

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F101031

JAY ELLIOTT,  
EMPLOYEE

CLAIMANT

MAVERICK TRANSPORTATION, INC.,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL FIRE INS. CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 10, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE MICHAEL HAMBY, Attorney at  
Law, Greenwood, Arkansas.

Respondents represented by HONORABLE MICHAEL RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal  
an Administrative Law Judge's opinion filed December 13,  
2002. The Administrative Law Judge found that the  
claimant's claim was not barred by the election of remedies  
doctrine. However, the Administrative Law Judge found that  
the claimant failed to prove he was entitled to additional  
medical treatment. After reviewing the entire record *de*  
*novo*, the Full Commission finds that the election of  
remedies doctrine does bar the instant claim, and that the  
claimant failed to prove he was entitled to additional

medical treatment. We therefore affirm, as modified, the opinion of the Administrative Law Judge.

I. HISTORY

James Jay Elliott, age 44, testified that he resided in Muldrow, Oklahoma. The parties stipulated that the claimant sustained a compensable injury to his back on January 18, 2001. The claimant was injured in Illinois. The claimant testified that the respondents told him to go to his family doctor, and the record indicates that he presented to Dr. Rick L. Robbins, an osteopathic physician. A note dated January 22, 2001 from Cooper Clinic, Sallisaw, Oklahoma, indicated:

Patient has had back pain. He states that he was picking up a tarp, he drives a flat bed trailer, and he had something pop in his back. He has had pain in his right hip and leg. This happened on the 18<sup>th</sup>.

Dr. Robbins assessed "Lumbosacral strain."

The parties stipulated that some medical treatment and temporary total disability compensation had been paid in Oklahoma. The claimant testified that he received temporary total disability compensation and that, as far as he knew, the respondents paid for his medical treatment.

The following impression resulted from a "lumbar spine without contrast" taken on January 29, 2001:

1. Mild canal narrowing L3-4 probably not a significant stenosis. Disc bulge L4-5 especially

prominent far right posterolateral and abutting the exiting nerve root and could actually be a small protrusion into this area.

2. Mild calcific atherosclerotic disease.

The claimant was treated conservatively. Dr. Robbins informed the claimant on January 31, 2001, "Your recent CT on your lumbar spine showed a disc bulge at L4-L5 and if your back does not get better, we certainly would consider making you an appointment to go see a neurosurgeon." The claimant testified that Dr. Robbins referred him to Dr. Queeney in Fort Smith, Arkansas. The record indicates that Dr. Joseph Queeney arranged a lumbar MRI, taken March 9, 2001:

The conus region is normal. No disc herniation or canal stenosis identified at any level. The vertebrae, intervertebral discs appear normal at all levels.

IMPRESSION: Normal lumbar MRI.

Dr. Robbins referred the claimant to Dr. Keith F. Holder for another opinion. Dr. Holder reported the following on April 2, 2001:

Mr. Elliott, employee of Maverick Transportation, reports low back pain while rolling and lifting lumber tarps in January....MRI scan and CT scan have been performed which are essentially normal except for a bulging disc discovered on CT scan. There was protrusions noted on MRI scan. The patient is expressing complaint of pain in the central lower back increasing with movement or for sitting for long periods....

Impression: Lumbar myofascial strain....

He may return to work with no lifting over thirty pounds. No pushing or pulling over thirty pounds. I have also recommended a nerve conduction study of the right leg due to reports of numbness which are intermittent. I had a long discussion with the patient and his wife about the significance of the bulging disc on CT scan. Also a significant discussion with the patient regarding his ability to return to work and the company's request that he go to Little Rock riding a semi-trailer on twice a week requesting that he has physical therapy and medical treatment there in Little Rock at the company headquarters. I have explained this to the patient that I believe this will not be a significant problem for him since this is almost three months out from his original injury. He may follow-up here as needed.

Dr. Robbins examined the claimant and assessed the following on April 25, 2001:

Degenerative disc disease of the lumbar spine with lumbar radiculopathy....The patient has subjective symptoms consistent with degenerative disc disease and lumbar radiculopathy. The patient has seen neurosurgery as well as occupational medicine and is still unable to return to work without being on pain medications. I feel that he has probably reached maximal medical benefit and this is not something that can probably be fixed medically. The patient was encouraged to seek occupational counseling and possible job retraining.

The claimant testified that the respondents terminated his employment in May 2001. The claimant began treating with Dr. James A. Rodgers, a neurological surgeon, who reported in September 2001:

With an MRI scan showing no obvious disc herniation or significant foraminal narrowing, malalignment or neoplastic process, and with a nuclear bone scan showing no dramatic arthritic uptake in his sacroiliac joints, or hip sockets, I am hard pressed to state what the main etiology of

his complaints are. Symptomatically it seems to be coming from his right trochanteric bursa....

I recommend that he undergo a trochanteric bursa injection by one of the pain specialists. This can be in Sallisaw, here in Tulsa, or even in Ft. Smith. If he receives some improvement with this injection, then an active physical therapy program, different than what he had early on will be recommended....I feel he should remain temporarily totally disabled until I hear he has done this injection. He also may need to see an orthopedic specialist with regards to the pain that he has in his pelvis and hips, not definitely neurosurgical in origin....

On September 19, 2001, Dr. Robbins planned a trigger point injection of the right lateral hip. The claimant testified that he did not receive an injection. The claimant testified that he did not receive any temporary disability or medical treatment from the respondents after September 24, 2001. The record contains an Illinois Industrial Commission Motion To Voluntarily Dismiss signed by the claimant on June 25, 2002 and granted by an arbitrator or commissioner on August 5, 2002.

Mr. Elliott claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to continued medical treatment, and temporary total disability compensation from September 24, 2001 through a date yet to be determined. The respondents contended that the claimant requested and received benefits in Oklahoma. The respondents contended that after the Oklahoma Commission

determined it lacked jurisdiction, the claimant voluntarily filed for benefits in Illinois, and that the Illinois claim was still pending. The respondents contended that the claimant had elected Illinois benefits and was barred from receiving Arkansas benefits. The respondents contended that additional medical treatment was not reasonably necessary.

The respondent-carrier subsequently referred the claimant back to Dr. Holder for an Independent Medical Evaluation. Dr. Holder evaluated the claimant's ability to return to work and concluded on September 4, 2002:

Myofascial lumbar strain would be the diagnosis during the first three months. With no objective evidence of significant pathology by six months this would be considered to be a chronic back pain case with the patients (sic) subjective complaints outweighing his objective findings. He currently is exhibiting illness behavior....Currently Mr. Elliot (sic) has a poor prognosis due to his illness behavior. I would consider Mr. Elliot to have reached maximum medical improvement by September 18, 2001....Due to the inconsistent functional testing of 8/27/2002 and his exam, I am unable to determine Mr. Elliot's true capabilities....No further treatment of Mr. Elliot's complaints of pain is warranted at this time.

After a hearing before the Arkansas Workers' Compensation Commission, the Administrative Law Judge found, "This claimant's claim for benefits in Arkansas is not barred by the election of remedies doctrine." However, the Administrative Law Judge found, "The claimant has failed to prove by a preponderance of the evidence that he is entitled

to additional medical treatment." The Administrative Law Judge also found that the claimant failed to prove he was entitled to additional temporary total disability compensation from September 24, 2001 to a date to be determined. The claimant appeals to the Full Commission the Administrative Law Judge's denial of additional benefits. The respondents cross-appeal the Administrative Law Judge's finding that the election of remedies doctrine did not bar the claim.

## II. ADJUDICATION

### A. Election of remedies

Although successive or simultaneous claims are not prohibited by Arkansas law, the Commission's jurisdiction may be denied if the claimant had previously made an election of remedies by actively initiating proceedings or knowingly receiving benefits pursuant to the laws of another state. Kamer v. Aristech Chemical Corporation, Workers' Compensation Commission E318865 (June 13, 1995); Biddle v. Smith & Campbell, Inc., 28 Ark. App. 46, 773 S.W.2d 840 (1989); Houston Contracting Company v. Young, 267 Ark. 322, 590 S.W.2d 653 (1979).

In the present matter, the Full Commission finds that the claimant knowingly received benefits pursuant to Oklahoma law and actively initiated proceedings in Illinois.

We therefore reverse the Administrative Law Judge's finding that the claimant's claim for benefits in Arkansas is not barred by the election of remedies doctrine. Following his compensable injury, the claimant sought medical treatment in his home state of Oklahoma. The parties stipulated that the respondents paid benefits in Oklahoma. The claimant testified that he found himself in an Oklahoma courtroom, where he was told his claim "can't be in Oklahoma because I got hired in Arkansas and hurt in Illinois." However, there is no record before us of any such adjudication in Oklahoma. The record does show the subsequent dismissal of a claim in Illinois. The preponderance of evidence therefore indicates that the claimant knowingly received benefits pursuant to Oklahoma law, and that the claimant actively initiated proceedings in Illinois. Whether or not a particular claimant has elected a remedy is a question of fact. Biddle, *supra*. In the present matter, the Full Commission finds that the claimant elected a remedy outside of Arkansas. We therefore reverse the Administrative Law Judge's finding that the instant claim was not barred by the election of remedies doctrine.

B. Additional benefits

Even if the preponderance of evidence showed that the election of remedies doctrine did not bar the instant claim,

the Full Commission affirms the Administrative Law Judge's finding that the claimant failed to prove he was entitled to additional medical treatment or additional temporary total disability compensation. The employer must 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). In order to prove entitlement to temporary total disability compensation, the claimant must prove that he remains within his healing period and is totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d (1981).

The parties stipulated that the instant claimant sustained a compensable injury to his back on January 18, 2001. A lumbar CT taken on January 29, 2001 showed a disc bulge at L4-5, but no treating physician has recommended surgery for the claimant. We noted that an MRI in March 2001 was normal. Dr. Holder explained in April 2001, "this will not be a significant problem for him since this is almost three months out from his original injury." Dr. Holder indicated at that time that the claimant could return to restricted work. On April 25, 2001, Dr. Robbins wrote that the claimant's symptoms were consistent with degenerative disc disease. Dr. Robbins stated, "I feel that

he has probably reached maximal medical benefit and this is not something that can probably be fixed medically. The patient was encouraged to seek occupational counseling and possible job retraining." We also note that Dr. Rodgers, a neurological surgeon, reported in September 2001 that he could not identify an etiology of the claimant's pain. We recognize that Dr. Rodgers recommended injections and physical therapy in September 2001 and following, but the evidence shows that this treatment would not be reasonably necessary in connection with the claimant's January 2001 compensable injury.

The Full Commission therefore finds that the claimant failed to prove that additional medical treatment would be reasonably necessary in connection with his compensable injury, pursuant to Ark. Code Ann. §11-9-508(a). We find that the claimant reached the end of his healing period no later than April 25, 2001, as reported by Dr. Holder and Dr. Robbins, so that the claimant failed to prove he was entitled to additional temporary total disability compensation. The Full Commission therefore affirms the Administrative Law Judge's finding that the claimant failed to prove he was entitled to additional benefits.

Based on our *de novo* review of the entire record, the Full Commission finds that the election of remedies doctrine

bars the claimant's claim in Arkansas. The Full Commission finds that even if the election of remedies doctrine did not bar the claim, the claimant failed to prove by a preponderance of the evidence that he was entitled to additional medical treatment or temporary total disability compensation. We therefore affirm, as modified, the opinion of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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JOE E. YATES, Commissioner

Commissioner Turner dissents.