

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103026

GARY GREEN, EMPLOYEE	CLAIMANT
TRUCK TRANSPORT, EMPLOYER	RESPONDENT NO. 1
PACIFIC EMPLOYERS INSURANCE COMPANY, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND,	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND,	RESPONDENT NO. 3

OPINION FILED JULY 8, 2005

Hearing held April 12, 2005 before HONORABLE S. DALE DOUTHIT, Administrative Law Judge, at El Dorado, Union County, Arkansas.

Claimant was represented by Honorable Stephen R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Honorable Betty Demory, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 and No. 3 did not participate in this hearing.

STATEMENT OF THE CASE

A prehearing telephone conference was held in this claim on January 12, 2005. A

Gary Green/F103026
Opinion 7/8/05

Prehearing Order was filed in this matter on January 14, 2005. A copy of the Prehearing Order was admitted into the record, subject to the modifications made at the full hearing, as Commission Exhibit #1, without objection.

At the hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including March 2, 2001.
- 3) That the applicable TTD and PPD rates are \$343.00 and \$257.00, respectively.
- 4) That on March 2, 2001, the claimant sustained a compensable injury resulting in a ten percent (10%) impairment to the body as a whole, which was accepted and paid by the respondents.
- 5) That the claimant reached maximum medical impairment on November 6, 2001.

At the April 12, 2005 hearing, the parties agreed to limit the issues outlined in the prehearing order to the following:

- 1) Whether the claimant is entitled to the additional medical treatment recommended by Dr. Rutherford on August 22, 2003.
- 2) The parties agreed to reserve all other issues outlined in the January 14, 2005 Prehearing Order.

The claimant contended he is entitled to all reasonably related medical treatment,

Gary Green/F103026
Opinion 7/8/05

specifically the referral made by Dr. Rutherford in his August 22, 2003, letter to Drs. Ackerman and Giglia.

The respondents contended the claimant has been paid all benefits to which he is entitled.

DISCUSSION

A. History

The claimant sustained an admittedly compensable injury on March 2, 2001, as a result of a motor vehicle accident. In said accident, claimant sustained multiple broken ribs, mild compression fracture of T6 through T10, and pulmonary contusion, which required a chest tube for drainage. The claimant received medical treatment at Wadley Medical Center for several weeks. Upon his release from the hospital, claimant required additional treatment at Healthsouth Rehab Hospital. The discharge summary from Healthsouth, dated April 3, 2000, provided discharge diagnosis of pulmonary contusion, arthritis, and hypertension. The arthritis and hypertension pre-existed claimant's compensable injury.

The claimant underwent physical therapy at Ouachita County Medical Center at the direction of Dr. Percy. The initial physical therapy record of evaluation dated April 5, 2001, revealed complaints of pain in the back, abdomen and right rib cage area. By

Gary Green/F103026
Opinion 7/8/05

May 10, 2001, claimant advised the physical therapist that the pain generated from surgery had decreased to a tolerable level. On May 31, 2001, the claimant underwent a lumbar MRI, which revealed mild degenerative disc disease at L3-4, a small central disc protrusion at L4-5, without evidence of spinal canal stenosis, or lateral recess stenosis, and mild contusion in the subcutaneous tissue posterior to the lumbar spine. After receiving the results of the MRI, claimant was prescribed additional physical therapy and was referred to Dr. Brett Dietz of Neurological Associates of Texarkana. Claimant was examined by Dr. Dietz on July 17, 2001, who ordered additional physical therapy, specifically for claimant's back complaints. After completing six weeks of physical therapy, claimant continued to complain of back pain and popping. Dr. Dietz explained to the claimant on August 28, 2001, that the claimant did not have a neurosurgical problem, and that he needed to continue with physical therapy.

Claimant was referred to Dr. Barry Green for a functional capacity evaluation on September 25, 2001, but due to the claimant's excessive heart beat, the evaluation was unable to be completed at that time. A subsequent evaluation was completed on October 17, 2001, and Dr. Green determined the claimant should be able to perform light work. Following an examination on November 6, 2001, Dr. Green assessed the claimant with ten percent (10%) anatomical impairment rating based upon the bulging

Gary Green/F103026
Opinion 7/8/05

disc at L5. Dr. Green further found the claimant had reached MMI as of November 6, 2001, "having had the appropriate treatment and being at plateau, not likely to improve with future treatment."

Claimant petitioned the Commission, and was granted, a change of physician to Dr. Reginald Rutherford, and came under his care on September 4, 2002. Dr. Rutherford referred the claimant to Dr. Anthony Giglia for a pulmonary consultation. After examining the claimant and reviewing his CT Scan of the chest, Dr. Giglia noted in his October 3, 2002 chart note:

"Indeed, patient does have several old separated posterior rib fractures with irregular fragments projecting toward the pleural surface. These have not healed, and I am not sure what effect they are making on patients dyspnea.

However, at this time, I know nothing to do to make these heal, especially, since his accident was in April of 2001, which is a year and a half ago. However, again, I think his dyspnea by pulmonary function test and O₂ evaluation with walking, may well be cardiac primarily in nature, though I am sure his chest discomfort plays a role. I did not see any aortic dilatation or cardiac compromise on his chest CT. However, with his hypertension, his obesity, and his age, I suggest cardiology evaluation on this man because they control his blood pressure. If he has any cardiac compromise that can be improved, will significantly improve his well-being."

Dr. Rutherford examined the claimant on September 24, 2002, and stated as follows:

"At this juncture I do not have a good explanation for the

Gary Green/F103026
Opinion 7/8/05

magnitude of Mr. Green's complaints referable to what has been found from his imaging studies. Arrangements will be made for EMG/Nerve conduction studies of all four limbs to evaluate whether or not there is injury to the peripheral nervous system..." (RX 1, p. 1)

The respondents controverted Dr. Rutherford's September 24, 2002 recommendation for the nerve conduction studies, and a hearing was conducted before ALJ Karen McKinney to determine whether the recommendation was reasonably necessary and related to the compensable injury. Along with other issues being determined, Judge McKinney, on June 18, 2003, issued an opinion that found the EMG Nerve Conduction Studies to be necessary additional medical treatment.

On August 22, 2003, the claimant's nerve conduction studies came back normal. (CX 1, p. 41). That same day, Dr. Rutherford entered a report which stated:

" It is not possible to demonstrate evidence of injury or abnormality of the peripheral nervous system contributing to his complaints."

Dr. Rutherford then recommended referral to Dr. Giglia for completion of Dr. Giglia's prior diagnostic and therapeutic recommendations and referred claimant to Dr. Ackerman for diagnostic facet joint blocks and pain management. The respondents controverted the referral from Dr. Rutherford.

B. Adjudication

An employer shall promptly provide for an injured employee such medical

Gary Green/F103026
Opinion 7/8/05

treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a). Reasonable 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). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown* 82 Ark. App. 600, 120 S.W. 3d 53 (2003). What constitutes reasonably necessary treatment under the Statute is a question of fact for the Commission. *Dalton v. Allen Engineering Co*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

Here, the claimant contends the referral to Dr. Giglia is reasonably necessary. Dr. Rutherford, in his August 22, 2003 letter, (RX 1, p. 6), seemed to be at a loss for explaining the claimant’s alleged symptoms and referred the claimant to Dr. Giglia “for completion of his prior diagnostic and therapeutic recommendations.” However, Dr. Giglia had previously recommended a cardiology evaluation on October 3, 2002, due to the claimant’s hypertension, age and obesity. It is worth noting that Dr. Giglia’s

Gary Green/F103026
Opinion 7/8/05

October 3, 2002 recommendation was addressed in a previous opinion written by Administrative Law Judge Karen McKinney, and filed on June 18, 2003. (CX 2). Judge McKinney recited Dr. Giglia's October 3, 2002 chart note word for word, on page eight of her June 18m 2003 opinion. Judge McKinney stated the following with regard to Dr. Giglia's recommendation on page ten of her June 17, 2003 opinion:

"Dr. Giglia has recommended additional testing due to claimant (sic) pre-existing factors of hypertension, obesity and age. Moreover, claimant has not sought any active treatment since last being seen by Dr. Rutherford in October of 2002."

This examiner notes the above findings of Judge McKinney because claimant's attorney acknowledged, on the record, at the April 12, 2005 full hearing that Judge McKinney's previous Opinion was the "...law of the case...." (T. p. 6, lines 16-18) There could be a strong argument that res judicata would apply to the claimant's request for referral to Dr. Giglia; however, res judicata was not argued at the April 12, 2005 hearing, nor raised by the respondents. Instead, this examiner finds the referral to Dr. Giglia is not warranted due to the fact the medical treatment is not related to the compensable injury. For the same reasons Judge McKinney cited in her previous opinion, I find the additional testing recommended by Dr. Giglia not connected to the compensable injury, but for pre-existing reasons actually cited by Dr. Giglia in his October 3, 2002 report.

Gary Green/F103026
Opinion 7/8/05

When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze the proposed procedure and the condition it is sought to remedy. The employee has the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 60, 120 S.W. 3d 153 (2003). For the reasons cited above, I find the claimant has failed to prove by a preponderance of the evidence that the additional testing recommended by Dr. Giglia on October 3, 2002, is connected to his compensable injury.

The claimant has contended the referral to Dr. Ackerman for pain management is reasonably necessary in connection with his compensable injury. To first assess whether the pain management referred is reasonably necessary, it is important to clarify the area of pain the claimant is alleging. The claimant testified as follows with regard to his pain symptoms:

Q. Pain where? Let's be clear. Where is the pain that wakes you up?

A. The lower part of my back. (T. pg. 18, lns 23-25)

Based on the claimant's testimony at the April 12, 2005 full hearing, he indicated his low back was causing his need for pain management. However, the parties introduced the transcript and all medical exhibits of the April 10, 2003 hearing which

Gary Green/F103026
Opinion 7/8/05

included MRIs of the claimant's cervical, thoracic and lumbar spine. (JX 1, pg. 136-137)

The MRIs showed no nerve root impingement, nor evidence of central canal stenosis. After the imaging studies Dr. Rutherford said the following in his September 23, 2002 report:

“At this juncture I do not have a good explanation for the magnitude of Mr. Green's complaints referable to what has been found from his imaging studies.”

It appears that since Dr. Rutherford was at a loss to explain the claimant's complaints of pain, that Dr. Rutherford then recommended EMG/Nerve Conduction Studies of all four limbs to evaluate whether or not the claimant had injury to the peripheral nervous system. On August 22, 2003 the claimant reported for nerve conduction studies of all four limbs. The results were normal and Dr. Rutherford recited the following findings:

“The nerve conduction study and needle examination are normal. There is no evidence via electrodiagnostic testing to suggest injury or dysfunction of the peripheral nervous system including cervical nerve roots, brachial plexus, median or ulnar nerves either upper extremity, lumbar nerve roots, lumbosacral plexus, common peroneal, posterior tibial nerves either lower extremity or generalized disturbance of nerve function, specifically peripheral neuropathy. (Emphasis added) (CX 1, pg 41)

In Walls v. Wal-Mart Associates, Full Workers' Compensation Commission

Gary Green/F103026
Opinion 7/8/05

Opinion filed 5/22/02 (WCC No. F100849) the Commission stated:

We note that an injured worker is not required by law to establish a need for on-going medical treatment through evidence of objective medical findings. *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W. 2d 1 (1999). However, we note that the presence or absence of ongoing objective pathology can be a relevant factor."

In light of the imaging and nerve conduction studies, this examiner finds the claimant has fallen short of his burden to prove by a preponderance of the evidence that the proposed referrals to Dr. Ackerman and Giglia are reasonably necessary in connection with his compensable injury.

Based on the evidence before me, it would seem more plausible that the claimant's pain would be attributable to his rib fractures, even though claimant admitted to a broken rib shortly prior to his compensable injury. However, the claimant testified to this examiner that his pain was due to his back and not the ribs.

Once again, it is worth noting how close the issue of pain management comes to being res judicata. Judge McKinney, in her June 18, 2003 opinion (CX 2) listed additional medical treatment as an issue and stated the following with regard to the pain management that had been offered up to the point of the April 10, 2003 full hearing.

"After reviewing the medical records I find that the claimant's medical condition has plateaued. Additional treatment has not been offered for claimant's compensable injury to improve the claimant's

condition.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

- 1) The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties at the April 12, 2005 hearing are reasonable and hereby accepted as fact.
- 3) Claimant’s healing period ended on November 6, 2001.
- 4) Claimant has failed to prove by a preponderance of the evidence that the additional medical treatment requested from Drs. Giglia or Ackerman is reasonably necessary in connection with his March 2, 2001 compensable injury.

Gary Green/F103026
Opinion 7/8/05

ORDER

For the reasons discussed herein, this claim for additional medical treatment from Doctors Ackerman and Giglia must be, and hereby are, respectfully denied.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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