

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E407622

JAMES E. FOX

CLAIMANT

FACTORY FIRST COMPANY

RESPONDENT EMPLOYER

WAUSAU

RESPONDENT CARRIER

ORDER AND OPINION FILED JULY 9, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Hot Springs, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on June 6, 2008. A prehearing conference was held on April 1, 2008 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable back injury on September 7, 1989.
2. The compensation rates were previously agreed to.
3. Respondents accepted a 10% permanent impairment rating.

The claimant contends that he is entitled to additional medical care and

treatment from Dr. Donald Boos and this treatment is reasonable and necessary. The claimant also contended respondents were in contempt and violating the terms of the June 5, 2003, order of the administrative law judge.

Respondents contend that Dr. Boos' treatment is not reasonable and necessary. Dr. Barry Baskins performed an independent medical evaluation in December 2005 and found that additional medical was not reasonable and necessary. Respondents also contend the June 2003 hearing determined the issue of compensability of the claimant's neck injury and did not address the back injury. Respondents contend there are no *res judicata* issues regarding Dr. Boos' treatment. Respondents further contend that even if Dr. Boos' treatment had been an issue in 2003, there was a change of circumstances when Dr. Baskins' independent medical evaluation was performed. Respondents contend the medical was controverted at the time of Dr. Baskins' independent medical evaluation.

ISSUES TO BE LITIGATED

1. Additional medical benefits.
2. Attorney's fees.

From a review of the record as a whole, to include medical reports, the record from the 2003 hearing, 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. There was a compensable back injury on September 7, 1989.
2. The compensation rates were previously agreed to.
3. Respondents accepted a 10% permanent impairment rating.
4. The claimant has proved by a preponderance of the evidence that the additional medical treatment that has been recommended by Dr. Boos is reasonable and necessary and related to his compensable injury.
5. Respondents remain responsible for the medical treatment.
6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

DISCUSSION

The claimant, 53 years old, sustained a compensable back injury in September 1989 and received conservative care and treatment. The claimant has been under the care and treatment of Dr. Donald Boos, a pain management specialist, and has received periodic epidural injections and pain medication. The claimant takes Ultram daily, Darvocet occasionally, and Hydrocodone if the pain becomes severe. The claimant continues to have low back pain going down his thigh and some toes are numb. The claimant is currently unemployed but looking for appropriate work. Activity

can worsen the claimant's pain.

According to the claimant, he would take epidural injections about two or three times per year on average and this helped with the pain. The claimant testified that the insurance company stopped paying for medication about two months before the hearing and stopped paying for the injections about two years ago.

Under cross examination, the claimant confirmed that he voluntarily left his employment with the respondent because he was unable to be on his feet all day. The claimant has had an MRI, a myelogram, x-rays, maybe a CT, physical therapy, epidural injections and medication, but no surgery.

ADJUDICATION

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that 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. The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (March 16, 2005). What constitutes reasonably necessary treatment under the statute is a question of fact for the Commission. *Id.* The Commission has the authority to accept or reject medical opinions and its resolution of the medical evidence has the force and effect of a jury verdict. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

Furthermore, it is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward

management of the claimant's injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the present case, the claimant has been provided reasonable and necessary conservative medical treatment following his 1989 back injury until September 2007, when the claim was controverted. After carefully reviewing the medical evidence and considering the credible testimony of the claimant who has been continuously employed until recently, I find the claimant has proven by a preponderance of the evidence that the additional medical treatment of steroid injections and medication are reasonable and necessary and remain the responsibility of respondents. The claimant has participated in a variety of treatment to prevent a fusion back surgery. According to the claimant, the epidural injections along with medication provide him sufficient relief so he can function. The claimant averages two to three epidural injections annually and he finds these help him deal with pain. Dr. Boos, pain management specialist, has treated the claimant for a number of years and recommended on September 25, 2007, a lumbar epidural steroid injection to help deal with the complaints of leg pain and numbness.

Respondents controverted additional medical and relied on the opinion of Dr. Barry Baskins who performed an independent medical evaluation on December 7, 2005. Dr. Baskins, a physical medicine and rehabilitation specialist, stated in his December 7, 2005, report that he had reviewed the claimant's medical records and after an examination, he opined that he did not think further injections were necessary, nor an additional percutaneous discectomy, nor physical therapy nor surgery were necessary. Dr. Baskins recommended the claimant perform a home physical therapy

program using information he had learned from his previous physical therapy sessions and continue periodic anti-inflammatory medications as needed for pain. Dr. Baskins was selected by respondents for a one-time look at the claimant and was not asked to provide any treatment. While I give his opinion consideration, I give greater weight to the opinion of Dr. Donald Boos, a pain management specialist, who has treated the claimant for a significant period of time and knows much more about the claimant's past and present condition. Dr. Boos has recommended a continuation of epidural steroid injections and the claimant has credibly testified that the steroid injections along with his medications provide him pain relief that enables him to work and handle his day-to-day activities. The claimant has successfully avoided a fusion surgery to date. The treating physician has not recommended the back surgery at the present but has recommended continued conservative care.

Respondents remain responsible for the reasonable and necessary medical treatment the claimant has pursued and has been recommended by Dr. Boos. Ark. Code Ann. §11-9-508.

The claimant has suggested that respondents are in contempt of the June 5, 2003, order of the administrative law judge. The contempt issue was not identified at the prehearing conference; therefore, it was not an issue to be decided at this hearing. If it had been an issue for this hearing, I find that the circumstances have changed in the past five years. Respondents relied on the opinion of another physician to deny further treatment. I find that respondents are not in contempt of the 2003, order. While I gave the claimant's treating physician's opinion greater weight and deference than respondents' IME physician, I recognize respondents relied on their physician's opinion

and did not violate a 2003, order.

ORDER

The claimant has proved by a preponderance of the evidence that the additional medical treatment that has been recommended by Dr. Boos is reasonable and necessary and related to his compensable injury. Respondents remain responsible for the medical treatment.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**