BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309815

RICKY D. BOLER, EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER CO., EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 15, 2004

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

Claimant represented by the HONORABLE NELSON V. SHAW, Attorney at Law, Texarkana, Texas.

Respondents represented by the HONORABLE WILLIAM G. BULLOCK, Attorney at Law, Texarkana, Texas.

Decision of administrative law judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge’s opinion filed March 17, 2004. The administrative law judge found, “The claimant has proven by a preponderance of the evidence that the additional medical treatment he received, including surgery and follow-up treatment by Dr. Shahim, was reasonably necessary in connection with the compensable injury of April 19, 2003.” After reviewing the entire record *de novo*, the Full Commission finds that the claimant

did not prove that Dr. Shahim's surgery was reasonably necessary in connection with the claimant's compensable injury. The Full Commission therefore reverses the opinion of the administrative law judge.

I. HISTORY

Ricky Dean Boler, age 42, testified that he began working for Cooper Tire in November 1982. The claimant sought emergency treatment in August 1990 after complaining of injuring his left hip and lower back at work. The impression from a radiology report on August 1, 1990 was "essentially normal lumbar spine." A physician wrote on August 1, 1990, "Three years ago he had a workman's comp. injury that involved the mid back area. He said that was severe pain and worse than this episode....X-rays of the back show a compression fracture of T11, and also a mild compression fracture of T12." The physician assessed, "Muscle strain of the thoracic and lumbar spine, and compression fractures of T11 and T12 without any neurological involvement." The physician assessed "low back pain, gradual improvement" in September 1990, and the claimant was returned to full-duty work.

It was reported in July 1993, "Pt. comes in with a history of shooting fireworks Saturday, then did some more

work Sunday and woke up Monday and really couldn't hardly get up out of bed because of apparent discomfort in the low back area." Dr. Reep-Mall's impression in July 1993 was "lumbar myalgias, myositis and spasm." Dr. Reep-Mall stated on July 8, 1993, "Patient's x-ray report returns revealing disc space narrowing at L5, S1. I clinically did not get a history in the patient of definite radicular pain to suggest disc herniation at this point and time. The wedging of T-11, T-12 is apparently unchanged versus the x-ray done back on 8/1/90."

Dr. McKay's assessment on July 12, 1993 was "Osteoarthritis, LS-s-pine with a lumbosacral strain. He wants to return to regular duty work....Prognosis is good, although, he is probably going to have problems with his back off and on."

The claimant was assessed with "apparent musculoskeletal pain" in September 1994.

An MRI of the lumbar spine was taken in December 1994:

> The alignment of the spine is normal. There are several Schmorl's nodes present. There is loss of the normal bright signal in the intervertebral disc at L4-5 and L5-S1. There is a left paracentral herniated disc at L4-5. Central disc protrusion is shown at L5-S1. The other discs appear normal. No spinal stenosis is seen. There are no intradural abnormalities noted.

IMPRESSION:

1. LEFT PARACENTRAL HERNIATED DISC L4-5.
2. CENTRAL DISC PROTRUSION AT THE L5-S1 LEVEL.
3. MULTIPLE SCHMORL'S NODES.

A subsequent lumbar myelogram was taken in December 1994:

Preliminary radiographs show a mild mid lumbar levoscoliosis, mild chronic compression fractures of T11 and T12, likely related to remote trauma, and mild narrowing of disc space at L4-L5 and L5-S1. The spot films and overhead films obtained following a lumbar subarachnoid water soluble contrast administration show a large left sided extradural defect at the level of L4-L5 which likely relates to disc herniation. No other significant extradural defects are observed between the L5-S1 level and the approximate level of L2. No significant intradural or intramedullary disease is delineated.

IMPRESSION:
1. LARGE LEFT SIDED EXTRADURAL DEFECT AT THE LEVEL OF L4-L5, MOST LIKELY RELATED TO DISC HERNIATION.

And the following impression resulted from post-myelography CT examination of the lumbar spine taken in December 1994:

1. LARGE LEFT PARACENTRAL DISC HERNIATION AT DISC LEVEL L4-L5, ASSOCIATED WITH DEFORMITY OF THECAL SAC.
2. ABNORMAL SOFT TISSUE DENSITY AND THECAL SAC DEFORMITY JUST BELOW LEVEL OF L5-S1 DISC, MOST LIKELY INDICATIVE OF EXTRUDED AND MIGRATED DISC FRAGMENT FROM L5-S1 DISC.
3. NO IDENTIFICATION OF SIGNIFICANT ABNORMALITY AT DISC LEVEL L3-L4.

An MRI of the lumbar spine was taken in October 1996, with the following impression:

1. NO SIGNIFICANT CHANGE IN APPEARANCE OF THE LUMBAR SPINE.
2. LEFT PARACENTRAL HERNIATED DISC SEEN AT THE L4-5 LEVEL. THIS APPEARS TO EXTEND INTO THE LEFT LATERAL RECESS.
3. CENTRAL DISC PROTRUSION SEEN AT THE L5-S1 LEVEL, WHICH IS UNCHANGED AS COMPARED TO THE PREVIOUS EXAMINATION.
4. LESION SEEN IN THE L1 VERTEBRAL BODY WITH HIGH SIGNAL AND T1 AND T2 WEIGHTED SEQUENCES, MOST CONSISTENT WITH A HEMANGIOMA. THIS IS UNCHANGED AS WELL.
5. DEGENERATIVE FINDINGS OF DISC SPACE NARROWING AND DISC DESICCATION AS SEEN ON THE PREVIOUS EXAM.

Dr. McKay reported in October 1996, "He is still having some left sided low back pain that goes into the left inguinal area....He had an MRI scan which looked similar to the previous MRI that was done back in 1994. He has a left paracentral disc herniation at L4/5 and also a central disc protrusion at L5/S1. Neither one of these looks changed." Dr. McKay assessed "Muscle strain of the lower back and left inguinal area. No evidence of a hernia." The claimant was returned to regular work duty in November 1996.

The parties stipulated that the claimant sustained a compensable injury to his back on April 19, 2003. The claimant testified that he sustained a twisting injury to his back. The claimant testified, "it was just like you had stuck a knife in my back." According to emergency department notes on April 19, 2003, the claimant reported

that he “hurt back at work while lifting approx 60-70 lbs”. The claimant was diagnosed with “lumbar strain.”

The parties stipulated that the respondents “accepted the April 19, 2003 injury as compensable medical only and paid medical benefits.” The claimant testified that he was on light duty for the respondents following the compensable injury, but that “my back just killed me all day.”

Dr. Craig E. Ditsch stated on April 21, 2003, “X-rays are obtained which don’t reveal any fracture or dislocation.”

The claimant testified, “The pain was radiating down my leg, all the way down to my foot. The bottom of my foot felt like it had pins sticking in the bottom of my foot. Tingling, numb, and on the side of my knee would hurt, ache, down my thigh.”

An MRI was taken on May 1, 2003, with the following impression:

> 1) Left posterolateral disc protrusion at the L4-L5 level and right paracentral disc protrusion at the L5-S1 level without significant change.
> 2) Central canal and lateral recess stenosis from L1-L2 through L4-L5 both related to spondylosis as well as developmental diminished volume.
>
> When compared to baseline study, the annular disc bulges at the L2-L3 level has progressed and has developed at the L3-L4 level.

The claimant followed up with Dr. Ditsch on May 5, 2003:

> His MRI shows a posterolateral disc protrusion without significant change. He has got some lateral recessed stenosis L1-L2 through L4-L5 related to spondylosis. Has had some progression of the bulging. There is really nothing here that is surgical. He says he is really not any better. Wants some more pain medicine....

Dr. Ditsch referred the claimant to Dr. Reza Shahim, who reported on or about June 9, 2003:

> I reviewed his lumbar spine MRI and he has a disc herniation at L4-5 on the left side which compresses the thecal sac and nerve root. There is also a small disc protrusion at L5-S1 on the right side which does not cause any significant thecal sac compression. He also has disc herniation and spondylosis at L1-2, 2-3 and 3-4....
>
> I believe Mr. Boler is symptomatic from disc herniation at L4-5 on the left side. I do not have his 1996 exam to review. Based on the radiology report there has not been any significant change on the MR study, but he does have lateral recess stenosis and nerve root compression caused by disc herniation. I have recommended to him to undergo three weeks of physical therapy and one lumbar epidural steroid injection. If his symptoms persist he will need a lumbar diskectomy at the left L4-5....He may continue with light duty for the time being.

Dr. Shahim stated on July 10, 2003, "Mr. Boler is symptomatic from a disc herniation at L4-5 and L5-S1. I have given him all options....I have recommended to him to consider surgery....Because of Mr. Boler's significant back and hip symptoms, he would prefer to have surgery done. We

will plan on proceeding with a lumbar diskectomy at L4-5 bilaterally, and also at L5-S1 on the right side."

The claimant testified that he underwent surgery on August 26, 2003.

Dr. Shahim wrote on September 11, 2003:

> Mr. Boler is status post lumbar diskectomies at 4-5 and 5-1. At the time of the surgery I found significant canal stenosis at L4-5 due to disc protrusion and facet degeneration....
>
> Mr. Boler does still have some back and hip symptoms. He says that prior to the work injury he was symptom free. He has been treated for a back injury in the mid 1990's, but had been completely symptom free and under no medical treatment until he had the work injury. Since then he has had severe back pain with pain radiating to both legs. Because his symptoms were brought on by the injury, I think the injury is a causative and aggravative cause of the lumbar disc disease....We will keep him off work for a month.... If his symptoms persist I will repeat an MRI of his lumbar spine.

The claimant's testimony indicated that he returned to work on or about October 19, 2003. However, "my back was still bothering me so I had to go back on light duty."

A pre-hearing order was filed on December 8, 2003. The claimant contended that he was entitled to temporary total disability compensation, and that "additional medical treatment, including surgery, was reasonably necessary in connection with the compensable injury."

The respondents contended that the claimant could not prove a causal relationship between the compensable injury "and the more recent controverted treatments, examinations, surgeries and disability periods; that the medical treatments received by the claimant were not incurred as a result of and were not reasonable and necessary treatments for a compensable injury; that the disability periods sustained by the claimant, if any, were not incurred as a result of a compensable injury; that the claimant has had a natural progression of a pre-existing low back problem; and that the respondents are entitled to an offset against any benefits paid by group health or other benefit plans."

The parties agreed to litigate "whether additional medical treatment, including the surgery received by the claimant, was reasonably necessary in connection with the compensable injury; whether the claimant is entitled to additional temporary total disability benefits; and controversion and attorney's fees."

Hearing before the Commission was held on February 12, 2004. The claimant testified that he remained on light duty for the respondents. The claimant testified:

Q. Are you able to walk without any difficulty?

A. My - on and off, you know. This morning my knee and my foot was hurting.

Q. Which knee?

A. My left knee....My left foot.

Q. And do you relate that to the injury?

A. Yes.

Q. Are you able to bend and stoop without any difficulty?

A. No. Like if I am trying to re-roll these liners and I'm leaning for very long, you know, if I lean very long then my back goes to hurting.

Q. What part of your back hurts?

A. My lower back.

Q. How often are you having trouble doing these types of things? Is this daily or weekly or just on occasion?

A. Every day that I'm working.

Q. How would you compare your physical condition now to the time right after surgery? Is it better, worse, or the same?

A. I would say it is the same. It could be maybe a little better but, like I say, the pain in my leg, I still have it; the pain in my back, I still have it.

Q. Do you feel like you have recovered since the surgery?

A. No.

The administrative law judge found, in pertinent part:

3. The claimant has proven by a preponderance of the evidence that his compensable injury of April 19, 2003,

combined with or aggravated his preexisting back condition to bring about his need for the surgery performed by Dr. Shahim.
4. The claimant has proven ... that the additional medical treatment he received, including surgery and follow-up treatment by Dr. Shahim, was reasonably necessary in connection with the compensable injury of April 19, 2003.
5. The claimant has proven ... that he is entitled to temporary total disability benefits for the time he was off from work as a result of Dr. Shahim's surgery and follow-up treatment.

The respondents appeal to the Full Commission.

II. ADJUDICATION

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). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to benefits. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment pursuant to Ark. Code Ann. §11-9-508(a) is a question of fact for the Commission. General Elec. Railcar Repair Servs. v. Hardin, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

In the present matter, the Full Commission finds that the claimant did not prove he was entitled to the surgical treatment provided by Dr. Shahim. The record indicates that

the claimant was first diagnosed with lumbar myalgias and myositis in July 1993. By December 1994, the claimant was shown to have a left herniated disc at L4-5 and a disc protrusion at L5-S1, along with degenerative Schmorl's nodes. These findings stayed essentially the same through 1996.

The parties stipulated to a compensable injury in April 2003, and the claimant testified that it felt like "a knife in my back." A subsequent MRI taken in May 2003 showed the same herniated discs at L4-5 and L5-S1. On May 5, 2003, Dr. Ditsch found no "significant change" in the new MRI studies. The preponderance of evidence does not show that the claimant sustained an acute disc injury as a result of the claimant's April 2003 lumbar strain. We note Dr. Shahim's finding in June 2003, "there has not been any significant change on the MR study, but he does have lateral recess stenosis and nerve root compression caused by disc herniation." The record before the Commission clearly shows that these conditions pre-existed the 2003 compensable injury and were not the result of the 2003 lumbar strain.

The Full Commission also notes Dr. Shahim's September 2003 correspondence, to wit: "Because his symptoms were brought on by the injury, I think the injury is a causative

and aggravative cause of the lumbar disc disease." The record before the Commission does not indicate that the claimant's April 2003 compensable injury was "a causative and aggravative cause of the lumbar disc disease." As we have discussed at length, the claimant's disc disease had existed since at least 1993 and clearly did not result from the 2003 lumbar strain. 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). In the present matter, the Full Commission attaches minimal weight to Dr. Shahim's finding that the claimant's compensable injury was the cause of the claimant's lumbar disc disease. The Commission attaches greater weight to the opinion of Dr. Ditsch, who stated, "There is really nothing here that his surgical." We also note that the claimant expressly testified that he had experienced no post-surgical improvement. A lack of post-surgical improvement is a relevant factor in considering whether Dr. Shahim's surgery was reasonably necessary. Winslow v. D&B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

Based on our *de novo* review of the record, the Full Commission finds that the claimant did not prove that the

April 19, 2003 compensable injury combined with or aggravated the claimant's pre-existing back condition bringing about a need for surgery by Dr. Shahim. The claimant did not prove that Dr. Shahim's treatment, including surgery, was reasonably necessary in connection with the claimant's compensable injury. Because the claimant contends that he is entitled to a period of temporary total disability compensation arising from his surgery from Dr. Shahim, which surgery we have found is not reasonably necessary, the claimant did not prove he was entitled to this period of temporary total disability. The Full Commission therefore reverses 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

____
KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the opinion of the majority reversing the Administrative Law Judge's

finding that claimant has proven by a preponderance of the evidence that additional medical treatment, including the surgery already performed, is, and was, reasonably necessary in connection with the compensable April 2003 lower back injury.

The issue is whether there is a causal connection between any additional treatment (the surgery) and the compensable injury. In my opinion, claimant has met his burden of proof.

On April 19, 2003, claimant sustained an admittedly compensable lumbar injury while lifting at work. Respondent accepted this claim as a medical only claim, but as is becoming more and more common, decided to controvert the claim in its entirety once the need for surgery arose.

Admittedly, claimant has a significant history of lumbar difficulties dating back to at least 1990. Prior MRI scans revealed disk protrusions at L4-L5 and L5-S1. Claimant’s lumbar condition never required surgery until after the present work-related accident at Cooper Tire. As noted by the Administrative Law Judge, a careful review of the MRI scan performed after the

April 2003 accident reveals several changes from the prior MRI scan conducted in 1996.

I likewise specifically find, as did the Administrative Law Judge, that claimant presented credible testimony. The greater weight of the evidence indicates that between late 1996 and the April 2003 work-related accident (over six years), claimant was essentially asymptomatic, did not receive any treatment for his lumbar difficulties and was not off work, much less on modified, light duty, as a result of these abnormalities. Dr. Shahim, claimant's treating neurosurgeon, provided the only medical opinion and opined that the compensable injury aggravated claimant's preexisting lumbar condition. Thus, his opinion is uncontroverted that there is a causal connection between claimant's current condition and the 2003 compensable injury.

As noted above, the primary issue is whether there is a causal connection between the work-related accident and claimant's need for surgery. In finding that a causal connection does not exist, the majority seems to place great importance on a finding that the surgery was not reasonably necessary because claimant

"expressly testified that he had experienced no post-surgical improvement."

First, that is not an entirely accurate evaluation of claimant's testimony. Claimant actually testified that his condition "could be maybe a little better..." Second, I do not believe that such a finding is particularly relevant in determining whether a causal connection exists between the work-related accident and the need for surgery.

Moreover, the Commission's denial of benefits for an aggravation of a preexisting condition has recently resulted in reversals by the Arkansas Court of Appeals. Williams v. L & W Janitorial, Inc., ___ Ark. App. ___, ____ S.W.3d ____ (February 4, 2004)(CA03-681); Parker v. Atlantic Research Corp., ___ Ark. App. ___, ____ S.W.3d ____ (June 30, 2004)(CA03-1362); and Pollard v. Meridian Aggregates, ___ Ark. App. ___, ____ S.W.3d ____ (September 29, 2004)(CA04-218).

In Williams, supra, the Court noted that the work-related accident need only be a "contributing factor" in the subsequent need for surgery. As noted above, for over six years prior to the work-related accident, claimant was essentially asymptomatic and had

not received any treatment or been off work as a result of his lumbar condition. Following the work-related accident, claimant was unable to work and his condition required surgery. Based on this evidence, as well as Dr. Shahim's medical opinion, claimant has proven by a preponderance of the evidence that a causal connection exists between the work-related accident and his subsequent need for treatment. The work-related accident certainly was a "factor" in claimant's need for treatment. Accordingly, I find that the opinion of the ALJ should be affirmed.

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SHELBY W. TURNER, Commissioner