

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211940

BOBBY BONDS, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, EMPLOYER	RESPONDENT
LUMBERMENS MUTUAL CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 24, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on October 26, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE JAMES W. STANLEY, JR., Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to additional medical treatment and attorney's fees.

At issue is whether or not additional medical treatment is reasonable, necessary and related to the compensable injury pursuant to Ark. Code Ann. §11-9-508, §11-9-102. All other issues are reserved.

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.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on October 10, 2002 at which time the claimant sustained a compensable injury at a compensation rate of \$425.00. Medical expenses; temporary total disability benefits (until July 24, 2003/July 28, 2003), a 10% impairment rating to the body as a whole, and attorney's fees have been paid.

The claimant contends he is entitled to additional temporary total disability benefits from July 28, 2003 to September 8, 2003, and attorney's fees.

The respondents contend the claimant was rated by Dr. Schlesinger on July 28, 2003 and returned to work. He is not entitled to additional temporary total disability as he is no longer in his healing period, totally unable to work. All medical expenses submitted through June, 2003 have been paid and respondent is unaware of any outstanding medical expenses.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript, along with the deposition of Dr. Safman incorporated by reference.

The claimant, who seemed to be sincere in his testimony, was the only witness to testify at the hearing.

The claimant, age 52 (D.O.B. August 31, 1953) developed low back and right leg pain after he slipped in oil and fell. The claimant has been treated by Drs. Blankenship, Schlesinger, Ackerman, and Burba. Surgery for a herniated nucleus pulposus (H.P.) was performed on January 8, 2003 and a 10% rating to the body as a whole was assessed by Dr. Schlesinger, (the claimant's medical history is summarized in the March 26, 2004 opinion).

Although the claimant returned to work, he continued to experience symptoms and the prescription medication made him dizzy. When the plant nurse sent the claimant to Dr. Burba, the claimant was continued on his medication but excused from work. The carrier then sent the claimant to Dr. Safman who took the claimant off Neurotin and returned the claimant to work.

The claimant obtained a change of physician through the Commission's Medical Cost Containment Division to Dr. Thomas Hart, who specializes in pain management. After the first visit, the respondents controverted further treatment with Dr. Hart.

The claimant testified he remains symptomatic with back, hip and right leg pain. Because his right leg is weak, he has shifted his weight to his left side, causing his left knee to swell. His job requires him to stand and walk on concrete all day which has exacerbated his symptoms. Over the past two years, the claimant has missed a total of about 30 days of work due to his back pain. Using

his group health insurance, Blue Cross/Blue Shield, the claimant has seen Drs. Morgan and Coker for medication to deal with pain, swelling and sleep disturbance. No medical records from Drs. Morgan or Coker were provided in the exhibit packet.

MEDICAL EVIDENCE

Following the 2003 surgery, a repeat MRI lumbar scan revealed an abnormality which the radiologist interpreted as a cyst, scar tissue or free disc fragment. Dr. Schlesinger ultimately dismissed this finding at L-4. as not clinically significant. However, an EMG/NCV study was positive for permanent nerve damage. Because of these test results, the claimant was prescribed Neurotin, which made him dizzy. When Dr. Burba excused the claimant from work and refilled the Necrotic prescription, the carrier transferred the claimant to Dr. Safman.

Dr. Safman repeated the EMG/NCV study which he interpreted as normal, took the claimant off Neurotin and returned him to work. A repeat MRI study done September 25, 2003 again showed an abnormality which the radiologist interpreted as a disc fragment or cyst. Dr. Safman opined these test results were similar to the previous study with the exception of scar tissue on the right at L-5. He prescribed medication which the claimant found ineffective.

Dr. Hart diagnosed the claimant with “failed back surgical syndrome” in a letter dated August 23, 2004. Dr. Hart recommended a discography to determine the etiology of the claimant’s pain.

In his deposition, Dr. Safman testified he specializes in physical medicine (muscle, ligament and tendon or myofascial pain). He began treating the claimant in September, 2003, for chronic back pain.

In contrast to Dr. Burba’s findings, Dr. Safman interpreted a repeat EMG/NCV study as negative. However, diagnostic testing also revealed epidural fibrosis around the lumbar nerve root. Dr. Safman opined there was no effective treatment for pain and discomfort caused by scar tissue.

Dr. Safman stated he found nothing in the medical testing or reports to explain the claimant’s symptoms of weakness in his right leg. Dr. Safman referred the claimant to Dr. Judy White Johnson for a psychological evaluation. She diagnosed somatization disorder. Dr. Safman

continued treating the claimant with Darvocet.

Dr. Safman ordered a repeat MRI scan which showed a disc bulge and osteophyte (spur) at L5-S1. Postoperative changes at L4-L5 include a bulging disc and osteophytes. A possible cyst appears at L4 which was present in earlier tests. At T11-T12 there is hypertrophy or ligament thickening, causing a decrease in the size of the spinal canal. This finding is considered degenerative. The radiologist did not report evidence of a herniated disc, impingement of a nerve root, or fibrosis. Based on Dr. Safman's testimony (Depo. p. 15-16, 25-26) it appears that he does not read the test but relies on the radiologist's interpretation for the test results.

Dr. Safman felt the claimant's complaints of diffuse pain on the right side and leg (covering the nerve roots from L2-S1) were inconsistent with his injury and surgery at L4-L5.

On cross-examination, Dr. Safman stated that the term, "failed back syndrome" was meaningless as it refers to the patient's subjective complaints of pain following surgery. Dr. Safman feels that if the surgery was not successful in alleviating the patient's pain, it is likely that the etiology of the pain was misdiagnosed. Dr. Safman feels that it is difficult if not impossible to correlate physical findings to subjective pain. He cited as an example patients with abnormal MRIs who never reported pain. Dr. Safman did admit that people respond differently to pain. But his standards for a diagnosis are very exacting. As an example, Dr. Safman explained that to make a diagnosis in the case at bar, he would want to see evidence of a disc herniation, muscle atrophy, nerve root impingement and positive EMG/NCV studies. Without these findings, the diagnosis is not certain, but just guesswork.

Dr. Safman felt Dr. Burba's May 2003 positive EMG/NCV study was "non-specific". The changes were minor and could not be correlated to the surgical site.

Dr. Safman feels that the subjects of discography and discogenic pain are controversial issues among physicians. Personally, Dr. Safman feels the test is unreliable and needs further study.

FINDINGS AND CONCLUSIONS

Employers must promptly provide medical services which are "reasonably necessary in

connection with” the 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. Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (2004). 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). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Commission opinion February 14, 2003 (E906565). 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).

The claimant is a credible witness who has cooperated with his physicians, the FCE evaluator, and the plant nurse. He has returned to work but his symptoms persist, requiring him to miss time from work and take medications (some of which interfere with his ability to work). He has consistently complained of symptoms on the right side since the accident, altering his gait. The claimant’s diffuse symptoms may have a psychological component, but he does indeed have scar tissue from the surgery, and his condition is aggravated by his working conditions (standing on concrete).

Pain management is reasonable and necessary medical treatment for a compensable injury. Since Dr. Hart is a specialist in pain management, and an authorized change of physician, it is appropriate that he treat the claimant’s compensable injury and its causally related consequences. The persistence of pain, however, does not entitle the claimant to additional temporary total disability benefits.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of

employer-employee-carrier existed among the parties on October 10, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$425.00. Medical expenses, temporary total disability benefits, and a 10% rating have been paid.

2. The claimant has returned to work but remains symptomatic with back and right leg pain. These symptoms have been consistent since the injury. Therefore, I find the claimant's complaints of pain are related to the compensable injury.
3. Dr. Hart has recommended a procedure that has not yet been tried by the other physicians. The procedure is designed to identify the source of the claimant's pain. As Dr. Hart specializes in pain management, I find that additional medical treatment with Dr. Hart is reasonable and necessary in relation to the compensable injury.
4. Respondents are directed to pay Dr. Hart's medical expenses within thirty days of receipt pursuant to Rule 30.
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.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

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