury at a compensation rate of \$245.00/\$184.00. Medical expenses and temporary total disability benefits (until June 30, 2004) have been paid. The Medical Cost Containment Division authorized the claimant to see Dr. Chakales in a Change of Physician Order filed January 21, 2005.

The claimant contends he remains symptomatic and wishes to pursue the recommendation of Dr. Chakales (see his report of February 21, 2005) for additional diagnostic testing (repeat MRI scan and EMG/NCV study of the lower extremities).

The claimant argues that a mandatory change of physician pursuant to Ark. Code Ann. §11-9-514 is not complete until or unless the doctor is permitted to complete his evaluation. And that until the evaluation is completed, the doctor is unable to render an opinion as to what additional treatment, if any, is needed. The claimant also argues that the Commission is empowered under Ark. Code Ann. §11-9-704(b) and §11-9-811 to investigate a claim and order an evaluation in an effort to protect the rights of the parties. The claimant relies on the following cases in support of his argument: Jay Rutz v. Waste Services, Inc., Administrative Law Judge opinion December 17, 2004 (F201121), Greer v. Phillip Mitchell Construction Co., Full Commission opinion February 14, 2003, Wal-Mart v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003), and Rachel Thomason v. Coleman Cable Systems, Administrative Law Judge opinion September 14, 2005 (E912874). Counsel is reminded that the opinion of the Administrative Law Judges carry no weight.

The respondents contend additional medical treatment is unreasonable and unnecessary. The claimant has all ready been evaluated by an MRI scan and released to return to work with no impairment. The respondents rely on Dr. Dickson's report of June 30, 2004 opining that the claimant is malingering.

The respondents argue that Dr. Chakales routinely orders redundant diagnostic testing in every case and these costs are unnecessary. The respondents have fulfilled their obligation by paying for Dr. Chakales' initial visit.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. Subsequent to the hearing, Mr. Davis authored a letter dated July 1, 2005 and Mr. Ryburn responded on July 11, 2005. Their correspondence to the Commission is incorporated by reference.

The claimant, wearing a back brace and using a cane, was the only witness to testify at the hearing.

The claimant, age 58 (D.O.B. July 31, 1946) has a tenth grade education and work experience in the logging industry, and driving a cement truck (TR. p. 8-10/19). His health history includes a workers compensation claim for a back injury in the 1980's. He worked for the respondent-employer 17 or 18 years before he injured his back on February 28, 2004 stacking lumber (TR p. 11, 22-23).

The claimant came under the care of the company physician, Dr. Garcia who referred him to Dr. Go. The carrier sent the claimant to Dr. Dickson who ordered a Functional Capacity Evaluation. The claimant stated he tried to perform the tasks but he was bothered by back pain and did not feel he was physically able to complete the testing.

The claimant obtained a change of physician to Dr. Chakales who prescribed pain medication and repeat diagnostic testing. The claimant would like to return to Dr. Chakales for additional treatment.

On cross-examination, counsel pointed out that the claimant's original complaint was swelling in his testicles diagnosed as orchitis. Then his low back started hurting and by the time he saw Dr. Chakales, his neck and shoulder were symptomatic. The claimant was unsure as to the cause of his neck problems.

MEDICAL EVIDENCE

Dr. Garcia's clinic notes show an entry on March 1, 2004 relating back pain and testicular swelling after loading lumber on February 28, 2004. The claimant was referred to Dr. Lupo, a urologist for acute right epididymo-orchitis.

Dr. Garcia referred the claimant to Dr. William Go, an orthopedic surgeon, who ordered x-rays of his back. A radiology report dated April 16, 2004 shows "minimal degenerative changes at the L2-3 disc." A follow-up report from Dr. Go records muscle spasm during the clinical examination. Dr. Go prescribed medication and physical therapy for a "back strain". Apparently, the carrier did not permit the claimant to return to Dr. Go. The claimant saw Dr. Bud Dickson on May 20, 2004 at the request of the adjuster. The only information provided to the doctor was a copy of lumbar x-rays. Dr. Dickson opined that the claimant's work-up was incomplete. He diagnosed osteoarthritis of the spine with no evidence of a herniated disc. Dr. Dickson ordered an MRI scan and FCE.

The MRI scan taken June 17, 2004 was interpreted as showing "moderate dessication of the L4-5 disc." The FCE was conducted June 17, 2004, approving the claimant for light work (lifting no more than 20 lbs.), based on incomplete tests, self-limiting behaviors, and positive Waddell's testing for malingering.

FCE REPORT: _____

This should be considered the lowest level of function secondary to self limiting behavior, with complaints of pain not matched by adequate physiological responses. The patient also demonstrated several inconsistencies during musculoskeletal screening. A comprehensive evaluation could not be completed for positional tolerance testing secondary to the patient declining to continue

testing.

Dr. Dickson released the claimant on June 30, 2004 with no restrictions or impairment rating.

I believe that Mr. Gibbs complaints are not documented secondary to objective findings... I believe this man is malingering.

The claimant saw Dr. Chakales on February 21, 2005. His report mentions the claimant's previous diagnostic testing (x-rays, MRI scan) but Dr. Chakales repeated x-ray examination in his office of the lumbar spine (degenerative disc disease at L4-5, L5-S1) and took new x-rays of the pelvis (normal) and the thoracic spine (degenerative disc disease). Dr. Chakales diagnosed lumbar disc syndrome with bilateral radicular symptoms. He recommended repeating the MRI scan (no reason was given) and obtaining an EMG/NCV study of the back and legs. The carrier controverted the additional testing and Dr. Chakales commented that the "recommended diagnostic studies are necessary for me to complete the evaluation."

It should be noted that the claimant referred to an EMG/NCV study during his testimony (TR. p. 24) however, those test results could not be located in the exhibit packet. The claimant stated he took his "paperwork" and x-rays to Dr. Chakales but not the MRI scan (TR. p. 27).

FINDINGS AND CONCLUSIONS

Employers are obligated to provide medical services which are reasonably necessary to treat compensable injuries, Ark. Code Ann. §11-9-508(a).

Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those 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 Co., Full Commission opinion February 14, 2003

(E906565); Ark. Code Ann. §11-9-705(a)(3)(Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and see Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The evidence of record shows the claimant developed an inflammation of the testicles and injured his low back in a lifting incident at work. The claimant was diagnosed with a lumbar strain based on muscle spasm observed during a clinical examination. Diagnostic testing showed only preexisting degenerative disc disease – there is no evidence of a disc bulge, herniation or other condition that would objectively establish an injury or warrant surgery. The claimant was treated by two different orthopedic surgeons with medication, physical therapy and injections. He was released with no restrictions or permanent impairment after an invalid FCE.

The claimant obtained a mandatory change of physician to a third orthopedic surgeon who recommended repeat diagnostic testing which the carrier controverted.

As I interpret the evidence, the respondents have provided adequate medical treatment, diagnostic testing and consultation with specialists. I would characterize the claimant's back injury as a temporary aggravation of a preexisting condition (degenerative disc disease). Based on the FCE results, the sincerity and duration of his complaints and need for more treatment is called into question.

If, as Mr. Davis argues, the claimant is automatically entitled to any testing requested by a change of physician, that would rob the Commission of its duty to judicially review the evidence. Counsel is reminded that the Commission reviews claims on a case by case basis. Each person's medical history is different and of course, credibility is always a factor in evaluating cases.

In the case at bar, I find that repeating the diagnostic testing is unnecessary. There is no indication that the test results were of poor quality or that additional views are needed. I also find

that additional medical treatment is unreasonable based on the FCE results showing malingering.

In the future, I think it would be helpful if the carrier would make sure that the physician has all the claimant's medical history and test results before the scheduled appointment. The carrier should also make it clear what part of the body the doctor is authorized to treat. And finally, the doctor should be given some idea of what information is needed. Are you asking his opinion on causation? A rating? Or do you just need the doctor to tell you if he has any other treatment recommendation for an aggravation of degenerative disc disease (aside from medication, physical therapy and steroid injections) that would improve the patient's condition? Of course, any questions posed to the doctor should be shared with the claimant and opposing counsel. But in general, I think improved communication with the doctor might reduce litigation.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on February 28, 2004 at which time the claimant sustained a compensable back injury.
2. The respondents have paid all appropriate benefits (treatment, medication, diagnostic testing, consultation with specialists) pursuant to Ark. Code Ann. §11-9-508.
3. The claimant has failed to prove by a preponderance of the evidence of record that additional medical treatment with Dr. Chakales is reasonable and necessary.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge