

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605957

JORGE VERA,  
EMPLOYEE

CLAIMANT

BUILT WELL CONSTRUCTION,  
EMPLOYER

RESPONDENT

CONTINENTAL CASUALTY COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 20, 2008

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

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

Respondent represented by the HONORABLE FRANK B. NEWELL,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed March 6, 2008. The administrative law judge found that "a third expert opinion should be obtained on the reasonableness and necessity of further surgical intervention....Dr. Luke Knox, a neurosurgeon, would be an appropriate physician to perform this evaluation." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

## I. HISTORY

The parties stipulated that the claimant sustained a compensable injury to his back on January 24, 2006. The claimant testified that he fell about 10 feet onto a concrete floor. The claimant began treating with Dr. James B. Blankenship on March 1, 2006. Dr. Blankenship reported "1. Mr. Vera's current diagnosis is grade II spondylolisthesis secondary to bilateral pars defects, along with bilateral extreme lateral disc herniations at L5/S1. He also has an annular tear with retrolisthesis and instability at L4/5." Dr. Blankenship operated on the claimant on March 28, 2006, which surgical procedures included fusion and discectomies at L4-5 and L5-S1.

Dr. Blankenship provided a radiographic interpretation on April 13, 2006: "The AP and lateral radiograph demonstrates the patient has undergone a reduction of his L4/5 spondylolisthesis and pedicular instrumentation, as well as interbody implantation at L4/5 and L5/S1....The pedicle system is in good position and there is no pathologic motion noted. No complication of the orthopedic implants are appreciated and this is a stable early postoperative radiograph."

Dr. Blankenship reported on May 11, 2006, "Concerning Mr. Vera, I did see him today and he was doing better. He has continued to improve and states that his back pain is significantly better than it was preoperatively....His x-rays look good today and he is healing."

Dr. Gregory Jelinek read the results of a medical imaging report on June 28, 2006 and reported:

The posterior fusion of L4, L5, S1 is seen. There is anterolisthesis at L5 relative to S1. It is first degree. Disc plug demonstrated at 4-5 and 5-1. Laminectomy at 5 also seen.  
IMPRESSION: FUSION PROCEDURE: HARDWARE APPEARS UNCOMPLICATED. SPONDYLOLISTHESIS IS DEMONSTRATED.

Dr. Blankenship planned to return the claimant to work at light duty on July 10, 2006. The parties stipulated that all appropriate temporary disability benefits were paid through July 11, 2006.

A lumbar MRI with and without gadolinium enhancement was done on July 19, 2006, and Dr. Blankenship gave the following impression:

Status post L4/5, L5/S1 pedicular fixation. Once again, the pedicle screw at L4 on the right is noted to be slightly laterally placed, but once again, does not appear to hinder the construct. No neural impingement is noted from any of the pedicular fixation, nor the implants.

The fluid that is noted in the disc space on the sagittal images in T2 is likely postsurgical. It

is possible that this represents infection, although without erosion of the endplates, this is unlikely. If clinically suspected, a CBC, Sed rate and C-reactive protein is recommended.

No residual or recurrent stenosis or compression of the thecal sac is appreciated and no abnormal enhancement is noted on the postgadolinium enhancement.

Dr. Blankenship reported on August 1, 2006 that he would no longer continue as the claimant's treating physician. Dr. Blankenship assigned the claimant a 10% anatomical impairment rating. The parties stipulated that the respondents "accepted liability for and commenced the payment of a permanent partial disability of 10% to the body as a whole on August 2, 2006."

Dr. Cyril A. Raben saw the claimant on December 26, 2006 and noted, "He fell from a roof and landed on a concrete floor on Jan 24, 2006....Jorge had fallen from a roof landing on his back with workup culminating in fusion by Dr. Blankenship March of this past year. Unfortunately, he claims that he is worse than it was before surgery. Grafting procedure completed and out nearly 9 months an MRI scan from July shows no notice of any neural impingement and some perineural scarring adhesion is noted." Dr. Raben

planned injection treatment and additional diagnostic studies.

The parties stipulated that there was "no dispute over the payment of medical expenses incurred through Dr. Raben's initial visit of December 26, 2006."

A pre-hearing order was filed on January 9, 2007. The claimant contended that he injured his lower back on January 24, 2006. The respondents contended, among other things, that the claimant was not entitled to an award of additional medical benefits. Issues the parties agreed to litigate included "3. The claimant's entitlement to continued medical services by Dr. Raben.

Dr. Raben ordered a bone scan, which was taken on January 18, 2007 with the impression, "Very minimal increased uptake at about the L5 level. I suspect this is most likely degenerative, but plain film correlation is recommended. There are no plain films at this institution for comparison."

A hearing was held on March 5, 2007. The claimant testified that his condition following surgery from Dr. Blankenship was "Bad. I had more pain....It was better before the surgery....I have pain all the time and I have to

be taking medication. My back bothers me all the time, my lower back, and I have spasms in my legs."

A lumbar myelogram was taken on March 7, 2007:

Metal hardware is present, pedicle screws have been placed at L4, L5 and S1 and are interconnected by a pair of vertically oriented bars. Material has been previously placed within the disc spaces at L4-5 and L5-S1. Lateral views were obtained with flexion and extension. There is a mild grade one spondylolisthesis at L5-S1. A mild degree of motion is seen in the extension position between the pedicle screws of L4 and L5. L5-S1 appears unchanged. No breakage of the hardware, however, can be seen.

IMPRESSION:

Normal-appearing lumbar myelogram. No definite signs of nerve root impingement seen.

A CT of the lumbar spine was also taken on March 7, 2007, with the following impression:

Soft tissue density in the left lateral recess and left neural foramen at L4-5. This may represent disc material or possibly scar formation. This is best seen on image #49.

Status previous fusion, L4 to S1.

Dr. Raben noted on May 8, 2007:

Jorge presents back today with a CT myelogram and bone scan. The bone scan shows perhaps some increased uptake at the L5-S1 interspace. The CT scan shows that several of the pedicle screws, perhaps, are lateral to normal fixation points and appear to be trying to obtain their fixation in muscle. This very well could be a cause for the persistent pain Jorge is experiencing.

At this point in time I think the better part of valor would be to go ahead and revise his surgery, and visualizing a pseudoarthrosis at least at the bottom, if not the L4-5 level, would mandate that this be done as quickly as possible. Also I'm concerned about the proximity of the screws to the major vessels; this could turn into a catastrophe....

Dr. Raben's diagnosis included "Complications, Failed Fusion, Mechanical Complication of Internal Device implant Graft." Dr. Raben planned a "revision fusion removal of old hardware 360 fusion."

An administrative law judge (ALJ) filed an opinion on May 29, 2007. The ALJ found, in pertinent part:

4. On January 24, 2006, the claimant sustained a compensable injury to his lumbar spine.
5. There is no dispute over the payment of medical expenses incurred through Dr. Raben's initial visit of December 26, 2006.
6. The claimant has proven by the greater weight of the credible evidence that the bone scan recommended by Dr. Raben and subsequent follow up evaluations or examinations by Dr. Raben also represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. The respondents are liable for the expense of these services, subject to the Commission's medical fee schedule.
7. The claimant has failed to prove that the myelogram with enhanced CT scan, which has been recommended by Dr. Raben, represent (sic) reasonably necessary medical services for his compensable injury under Ark. Code Ann. §11-9-508. The respondents are not liable for the expense of this service....
8. The respondents have controverted the claimant's entitlement to any temporary

total disability benefits after July 12, 2006, and his entitlement to any additional medical services by Dr. Raben after the initial visit of December 26, 2006.

The parties have stipulated that the administrative law judge's May 29, 2007 opinion "has become final and is *res judicata* on all issues raised and addressed therein."

Dr. Raben noted on May 29, 2007, "Apparently, Dr. Muzzonigro felt that there was not sufficient evidence to allow him to undergo his revision fusion. I must not have made myself clear and the fact that the hardware that was put in him is in a very precarious position and in fact is not in bone at least laterally in a couple of vertebra. The bone graft was very scanty and in fact has not healed."

Dr. Raben noted on June 19, 2007, "Jorge has been forced by his insurance company to do nothing. Now, they're not allowing him to undergo a revision fusion procedure as recommended. Until that point, he is completely and totally disabled."

Dr. Blankenship corresponded with the respondents' attorney on September 27, 2007 and stated in part:

Mr. Vera underwent surgical intervention by me for a grade I bordering on grade II spondylolisthesis. The gentleman underwent this surgical intervention in early April of 2006. The gentleman's last MRI that was done on July 19, 2006 demonstrated that

the L4 pedicle screw was slightly laterally placed. I had indicated at that time that this did not hinder the construct and there was no neural impingement. This also was unchanged throughout the postoperative period. There was also edema in the disk space, but that is likely representing post surgical changes. The last set of x-rays that I had showed a good solid stabilization without any movement....

The pedicle screws, albeit somewhat laterally placed, are laterally placed and still encased in the vertebral body. There is no indication from either the radiologist that read these out or from my visualization that these are in any where near in proximity to the major vessels. The major vessels at the L4-5 level are anterior to the vertebral body and most certainly the pedicle screws are not affecting that. If anything, a laterally placed screw is further away from the great vessels. At the L5-S1 level, they do fan out more laterally but these screws do not appear to be in any proximity of it. The bottom line is that in my 20 years of practice, I have never seen a delayed injury to a vessel because of a poorly placed pedicle screw and in these situations these are less than optimally placed pedicle screws, but still placed with solid stabilization....

I would be very concerned given Mr. Vera's postoperative course about revising any surgery on him. He had a good reduction and stabilization with his surgery. He, under direct observation, had a significant amount of inappropriate illness behavior that was noted by the therapist working with him in the postoperative period.

In summary, I disagree with Dr. Raben. I do not feel like that another surgery on Mr. Vera would be of any benefit. I think that performing surgery initially was perfectly reasonable due to the segmental instability that he had, but I do think that he is in the unfortunate group that for whatever reason have failed surgery. I most

vehemently disagree that there is any danger to his vascular structure and obviously if I had thought there was at any time I would revise the pedicle screws that I had documented were laterally placed. As a perfectionist, I never like having pedicle screws that are not text book perfect but unfortunately in real time situations you will have pedicle screws that are not in exact perfect location. These screws, however, are not in any proximity to any neural structures, or in my opinion, any vascular structures.

The second question would be whether he would require surgery because of his persistent pain, and I would state that at present with what I believe is a solid arthrodesis that further surgery has minimal chance of improving his pain. I most certainly would not entertain another operation on Mr. Vera unless he underwent a full neuropsychological battery of testing....

A pre-hearing order was filed on October 9, 2007. The parties agreed to litigate the following issue: "1. The claimant's entitlement to the additional medical services recommended by Dr. Raben, specifically surgery to remove hardware from a prior surgery."

Dr. Raben informed the claimant's attorney on November 16, 2007, "I have reviewed Dr. Blankenship's narrative and this has not changed my opinion from my clinic records. Jorge still needs surgical intervention."

A hearing was held on November 26, 2007. The administrative law judge filed an opinion on March 6, 2008 and found that "a third expert opinion should be obtained on

the reasonableness and necessity of further surgical intervention....Dr. Luke Knox, a neurosurgeon, would be an appropriate physician to perform this evaluation.”

The respondents appeal to the Full Commission.

## II. ADJUDICATION

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. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

An administrative law judge found in the present matter:

4. In order to protect the interests of all parties concerned, and to reasonably insure an accurate decision on the current issue of the claimant's entitlement to additional surgery, a third expert opinion should be obtained on the reasonableness and necessity of further surgical intervention. Such an evaluation and any testing it may require would itself constitute reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Thus, the expense of this

evaluation would be the liability of the respondents herein subject to the Commission's medical fee schedule.

5. This evaluation should be performed by a neurosurgeon or orthopaedic surgeon with particular expertise in the treatment of spinal injuries and conditions. Dr. Luke Knox, a neurosurgeon, would be an appropriate physician to perform this evaluation.

The Full Commission affirms the administrative law judge's findings. The parties stipulated that the claimant sustained a compensable injury, and Dr. Blankenship thereafter performed surgery. The claimant initially reported a decrease in his post-injury pain symptoms but subsequently claimed that his condition worsened greatly. While admitting that the pedicle screws he applied during surgery were "less than optimally placed," Dr. Blankenship opines that the claimant does not need additional surgery. Dr. Raben to the contrary states that the claimant's situation is potentially "catastrophic" if Dr. Raben does not perform additional surgery.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant is entitled to an evaluation by Dr. Knox. The Commission on its own initiative can cause such medical examination to be made as will protect the

rights of all parties. See Ark. Code Ann. §11-9-811 (Repl. 2002). The Commission expressly reserves the issue of the claimant's entitlement to additional medical treatment in the form of lumbar surgery proposed by Dr. Raben.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant is entitled to an evaluation by Dr. Luke Knox. In my opinion, the ordering of the independent medical evaluation by the administrative law judge was an abuse of his discretion and gives the claimant an impermissible "second bite at the apple." Accordingly, I would reverse the decision of the Administrative Law Judge and find that the claimant had failed to prove by a preponderance of the evidence that he was not entitled to additional medical treatment.

The Commission has before it two conflicting medical opinions. The parties presented at the hearing ready and willing to go forth on the issue of whether or not the recommended surgery was reasonable and necessary medical treatment. Instead of making a decision, the administration law judge decided that another medical opinion was necessary to "break the tie" so to speak. While I do recognize that the administrative law judge has the discretion to order independent medical evaluations, he abused that discretion by ordering the independent medical evaluation.

As a general rule, all evidence on an issue must be presented at the initial hearing on a controverted claim. Ark. Code Ann. § 11-9-705(c)(1) (1987). In addition, it is the duty of the Commission to translate the evidence on all issues before it into findings of fact. Sanyo Manufacturing Corporation v. Leisure, 12 Ark. App. 274, 675 S.W.2d 841 (1984). The Commission's statutory obligation is to make specific findings of fact and to decide whether the party having the burden of proof on an issue has established it by the preponderance of the evidence. White v. Air Systems,

Inc., 33 Ark. App. 56, 800 S.W.2d 726 (1990); Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002 ). However, an administrative law judge has discretion to order additional hearings for the purpose of taking additional evidence and the discretion to order an independent medical evaluation under appropriate circumstances. See Ark. Code Ann. § 11-9-705(c) (Repl. 2002); see also Ark. Code Ann. § 11-9-508(a) and Ark. Code Ann. § 11-9-811 (Repl. 2002). In addition, an administrative law judge has discretion to reserve his or her decision on a related issue which may be affected by any additional evidence. Grimes v. North American Foundry, 316 Ark. 395, 872 S.W.2d 59 (1994); Wooten v. Arkansas Aluminum Window & Door, Inc., 17 Ark. App. 209, 706 S.W.2d 198 (1986). The Court of Appeals has also held that the Commission abuses its discretion by reserving an issue which serves no other purpose than to allow the claimant a "second bite at the apple" by giving the claimant an additional opportunity to present evidence substantial enough to prove a claim. See Gencorp Polymer Products v. Landers, 36 Ark. App. 190 (1991).

This case is akin to the case of Martha Stewart v. Frolic Footwear, Full Commission opinion filed August 26, 1997 (Claim No. E504112). In the Stewart case, the administrative law judge advised the parties after the claimant's testimony that he was going to refer the claimant to a hand specialist for an evaluation at the respondent's expense. The Commission found that the administrative law judge had erred because neither party had requested an independent medical evaluation and both parties were prepared to proceed to a determination on the merits. This is exactly what happened in this case presently before the Commission. The parties put on evidence regarding the recommended surgery and neither party requested an independent medical evaluation. Instead of rendering a decision, the administrative law judge *sua sponte* ordered the independent medical evaluation. In my opinion, had the administrative law judge determined based upon the evidence that the claimant had proven his case, he would have awarded benefits. It appears that the administrative law judge found that the claimant failed to prove his case and he was giving the claimant another chance to prove his

claim. This is clearly an abuse of the administrative law judges' discretion in that the claimant is given another chance to prove his case. Accordingly, the decision of the administrative law judge should be reversed.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion.

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KAREN H. MCKINNEY, Commissioner