

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F407633

LARRY WINNER, Employee	CLAIMANT
LIFTRUCK PARTS & SERVICE, Employer	RESPONDENT
CONTINENTAL CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED DECEMBER 14, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by FRANK B. NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 14, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 7, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant suffered a compensable injury on June 28, 2004.
4. The claimant was granted a change of physician to Dr. Raben by the Commission on February 24, 2005.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to medical benefits; specifically, testing recommended by Dr. Raben.

2. Temporary total disability benefits.
3. Attorney fee.

At the time of the hearing the claimant withdrew and reserved as an issue his entitlement to temporary total disability benefits.

The claimant contends he is entitled to additional medical benefits; specifically, testing recommended by Dr. Raben.

The respondents contend that additional testing is not reasonable and necessary.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 7, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, additional testing recommended by Dr. Raben.

FACTUAL BACKGROUND

The claimant suffered a compensable injury on June 28, 2004 when several pallets fell down on him almost knocking him to the ground. Claimant testified that he was struck on the top of his head, down his back and leg.

On the date of injury claimant was evaluated by Dr. McLellan. Dr. McLellan's report indicates that claimant's primarily complaints at that time were of headaches and soreness

in his neck. Dr. McLellan noted that claimant had abrasions over his left shoulder, arm, and left flank. Dr. McLellan prescribed no restrictions, indicated that claimant should take Ibuprofen or Tylenol as needed, and that claimant should receive follow-up treatment in five days.

The next medical report is dated July 19, 2004 from Dr. Samms in the same clinic as Dr. McLellan. At that time claimant was complaining of paresthesias in his right arm along with back pain and headaches. A CAT scan of the claimant's head returned normal and x-rays of claimant's cervical and thoracic spines were significant for osteoarthritis and loss of disc space at C4-5 which according to Dr. Samms would correspond with claimant's right arm paresthesias. As a result of claimant's complaints Dr. Samms ordered an MRI scan of claimant's cervical spine.

The MRI scan was performed on July 28, 2004 and the radiology report indicates that claimant had spondylotic ridging and multiple levels with foraminal spurs. It also noted that claimant had a small left spur/bulge/protrusion at C5-6. Following the MRI scan claimant was evaluated by Dr. Holder on August 2, 2004. Dr. Holder indicated that the claimant's MRI scan revealed a herniated disc at C4-5. (Dr. Holder in a letter dated October 3, 2005 clarified that his report should have read a herniated disc at the C5-6 level as opposed to C4-5.) Dr. Holder's report of August 2 indicates that claimant was complaining of headache as well as pain in the left and right side of his neck and head.

In a report dated August 11, 2004 Dr. Holder noted that claimant was still complaining of neck pain. He indicated that he informed claimant that the left-sided herniated disc would not explain symptoms in claimant's right hand. Dr. Holder on that date ordered a nerve conduction study of the right upper extremity and neck. The EMG study was performed on August 26, 2004 and read as being mildly abnormal showing a very mild/borderline right carpal tunnel syndrome. The report noted that there was no evidence of radiculopathy affecting the right upper extremity.

On August 31, 2004 claimant was sent by the respondent to Dr. Bradley Short for a second opinion. At the time of claimant's evaluation by Dr. Short his primary complaints involved the right side of his neck and right upper extremity. Dr. Short did not believe that these right-sided complaints were related to claimant's compensable injury at that time. Dr. Short referred claimant for physical therapy, application of a TENS unit, and possible anti-inflammatory medication.

Claimant next returned to Dr. Holder on September 16, 2004 following physical therapy. The claimant's complaints were better and Dr. Holder released claimant to home exercises and use of medication as needed. Dr. Holder also released claimant to return to work with some restrictions. On October 11, 2004 claimant was evaluated by Dr. Clark who is in the same clinic with Dr. Holder. Dr. Clark's report indicates that claimant's condition varies depending upon the activity he is performing. Dr. Clark refilled claimant's medication and released claimant to return to work with restrictions. Finally, on November 1, 2004 Dr. Clark released claimant to return to work without restrictions and instructed him to return as needed. Dr. Clark also refilled claimant's medication which he was to take primarily in the evening when he was having soreness.

Subsequent to the November 1, 2004 evaluation by Dr. Clark, claimant requested his one-time change of physician and on February 24, 2005 claimant was granted a change of physician to Dr. Tony Raben, neurosurgeon. Dr. Raben evaluated the claimant on February 28, 2005 and noted at that time that his chief complaint involved left-sided neck pain. Dr. Raben noted that since the claimant's last medical treatment his pain, spasm, soreness, and stiffness in his cervical spine had progressively increased. Dr. Raben assessed the claimant's condition as neck pain with a possible C5 or C6 radiculopathy on the left. Dr. Raben recommended that the claimant undergo an EMG/NCV and a CT/myelogram "to see if there is any bony osteophytosis or spurring that we are missing and to see if there is anything further to offer this gentleman." It is the

testing recommended by Dr. Raben which is at issue in the present claim.

ADJUDICATION

Even though the claimant was granted a change of physician to Dr. Raben by the Commission, a claimant is not automatically entitled to medical treatment that a physician recommends following a change of physician. Instead, claimant must establish by a preponderance of the evidence that the proposed medical treatment is reasonable and necessary in connection with the compensable injury. *Brinkley v. Gateway Industrial Services, Inc.*, Full Commission Opinion filed June 27, 2005 (F207551).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that the proposed testing recommended by Dr. Raben is reasonable and necessary in relation to claimant's compensable injury.

As previously noted, Dr. Raben in his report of February 28, 2005 recommended an EMG/NCV and CT/myelogram to determine whether there was bony osteophytosis or spurring which had been missed on earlier tests. In addition, Dr. Raben addressed his recommendation for additional testing in a letter dated August 26, 2005. Dr. Raben stated in that letter that the mechanism of the claimant's injury may have caused a traction injury to one of claimant's nerve roots which could have progressed over time. It was for that reason that Dr. Raben recommended the additional testing.

I find that Dr. Raben's opinion is credible and entitled to great weight. First, I note that Dr. Raben is the only neurosurgeon who has evaluated the claimant. Furthermore, I note that the CT/myelogram test is a more advanced test than the MRI scan which was previously performed. Furthermore, with respect to the EMG/NCV study, I note that the prior test was performed on claimant's right upper extremity. At the time of claimant's visit to Dr. Raben claimant's complaints involved his left side. As a result, Dr. Raben

diagnosed claimant as suffering from neck pain with possible C5 or C6 radiculopathy on the left.

With respect to this issue, I note that there was some testimony elicited regarding whether claimant's complaints on the left side began in September 2004 following an incident at home when claimant was working on one of his vehicles. However, the medical report from the date of injury indicates that claimant's complaints at that time involved the left side of his neck and head. The medical records clearly indicate that claimant has had left-sided neck pain since the date of his injury. Furthermore, to the extent that claimant may have had increased left-sided neck pain in September 2004, I find no evidence of an independent intervening cause which resulted from activity unreasonable under the circumstances.

Finally, I note that Dr. Raben in his letter of August 26, 2005 made a statement indicating that he concurred with Dr. Short that claimant had suffered no compensable injury "according to the Arkansas modification of the *AMA Guidelines*. However, compensability is not at issue since respondent has stipulated to a compensable injury. The only question to be determined is whether claimant is entitled to additional medical treatment as a result of that compensable injury.

In summary, claimant has the burden of proving by a preponderance of the evidence that the proposed testing recommended by Dr. Raben is reasonable and necessary in relation to his compensable injury. I find that claimant has met his burden of proof. First, I find that the opinion of Dr. Raben is credible and entitled to great weight. Dr. Raben is the only neurosurgeon who has evaluated the claimant. Dr. Raben has recommended more advanced testing in the form of a CT/myelogram and has recommended an EMG/NCV study to determine whether radiculopathy exists on the claimant's left side, not the right side as was previously tested. Based upon this evidence, I find that claimant is entitled to additional medical treatment in the form of the tests recommended by Dr.

Raben.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, an EMG/NCV study and a CT/myelogram as recommended by Dr. Raben.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE