

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301968

BILLY L. SIMPSON, EMPLOYEE	CLAIMANT
KERR PAPER & SUPPLY COMPANY, INC., EMPLOYER	RESPONDENT
STATE FARM FIRE & CASUALTY COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 30, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on January 9, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted January 9, 2006, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 7, 2005, and a Prehearing Order was filed on said date. In addition, this claim has been the subject of prior proceedings, specifically, during the later part of 2004 when a dispute arose concerning the claimant's entitlement to an independent medical evaluation which was resolved as the result of claimant's request for a change of physicians to Dr. Reza Shahim which was agreed to by the parties as reflected by a Change of Physician Order filed November 18, 2004.

At the hearing, the parties announced that there were no stipulations in addition to those set out in the Prehearing Order. It was undisputed that the

employment relationship existed at all relevant times, including February 13, 2003; that the claimant sustained a compensable back injury on said date; that he earned sufficient wages to entitle him to compensation rates of \$302.00 per week for temporary total disability and \$227.00 per week for permanent partial disability; and that the respondents had controverted all benefits beyond those previously paid.

At the prehearing conference, the parties agreed that the issues to be presented for determination included:

- 1) Claimant's entitlement to additional medical treatment.
- 2) Claimant's entitlement to additional temporary total disability.

At the hearing, the claimant dismissed his claim for additional temporary total disability. Accordingly, the sole issue concerned claimant's entitlement to additional medical treatment, if any.

The claimant contended, in summary, that as a result of his February 13, 2003, admitted injury, he was entitled to additional medical treatment recommended by Dr. Reza Shahim, his authorized treating physician, specifically, an additional MRI, together with further evaluation by Dr. Shahim following the recommended diagnostic study.

The respondents contended that the claimant has been paid all appropriate benefits to which he is entitled, maintaining that the additional medical treatment was not reasonable and necessary, relying on various medical reports of Dr. William F. Blankenship, in addition to the diagnostic tests previously performed. Although the claimant dismissed his claim for additional temporary total disability, respondents

asserted that it was entitled to a credit for overpayment of temporary total disability benefits should indemnity benefits be sought in the future.

The claimant was the only witness to testify. The record is composed solely of the transcript of the January 9, 2006, hearing containing numerous exhibits. The November 18, 2004, Change of Physician Order is incorporated by reference and made a part of the record herein.

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. The claimant has proven, by a preponderance of the evidence, that he is entitled to a repeat MRI diagnostic study as recommended by his authorized treating physician, Dr. Reza Shahim.
4. Claimant's entitlement to continued medical treatment beyond the diagnostic testing previously recommended requires further development of the medical evidence and is, by necessity, reserved.

DISCUSSION

\_\_\_\_\_The claimant sustained an admitted, compensable low back injury on February 13, 2003. The claimant was first treated by Dr. Harold H. Chakales, an orthopedic surgeon in Little Rock, Arkansas. The claimant was first seen by Dr. Chakales on February 17, 2003, with complaints of low back pain and sciatica related to the compensable injury. The record reflects that the claimant had previously been treated by Dr. Chakales with similar complaints related to an earlier injury. Dr. Chakales' initial report reflects that the claimant had been asymptomatic since August, 2002. The record reflects that, for both the prior injury, as well as the within claim, Dr. Chakales treated the claimant conservatively with medications and physical therapy. Dr. Chakales ordered various diagnostic studies and eventually released the claimant to return on an as needed basis on October 22, 2003. At that time, the only additional suggestion made by Dr. Chakales was the recommendation of a discogram to determine whether the claimant had a central disc protrusion. It appears from Dr. Chakales' November 4, 2003, report that the purpose for his recommendation was both to determine if the claimant suffered a disc protrusion, and also to ascertain whether the claimant had sustained any anatomical impairment. Dr. Chakales' report of November 4, 2003, to the respondent-insurance carrier is set out below:

To Whom It May Concern:

I saw Mr. Billy Simpson in my office for evaluation on August 8, 2003, and felt that lumbar discography was indeed indicated. I felt he might indeed suffer a central disc protrusion, and that discography would show this definitively. I therefore recommended a lumbar discogram.

Mr. Simpson was next seen by me on October 22, 2003, at which time he continued to complains [sic] of chronic low back and leg pain. He had not returned to work. X-rays were made of the lumbar spine which showed evidence of lumbar degenerative disc disease. A functional capacity evaluation had been performed on him, and it was felt he was capable of doing some form of sedentary labor. To date, discography has not been performed.

In response to the questions posed in your letter of September 24, 2003, Mr. Simpson continued to show symptoms at the time of his last visit, and I therefore felt he had not reached maximum medical improvement.

With regard to additional treatment or therapy, I felt lumbar discography with a CT scan to follow would indeed be indicated in order to determine whether he did or did not have a central disc protrusion.

Discography is not indicated for the pre-existing condition, but to determine whether or not his symptoms at this time are those of a disc protrusion with internal disc derangement.

I do not believe the discogram will be able to distinguish whether or not there was pre-existing disease prior to the injury of February 2003. From a clinical standpoint, if discography is not approved, I would feel he has reached maximum healing and have nothing further to offer him.

Before determining his anatomical impairment, I feel it would be wise to have some form of definitive diagnostic testing to determine if he does suffer a disc protrusion or internal disc derangement, as could be determined by provocative discography and CT scanning. (Cl. Ex. A, pp.31-32)

On cross-examination, the record reflects that the claimant sustained two (2) prior work-related injuries involving his lower back, specifically, in November, 1995, as the result of a motor vehicle accident, and a prior workers' compensation claim with the same employer herein in 1999.

Following Dr. Chakales' November 4, 2003, recommendations, aforementioned, respondents referred the claimant to Dr. William F. Blankenship, an orthopedic surgeon in Little Rock, Arkansas. Dr. Blankenship evaluated the claimant

on December 9, 2003. Although Dr. Blankenship's report indicated that the claimant was seen for an independent medical evaluation, it is clear that the claimant was evaluated by Dr. Blankenship at the request of the respondents. (Tr.20)(Cl. Ex. A, pp.33-37)

Dr. Chakales issued follow-up reports on January 9, 2004, as well as February 2, 2004, again recommending a lumbar discogram and CT scan. Dr. Chakales indicated he had nothing further in the way of treatment to offer without the diagnostic studies. He further encouraged the carrier to send him a letter of denial in order that he could proceed with the study on the claimant's private health insurance. (Cl. Ex. A, pp.38-39)

The record reflects that the claimant ultimately underwent a lumbar discography on April 27, 2004. It is unclear whether the respondent-carrier or claimant's health insurance paid for the study. Dr. Chakales interpreted the study as being grossly abnormal at L4-5 and L5-S1, as well as somewhat abnormal at L3-4. Dr. Chakales opined that the claimant was "probably a candidate for decompression and stabilization" surgery which was never performed. (Cl. Ex. A, pp.41-43)

The record reflects that the claimant was seen one-time only by Dr. Blankenship, specifically, December 9, 2003. Dr. Blankenship did issue a supplemental report on August 17, 2004, specifically responding to an inquiry as to whether or not the recent diagnostic tests altered his initial opinion concerning the lack of any objective findings to support an impairment rating. Although Dr.

Blankenship did not address all of the findings reflected in the lumbar discogram performed April 27, 2004, he did conclude that there did not appear to be any objective basis relating the claimant's complaints to the February 13, 2003, admitted injury. (Jt. Ex. A, pp.44-45)

As previously pointed out, the parties subsequently agreed to allow the claimant to change treating physicians to Dr. Reza Shahim. An Agreed Order was filed on November 18, 2004, permitting the claimant to change physicians to Dr. Shahim. Although it is clear that the change of physicians to Dr. Shahim was authorized by this Commission, it appears that the purpose of the change was not communicated to Dr. Shahim. The only report from Dr. Shahim indicates that the claimant was referred to him by claimant's family physician, Dr. David Stewart, without any indication that Dr. Shahim would be considered claimant's treating physician. Dr. Shahim's report of January 13, 2005, reflects that he examined and evaluated the claimant strictly for a consultation, as well as his recommendations. Dr. Shahim's January 13, 2005, report is set out, in part, below:

**PHYSICAL EXAM:** Well developed gentleman whose height is 5'8" and weight is 175 lbs. Cranial nerves II-XII are intact. Neck is supple. Abdomen is benign. Extremities are without lesions. Motor strength, bilateral upper extremity, is 5/5. Left lower extremity is limited to pain. Psoas and quads are 4+/5. Plantar flexion and dorsiflexion is 5/5. Right lower extremity is 5/5. Reflexes are 2/4. He has a positive straight leg raise test on the left side at 90 degrees. He has a negative Patrick's sign.

**STUDIES REVIEWED:** I reviewed an MRI of the lumbar spine from 2003, which showed disc degenerative at L5-S1. I don't see any disc herniation or canal stenosis. The disc height and appearance is normal. I also reviewed a recorded discography by Dr. Chakales April of 2004, which says the patient had a positive

discogram at L4-5 and L5-S1. I don't have those images to review.

**DECISION MAKING:** I believe Mr. Simpson is symptomatic from discogenic back pain, which is the result of a work injury he received in February 2003. I don't see any canal stenosis or disc herniation on this imaging study, which goes back to 2003. Since his symptoms have been persistent, I would recommend repeating the MRI. A lumbar fusion at L4-5 and L5-S1 may be a reasonable treatment, but I would recommend minimal invasive treatments initially. He should be evaluated by pain management for IDET in the disc space at L4-5 and L5-S1. The chance of surgery completely eliminating his symptoms is very small. I will refer him for MRI of the lumbar spine and also evaluation by pain management for possible IDET. (Cl. Ex. A, p.47)

Respondents requested a supplemental report from Dr. Blankenship, specifically, inquiring whether or not, in Dr. Blankenship's opinion, the recommendations made by Dr. Shahim were associated with the claimant's work-related injury or some underlying, pre-existing and possibly unrelated condition. Again, Dr. Blankenship did not appear to directly answer the inquiry, but stated, in summary, that he, again, did not find objective basis for recommending any additional treatment on the claimant regarding the injury for which the IME was performed. (Cl. Ex. A, p.49)

The sole issue presented for determination is whether respondents should be held responsible for additional treatment recommended by Dr. Shahim, specifically, an additional MRI and further evaluation by Dr. Shahim of that MRI.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A.

§11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Respondents rely primarily on the reports of its own physician, Dr. Blankenship, in contending that additional medical treatment is not reasonable and necessary. In addition, they point out that the recommended diagnostic test, an MRI, has already been performed.

First, it must be noted that although the claimant underwent MRIs on October 5, 2000, and July 16, 2002, as well as a repeat MRI following the compensable injury, specifically, May 1, 2003, Dr. Shahim recommended a repeat study based upon his review of the MRI from 2003, which he stated showed disc degeneration at L5-S1 without herniation or canal stenosis, together with the recorded discography by Dr. Chakales in April, 2004, which stated that the claimant had a positive discogram at L4-5 and L5-S1. I feel compelled to point out that, for some unexplained reason, although the parties provided Dr. Shahim with Dr. Chakales' interpretation, they did not provide him the discogram images to review. Further, quite frankly, I find it somewhat disingenuous for the parties to allow the claimant to change treating physicians and then refuse to honor a reasonable recommendation

for a repeat MRI. Rather, respondents chose to obtain supplemental reports from its hand-selected physician, and forced the claimant to seek relief through the hearing process. Admittedly, perhaps if the claimant had dismissed his claim for temporary total disability prior to the hearing, rather than at the hearing, the parties may have been able to reach an agreement. The record reflects that the claimant had worked for various employers since his release by Dr. Chakales and was, therefore, not entitled to temporary total disability benefits.

I feel compelled to further point out that I also specifically find that Dr. Shahim's recommendation that the claimant be evaluated by pain management for a IDET in the disc space at L4-5 and L5-S1 to be premature. First, it is my belief that Dr. Shahim should have been provided all discography images rather than merely the recordings made by Dr. Chakales in April, 2004. In addition, it is my belief that the additional diagnostic study recommended, the MRI, should be completed and reviewed prior to any further recommendations which should be subject to cross-examination by respondents. Respondents elected to rely on the reports of its own physician. I find Dr. Blankenship's report to lack probative value, and to be inconsistent with the workers' compensation law. In summary, he concludes that there is no objective basis for any additional medical treatment based on his evaluation.

Although the Workers' Compensation Act requires medical evidence supported by objective findings to establish compensability as well as permanent impairment, the law does not require medical evidence supported by objective

findings for additional and continued medical treatment. *Green Bay Packing vs. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 695 (1999).

I find that the claimant has proven, by a preponderance of the evidence, that the recommended MRI is reasonably necessary. Respondents were not justified in unilaterally terminating all medical treatment. It should also be noted that the claimant testified at the hearing that respondents also terminated his right to obtain medications prescribed by his family physician after his release by Dr. Chakales. The question of claimant's entitlement to outstanding medical and related treatment was not properly addressed and will require further development of the evidence. The sole issue concerned respondents' responsibility for the recommended repeat MRI which I find is reasonably necessary. Accordingly, I hereby make the following:

AWARD

Respondent, State Farm Fire & Casualty Company, is hereby directed and ordered to pay the medical treatment previously recommended, specifically, a MRI as recommended by Dr. Reza Shahim, the claimant's authorized treating physician.

All additional issues are specifically reserved.

Since this is a request for medical only, attorney's fees are not applicable under A.C.A. §11-9-715 as amended.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge