

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103026

GARY GREEN, EMPLOYEE	CLAIMANT
TRUCK TRANSPORT, EMPLOYER	RESPONDENT NO. 1
PACIFIC EMPLOYERS INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 20, 2006

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

Claimant represented by HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE BETTY J. DEMORY,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The claimant appeals a decision of the
Administrative Law Judge filed on July 8, 2005. The
claimant had requested additional medical treatment from Dr.
Ackerman or Dr. Giglia. The Administrative Law Judge denied
treatment from Dr. Giglia based on the finding that the only
treatment the claimant would receive would be for heart-

related problems directly related to pre-existing obesity, hypertension, and age. Likewise, he denied treatment from Dr. Ackerman based on the finding that he would only be treated for pain in his low back and that Dr. Rutherford could not attribute the claimant's pain to his low back or compensable injury.

After a de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. In our opinion, Dr. Rutherford's recommendation to provide the claimant with additional cardiovascular care was solely related to his pre-existing hypertension, age, and obesity. Furthermore, in our opinion there is no evidence to indicate the claimant's admittedly compensable injuries in any way aggravated those pre-existing conditions. Accordingly, we affirm the portion of the Administrative Law Judge's decision to deny the claimant additional medical treatment for his heart conditions.

However, we find that the claimant should be entitled to the recommended treatment from Dr. Ackerman. There is no dispute that the claimant suffered multiple fractures to his ribs. He also suffered compression fractures in his lumbar spine and a herniated disc in his

lumbar spine. In fact, his injuries to his back were severe enough to warrant a 10% impairment rating. There is no dispute that the claimant had never suffered from back pain prior to sustaining his admittedly compensable injuries. There is also no dispute that since the accident the claimant has been approved for social security disability benefits and that his personal physician has treated him for and referred him for additional treatment for his back pain. Accordingly, in our opinion, the medical records and the other evidence in the case are indicative that the claimant suffered a compensable injury which requires ongoing treatment in the form of pain management for his back. As such, we reverse the portion of the Administrative Law Judge's decision denying the claimant additional treatment from Dr. Ackerman.

The claimant sustained admittedly compensable injuries on March 2, 2001. The injuries occurred after the claimant was involved in a severe motor vehicle accident which resulted in the death of the other driver. On the date of the injury, the claimant was admitted to Wadley Regional Medical Center, located in Texarkana, TX.

A CT of the claimant's thoracic and lumbar spine was performed on March 11, 2001. It revealed that the

claimant had fractures at T6, T7, T8, T9, and T10. It further noted, "Transverse process of L2-3 are fractured, and there is a questionable fracture of the L1 right transverse process." The report also provided that the claimant suffered possible mild compression of T5 and T6.

On March 21, 2001, the claimant was discharged from the hospital. At the time of his release he had the following diagnoses:

- 1) Multiple rib fractures.
- 2) Hemopneumothorax
- 3) Pulmonary contusion.
- 4) Respiratory insufficiency posttrauma.
- 5) T5-6 compression fractures.
- 6) Transverse process fractures at the L2 and L3.
- 7) Spinous process fractures of T6 through T10.

On March 29, 2001, an x-ray of the claimant's chest indicated that the claimant had right basilar infiltrate or atelectasis and suspected right parahilar infiltrate or mass. However, his heart was not enlarged.

On April 5, 2001, in an initial evaluation for physical therapy, the claimant reported he suffered from pain in his back, abdomen, right rib cage, and around his right scapula. An x-ray from April 19, 2001, indicated the claimant's heart was normal in size and that he had normal pulmonary vasculature.

An MRI dated May 31, 2001, revealed that the claimant had mild degenerative disc disease at L3-4. It further indicated,

2. SMALL CENTRAL DISC PROTRUSION AT THE L4-5 LEVEL WITHOUT EVIDENCE OF SPINAL CANAL STENOSIS OR LATERAL RECESS STENOSIS.

3. MILD CONTUSION IN THE SUBCUTANEOUS TISSUES POSTERIOR TO THE LUMBAR SPINE.

The claimant was treated at Neurosurgical Associates of Texarkana on July 17, 2001. The note indicated the claimant reported severe pain in his lower back and that he had suffered that pain since his accident. The report also indicated the claimant suffered no obvious neural impingement at level L4-5.

On August 28, 2001, Dr. J. Brett Dietze indicated that the claimant was suffering from back pain and from popping of his rib when lying down and breathing. Dr. Dietze told the claimant that he did not think there was a neurosurgical problem and advised him to continue with physical therapy. On October 23, 2001, the claimant apparently asked Dr. Dietze for a referral to a cardiologist. The claimant underwent a Functional Capacity Exam (FCE) on October 17, 2001. He was unable to complete it due to having shortness of breath and a rapid heart beat.

On November 6, 2001, the claimant was assessed an impairment rating. Dr. Barry Green indicated,

Based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, 1993 version, using the DRE Model for diagnostic related estimates (the Injury Model) found on Page 110, Table 72, II, he receives 5% *whole person impairment for the lumbar injury*. He definitely has a back injury. Next, we will look at Page 111, Table 74, II (A), and he receives 5% *whole person impairment for the thoracic injury*. These are combined for **10% whole person impairment**.

On March 29, 2002, Dr. Donald G. Blagdon indicated that the claimant's most serious injuries were his rib fractures and his fractured lumbar spine. He further recommended a MRI of the claimant's dorsal spine and right ribcage. He opined that he believed the claimant had an unstable spine. On April 9, 2002, Dr. Blagdon indicated the claimant had, "Chronic spinal instability from old fracture vertebrae." He also indicated he believed that the claimant, "may very well come to spinal stabilizing surgery."

On April 9, 2002, a radiologist report indicated the claimant had a tortuous thoracic aorta. It further indicated that there was a progressive prominence of the mediastinum on the right when compared to a film from 1992.

Lastly, it indicated that the claimant's condition could be the result of chronic hypertension with a prominent aorta and opined the claimant would benefit from a CT to assure there was no mass present.

On April 26, 2002, Dr. Blagdon opined,

This recent x-rays (sic) suggests a prominence of the right mediastinum meeting the internal organ structure of the chest. It is possible that the enlargement is simply due to Mr. Green's considerable bulk and size and also from his chronic hypertension. However, trauma experts will tell you that fractures of the first and second rib almost always indicate significant internal chest injuries and is quite possible that there has been some injury to the internal structure that cannot be evaluated on a plane x-ray and needs to have a further CT.

Dr. Blagdon further recommended the claimant have another MRI of his spine.

On September 4, 2002, Dr. Reginald Rutherford treated the claimant and indicated the claimant suffered from a history of high blood pressure. He further indicated that the claimant had a chronic cough and an inability to lie flat. Dr. Rutherford indicated the claimant had experienced, "moderately severe extensive trauma." He further opined,

He clearly requires further investigation. He requires pulmonary consultation to further evaluate his chronic cough and intolerance of assuming horizontal position. Referral to Dr. Anthony Giglia is recommended. In conjunction with this he needs a total body bone scan, MRI imaging of the cervica, (sic) thoracic, and lumbar spine and CT scan of the chest.

Dr. Rutherford also prescribed the claimant a duragesic patch for pain control.

On September 11, 2002, Dr. Rutherford indicated the claimant's MRI failed to reveal evidence of frank disk herniation, spinal cord compression, or nerve root impingement. He continued the claimant's work restriction and increased the strength of the claimant's duragesic patch.

On September 24, 2002, Dr. Giglia, treated the claimant for his pulmonary condition. He assessed the claimant with borderline cardiomegaly and noted, "The right hilum appeared to have either more prominent aorta or right pulmonary artery." He further indicated that the claimant had a history of chest trauma and indicated, "Must rule out aortic dilatation and cardiac compromise, as well as pulmonary etiologies."

A radiology report dated September 24, 2002, indicated the claimant had a possible enlarged pulmonary artery, borderline cardiomegaly and old healed granuloma. On October 3, 2002, Dr. Giglia indicated that the claimant had, "several old separated posterior medial rib fractures with irregular fragments projecting toward the pleural surface." He further indicated he did not know the impact the ribs were making on the claimant's dyspnea. He recommended that considering the claimant's hypertension, obesity, and age, a cardiologic evaluation was needed. He indicated, "If he has any cardiac compromise that can be improved, will significantly improve his well being." He also opined that he did not see any aortic dilatation or cardiac compromise on the claimant's chest CT. He further recommended further evaluation based on the claimant's hypertension, age, and obesity.

On October 4, 2002, Dr. Rutherford recommended an EMG Nerve Conduction Study to find out if an injury to the claimant's peripheral nervous system contributed to his complaints. The test was performed and returned as normal. On August 22, 2003, Dr. Rutherford indicated that the claimant had principal problems of multiple rib fractures,

chronic low back pain, and impaired pulmonary function. He recommended the claimant be referred back to Dr. Giglia for, "completion of his prior diagnostic and therapeutic recommendations." He further recommended the claimant be referred to Dr. William Ackerman for diagnostic facet joint blocks and pain management.

The respondent subsequently requested additional information regarding the treatment suggested by Dr. Rutherford. Specifically, they asked for additional information regarding whether there were objective findings showing the need for pain management treatment. When Dr. Rutherford did not respond to the questions, the respondents denied the treatment.

The claimant testified that he has not been treated by Dr. Rutherford since August of 2003. He also said that he was approved for social security disability benefits in July of 2004, and said that for a period of time, he was unable to seek medical attention due to not having health insurance or the ability to pay for treatment. The claimant further indicated he had been receiving treatment for back pain from his personal physician. He said his physician had referred him to another doctor and

that he had received treatment in the form of a stimulator.

On June 18, 2003, an Administrative Law Judge issued a decision awarding the claimant additional medical treatment in the form of an EMG as recommended by Dr. Rutherford. The decision further indicated that the claimant reached maximum medial improvement as of November 6, 2001. Since that decision has been rendered, the claimant has undergone the EMG, which was returned as normal. Despite the normal results of that test, Dr. Rutherford referred the claimant for additional medical treatment from Dr. Ackerman and Dr. Giglia. The sole issue in the present claim now involves whether the claimant is entitled to the treatment recommended by Dr. Rutherford.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). What constitutes reasonably necessary medical treatment is a question to be determined by the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). 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). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The Court of Appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment if the treatment is geared toward management of the claimant's compensable injury. See, Patchell v. Wal-Mart Stores, Inc., ___ Ark App. ___ ; ___ S.W. 2d ___, (CA 03-1087; 5-19-04), citing Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W. 2d 845 (1983). Furthermore, this Commission has found that, treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonable and necessary. See, Maynard v. Belden Wire & Cable Company, Full Workers' Compensation Commission Opinion filed April

28, 1998 (E502002); See also, Billy Chronister v. Lavaca Vault, Full Workers' Compensation Commission opinion filed June 20, 1991 (Claim No. 704562).

In our opinion, the claimant's need for further cardiac treatment is solely due to his pre-existing conditions. While the record reflects the claimant suffered from a cardiac contusion at the time of the compensable injury, the evidence is clear that the claimant did not sustain cardiac compromise. Furthermore, since the claimant had a history of chronic hypertension and obesity, which was noted by each of his doctors, we find that his need for pulmonary care is due to pre-existing conditions rather than his work related injury. Additionally, Dr. Giglia specifically indicated the claimant's CT scan did not show cardiac compromise or aortic dilatation and provided that the claimant would need further treatment based on his pre-existing conditions of age, hypertension, and obesity. Accordingly, we find that the claimant has not shown his need for further cardiac treatment was related to his compensable injury.

However, we find that the claimant's request for additional treatment in the form of pain management

treatment should be granted. The medical records are clear that the claimant suffered extensive injury to his back and that he consistently complained of back pain from the time of the compensable injury. The claimant's treating physician, Dr. Rutherford recommended the claimant receive the additional treatment. The claimant's testimony also indicates that his personal physician and another doctor, to which he was referred, have also recommended treatment in the form of pain management for his back. The evidence shows that the claimant had never received treatment for any back condition prior to his admittedly compensable injury. Absent any other explanation for the claimant's ongoing symptoms and considering no doctor has indicated he will not need the recommended treatment, we find that the requested treatment is reasonable and necessary as a direct result of his admittedly compensable injury.

In denying the claimant's request for additional treatment in the form of pain management, the Administrative Law Judge concluded that the claimant did not have objective findings to support he should have pain in his back. Likewise, the Administrative Law Judge opined that Dr. Rutherford had concluded the claimant had no reason for

ongoing pain in his low back. In our opinion, these findings are erroneous.

First, we note that the claimant had multiple, objective injuries to his back. Next, we note that the claimant is not required to show objective findings in order to receive ongoing treatment. See, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d1 (1999). It is undisputed that the claimant broke multiple ribs and suffered from multiple compression fractures in his back. It is also undisputed that the claimant suffered from compression fractures in his lumbar region at levels L2 and L3 and that he received a 5% impairment rating for his injuries to the lumbar spine. There is also no dispute that the claimant was approved for social security disability benefits in July of 2004, which further indicates that his injuries to such a degree that he is unable to work due to the residual impact of his compensable injury. Finally, the claimant testified that he has continued to receive pain medication from his personal physician and that he is now using a stimulator for his back.

The Administrative Law Judge notes that the claimant's herniated disc at level L4-5 did not exhibit

signs of nerve root impingement. However, in our opinion, that fails to recognize that he had other, admittedly compensable injuries to his lumbar spine which account for his low back pain.

During the hearing in April 2003, the claimant testified,

A I've got a cough that has lasted all this time. There are ribs on the right side of my chest that are not healed. I can actually feel them moving.

Q Do you have any problems in your mid-back where you had a fracture there?

A If I happen to sneeze, I don't know if it's my back or back of my ribs or whatever, but I am in a lot of pain if I sneeze, sometimes so bad that I can't even control my bladder or my bowels either one...

There is no indication that these symptoms had subsided as of the time of the hearing in April 12, 2005. During the hearing on April 12, 2005, the claimant testified his need for treatment was primarily due to his low back pain. However, the record also indicates he still had difficulty associated with lying down, his rib popping, and suffered from coughing. The claimant indicated that as of the date of his last treatment in August 2003, he was,

"having back pain, mostly lower back pain and some upper back pain, especially if I sneezed or if I had been coughing, and I still feel something moving on the right side of my chest." When considering the report from Dr. Giglia, dated October 3, 2002, which indicated the claimant's ribs had not healed and had irregular, projecting fragments, it is easy to ascertain why the claimant continues to suffer from pain and discomfort in his back.

The claimant went on to testify as follows: "Q Okay. Now how are your symptoms today in reference to that? A The same as they have been, if not worse." The claimant testified that his symptoms have stayed the same since he was last treated by Dr. Rutherford in August of 2003.

In our opinion, the aforementioned testimony is consistent with the various medical records outlining the claimant's complaints. Since there is no other explanation for the claimant's ongoing complaints of back pain, we find that the evidence is clear that his symptoms are directly related to his admittedly compensable injury.

The Administrative Law Judge further relies on the opinion of Dr. Rutherford from September 24, 2002, to deny treatment. In our opinion, this ignores the opinion of Dr.

Rutherford from August 22, 2003, recommending the claimant be referred to Dr. Ackerman for pain management. The visit in question occurred before the claimant's EMG test results were returned as being normal. Dr. Rutherford opined, "At this juncture I do not have a good explanation for the magnitude of Mr. Green's complaints referable to what has been found from his imaging studies." In denying benefits, the Administrative Law Judge indicated this language was indicative that Dr. Rutherford believed that there was no reason for the claimant's complaints of pain.

On August 22, 2003, Dr. Rutherford indicated,

Principal problems at present are impaired pulmonary function associated with chronic cough, background problem of multiple rib fractures and chronic low back pain without evidence via electrodiagnostic testing to incriminate injury or dysfunction of the peripheral nervous system or lumbar nerve roots.

He goes on to recommend treatment from Dr. Ackerman in the form of facet joint blocks and pain management. In our opinion, this language indicates that despite the results of the EMG, the claimant still needs additional treatment in the form of pain management. Furthermore, in our opinion, all the above language does is indicate the claimant's

source of low back pain is not due to his lumbar nerve root or due to dysfunction of his peripheral nervous system.

We note that Dr. Rutherford's note does not indicate that the claimant should have no symptoms related to his admittedly compensable injuries. Rather his note indicates that he does not, "have a good explanation for the magnitude of Mr. Green's complaints...". In our opinion, this indicates that while Dr. Rutherford did not find objective evidence for the severity of the claimant's complaints, he also did not conclude there was no reason for the claimant not to have any complaints. In fact, the record is clear that as of September 11, 2002, Dr. Rutherford was still restricting the claimant from returning to work. Additionally, when considering the claimant's testimony that he has received treatment in the form of a stimulator and pain pills even after Dr. Rutherford's treatment was denied and his EMG tests were performed, it is clear that the claimant suffered from back injuries that Dr. Rutherford and subsequent doctors believed he needed to be treated with pain medication.

Ultimately, the record reflects that the claimant had no history of having back pain until his admittedly

compensable injury. Since that time he has consistently complained of back pain. Given Dr. Rutherford's reputation for being conservative, the extensive nature of the claimant's back injuries, the claimant's testimony that he is now receiving social security/disability benefits, and that he has received treatment in the form of pain management from two doctors other than Dr. Rutherford, we find that the claimant should be entitled to receive additional medical treatment in the form of pain management for back pain from Dr. Ackerman.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an

additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Special Commissioner Wilson concurs in part and dissents in part

CONCURRING AND DISSENTING OPINION

I respectfully concur in part with, and dissent in part from the majority's opinion. Specifically, I concur in the findings of the majority affirming the decision of the Administrative Law Judge to deny the claimant additional medical treatment for his heart conditions. However, I must respectfully dissent from the majority's award of recommended medical treatment from Dr. Ackerman. In my opinion, I find that the claimant has failed to meet his burden of proof.

The medical records show that the claimant was provided medical treatment from various physicians after his accident. He was even provided care after November 2001,

when he reached the end of his healing period. In fact, he was allowed a change of physician to Dr. Rutherford and saw him in September 2002. Dr. Rutherford recommended additional diagnostic tests and those tests were approved. The MRI performed on September 11, 2002, showed no nerve root impingement. It was not until after those additional diagnostic tests showed normal findings that the respondents denied additional treatment. In fact, the claimant was evaluated by Dr. Giglia on September 24, 2002, and October 3, 2002. Dr. Giglia, a pulmonologist, found that the claimant did not have a pulmonary problem.

After the prior hearing in this matter, the claimant received additional treatment from Dr. Rutherford. On August 22, 2003, the claimant had an EMG/NCV test, which yielded normal results. On that same day, Dr. Rutherford authored a report stating that the electro diagnostic testing of all four of the claimant's limbs were normal. Dr. Rutherford stated the following findings:

The nerve conduction study and needle examination are normal. There is no evidence via electrodiagnostic testing to suggest injury or dysfunction of the peripheral nervous system including cervical nerve roots, brachial plexus, median or ulnar nerves either upper extremity, lumbar nerve roots,

lumbosacral plexus, common peroneal, posterior tibial nerves either lower extremity or generalized disturbance of nerve function, specifically peripheral neuropathy.

The Commission, in Walls v. Wal-Mart Associates, Full Workers' Compensation Commission Opinion filed May 22, 2002 (Claim No. F100849), found that a claimant does not have to provide evidence of objective finding to prove his need for ongoing medical treatment. However, the claimant's testing yielded normal results. Dr Rutherford further stated any that evidence of injury or abnormality of the peripheral nervous system contributory was impossible to demonstrate that they were related to the claimant's complaints. He referred the claimant to Dr. Giglia for the pulmonary complaints and to Dr. Ackerman for back pain. The claimant had previously been evaluated by Dr. Giglia and he found that the claimant did not have pulmonary condition which needed treatment. With respect to the referral to Dr. Ackerman, Dr. Rutherford did not indicate why he was making the referral when the diagnostic tests were normal. The respondents requested additional information from Dr. Rutherford regarding the referral to Dr. Ackerman. However, Dr. Rutherford did not provide the requested

information and the respondents did not approve the additional treatment. Clearly, there is no information in the record to support a finding that the additional treatment is reasonably necessary.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of additional medical treatment.

MIKE WILSON, Special Commissioner