

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400568

JIMMY FORD, EMPLOYEE	CLAIMANT
HEPCO, INC., EMPLOYER	RESPONDENT
UNION INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 26, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 12, 2006 in Little Rock, Arkansas. A prehearing order was entered in this case on June 12, 2006. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

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

2. The employee/employer/carrier relationship existed at all relevant times, including December 8, 2003.
3. On December 8, 2003, the claimant sustained a compensable injury to his low back.
4. Respondents accepted the December 8, 2003 low back injury as compensable and paid benefits.
5. The claimant earned wages sufficient to entitle him to the maximum compensation rates.

By agreement of the parties at the start of the hearing, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant is entitled to additional medical treatment and temporary total disability benefits starting on February 13, 2006.
2. Controversion and attorney's fees.
3. Whether the claimant's request for additional medical treatment beginning with Dr. Calhoun's surgery on February 13, 2006 is barred by the change of physician provisions of Ark. Code Annotated § 11-9-514.

The record consists of the December 12, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained a compensable low back injury on December 8, 2003. The respondents paid for treatment and testing prescribed by Dr. Russell Hatley, Dr. Jim Moore, and Dr. John Wilson. On November 3, 2004, Dr. Moore released the claimant to return on an as needed basis.

The claimant then initiated treatment with Dr. Gregg Massanelli, Dr. Thomas Hart, and Dr. Michael Calhoun, who performed an L5-S1 fusion on February 13, 2006. In the present claim, the claimant seeks additional temporary disability compensation beginning on February 13, 2006. In addition, the claimant seeks an award of additional medical benefits beginning with Dr. Calhoun's February 13, 2006 surgery.

- 1. Do the provisions of Arkansas Code Annotated § 11-9-514(c) bar the respondents from liability for the disputed medical treatment provided by Dr. Calhoun beginning on February 13, 2006 under circumstances where the claimant did not obtain a change of physician order, but the hearing record also does not contain a Form AR-N signed by the claimant?**

Arkansas Code Annotated § 11-9-514 (Repl. 2002) sets forth the statutory procedures for a change of physician.

Arkansas Code Annotated § 11-9-514(c) provides:

- (1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified mail, return

receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

(2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

(3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

In the present case, the respondents provided the claimant treatment through Dr. Hatley, Dr. Moore, and Dr. Wilson. The claimant testified that he never went back to Dr. Moore after November 3, 2003. The claimant testified that he was never refused an appointment with Dr. Moore, and the claimant understood that if he needed to, he could go back to Dr. Moore for treatment. [T. 36] In addition, the record indicates that the claimant sought from the Commission but was denied a change of physician request to Massanelli on January 19, 2006. [R. Exh. 4]

Citing Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000), a majority of the Full Commission has recently concluded that, absent an indication in the record that the claimant received a copy of the notice and change of physician rules pursuant to Ark. Code Ann. § 11-9-514(c), the change of physician rules do not apply. The

Commission reached this conclusion under circumstances where, as here, the claimant hired an attorney and applied for a change of physician with the Commission.

Nevertheless, the Commission concluded that a claimant's agreement that her attorney explained the rules regarding change of physician to her did not establish that she received notice of the rules in the manner specifically required by Arkansas Code Annotated § 11-9-514(c). Fisher v. Staff Mark, Full Workers' Compensation Commission, Opinion filed September 11, 2006 (F411831).

Because the parties have not submitted a signed Form AR-N in the record in the present case, I likewise find in the present case that the claimant was free to seek reasonably necessary medical treatment from Dr. Calhoun.

2. Was Dr. Calhoun's February 13, 2006 L5-S1 fusion surgery reasonably necessary medical treatment for the claimant's December 8, 2003 low back injury?

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App.

100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find for several reasons that the claimant has failed to establish by a preponderance of the credible evidence that Dr. Calhoun's L5-S1 fusion surgery was reasonably necessary for treatment of his work related injury.

First and foremost, I note that four neurosurgical or orthopedic specialists have either evaluated or treated the claimant for his low back: Dr. Moore, Dr. Wilson, Dr. Akin, and Dr. Calhoun. Of those four specialists, only Dr. Calhoun offered the claimant fusion surgery. I find more credible and accord greater weight to the conclusions of Dr. Moore and Dr. Wilson, that the claimant was not a surgical candidate, than the weight I accord Dr. Calhoun's decision to offer the claimant elective L5-S1 fusion surgery.

In assessing the credibility of the doctors' conclusions, I recognize that Dr. Calhoun had the benefit of a second MRI and a discogram which were performed after the claimant was last evaluated and found by Dr. Wilson and Dr.

Moore not to be a surgical candidate. However, I note that Dr. Wilson also testified that the radiologist's report from the second MRI contained the same findings as Dr. Wilson saw and read himself in the first MRI. [R. Exh. 1 p. 15]

Conversely, I also note that Dr. Calhoun did not have available when offering the claimant surgery in 2006 the prior 2004 reports of Dr. Wilson and Dr. Moore, or the first MRI. Dr. Wilson, who also performs fusions, discussed in his September 19, 2006 deposition his thoughts on discograms as a diagnostic tool. Under these circumstances, I find that Dr. Moore and Dr. Wilson were not at a disadvantage to Dr. Calhoun in rendering surgical opinions in this case.

Second, I note that Dr. Calhoun testified in a July 6, 2006 deposition that he would be hard pressed to say that the claimant's condition got any better after surgery. [R. Exh. 2 p. 21] The Arkansas Court of Appeals has indicated that "[p]ostsurgical improvement is a proper consideration in determining whether the surgery was reasonable and necessary...." Winslow v. D & B Mechanical Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

Third, with regard to whether the surgery was reasonably necessary when scheduled, Dr. Calhoun testified:

Q. And while, you know, hindsight is always 20/20, and you've indicated today that perhaps Mr. Ford didn't have the optimum outcome of the procedure, when you were discussing the risks and the benefit of the surgery with him, was it your opinion at that time that this was a reasonable and necessary treatment for his condition?

A. Well, gosh, that's a tough question. I mean this is purely an elective operation. It depends on if they, you know, they clearly know that the results aren't as good, that he may not be any better - I honestly don't know if I can say it's truly reasonable and necessary, but I think it gave him a chance to get better when everything else had been exhausted. [R. Exh. 2 p. 28-29]

In light of the medical opinions of Dr. Moore and Dr. Wilson concluding that the claimant was not a surgical candidate, Dr. Calhoun's assessment that he would be hard pressed to say that the claimant's condition got better after surgery, and Dr. Calhoun's inability to say himself with any conviction that the elective surgery offered was reasonable and necessary treatment, I find that the claimant has failed to establish by a preponderance of the credible evidence that L5-S1 fusion was reasonably necessary treatment for the claimant's lumbar low back injury.

3. **Is the claimant entitled to additional temporary disability compensation for his post-surgical healing period beginning on February 13, 2006, if the surgery was not reasonably necessary treatment for his compensable injury?**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, because I find that Dr. Calhoun's February 13, 2006 surgery was not reasonably necessary treatment for the claimant's compensable injury, I find that this surgery did not extend or re-open the claimant's healing period for his compensable low back injury. The claimant has failed to establish that he remained within the healing period for his 2003 injury during any period on or after February 13, 2006. This claim for additional temporary total disability compensation must therefore be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed

at all relevant times, including December 8, 2003.

3. On December 8, 2003, the claimant sustained a compensable injury to his low back.

4. Respondents accepted the December 8, 2003 low back injury as compensable and paid benefits.

5. The claimant earned wages sufficient to entitle him to the maximum compensation rates.

6. The change of physician rules do not apply to the medical treatment at issue in the present matter because the record does not contain evidence that the claimant was provided statutorily required notice explaining his rights and responsibilities regarding a change of physician.

7. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment that he has received from Dr. Calhoun beginning on February 13, 2006 at issue in this claim, specifically L5-S1 lumbar fusion, was reasonably necessary medical treatment for his December 8, 2003 compensable injury.

8. The claimant has failed to prove by a preponderance of the evidence that he remained within the healing period for his December 8, 2003 compensable injury at any point on or after February 13, 2006. The claimant has therefore failed to establish by a preponderance of the

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evidence that he is entitled to any period of additional temporary total disability compensation on or after February 13, 2006.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge