

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210757

SHARON K. SHANNON, EMPLOYEE

CLAIMANT

HOLLAND USA, EMPLOYER

RESPONDENT

ROYAL & SUN ALLIANCE INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED JUNE 17, 2005

Hearings before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on February 4, 2005 and March 21, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE ANDREW M. IVEY, Attorney at Law, Little Rock, Arkansas.

ISSUES

Two hearings were conducted on this claim to determine the claimant's entitlement to additional medical treatment and payment of expenses, additional temporary total disability benefits, and attorney's fees.

At issue is whether or not the treatment is reasonable, necessary and related to the compensable injury pursuant to Ark. Code Ann. §11-9-508. An additional issue is whether or not the respondents are in contempt of the Commission's Orders pursuant to Ark. Code Ann. §11-9-706.

After review, I find the evidence does not preponderate in favor of the claimant but the respondents are in contempt of the Commission's Order.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on September 18, 2002, at which time the claimant sustained a compensable back injury at a compensation rate of

\$293.00/\$220.00. Medical expenses and temporary total disability benefits (until November 6, 2004) were paid. This claim was the subject of a previous hearing with an order entered by Judge Curdie on May 22, 2003.

The claimant contends she remained symptomatic and in need of medical treatment from Dr. Ackerman which the respondents refused to provide. The claimant then went to the emergency room at McGhee County Hospital and St. Vincent's in Little Rock where she came under the care of Dr. Scott Schlesinger who performed surgery. The claimant seeks payment of medical expenses, temporary total disability benefits from October 31, 2004 to a date yet to be determined and attorney's fees. The claimant further contends the respondents are in contempt of Judge Curdie's order to provide medical treatment.

The respondents contend they are not in contempt of any order nor have they controverted this claim. They were simply investigating the doctor's treatment to determine if it was reasonable and necessary and related to the compensable injury. The respondents further contend that the claimant suffered an independent intervening accident when she fell in the shower on October 30, 2004. Respondents also contend the claimant's surgery was not pre-authorized.

The following were submitted without objection and comprise the evidence of record: The parties' prehearing questionnaire and exhibits contained in the hearing transcripts, along with the deposition of Dr. Scott Schlesinger taken January 6, 2005. The claimant and her husband testified in the hearing transcript dated February 4, 2005 while the adjuster, Bryan Elkins testified in the hearing transcript dated March 21, 2005.

The claimant, age 54, injured her back at work on September 18, 2002 and developed radicular right leg pain. She was treated conservatively by Dr. Ackerman, and missed a year of work, before she was released. She returned to work but remained symptomatic and had to leave work early on October 30, 2004.

The claimant's right leg pain had gotten progressively worse and she sought treatment from Dr. Ackerman on August 17, 2004, general practitioner, Dr. Young on October 7, 2004, and the emergency room (ER) at McGehee - Desha County Hospital on October 31, 2004. The claimant tried to return to Dr. Ackerman but had difficulty getting the carrier to approve the appointment. She stated she called his office every day for over a month to see if they had gotten approval from the carrier. She even called Dr. Ackerman at his home. She also talked to human resource manager, Tiffany Poe at work. Ms. Poe called the adjuster to see if she could speed up the approval but nothing happened. Attorney Buckner also wrote Attorney Ivey on October 22, 2003 trying to resolve the problem.

On January 14, 2004, the claimant went to the ER at St. Vincent's Hospital in Little Rock. Dr. Schlesinger performed surgery after a positive MRI scan which improved her condition. She returned to work on January 3, 2005. Once the claimant had been admitted to St. Vincent's, she learned her appointment with Dr. Ackerman had been approved. She cancelled the appointment with Dr. Ackerman and went through with the surgery even though she doesn't recall obtaining pre-authorization or giving the hospital personnel the necessary information to contact the adjuster.

The claimant also injured her left knee in October 2004 when she twisted it while exiting the shower at home. She was treated by Nurse Hubbard (Tr. p. 10-18).

Dr. Schlesinger issued two reports assessing anatomical impairment. On March 31, 2003 he rated the claimant at 5% to the body as a whole based on the 4th Edition of the AMA Guidelines. A report dated February 21, 2005 changed the assessment to 8% to the body as a whole.

CONTEMPT

The matter of contempt concerns two Commission orders filed May 22, 2003 and December 1, 2004.

On May 22, 2003 Judge Curdie issued an opinion finding the claim compensable and directing the respondents to pay “reasonably necessary medical treatment relating to the compensable injury.” There is correspondence in the record (see Mr. Buckner’s letter of April 2, 2004 and Mr. Ivey’s replies of April 15, 2004 and June 2, 2004) as well as medical reports (see Dr. Schlesinger’s report of December 24, 2003) suggesting difficulty in getting procedures approved or delays in receiving payment of benefits. There have also been problems with the calculations of benefits (see Mr. Buckner’s letter of November 4, 2003). These problems pre-dated the disputed hospitalization with Dr. Schlesinger.

On December 1, 2004 this examiner issued a prehearing order directing the Adjuster, Mr. Elkins, to appear for cross-examination and bring his file to the hearing. Mr. Elkins who resides in Texas, did not appear at the first hearing scheduled on February 4, 2005. Mr. Ivey advised this examiner that his client was aware of the Order and hearing but that he would not be in attendance. A supplemental hearing was conducted on March 21, 2005 which Mr. Elkins attended.

MEDICAL EVIDENCE

A review of the medical records show the claimant sustained a work-related back injury in February, 1999 and was treated conservatively by Drs. Schlesinger and Ackerman. She returned to

work with restrictions until her re-injury on September 18, 2002. Her medical records indicate she was eager to return to work but was susceptible to re-injury lifting heavy objects (for example, see Dr. Schlesinger's report of April 23, 2003).

Medical records show an increase in the claimant's pain on September 29, 2003 and August 17, 2004, well before the shower incident on October 6, 2004. The claimant was treated with medication and steroid injections by Dr. Ackerman.

The claimant injured her left knee on October 6, 2004, when she twisted it while exiting the shower at home. She was treated by Nurse Hubbard (Tr. p. 10-18). The claimant disagreed with the nurse's characterization of the shower incident as a fall, however, the only injury sustained in October 2004 was a sprain to the left knee. There is no mention of a back or right leg injury. This is not an independent intervening cause breaking the chain of liability for the back injury.

The disputed hospitalization with Dr. Schlesinger occurred in November 2004. His report of November 4, 2004 mentions a "new" symptom of sciatica since he had last seen her. However, Dr. Ackerman also noted sciatica in his report of August 17, 2004 prior to the shower incident.

The MRI revealed a large right L5-S1 disk herniation that correlated with the claimant's right radicular leg pain. Dr. Schlesinger performed surgery on November 6, 2004. The surgery alleviated the claimant's pain but left her with some mild numbness in the foot.

In his deposition, Dr. Scott Schlesinger testified he treated the claimant on December 26, 2002 for a September 18, 2002 back injury and referred her to Dr. Ackerman for pain management. The next time Dr. Schlesinger saw the claimant was two years later in November 2004 when he performed her surgery.

At the time of his evaluation in December, 2002, diagnostic studies showed degenerative changes and a bulge at 4-5 but no herniation at L5-S1. He diagnosed a strain of the joints (either facet or sacroiliac) and possibly aggravation of her preexisting degenerative disc disease. He opined she was not a surgical candidate and assessed 0% impairment.

Dr. Ackerman treated the claimant for radiculopathy which responded to epidural steroid injections. On March 31, 2003 he assessed a 5% rating for a disc bulge at L4/5 and released her to return to work. The claimant returned to Dr. Ackerman on August 17, 2004 with sciatica in both lower extremities.

Dr. Schlesinger explained that he did not know what caused the claimant's 2004 herniation at L5-S1 and resulting need for surgery. A degenerated disk is at risk for herniation of that same disc but it does not affect other levels of the vertebrae.

In summary, Dr. Schlesinger found no causal connection between the 2002 bulging disc at L4-5 and the 2004 herniation at L5-S1.

FINDINGS AND CONCLUSIONS

A compensable injury is one arising out of and in the course of employment, Ark. Code Ann. §11-9-102(4)(A)(1). The claimant must prove, among other things, a causal relationship between her employment and the injury. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002).

The Court has held that if:

[a] claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no

substantial evidence to sustain the [C]ommission's refusal to make an award. Clark v. Ottenheimer Bros., 229 Ark. 383, 314 S.W.2d 497. But if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the [C]ommission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172.

Hall v. Pittman Constr. Co., 235 Ark. 104, 105-106, 357 S.W.2d 263, 264 (1962).

The evidence shows that the claimant suffered a compensable back injury in 2002, a bulge at L4-L5, which responded to Dr. Ackerman's treatment with injections, allowing her to return to work.

In 2004, she began having trouble with her legs and increased right leg sciatica. She returned to Dr. Ackerman in August and September 2004 for treatment. In October, she injured her left knee in her shower at home. There is no evidence in the record of a second back injury at work or a back injury in the shower incident. In November, Dr. Schlesinger performed surgery for a herniation at L5-S1.

Dr. Schlesinger opined that the disc herniation at L5-S1 was not a compensable consequence of the earlier bulge at L4-5. Accordingly, I find the claimant has failed to meet her burden of proving by a preponderance of the evidence of record.

Further, I find the respondents are not in contempt of Judge Curdie's order to pay reasonable and necessary medical expenses. The respondents may at any time controvert a claim. However, I find the respondents are in contempt of the prehearing order directing Mr. Elkins to appear at the first hearing for cross-examination and to bring his file. As the adjuster, Mr. Elkins is a party to this claim and subject to cross-examination about the handling of a case. The fact that the carrier had

to pay Mr. Elkins' travel expenses is a cost of doing business out-of-state.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 18, 2002 at which time the claimant sustained a compensable back injury (bulge at L4-L5) at a compensation rate of \$293.00/\$220.00. Medical expenses (until November 6, 2004) were paid.
2. The claimant has failed to prove by a preponderance of the evidence of record a causal connection between the compensable injury and the development two years later of a herniation at L5-S1. Therefore, Dr. Schlesinger's surgery was unreasonable and unnecessary and respondents have no liability.
3. The respondents are in contempt of the Commission's prehearing order directing Mr. Elkins' attendance at the first trial. The fact that Mr. Elkins ultimately complied, albeit necessitating a second hearing, is reflected in the amount of the fine. The respondents are directed to pay \$5,000.00 to the Commission to be sent to the fiscal officer.

This claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge