

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F111738

RONNIE C. HUDSON, EMPLOYEE	CLAIMANT
CITY OF LITTLE ROCK, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 6, 2006

A hearing in this case was conducted on December 20, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Betty J. Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held in this claim on November 15, 2005. A Prehearing Order was filed on November 16, 2005. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to five stipulations which were confirmed at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on May 19, 2001 and at all other relevant times.
2. Claimant filed a claim for a left arm or shoulder injury occurring on May 19, 2001 for which Respondents paid medical benefits and permanent partial disability benefits.
3. Claimant's temporary total disability rate is \$410.00 and his permanent partial disability rate is \$308.00.

4. Respondents accepted the claim as compensable and provided medical treatment and indemnity benefits until July 30, 2002, including an 11% anatomical impairment rating.

5. Claimant has withdrawn his request for a hearing as to the alleged injury to his right shoulder. AWCC file F304722 will be returned to open general files and file F111738 will proceed to a hearing on the issues set forth herein.

At the December 20, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. As evidenced by Commission Exhibit #2 and statements of counsel at the start of the hearing, by agreement of the parties issue number three listed in the Prehearing Order was amended. The parties then agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant's medical treatment by Dr. Hefley was authorized, reasonable, and necessary.

2. Whether Claimant is entitled to additional medical benefits, including out of pocket expenses and mileage.

3. Whether Claimant is entitled to temporary total disability benefits from August 28, 2003 through March 22, 2004.

DISCUSSION

A. Dr. Hefley's Medical Treatment

At the time of the hearing, Claimant was a 35-year veteran of the Little Rock Fire Department holding the rank of Captain. He described how his left shoulder was injured on May 19, 2001.

Q. Tell the Judge what happened on that date.

A. We had a structure fire on Comstock, and me and my hoseman attempted to go in through the garage. The house kind of exploded and blew us out of the house and back between two cars in the garage, with him landing on top of me. It was a pretty good explosion, and I ended up hurting my left shoulder. It knocked my air pack off for a second, and I had some smoke inhalation. Other than that, we got the fire out and got out of it.

Q. Prior to that, had you had any problems with your left shoulder?

A. No.

Q. Tell the Judge what kind of problems you were having with your left shoulder after this.

A. It hurt. I couldn't lift it without it hurting. It just hurt all the time, and I couldn't pick up anything real heavy with it without it hurting. I had quite a bit of pain with it.

Claimant initially presented to Dr. William Hefley, but the Respondent employer informed him that he would need to see Dr. David Collins.

Dr. Collins performed surgery on Claimant's left shoulder on October 1, 2001. Unfortunately, Claimant's "pain never went away or got any better than it was before the surgery, and Doctor Collins couldn't explain it." Claimant testified that Dr. Collins "discharged" or released him on April 1, 2002. Claimant recalled asking for a second opinion during his April of 2002 visit with Dr. Collins; he was told that would be okay, but no one ever contacted him about actually getting a second opinion.

Following another complaint to Dr. Collins in July of 2002 concerning his left shoulder, the medical records are largely silent concerning this injury until Claimant again presented to Dr. Hefley in July of 2003.

Q. Tell the Judge why there was a big gap in treatment on your left shoulder from July of '02 to July of '03.

A. Well, after Dr. Collins released me and told me that I had a sound shoulder and it was a pain management problem, I didn't know what else to do. I just knew I hurt, but he couldn't explain it. Finally through recommendations, I went back to see Dr. Hefley.

Claimant testified that he was able to work during this period of time.

On cross-examination and recross-examination, Respondents established that Claimant's decision to return to Dr. Hefley in July of 2003 was taken on his own initiative without consulting Respondents.

Q. As I understand from your deposition, you went to Doctor Hefley on your own for your left shoulder?

A. Yes, I did.

Q. In fact, I think you actually said, "I went back in and got the left shoulder redone with Doctor Hefley. He scoped it, and that was not workman's comp. I just did it on my own in July of 2003." Is that right?

A. Yes.

Q. And I think that's what Doctor Hefley indicated in his reports, that it was going to be on your own and was not a work comp claim at that point in time. Is that right?

A. Yes.

Q. Now, you never did turn those bills in to the City of Little Rock or to Risk Management Resources until you requested a hearing and we started this process here; is that right?

A. Right.

Q. In fact, when we had the hearing in April of 2004 over an issue for your right shoulder, you also said then that you had had your left shoulder done on your own?

A. Right.

....

Q. We've discussed the conversation you had back on April the 1st of 2002 about a second opinion. Between July of 2002 and July of 2003, you didn't

call anybody to follow up on your request for a second opinion; did you?

A. They had released me.

Q. When you went in to see Doctor Hefley in July of 2003, you didn't call and request approval to see Doctor Hefley at that time; did you?

A. No.

Dr. Hefley eventually performed another procedure on Claimant's left shoulder. Claimant recalled that "[a]fter Dr. Hefley went in and redone it, the pain went away and it worked fine. So it's okay. He fixed my shoulder." Claimant emphasized that his May of 2001 left shoulder injury did not resolve until Dr. Hefley performed the second surgery.

The medical records indicate that Claimant first presented to Dr. Scott Bowen on June 21 and 28, 2001; he then presented to Dr. Hefley on July 2, 2001. During this time, a June 26, 2001 MRI study revealed the existence of a small high grade partial thickness tear along the anterior leading edge of Claimant's distal supraspinatus tendon at its insertion in Claimant's left shoulder.

Claimant presented to Dr. Collins on July 3, 2001. Claimant denied any previous problems with his left shoulder until his work-related injury. Following conservative treatment Dr. Collins attempted to repair Claimant's left shoulder rotator cuff tear on October 1, 2001. The operative report of that date only documents the existence of one rotator cuff tear, which was repaired.

Claimant then began a series of follow-up visits with Dr. Collins. On October 29, 2001, Claimant "report[ed] pain, almost continuously." "Discomfort" was reported on November 19, 2001. On December 10, 2001, Dr. Collins noted that Claimant "is reporting perhaps less pain, but still more pain than one would expect him to be having after cuff

repair.” However, on January 9, 2002, Claimant “report[ed] improvement in his symptoms. His range of motion has definitely improved.” Dr. Collins observed on February 27, 2002 that Claimant “is asymptomatic at this point. He has nearly full range of motion. No crepitation, though he is slightly weak.”

Claimant testified that he met with Dr. Collins on April 1, 2002. Dr. Collins’ note of that date states in part:

He is doing extremely well. He was pulling on a fire hose last week and developed some increasing pain in his shoulder. His exam is not changed. There is very minimal crepitation. He has nearly full range. His power is satisfactory. Tendon signs absent.

Dr. Collins declared Claimant at maximum medical improvement and assigned Claimant an impairment rating. The parties stipulated that Claimant has been paid an 11% anatomical impairment rating.

Claimant sustained an injury to his right shoulder on June 1, 2002. Although a Form N for his left shoulder injury is not in the record, a Form N dated June 1, 2002 for the right shoulder appears on page 20 of Respondents’ Exhibit #1. Claimant identified his signature on this Form N; the Form states: “My signature below also indicates that I have been provided with my rights regarding a change-of-physician.” Claimant subsequently began a course of treatment for his right shoulder.

When presenting for right shoulder treatment, Claimant occasionally mentioned the status of his left shoulder. On June 4, 2002, Dr. Kevin Roberts recorded: “He had surgery on his left shoulder fairly recently. It is doing fairly well. He is having some pain.” On June 4, 2002, Dr. Collins recorded: “Left shoulder exam shows very minimal crepitation and ROM is full in the overhead position.” Finally, on July 12, 2002, Dr. Collins recorded the

following:

He reports bilateral shoulder pain, worse at night. It is difficult to account for his symptoms as there has been no event of injury. I have reviewed synopsis of surveillance tapes for this gentleman with Melissa Morgan. This shows him engaged in what appears to be very heavy activities.

PHYSICAL EXAMINATION: Both shoulders are examined today. There is really no significant crepitation. Motion is satisfactory and power is satisfactory.

I am unable to account for his pain based on a structural lesion....

Dr. Collins returned the Claimant to work without restrictions.

Dr. Hefley authored a note concerning Claimant on July 16, 2003. The notes states in part:

I saw him last two years ago with work-related left shoulder problems. We were going to schedule left shoulder arthroscopy. Apparently his employer had some sort of contract with Dr. David Collins and he had Dr. Collins do the surgery. [Claimant] tells me after the surgery his pain never improved. He has continued to have shoulder problems. Dr. Collins did not do an arthroscopy. He did an open surgery. [Claimant] is having pain around the acromion and AC joint. It is worse with reaching overhead. He has continued to work as a fire fighter. This originally was a work comp injury. Dr. Collins has sent him to a pain management specialist and released him. [Claimant] is putting this on his regular insurance so he can get this addressed.

Dr. Hefley suspected a rotator cuff tear and sought an MRI of Claimant's left shoulder. However, this July 22, 2003 MRI found "no evidence of rotator cuff tear."

Nonetheless, Dr. Hefley continued to suspect the existence of a partial rotator cuff tear. He operated on Claimant on August 29, 2003; his post-operative diagnosis is "left shoulder small full thickness rotator cuff tear, acromioclavicular degenerative joint disease, type 2 SLAP lesion." This operative note does not clearly indicate that the rotator cuff tear repaired was the same one addressed earlier by Dr. Collins; indeed, it notes that Dr. Hefley

“encountered sutures from a previous rotator cuff repair.” Dr. Hefley recorded in an August 29, 2003 letter:

I took Ronnie Hudson to the operating room today for left shoulder arthroscopy.

I found a Type 2 SLAP lesion. He had a small tear of the anterior edge of the supraspinatus. I could see sutures from a previous rotator cuff repair through bone tunnels in the tuberosity. He had a large anterior acromiale spur and significant AC joint degenerative changes.

I did an arthroscopy, SLAP repair, rotator cuff repair, subacromial decompression, and distal clavicle excision and removed the previous suture knots that might have been contributing to his impingement.

Again, this note does not clearly indicate that the tear repaired by Dr. Collins is the same tear repaired by Dr. Hefley.

Respondents first contend that Dr. Hefley was not an authorized treating physician. Treatment or services furnished by a physician other than one selected according to Ark. Code Ann. § 11-9-514(a)(3), except for emergency treatment, are at the claimant’s expense. Ark. Code Ann. § 11-9-514(b); see Byars Constr. Co. v. Byars, 72 Ark. App. 158, 34 S.W.3d 797 (2000). However, if a respondent is notified of an injury and thereafter fails to furnish the claimant with a copy of a notice explaining the claimant’s rights and responsibilities concerning change of physician, the change of physician rules do not apply. Ark. Code Ann. § 11-9-514(c); see Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000).

I find that Claimant is not bound to the change of physician rules because there is no proof that he received a copy of the notice explaining his rights and responsibilities as to a change of physician. There is no Form N in the file concerning Claimant’s left shoulder injury. While the file contains a Form N with regard to Claimant’s right shoulder

injury, that form relates to a separate injury involving a separate file number. The statute specifies that “[a]fter being notified of an injury,” Claimant should have been delivered a notice by Respondents. Ark. Code Ann. § 11-9-514(c)(1) (emphasis supplied). To hold Claimant to the change of physician rules, Respondents should have produced a notice relating to his left shoulder; a notice relating to his right shoulder is not sufficient.

Respondents also contend that Claimant’s treatment by Dr. Hefley was not reasonably necessary in connection with his injury. An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Reasonably necessary medical services “may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from 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 Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). Claimant need not establish that his compensable injury is the major cause for his need for medical treatment; rather, it is sufficient if his compensable injury is a factor in his resulting need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Ballance v. K.C. Contracting, Full Workers’ Compensation Commission Opinion filed August 30, 2004 (F204392).

The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, ___ Ark. App. ___, ___ S.W.3d ___ (March 16, 2005). “Preponderance of the evidence” means

evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant has not sustained his burden of proving by a preponderance of the evidence that Dr. Hefley's medical treatment was reasonably necessary in connection with his injury. Simply put, Claimant has not met his burden of proof to establish that his compensable injury is a factor in his resulting need for Dr. Hefley's treatment. Claimant did testify to the absence of another incident between Dr. Collins' first surgery and Dr. Hefley's second surgery. Likewise, he testified to continuing pain during this time. However, the medical records indicate that Claimant's left shoulder problem resolved in 2002. On February 27, 2002, Dr. Collins recorded that Claimant was "asymptomatic at this point." On April 1, 2002, Dr. Collins recorded that Claimant "is doing extremely well," although another work incident had "developed some increasing pain in his shoulder." Finally, Dr. Roberts noted on June 4, 2002 that, with regard to his recent left shoulder surgery, Claimant was "doing fairly well" although he was "having some pain."

Other evidence refuting a connection between the injury and the need for Dr. Hefley's treatment consists of Claimant's own actions. While the June 1, 2002 Form N on page 20 of Respondents' Exhibit #1 is for a separate claim, it did notify Claimant of his change of physician rights. Despite this knowledge, when Claimant sought Dr. Hefley's treatment in July of 2003 he acted entirely on his own. He did not seek a change of physician; he submitted the medical bills from Dr. Hefley's treatment to his group health insurance carrier; he did not turn those bills over to Respondents; he did not call and request approval from Respondents to see Dr. Hefley.

Further, the medical records do not adequately connect Dr. Hefley's treatment to Claimant's compensable left shoulder injury. Claimant's June 26, 2001 MRI study only identified one tear; presumably, this was the one tear identified and repaired by Dr. Collins on October 1, 2001. There is no indication in Dr. Hefley's notes or operative report that he addressed this exact same tear.

In light of the foregoing, the preponderance of the evidence does not establish a connection between Claimant's compensable injury to his left shoulder and his need for treatment from Dr. Hefley.

B. Additional Medical Treatment

Applying the law stated above, I further find that Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to additional medical benefits, including out of pocket expenses and mileage. The proof simply does not establish a connection between Claimant's compensable left shoulder injury and any additional medical treatment. There is evidence in the record that the left shoulder injury had resolved at the time of Claimant's release by Dr. Collins; Claimant did not treat his claim as work-related at the time he sought Dr. Hefley's treatment; and the medical records do not establish that the tear treated by Dr. Collins is the same tear treated by Dr. Hefley.

C. Temporary Total Disability Benefits

Dr. Hefley performed Claimant's second surgery on his left shoulder on August 29, 2003. Claimant testified that between August 28, 2003 and March 22, 2004, he did not work because of his left shoulder. He testified as to how he was paid during this time.

Q. Did you receive any work comp benefits during that period of time?

A. No. I was strictly on my own sick leave and everything.

Q. Okay. So you used your sick leave and vacation time from work?

A. Sick leave and paid my own deductibles and everything.

....

Q. When you took time off work for your left shoulder, you just turned that in as regular sick leave and used your sick leave and vacation to continue receiving your payroll checks; is that right?

A. Yes.

Q. And you didn't miss any payroll checks during this period of time from August 29th of '03 until you went back in March of 2004?

A. No.

Claimant now seeks temporary total disability benefits for the time he was off work.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Fred's, Inc. v. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (March 31, 2005). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant has not sustained his burden of proving that he is entitled to temporary total disability benefits. In particular, Claimant did not sustain his burden of proving that his incapacity is due to his compensable injury. Evidence in the record indicates that the left shoulder injury had resolved at the time of Claimant's release by Dr. Collins, and the medical records do not establish that the tear treated by Dr. Collins is the same tear treated by Dr. Hefley. Further, Claimant did not treat his time off work following

his second surgery as an “incapacity because of compensable injury.” That is, rather than requesting benefits at that time, he utilized his sick leave and vacation time to continue receiving payroll checks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on May 19, 2001 and at all other relevant times.
3. Claimant filed a claim for a left arm or shoulder injury occurring on May 19, 2001 for which Respondents paid medical benefits and permanent partial disability benefits.
4. Claimant’s temporary total disability rate is \$410.00 and his permanent partial disability rate is \$308.00.
5. Respondents accepted the claim as compensable and provided medical treatment and indemnity benefits until July 30, 2002, including an 11% anatomical impairment rating.
6. Claimant has withdrawn his request for a hearing as to the alleged injury to his right shoulder. AWCC file F304722 will be returned to open general files and file F111738 will proceed to a hearing on the issues set forth herein.
- _____7. Claimant did not sustain his burden of proving by a preponderance of the evidence that Dr. Hefley’s medical treatment was reasonably necessary because he did not establish that his compensable injury is a factor in his resulting need for this treatment. There is evidence in the record that the left shoulder injury had resolved at the time of Claimant’s release by Dr. Collins; he did not treat his claim as work-related at the time he sought Dr. Hefley’s treatment in July of 2003; and the medical records do not establish that

the tear treated by Dr. Collins is the same tear treated by Dr. Hefley.

8. Claimant did not sustain his burden of proving by a preponderance of the evidence his entitlement to additional medical benefits for the same reasons given in paragraph 7 for his failure to establish that Dr. Hefley's July 2003 medical treatment was reasonably necessary.

9. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 28, 2003 to March 22, 2004. The proof does not support a finding that Claimant was incapacitated because of his compensable injury. Evidence in the record indicates that the left shoulder injury resolved at the time of Dr. Collins' release of Claimant; the medical records do not establish that the tear treated by Dr. Collins is the same tear treated by Dr. Hefley; and Claimant did not treat his time off work following his second surgery as an "incapacity because of compensable injury."

ORDER

Because Claimant failed to sustain his burden of proof as noted in the Findings of Fact and Conclusions of Law, his claim is denied and dismissed as to the issues presented.

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml