

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700855

JAMES LEE CULLINS, EMPLOYEE	CLAIMANT
COMMERCIAL TRANSPORTATION, INC., EMPLOYER	RESPONDENT
RETENTION MANAGEMENT SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 15, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on October 8, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 8, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on September 12, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the parties at all relevant times, including January 8, 2007; that the claimant sustained a compensable injury on said date; that he earned sufficient wages to entitle him to the maximum applicable compensation rates of \$504.00 per week for temporary

total disability and \$378.00 per week for permanent partial disability; that respondents paid appropriate temporary total disability through February 26, 2007, as well as medical and related expenses through on or about July 30, 2007; and that respondents have controverted all benefits beyond those previously paid.

By agreement of the parties, the following issues were presented for determination:

- 1) Claimant's entitlement to additional temporary total disability.
- 2) Respondents' responsibility for additional, continued medical treatment.

Claimant contended, in summary, that his healing period had not yet ended; that he was entitled to additional temporary total disability benefits beginning February 26, 2007, and continuing through a date yet to be determined; that respondents should be held responsible for additional recommended treatment by Dr. David Arnold, including, but not limited to additional diagnostic testing; and that a controverted attorney's fee should attach to any additional benefits awarded. The claimant reserved the issue of entitlement to permanent disability benefits.

The respondents contended that it had paid all appropriate benefits to which the claimant was entitled; that claimant's need for additional treatment was not associated with the acute injury sustained on January 8, 2007; and that the additional testing recommended by Dr. Arnold was not reasonably necessary, pointing out that an MRI was performed on January 30, 2007.

The claimant testified in his own behalf. Debra Shahlaie, a nurse case

manager, was called as a witness by the respondents. At the hearing, respondents pointed out that it subpoenaed Jon Peeks, an employer representative; that the subpoena was served by telephone seventy-two (72) hours prior to the hearing and that Mr. Peeks did not appear. Respondents requested that Mr. Peeks' testimony be permitted by evidentiary deposition. The claimant did not object. The deposition was permitted as long as it was submitted within twenty-one (21) days of the hearing. The deposition was taken October 25, 2007, and hand-delivered on October 29, 2007. The record in this claim is composed solely of the transcript of the October 8, 2007, hearing containing numerous medical exhibits, together with the telephone deposition of Jon Peeks, submitted subsequent to the hearing and retained in the Commission file in bound form.

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 witnesses and to observe their 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 failed to prove, by a preponderance of the credible

evidence, that he is entitled to additional temporary total disability. The question of whether the claimant has reached maximum medical improvement cannot be determined based on the record as it stands. However, even if the claimant's healing period has not yet ended, the claimant cannot prove entitlement to total disability benefits.

4. The claimant has proven, by a preponderance of the evidence, that he is entitled to additional diagnostic testing recommended by Dr. David Arnold, to determine the true nature and extent of claimant's admitted injury. Respondents are responsible for additional recommended treatment, including, but not limited to the additional diagnostic testing recommended by Dr. Arnold.
5. Any additional issues, including entitlement to permanent disability benefits, if any, are by necessity, specifically reserved.

DISCUSSION

This is an extremely troubling claim. The respondents' course of conduct in limiting the claimant's access to medical treatment, as well as its unilateral and *ex parte* communications with an authorized treating physician has clearly frustrated the claimant's ability to ascertain the true nature and extent of his admitted injury. However, the record further reflects that the claimant has failed to seek any gainful employment since the January 8, 2007, injury. Although the claimant maintains that he cannot return to the physically demanding work that he

was performing before January 8, 2007, there is no credible evidence that the claimant cannot return to work in a job that is less physically demanding. The claimant has had prior work-related injuries and has undergone multiple surgeries before January 8, 2007. The claimant had prior physical impairments. Following the within claim, the claimant applied for social security disability rather than seek alternative employment.

The claimant, James Cullins, is thirty-seven (37) years old. He has a high school education. The claimant began working for the employer as an over-the-road truck driver during June, 2006. He described his job duties as physically demanding. Although the claimant's primary activity involved driving, he stated that he was required to secure the load with heavy tarps, straps, and chains which, the claimant stated, required heavy lifting. Again, the claimant began working for the respondent in June, 2006. His injury occurred on January 8, 2007, as described below:

Q What happened to you on January the 8th of 2007?

A I had called Jon Peeks the night before and told him the truck would not crank.

Q Now, who is Mr. Peeks?

A Mr. Peeks was operations manager at Commercial Transportation.

Q Go ahead.

A So I called him at home that Sunday night and told him the truck wouldn't crank, he needed to get somebody out there to jump it off. He told me to call him back in the morning, and he would give me a check to get batteries, and we'll just put brand new batteries in there, because he knew that I had a pickup truck in

Alabama over there.

Q That's where you were when this accident took place?

A Yes, sir, in Sylacauga, Alabama.

Q Go ahead.

A So the next morning I took my pickup truck and I went and got three truck batteries. They had to order them, so they didn't get in until that evening. I had to take the old batteries out of the truck and install three new ones. I had to crawl up under the truck and lift the batteries up and put them in the battery holder, and that's how I hurt my back.

Q Now, you're living in Alabama?

A Yes, sir.

Q And when did you move to Arkansas?

A In June of '06.

Q Is that why you would have had a pickup truck over there, is because you lived in Alabama?

A Yes, sir. I had – at the time I had three vehicles, and I left one of them in Alabama.

Q Okay. Do you have some family there that was –

A Yes, sir, that's where all my family lives. (Tr. 11-12)

The record reflects that the claimant promptly reported his injury to Jon Peeks and was told to go ahead and deliver the load and pickup another before returning to Little Rock. The claimant stated that he drove from Alabama to Augusta, Georgia; August, Georgia, to Chicago, Illinois; Chicago, Illinois, to Elkhart, Indiana, and back to Little Rock, at which time he was provided medical treatment.

The claimant was initially examined and treated by Dr. Cynthia Almond at Concentra Health Centers in North Little Rock, Arkansas, on January 15, 2007. Dr. Almond took some spinal x-rays, diagnosed lumbar strain with lumbar radiculopathy and prescribed a number of medications including Decadron, Depo-Medrol, Toradol, Celebrex, and Zanaflex, Darvocet for pain; scheduled the claimant for three (3) sessions of physical therapy; and released the claimant to return to work with restrictions of lifting no more than ten (10) pounds and avoid bending. The claimant returned to work for the employer, sitting at a desk, dispatching trucks. The claimant was paid \$280.00 per week and also received a supplemental, temporary partial disability workers' compensation check during the time he was provided limited duty. (Tr. 17-18) (Cl. Ex. A, pp.1-5)

The claimant returned to Concentra on January 18, 2007, at which time he was seen by Dr. Michelle Ibsen. The claimant was continued on his previous medications and scheduled for additional physical therapy for two (2) weeks to be rechecked in ten (10) days. The claimant next returned to Concentra on January 29, 2007, at which time Dr. Cynthia Almond ordered an MRI for possible herniated disc, noting that the claimant had a history of low back surgery in 2002 and 2004. The claimant was scheduled to return for further evaluation on February 5, 2007, after the MRI was completed. The MRI was taken on January 30, 2007, at which time the following impression was noted by the radiologist:

IMPRESSION: 1. POST SURGICAL CHANGES CONSISTENT WITH PRIOR RIGHT L4-5 LAMINECTOMY.

2. LARGE DISC OSTEOPHYTE COMPLEX IN A RIGHT PARACENTRAL LOCATION AT THE L4-5 LEVEL OBLITERATING THE L5 NERVE ROOT. CONSIDER CT TO FURTHER EVALUATE THIS DISC OSTEOPHYTE COMPLEX.
3. MILD DISC BULGE AND DISC DESICCATION IS ALSO NOTED AT THE L3-4 INTERSPACE. (Cl. Ex. A, pp. 10-11)

The claimant next returned to Dr. Almond on February 5, 2007, at which time the claimant was instructed to continue his previous medications, an exercise program as instructed, maintain his restrictions, and to return for further evaluation on February 7, 2007, at which time the claimant and the medical case manager would be present with a reading from a peer review person, apparently, regarding a prior MRI, at which time a decision on further treatment would be made. (Cl. Ex. A, pp. 14-15)

The claim then becomes troubling because of the carrier's course of action. As previously noted, the claimant had an appointment with Dr. Almond for February 7, 2007. The claimant testified that when he went for his appointment, Dr. Almond discussed referring him to a specialist for further evaluation while informing him that his appointment needed to be rescheduled because the nurse case manager, Debra Shahlaie, was not present. The claimant stated that he immediately called Ms. Shahlaie who was upset that he was at the doctor's office because the appointment had been cancelled, but apparently not conveyed to the claimant. The claimant advised Ms. Shahlaie that Dr. Almond wanted to refer him to a specialist. The claimant asserted that the appointment was rescheduled. He maintained that prior to his follow-up examination by Dr. Almond, Ms. Shahlaie and the doctor met

privately and that after Dr. Almond returned for his exam, he was released from Dr. Almond's care without any restrictions. (Tr. 23-26) (Cl. Ex. A, pp. 19-21)

Between the claimant's two (2) appointments with Dr. Almond, respondents obtained a report on its own from one Dr. David H. Berns, Medical Director of Advanced Ancillary Services (an unknown medical provider), who was asked by the respondent to provide an aging report which was then apparently provided to Dr. Almond and which apparently resulted in the claimant's release without restrictions.

The report is set out, in part, below:

I have been asked to provide an aging report on patient James Cullins who had an MR [sic] study of the lumbosacral spine on January 30, 2007. The study consists of sagittal and axial T1 and/or T2 weighted spin echo sequences. Following the administration of intravenous contrast axial and sagittal T1 weighted images were repeated. The patient has had prior surgery.

The disks appear normal except for the L3-4 and L4-5 levels where there is disk degeneration. At L3-4, there is no evidence for disk herniation, central spinal or neural foraminal narrowing. At L4-5 there is some bulging of the disk and most likely some postoperative change to the right of midline where there is epidural fibrosis. There is no evidence for recurrent disk herniation or central canal narrowing. There is some bulging of the disk into the neural foramen where there is mild bilateral stenosis.

In conclusion, there is disk degeneration at L3-4 and L4-5. There is postoperative change to the right of midline at L4-5 but no evidence for recurrent disk herniation. The disk does bulge causing neural foraminal compromise which appears mild. None of these findings are on an acute basis. The findings reflect chronic disease.

I hope this answers any questions that you might have. Please do not hesitate to contact me with any additional help that I might provide. (Cl. Ex. A, p.16)

After Dr. Almond released the claimant without restrictions, the claimant was advised by his employer that he would be required to take another DOT physical

before being permitted to return to work. The claimant reportedly told Jonathan Peeks that he was physically unable to pass the physical. The claimant stated that it was suggested that he use his health insurance to see another physician. The claimant was next seen by Dr. David M. Arnold, an orthopedic surgeon in Conway, Arkansas. The one-time evaluation by Dr. Arnold was made under the claimant's health insurance. Dr. Arnold's February 26, 2007, progress note follows:

Mr. Cullins came here for somewhat of a second opinion as he is embroiled in Arkansas Compensation. He apparently has had case controvert but has a lawyer helping him. Assuming his story is true, this clearly is a Worker's Compensation case in as much as he was injured on the job. He did have a previous back problem, but, as best I can tell, he had a diskectomy and posterolateral in situ fusion that resulted in virtually a pain-free status. One can argue that this might predispose him for other problems at this level or above, but it also is possible to have these injuries without any preexisting spine surgery or back problems. I told him I believe this is a matter of Arkansas Worker's Comp law and that he and his lawyer can decide what to do. I just wanted to enter my opinion with the record that I see nothing to suggest that this is not rightfully a Worker's Compensation case based on history alone and an extensive review of outside records from elsewhere. At my rate, I would pursue things on a conservative fashion at this time with epidural steroid injections and possible our MedX Back Rehab program. If that fails, I would repeat the lumbar MRI with a larger magnet as they used an open magnet elsewhere which is somewhat lacking in resolution. Dependent upon those findings, I would consider possible electrodiagnostic testing and CT/myelography if things were to move in a surgical direction. However, he has not only had surgery at L4, 5, but there is degeneration at L3, 4 which makes the problem a more complicated one, although the current pathology appears on the right side at L4, 5. Even though he has had a fusion, I really do not see much evidence of that, but he would need some routine x-rays to assess that. He probably had resorption of the fusion, but because it was a recurrent herniated disk, one could anticipate just as good a result without a fusion as there may be residual motion at L4, 5 to explain his current pathology. He has no primary caregiver but does have a physician in Little Rock, Dr. Almond, who can continue to take care of him until the dust settles, as I would otherwise be happy to be involved with his future care. (Cl. Ex. A, p.29)

The claimant maintained that he could not afford to follow-up on the

recommendations made by Dr. Arnold. He stated that his insurance with Blue Cross/Blue Shield was cancelled and that he was told that he was not eligible for COBRA. The claimant did not see any medical providers between February 26, 2007, and July 30, 2007, at which time the claimant returned to Dr. Arnold following a Commission approved change of physicians. A procedural history of this claim is also warranted.

After respondents terminated benefits upon Dr. Almond's release in February, 2007, the claimant filed a claim for additional benefits and requested a hearing, at which time the claim was assigned to the Adjudication Division. (Resp. Ex. B)

A prehearing conference was ultimately conducted on May 30, 2007, at which time a Prehearing Order was filed. During the prehearing conference, it was determined that the primary issue concerned claimant's entitlement to a change of treating physicians, specifically, to Dr. David Arnold, which was not requested until following the claimant's February 26, 2007, evaluation. Respondents did not resist the claimant's entitlement to a one-time change of physicians while maintaining that the prior examination and evaluation by Dr. Arnold was never authorized. Both parties agreed that all issues could be held in abeyance and that the claim could be referred to the Medical Cost Containment Division for entry of an appropriate Order. Accordingly, the claim was then transferred to the Medical Cost Containment Division and a Change of Physician Order was filed on June 19, 2007, approving

a change of physicians from Dr. Cynthia Almond to Dr. David Arnold. Dr. Arnold issued a July 30, 2007, report in which he made the same recommendations previously suggested in his February 26, 2007, narrative report. (Cl. Ex. A, pp. 25-29)(Cl. Ex. B)

Suffice it to say that respondents refused to authorize the additional diagnostic studies recommended by Dr. Arnold. Dr. Arnold issued the following progress note on August 6, 2007:

The adjuster for this work comp case would not allow us to get x-rays and MRIs, and obviously, he is dictating the care of this case. As previously stated, I cannot be involved in this patient's care. The patient was notified of this. (Cl. Ex. C-1)

Debra Fay Shahlaie was called as a witness for the respondents. Ms. Shahlaie was the nurse case manager retained by the respondents to work on the within claim. The purpose of her testimony was to explain that she set up an aging report on the claimant's MRI which was the basis for the carrier terminating the claimant's benefits. (Tr. 55, 62)

I feel compelled to point out that Ms. Shahlaie confirmed that the claimant called her before his final release by Dr. Almond and advised her that Dr. Almond wanted to refer him to a specialist. In addition, Ms. Shahlaie acknowledged that the protocol for nurse case managers meeting with treating physicians was different at Concentra compared to other medical providers which I find troubling. A portion of Ms. Shahlaie's testimony in response to questions from this examiner follows:

Q Well, my question is, did the Claimant tell you that Dr. Almond had wanted to refer him to a specialist?

A Yes, sir.

Q Okay. And he told you that he had the appointment. I mean, you can't just walk in and see these doctors without an appointment, can you?

A Yes, sir, you can at Concentra. It is a walk-in clinic.

Q Okay. Had the Claimant ever done that on any of his previous appointments?

A I was with him on two previous appointments, and I can't say for the appointments before the 18th what had happened.

Q And was the Claimant correct, that prior to his seeing Dr. Almond, that you had visited with Dr. Almond?

A On what date?

Q On the 8th.

A On the 8th, after he went into the exam room, the nurse came out and asked me to come back to speak with the doctor.

Q Okay.

A And that's typical for Concentra. You don't go into the exam room. You speak with the physician separately.

Q But is it typical that nurse case managers can't be in the exam room –

A At Concentra.

Q – but do you typically see the doctor outside the exam room?

A Always.

Q Always. Are the claimants ever permitted to be a party to any conversations between the doctor and the nurse case manager?

A If they request to, but the standard protocol for Concentra is they have you – the doctor has you wait in the consultation room, and the doctor comes out and speaks with you, comes and meets you in the consultation room.

Q So whatever conversations that the nurse case manager has with the doctor are *ex parte*, without –

A At Concentra.

Q At Concentra. Is that different from some others?

A Most physicians' appointments I go back on the exam and everything is done in the exam room. (Tr. 65-67)

I am troubled by the fact that Dr. Almond, the authorized treating physician, wanted to refer the claimant to a specialist prior to meeting with the nurse case manager. The standard protocol with most physicians is that all communications are in the exam room where the patient is present. The protocol at Concentra leaves the claimant excluded from relevant communications and appears to give the respondent the ability to influence medical decisions. Clearly, Dr. Almond did not articulate the reason for the abrupt change from an extremely restricted release to an unrestricted release. The aging MRI report, aforementioned, was not clear and unambiguous. In fact, it suggested changes from the prior MRI. The most rational inference is that the respondent influenced medical treatment.

The evidentiary deposition of Jonathan Peeks was submitted subsequent to the hearing. Mr. Peeks was the operations manager for the employer at the time of the claimant's injury. In his deposition, he stated that he last worked for the respondent on May 15, 2007. Mr. Peeks further stated that the claimant was provided work in a light-duty capacity until he was notified by the workers' compensation carrier that the claimant had been released by Dr. Almond, at which

time he advised the claimant if he wanted to go back to driving, the employer needed him to get a re-certification physical. Mr. Peeks stated that the claimant advised him that he did not think he could pass the physical and that there was therefore no need to take the physical. On cross-examination, Mr. Peeks was questioned concerning whether a dispatcher job was available at that time. He stated that they did not discuss that possibility. Further, I feel compelled to point out that A.C.A. §11-9-505 was not an issue raised in this claim.

By agreement of the parties, the only issues presented for determination included, first, whether the claimant was entitled to additional temporary total disability, and, second, respondents' responsibility for continued medical treatment.

TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate his ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment.

see, *Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant bears the burden of proving his entitlement to temporary total disability. In my opinion, the claimant has failed to prove that he is totally disabled from engaging in any gainful employment. The record reflects that the claimant is capable of working. In fact, the record reflects that the claimant continued working at all times following his admitted injury while receiving temporary partial disability until his full release by Dr. Almond in February, 2007. The claimant was never totally disabled. His course of conduct and work history reflects that while he may have been precluded from physically demanding jobs, he was quite capable of performing certain types of gainful employment.

ADDITIONAL MEDICAL TREATMENT

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. v. 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 v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. 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. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the instant case, the Commission authorized a one-time only change of physicians from Dr. Cynthia Almond to Dr. David Arnold. Dr. Arnold has recommended a repeat lumbar MRI with a larger magnet, pointing out that the previous MRI used an open magnet which was somewhat lacking in resolution. Dr. Arnold further stated that dependent on those findings, he would consider possible electrodiagnostic testing and CT/myelography if warranted. In my opinion, the recommendations by Dr. Arnold are not conflicting with the aging report offered by Dr. David Berns. Even Dr. Berns suggested that there were postoperative changes, but no evidence of recurrent disc herniation, as well as a bulge causing neural foraminal compromise which appeared mild. Despite Dr. Berns' opinion that he did not find these findings showed an acute injury, they also did not rule out additional injury. Dr. Arnold's recommendations are reasonable and should be authorized..

Further, as previously pointed out, I find Dr. Almond's abrupt change from a release with substantial restrictions to a release without restrictions made following *ex parte* communications with the nurse case manager to be the result of influence from the insurance carrier rather than based upon physical examination and clinical findings. The nurse case manager was advised by the claimant that Dr. Almond suggested a referral to a back specialist. The nurse case manager conceded that it was the carrier's decision and not hers to terminate the claimant's medical treatment. Purportedly, based upon a supplemental MRI aging report, Dr. Almond radically changed her position.

When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, AWCC #D511255, Full Workers' Compensation Commission Opinion filed December 13, 1989.

The Commission ordered a change of physicians to Dr. David Arnold. Dr. Arnold has made clear and specific recommendations in an effort to determine the true nature and extent of claimant's admitted injury. Authorizing a one-time only examination and then refusing to follow through with the recommendations frustrates the purpose of the Workers' Compensation Act. The claimant has an absolute right to a change of physicians one-time and respondents must pay for at least one visit to the new doctor. See, *Collins v. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002) and *Virginia A. Gordon v. Wal-mart Stores, Inc.*, AWCC #F107611, Full Commission Opinion filed March 17, 2003. I find an alarming trend. Respondents permit the one-time visit and then dispute any further treatment regardless of the findings and recommendations. Respondents should be held responsible for the recommendations made by the authorized treating physician unless the recommendations are unreasonable on its face. Otherwise, the change of physicians procedure has been rendered meaningless.

AWARD

Respondent, Retention Management Services, Inc., is hereby directed and

ordered to pay for additional recommended treatment by Dr. David Arnold, including, but not limited to the additional diagnostic testing suggested by Dr. Arnold.

By necessity, all additional issues are specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge