

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303489

OLIVER PETTIS, EMPLOYEE	CLAIMANT
SOUTHEASTERN ERECTORS, UNINSURED EMPLOYER	RESPONDENT NO. 1
MAY CONSTRUCTION COMPANY, PRIME CONTRACTOR	RESPONDENT NO. 2
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT NO. 2

OPINION FILED February 14, 2005

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

Claimant represented by HONORABLE JASON WATSON, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 not represented by counsel.

Respondent No. 2 represented by HONORABLE ROBERT HENRY, III, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and Reversed in part.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by respondents from an opinion filed herein by an Administrative Law Judge on February 12, 2004. The parties stipulated to the compensability of this claim. Respondents No. 2 specifically appeal that portion of the Opinion finding that claimant is entitled to additional medical, namely cervical spine surgery as recommended by

Dr. McCaskill. There is no appeal from that portion of the Opinion finding Southeastern Erectors (Respondent No. 1) is an uninsured subcontractor of Respondent No. 2, and is thereby liable for reimbursement of Respondent No. 2 for all benefits paid. Respondent No. 1 does not appeal in this matter.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the credible evidence that he is entitled to additional medical benefits. Therefore, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part.

At the time of his compensable injury, the claimant had been an iron worker/crane operator for over twenty years. He had been employed with Respondent No. 1 for approximately two weeks, when on the morning of April 2, 2003, the claimant was hit in the head by a bar joist, knocking him to the ground and rendering him momentarily unconscious. The claimant did not seek emergency medical treatment on the day of his accident. However, the following day, April 3, 2003, the claimant was seen at the Sparks Regional Medical Center emergency room, for increasing

symptoms of soreness and stiffness in his neck and numbness in his fingers. X-rays taken at the emergency room revealed degenerative disc disease at C5-C6 and C6-C7. The claimant was prescribed pain medications and advised to follow-up with an MRI. The claimant returned to work and requested a light duty assignment. The claimant was informed that there was no light duty available for him, so he returned to his home in Lowell. On April 4, 2003, the claimant was seen in the emergency room of the Northwest Medical Center in Springdale, Arkansas, for complaints of shooting pain in his right arm with occasional numbness. The claimant was instructed to restrict his lifting and repetitive movement for three days, use ice packs and medications as prescribed, and come back to the ER or see his family physician should he experience more problems. On April 14, 2003, an MRI of the claimant's cervical spine revealed the following:

[D]egenerative disc disease at C4 through C7 in which the findings are most prominent at C4-C5, there is a right paracentral disc protrusion (herniated nucleus pulposus) which indents the right aspect of the cervical cord at that level.

On April 21, 2003, the claimant was seen in a follow-up appointment by Dr. Cyril A. Raben at Northwest Arkansas Spine & Orthopaedics. In his clinic note of that visit, Dr. Raben commented:

This 39 year old presents to me today with these complaints [neck and right arm pain] beginning some 3 weeks ago. ... [After a brief recapitulation of the claimant's accident, the doctor continues ...] He tried to continue working. He was able to do so for perhaps some 2 hours; however, the pain became progressively more severe. He tried to show back up for work the next day or two feeling he was "too tough to see a doctor." However, the pain persisted to a point where he finally presented to the ER at Fort Smith. He was seen, evaluated and told that he had muscle spasm. He was given medication for pain and spasm. He has been going back and forth to the ER since then.

Based upon his examination of the claimant and review of the X-rays and MRI results, Dr. Raben assessed the claimant with cervical disc herniation with radiculopathy. Doctor Raben opined that the claimant would benefit from drug and physical therapy. Doctor Raben stated that surgical intervention would likely be required due to the size of claimant's disc herniation. In his closing remarks, Dr. Raben stated the following:

We will give him an injection of corticosteroid today and two-day oral corticosteroid dosage. We will see him back with us for a nurse practitioner visit in 1 week. If he is making little or no progress with this therapy and other modalities, I think that we will need to go ahead and get him on the schedule for an anterior cervical discectomy and fusion at at least C4/5. Because of the degeneration and because of the osteophytosis and the bony changes around C5/6 and C6/7 and because we are expecting and anticipating heavy loading secondary to his occupation, I would recommend that we do these levels, as well.

Doctor Raben took the claimant off of work until May 29, 2003. Sometime afterwards, the claimant moved to Texas.

On June 24, 2003, the claimant was seen by Dr. John L. Wilson in Little Rock, for an independent evaluation of his condition upon referral by Crockett Adjustment (Respondent No. 2). Doctor Wilson's examination revealed evidence of C6-7 radiculopathy with decreased tricep strength in the right arm. Believing a large percentage of the claimant's problem to arise from level C6-7, Dr. Wilson recommended a selected nerve block in that area of his spine. Based upon his examination and evaluation

of the claimant's condition, Dr. Wilson stated that he would be "extremely hesitant" to recommend a three level anterior cervical fusion on the claimant. Dr. Wilson further commented that the claimant could not work at that time.

A right C6-7 transforaminal nerve block and steroid injection was performed by Dr. William Deaton at St. Vincent Infirmary on June 24, 2003. This procedure was reportedly helpful in alleviating the claimant's symptoms at the C6-C7 level.

Doctor Phillip R. Shelan performed a myelogram of the claimant's cervical spine on July 21, 2003. This test revealed mild narrowing of at C4-C5 and C6-C7 intervertebral disc spaces; mild ventral epidural defects at C4-C5 and C6-C7; and, poor filling of both C7 root sleeves, more so on the right than the left. Doctor Shelan concluded from a post-myelogram CT of the claimant's cervical spine performed on that same day that the claimant's history was "highly suggestive of a right-sided disc herniation." Doctor Shelan added, however, that "such an abnormality is not clearly discernible" on either the myelogram or post-myelogram CT. Degenerative changes at levels C4-C5 through C6-C7 disc spaces were evident from these tests, as was spinal cord

compression at C4-C5. These tests also confirmed narrowing of both C6-C7 neural foramina and relatively poor opacification of both C7 nerve root sleeves, which appeared to Dr. Shelan to be "chronic."

The claimant testified that his adjuster Mr. Rudy Bischof, obtained a Dallas physician for him in July of 2003, namely Dr. Bernie L. McCaskill. Although there is no record of this visit contained in the file, the claimant testified that he first saw Dr. McCaskill sometime in July of 2003. Doctor McCaskill referred the claimant to Dr. Samuel M. Bierner for a nerve conduction study, which was performed on August 7, 2003. In his August 12, 2003, clinic note, Dr. McCaskill stated that the nerve conduction study showed cervical radiculopathy with no evidence of ulnar nerve entrapment in the right extremity. During his visit with the claimant on August 12<sup>th</sup>, Dr. McCaskill discussed his surgical and non-surgical treatment options. Doctor McCaskill explained to the claimant that his symptoms do not "radiate in a C7 dermatome," making his prognosis for pain relief less than optimal. The claimant informed Dr. McCaskill that he wished to opt for surgery.

In a response letter dated August 28, 2003, to Crockett Adjustment, Dr. Wilson reiterated his early opinion that surgery was not an appropriate treatment option for the claimant. In this letter, Dr. Wilson stated:

Based on the presentation that this gentleman made to me, his physical findings, and particularly his lack of response to selective nerve block at C6-C7, with failure of finding neurological deficit, and the triceps not showing EMG changes, I could not recommend surgery on this gentleman. Dr. McCaskill's initial thought was radiculopathy at C5 on the right side due to herniated disc, but he certainly does not have symptoms related to C5. His symptoms seem to relate to C7. As noted on August 12<sup>th</sup>, he [Dr. McCaskill] he told the patient that the prognosis for pain relief was slightly less than optimum and I think this may be an understatement, particularly due to the fact that he did not respond to selective nerve block.

Doctor Wilson assigned the claimant a 5% impairment rating to the body as a whole, but he could not ascertain whether the claimant had reached the end of his healing period at that time.

The claimant saw Dr. McCaskill on August 29, 2003, at which time Dr. McCaskill stated that the claimant's "right sided neck pain" had reportedly worsened since his

injury nineteen weeks earlier. The doctor further stated that the claimant had not been given a work release; that he was unable to predict when the claimant might reach MMI under his care; and, that the claimant's prognosis was "good to fair." The claimant was next seen by Dr. McCaskill on September 19, 2003, at which time the doctor released him to "light active work lifting up to ten pounds." Doctor McCaskill opined from this visit that the claimant should reach MMI under his care "twelve weeks following the proposed surgery."

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). 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 Workers' Compensation Commission  
Opinion filed December 13, 1989 (Claim No. D512553).

Moreover, the respondent is only responsible for medical services which are causally related to the compensable injury.

After the claimant's compensable injury of April 2, 2003, the respondents promptly provided medical services which were reasonably necessary for the treatment of the claimant's compensable injury. However, in analyzing the proposed procedure, specifically the anterior cervical discectomy and fusion, and the condition it is sought to remedy, namely degenerative disc disease at levels C4-7, the claimant has failed in this claim to prove by a preponderance of the evidence that the proposed surgery is either reasonably necessary or causally related to his compensable injury for the following reasons.

First, Dr. Raben initially recommended surgical intervention in order to alleviate the claimant's condition approximately three weeks post-injury. Dr. Wilson, on the other hand, first examined the claimant some ten weeks subsequent to his compensable injury. At this juncture, Dr. Wilson was able to base his recommendation for a

conservative treatment plan on more cumulative objective medical evidence than that available to Dr. Raben. By the time of his second examination of the claimant on August 28, 2003, Dr. Wilson determined the success of nerve block therapy and analyzed the results of further medical testing as compared to those initially performed, i.e., cervical myelogram and post-myelogram CT performed on July 21, 2003. Based upon objective medical findings, at no time has Dr. Wilson agreed that surgery is an appropriate treatment option for the claimant. In fact, as of his August 28<sup>th</sup> examination of the claimant, Dr. Wilson was strictly opposed to surgery, stating, "I could not recommend surgery on this gentleman." As detailed above, Dr. Wilson based his opinion on several objective findings, including a failure to find a neurological deficit. Moreover, Dr. Wilson pointed out that the claimant's symptoms relate to C7, and not C5, as originally thought by Dr. McCaskill. Furthermore, Dr. McCaskill discussed the claimant's treatment options with him, which included surgery. Doctor McCaskill did not, however, state definitively that surgery was the claimant's only, or even his best treatment option. Instead,

Dr. McCaskill presented the claimant with his options and left the decision to the claimant.

The Arkansas Court of Appeals has stated that the Commission has the duty of weighing medical evidence, and if the evidence is conflicting, its resolution is a question of fact for the Commission. University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997); see also Whaley v. Hardee's, 51 Ark. App. 166, 912 S.W.2d 14 (1995). Furthermore, the Commission is not required to believe the testimony of any witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. In the case of Mosley v. McGehee School District, 36 Ark. App. 11, 816 S.W. 891 (1991). It appears from the record that all of the claimant's treating physicians are credible; however, none of them testified. We find that the opinion of Dr. Wilson should be given more weight in this claim based upon the totality of the credible objective medical evidence presented herein. Surgery is not a reasonable and necessary treatment for the claimant's compensable injury, and it should be denied.

Aside from the objective medical evidence presented in this claim, non-medical extrinsic evidence

introduced further supports a finding that the claimant has failed to prove by a preponderance of the credible evidence that a cervical fusion is reasonable and necessary for the treatment of his compensable injury. The record reveals that the claimant has availed himself to several inherently dangerous activities, both before and after his compensable injury of April 2, 2003, any of which could have easily resulted in the type back condition from which the claimant now suffers. Moreover, and more importantly, the activities in which the claimant has participated are inconsistent with those typically engaged in by someone in need of cervical fusion surgery. For example, the claimant's girlfriend, Ms. Billie Butterworth, testified by deposition that subsequent to April 2, 2003, she either witnessed or the claimant told her of his involvement in the following activities: (1) bull riding at a rodeo on August 21, 2003; (2) painting the exterior of Ms. Butterworth's home during the summer of 2003; (3) assisting one of Ms. Butterworth's relatives put a drive-shaft and transfer case in a pick-up truck on the 4<sup>th</sup> of July weekend, 2003; (4) helping construct a building for pay in September of 2003; (5) camping, boating, swimming, and fishing for one week

beginning on the 4<sup>th</sup> of July weekend, 2003; and, (6) helping his mother move from her large home at the end of August 2003. Photographs and other documentary evidence of the claimant engaged in some of these activities were submitted into the record and help confirm the validity of Ms. Butterworth's testimony. Furthermore, Ms. Butterworth stated that the claimant has been a long-time active participant in rodeos and rodeo activities, and he has been a member of the Professional Bull Rider's Association.

Specifically, Ms. Butterworth stated:

Oh, yeah. That's - Oliver's [the claimant] always rode bulls. Always. He's been a member of the Professional Bull Rider's Association. I mean, it's in his heart. That's just what he is.

Ms. Butterworth further stated that the claimant's participation in bull riding on August 21, 2003, was voluntary, as were the other somewhat less dangerous activities in which he participated during that period of time. When questioned as to whether the claimant ever denied to her being physically able to engage in any of the above described activities due to physical problems or limitations caused by his compensable injury, Ms. Butterworth

consistently replied, "No." Furthermore, Ms. Butterworth testified that she often witnessed the claimant abusing his prescription pain medication after his compensable injury. For example, regarding a 30-day supply of medications, Ms. Butterworth stated, "He could get a prescription for Ambien and be gone through the medicine within six, seven, eight days, the same with Soma. He was constantly staying very messed up." Ms. Butterworth testified that the claimant had lived with her prior to September of 2003, at which time she asked the claimant to leave her home due to his abuse of prescription medications.

The claimant admitted in his testimony during the hearing of November 4, 2003, that he has been injured on several occasions from bull riding. The claimant further admitted that he did not inform Dr. Wilson or Dr. McCaskill of his recreational and other non-work related activities as previously described.

The question of whether medical treatment is reasonably necessary is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). The extrinsic, non-medical evidence presented in this claim clearly demonstrates that the

claimant has been very physically active since his injury of April 2, 2003, even engaging in abnormally dangerous activities. The extrinsic non-medical evidence supports Dr. Wilson's objective medical opinion that the claimant is not in need of a cervical fusion, particularly at level C5.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the credible evidence that he is entitled to additional medical treatment, specifically a cervical fusion. Therefore, we find that the decision of the Administrative Law Judge is hereby reversed in part and the award of additional medical benefits is hereby denied.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

\_\_\_\_\_ I dissent from the majority opinion finding that the claimant is not entitled to further medical treatment. I

find that the claimant has established that the treatment at issue is reasonable and necessary and related to his admittedly compensable injury and that the respondent should be ordered to provide the treatment to him.

The Majority has found that the opinion of a consulting physician, Dr. John Wilson, an orthopedist chosen by the respondent, is entitled to more weight than the opinions of two other doctors who saw and treated the claimant. I disagree and find that Dr. Wilson's opinion is based on inaccurate information. Dr. Wilson saw the claimant on June 24, 2003 and noted in a report of that date that the claimant was suffering radicular symptoms as a result of his neck problems and discovered that the claimant had a muscle decrease in the triceps in his right arm. Dr. Wilson suggested the claimant undergo a selective nerve block to further isolate his problems. Contrary to the statements of the Majority, the claimant did not ever see Dr. Wilson again. However, at the request of the respondent's claims adjuster, Dr. Wilson was asked in August, 2003 to prepare a narrative report outlining his recommendations for the claimant's future treatment. In his letter (a copy of which is included in the record), the adjuster tells Dr. Wilson

that he did not believe that the claimant was an appropriate candidate for surgery and that the respondent would not agree to pay for any further medical treatment. Not surprisingly, Dr. Wilson states in his reply that he could not recommend surgery on the claimant. He further states that this conclusion is based upon his physical findings from his examination of the claimant and "particularly his lack of response to selective nerve block at C6-7. . . ." Later in the same report, Dr. Wilson once again notes that the claimant "did not respond to a selective nerve block." However, a review of the medical record reveals that the nerve block in question was performed by Dr. William Deaton on June 24, 2003. In a report of that date, Dr. Deaton outlines the nerve block procedure. After discussing the injection into the C6-7 level of the claimant's cervical spine, Dr. Deaton stated: "Injection at this level did seem to improve the patient's usual symptoms." Dr. Wilson obviously did not review Dr. Deaton's report before stating that the claimant did not respond to the nerve block.

Dr. Wilson was also contradicted by two other physicians who examined the claimant. Dr. Cyril Raben, a Fayetteville orthopedist who specializes in treatment of

spinal conditions, saw the claimant on April 21, 2003, less than three weeks following his injury. Dr. Raben reviewed the MRI of the claimant's cervical spine and recommended that he start physical therapy, Dr. Raben further stated that he believed that future surgical intervention was likely because of the large size of the claimant's disc herniation at C4-5.

The claimant also sought medical treatment from Dr. Bernie McCaskill, a surgeon in Dallas, Texas. Dr. McCaskill, in a report dated August 12, 2003, discussed the option of surgery with the claimant and provided him information regarding it. Dr. McCaskill opined that the claimant's prognosis with surgery was very good and that he would reach maximum medical improvement in 12 to 18 weeks following the surgery.

I find that when Dr. Wilson's opinion is weighed against that of Dr. Raben's and Dr. McCaskill's, it is evident that it is not a reasonable basis for denying the claimant his requested medical treatment. His contact with the claimant was very limited and his conclusion was based upon a misunderstanding of the results of the nerve block

which he had directed the claimant undergo. I, therefore, find that Dr. Wilson's report should be disregarded.

The other basis relied upon by the Majority was that the claimant's activity level indicates surgery is not necessary. In the Majority Opinion, a number of the claimant's work and recreational activities are outlined. However, the issue in this case was not whether the claimant was able to return to work or what type of activities he could safely engage in. The question was whether he is entitled to receive medical treatment which is intended to relieve symptoms such as tingling, numbness, and loss of strength in his right arm. Those symptoms are verifiable by objective diagnostic testing and muscle atrophy. Of considerable significance is that the MRI which discovered the herniated disc in the claimant's cervical spine was performed within two weeks of his injury, long before the activities outlined in the Majority Opinion.

For these reasons, I dissent.

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SHELBY W. TURNER, Commissioner