

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202727

ANDY E. SANDERS, EMPLOYEE	CLAIMANT
BACKUS PAINT & BODY SHOP, EMPLOYER	RESPONDENT
UNION STANDARD INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 3, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on November 5, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE BEN E. RICE, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE ANDY CALDWELL, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, a Functional Capacity Evaluation, additional temporary total disability benefits and attorney's fees. All other issues are reserved.

At issue is whether or not additional medical treatment is reasonable and necessary as defined by 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 preponderates in favor of the claimant with regard to additional medical treatment for pain management..

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on January 21, 2002 at which time the claimant sustained a compensable scheduled injury at a compensation rate of \$129.00. Medical expenses and temporary total disability benefits (from March 18-June 21, 2002 and from November 11-November 24, 2003) have been paid.

The claimant injured his right knee at work. He seeks additional temporary total disability benefits (30.14 weeks totaling \$3,888.31) based on his contention that his healing period ended on January 30, 2003. The claimant also seeks a Functional Capacity Evaluation (FCE) and continuing

medical treatment for pain management.

The respondents contend all appropriate benefits have been paid and further medical treatment is unreasonable and unnecessary. The claimant has been treated conservatively by Drs. Lytle, Martin, Massenelli, and Mulhollan. The claimant is not considered a surgical candidate.

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

The following witnesses testified at the hearing: the claimant; his employer and childhood friend, Joe Backus, whose testimony was corroborative; and the insurance adjuster, Leslie Ann Goodbar.

The claimant, age 46 (D.O.B. June 21, 1958), has a ninth grade education and work history as a manual laborer, farmer and body shop repairman (since October or November 2001). The claimant health history includes cancer and back surgery and he receives Social Security Disability benefits (\$499.00 monthly since 1995 or 1996). Because of his knee injury, the claimant walks with a limp and his foot turned inward to keep his balance. The claimant also uses a brace, cane and crutches although no physician has prescribed any walking aid.

The claimant described two injuries to his knee although he was unsure of the dates of the incidents. He first injured his knee when he slipped off the steps of a van, striking the ground with his hands and knees. He developed pain and swelling in his right knee. Then a gear box fell on his knee.

The claimant came under the care of general practitioner, Dr. Asemota, who referred him to orthopedic surgeon, Dr. Lytle. After a normal x-ray and MRI scan on April 22, 2002, the insurance carrier declined to pay for the exploratory surgery recommended by Dr. Lytle and sent the claimant to orthopedic surgeon, Dr. Ken Martin, who returned the claimant to work June 26, 2002. There is a seven month gap in the medical records from June 2002 to January 2003.

On January 28, 2003, the claimant came under the care of orthopedic surgeon, Dr. Massenelli, who recommended an FCE in a report dated January 21, 2002, but the carrier refused

to authorize the test. A second MRI scan was performed on January 31, 2003 and showed no evidence of a meniscal tear.

The claimant was also examined by orthopedic surgeon, Dr. James Mulhollan, who prescribed bicycle exercises and released the claimant in January, 2003.

The claimant stated his knee remains painful and swollen and he requests continuing medical treatment.

Insurance Adjuster Goodbar testified she had 29 years of experience handling claims. The claimant's case was initially accepted as compensable until it was discovered that he had more than one injury to his knee and there were some discrepancies in his account of the accident. The physical therapy notes show the claimant injured his knee while mowing the yard on April 10, 2002 and he had a preexisting football injury to his knee. However, the respondents did not list compensability as an issue in their prehearing questionnaire. Temporary total disability benefits were discontinued in July. Of the treating physicians (Lytle, Massenelli, Martin, Mulhollan) only one, Dr. Massenelli recommended an FCE, and only one, Dr. Lytle, recommended surgery.

Ms. Goodbar did attempt to schedule the FCE but she found it difficult to communicate with the claimant because his phone was disconnected and he would not respond to her letters. Certified letters were accepted at the claimant's last know address. Even when treatment was arranged, the claimant did not follow through with his appointment, as in the case of the physical therapy recommended by Dr. Mulhollan. After Attorney Rice became involved, Dr. Massenelli refused to refer the claimant again for an FCE because he hadn't examined him in over one year.

MEDICAL EVIDENCE

The claimant was injured on January 21, 2002 but the medical exhibits do not begin until March 8, 2002. The claimant complained of pain and swelling in his right knee but Dr. Asemota saw no evidence of swelling and the x-ray was interpreted as normal. The claimant was then referred to orthopedic surgeon, Dr. Lytle.

Dr. Lytle recorded a normal physical examination on March 18, 2002 with no evidence of

swelling, catching or locking and no outward sign of trauma or injury. Dr. Lytle also indicated the claimant had trouble pinpointing the source of his pain. Dr. Lytle recommended physical therapy, medication and light duty.

Because of persistent symptoms, Dr. Lytle ordered an MRI scan. Despite some effusion, the test results were characterized as “negative.” The claimant returned on May 9, 2002 with swelling and open wounds on his leg caused by wearing a knee brace that was not prescribed by any physician. Dr. Lytle then recommended arthroscopy for internal derangement of the knee but the basis for this diagnosis is unclear. The carrier refused to authorize surgery (see Dr. Agnew’s Peer Review Analysis dated May 20, 2002) and sent the claimant to Dr. Ken Martin.

On June 26, 2002 Dr. Martin examined the claimant and diagnosed “patella contusion with patellofemoral pain syndrome.” He did not feel the claimant was a surgical candidate. Dr. Martin recommended home exercises and advised the claimant that it might take a year to eighteen months for the pain to subside. However, the claimant could continue his activities as tolerated.

Dr. Massanelli saw the claimant on January 28, 2003 and recommended another MRI scan. The test, conducted January 31, 2003, showed a “small effusion, no meniscal tear, some changes about the MCL which could reflect an MCL sprain or strain superimposed on some chronic scarring from an old injury,” and “mild patellofemoral compartment chondromalacia.”

Dr. Massanelli agreed that the claimant was not a surgical candidate but felt he might need to consult a pain management specialist and receive occasional steroid injections. He also recommended an FCE “to see just what he can do,” because apparently Dr. Massanelli questioned the claimant’s sincerity and the extent of the injury:

His MRI certainly does not account for the severe pain that he says he has, and it certainly would not restrict him from doing any manual labor.

He is now a year out from his injury and it is my impression that he has reached maximum medical improvement.

The claimant saw Dr. Mulhollan on November 11, 2003. Based on x-rays and a physical examination, Dr. Mulhollan diagnosed “chronic pes anserine bursitis” and “osteopenia.” The

claimant was prescribed home exercises and medication.

Dr. Mulhollan's Report of 11-20-03:

The original treating physician felt that he had reached maximum medical recovery in January, 2003. I totally concur with that. When a patient is off the job for this interval, there is virtually no possibility of improvement. That indeed applies to Mr. Sanders.

It should be noted that he has no anatomical injury pattern, so the entire physical impairment here relates to a lack of normal strength. It is a very small number, perhaps 2 percent of the extremity, and certainly no more than that. I do not think any additional care is indicated.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

In summary, the evidence shows that the claimant began work for a childhood friend while he was drawing Social Security Disability benefits for various health problems. After a couple of months, the claimant reported a right knee injury which was accepted as compensable. The claimant has seen a number of physicians who have treated him conservatively for a strain superimposed on a preexisting condition. The claimant is now requesting additional medical treatment and temporary total disability benefits.

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. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, February 17, 1989 (Claim No. D612291). 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 do not consider an FCE to be medical treatment. It is a tool used to evaluate the claimant's physical stamina and abilities in order to assess vocational rehabilitation or job placement assistance. There is no authority mandating an FCE and in fact, the Commission adjudicates claims without FCEs all the time.

Pain management, however, is a reasonable and necessary medical expense, L. Vault v. B. Chronister, Full Commission opinion July 12, 1988 D704562. Despite the differing medical opinions, the claimant has been diagnosed with reduced bone mass, softened cartilage and inflammation. All of his physicians have prescribed medication so I believe the claimant does have some pain. I suggest the occasional steroid injection can be handled by a general practitioner rather than a specialist and urge the parties to agree on a physician.

The claimant has also requested additional indemnity benefits. Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period or until he returns to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended. Moreover, the persistence of pain is not sufficient in itself to extend the healing period. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

As I interpret the medical evidence, the healing period ended in June, 2002 when Dr. Martin released the claimant. By that time both Dr. Agnew and Dr. Martin had concluded that the claimant was not a surgical candidate. After that, treatment was offered to help the claimant cope with pain, but no other medical treatment was offered that would improve the condition of his knee.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on January 21, 2002 at which time the claimant sustained a compensable right knee injury at a compensation rate of \$129.00. Medical expenses and temporary total disability benefits (from March 18 to June 21, 2002 and from November 11 to November 24, 2003) have been paid.
2. The claimant's healing period ended June 26, 2002 based on Dr. Martin's assessment that he was not a surgical candidate. Respondents are directed to pay temporary total disability benefits from June 22, 2002 to June 26, 2002.
3. The claimant is not entitled to a Functional Capacity Evaluation based on statutory or case law.
4. The claimant is entitled to continuing medical treatment for pain management. If the parties cannot agree on a medical provider, the Commission will appoint a general practitioner to monitor the claimant.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

6. If they have not already done so, the respondents are directed to pay the court reporter within thirty days of this award.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct.

App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge