

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408404

JOHNNIE VICKERS,
EMPLOYEE

CLAIMANT

DEPARTMENT OF HEALTH,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 4, 2006

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

Claimant represented by the HONORABLE MICHAEL HAMBY,
Attorney at Law, Greenwood, Arkansas.

Respondents represented by the HONORABLE RICHARD SMITH,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed May 25, 2006. The administrative law judge found that the claimant proved he was entitled to additional medical treatment. The administrative law judge found, "The claimant is to be seen by Dr. Luke Knox for evaluation and possible treatment. If Dr. Knox refuses to see the claimant since he has already been operated on by Dr. Capocelli, the

claimant is to be seen and possibly be treated at the Texas Back Institute at the respondents' expense." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding as modified. The Full Commission finds that treatment from Dr. Knox is reasonably necessary in connection with the claimant's injury.

I. HISTORY

Johnnie Vickers, age 36, testified that he had been employed with the Department of Health as a CNA. The parties stipulated that the employment relationship existed on July 27, 2004, and that the claimant sustained a compensable injury to his low back. The claimant testified, "I was transferring a client's leg up on her bed and ruptured a disc in my back."

The record indicates that the claimant began treating with Dr. Lance W. Barton on July 27, 2004. The respondents' attorney examined the claimant at hearing:

Q. But you got to Dr. Barton. Were you referred there by your employer? How did you get to Dr. Barton to begin with, or was he your family doctor, or what?

A. No. There was - they had a list at work that they showed me and there was no workers' comp doctors in Booneville and he was the closest, so that's -

Q. Okay....

Dr. Barton assessed lower back pain and muscle spasm.

An MRI of the claimant's lumbar spine was taken in August 2004, with the following impression:

1. There is probably a transitional vertebral segment and I have labeled it as such. Would recommend correlation with plain radiographs to be sure.
2. There is a focal extradural defect at L5-transitional segment, which appears to be central and slightly eccentric right disc protrusion/herniation.
3. No other significant extra-dural defect seen.

The claimant began treating with Dr. Joe Paul Alberty in September 2004.

The claimant returned to Dr. Barton in October 2004; Dr. Barton's plan included continued appointments with Dr. Alberty. The claimant testified that he was not happy with his treatment with Dr. Alberty, "because he tried the injections. He did three injections and it seemed to - you know, I had a bad reaction to it."

Dr. Alberty stated in October 2004, "We think that he would benefit from a decompression with excision of the herniated disc. He is three months post injury now and is actually getting worse in his opinion instead of better. Has not responded to adequate and persistent physical therapy & non-operative measures."

The claimant followed up with Dr. Barton on November 8, 2004:

The patient is now completed his series of 3 injections by Dr. Alberty and is no better. They had surgery scheduled for November 4th, but Workman's Comp. said he did not meet criteria for surgery and wanted him to get a second opinion. He has an appointment set up on the 19th of November with a Dr. Chris Boxell in Tulsa for a second opinion. Dr. Boxell is a neurosurgeon as I understand it. The patient is still having problems with daily chronic back pain, as well as a right lower extremity radiculopathy. He is also having some weakness in that leg....

I agree with the neurosurgical evaluation. I am very suspicious of the fact that he will have to have surgical intervention....

Dr. Barton assessed "1. Low back pain. 2. Right lower extremity radiculopathy."

The claimant saw Dr. Anthony L. Capocelli in December 2004:

The patient is referred over by Dr. Barton for consultation regarding sciatica....The MRI is reviewed and there is evidence of a right-sided central paracentral disc herniation with probable encroachment upon the neuroforaminal nerve root exiting on the right side at L4-5/L5 transitional....

Dr. Capocelli gave the following impression: "L4-5 disc herniation with L5-S1 radiculopathy....This patient is an excellent candidate for surgery as he has had 5-6 months of treatment without significant reduction in his symptomatology and at this point is an excellent candidate for a lumbar METRx discectomy."

The claimant continued to follow up with Dr. Barton.

In correspondence to the Commission dated January 3, 2005, the claimant's attorney requested a change of physician to Dr. Anthony Cappocelli. The record on appeal to the Full Commission does not include the Change Of Physician Order, but the respondents acknowledge that the claimant was granted a change of physician to Dr. Cappocelli.

Dr. Capocelli performed a right laminotomy with diskectomy in February 2005. Dr. Capocelli's preoperative

and postoperative diagnoses were "Herniated right L4-5 (L4-D) disc herniation."

The record indicates that Dr. Capocelli referred the claimant for physical therapy at Total Rehabilitation, Inc., Fort Smith, AR., beginning in April 2005.

Dr. Capocelli noted on April 20, 2005, "At this point I have given him one more prescription for Hydrocodone #42 from this office as I sense there are some issues regarding drug dependence. He has frequently gotten early refills on his prescription and crescendoing and this may be consistent with drug dependence as opposed to an actual pain problem. At this point I have counseled him to go wean from his script. Certainly if he cannot then detoxification may be indicated. We will not fill any further narcotics."

Dr. Capocelli indicated that the claimant could return to work, with permanent restrictions, effective June 14, 2005. Dr. Capocelli also assigned a 10% whole-person impairment rating on June 14, 2005. The parties stipulated that the respondents had accepted and paid a 10% impairment rating to the body as a whole.

The claimant began pain management with Dr. Jerry O. Lenington in October 2005. The claimant testified that Dr. Lenington offered steroid injections, but that he declined this treatment because steroid injections caused swelling and pain.

Dr. Barton wrote to the claimant's attorney on October 18, 2005:

Johnnie is still bothered by chronic low back pain and right leg weakness. It appears that his surgery done in early 2005 by Dr. Capocelli was unsuccessful. If anything, his pain is worse now than prior to operative intervention. Local neurosurgeons are unwilling to give second opinions or see someone operated on by another surgeon. I'm not willing to give up on a 35 year old young man without a second opinion. I think it is not only reasonable, but necessary to get a second opinion by a tertiary referral center. I have had excellent results with difficult cases sent to the Texas Back Institute. I think the patient is still within his healing period and could benefit by a second operative intervention.

A pre-hearing order was filed on January 4, 2006. The claimant contended that "his treating physician, Lance Barton, has referred him to the Texas Back Institute for further treatment. The respondents have refused to honor said request. The claimant is entitled to reasonable and necessary medical treatment as recommended by Dr. Barton,

including, but not limited to referral to the Texas Back Institute, or alternatively, a second opinion."

The respondents contended that "the claimant obtained a change of physician to Dr. Capocelli on February 2, 2005, that Dr. Barton is no longer his authorized treating physician, and was not on October 18, 2005, when he made the referral to the Texas Back Institute and that the referral to the Texas Back Institute is not reasonable and necessary."

The parties agreed to litigate the following issue: "1. Additional medical to go to the Texas Back Institute."

A hearing was held on March 16, 2006. The claimant testified that his physical condition was worsening. The claimant testified that he wanted to follow up on Dr. Barton's recommendation to go to Texas Back Institute.

The administrative law judge found, in pertinent part:

7. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury. The claimant is to be seen by Dr. Luke Knox for evaluation and possible treatment. If Dr. Knox refuses to see the claimant since he has already been operated on by Dr. Capocelli, the claimant is to be seen and possibly be treated at

the Texas Back Institute at the respondents' expense.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

The employer shall 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 must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). 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).

B. Change of Physician

Ark. Code Ann. §11-9-514(a)(3) provides a claimant with an absolute one-time right to a change of physician. *Collins v. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002). Ark. Code Ann. §11-9-514(b) provides that treatment by a physician other than the claimant's

authorized treating physician, except emergency treatment, shall be at the claimant's expense. That section, however, is inapplicable if the authorized treating physician refers the claimant to another doctor for examination or treatment. *Am. Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). Whether treatment is a result of a referral rather than a change of physician is a question of fact for the Commission. *Dep't of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

The administrative law judge found in the present matter, "The claimant has proven ... that he is entitled to additional medical treatment for his compensable low back injury. The claimant is to be seen by Dr. Luke Knox for evaluation and possible treatment. If Dr. Knox refuses to see the claimant since he has already been operated on by Dr. Capocelli, the claimant is to be seen and possibly be treated at the Texas Back Institute at the respondents' expense."

First, it is clear that the claimant has received his one-time change of physician, i.e., the change of physician to Dr. Capocelli. Dr. Capocelli performed surgery in

February 2005, and he assigned an impairment rating in June 2005. Nevertheless, the claimant ultimately returned to Dr. Barton. The preponderance of evidence indicates that Dr. Barton was an authorized treating physician. The claimant testified that he got Dr. Barton's name from a list provided by the respondents; the record does not show that Dr. Barton was merely the claimant's family physician. Dr. Barton was a workers' compensation physician. Further, a plain reading of Dr. Barton's October 2005 letter demonstrates that Dr. Barton referred the claimant to Texas Back Institute. Even though the claimant had already received his one-time change pursuant to *Collins*, we find that Dr. Barton's referral to Texas Back Institute made the change of physician rules inapplicable. *Garey, supra*.

Since entry of the administrative law judge's opinion, however, it is apparent that the claimant went ahead and sought treatment from Dr. Luke Knox. The claimant asks the Full Commission to affirm the administrative law judge's finding that the claimant is entitled to treatment from Dr. Knox. The respondents expressly state in their reply that they do not object to the claimant treating with Dr. Knox.

The respondents just do not want to pay for treatment at Texas Back Institute (TBI).

Based on all of the pleadings before us, the Full Commission affirms as modified the administrative law judge's opinion. The Full Commission finds that treatment to the claimant from Dr. Knox is reasonably necessary in connection with the compensable injury. The claimant contended at pre-hearing that he was entitled to a referral to TBI "or alternatively, a second opinion." We find that the claimant proved he was entitled to a second opinion with Dr. Knox. The Full Commission does not affirm the administrative law judge's finding that the claimant proved he was entitled to treatment at Texas Back Institute. We have not considered the additional evidence submitted with the claimant's brief on appeal.

Based on our *de novo* review of the entire record, the Full Commission affirms as modified the opinion of the administrative law judge. We find that the claimant proved treatment from Dr. Knox is reasonably necessary in connection with the claimant's compensable injury. The Full Commission does not affirm the administrative law judge's

finding that the claimant proved he was entitled to treatment at Texas Back Institute. For prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs.