

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E505070

JESSE TEDDER, EMPLOYEE	CLAIMANT
FLUOR CORPORATION, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on November 16, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE FLOYD M. THOMAS, JR., Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of continuing medical treatment, permanent disability benefits and attorney's fees.

At issue is whether or not the claimant has met his burden of proof for additional medical treatment pursuant to Ark. Code Ann. § 11-9-508 and whether or not the claimant has sustained a loss of earning capacity pursuant to Ark. Code Ann. § 11-9-522. 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 does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on April 3, 1995 at which time the claimant sustained compensable injuries to his back and right ankle at a compensation rate of \$270.00/\$203.00. Medical expenses, temporary total disability benefits and impairment ratings

to the back, 8% as assessed by Dr. Paul Tucker on January 17, 1996 and 14% to the lower extremity as assessed by Dr. Ruth Thomas on July 17, 1996 have been paid.

The claimant contends he remains symptomatic and in need of pain management treatment with Dr. Tucker. The claimant further contends that due to his age, 51 (D.O.B. March 24, 1954), education (high school graduate) , work experience (boiler maker), permanent impairment to the body as a whole and work restrictions, he is permanently and totally disabled. The claimant has undergone a Functional Capacity Evaluation and vocational rehabilitation evaluation with Corvel and Tri-State Rehabilitation. The claimant contends he is not a good candidate for rehabilitation.

The respondents contend all appropriate benefits have been paid.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the deposition of Dr. Paul Tucker (taken November 10, 2005) incorporated by reference. Although the record makes mention of a vocational report and medical records from Drs. Russell and Blankenship, those documents were not introduced into evidence.

The claimant was the only witness to testify at the hearing. He walked slowly using a cane while grimacing.

The claimant, age 51 (D.O.B. March 24, 1954) has a high school education. His work experience includes jobs as a construction worker and boiler maker, earning \$16.00 – \$18.00 per hour plus benefits.

The claimant's health history includes an eye condition (pterygium) that has required four surgeries, kidney stones and hepatitis.

The claimant sustained compensable injuries to his teeth, hand, back and right ankle when he fell from scaffolding on April 3, 1995. He declined surgery and was treated conservatively for his back injury. Dr. Paul Tucker assessed an 8% impairment rating to the body as a whole on January 17, 1996. The scheduled ankle injury required three surgeries by Dr. Ruth Thomas who assessed a 14% impairment rating on July 17, 1996.

The claimant stated he remains symptomatic with back pain, and weakness in his left leg, causing him to stumble and fall. The pain causes sleep disturbance and limits his ability to walk or sit for long periods of time. He is, however, able to hunt, fish and mow the lawn.

The claimant has not worked since 1995. His income is derived from a \$222,000.00 settlement in 1997 from a third party lawsuit; a \$900.00 per month pension from the Boilermakers union; and Social Security Disability benefits (since 1996) in the amount of \$1,200.00 per month.

MEDICAL EVIDENCE

On April 4, 1995, Dr. Robert Gullett diagnosed the claimant with a fracture of the medial malleolus of the right ankle after falling 10-15 feet from a scaffold. Surgery was performed on April 4, 1995.

The claimant also complained of back pain. A CT scan of the lumbar spine was interpreted as showing “modest annular bulging at L5, S1 and vertebral disc with some calcification, or some associated osteophytic spurring, with no significant encroachment upon the thecal sac or nerve roots.” Dr. Gullett’s report of May 23, 1995 indicates the claimant’s “back pain and sciatic symptoms subsided.”

Dr. Tucker, a neurologist, saw the claimant on May 16, 1995 for complaints of radicular left leg pain after falling from a ladder, performing his job as a welder. Dr. Tucker noted “changes” at L5-S1 with bilateral disc bulging and prescribed physical therapy. A post myelogram CT scan was conducted in October, 1995 and revealed a bulging lateral disc on the left at L4-5. At L5-S1 there was a spur with bulging. Dr. Tucker mentioned that the claimant might require surgical intervention.

Dr. Ruth Thomas, an orthopaedic surgeon, saw the claimant on November 27, 1995 for “Grade 2 Degenerative Joint Disease” of the right ankle. She prescribed an elastic ankle brace and commented, “I am not optimistic that he will return to his previous form of occupation.” An MRI scan of the ankle revealed tears in the peroneus longus and anterior talar fib ligament. Dr. Thomas recommended surgery in her report of February 8, 1996.

The claimant was seen by Dr. Young, an orthopaedic surgeon in October and November 1997, and July and September 1998. The MRI of the lumbar spine was described as “normal”. The claimant’s MRI results could not be correlated to radicular leg pain but there was some discussion about treating his left knee for a meniscal tear. The claimant declined knee surgery.

The claimant returned to Dr. Tucker on November 11, 1997. They discussed back surgery but the claimant felt his condition had “resolved” with physical therapy and medication. The claimant informed the doctor he no longer had radicular left leg pain.

The claimant saw Dr. Tucker on February 12, 1998 and April 13, 1998 with complaints of severe left leg pain, however, he again declined Dr. Tucker’s offer to refer him to a surgeon.

Dr. Ackerman examined the claimant on September 11, 1998 and opined that the claimant's back pain emanated from the facet joints. He prescribed a back stabilization program, aquatic therapy and facet joint injection therapy. The doctor noted this treatment was directed toward pain management to increase the claimant's activities of daily living. However, the doctor felt the claimant would be unable to return to work.

The claimant returned to Dr. Tucker on January 27, 1999. Apparently, there was no follow-up on Dr. Ackerman's recommendations.

The claimant saw Dr. Tucker periodically from 2000 to 2004 for prescription medication. The results of the physical examinations vary, but as of April 20, 2004 Dr. Tucker was no longer recommending surgery because the claimant's muscle weakness was "atypical".

Dr. Tucker's notes also mention consultations with Drs. Anthony Russell and Dr. Blankenship. Apparently these surgeons did not consider the claimant a surgical candidate, however, their reports are not in the exhibit packets. A repeat MRI scan performed June 7, 2002 showed degenerative disc disease with a bulge at L5-S1 and no evidence of nerve root compromise.

Dr. Tucker's records also mention the claimant's son died in October, 2001, and the claimant was being treated by a cardiologist. The reports indicate the workers' compensation carrier refused to pay for medical treatment (diagnostic testing, medication) but there is no evidence the claimant ever asked the Commission to resolve these disputes. Dr. Tucker also mentions that the claimant was using his cane improperly and that he was not taking his medication as scheduled, although there was no indication that he was abusing his medications.

A Functional Capacity Evaluation was performed on September 9, 1997. The test results were considered invalid:

...The wear pattern on his shoes does not correlate to the antalgic gait demonstrated in the clinic. Movement patterns for overhead reaching do not correlate to his diagnosis and complaint of lower back pain... He appears quite inconsistent and pain focused. The measurements of this assessment should only be considered to reflect his present subjective pain tolerance rather than his functional capacity.

In his deposition, Dr. Tucker explained that he has treated the claimant for back pain since 1995. On the initial CT scan, he thought there was bulging at L4-5 but that could not be confirmed by the MRI scan which appeared normal, (Depo. 7, 15-18). Diagnostic testing showed no evidence of nerve root compression which could be correlated to the claimant's symptoms. And the claimant was not considered a surgical candidate according to Dr. Young and Dr. Russell.

Dr. Tucker explained that the impairment rating was based on pain and lack of strength. The doctor conceded these factors were subjective, (Depo. 11-12). Dr. Tucker also stated the claimant had no work restrictions and no need for continuing medical treatment (Depo. 19-20).

FINDINGS AND CONCLUSIONS

There is no dispute that the claimant suffered a serious right ankle injury. However, the medical records and FCE results raise questions about the extent of the back injury. The claimant has requested continuing medical treatment for his back.

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., 86 Ark. App. 230, ___ 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).

Based on Dr. Tucker’s deposition, the claimant does not need continuing medical treatment for his back. Subjective symptoms have been reported for the last 10 years but cannot be correlated to objective findings. If anything, diagnostic testing suggests the claimant’s back has improved and, according to the FCE results, there is evidence of symptom magnification.

Accordingly, I find the respondents have provided adequate medical care for the compensable back injury and further medical treatment is unreasonable and unnecessary and unrelated to the compensable injury.

The claimant has also requested wage loss disability benefits based on his back injury. The respondents did accept the back injury as compensable and paid a permanent anatomical impairment rating to the body as a whole.

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bone fide job offers, credibility, or voluntary termination. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Based on Dr. Tucker's deposition, the impairment rating was based on subjective symptoms rendering the rating invalid, and there simply are no work restrictions on his back that would prevent his return to the work force.

After considering the claimant's financial status, his lack of interest in vocational retraining, the invalid Functional Capacity test results, the lack of specific work restrictions and the invalid impairment rating, I find the claimant has failed to meet his burden of proving he is permanently and totally disabled.

1. The Workers' Compensation Commission has jurisdiction of this case in which an employer-employee-carrier relationship on April 3, 1995 at which time the claimant sustained compensable injuries to his back and right ankle at a compensation rate of \$270.00/\$203.00. Medical expenses, temporary total disability benefits and impairment ratings to the back, 8% as assessed by Dr. Paul Tucker on January 17, 1996, and 14% to the lower extremity

as assessed by Dr. Ruth Thomas on July 17, 1996
have been paid.

2. The claimant has failed to prove that additional medical treatment for his back is reasonable and necessary and related to the compensable injury.
3. Based on the invalid impairment rating and lack of work restrictions and considering the claimant's age, education, work experience and lack of motivation, I find the claimant has failed to meet his burden of proving he is entitled to any wage loss disability benefits.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge