

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400978

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| ERNEST M. WADDELL, EMPLOYEE | CLAIMANT |
| GREYHOUND LINES, INC., EMPLOYER | RESPONDENT |
| ACE AMERICAN INSURANCE COMPANY, INSURANCE CARRIER/TPA | RESPONDENT |

OPINION FILED AUGUST 10, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on June 13, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. R. Scott Morgan, Attorney-at-Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 13, 2005, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on April 27, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties stated that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. Because a future, potential dispute may exist concerning claimant's entitlement to indemnity benefits, if any, respondents introduced a copy of the claimant's pre-injury wage records at the hearing. A copy of the Prehearing Order received without objection as "Commission's Exhibit 1."

Prior to the prehearing conference, as well as the hearing, the claimant was advised of his right to legal representation; that an attorney could not charge him a

fee without approval of this Commission; that attorney's fees were normally awarded out of any benefits obtained on his behalf; and, further, that he would be required to sustain his burden of proving entitlement to additional benefits, and, that if for any reason he was unsuccessful, he could not request a second hearing, maintaining that any failure was due to his inability to properly represent himself. The claimant elected to proceed in his own behalf.

It was stipulated that the employment relationship existed at all relevant times, including December 19, 2003, and continuing through the present; that the claimant sustained a compensable back injury on December 19, 2003, which was treated as a medical only claim and for which medical benefits were paid; and that respondents had controverted claimant's entitlement to additional medical benefits.

By agreement of the parties, the primary issue presented for determination concerned claimant's entitlement to additional medical treatment.

Claimant contended, in summary, that he had continued to experience physical problems which were directly and causally related to the December 19, 2003, admitted injury; that respondents should be held responsible for his outstanding medical treatment, together with continued, reasonably necessary medical treatment. The claimant reserved his entitlement to indemnity benefits, if any.

The respondents maintained that the claimant had been paid all appropriate benefits to which he was entitled and that claimant's current, physical problems, if

any, were unrelated to the admitted injury.

The claimant was the only witness to testify. The record is composed solely of the transcript of the June 13, 2005, hearing containing numerous exhibits.

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 claimant and to observe his 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. At the time of claimant's December 19, 2003, injury, his average weekly wage was \$446.30, entitling him to compensation rates of \$298.00 per week for temporary total disability and \$224.00 per week for permanent partial disability, in the event claimant is entitled to indemnity benefits. The claimant's entitlement to indemnity benefits was specifically reserved.
4. The claimant made an unauthorized change of physicians to his family physician, Dr. Archie Hearne after receiving a Commission Form AR-N advising him of his rights and obligations concerning medical treatment. Accordingly, all of the claimant's medical treatment after January 9, 2004, is

unauthorized and remains the responsibility of the claimant.

5. Respondents have paid all authorized medical bills, to date.
6. Issues not addressed herein are, by necessity, specifically reserved.

DISCUSSION

This is an extremely difficult claim to adjudicate. The reason, in part, is because the claimant appeared *pro se*, and lacked the knowledge to properly articulate all the potential issues in his claim. Although this administrative law judge feels a sense of responsibility for not clearly identifying all potential issues, respondents, likewise, share in creating what appears to be the need for additional litigation by failing to identify all potential issues requiring resolution. Specifically, although the sole issue concerned medical treatment, corollary issues, including the claimant's right to change physicians, were not discussed. First, it is undisputed that the claimant sustained a compensable injury on December 19, 2003. Respondents initially paid all related medical treatment until the claimant was released to return to work without restrictions on January 9, 2004, at which time it terminated all additional benefits. As will be set out further below, it appears that the claimant is entitled to some temporary total disability benefits; however, the claimant specifically reserved entitlement to all indemnity benefits. Further, although the claimant has continued to received follow-up care by his family physician, Dr. Archie Hearne, this medical treatment was obtained at the claimant's own expense, without requesting a change of physicians from either the respondent

or this Commission. Clearly, the claimant could have requested, and has an absolute statutory right to at least a one-time examination and evaluation to determine whether additional treatment is reasonably necessary. The claimant failed to make this request and respondents failed to identify this potential issue. Unfortunately, the net result is a decision which fails to make any meaningful resolution. As will also be set out further below, the record reflects that the claimant had a pre-existing back problem. Because the medical evidence has remained undeveloped, it will be difficult to determine whether the claimant's ongoing medical needs, if any, are the result of the pre-existing condition or an aggravation of that condition caused by the December 19, 2003, admitted injury. The parties have, on multiple occasions be encouraged to amicably resolve their differences, if at all possible, in order to avoid protracted litigation, and are still encouraged to do so.

The claimant, Ernest M. Waddell, is fifty-eight (58) years old. He has been employed by Greyhound Lines, Inc., as a bus driver since 1987. The claimant sustained an admitted back injury on December 19, 2003, while pulling luggage for a passenger from a bin underneath the bus. The claimant promptly reported the injury to his supervisor, Sherman Hollis. Respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant prompt medical treatment with Concentra Medical Centers. The record reflects that the claimant underwent various diagnostic studies and was treated primarily with medication, injections, and physical therapy. The claimant was

apparently off work from the date of the injury and continuing through January 9, 2004, at which time he was released to regular duty without restrictions, with a diagnosis of lumbar strain with instructions to return to the clinic as needed. (Jt. Ex. A, pp. 1-7)

Although respondents asserted that light-duty work was made available to the claimant before January 9, 2004, the issue of claimant's entitlement to all indemnity benefits was specifically reserved. I do feel compelled to point out that the medical reports from Concentra clearly indicate that the claimant was restricted from performing his regular job duties, including driving the bus, and the medical records further indicate that the claimant was not working because the employer was unable to accommodate modified work restrictions.

The record reflects that following his release by Concentra, the claimant did not seek any follow-up medical care until after March, 2004, at which time he was seen by his primary care physician, Dr. Archie Hearne. Although the claimant did voice complaints of discomfort with his back on March 2, 2004, Dr. Hearne's records indicate he was seen primarily for a check of his blood pressure. Dr. Hearne's notes failed to reflect any history of work-related injury. The claimant was directed to return in four (4) weeks. The next note from Dr. Hearne indicates that the claimant was treated for chronic back pain on June 29, 2004, and released to return to work on July 11, 2004, with the only restriction being no heavy lifting. The claimant has continued to receive sample medication from Dr. Hearne while

continuing to work. Dr. Heame did subsequently refer the claimant to Dr. Reza Shahim for a neurological evaluation. Dr. Shahim saw the claimant one-time only on February 2, 2005, at which time he reviewed the lumbar MRI from January, 2004, (apparently ordered by Concentra) which showed degenerative disc disease, without nerve root compression. Dr. Shahim indicated that the claimant was symptomatic from lumbar spondylosis at L4-5. He recommended a new MRI because the symptoms had persisted, to rule out the worsening of the disc disease. He also recommended a course of physical therapy and epidural steroid injections and opined that the claimant was not a surgical candidate. (Jt. Ex. A, pp.8-13)

Initially, the claimant testified that he never received a Commission Form AR-N explaining his rights to change treating physicians. However, on cross-examination, claimant acknowledge that he personally filled out the form AR-N, giving his notice of injury after the insurance adjustor had advised him that his claim was closed and that they were not going to pay any further benefits. As previously pointed out, thereafter, the claimant sought follow-up medical care from his family physician without requesting either a change of physicians or any additional benefits until the filing of the immediate claim. (Tr.27-29)(Resp. Ex. 2)

When questioned by this administrative law judge, the claimant acknowledged having sustained prior back injuries going back to an accident when he was a child, while maintaining that he had not seen a doctor for his back in several years prior to the December 19, 2003, admitted injury. However, on cross-

examination, the claimant acknowledged that he received treatment from Dr. Hearne for a back injury as the result of a motor vehicle accident in May, 2003. Clearly, the claimant's testimony was extremely inconsistent and makes his credibility suspect. (Tr.13-14, 33-34)

When a claimant desires a change of physicians, he must petition the Commission for approval. *Sharp vs. Lewis Ford, Inc.*, 78 Ark. App. 164, 78 S.W.3d 746 (2002). Pursuant to the provisions of Act 796 of 1993, there is an absolute, statutory right to a one-time change of physicians. See, Ark. Code Ann. §11-9-514(a)(3); *Collins vs. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002).

Treatment or services furnished or prescribed by any physician other than the one selected according to the provisions of Ark. Code Ann. §11-9-514(a)(3), except emergency treatment, shall be at the claimant's expense. See, Ark. Code Ann. §11-9-514(b).

In the instant claim, the parties stipulated that the claimant sustained a compensable back injury on December 19, 2003. The claimant signed a Commission Form AR-N, an Employee's Notice of Injury, on January 16, 2004. Accordingly, he was, therefore, notified of his rights and responsibilities with regard to changing physicians. Thereafter, the claimant began receiving treatment on his own with Dr. Archie Hearne beginning March 3, 2004. There is no evidence whatsoever indicating that Dr. Hearne's treatment was "emergency treatment"

pursuant to A.C.A. §11-9-514(b). Accordingly, all treatment by Dr. Hearne or by his referral is at the claimant's own expense.

It appears that the claimant's ongoing, physical problems and need for treatment are related to his pre-existing, degenerative disc disease rather than the aggravation of his pre-existing condition caused by the December 19, 2003, admitted injury which was diagnosed as a lumbar strain. Admittedly, the respondent insurance adjustor was not justified in terminating all medical treatment upon the claimant's release by Concentra on January 9, 2004, since it is clear that the company physicians released the claimant to return on an as needed basis. However, the claimant failed to pursue additional benefits, including, but not limited to his one-time only right to a change of treating physicians.

Likewise, the record reflects that the claimant is entitled to some temporary total disability benefits. At the least, the claimant appears to be entitled to temporary total disability from the date of the admitted injury through January 9, 2004, at which time he was permitted to resume his regular duties. In fact, the claimant returned to his regular duties as a bus driver which continued through the date of the within hearing. Although the claimant testified that he has missed some additional work while receiving medical treatment from Dr. Hearne, no off-work slips were introduced, save the note by Dr. Hearne which indicated that the claimant had been treated for chronic back pain on June 29, 2004, and was released to return to work on July 11, 2004; however, Dr. Hearne failed to indicate whether the treatment

was for the claimant's pre-existing condition or the aggravation thereof. Again, the claimant's entitlement to all indemnity benefits has been specifically reserved.

The claimant has the burden of proving his entitlement to outstanding medical and related treatment, together with continued, reasonably necessary medical treatment. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he is entitled to the benefits requested. Accordingly, the immediate claim is hereby, respectfully denied and dismissed.

By necessity, all additional issues are specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge