

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200907

EDWARD GRAYS, EMPLOYEE	CLAIMANT
BECTON TIMBER CO., INC., EMPLOYER	RESPONDENT
AMERICAN INTERSTATE INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 9, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on March 14, 2005 at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE STEVEN MCNEELY, 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 expenses, a rehabilitation evaluation or wage loss disability benefits and attorney's fees.

At issue is whether or not medical treatment is causally related to the compensable injury and whether or not the claimant is eligible for wage loss pursuant to Ark. Code Ann. §11-9-522. All other issues are reserved.

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 November 21, 2001 at which time the claimant sustained an injury to his neck at a compensation rate of \$333.00/\$250.00. Medical expenses, temporary total disability benefits, and a 10% rating to the body as a whole (see Dr. Cathey's report of January 27, 2003) have been paid.

The claimant contends he is entitled to payment of additional medical expenses incurred with Dr. Brian Nichol's treatment (since August, 2004) and wage loss in excess of the rating. The claimant is willing to participate in a rehabilitation evaluation at the respondents' expense.

The respondents contend Dr. Nichol's treatment is directed at new symptoms unrelated to the compensable injury. Respondents further contend that they offered the claimant a job driving a truck. Both Dr. Cathey and Dr. Baskin have released the claimant with no work restrictions. Therefore, the claimant is not entitled to rehabilitation or wage loss.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant, his wife and mother were the only witnesses to testify at the hearing. The claimant was not very articulate.

The claimant, age 49 (D.O.B. July 5, 1956) has a high school education and work experience as a mechanic, factory worker (Burlington - 19 years) and construction laborer. He worked as a skidder/chainsaw operator and log truck driver for the respondent-employer four to five years earning \$500.00 per week as a trucker. His health history includes a knife wound to the right shoulder, hypertension, right knee problems and a motor vehicle accident. The claimant presently has a commercial driver's license (CDL). He also has child support obligations.

The claimant fell when he left his truck on the scales to be weighed. He has a lawsuit pending against the owners of the scale house. The claimant described his injury as a "tear" in his neck. He experienced pain and numbness in his neck and both arms. Surgery was performed in June, 2002, but he felt his condition worsened after the surgery affecting not only his grip strength but producing leg and hip pain (Tr. p. 11, 21-22). The claimant is presently being treated by Dr. Nichols for pain management with plans to surgically implant a morphine pump.

The claimant took a Functional Capacity Evaluation (FCE) on February 16, 2005 but refused to perform some tests. The FCE was considered unreliable based on the claimant's inconsistent efforts and inappropriate pain responses. The claimant explained that since the test, he has had a trial morphine infusion pump and feels he could now participate in rehabilitation. The claimant has not worked for the past three and one half years.

MEDICAL EVIDENCE

Dr. Steven Cathey performed surgery (fusion at C5-C6) for a disc herniation at C5-C6 on the right. He was assessed a 10% anatomical impairment rating with no work restrictions and released in January, 2003.

After the surgery, the claimant continued to complain of pain, but Dr. Cathey concluded the claimant did not need additional surgical treatment based on a postoperative MRI scan showing a solid fusion with good alignment and no evidence of any abnormalities. Dr. Cathey referred the claimant to Dr. Nichols for pain management. Epidural steroid injections were tried but they adversely affected the claimant's blood sugar and did not provide any lasting relief from the pain. Likewise, the claimant stated that physical therapy did not relieve his symptoms.

Dr. Barry Baskin evaluated the claimant on May 15, 2003, summarizing the claimant's medical treatment in his report. He offered a second opinion essentially agreeing with Dr. Cathey. Dr. Baskin found no objective medical evidence to explain the claimant's symptoms of pain in his upper right extremity.

Many of Dr. Nichols' records are handwritten and difficult to read. In his report of October 25, 2002, Dr. Nichols seems to be under the impression the claimant's symptoms began after a seizure. Dr. Nichols recommended facet blocks (November 7, 2002), radiofrequency neurotomy (August 19, 2004/August 26, 2004) and a spinal cord stimulator (February 17, 2005) for facet related cervicgia from C3-C7.

It is unclear how treatment to multilevel facets bilaterally from C3 to C7 is related to the compensable disc herniation at C5-C6 on the right.

Dr. Nichols' notes indicate the adjuster controverted the claim on August 17, 2004 and the claimant's bills were then paid by his group carrier, Blue Advantage.

The claimant stated that Dr. Nichols' treatment had not provided lasting relief (Tr. p. 23-24) until he tried the trial morphine pump and he intended to return to Dr. Nichols to obtain the

permanent pump. He felt the pump made him “think better”, gave him “peace of mind”, and “control of (his) mind”. However, he does not think he can drive a truck.

LIENS

The claimant’s former attorney, Mr. Philip Wilson, filed correspondence with the Commission, asserting a lien. However, his letter offered no information on the amount of money he was claiming.

The Commission notified Mr. Wilson that unless he specified the amount and provided documentation of his expenses and an accounting of services for his fees, the lien would be deemed waived. Mr. Wilson never responded to the notice.

The involvement of the group carrier, Blue Advantage, was not disclosed on the claimant’s prehearing questionnaire and they were not notified of these proceedings. In the event of any award on appeal, the claimant will need to provide the Commission with additional information (address, policy or account numbers, etc.) so that this party may be given an opportunity to file a lien.

FINDINGS AND CONCLUSIONS

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

I find the respondents have provided adequate medical treatment, diagnostic testing, and consultation with specialists. Both Dr. Cathey and Dr. Baskin agree the surgical fusion is stable and there is no medical evidence to substantiate the claimant's symptoms. Dr. Nichols has not explained how the treatment to the facets from C3-C7 is causally related to the compensable herniated disc at C5-C6. Nor has Dr. Nichols explained why this treatment would render the claimant disabled. Accordingly, I find Dr. Nichols' treatment is unreasonable, unnecessary and unrelated to the compensable injury.

To be entitled to a program of vocational rehabilitation, the claimant must show he has a permanent injury, that the program is reasonable in relation to the disability sustained, and he must show that the employer was unwilling to make a job available within his work restrictions. Tackett v. Hickory springs Manufacturing Company, Full Commission opinion August 14, 1979 (C715817), Jones v. Tyson Foods, Inc., Full Commission opinion October 4, 1985 (D100551), Coosenberry v. McCroskey Sheet Metal, 6 Ark. App. 177, 639 S.W.2d 518 (1982), Ark. Code Ann. §11-9-505 (1987).

The outcome of a program of rehabilitation is a threshold issue before the final determination of wage loss. Rehabilitation is not available to create a more remunerative position; it is used only to return the claimant to their pre-injury status. Roche v. Bonanza Steak House, Full Commission opinion of March 3, 1988 (D309691), affirmed by the Court of Appeals December 21, 1988 in an unpublished opinion (CA88-153), Pope v. Amoco Foam Products Company, Full Commission opinion of April 19, 1993, (D903860), affirmed by the Court of Appeals in an unpublished opinion April 20, 1994 (CA93-764).

Rehabilitation has been defined by the Full Commission as anything necessary to return the claimant to the work force as soon as possible and as close as possible to his pre-injury wages. Tackett v. Hickory Springs Manufacturing Company, (1979)(C715817). This program may include any of the following options:

- a) re-employment by the same employer either
 - 1) modifying the claimant's previous job, or
 - 2) moving the claimant to a different job
- b) exploration of the claimant's transferrable skills to another type of employment
- c) placement assistance or on-the-job training
- d) retraining programs suitable to the claimant's intellectual and aptitudinal abilities which would result in gainful employment

Act 796 of 1993 changed the provisions of Ark. Code Ann. §11-9-505 prohibiting a claimant from receiving wage loss disability benefits if rehabilitation is effectively waived without good cause shown:

...The employee shall not be required to enter any program of vocational rehabilitation against his consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings. A request for the program, if elected by the claimant, must be filed with the Commission prior to a determination of the amount of permanent disability benefits payable to the employee.

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bona fide job offers, credibility, or voluntary termination. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The claimant's motivation to return to the work force is called into question by the lack of work restrictions, his lack of effort on the FCE and what I perceive to be a lack of interest in rehabilitation despite his request for that service.

The claimant is still relatively young. He has no work restrictions and his surgical treatment was successful. He has a high school education and maintains a CDL. I see no reason why the claimant could not return to work for either this employer or with another employer.

Accordingly, I find the claimant has failed to prove he is entitled to additional benefits by a preponderance of the credible evidence of record.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the claimant sustained a compensable neck injury at a compensation rate of \$333.00/\$250.00. Medical expenses, temporary total disability benefits and a 10% rating have been paid.
2. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment provided by Dr. Nichols is reasonable and necessary and related to the compensable injury based on the opinions of Dr. Cathey and Dr. Baskin. The claimant has received adequate treatment and respondents have paid all appropriate medical expenses for the compensable injury.
3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional permanent partial disability benefits for rehabilitation or wage loss. The claimant has no work restrictions, failed an FCE, and declined the respondents' job offer.
4. Claimant's former Attorney, Philip Wilson waived his lien by failing to comply with the Commission's directives.

This claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge