

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708378

EDDIE L. HARRIS, EMPLOYEE	CLAIMANT
PETIT JEAN POULTRY, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 20, 2009

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

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

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed July 21, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 3, 2006, the relationship of employee-employer-carrier existed among the parties, when the claimant sustained an injury to his low back arising out of and in the course of his employment.

3. On October 3, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$244.00/\$183.00, for temporary total/permanent partial disability based on an average weekly wage of \$366.00.
4. The claimant was temporarily totally disabled for the period beginning August 17, 2007, and continuing through the end of his healing period, a date to be determined.
5. On December 12, 2007, a Change of Physician Order was entered by the Medical Cost Containment Department of the Arkansas Workers' Compensation Commission designating Dr. Harold H. Chakales as the claimant's authorized treating physician relative to the October 3, 2006, compensable low back injury.
6. The diagnostic studies recommended by Dr. Chakales in his January 2, 2008, initial evaluation report regarding the claimant is reasonably necessary treatment in connection with the claimant's October 3, 2006, compensable low back injury.
7. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of October 3, 2006.
8. The respondents have controverted the claimant's entitlement to medical treatment under the care of Dr. Harold H. Chakales subsequent to the initial visit of January 2, 2008, and the claimant's entitlement to temporary total disability benefits subsequent to August 16, 2007.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the July 21, 2008, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

PHILIP A. HOOD, Commissioner

Chairman Bell concurs.

CONCURRING OPINION

I agree with the decision to affirm and adopt the administrative law judge's findings in the present matter. I attach this concurring opinion in order to correct the administrative law judge's erroneous conclusion that the respondents' controversion of the claim "borders on contempt" of the December 12, 2007 Change of Physician order. The Arkansas Court of Appeals has expressly held that, when an employee has exercised his absolute, statutory right to a change of physician, the respondent-carrier must pay for the initial visit to the new physician in order to fulfill its obligation to provide adequate medical services under the provisions of Ark. Code Ann. §11-9-508. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). The respondents are allowed to controvert treatment after paying for the initial visit following

the change of physician order. See *Foster v. Kann Enterprises, Inc.*, Workers' Compensation Commission F704651 (Jan. 6, 2009). See also *Goyne v. Crabtree Contracting Co.*, CA08-1152 (March 18, 2009).

The respondents are entitled to controvert additional testing and treatment recommended by Dr. Chakales and their actions in this regard do not "border on contempt." Nevertheless, I otherwise agree to affirm and adopt the administrative law judge's findings in the present matter.

A. WATSON BELL, Chairman

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he was entitled additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

After the incident, the claimant was treated by Dr. Michael C. Young. Dr. Young had the claimant undergo physical therapy for four to six weeks. On April 17, 2007, the physical therapist, Robert L. Moore, stated that the claimant had participated in physical therapy and that the claimant had a good understanding of the body mechanics required to stabilize his back during activities and that the therapist hoped that the claimant would be able to continue to participate in work. On April 23, 2007, the claimant underwent an MRI. The radiology report reflects:

IMPRESSION:

1. At the L2-3 level the patient has a very slight disc bulge, suggestion of a mild canal stenosis.
2. The patient has disc protrusion paracentral to the left at the L5-S1 level causing some neural foraminal narrowing, nerve root impingement and some indentation on the thecal sac.
3. At the L4-5 level there is a broad-based disc bulge with some degenerative facet changes and this is resulting in a mild to moderate canal stenosis.
4. At the L3-4 level there is a broad-based small disc bulge, this coupled with degenerative facet changes resulting in a mild canal stenosis.

The claimant saw Dr. Young on April 25, 2007, wherein Dr. Young noted that the claimant had multi-level disc disease and he needed to see a surgeon that would probably offer him epidural steroid injections. The claimant made an appointment with Dr. Brent Sprinkle for May 23, 2007.

On June 21, 2007, the claimant was seen by Dr. Brent Sprinkle. Dr. Sprinkle noted that the claimant had lumbar degenerative disc disease and possibly a small annular tear at L5-S1 which was not a justification for surgery. Dr. Sprinkle performed epidural steroid injections on the claimant on July 11, 2007. The claimant returned to Dr. Sprinkle on July 19, 2007. Dr. Sprinkle noted that the injection did not help so they were going to try some facet blocks. The claimant underwent the facet blocks on July 25, 2007. On August 16, 2007, the claimant saw Dr. Sprinkle. Dr. Sprinkle noted:

IMPRESSION:

1. Lumbar degenerative disc disease
2. Lumbar strain

PLAN:

1. He is at maximum medical improvement for his lumbar strain.
2. Lumbar degenerative disc disease is pre-existing and will be chronic and will produce chronic symptoms. I

think most of the findings on MRI are consistent with pre-existing lumbar degenerative phenomena therefore do not justify permanent impairment.

3. Recommend he try to work full duty and if he can't tolerate that recommend he get FCE. Any restrictions identified by the FCE would be more related to his pre-existing degenerative disc disease than his lumbar strain injury.

4. I have nothing further to offer him at this time.

5. I am not optimistic that a major lumbar surgery would overall change his functional level significantly.

The claimant went on medical leave when he was released by Dr. Sprinkle. It is of note that he was working the whole time before Dr. Sprinkle released him.

The claimant received a change of physician to Dr. Harold Chakales and saw Dr. Chakales on January 2, 2008. Dr. Chakales opined that the claimant was temporarily disabled and he needed additional testing. The respondents sent the claimant to see Dr. Clemens Soeller who agreed with Dr. Sprinkle that the claimant had degenerative disc disease consistent with his age and that he was able to return to work at full and regular duty.

The claimant filed a claim with the Commission requesting additional medical treatment in the form of

the EMG/NCV studies of both lower extremities and possibly a diskogram as recommended by Dr. Chakales. Dr. Chakales also suggested a Functional Capacity Evaluation.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). 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 evidence demonstrates that out of the four doctors that treated the claimant, three of those doctors have released the claimant to return to regular work. The only opinion that we have stating that the

claimant is unable to return to work and in need of additional testing is that of Dr. Chakales who has only the seen the claimant one time. The MRI showed that the claimant had slight disc bulging and some degenerative facet changes. According to Dr. Chakales the claimant's MRI showed the same thing that any fifty-four year old poultry worker was likely to have. Dr. Sprinkle commented that most of the findings on the claimant's MRI were consistent with pre-existing lumbar degenerative disk disease. Further, Dr. Soeller performed an independent medical evaluation of the claimant and stated that he did not think that the claimant needed any additional diagnostic testing, that the claimant had pre-existing degenerative disk disease, and that he agreed with the date of maximum medical improvement as opined by Dr. Sprinkle. Additionally, Dr. Soeller indicated that the claimant was amplifying his level of pain and did not have any significant limitations. He also noted that the claimant did not take any medications routinely which would be expected in someone who has chronic pain of the duration and severity that the claimant has indicated.

I cannot find that the claimant has proved by a preponderance of the evidence that he is entitled to additional medical treatment. The Commission is entitled

to weigh the medical evidence to determine whether the claimant has proven that additional testing from a change of physician doctor is reasonable and necessary medical treatment. Goyne v. Crabree Contracting Co., Inc., ___ Ark. App. ___, ___ S.W.3d ___ (March 19, 2009). When I consider the opinions of Drs. Soeller, Sprinkle, Young and Chakales, I give more weight to the opinions of Drs. Soeller, Sprinkle and Young than I do the opinion of Dr. Chakales who has only seen the claimant one time. The claimant has received more than adequate care by Dr. Sprinkle and Dr. Young. An independent medical evaluation by Dr. Soeller indicated pain amplification. Neither Dr. Sprinkle nor Dr. Soeller have recommended additional testing. Accordingly, I cannot find that additional testing is reasonable and necessary. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner