

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704651

BRYAN FOSTER, EMPLOYEE	CLAIMANT
KANN ENTERPRISES, INC., EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 6, 2009

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Mountain Home, Arkansas.

Respondent represented by the HONORABLE WILLIAM C. FRYE,
Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed July 25, 2008. The administrative law judge
found that the claimant did not prove additional medical
treatment proposed by Dr. Hart was reasonably necessary.
After reviewing the entire record *de novo*, the Full
Commission affirms the administrative law judge's opinion.

I. HISTORY

The parties stipulated that Bryan Foster, age 35, "sustained multiple injuries on April 2, 2006, including injuries to his head, neck and left shoulder." The claimant testified, "I was in the process of pulling a stack of tires, it was on a pallet, from the wall and turning it to go up into the tractor trailer rig, and in the process of doing that, there was a forklift driver who picked up a stack of empty pallets that were they was going to take them back farther off into the warehouse to have them refilled, and as he was backing up, the very top pallet hooked on the next row over and slid off and come down on top of me....It struck me in the top of the head and, as it did that, it buckled me a little bit, and then it come down and hit me on the shoulder."

An Employee's Report of Injury indicated that a skid fell on the claimant's head. The claimant was admitted to a hospital on April 2, 2006 with the diagnosis of a head laceration. The laceration was treated with staples. A CT of the claimant's head and brain on April 2, 2006 was "Normal unenhanced head CT." A CT of the claimant's cervical spine was negative. An x-ray of the claimant's pelvis was negative. An x-ray of the claimant's cervical

spine was a negative study. The claimant was diagnosed as having a left cervical strain and left hamstring sprain. The claimant was returned to regular work duty and was instructed to follow up for staple removal.

The claimant began treating at Gabbie Medical Clinic on April 4, 2006, where the physician diagnosis was blunt trauma to scalp with laceration. 1+ swelling was noted in the claimant's left knee. The claimant was assigned physical occupational therapy for a left hamstring strain and left cervical strain. It was noted at Gabbie Clinic on April 11, 2006 that the laceration to the claimant's scalp was healed, and that staples were removed.

An MR of the claimant's cervical spine on May 18, 2006 showed minimal bulging at the C3-4 level.

The claimant began treating with a physical therapist on June 2, 2006.

Dr. Gabbie diagnosed cervical strain with spasm and left knee strain on June 14, 2006. A physical therapist reported to Dr. Gabbie on July 5, 2006:

Patient is a 33-year-old WM referred to Physical Therapy with a diagnosis of neck and leg pain. He was injured in 04/06 when a pallet fell from overhead, striking him on top of his head. He reports having injured his neck, shoulder, hip,

knee and ankle - all on the left side - with this incident.

Treatment has included: modalities for pain, strengthening, ROM and education for posture and body mechanics. Patient has been seen for nine (9) visits. He has made very little subjective progress at this time. He continues to report high levels of pain.

PLAN: He has completed his prescriptive orders. Patient is now discharged on this date, with limited potential to benefit from further treatment....

On July 13, 2006, a physical therapist noted that she had been instructed by a representative of Dr. Gabbie's office to discontinue the claimant from physical therapy.

The parties stipulated that "pursuant to a Change of Physician Order entered August 30, 2007, the claimant's primary treating physician is Dr. Thomas Hart." Dr. Thomas M. Hart examined the claimant on September 28, 2007 and stated in part:

I would like to refer him to Dr. Scott Bowen for an orthopedic shoulder evaluation and get his opinion. I would like to refer Mr. Foster to Reginald Rutherford, M.D., for a neurological evaluation and also consideration for EMG and nerve conductions to rule out any other ominous type pathology and discuss the possible tremors in the left hand and his continuing visual disturbances. As to what I can provide for Mr. Foster, I think, again, he would be an appropriate candidate for diagnostic cervical facet injections and if beneficial, then consideration of radiofrequency.

Other than that I think in Mr. Foster's situation since he is working, I think that it is to his benefit to continue working so he won't become disabled. I think his previous physician Dr. Gabbie was very appropriate and his imaging studies ordering an MRI and his suggestions, again, of possible injections, but these were never performed for the above stated reasons....

The parties stipulated that the respondents "have controverted any and all treatment following the initial evaluation conducted by Dr. Hart on September 28, 2007."

A pre-hearing order was filed on March 14, 2008. The claimant contended, among other things, that "the additional medical treatment being recommended by Dr. Thomas Hart is reasonable, necessary and related to his compensable injuries and the respondents should be ordered to pay for same." The respondents' contentions were listed as follows: "1. The claimant suffered an injury on April 2, 2006, when he was struck on the head with a pallet. He required seven staples in his head and Dr. Gabbie ordered an MRI of the cervical spine which was normal. Also, the claimant had tremors in his leg which Dr. Gabbie indicated had no objective explanation. 2. It was also noted that the claimant suffers from bi-polar disorder as well as migraine headaches. Dr. Gabbie released the claimant and did not make any further recommendations for treatment. It was

noted that he returned to regular duty. Also, he could not remember the number of times that he went to therapy and was non-compliant with that therapy. It was recommended he simply go for home exercises. 3. The claimant then requested a change of physician to Dr. Hart, who noted that all studies were normal and there was no evidence of nerve root compression. Despite all of the normal studies, Dr. Hart recommended both radio frequency and facet injections. It is the respondents' position that this treatment is not reasonable or necessary."

The parties agreed to litigate the following issue: "1. Additional medical treatment proposed by Dr. Hart." An administrative law judge found, in pertinent part, "7) The claimant has failed to establish by a preponderance of the evidence that the additional medical treatment proposed by Dr. Hart is reasonably necessary for treatment of his work related injuries."

The claimant appeals 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) (Repl. 2002). 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).

In the present matter, an administrative law judge found that the claimant did not prove additional medical treatment proposed by Dr. Hart was reasonably necessary. The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on April 2, 2006. The claimant testified that a pallet fell, struck the claimant's head and also hit his shoulder. The claimant was treated for a head laceration. All of the diagnostic testing performed was otherwise normal. The claimant was diagnosed as having a left cervical strain and left hamstring sprain. The claimant was subsequently seen for at least nine visits of physical therapy. The physical therapist informed the treating physician on July 5, 2006 that the claimant had limited potential to benefit from further treatment. The record indicates that the treating

physician, Dr. Gabbie, discontinued physical therapy on or about July 13, 2006.

The claimant was granted a change of physician to Dr. Hart on August 30, 2007. Dr. Hart examined the claimant on September 28, 2007. The record indicates that the respondents paid for the claimant's initial visit with Dr. Hart, therefore fulfilling their obligation to provide adequate medical services under the provisions of Ark. Code Ann. §11-9-508(a). *Brown, supra*. The respondents controverted further treatment following Dr. Hart's initial evaluation. Dr. Hart recommended cervical facet injections and "consideration for radiofrequency." The evidence does not demonstrate that this proposed treatment in September 2007 and following would be reasonably necessary following the claimant's completion of physical therapy on July 5, 2006. Nor does the evidence show that additional orthopedic and neurological evaluations, proposed by Dr. Hart, would be reasonably necessary in connection with the April 2, 2006 pallet incident. The record does not demonstrate that tremors in the claimant's left hand or reported visual disturbances were in any way causally related to the April 2, 2006 compensable injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove additional treatment or referrals recommended by Dr. Hart were reasonably necessary in connection with the claimant's compensable injury. We therefore affirm the administrative law judge's finding that the claimant did not prove he was entitled to additional treatment recommended or proposed by Dr. Hart.

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 denying the claimant additional medical treatment with Dr. Thomas Hart.

HISTORY

The claimant sustained a compensable injury on April 2, 2006 when a pallet fell striking him on the

head and sliding down the left side of his body. According to the "Employees Report of Injury" the claimant injured his head, hip, shoulder, neck and knee. On the day of the accident, the claimant was admitted to the hospital where a CT scan of his head, brain, and cervical spine were performed. X-rays were taken of his cervical spine and pelvis. All of these studies were normal. The claimant was treated for a scalp laceration and headaches and for problems with his neck, left hip, left knee, and left hamstring. Two days later, the claimant was sent to the company doctor, Dr. Mark Gabbie. Dr. Gabbie treated the claimant's multiple injuries with medication and physical therapy. Dr. Gabbie diagnosed post traumatic headaches and radicular pain and paresthesia in the left shoulder. He had an cervical MRI performed on May 18, 2006. That study showed:

There is minimal bulging
across the canal
anteriorly at C3-4
creating mild compression
of the subarachnoid space
and minimal compression of
the takeoff of the left
neural sheath.

After the MRI, the claimant underwent physical therapy, at the direction of Dr. Gabbie, for treatment of the muscles in his neck and shoulders and for the left hamstring sprain. The physical therapist noted that the claimant was having the following problems:

Chief complaint is that a knot comes up from his shoulder blade and spine. He has headaches and reports tremors to his left hand. He also states that his left knee gives way at times. He has not had any surgery. He describes his pain as sharp primarily to his hip and knee also with pain radiating to his left shoulder and forearm.

Physical therapy proved ineffective in alleviating the claimant's difficulties and the therapist eventually determined that his treatment was of little benefit. In addition, the claimant had missed several physical therapy appointments and Dr. Gabbie thought that he was not being compliant with physical therapy. On October 6, 2006, Dr. Gabbie gave the claimant a full and complete release, returned him to full duty, indicated

that the claimant could not refill his medications, and terminated all treatment.

The claimant requested that he be given a new treating physician and a change of physician request was granted by the Workers' Compensation Commission. For this purpose, the Commission selected Dr. Thomas M. Hart, an interventional spine specialist. Dr. Hart was selected from, and was a member of, the respondent insurance carrier's managed care organization. Dr. Hart examined the claimant on September 28, 2007. Dr. Hart conducted an extensive evaluation and authored a detailed report. Dr. Hart identified three areas of concern and made treatment recommendations for each. According to Dr. Hart, the claimant was experiencing continuing difficulty with his neck, shoulder, and head. With regard to the neck injury, Dr. Hart made the following recommendations:

Basically I had a long discussion with Mr. Foster, first of all it sounds like he has sustained a hyperextension, hyperreflexion injury, i.e., whiplash. When a pallet hits you on the

head it whiplashes your neck and you can have continuing neck pain complaints. An MRI did indicate a disc bulge but as I indicated to Mr. Foster at his age I would be extremely reluctant to perform a cervical discography. If we found an abnormal disc, then the question is what do you do with it. Most good surgeons would not want to fuse it. It would be more risks than benefits and it may lead to further surgeries in the future. . . . My suggestion would be to leave the disc alone. The most common cause of neck pain though according to medical literature, in fact it is well documented and there is an excellent article even back in the New England Journal of Medicine December 1996 talking about chronic neck pain for hyperextension injury. One could have a normal MRI, one could have normal EMG and nerve conductions and normal neurological evaluation. The most common cause are the cervical facets, i.e., the joints. Basically it requires diagnostic injections. Again, this is according to the medical literature and can be well documented by this

article and several others. My suggestion to a degree of medical certainty and probability it very simple and straight forward which has not been done but was suggested by his previous physician, "if not better will need injection", i.e., Dr. Gabbie, is line him up for a properly performed per medial branch approach for a left cervical facet injections. If performed properly under fluoro and it does reduce his neck pain complaints short term and he continues to improve with the anti-inflammatory, obviously leave it along. If he gets short term relief but no long term benefit, then the standard of care is radiofrequency. This is a minimally invasive, outpatient, nonsurgical procedure. It is not a cure. There is no cure, but it may provide more long term benefit for his neck pain complaints so he can continue his activities. Obviously if the facet injections are not beneficial then we will not consider radiofrequency denervation. I demonstrated in the book to Mr. Foster the difference between a disc,

a joint, referred pain
versus radicular pain.
Again, this is a very
common cause and we see
this on a regular basis.

With regard to the head injury, Dr. Hart made the
following observations and recommendations:

The other issue is that I
am not a neurologist and
he still may have
continuing post traumatic
stress headaches from his
injury to the head. He
has never had any EMG or
nerve conductions not to
say that he may have a
possible involvement of
the brachial plexus even
though neurologically he
appears to be intact,
which could explain the
tremor.

* * * * *

I would like to refer Mr.
Foster to Reginald
Rutherford, M.D., for a
neurological evaluation
and also consideration for
EMG and nerve conductions
to rule out any other
ominous type pathology and
discuss the possible
tremors in the left hand
and his continuing visual
disturbances.

With regard to the shoulder injury, Dr. Hart made the following recommendations:

As I failed to mention also of concern is that he had shoulder pain, which he has not had an orthopedic evaluation. That is still quite tender in the anterior deltoid. I think it would be appropriate to get an orthopedic evaluation.

* * * * *

I would like to refer him to Dr. Scott Bowen for an orthopedic shoulder evaluation and get his opinion.

Despite the findings and recommendations of Dr. Hart, the respondents refused to accept responsibility for any additional medical treatment except for the claimant's one office visit of September 28, 2007. Thereafter, the claimant was totally without the benefit of medical treatment.

There was no evidence of any preexisting medical condition or ongoing disease process which would relate to any of the problems which arose after the claimant's compensable injuries of April 2, 2006.

ANALYSIS

The Arkansas Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Furthermore, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the treatment is geared toward management of the claimant's injury. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230; 184 S.W. 3d 31,

(2004), citing Artex Hydroponics, Inc. v. Pippin, supra. More aggressive treatments that may alleviate an individual claimant's pain can be reasonably necessary. White Consolidated Industries v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001).

Until the claimant was seen by Dr. Hart, all of the claimant's medical care was administered under the direction of the respondents, through Dr. Gabbie. Dr. Gabbie is a primary care physician and the company doctor. Medication and physical therapy were the only treatments given by Dr. Gabbie and both were unsuccessful and discontinued. It is important to note, however, that neither Dr. Gabbie nor the physical therapist indicated that the claimant's injuries had healed or that he had even shown improvement. Because the treatment was unsuccessful and no additional modalities were being offered, the claimant requested a change of physician. This request was appropriately granted by the Arkansas Workers' Compensation Commission and Dr. Hart was appointed by the Commission to be the claimant's new treating physician. Dr. Hart is a member of the insurance carrier's certified managed care

organization. Dr. Hart is an interventional spine specialist, the only specialist the claimant has seen. Dr. Hart conducted a thorough evaluation and concluded that he could treat the neck injury with injections, a treatment originally recommended by the company doctor but never performed. He noted that the claimant was experiencing neurological problems and recommended an evaluation with a neurologist. He also pointed out that the claimant was having shoulder problems and needed to be evaluated by an orthopedic surgeon. Even though Dr. Hart is a specialist, the claimant's treating physician, and was selected by the Commission to treat the claimant, the claimant was allowed to see Dr. Hart only one time and none of his recommendations were implemented.

The Administrative Law Judge, and now the majority, has refused to compel the respondents to assume their responsibility for reasonably necessary medical treatment for these compensable injuries. Instead, the majority relies on the opinion of the company doctor and determines that the respondents have no further obligation to provide medical treatment,

primarily because the claimant was not particularly compliant with the recommendations of Dr. Gabbie. At this point in time, the advisements of the company's primary care physician seem to lack relevance. The majority also makes much of the fact that the initial diagnostic studies did not show much in the way of abnormal findings. Those studies were conducted almost a year and a half before the claimant was seen by the specialist. In addition, Dr. Hart explains in detail how there could be significant problems with the claimant's neck which would not necessarily show up on the tests which were conducted. In addition, there have been no diagnostic studies performed for his neurological problems or for his shoulder difficulties.

Under the above mentioned circumstances, it was inappropriate to terminate the claimant's medical care after being treated only by the company primary care physician and at a time when he was obviously in need of additional specialized treatment and evaluation. A physician has been appointed by the Commission for the purpose of providing this treatment and evaluation and

the scope of this physician's involvement should not have been limited to one office visit.

For the reasons stated above, I must dissent from the majority opinion.

PHILIP A. HOOD, Commissioner