

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406587

JAMES WESLEY GOYNE, EMPLOYEE	CLAIMANT
CRABTREE CONTRACTING COMPANY, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 19, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on November 9, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Melissa Wood, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 9, 2007, to determine whether the claimant was entitled to additional workers compensation benefits.

A prehearing telephone conference was conducted in this claim on September 5, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, the issue, as well as their respective contentions were properly set out in the Prehearing Order, subject to a supplemental contention stated at the hearing which was first raised when respondents submitted supplemental medical records on November 1, 2007. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the claimant sustained a compensable low back injury

on June 4, 2004; that he earned sufficient wages to entitle him to a compensation rate of \$347.00 per week for temporary total disability and \$260.00 per week for permanent partial disability; that respondents paid temporary total disability until on or about February 3, 2005, at which time Dr. Scott Carle assessed a five percent (5%) permanent impairment which respondents also accepted and paid; that the claimant subsequently petitioned and received a one-time change of physicians from Dr. Carle to Dr. Harold Chakales on April 6, 2007; that respondents paid for the initial evaluation by Dr. Chakales; and that respondents have controverted claimant's entitlement to additional diagnostic studies and medical treatment.

By agreement of the parties, the sole issue presented for determination was whether the claimant was entitled to additional testing and treatment, specifically, an EMG study recommended by Dr. Harold Chakales.

Claimant contended, in summary, that as the result of his admitted compensable injury, he obtained a change of treating physicians to Dr. Harold Chakales; that based upon objective findings, Dr. Chakales recommended additional diagnostic testing in the form of an EMG; that the recommended testing was reasonably necessary, as well as related to the claimant's compensable injury and should be paid by respondents.

The respondents contended that it had paid all appropriate benefits; and that additional studies and treatment are not reasonably necessary. At the hearing, respondents amended its contention, pointing out that the claimant sustained a slip

and fall in August, 2006, which would constitute a new injury and/or a new intervening cause.

The claimant testified in his own behalf. Rick Byrd, the owner of Functional Testing Centers, Inc., who performed a functional capacity evaluation of the claimant, testified in respondents' behalf through an evidentiary deposition submitted subsequent to the hearing, as will be set out further below. The record is composed solely of the transcript of the November 9, 2007, hearing containing various medical records, together with the telephone deposition of Rick Byrd 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 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 an EMG diagnostic study recommended by Dr. Harold Chakales

following a change of physician, authorized by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission pursuant to an Order filed April 6, 2007.

4. The claimant's entitlement to additional medical treatment, if any, requires further development of the medical evidence and is, by necessity, specifically reserved.

DISCUSSION

This is an extremely troubling claim. The claim has a lengthy and complicated procedural history. The claimant's course of conduct and failure to timely pursue additional workers' compensation benefits after respondents terminated all medical treatment is perplexing and has not been fully explained. Likewise, respondents' course of conduct in unilaterally changing the claimant's authorized medical providers is equally troubling. Once the claimant belatedly pursued his right to a change of treating physicians, respondents agreed to the examination and evaluation. However, once the authorized examination was completed, respondents refused to authorize an inexpensive diagnostic study suggested by the authorized physician, apparently, in an effort to determine the true nature and extent of the claimant's compensable injury. Rather, after taking a hard-line position that the recommended diagnostic study was not reasonably necessary, respondents conducted additional discovery, and eight (8) days prior to the hearing, submitted timely supplemental medical records reflecting that the

claimant sustained a slip and fall in August, 2006, while at the same time contending that the claimant sustained a new injury and/or an independent intervening cause which would account for his current need for medical treatment, if any. At the hearing, claimant's attorney objected to both a functional capacity evaluation performed on January 18, 2005, and proffered by respondents, as well as the new supplemental defense first raised by respondents on November 1, 2007, when respondents submitted additional medical evidence. Clearly, the new medical evidence was submitted seven (7) days prior to the hearing as required by Ark. Code Ann. §11-9-705(c).

The evidentiary issue concerning the admissibility of Mr. Byrd's functional capacity evaluation was resolved by permitting his evidentiary deposition to be submitted subsequent to the hearing which allowed the claimant the right to cross-examine Mr. Byrd. However, permitting respondents to add an additional issue, contemporaneous with the submission of supplemental medical by amending its contentions denies the claimant due process. Although the claimant could not object to the introduction of the medical evidence as being untimely, it was not proper for this Administrative Law Judge to add additional issues, unless, by agreement of both parties. The parties did not agree to litigate whether the claimant's physical problems and need for treatment after August 14, 2006, were related to his admitted injury or an independent intervening cause. Accordingly, all additional issues other than the agreed upon issue must be specifically reserved for

future determination, if necessary.

HISTORY

The claimant, James Wesley Goyne, is forty-seven (47) years old. He has an eleventh grade education. The claimant subsequently obtained a GED. The claimant worked for Crabtree Contracting Company approximately two and one-half (2-1/2) years prior to sustaining a work-related injury as the result of a specific event identifiable in time and place of occurrence on June 4, 2004. The claimant's description of the injury, its prompt reporting, as well as claimant's course of medical treatment is set out below:

Q And what happened on that date, briefly?

A They were pouring concrete, had a screen hung up, and I tried to lift it out of the jam it was in. It sounded like a shotgun went off, and my back popped and I went down.

Q Okay. And you reported that to your supervisor?

A Yeah, yes, sir. He was there. He saw it.

Q And how long had you worked there at Crabtree?

A Two years close, year and a half, two years.

Q Okay. After this incident you reported to your supervisor. Were you provided medical care and treatment?

A Yeah, four hours later.

Q Okay. And explain what happened then.

A After medical care or what?

Q Well, yeah, did your employer take you to the emergency room?

A They took me to the emergency room, and drove off and left me standing at the door.

Q Okay. Anyway, you saw the doctors in the emergency room. Did they refer you to any physicians after that?

A Yes, sir.

Q Who did they refer you to?

A Well, I went to Jackson just to get him to refer me to a specialist, and he sent me to Kornblum over here, a neurologist at St. Bernards.

Q Okay. So the employer took you to the emergency room, the emergency room – is Dr. Jackson your family doctor?

A Yeah, he's just an MD there in Newport.

Q Did the emergency room advise you to follow up if you had problems?

A Yes.

Q Okay. And did you tell your supervisor about these people?

A Yes.

Q Okay. So you were under the active medical care and treatment of Dr. Kornblum, is that correct?

A Yes, sir.

Q Who was the next doctor you saw?

A One that they sent me to.

Q The records show that you've seen a Dr. Carle?

A Carle was the next one that I saw.

Q Okay. And who sent you to Dr. Carle?

A Workers' comp.

Q Were you still under the active care and treatment of Dr. Kornblum at the time they sent you to Dr. Carle?

A Yes, sir.

Q Okay. Did the nurse case manager send you?

A Yes, sir.

Q Did she advise you that you didn't have to see Dr. Carle?

A I don't remember.

Q Well, did she advise you that you did have to see him?

A If I wanted to continue to receive benefits and care, that I had to.

Q Okay. And so she changed your physician, your treating physician from Dr. Kornblum to Dr. Carle?

A Right. Dr. Carle was just to see who to send me to the next guy.

Q Okay.

A I mean, it was –

Q And then –

A I just cooperated with them. I did what they asked me to do.

Q Okay. Then you saw Dr. Ackerman. Who sent you to Dr. Ackerman?

A Carle sent me to Ackerman.

Q Okay. And approximately how many times did you see Dr. Ackerman?

A Five times, exactly five times.

Q Can you explain to the Judge – did Dr. Ackerman, when you went in to see him, did he explain everything to you, spend a lot of time with you?

A He spent no time with me. Basically, he poked around on me a little bit, gave

me pain medication, and sent me home. He did schedule one steroid block, and after that, when I went back for my fifth appointment, he said that if that –

MS. WOOD: Objection, Your Honor, hearsay.

MR. WILSON: Don't say what he said.

BY MR. WILSON:

Q What did he do?

A What did he do?

Q Yeah. Did he say he was through treating you?

A He said – yeah.

Q Okay. Did the doctor indicate – was it your understanding that there was nothing else that the doctors could do for you, Drs Carle or Ackerman, from a medical standpoint?

A It's my understanding that they didn't intend to do anything else.

Q Okay. And then I believe at that point in time you went through the workers' compensation process and got an appointment – got a change of physician to Dr. Chakales, is that correct?

A You did that for me.

Q Okay. And –

A After two years of no treatment.

Q Okay. And then did you see Dr. Chakales?

A Yes, sir.

Q Okay. And in the medical records that we do have from your physical therapy, who's the doctor that sent you to physical therapy?

A That was just – no doctor sent me to that. That was just Irene Voyles sent me.

Q Irene, the adjuster sent you –

A Yes. (Tr.14-18)

The claimant has not returned to gainful employment since June 4, 2004. The claimant stated that his back condition had remained about the same since the injury, maintaining that it had neither improved nor gotten worse. He stated that he was in constant pain and that he continued to experience muscle spasms at all times since the injury, including when he was under the care of Dr. Carle and Dr. Ackerman. The claimant disputed the findings in the functional capacity evaluation performed by Rick Byrd stating that he gave his best effort during the entire test, disagreeing with Mr. Byrd's assessment that the claimant gave an unreliable effort with twenty-six (26) of fifty-one (51) consistency measures within expected limits.

The claimant was initially examined and treated in the emergency room of the Harris Hospital in Newport, Arkansas. The claimant was diagnosed as having sustained an acute lumbar strain; treated with multiple medications; and prescribed physical therapy. The claimant received follow-up physical therapy. The initial hospital record, as well as the physical therapy records note the persistence of muscle spasms.

As previously pointed out, the claimant was next referred to Dr. Kornblum, a neurosurgeon in Jonesboro, Arkansas. For some unexplained reason, neither party submitted the medical records from Dr. Kornblum which is only one of many reasons why the nature and extent of claimant's injury requires further development

of the medical evidence. Apparently, as reflected by the claimant's testimony on cross-examination, Dr. Kornblum recommended an evasive procedure known as a IDET which respondents refused to authorize and which the claimant did not wish to undergo, at which time respondents, unilaterally, changed the claimant's treatment from Dr. Kornblum to Dr. Scott Carle who apparently first evaluated the claimant on or about November 14, 2004. Dr. Carle subsequently referred the claimant to Dr. William E. Ackerman, an anesthesiologist and pain management specialist with Arkansas Specialty Care Center in Little Rock, Arkansas. As previously pointed out, the claimant stated that he saw Dr. Ackerman approximately five (5) times. Dr. Ackerman treated the claimant with medications and also referred the claimant to Rick Byrd with Functional Testing Centers, Inc., in Norfolk, Arkansas, for a functional capacity evaluation. The functional capacity evaluation was performed on January 18, 2005. Thereafter, the claimant returned to Dr. Ackerman on January 27, 2005. Dr. Ackerman's clinic note is set out, in its entirety, below:

CLINIC NOTE

PATIENT NAME: James Goyne

DATE OF VISIT: January 27, 2005

REFERRING PHYSICIAN: Scott W. F. Carle, MD

CHIEF COMPLAINT: Pain in lumbar spine.

INTERIM HISTORY: The patient returns today for a refill of medications and to discuss his functional capacity evaluation. He relates that his pain is worse. He

relates that with the diagnostic injections that he only had a small amount of pain relief in the area where he received the injection. Overall his pain was actually worse with a component of burning. As expected the injection lasted 60 minutes. He is complaining of insomnia as well as severe pain. He has not lost bowel or bladder function. He relates that he does have a "leaky bladder." He is not doing therapy at this time. He has no new medical condition since I last saw him. He has had a functional capacity evaluation. His functional capacity evaluation was consistent with an unreliable effort in 26 of 51 consistency measures. His effort was inconsistent throughout the exam. Inappropriate illness behaviors were appreciated and recorded. He qualifies for a Department of Labor light duty classification.

MEDICATIONS: None.

PHYSICAL EXAMINATION:

VITAL SIGNS: Weight 172 pounds. Blood pressure 127/87. Pulse 139. Respirations 18. Verbal assessment – pain score 6.

NEUROLOGICAL: The patient is alert and oriented times 3. Gait and balance are normal. He is unable to stand straight. He is in a bent over position. Light touch about his lumbar spine causes him severe pain. He has decreased range of motion in all planes about his lumbar spine.

HEENT: Pupils non-miotic.

ABDOMEN: Bowel sounds normal.

ASSESSMENT: Sprain/strain injury. He has exceeded the normal healing time for this type of injury. He had no relief with a diagnostic/therapeutic injection. I have not detected muscle spasms.

PLAN: Essentially I have no objective criteria to award him an impairment rating. Therefore, it is my medical opinion that he is at maximum medical improvement and has an impairment rating to the body as a whole of 0% using the American Medical Association Guides To The Evaluation of Permanent Impairment, fourth edition, page 110. (Resp. Ex. A, pp.19-20)

Again, for some inexplicable reason, all of the Dr. Ackerman's prior evaluations were not submitted. In his January 27, 2005, clinic note, Dr. Ackerman noted that he did not detect muscle spasms on the date of his last visit. I found Dr.

Ackerman's notes to be somewhat self-contradicting. In the interim history, Dr. Ackerman indicated that the claimant qualified for a Department of Labor light-duty classification while opining that the claimant had reached maximum medical improvement without any permanent impairment.

On February 3, 2005, Dr. Scott Carle, the doctor to whom respondents referred the claimant for treatment, issued what he described as a supplemental IME statement consisting of eight (8) pages. Rather than conduct an exhaustive analysis of Dr. Carle's somewhat confusing report, suffice it to say that he released the claimant as having reached maximum medical improvement and assigned a five percent (5%) whole person permanent impairment which respondents accepted, and have apparently paid.

As previously pointed out, the claimant did not see another physician for his work-related back injury between the time he was released by Dr. Carle in February, 2005, until after an Order was filed on April 6, 2007, authorizing the claimant to change treating physicians from Dr. Carle to Dr. Harold Chakales, an orthopedic surgeon in Little Rock, Arkansas. The record does reflect that the claimant sought the services of an attorney in August, 2005, at which time his attorney filed a claim for additional benefits. However, the request for change of physician was not requested until on or about January, 2007. The claimant was ultimately examined by Dr. Chakales on May 9, 2007. Dr. Chakales was provided with copies of previous diagnostic studies, including, apparently, x-rays, MRI, and myelogram. Dr.

Chakales' physical examination reflected involuntary muscle spasms, as well as positive straight leg raising bilaterally. Dr. Chakales diagnosed lumbar disc syndrome with nerve root irritation. Based upon the review of claimant's old medical records, together with his examination, Dr. Chakales recommended obtaining an EMG of claimant's back and both legs. (Cl. Ex. A, pp.29-30)

As reflected above, just prior to the hearing, respondents obtained and submitted records from the Harris Hospital showing a date of service on August 14, 2006. The history reflects that the claimant slipped on water and fell, sustaining a back strain while also noting an injury to the claimant's back two (2) years previous. The record reflects that the aforementioned incident occurred during a time that the claimant was incarcerated for non-payment of child support obligations which were substantially in arrears since the claimant has not returned to gainful employment since June 4, 2004. The claimant testified that he did not re-injury his back as the result of the August 14, 2006, incident while, at the same time, maintaining that he had fallen numerous times as the result of weakness in both extremities.

The sole issue presented for determination was whether the claimant was entitled to additional testing and treatment, specifically, an EMG diagnostic study recommended by Dr. Harold Chakales.

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).

Further, in assessing whether a given medical procedure 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 vs. Seba, Inc.*, AWCC #D511255, Full Commission Opinion Filed December 13, 1989.

In the instant case, respondents have not been asked to provide additional medical treatment, to date. Rather, respondents have refused to provide an additional diagnostic study recommended by an authorized treating physician, specifically for the purpose of determining the nature and extent of claimant's injury. The Workers' Compensation Commission ordered a change of physicians from Dr. Carle to Dr. Chakales. Dr. Chakales' recommendation cannot be considered unreasonable or outrageous. Authorizing a one-time only examination and then refusing to follow through with the recommendations of the authorized physician 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 perceive 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.

I have read the report of Rick Byrd, as well as his evidentiary deposition. I recognize that the claimant's testimony is contradicted by Mr. Byrd. However, any inconsistencies between the testimony of the claimant and the record as a whole which questions the claimant's credibility is relevant to the exact nature and extent of the claimant's injury which does not change my opinion that respondents should, at the very least, be held responsible for the additional diagnostic test recommended by Dr. Chakales.

I further recognize that respondents have raised an independent intervening accident as justification for maintaining that the recommended diagnostic study is neither reasonably necessary nor related to the claimant's compensable injury. In my opinion, the issue of whether the claimant's physical problems and need for treatment are the result of the admitted compensable injury or an independent

intervening accident, requires further development of the medical evidence, and is by necessity specifically reserved.

AWARD

Respondent, AIG Claims Service, Inc., is hereby directed and ordered to pay for an MRI study of the claimant's low back and lower extremities recommended by Dr. Harold H. Chakales. Claimant's entitlement to further medical treatment, if any, as well as all additional issues, are specifically reserved pending further development of the medical evidence.

Since this is a medical only claim, attorney's fees cannot be awarded pursuant to Ark. Code Ann. §11-9-715.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge