

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506898

WILLIAM DUNAVAN, EMPLOYEE	CLAIMANT
COMSTAR ENTERPRISES, EMPLOYER	RESPONDENT
PROVIDENCE PROPERTY & CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 1, 2006

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MICHAEL WHITE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeals a decision of the Administrative Law Judge filed on March 24, 2006, finding that the claimant is entitled additional medical benefits in relation to a compensable right leg injury that he sustained on March 7, 2005.

Our carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove that additional medical treatment is reasonably

necessary for the treatment of his compensable leg injury. Therefore, the decision of the Administrative Law Judge is hereby reversed and additional medical benefits are hereby denied.

On March 7, 2005, the claimant was struck on the right shin with a piece of metal, resulting in a laceration. The claimant, a truck driver who was on an out-of-state-run, contacted the respondent employer immediately concerning this incident. The claimant was advised that because he was not seeking emergency medical treatment, he would need to obtain treatment in Arkansas. The medical records reflect that the claimant first sought treatment for his wound on March 17, 2005, from Dr. Ronald Bertram. Based upon his clinical examination of the claimant, Dr. Bertram diagnosed him with cellulitis of the right lower extremity, for which he recommended appropriate treatment modalities. The medical records reflect that the claimant was next seen by Dr. Bertram on March 22, 2005, and the following day, Dr. Bertram referred him to the Wound Care Clinic of

Washington Regional Medical Center. The claimant returned to Dr. Bertram on March 29, 2005, and was again advised that he should be seen at the Wound Care Center.

On March 31, 2005, the claimant was examined by Dr. John Moore at the Wound Care Center. Dr. Moore, who performed a debridement of the claimant's wound during that visit, reported minimal, nonpurulent discharge at the wound site. The claimant underwent a second debridement on April 12, 2005, which was performed by Dr. Ronald Jay Mullis. The claimant was next seen at the Wound Care Center on April 25, 2005, by Dr. Jeffrey Kellar. Thereafter, the claimant returned for periodic redressing of his wound.

On June 27, 2005, the claimant was released to return to regular duty with no restrictions. The claimant returned to work on that date, and did not seek further medical treatment for his injury until July 20, 2005. A report from that visit indicates that the claimant's wound was not completely healed, and that dressing changes were still needed. The claimant was scheduled to return to the

clinic in one week after his July 20, 2005, appointment. However, sometime after that date, the claimant left his employment with the respondent employer and moved to Indiana.

The claimant testified that following his release on June 27, 2005, he returned to work for the respondent employer in nauseating pain. The claimant further testified that since his return to Indiana, his pain continues to be so severe that he is unable to work with regularity. The claimant stated that his pain increases with increased activity, and that his only relief is to "lay down and prop it [his right leg] up." The claimant agreed that he has group health insurance. However, despite the alleged disabling severity of his leg pain, the claimant admitted that he has not sought medical treatment through his group health insurance carrier. The claimant explained that he has not sought treatment through his group carrier because he does not feel that it is his health insurance carrier's responsibility to pay for his treatment. Further, the

claimant alleges that prior to moving to Indiana he sought authorization from the respondent carrier for a change of physician to his family doctor in Indiana, but was denied.

The claimant's prior medical history includes surgery to repair a torn rotator cuff in his shoulder and surgery to remove a blood clot in his right leg. These two surgeries stemmed from the same event.

Ark. Code Ann. §11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal Mart Stores, Inc. v. Brown,

supra; Specialty Chem. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equip. v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

Following his admittedly compensable injury of March 7, 2005, the claimant was provided with all reasonable and necessary medical treatment related to that injury. The claimant underwent two debridements and regular redressing of his wound throughout the course of his treatment. This treatment was shown to have had satisfactory results in that the claimant was released to his regular work activities without restrictions on June 27, 2005. Moreover, his follow-up report from July 20, 2005, indicates that the claimant's wound was almost completely healed, with appointments for

redressing the only required remaining treatment. In support of additional medical treatment, the claimant sites only his alleged debilitating pain. The claimant admits that he has not re-injured his leg. In addition, the claimant's physical wound has not required medical treatment since he moved to Indiana sometime after July 20, 2005. This is demonstrated by the fact that, even though he has group health insurance, he has not sought treatment subsequent to July 20, 2005. Logic dictates that had he suffered a complication, such as a recurrence of infection, the claimant would have had no alternative but to seek additional medical treatment by any means available. The claimant has offered no proof that he suffers from such a complication, but now seeks additional medical treatment to address his subjective complaints of pain only. However, the medical records establish that the claimant's condition had stabilized no later than June 27, 2005, after which date the only treatment necessary, in the opinion of his treating physicians, was redressing of his wound. Furthermore, although the claimant testified that a

family physician in Indiana, Dr. Kelly Watts, attempted to obtain authorization from the respondent carrier to treat the claimant, the record is devoid of documentation from this physician to corroborate the claimant's testimony. Moreover, although the claimant testified that he contacted the respondent carrier seeking a change of physician to a medical provider in Indiana while he still resided in Arkansas, he candidly admitted that he has not sought such a change subsequent to that time. Furthermore, the claimant did not petition the Commission for a change of physician, although he has had the benefit of legal counsel, and was therefore, aware of his right to petition the Commission for such a change. Ark. Code Ann. §11-9-514(a)(3)(ii) (Repl.2002) provides a claimant with an absolute one-time right to a change of physician. See Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 2004 (2002). Therefore, had the claimant petitioned the Commission for a change of physician, his petition would have been granted. Finally, although the claimant currently rates his level of

pain as 55 on a scale of 10, the record is devoid of any evidence that he has sought medical treatment for this alleged excruciating pain since he left Arkansas. Once again, logic dictates that such a severe level of pain would have, at some point, driven the claimant to seek relief in the form of medical treatment, regardless of who was actually responsible for payment of that treatment. Consequently, it is simply incomprehensible, especially in view of the fact that the claimant had legal counsel and was aware of his rights pursuant to this claim, that he had not sought medical treatment, emergency or otherwise, for 8 months at the time of the hearing, for pain that he would have us believe was, at times, intolerable. Finally, the claimant's excuse for not seeking medical treatment during the time in question was that he did not believe his group health insurance carrier should be liable for any treatment associated with his injury. That the claimant refused as a *matter of principle* to seek medical treatment for his

alleged debilitating pain, makes his testimony concerning his degree of pain, at the very least, questionable.

Based on the above and foregoing, aside from his subjective and unquantifiable complaints of pain, the claimant has offered no proof that additional medical treatment is reasonable and necessary for the treatment of his compensable injury. Therefore, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment. Based on the above and foregoing, the decision of the Administrative Law Judge is hereby reversed and additional medical treatment is denied.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion to deny the claimant additional medical benefits. After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been affirmed. The claimant was never released from medical care and there is no objective evidence to indicate his wound has finished healing. Likewise, the claimant credibly testified that he requested additional treatment, but that treatment was denied. As the last medical report in the record indicates the claimant needed additional care and the claimant testified he needed additional medical attention, I find the decision of the Administrative Law Judge should have been affirmed.

In the present case, the preponderance of the evidence shows the claimant has sustained an injury for which he needs ongoing treatment. The claimant was documented to have a compensable injury for which the

respondents accepted liability until July 20, 2005. The evidence shows that the respondents refused to provide the claimant medical treatment after that time, despite the language in the medical record indicating he needed to return for more treatment.

Specifically, I note that as of April 25, 2005, the time of the last debridement, the doctor's note indicated that the claimant would need to have VAC therapy and dressing changes for a period of six months beginning April 28, 2005. Certainly, this would indicate that the claimant needed treatment past the date of July 20, 2005.

Additionally, even at the time of the claimant's last treatment on July 20, 2005, the claimant's wound had not healed. In fact, the doctor's report from July 20, 2005, specifically described the claimant's injury as, "Not Healed." Additionally, it indicated the claimant was to return in a period of one week for care. Accordingly, when considering medical reports providing that the claimant had not been released for treatment, in conjunction with the

document ongoing difficulty in his wound healing and the claimant's testimony that his wound was still problematic, I find that the claimant is entitled to ongoing medical treatment.

The Majority contends the claimant's only basis for requesting additional medical benefits is based on subjective complaints of pain. They further argue that the claimant did not ask for medical care after July 20, 2005, and contend that if he were in pain, he would have sought treatment, regardless of whether it was paid for by the respondents. I find these arguments to be unconvincing.

First, I note that the last medical report in the record indicates that the claimant needed ongoing medical treatment and indicates the claimant's wound had not healed. While the respondents assert that the claimant's wound only required dressing changes after that point, and should have healed by this point, there is simply no evidence to objectively establish such a contention. Furthermore, in my opinion, to conclude that the claimant's wound has healed is

to resort to impermissible conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

I also reject the Majority's contention that the claimant did not request additional medical care and instead simply stopped going to the doctor on his own volition. I also reject the proposition that the claimant's failure to request a change of physician indicates he did not need more care. While it appears that even at this point the claimant would be entitled to his one-time change of physician, I do not think his failure to make such a request to be indicative of his need for care. Certainly, since the claimant had moved and his medical reports indicated he needed care, the respondents should have simply told the

claimant which doctor to see in an area that was near his new residence.

Likewise, there is evidence that while the claimant did not file a formal request for a change of physician, he did contact the respondents in an effort to get a new doctor. The claimant testified that on two separate occasions he contacted the respondents in order to receive treatment from Kelly Watts, his physician in Indiana. Yet despite these requests and the obvious need for ongoing care, the respondents refused to pay for the treatment. As the claimant had been receiving medical care for months prior to moving to Indiana and testified that he had ongoing problems with his leg, I find that it is unlikely he would stop going to the doctor only to pursue litigation unless the respondents would not accept liability for the requested care.

Finally, I reject the Majority's contention that the claimant would have sought medical treatment and filed it through his personal insurance if he was in pain as

severe as that he described. The medical record from July 20, 2005, sets forth that the claimant needed more care, indicating that the claimant had a legitimate need for treatment. In Workers' Compensation cases it is certainly not unusual for a claimant to go without medical treatment based on the respondents' denial and a lack of financial resources. Similarly, in this instance the claimant testified that he decided to relocate for financial problems, and certainly, even if he had insurance, he would bear some financial burden. Furthermore, I note the claimant's testimony that he did not feel that his health insurance should have to pay for treatment if the respondents were liable for that treatment. Certainly, since the claimant's need for care was directly related to a workers' compensation injury, the respondents were liable for payment of that treatment, and the claimant should not have been required to pay for treatment or ask another insurance carrier to pay for that treatment. Likewise, he

should not be deemed to be not credible because he did not choose to seek medical care at his own expense.

_____ Ultimately, the available evidence shows that the claimant should be entitled to ongoing medical treatment. The last medical report which is available clearly indicates that the claimant's wound was not healed and the claimant credibly testified that he continues to have ongoing problems with his injury. There is no objective evidence to establish that the claimant's wound has healed. Likewise, there is no medical report to indicate that the claimant has been or should have been released from care. Accordingly, in my opinion, the claimant is entitled to additional medical treatment and the decision of the Administrative Law Judge should have been affirmed.

For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner