

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303461

PERRY M. PECTOL, EMPLOYEE	CLAIMANT
KALLSNICK, INC, EMPLOYER	RESPONDENT
STATE FARM FIRE & CASUALTY, CARRIER	RESPONDENT

OPINION FILED JULY 12, 2007

A hearing was held on May 2, 2007, before Administrative Law Judge Chandra Hicks, in Batesville, Independence County, Arkansas.

The claimant was represented by The Honorable Kristofer Richardson, Attorney at Law, Jonesboro, Arkansas.

The respondent was represented by The Honorable Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 2, 2007, in Batesville, Arkansas. A Prehearing Order was entered in this case on February 26, 2007. This Prehearing Order set out the stipulations offered by the parties, and outlined the issues to be ligated and resolved at the hearing.

Stipulations

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The employee-employer-carrier relationship existed on December 14, 2002, and at all other relevant times.
2. The claimant sustained compensable injuries to his legs and low back on December 14, 2002.

3. The claimant's average weekly wage at the time of his injury was \$575.00. His temporary total disability rate is \$383.00; and his permanent partial disability rate is \$287.00.

Issues

By agreement of the parties, the issues to be litigated were limited to the following:

1. Whether the claimant is entitled to additional medicals-unpaid and future reasonable and necessary medical treatment to his lower back.
2. Statute of limitations defense.
3. All issues relating to permanency are reserved.
4. Permanent impairment rating (The parties added this as an issue at the time of the hearing).

Contentions

In regard to the foregoing issues, the claimant contends that respondents have wrongfully refused to provide payment for treatment of the claimant's compensable lower back injury. Specifically, claimant has sought and received treatment from Dr. Jerry Frankum as well as chiropractic treatment which is reasonably necessary in connection with the claimant's compensable injury and remains unpaid by the respondents.

Respondents contend that all appropriate benefits have been paid associated with the claimant's compensable leg and lower back injuries. Additional medical care is not reasonable and necessary. Further, respondents contend that the statute of limitations has run, as the last payment of medical benefits was

in September of 2003.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order which has been marked Commission's Exhibit No. 1. Post-trial briefs were filed and have been marked as Commission's Exhibit No. 2. These have been blue-backed, and are hereby incorporated by reference. The claimant's Prehearing Questionnaire was marked as Claimant's Exhibit No. 1, and medical records submitted by the claimant from Dr. Frankum were marked as Claimant's Exhibit No. 2. The claimant's chiropractic records were marked as Claimant's Exhibit No. 3. The impairment rating from Dr. Taylor was marked as Claimant's Exhibit No. 4. The May 13, 2005 hearing transcript was marked as Claimant's Exhibit No. 5. The Opinion filed August 4, 2005 was marked as Claimant's Exhibit No. 6. The respondent's Prehearing Questionnaire was marked as Respondent's Exhibit No. 1, and the medical packet submitted by the respondent was marked as Respondent's Exhibit No. 2. The respondent's non-medical packet was marked as Respondent's Exhibit No. 3.

The following witness testified at the hearing: the claimant.

DISCUSSION

The claimant, age 60 (5/28/47), sustained admittedly compensable injuries to his legs and low back on December 14, 2002 when he fell several feet out of a "bob truck."

According to the claimant, since his compensable injury, he has treated with Dr. Frankum, his primary care physician, Dr. Tom

Taylor, a chiropractor, and other physicians he was sent to by the respondent. The claimant testified he underwent an MRI and a CT scan in Newport, but to his knowledge, these bills have not been paid. The claimant further maintains that the bills from Dr. Frankum have not been paid by the respondent. According to the claimant, these bills were paid by his insurance carrier, Blue Cross and Blue Shield Insurance.

The claimant admitted to being involved in an automobile accident after his work-related injury wherein he and his son-in-law were rear-ended. According to the claimant, this accident involved only his neck, for which he sought treatment from Dr. Taylor. The claimant admitted that at some point, Dr. Taylor stopped treating his neck and started treating his back, which he maintains was related to his work-related injury. However, the claimant further testified that whenever he saw Dr. Taylor, he would work on his entire body, as he would perform a complete adjustment. The claimant testified that everything he owed Dr. Taylor has been paid by Medicare. He testified that Newport Hospital and bills from Dr. Frankum have not been paid, as they have been turned over to a credit collection agency.

As to his current symptoms, the claimant testified he has pain down in his back, lower back, and right hip and leg. According to the claimant, his leg burns and goes numb. The claimant maintains that the car accident did not cause problems with his back. The claimant denied any injuries with his low back except for his work-related injury.

On cross examination, the claimant testified:

____ Q. Mr. Pectol, when we went to a hearing back in May of 2005, do you remember Kris asking you a similar question if you'd had any other accidents or injuries to your back?

A. As far as my back?

Q. Or any other accidents or injuries at all? Do you remember him asking you that question?

A. I can't remember.

Q. Well, you denied the same. You said that you didn't have any other accidents, but you did, in fact, have the motor vehicle accident, is that correct?

A. I was hit in the back end, me and my son-in-law.

Q. Okay. And that was in December of 2003, is that correct?

A. You know, we're talking about seven years ago, almost, four years ago, I can't remember.

Q. If that's what the medical records show when it happened, do you have any reason to dispute it?

A. Hey, like I said, I don't know.

The claimant again denied any injury to his low back as a result of the December 15, 2003 car accident.

Upon being questioned by the Commission, the claimant testified he was asking for payment of the bills from Dr. Frankum and Newport Hospital, which includes an MRI. The claimant also testified he would settle for payment of the aforementioned medical bills without any future medical benefits.

Medical notes dated March 9, 2003, authored by Dr. Frankum, state, in pertinent part:

A male patient who is placed in Newport Hospital on 3-9-03. He is noted to have an umbilical hernia. She

[sic] is seen by Dr. Allen for this. He wants to defer until his back is better. He is admitted to this physician's service by Dr. Hunt. He is also having intractable back pain. He has been involved in falling at work.

PROVISIONAL DIAGNOSIS:

1. INTRACTABLE BACK PAIN
2. UMBILICAL HERNIA
3. COPD.

On May 2, 2003, the claimant was seen by Dr. David Reding, who reported, in pertinent part, the following:

HPI: This is a gentleman who was seen in consultation on 5/2/03. He is 55 years old and took a fall out of the back of a truck on 12/13/02 while he was on the job. He apparently really twisted his back and bruised up his side rather severely. He has had rather severe pain ever since then. He continued to work up until about March of this year, but has not worked since then. He continues to have pain mostly across his low back, but he does have some pain into his right hip and thigh. He says it occasionally feels like his right leg just won't go. The pain is aggravated by sitting and standing. He has had some physical therapy. He has been on Cyclobenzaprine and Darvocet. He hasn't been on any steroids or anti-inflammatories that he is aware of.

MDM: I reviewed his MRI scan and his lumbar spine series. I would tend to agree with them that it just shows some mild degenerative changes and does not show any significant disc herniation or nerve root compression. I talked to him about this at some length. I think he has a soft tissue injury with some muscle strain. I don't know if the hernia has contributed any to his problems or not, but I would leave that up to your judgment. As far as the spine itself goes, I don't see a major injury and so I would probably send him back to a light duty type work sometime in the near future unless he does need surgery on his abdomen. The only thing I had to add to your treatment was I'm going to put him on some Vioxx on a fairly regular basis and he can take that and probably even drive, and so that may be a good choice for him to

try to get off some of the other medication and get slightly more active. I did not make him a followup appointment. I don't see any permanent impairment from the back itself.

On June 18, 2003, Dr. Frankum admitted the claimant to the hospital, he reported:

HISTORY OF PRESENT ILLNESS: A 56 year old male patient who comes into the office and goes to the Newport Hospital ER. He was complaining of back pain, sore throat, COPD. His back was hurting him and he felt he needed some physical therapy. He is hurting on the lumbosacral area on the right side and to his right hip and right leg. He also was having sinus trouble and a sore throat.

PAST MEDICAL HISTORY: He has recently had an MI and has had a stent. He has been seen by a neurosurgeon in Little Rock, AR.

FAMILY HISTORY: Noncontributory.

SOCIAL HISTORY: Lives in Newport area

REVIEW OF SYSTEMS

PHYSICAL EXAMINATION: BP 167/97, P 65, R 12, T 98.
Pain scale 9/10.

HENT: The head is symmetrical. There is no icterus, exophthalmos, no lid lag.

CHEST: Increase in AP diameter, increased breath sounds.

ABDOMEN: Umbilical ventral hernia.

BACK: Low back pain.

PROVISIONAL DIAGNOSIS: LOW BACK PAIN

On September 3, 2003, Teresa Baker requested the following information of Dr. Jim Moore:

Dear Dr. Moore;

We have been asked by the insurance company to have a MD Review done on Perry Pectol. Here are the questions that need to be addressed:

1. What is the causal relationship between admission 3/9/03 to 3/18/03 to workers injury of the lumbar

spine?

2. Is this admission reasonable and necessary in relationship to his low back injury?

3. His treatment of the back pain only consisted of IM and PO pain medications and PT, this does not meet admission criteria for in patient status and not for 9 days. There was more focus on his other medical conditions than the workers [sic] injury to his low back.

4. Second admission on 3/28/03 would require answers to above questions as well.

When addressing questions in the report, we find it to be beneficial to number your answers to correlate with the numbered questions. It is helpful in eliminating addendums and has ensured that each question has been addressed.

In a letter dated September 3, 2003, Dr. Jim Moore reported the following:

I have reviewed the medical file on this patient which encompasses treatment by his family physician apparently after trauma falling off of some sort of a truck. The patient was offering complaints multiple and in various organ systems including back, abdomen and respiration, the latter being COPD. He was treated supportively, conservatively and investigatively. Apparently a recommendation for neurosurgical evaluation was made but apparently has not as yet been achieved initially to Dr. Schlesinger and then to Dr. Adametz. I do not know the answer for this. The patient did have an MRI. Apparently one of the doctor's notes showed degenerative arthritis and some disk disease but I do not see a copy of the MR report itself for review. I am going to attempt to answer the questions posed.

1. I do not believe that it would be justified to admit this patient to the hospital for a back injury such as is described in the medical review today. This also answers question #2.

3. You are correct that the medication program and therapy does not meet admission criteria. This could be achieved by outpatient and it does appear that the other medical conditions seem to take precedence over

the alleged back injury.

4. The same applies to the second admission of 3-28-03.

An MRI of the claimant's lumbar spine was taken on March 10, 2003, with the following impression: **Mild degree of degenerative disease of the lumbar spine. No herniated disc is seen.**

A review of the medical evidence of record shows that the claimant received chiropractic treatment from Dr. Thomas Taylor from January 5, 2003 (this appears to be a clerical error) through January 12, 2004. In the Patient Introduction Card, it is noted that the claimant's major complaints are "neck is stiff, and back-low back pain into the right leg and right knee." The claimant was treated due to sore neck soreness, and mid-back pain. Further review of the medical evidence shows that the claimant continued to treat with Dr. Taylor due to these symptoms until March 16, 2007.

On April 16, 2004, Dr. Taylor reported in pertinent part, the following:

Spine-

In accordance to the Guides, referring to **Table 75- Whole Person Impairment Percent Due to Specific Spine Disorders**, a reduced dislocation or subluxation in the cervical spine is equivalent to 5% impairment of whole person; 3% in the thoracic spine; and 6% in the lumbosacral spinal area. Special notation is made that "if two or more vertebrae are dislocated and reduced, combine the impairment values using the Combine Values Chart." Therefore, one vertebra has been found reduced and consequently the impairment rating will be as follows:

C5 (Reduced) = 5% Whole Person

RANGE OF MOTION (ROM)

Cervical Spine

Flexion-----	30/50=3%	Whole Person
Extension	60/60=0%	Whole Person
Rt. Lat. Flex.	45/45=0%	Whole Person
Lt. Lat. Flex.	30/45=1%	Whole Person
Rt. Rotation	80/80=0%	Whole Person
Lt. Rotation	<u>80/80=0%</u>	<u>Whole Person</u>
	4%	Whole Person

Dorsolumbosacral Spine-

Flexion-----	60/60=0%	Whole Person
Extension	25/25=0%	Whole Person
Rt. Lat. Flex.	25/25=0%	Whole Person
Lt. Lat. Flex.	15/25=2%	Whole Person
Rt. Rotation	30/30=0%	Whole Person
Lt. Rotation	<u>30/30=0%</u>	<u>Whole Person</u>
	2%	Whole Person

Spinal WP Summary

5 C 4 = 9 C 2 = 11% Whole Person

In a letter dated April 5, 2007, Dr. Taylor reported the following to the claimant's attorney:

This office has treated the above-captioned patient since his inception of 11/3/86 at which records show he was treated twice on 11/3/86 and 2/5/88 for subluxations at C1, C2 and sacrum which appear to be from a strain to his spine after lifting on a pallet jack. He was not seen again by this office until 1/5/04 at which time he was treated for injuries sustained in an auto accident of 12/15/03. A report issued by our office on 4/16/04 relates my impression of his impairment related to the accident of 12/15/03 but I deferred an impairment rating at that time relative to his back because of his previous injury falling out of a truck in January 2001 possibly contributing to his condition at that time, since I felt the "latter accident (1/5/04) may have superimposed injury over the previous one (January 2001).

According to the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, p. 3/113, in Section II. Intervertebral disc or other soft-tissue lesion, unoperated on, stable, with medically documented...is

equivalent to 5% whole person. If this amount is combined with the 2% rating on p.5 of our REPORT OF CONSULTATIVE EXAMINATION dated April 16, 2004, then the whole permanent impairment of the lumbosacral spine value will be 7% Whole Person Impairment.

Adjudication

A. Statute of limitations

The first issue for determination is whether the claimant's claim for past unpaid medical expenses relating to his compensable injury, and an alleged 7% permanent anatomical impairment rating, which has been assessed by Dr. Thomas Taylor is barred by the statute of limitations.

Based on the record before me, I find that the claimant's claim for unpaid past medical care relating to his compensable injury and an alleged 7% anatomical impairment is not barred by the statute of limitations, nor is his claim for past unpaid medical care barred by the doctrine of res judicata.

In the present matter, although the claimant's request for additional benefits has not been made part of the record, based on the record before me, it appears that the claimant made a timely claim for additional benefits, which resulted in a hearing being held on May 13, 2005, and an Opinion being filed by an administrative law judge on August 4, 2005. A determination was in fact made in the August 2005 Opinion relating to the claimant's claim for additional benefits relating to his gastrointestinal or cardiac problems. However, in this opinion, the administrative law judge found, "The following issues are reserved: Claimant's entitlement to temporary total disability

benefits; claimant's entitlement to an attorney's fee; the compensability of claimant's alleged hernia; and additional medical treatment for claimant's compensable injury in the form of payment for medical bills." This opinion was not appealed. In this particular case, although a hearing was held with respect to a portion of the claimant's claim for additional benefits, no determination was ever made regarding the claimant's entitlement to unpaid medical care and permanency. By having reserved the aforementioned issues, I find that the claimant's claim for additional benefits remained open, thereby tolling the statute of limitations considering that the remainder of the claim was neither litigated nor dismissed. See generally Vanwagner v. Wal-Mart Stores, Inc., 95 Ark. App. 173, ___ S.W. ___ 3d. ___ (2006). Although a determination was made regarding the claimant's claim for additional treatment with Dr. Frankum pertaining to his alleged gastrointestinal problems, there has been no determination made on the claimant's entitlement to additional unpaid medical for his compensable back injury. Therefore, I find that this claim is not barred by the doctrine of res judicata.

B. Additional medical benefits

The next issue for determination is whether the claimant is entitled to additional medicals-unpaid and future reasonable and necessary medical treatment to his lower back.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in

connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant bears the burden of proving that he is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

It appears the claimant is asserting his entitlement to treatment with Dr. Jerry Frankum, and the chiropractic treatment from Dr. Taylor.

The record indicates that claimant suffered a compensable injury to his back on December 14, 2002, in the form of a soft tissue injury with some muscle strain. The MRI of March 2003 showed only pre-existing degenerative disc disease, as no herniation or acute injury was demonstrated. In May of 2003, after reviewing the MRI scan, and examining the claimant, Dr. Reding, a neurosurgeon, noted that he did not see a major injury and essentially opined that the claimant had a soft tissue injury with some muscle strain. As a result, he released the claimant to light-duty work, placed him on Vioxx and did not make any follow-up appointments. Dr. Reding also reported that he did not see any permanent impairment from the back itself.

The claimant sought extensive treatment from Dr. Frankum, due to intractable back pain and other unrelated conditions. Such treatment included extensive diagnostic testings and hospitalization. However, based on my review of these medical

records, I find that although the claimant received treatment for his back from Dr. Frankum, the majority of this treatment and/or the primary focus of said treatment, was for conditions unrelated to his compensable back injury. Nor does the evidence demonstrate that the claimant's complaints relating to his back required hospitalization. Hence, the claimant failed to demonstrate that the treatment he received from Dr. Frankum was reasonably necessary in connection with his compensable back injury.

I also find that the claimant failed to prove that the treatment he received from Dr. Taylor was reasonably necessary in connection with his compensable back injury. The claimant admitted that when he began treating with Dr. Taylor, he had been involved in an automobile accident on December 15, 2003, which resulted in injury to his neck. However, the medical reports show that during the claimant's initial consultation with Dr. Taylor, he complained of neck and back problems, for which claimant received complete body adjustments. In light of the automobile incident of December 2003, and the fact that the claimant complained of neck and back pain immediately following this accident, it would require conjecture and speculation to causally link the treatment received from Dr. Taylor to the December 14, 2002 specific incident. Conjecture and speculation cannot supply the place of proof. Dena Construction Co. V. Herndon, 264 Ark. 791, 575 S.W. 2d 155 (1979).

With respect to future medical treatment, in the present

matter, no treating physician is currently recommending future care for the claimant's compensable back injury, nor has any evidence been presented to support a finding for future treatment in any form. Therefore, I find that the claimant has failed to prove his entitlement to any future medical treatment for his compensable back injury.

C. Anatomical Impairment

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. §11-9-704(c)(1)(B). It must also be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). "Major cause" means more than fifty percent of the cause. Ark. Code Ann. §11-9-102(14)(A).

Pursuant to Ark. Code Ann. § 11-9-522(g) and Commission Rule 099.34, the Commission has adopted the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used to assess anatomical impairment.

In the present matter, the claimant contends he is entitled to a 7% impairment rating to the whole person due to his compensable injury as assessed by Dr. Thomas Taylor, a chiropractor. Based on the record before me, I find that the

claimant did not sustain his burden of proving that he is entitled to any benefits for a permanent impairment.

The claimant sustained an admittedly compensable injury to his back on December 14, 2002. He suffered only a "soft tissue injury with some muscle strain." An MRI was taken of his lumbar spine on March 10, 2003, which showed a mild degree of degenerative disease of the lumbar spine, but no herniated disc or other abnormality was seen or noted. Dr. Reding, a neurosurgeon, stated in May 2003 that he did not calculate any permanent impairment from the back itself. In my opinion, Dr. Reding's assessment of a zero percent permanent anatomical impairment for the claimant's compensable back injury, given his specialty, is accurate and consistent with the evidence presented. While I recognize that Dr. Taylor, assessed the claimant with a purported 5% whole person rating based on the 4th edition of the Guides, using Table 75, p. 3/113, in Section IIB, "Intervertebral disk or other soft tissue lesion," however, the claimant has failed to sustain his burden of proof of any permanent impairment under this section by objective and measurable findings. The criteria for an impairment, as listed in Section IIB are, "injury, pain, and rigidity." The MRI showed no new injury, only preexisting mild degenerative disc disease. The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Emerson Elec. v. Gatson, 75 Ark. 232, 58 S.W. 3d 848 (2001). With respect to "rigidity," there are no documented objective findings of post-

injury symptoms of this in the record (i.e. muscle spasm, etc.). Dr. Taylor also refers to a report dated April 16, 2004, wherein he assesses the claimant with an additional 2% whole body rating for the lumbosacral spine for a total value of 7% to the whole person. This report specifically states that the 2% impairment is based solely on range of motion tests. Range of motion tests are subjective in nature, and specifically excluded under the Act.

To summarize, the claimant failed to prove that his compensable back injury resulted in an anatomical impairment supported by objective and measurable physical findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed on December 14, 2002, and at all other relevant times.
2. The claimant sustained compensable injuries to his legs and low back on December 14, 2002.
3. The claimant's average weekly wage at the time of his injury was \$575.00. His temporary total disability rate is \$383.00; and his permanent partial disability rate is \$287.00
4. The claim for additional medical benefits and an anatomical impairment rating is not barred by the statute of limitations, nor is the claim for additional medical benefits for his compensable back injury barred by the doctrine of res judicata.
5. The claimant failed to prove his entitlement to additional medical treatment of his compensable back injury from Drs. Frankum and Taylor. He also failed to prove his entitlement to any future treatment for the same.
6. The claimant did not present evidence of objective and measurable physical findings to support an impairment rating, so as to sustain his burden of

proving that he is entitled to benefits for a permanent impairment rating.

ORDER

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

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge