

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214259

STEVEN BAKER,
EMPLOYEE

CLAIMANT

DANA CORPORATION,
EMPLOYER

RESPONDENT

SPECIAL RISK SERVICES, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 12, 2004

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE RANDY MURPHY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law
judge's opinion filed August 28, 2003. The administrative
law judge found that the problems the claimant continued to
experience were causally related to the claimant's
compensable injury. After reviewing the entire record *de*
novo, the Full Commission affirms the opinion of the
administrative law judge.

I. HISTORY

Steven Baker, age 31, sustained an admittedly-compensable injury on October 9, 2001. Mr. Baker testified, "I was sorting, we've got racks on the floor, with the part number, we had to sort them cores out by part number and I was getting ready to set one into a rack and I felt this real sharp, paralyzing pain and I dropped to my knees and I dropped the part and everything." The impression of Dr. Kenneth B. Turner on October 9, 2001 was "Lumbar spine strain." Dr. Turner treated the claimant conservatively, which treatment included a referral for physical therapy. An MRI of the lumbar spine was taken on November 21, 2001:

There is disc desiccation at the level of L5-S1....There is a diffuse disc bulge at the L5-S1 level. There is canal stenosis and small thecal sac. The remainder of the levels are unremarkable.

IMPRESSION: Diffuse disc bulge and canal stenosis at L5-S1.

Dr. Turner's impression on November 26, 2001 was "Canal Stenosis L-5 S1, Probable cause for low back pain." Dr. Turner planned to refer the claimant to a neurological surgeon. However, the respondents controverted further benefits after November 26, 2001.

The claimant presented to Dr. Scott M. Schlesinger in December 2001, and Dr. Schlesinger referred the claimant to

Dr. Marc A. Valley for epidural injections. Dr. Valley told the claimant on January 18, 2002, "I am unclear whether or not this is exacerbation of an existing complaint or a continuance of a long term problem. I do not have his medical records, prior to this injury, however, he states categorically that he has never had a hospital or physician visit for low back pain prior to this injury. If this is true this is within reasonable degree of medical certainty consistent with an acute exacerbation of a chronic asymptomatic condition." Dr. Valley began administering lumbar injections on February 14, 2002.

Dr. Wayne L. Bruffett reported on September 4, 2002, "X-rays reveal an isthmic spondylolisthesis, L5 on S1, with marked disc space narrowing. His MRI scan is reviewed. He has marked disc degeneration and desiccation at L5-S1. The remaining discs look pristine." Dr. Bruffett's impression was "Isthmic spondylolisthesis, L5/S1, with probable discogenic pain from this level and instability." Dr. Bruffett stated, "I think the best operation would be a decompression at L5-S1 with a posterior lumbar interbody fusion and posterior spinal fusion with instrumentation." Dr. Bruffett performed surgery on October 1, 2002, finding, "There was a spina bifida occulta at L5 and S1. The

posterior elements were markedly loose consistent with an isthmic process. I exposed the lumbosacral junction and performed a decompression in a guild type fashion. I performed an interbody fusion after complete diskectomy."

Dr. Bruffett wrote to the claimant's attorney on November 27, 2002:

His isthmic spondylolisthesis was a problem pre-existing to his work injury. However, he is very specific in his reports that on approximately October 9, 2001, he injured his back while lifting at work. I see this quite often, and although the isthmic process was pre-existing, I do not think this gave Mr. Baker significant problems prior to the work-related injury. Therefore, I would characterize this as an exacerbation of a pre-existing problem. I would say that the accident was a major cause (more than 50% of the reason for) of his subsequent disability and need for spinal surgery.

Mr. Baker claimed entitlement to additional worker's compensation. The claimant contended that he sustained a compensable injury on October 9, 2001, and that he continued to experience problems which were causally related to the compensable injury. The respondents contended that, if the claimant continued to experience problems, then they were not related to the compensable injury.

The parties deposed Dr. Bruffett on May 7, 2003. Dr. Bruffett testified that he considered the surgery to be

successful, and that the claimant's leg pain was gone. The respondents' attorney examined Dr. Bruffett:

Q. What was your preoperative diagnosis?

A. Isthmic spondylolisthesis.

Q. What is the definition of that?

A. That's a condition where there's a defect in one of the vertebrae in the lumbar spine, causing instability between that vertebrae, and the one below it.

Q. Is that at L5-S1?

A. Yes.

Q. Is that the same thing as isthmic process?

A. Yes.

Q. Is that congenital or degenerative?

A. There's a separate type that's considered congenital. It's more of a - it's considered to be more of like a stress fracture, I think. I'm not sure that's it's even well-defined by the experts. But basically, the way I look at it, is an area of somewhat weakened bone from birth that ultimately breaks through, and then can give rise to further degeneration of the disc, and the motion segment.

Q. All right, sir. I note that you also refer to this spondylolisthesis with spina bifida occulta. That's the congenital bony defect, isn't it?

A. Yes.

Q. So Mr. Baker came to see you with a condition that was acute or chronic, or could you determine that?

A. His condition was probably rather chronic. His pain was more, I don't know if I would say acute, but more recent, based on his history....

Q. You can just go ahead and explain it for us so we'll have the record clear on what exactly your x-rays showed.

A. Okay. I'll have to kind of look back on my notes, but basically, it showed a defect in the bone at L5. Some narrowing of the disc space at L5-S1, and some slippage of L-5 on S-1.

Q. What was producing the pain?

A. The disc, primarily. That's what it's - we hypothesize.

Q. Was it the slippage of the disc that was producing the pain?

A. Yes, causing the back pain....the goal of the surgery was to eradicate the disc to help with the back pain....

Q. We've got treatment. We've got Dr. Valley's injections as of April, 2002. He's improved from these lumbar injections, to the point where Dr. Valley gives him a full release. In fact, Mr. Baker requests a full release, as you can see here. Six months later, he's got a resumption of pain. Does that have an effect on your opinion, or can you comment on that, from a causation standpoint, if you understand what I'm asking.

A. You know, that's really hard for me to answer. Because the way I look at this case, and most cases is, if the patient does not have any problems per se, and then has an episode that occurs at work that is specific, and that causes pain, then typically that pain related to that, and the subsequent need for treatment is related to the work injury. If they've had rather chronic problems, and this is just kind of an insidious onset, just repetitive sort of thing, but no acute

injury, or no acute manifestation of pain, then it's probably not particularly work related....

After a hearing before the Commission, the administrative law judge found that the claimant proved he sustained a compensable injury. The administrative law judge found, "a preponderance of the evidence establishes that the problems that he continued to experience are causally related to his compensable injury." The administrative law judge therefore awarded the claimant benefits in accordance with the findings of fact; respondents appeal to the Full Commission.

II. ADJUDICATION

The claimant must prove by a preponderance of the evidence that he is entitled to benefits. Morrow v. Mulberry Lumber Co., 5 Ark. App. 260, 635 S.W.2d 283 (1982). An 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). 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).

In the present matter, the Full Commission affirms the opinion of the administrative law judge. The evidence indicates that Dr. Bruffett's surgery was reasonably necessary in connection with the claimant's compensable injury. The respondents implicitly assert that the claimant's need for additional treatment was causally related to a pre-existing condition or prior injury. The Full Commission does not find this assertion to be supported by the preponderance of evidence. We recognize that the claimant reported some previous soreness in his back, but the claimant credibly denied that he had sustained a prior accidental injury. The respondents agreed that the claimant sustained a compensable injury on October 9, 2001. We attach significant weight to the opinion of the medical experts that the compensable injury caused the "slippage" at L5-S1. Dr. Bruffett opined that the compensable injury had aggravated the claimant's spinal condition. During surgery, moreover, Dr. Bruffett explicitly noted "loose elements" around the spine. The determination of whether a causal connection exists is a question of fact for the Commission. Jeter v. B.R. McGinty Mechanical, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The Full Commission finds in the present matter that the objectively-documented "slippage" and "loose

elements" around the claimant's spine were the causal result of the claimant's compensable injury.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's opinion that the claimant's continued problems were causally related to the compensable injury. For prevailing before the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the additional medical treatment is reasonably necessary in connection with claimant's compensable injury. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof. Specifically, I find that the claimant has failed to prove

by a preponderance of the evidence that surgery for claimant's isthmic spondylolisthesis and spina bifida occulta is reasonably necessary medical treatment in connection with claimant's compensable injury. Therefore, I find that the decision of the Administrative Law Judge should be reversed.

Claimant sustained an admittedly compensable injury on October 9, 2001, when he was lifting cam shafts onto a rack when he felt "this sharp, paralyzing pain" in his lower back which caused the claimant to drop to his knees. The claimant completed an accident report and was sent to the Russellville Family Clinic. The clinic notes from this visit records a history as follows:

c/o low back pain in sacral area - low lumbar. Began this am. Had been moving approx 200 50 lb cam shafts from boxes to racks. Felt a sudden paralyzing type pain - pt fell to knees. C/o severe pain now.

2 weeks ago pt. felt a "pinched nerve" in [rt] hip - went to family dr & was given Skelaxin.

Claimant was diagnosed with a lumbar spine strain, and was prescribed medication and conservative treatment. In a follow-up visit on October 15, 2001, claimant's treating physician noted that the claimant was "a litler

better than he was before, but still not up to his usual work activity which includes lifting 200 50 lb camshafts per day." Likewise, on October 29, 2001, claimant was noted to be doing better after participating in physical therapy. Nevertheless, claimant continued to complain of back pain.

On November 19, 2001, the clinic notes reveal that the claimant's back problems had "plateaued about 2 ½ weeks ago despite on going PT and anti-inflammatory medications." Due to claimant's continued complaints of back pain, an MRI was ordered. This diagnostic test revealed a "diffuse disc bulge and canal stenosis at L5-S1." Accordingly, claimant was referred to Dr. Scott Schlesinger. Dr. Schlesinger examined the claimant on December 10, 2001. In his report of that same date, Dr. Schlesinger stated:

I have read the MRI scan of the lumbar spine. He has a Grade I spondylolisthesis at L5-S1 with some stenosis of the canal. I am hopeful he will do well with conservative care and I have set him up for lumbar epidural steroid injections. If he does not improve, I will need to have him see one of my ortho spine colleagues for consideration of a fusion, but hopefully this will not be necessary.

Upon referral from Dr. Schlesinger, Dr. Marc Valley administered a series of epidural steroid injections

beginning in January of 2002. In his report dated January 18, 2002, Dr. Valley stated:

The patient states that on October 9, 2001, he was lifting a heavy weight at work and hurt his back. Evaluation including MRI showed diffuse disc bulging and canal stenosis at L5-S1, and diffuse disc bulging at L5-S1. The patient has been informed by me, that his canal stenosis and degenerative changes were almost certainly there prior to this injury. I have told him that I am unclear whether or not this is exacerbation of an existing complaint or a continuation of a long term problem. I do not have his medical records, prior to this injury, however, he states categorically that he has never had a hospital or physician visit for low back pain prior to this injury. If this is true this is within reasonable degree of medical certainty consistent with an acute exacerbation of a chronic asymptomatic condition.

After completing the series of three injections, Dr. Valley noted on April 12, 2002, that the claimant reported approximately 75% improvement. Dr. Valley further noted that the claimant had an increase in his range of motion and that the claimant wanted to return to full duty work.

The claimant did not seek any additional medical treatment until August 2, 2002, when he went on his own to a chiropractor. On September 4, 2002, claimant was evaluated

by Dr. Wayne Bruffett an orthopedic surgeon. After conducting a physical examination of the claimant and reviewing claimant's x-rays and MRI, Dr. Bruffett explained to the claimant that his pain is "primarily from the disc degeneration at L5-S1 from the instability imparted by the spondylolisthesis." After discussing claimant's medical options, claimant decided that he wanted to undergo surgery. Dr. Bruffett performed a decompression at L5-S1 with posterior fusion and posterior lumbar interbody fusion at L5-S1 on October 1, 2002. It is this surgery that is at issue between the parties.

The claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish her claim for compensation by a preponderance of the evidence. Kuhn v.

Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995);
Bartlett v. Mead Container Board, 47 Ark. App. 181, 888
S.W.2d 314 (1994). When assessing whether medical treatment
is reasonably necessary for the treatment of a compensable
injury, we must analyze both the proposed procedure and the
condition it is sought to remedy. Deborah Jones v. Seba,
Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

Dr. Wayne Bruffett authored a letter dated
November 27, 2002, addressed to claimant's attorney
expressing his opinion as to the cause or need for surgery.
In this letter Dr. Bruffett wrote:

I am in receipt of your
correspondence dated November 18, 2001,
regarding Mr. Steven Baker. I have
reviewed his chart and your letter. His
isthmia spondylolisthesis was a problem
pre-existing to his work injury.
However, he is very specific in his
reports that on approximately October 9,
2001, he injured his back while lifting
at work. I see this quite often, and
although the isthmia process was pre-
existing, I do not think this gave Mr.
Baker significant problems prior to the
work-related injury. Therefore, I would
characterize this as an exacerbation of
a pre-existing problem. I would say
that the accident was a major cause
(more than 50% of the reason for) of his
subsequent disability and need for
spinal surgery.

In his deposition, Dr. Bruffett testified that the actual condition for which he performed surgery was a chronic condition that in all likelihood pre-existed the incident at work. Dr. Bruffett was shown Dr. Valley's medical record dated April of 2002, which reflects that the claimant received a 75% improvement in his pain and was requesting a release to full duty, he was then asked whether this medical record affects his opinion as to the relationship between the work related injury and the surgery to which he responded:

You know, that's really hard for me to answer. Because the way I look at this case, and most cases is, if the patient does not have any problems per se, and then has an episode that occurs at work that is specific, and that causes pain, then typically that pain related to that, and the subsequent need for treatment is related to the work injury.

If they've had rather chronic problems, and this is just kind of an insidious onset, just repetitive sort of thing, but no acute injury, or no acute manifestation of pain, then it's probably not particularly work related.

Now when you have something where the patient recovers in a sense, and then has a recurrence months down the road, I don't know. I guess it would depend on maybe what his activities were during that period of time, and that sort of thing.

Despite the history claimant provided to Dr. Valley and Dr. Bruffett of never having received hospital or doctor care for low back pain prior to his work related injury, the medical records do not support this statement. Claimant even provided a history on the date of his injury as having "felt a pinched nerve in his [right] hip" two weeks prior to his injury. Moreover, the off work slips introduced into evidence as Respondents' exhibit 4 clearly contradict this history. These exhibits reveal that the claimant was seen at Chambers Memorial Hospital in Danville, Arkansas on August 8, 2001, and was provided an off work slip for August 1st and 2nd because of lumbar strain. Claimant was again seen at Chambers Memorial Hospital on August 10, 2001, and was again provided with an off work slip for August 9th and 10th "due to back strain." Finally, this exhibit reveals that the claimant was seen at the Scenic 7 Medical Clinic by Dr. Karl Sandberg on October 1, 2001 and was provided an excuse from work for September 30, 2001, through October 2, 2001, for a diagnosis of "Lumbago."

Claimant attempted to downplay these off work slips and any mention of previous back pain, by testifying

that he never previously had any pain like the paralyzing pain he felt at work on October 9, 2001.

It is a medical fact that the condition for which claimant underwent surgery pre-existed his work related incident which occurred on October 9, 2001. It is undisputed that the claimant sustained a work-related injury on October 9, 2001, while lifting cam shafts at work. The issue is whether the surgery to address this pre-existing condition is reasonably necessary in connection with this admittedly compensable injury. In order to address this issue, we must analyze the evidence and determine to what extent this work-related injury brought on the claimant's back pain.

The medical care providers and the majority all rely upon the claimant's "categorical" statements that he was injured on October 9, 2001, and that he never had hospital or physician treatment for his back pain prior to this injury. Obviously, this last statements is false. A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, FC Opinion filed Jan. 22, 1996 (E417617). The Commission has the

authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

Unfortunately, the accompanying medical records are not in evidence, however, the three off work slips for August 1st and 2nd, August 9th and 10th and September 30th, October 1st, and 2nd, for low back pain and strain belittle claimant's testimony and statements that he never had any back pain or treatment for back pain prior to his work related injury. While the claimant testified that his statements were true because he had never felt the paralyzing pain prior to the work related injury, I do not find his argument persuasive. Obviously the claimant's pain was severe enough and significant enough to seek medical attention and to remove him from work on at least 7 days before the unfortunate incident at work. Accordingly, I find that the opinions expressed by claimant's treating physicians as to the cause and need for surgery which are based upon the claimant's self-reported history are not entitled to any weight. The medical records clearly indicate that these opinions which rely upon a history of no previous back problems are based upon inaccurate

information. It is the report of pain after the work related injury which the medical professional rely upon to relate the claimant's work-related injury to the need for surgery. However, the medical records reflect that the claimant suffered from back pain significant enough to seek medical attention and to be removed from work on at least three occasions in the two months prior to his work related injury.

Accordingly, for those reasons set forth herein, I find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed. Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner