

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F614029

RICHARD PALMER, EMPLOYEE	CLAIMANT
BURGESS COMPANY, INC., EMPLOYER	RESPONDENT
AIG DOMESTIC CLAIMS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 8, 2009

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

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

Respondents represented by the HONORABLE JARROD PARRISH, 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 April 14, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 13, 2008, and contained in an amended pre-hearing order filed December 22, 2008, are hereby accepted as fact.
2. I find that the claimant has proven by a preponderance of the evidence that the

claimant is entitled to visit Dr. Raben for reevaluation in (sic) regarding his cervical spine difficulties and it is reasonable and necessary that he receive appropriate diagnostic testing, medications, and pain management referrals as authorized by Dr. Raben.

3. I find that the claimant has proven by a preponderance of the evidence that the claimant is entitled to see Dr. Fox in regards to his right shoulder difficulties for a reevaluation of his right shoulder. This evaluation shall include any diagnostic studies authorized by Dr. Fox to ascertain difficulties that Dr. Fox may believe present in the claimant's right shoulder.

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 April 14, 2009, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment as recommended by Dr. Cyril Raben and finding that the claimant was entitled to see Dr. Fox in regards to his right shoulder difficulties. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a diesel mechanic. On December 12, 2006, he was loosening a bolt when he slipped and went over the back of the operator's station on the caterpillar/dozer that he was working on. The claimant sustained admittedly compensable injuries to his neck and right shoulder. He was initially treated at Pro-Med Family Clinic where he underwent X-rays and an MRI of his neck and right shoulder. The claimant began treating with Dr. David Sudbrink for his right shoulder and Dr. Michael Standefer for his neck. The respondents paid for treatment for both doctors. The claim was treated conservatively for his right shoulder, but ultimately underwent a distal clavicle excision on February 16, 2007. The claimant was treated by Dr. Standefer who

prescribed medicines and physical therapy for the claimant's neck injury. Dr. Standefer released the claimant on March 27, 2007.

The claimant continued to suffer from problems with his right shoulder and he was examined by Dr. Jeff Fox in Tulsa, Oklahoma. Dr. Fox evaluated the claimant and determined that additional surgery was necessary. Dr. Fox had examined the claimant for a second opinion because Dr. Sudbrink had recommended surgery. Dr. Fox agreed with that assessment. Dr. Fox performed an articular debridement and bicep tenodesis with subacromial decompression on August 22, 2007. Dr. Fox continued to treat the claimant with post-operative physical and medication. On January 4, 2008, Dr. Fox opined that the claimant had reached maximum medical improvement and assigned an eight percent (8%) permanent anatomical impairment rating for the claimant's shoulder.

Once the claimant's benefits ran out, the claimant sought a change of physician to Dr. Cyril Raben. Dr. Raben made recommendations for additional treatment for the claimant without reviewing the claimant's prior diagnostic studies. The claimant is

now requesting to undergo the testing recommended by Dr. Raben.

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.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional treatment for his neck. The evidence demonstrates that the claimant has been treated

by Dr. Standefer for his neck complaints. After reviewing the claimant's MRI films, Dr. Standefer stated:

From my viewpoint, the patient is doing well. We are going to release him from clinic as of today. He may return as needed. That specific restriction may be applied from the neurosurgical standpoint. A return to work can be determined by Dr. Sudbrink (orthopedic surgery). From the neurosurgery standpoint, the patient is stable and we will release him from the clinic as of today. The claimant was released as of March 27, 2007.

The claimant's request for additional medical treatment on his neck stems from complaints of headaches. However, the claimant has suffered from headache problems in 2004. He also conceded that he had previously had problems with headaches associated with antidepressants he had taken.

The claimant has already undergone a head CT, X-rays, and an MRI of his cervical spine prior to Dr. Standefer's determination that no further treatment was needed. The claimant did not attempt to return to Dr. Standefer after he was released on March 27, 2007. Now the claimant is requesting that additional testing be

done. However, the evidence demonstrates that Dr. Raben did not even review the diagnostic studies that had previously been performed on the claimant. In his report from September 18, 2008, Dr. Raben stated, "Apparently he has had studies including an MRI scan of the cervical spine which I do not have a copy of." Despite having knowledge that the claimant had already undergone testing, Dr. Raben recommended additional testing. In my opinion, the doctor should not order additional testing when he has not even seen the claimant's diagnostic testing that was already undergone and is available. Simply put, Dr. Raben should be sent the prior diagnostic tests and those should be reviewed before any of the recommendations regarding further testing should be made. Accordingly, I find that the only additional medical treatment awarded should be that Dr. Raben be sent the prior studies that the claimant has undergone and he should be allowed to review those before any additional recommendation should be made and considered. Accordingly, I find that the claimant did not prove by a preponderance of the evidence that he is entitled to additional treatment in the form of additional testing.

With respect to whether or not the claimant is entitled to any additional treatment by Dr. Fox for his right shoulder, the evidence also fails to demonstrate that he is entitled to it. The evidence demonstrates that in late October or early November of 2008, the claimant was hanging rafters at a barn that he was building with his brother. The claimant presented to the emergency room at St. Edward's Mercy on November 3, 2008, complaining of pain in his left arm "since Sunday" after hanging rafters at his brother's garage. In the ER report from the St. Edward's ER, the claimant failed to indicate on a form of whether or not he had suffered a new injury. The ER personnel checked "possibly".

The claimant had also been working a new job, often clocking more than 60 hours per week before the incident involving the rafters. After the claimant was released by Dr. Fox, he went to work as a mechanic working on construction equipment. In my opinion, it is conjecture and speculation to conclude that the claimant's right shoulder problems that he currently has are related to his prior injury with the respondent employer. The claimant was employed doing basically the same kind of work he had done prior to his work related injury and he injured himself hanging rafters for his

brother. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Further, the evidence shows that the claimant's physical therapy visits after his second surgery indicated that the claimant was improved. The claimant was noted in January of 2008 to be "doing great" with "increased range of motion and strength." In fact, the claimant informed his therapist that his shoulder felt really good and that he made a specific request to return to work. In my opinion, this discredits the claimant's assertion that his shoulder symptoms never improved and continued to worsen.

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

KAREN H. MCKINNEY, Commissioner