

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404798

JOHN HENDERSON

CLAIMANT

KOPPERS INDUSTRIES

RESPONDENT EMPLOYER

AMERICAN HOME ASSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED AUGUST 18, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on June 22, 2005. A prehearing conference was held on May 24, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable September 29, 2003, injury.
2. The compensation rates are \$440/330.
3. The respondents paid temporary total disability benefits from January 29, 2004, through June 10, 2004.
4. The respondents accepted and paid a 5% permanent impairment rating.

The claimant contends that he had an admittedly compensable injury and received medical care and some temporary total disability benefits and an impairment rating; however, benefits were later controverted. The claimant contends he is entitled to additional medical treatment and to temporary total disability benefits from June 11, 2004, to a date to be determined.

Respondents contend that the claim was accepted and benefits paid through June 10, 2004, for temporary total disability benefits. The permanent impairment rating was accepted and those benefits were paid. Medical benefits were controverted in October 2004. Respondents alternatively ask for a credit for any group disability or health insurance paid in this matter, if additional benefits are awarded.

ISSUES TO BE LITIGATED

1. Medical benefits.
2. Temporary total disability benefits.
3. Attorney's fees.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable September 29, 2003, injury.

2. The compensation rates are \$440/330.
3. The respondents paid temporary total disability benefits from January 29, 2004, through June 10, 2004.
4. The respondents accepted and paid a 5% permanent impairment rating.
5. The claimant has failed to prove by a preponderance of the evidence that the surgery performed by Dr. Reza Shahim, was reasonable and necessary and the responsibility of respondents.
6. The claimant has proven by a preponderance of the evidence that additional conservative pain management treatment is reasonable and necessary and the responsibility of respondents.
7. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from June 11, 2004, to a date to be determined.

DISCUSSION

The claimant, 39 years old, sustained a low back injury while attempting to remove a 136-foot steel cable from a cylinder on September 29, 2003. The claim was accepted and the claimant was initially treated at St. Vincent Hospital and then was referred to Dr. Reginald Rutherford. Dr. Rutherford referred the claimant to Dr. Frazier and to Dr. Cathey. Finally, the case manager advised the claimant that additional medical bills would not be paid. The claimant next followed up with his family doctor, Dr. Wijewardane, and was referred to various doctors, to include Dr. Frazier, Dr. Sundeep Lal and Dr. Shahim. Dr. Shahim ultimately performed surgery on March 11, 2005 and the claimant has not as yet been released to return to work. The claimant did

file his medical benefits under his group health insurance after the workers' compensation insurance controverted the claim.

According to the claimant, he continued to have back problems after Dr. Rutherford released him. The claimant testified that his back problems continued to worsen until his surgery and he has seen some improvement. The claimant continues to have back pain but can now sit a little longer. The claimant also has right leg pain and pain radiating in both hips but worse on the right. The claimant can now sit for as long as 30 minutes and takes Tylenol 4, Paxil, Amitriptyline, a muscle relaxer, Percocet, and another antidepressant. The claimant has been terminated from his employer and has not sought employment elsewhere.

The 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(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 20 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present case, respondents accepted the claim as compensable and referred the claimant to treat with Dr. Reginald Rutherford. The claimant underwent some diagnostic testing and was treated conservatively with medication, epidural steroids and physical therapy. Dr. Rutherford referred the claimant to see Dr. Steven Cathey for a consult on May 24, 2004, and Dr. Cathey noted the claimant's midline disc bulge at L3-L4, but did not find nerve root impingement and did not recommend the

claimant for any surgical procedures. A functional capacity evaluation was ordered and the claimant participated in this test on June 8, 2004, and the evaluator concluded that the claimant could work in a light physical demand job even though his efforts were inconsistent and submaximal during the testing. Dr. Rutherford released the claimant with no restrictions on June 10, 2004 and temporary total disability benefits ceased.

The claimant saw his family physician, Dr. Priyantha Wijewardane, and was referred to Dr. Sundeep Lal on July 28, 2004. Dr. Lal reviewed the claimant's diagnostic tests and opined the claimant was not a surgical candidate but did recommend aggressive physical therapy and a back conditioning program. The claimant was also referred to Dr. Reza Shahim who ordered some diagnostic testing and opined on January 6, 2005, that the claimant was not a surgical candidate but did recommend rehabilitation and pain management. The claimant next saw Dr. Sunder Krishnan on January 24, 2005, who also agreed that surgery should be avoided but back rehabilitation was recommended. The next medical evidence was an operative report from Dr. Reza Shahim who performed a lumbar decompressive laminotomy at right L3, lumbar decompressive laminotomy at right L4 and lumbar microdiscectomy at right L3-L4.

The claimant testified that he still has pain following his surgery but can now sit for a longer period of time than he could before the surgery. Evidence of post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D&B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). In the present case, I find the claimant has failed to prove that the surgery performed by Dr. Shahim was reasonable and necessary. The claimant saw at least

four specialists that opined the claimant was not a surgical candidate. Without explanation in the medical records, Dr. Shahim performed surgery on March 11, 2005. While the claimant testified he is some better, he still contends he is unable to work and still has great pain and takes a number of medications and will likely need a fusion surgery now.

Dr. Cathey, on May 24, 2004, opined that surgery was not recommended but did recommend continued conservative treatment, as did Dr. Reza Shahim and Dr. Sundeep Lal. While the medical evidence does not support surgery as being reasonable and necessary, the medical evidence does support the claimant's need for some additional pain management.

Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. §11-9-508(a) See, *Chronister v. Lavaca Vault*, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

While I find the claimant's surgery was not reasonable and necessary, I find the claimant has proven by a preponderance of the evidence that some conservative pain management is reasonable and necessary and the responsibility of respondents.

The claimant contends that he is entitled to temporary total disability benefits from June 11, 2004, to a date to be determined. In order to be entitled to temporary

total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from June 11, 2004, to an unspecified date. The medical records document the claimant was released without restrictions by Dr. Rutherford on June 11, 2004. A Functional Capacity Evaluation was performed on June 8, 2004, and the evaluator opined the claimant provided submaximal effort but demonstrated that he could at least perform light, physical-demand work. The claimant has not returned to work nor attempted to return to work since he last worked for the respondent employer. In light of being released by the doctor without restrictions and with the light-duty recommendation by the FCE evaluation, and unauthorized and not reasonable and necessary surgery for the compensable injury, I find the claimant has failed to prove he was totally unable to earn wages.

ORDER

The claimant has failed to prove by a preponderance of the evidence that the surgery performed by Dr. Shahim, was reasonable and necessary and the responsibility of respondents. The claimant has proven by a preponderance of the evidence that additional conservative pain management treatment is reasonable and necessary and the responsibility of respondents. The claimant has failed to prove by a preponderance

of the evidence that he remained in his healing period and was totally unable to earn wages from June 11, 2004, to a date to be determined.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. Ark. Code Ann. §11-9-715. Therefore, no attorney's fees are awarded.

All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. §11-9-809.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**