

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F011651

JENNINGS WRIGHT	CLAIMANT
CRAWFORD COUNTY	RESPONDENT
AAC RISK MANAGEMENT SERVICES INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 15, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by GAIL MATTHEWS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 27, 2006, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on April 28, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. The prior opinions are res judicata and the law of this case.

3. The respondents accepted the claimant's injury at L5-S1 as compensable.

4. The respondents have paid medical on the claimant's injury at L5-S1.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury at L4-5 level.
2. Related medical.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained a compensable injury on September 18, 2000, to his lumbar spine. As a result of this compensable injury, the claimant had surgical intervention on July 11, 2001, a right L5-S1 microlaminotomy and microdiscectomy with Dr. Joseph Queeney. The claimant has undergone substantial medical treatment from and since that surgical intervention. The respondents have refused the claimant to be seen by a local neurosurgeon for follow up medical care. The respondents have refused the payment of medical expenses in the nature of MRI and a diskogram recommended by Dr. Arthur Johnson. The respondents attempted to refer the claimant to Dr. Arthur Johnson on April 7, 2004. The claimant on his own efforts was able to see Dr. Johnson and the medical treatment ensued for the compensable injury. Dr. Arthur Johnson has examined the claimant, has performed diagnostic tests, and has recommended a lumbar fusion to the area of the compensable injury. The claimant contends she is entitled to the medical treatment at the direction of Dr. Arthur Johnson, that all benefits have been controverted in their entirety, that the claimant is entitled to temporary total disability benefits for the period of time required for the surgical intervention and healing period subsequent to the surgical

intervention. The claimant is entitled to attorney's fees on all controverted benefits, including medical expenses and indemnity benefits, pursuant to Ark. Code Ann. §11-9-715, since the injury occurred prior to July 1, 2001.

In regard to the foregoing issues the respondents contend that there is a prior ruling that a diskogram is not needed. It is res judicata to said claim.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary medical records marked Claimant's Exhibit No. 1, non medical documentation marked Claimant's Exhibit No. 2 and a letter from the respondents' attorney to the claimant's attorney marked Claimant's Exhibit No. 3. The respondents submitted the deposition of Dr. Johnson marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

An objection was raised by the claimant as to the respondents' representative. After statements and argument of counsel, the claimant's objection was overruled noting their exception.

DISCUSSION

This matter was previously tried on June 24, 2004, and an opinion was issued on August 4, 2004. At the time of the 2004 hearing, the parties stipulated that there was an employment relationship on the date the claimant sustained a compensable injury to his low back as the L5-S1 level on September 18, 2000. It was further found that the claimant was not entitled to a

diskogram for the treatment of his compensable injury but it was found that he was entitled to additional medical treatment by Dr. Revelis for pain management.

The claimant testified that he is still employed with the respondent and has been so employed for close to twelve years in their road department. The claimant agreed that since the last hearing in June 2004 he has continued to have medical treatment with various medical providers including Dr. Robert Baker who is his primary treating physician, Dr. Revelis, a pain consultant and he has been seen by Dr. Arthur Johnson, a neurosurgeon. The claimant agreed that Dr. Baker referred him on December 1, 2005, to Dr. Arthur Johnson but that the respondents refused to pay for this visit to Dr. Johnson. The claimant testified that he has group insurance which paid part of the cost of the visit to Dr. Johnson and the remainder he paid out of his pocket. The claimant testified that Dr. Johnson had him undergo a diskogram in January 2006. The claimant agreed that after viewing the diskogram, Dr. Johnson recommended a fusion of the claimant's low back when he was seen in March 2006. The claimant testified that he was willing to undergo the surgery as recommended by Dr. Johnson and would like to have it done. The claimant testified that since he underwent surgery performed by Dr. Queeney, he has continued to have pain in his low back, right leg, foot and toes. The claimant testified that since the last hearing, his condition, in fact, has continued to get a little worse.

The claimant testified that he works for the respondent's road department as a road grader operator. The claimant explained that he maintains dirt roads, cleans ditches and does light maintenance on the road graders. The claimant testified that due to his back problems he has to stop the grader and get off quite a bit, noting that he never had to do this before his compensable injury. The claimant testified that his duties for the respondent have remained the same since the last hearing but again stated that he does have to get off his grader and rest more often than before. The claimant agreed that he also takes medications while he is operating the road grader and that the respondent is aware of the medications which he is taking. The claimant testified that he reported to Larry McClure and Danny Brown the supervisor and road superintendent for the respondent about the medications he was taking. The claimant was asked if Larry McClure is still employed with the respondent and the claimant responded, "No." The claimant agreed that he last saw Dr. Johnson on March 2006 but that he has continued to receive prescription medications through Dr. Johnson for his pain. The claimant further agreed that he was seen at the emergency room in March 2006 due to the pain in his back, down his leg and into his foot. The claimant testified that while in the emergency room he was given an injection for pain.

On cross examination, the claimant testified that he weighed 285 pounds and agreed that he had gained thirty-three pounds since the last hearing in June 2004. The claimant testified that he has not quit smoking and smokes two packs a day which is one pack down

from what he was smoking. The claimant agreed that he has seen five or six different doctors and undergone therapy, injections, and received medications for the treatment of his low back. The claimant testified that he was off work following his back surgery for a period of eleven months and returned to work for the respondent in 2003 and has continued to work since then. The claimant did agree that he was operating the best grader the respondent had but noted that all the grader ride about the same. The claimant agreed that other employees do the work of changing out the grader blades, changing the tires and the heavy maintenance. The claimant testified that he does change the oil and last month did the yearly overall on the grader.

Danny Brown testified on behalf of the respondents stating that he retired from the respondent's road department after twenty-six years. Mr. Brown testified that he had been the claimant's supervisor for approximately nine years and was his supervisor when he got hurt in 2000. Mr. Brown testified that other employees did the heavy work on the grader and he was aware that the claimant had a weight limitation and should not lift. This witness testified that any time the claimant had a problem with his grader they try to fix it right away.

The medical records set forth that the claimant underwent an MRI of his lumbar spine on October 9, 2000, which revealed a defused bulging annulus at the L4-5 and L5-S1 levels with a small central disc protrusion at the L5-S1 level with mild to moderate channel stenosis at these two levels. The claimant underwent

surgery for his herniated disc at the L5-S1 level performed by Dr. Joseph Queeney on July 11, 2001. Dr. John Swicegood provided the claimant with pain management treatment beginning on January 7, 2002, and again on February 20, 2002. The medical records set forth that the claimant continued receiving treatment for his low back in the form of medications subsequent to his surgery. On May 8, 2003, the claimant underwent an MRI of his low back which revealed post surgical changes on the right side at L5, slight enhancements as well as a bright signal on T2 waiting through the posterior aspect of the disc at L5-S1, noting that this may be a post surgical change with some granulation tissue in that area, mild defused disc bulge at L4-5 and also disc degeneration at L4-5 level with desiccation apparent and there are no signs of any focal disc herniations

Dr. Robert Baker writes on June 6, 2003, that he has seen the claimant for his complaints of worsening low back pain noting that he is running a road grader. The doctor notes that the claimant has to get off and walk around every hour or so due to his legs and back hurting. Dr. Baker mentions that the claimant has been to the pain clinic, gone through physical therapy as well as surgery. The doctor notes that the claimant has lost five pounds and it is his opinion that this is key to any long term improvement. Upon examination, the doctor notes that the claimant has lumbar paraspinous spasm with pain on palpitation and decreased range of motion. Dr. Baker prescribed additional medication in hopes of improving the claimant's sleep and discussed at length a diet again

indicating weight loss might improve his condition. In August 2003 the claimant was seen by Dr. Michael Standefer for a second opinion. Upon examination it was noted that the claimant is morbidly obese with poor muscle tone. After reviewing the radiographic studies it is noted that there is no evidence of any recurrent vocal disc protrusion. Dr. Standefer writes that the claimant has chronic low back pain secondary to multiple factors. Dr. Standefer continues to write that the claimant is overall detoned, deconditioned and in very poor general health, noting further that his occupation would tend to cause him to have aggravation of his back pain. Dr. Standefer recommended conservative treatment. Dr. Baker saw the claimant on January 2, 2004, where it is noted that he has lost thirty pounds and that the claimant has lumbar paraspinous spasm with pain on palpitation. Dr. Baker refilled and adjusted his medications. The claimant continued to see Dr. Baker approximately every two to three months throughout 2004. Dr. Baker writes on October 6, 2004, that the claimant has continuing complaints of back pain which has been worse lately noting that he is working on the road grader and is up and down all day. It is further noted that the claimant has lost down to 236 pounds again his medications were adjusted and an MRI was discussed. When the claimant was seen by Dr. Anthony Revelis on December 10, 2004, the doctor recommended at this time a diskogram which in his opinion would be advantageous in delineating whether further surgical intervention was indicated. Dr. Revelis suggested changing the claimant to Methadone three times a day and

to discontinue his Lortab. Dr. Baker writes on February 4, 2005, that the Methadone that the claimant was prescribed by the doctor in Tulsa was not tolerated by the claimant so he has gone back to some Lorcet 10. Dr. Baker refilled the claimant's medications and recommended that he come back in three to six months. The claimant returned to see Dr. Revelis on February 18, 2005, and after examination it was suggested that he be seen by a doctor in Oklahoma City for possible surgical intervention and his medications were changed to Oxycotin. Dr. Baker writes on April 14, 2005, that the claimant is having problems with the Oxycotin prescription, noting that he is very depressed and fatigued. It is also noted that he has stopped smoking for ten weeks and feels like he is going to be able to stay off of cigarettes. It is noted that the claimant now weighs 251 pounds and it was recommended that his medications be changed. On May 12, 2005, Dr. Baker notes that the claimant is seen for a knot on his back just to the right of his previous laminectomy scar. Dr. Baker notes that he is still having ongoing pain and upon examination it was noted that he has lumbar paraspinous spasm as well as decreased range of motion. Dr. Baker diagnosed the claimant with having a lipoma right lumbar area which they were going to watch. The claimant was seen by Dr. Baker in July 2005 with complaints of chest pain which after examination was diagnosed as possible new onset angina pectoris. Dr. Baker, in a letter to the claimant's attorney dated September 13, 2005, recommends that the claimant needs further evaluation and treatment by a neurosurgeon. On October 7, 2005, Dr. Baker saw the claimant

for his degenerative disc disease, hypertension and hyperlipidemia, noting that he has been to see Dr. Adjei who prescribed Lisinopril. Dr. Baker notes that the claimant is still having chronic constant low back pain with radiation into his right lower extremities and the doctor referred him to Dr. Arthur Johnson. The claimant underwent an MRI of his lumbar spine on October 10, 2005, which revealed post laminectomy findings again at L5-S1 and moderate defused disc bulge at L4-5 with an annular tear on the left vertebral body hemangiomata. The claimant was seen by Dr. Arthur Johnson on December 1, 2005. After physical examination and review of the claimant's latest MRI, he was diagnosed with having probable discogenic low back pain. Dr. Johnson sent the claimant for a diskogram at L3-4, 4-5 and 5-1. Dr. Johnson encouraged the claimant to loose weight, started him on Ultram and another medication, noting that if he is a candidate for surgical intervention he will need to loose weight and quit smoking. On December 28, 2005, Dr. Johnson writes that the claimant's MRI shows post laminectomy changes and also an annular tear at the L4-5 level that is on the left-hand side. Dr. Johnson writes that it is his opinion that the claimant's current problem is related to his compensable injury and he will need additional evaluation in order to determine the exact nature of the problem that may be related to discogenic low back and that subsequent treatment would be based on the findings of the lumbar diskogram. On March 7, 2006, Dr. Johnson writes that based on the claimant's diskogram, he was positive at L4-5 on the right side, noting that the claimant still

continues to have pain in his back and right lower extremity. The claimant was diagnosed with discogenic low back pain at L4-5. Surgery was discussed with the claimant and it is noted that he desires to proceed with surgical intervention. Dr. Johnson prescribed medications for the claimant.

In Dr. Author Johnson's deposition he stated that when he first saw the claimant he had already undergone an MRI which indicated that at the L4-5 disc area there was a problem on the left side. Dr. Johnson agreed that when he saw the claimant he had him undergo a diskogram which set forth that the claimant had a problem at the L4-5 disc area on the right side. Dr. Johnson stated that this was not inconsistent due to the differences in the types of tests being given. Dr. Johnson testified that the purpose of the diskogram is primarily used when they are looking for a discogenic type pain when there is not any other obvious cause for the pain shown on an MRI, CT scan or with a CT myelogram. The doctor explained that a diskogram is based on what they can see radiographically and also what they find in terms of reproduction of pain. Dr. Johnson testified that the claimant is not the optimal surgical candidate due to his weighing 274 pounds and a heavy smoker. Dr. Johnson testified that the success rate on fusion operations depends on how good the fusion is and even with smokers he has had a fairly good fusion rate. Dr. Johnson was informed that Dr. Queeney, Dr. Standefer and Dr. Boxell had all written that the claimant is not a candidate for back surgery, Dr. Johnson respondent that that is their opinion. Dr. Johnson stated

that you can get different opinions from different physicians based on what their practices dictate. Dr. Johnson was asked if there was any way of knowing when the claimant's L4-5 problems occurred and Dr. Johnson responded, "There is no way of knowing that."

On cross examination, Dr. Johnson reviewed the claimant's MRI which was conducted in the year 2000 shortly after his initial injury. Dr. Johnson indicated that even though the MRI shows a diffused bulging annulus at L4-5, these usually are asymptomatic and further stated that the L5-S1 level would tend to be more symptomatic because it is a central disc protrusion. Dr. Johnson then reviewed an MRI done on May 8, 2003, and stated that it just shows that there is minimal disc bulging diffusely at the L4-5 level which is consistent with the other MRI. Dr. Johnson was then shown the MRI made on October 19, 2005, and after reviewing this test Dr. Johnson stated that, "There is an annular tear at the L4-5 level on the left. And that one is different than the previous MRI scans." Dr. Johnson testified that when he first saw the claimant the claimant filled out an outline of his medical history concerning his back injury and indicated that he had back pain which radiated to the right side of his leg down to his toe, the left leg hurts some which Dr. Johnson opined was not a major factor of his pain. It was also noted that he had some burning sensation and numbness to the right leg. Dr. Johnson testified that some of the claimant's left leg pain could be attributable to his L4-5 disc rupture. Dr. Johnson again testified that preliminary MRI did not indicate any evidence of a tear, noting that it was more of a

bulging disc at L4-5. Dr. Johnson then stated that the 2005 MRI indicates a disc rupture or tear which was visible on the left at L4-5 which is different from the previous MRI scans. Dr. Johnson was asked if his treatment plan was related to the claimant's original injury of 2000. Dr. Johnson responded that it is hard to say whether the tear was there at the beginning without a more definitive test. Dr. Johnson testified that the pain which the claimant refers to is a similar type pain that he has had since the very beginning and even though he had surgery he has continued to have the same problems as he had prior to his surgery. Dr. Johnson continued to testify that in his opinion the pain which the claimant has had all along was at the L4-5 level and not at the L5-S1 level and was due to an annular tear at that L4-5 level and that was where his symptoms were actually coming from. Dr. Johnson was asked if the original MRI of October 2000 did not show a tear at the L4-5 level was it possible that that test might have missed the tear and Dr. Johnson responded, "Yes. Its not uncommon to have annular tears that don't show up on MRI scans." Dr. Johnson agreed that it would be a fair assumption that based on the history given by the claimant, his review of the claimant's medical records and previous MRIs that the fusion which he is now recommending for the claimant is needed as a result of his original job injury in September 2000.

On redirect examination, Dr. Johnson agreed that on the claimant's original MRI taken October 9, 2000, the test showed that the claimant had degenerative disc disease at L4-5. Dr. Johnson

also agreed that the claimant's other tests prior to October 2005 all showed that the claimant had degenerative disc disease at the L4-5 level. Dr. Johnson was asked, "A man with degenerative disc disease that he had five years ago, the natural progression of that would be that you would very well get an annular tear?" Dr. Johnson responded, "Yes." Dr. Johnson agreed that the annular tear that was found in October 2005 could very well be just the natural progression of degenerative disc disease. Dr. Johnson also agreed that his opinion that the claimant's present problems were caused by his September 2000 injury were based on the claimant telling him that he had the same pain all along was one of the major factors in his forming this opinion. Dr. Johnson agreed that the first time the claimant's tear at L4-5 was recognized on an MRI was on October 10, 2005.

After a complete review of this entire matter, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury at the L4-5 level on September 18, 2000, when he was working for the respondent. The claimant had an MRI of his low back in October 2000 and then again in the year 2003, neither of these MRIs revealed any tear at the L4-5 level, although they did reveal a bulging at this area. Dr. Johnson, in his deposition, clearly states that it would be expected that a man such as the claimant who weighed 280 pounds and was fifty years old to have degenerative disc disease. The doctor also agreed that a bulging disc such as seen on the MRI in 2000 and again in 2003 at the L4-5 level would be considered to be

degenerative disc disease. Dr. Johnson also agreed that it would be a natural progression for the claimant with degenerative disc disease after a five-year period of time to get an annular tear in an area which he previously had had a bulge. Dr. Johnson also stated in his deposition that he bases his opinion that the claimant's L4-5 level problems are as a result of his original compensable injury based on his continued complaints of pain from the time of his initial injury to present and that in his opinion the claimant was not tested properly. Arkansas law requires objective medical findings on which to verify a compensable injury. The claimant's first two MRIs, the first in 2000 the next in 2003, neither one showed a tear only degenerative disc disease at the L4-5 level. It was only after five years that an MRI revealed a tear at the L4-5 level which even Dr. Johnson agrees would be the natural progression of his degenerative disc disease. Therefore, this claim for benefits for the claimant's treatment of his L4-5 annular tear should be denied in its entirety.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. The prior opinions are res judicata and the law of this case.
3. The respondents accepted the claimant's injury at L5-S1 as compensable.
4. The respondents have paid medical on the claimant's injury at L5-S1.

5. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his L4-5 level on September 18, 2000. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his L4-5 level while he was working for the respondent on September 18, 2000. Therefore, this claim for benefits should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE