

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506771

DAVID C. EATON, EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER COMPANY, A SELF INSURED EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, INC., TPA	RESPONDENT

OPINION FILED AUGUST 8, 2008

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

Claimant represented by HONORABLE PAUL MILLER, Attorney at Law, Texarkana, Texas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed October 2, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3) Claimant has failed to prove by a preponderance of the evidence that the L5/S1 bilateral decompression surgery recommended by Dr. Shahim is reasonably necessary in relation to his compensable injury of June 22, 2005.

4) Therefore, claimant's request for the L5/S1 bilateral decompression surgery is hereby denied.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant failed to prove, by a preponderance of the evidence, that the surgical procedure recommended by his treating physician was not reasonably necessary in relation to his compensable injury.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion.

The claimant is a 61-year-old gentleman who worked for the respondent, Cooper Tire and Rubber Company. On June 22, 2005, the claimant was pushing a tray when he felt a pop in his low back. The claimant was initially seen in the emergency room and then sent to the company doctor, Dr. Craig Ditsch, who was described as "the gatekeeper" by the respondent's attorney. Dr. Ditsch apparently had an MRI performed on June 29, 2005. However, this MRI report was not introduced into the record with the other reports from the diagnostic studies performed (Respondent's Exhibit No. 3, entitled "Radiological Reports"). Dr. Ditsch tried a number of conservative treatment modalities, including prescriptions for muscle relaxants and pain medication, use of a back brace, physical therapy and epidural steroid injections. On December, 19, 2005, Dr. Ditsch ordered an a myelogram and a CT myelogram. After reviewing the results of these diagnostic studies, Dr. Ditsch referred the claimant to Dr. Reza Shahim, a neurosurgeon.

Dr. Shahim instituted additional conservative treatment with limited benefit. Dr. Shahim ordered a second MRI which showed:

Findings are most consistent with a focal posterior central annular tear in the L5-S1 disc with a very small focal central disc protrusion. There is no thecal compression. (emphasis added)

Dr. Shahim reviewed the films, drew the following conclusions, and made the following recommendations:

I reviewed the MRI with him and he has canal stenosis at L5-S1. This is due in combination to ligamentous hypertrophy at this level and a central disc herniation at L5-S1. He has undergone multiple injections and therapy without any real improvement. (emphasis added)

* * *

I do not agree with the radiologist reading since he has on axial cuts at L5-S1 he has significant canal stenosis. His symptoms were brought on by the accident at work and were aggravated by that and are mostly due to the work injury. We will plan on bilateral L5-S1 decompression. (emphasis added)

The respondents questioned Dr. Shahim's surgery recommendation and solicited an opinion from some unnamed

doctor in Salt Lake City, Utah with a company called Medical Review Institute of America, Inc.(MRIoA). MRIoA issued a report saying that the surgery recommended by the neurosurgeon was not appropriate. MRIoA said that the identity of the physician who authored the report was confidential and could not be released.

After receiving the report from MRIoA, the medical management company, hired by the respondents, tried to set up a second opinion with Dr. Steven Cathy, neurosurgeon. Dr. Cathy refused. An attempt was then made to have Dr. Ron Williams, neurosurgeon, give a second opinion. He also refused. Finally, Dr. Edward Saer, orthopedic surgeon, agreed to provide an opinion for the respondents.

Dr. Saer conducted a 15 minute examination of the claimant, reviewed records and films, and concluded that surgery was not needed. Dr. Saer reviewed the June 29, 2005 MRI and said that it showed "a small central bulge at L5-S1, but no evidence of nerve root compression or frank disk herniation". Dr. Saer reviewed the April 25, 2006 MRI report and said that it showed "a little facet enlargement at L5-

S1, but it is not terribly impressive". Based on his determination that the diagnostic studies displayed minimal abnormal findings, Dr. Saer said that "I just do not think that laminectomy or diskectomy is going to help him".

The Administrative Law Judge agreed with the conclusions reached by Dr. Saer and refused to hold the respondents responsible for the surgery recommended by the claimant's treating neurosurgeon. This decision is erroneous for a number of reasons.

Most importantly, the evidence of record indicates that the radiographic studies contain disparate and more significant abnormalities than were acknowledged by Dr. Saer. While the radiology report from the June 25, 2005 MRI was omitted from the record and is not available for comparison with the opinion of Dr. Saer, the April 25, 2006 MRI report is a part of the record and can be compared. This MRI shows a "annular tear" and a "disk protrusion" (herniation) at L5-S1. With regard to the L5-S1 disk space, Dr. Saer said it showed only "a little facet enlargement". He said there was no disk herniation or stenosis. When

Dr. Shahim reviewed this MRI, he acknowledged the herniated disk at L5-S1 and noted the stenosis. Clearly, one need only read the MRI report of April 25, 2006, to determine which doctor properly diagnosed the claimant's condition and which doctor refused to acknowledge the severity of the MRI findings.

It should also be noted that, according to the medical management report of July 18, 2006, Dr. Saer told the claimant that the "disc bulge identified on the initial MRI on 6/29/05 was no longer evident on the recent study of 4/25/06". Of course, the bulge was, most certainly, present on the most recent study. In fact, the disk at L5-S1 was described as torn and protruded (herniated) on the second MRI, a more significant abnormality than was described on the first study. This was yet another example of Dr. Saer's endeavor to minimize the significance of the diagnostic findings in an obvious attempt to convince the Administrative Law Judge, as well as the claimant, that Dr. Shahim was wrong about the claimant's need for surgery.

Finally, it goes without saying that the opinions of a treating neurosurgeon, who has substantial familiarity with a particular patient, should be given greater weight than a one-shot medical opinion solicited by an opposing party in an effort to bolster a defense to the payment of benefits. This is especially true when that treating physician was hand-picked by the adverse party. Unless there was some question as to Dr. Shahim's credibility, then his opinions should have been given precedence over those of Dr. Saer. There were no credibility issues with regard to the opinions of Dr. Shahim. Quite to the contrary, it was Dr. Saer's opinion that was suspect. He failed to acknowledge meaningful findings contained in the last MRI report and told the claimant that a crucial finding had disappeared when that finding was present and had, in fact, become more pronounced. Under these circumstances, the opinions of Dr. Shahim should control the result in this case.

For the reasons stated above, I find that the claimant proved, by a preponderance of the evidence, that

the surgery recommendation by his treating physician was reasonably necessary in relation to his compensable injury of June 22, 2005. Therefore, I respectfully dissent from the majority opinion denying these benefits.

PHILIP A. HOOD, Commissioner