

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301968

BILLY SIMPSON, EMPLOYEE	CLAIMANT
KERR PAPER & SUPPLY, EMPLOYER	RESPONDENT NO. 1
STATE FARM INSURANCE, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 2, 2009

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

Claimant represented by HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondent No. 1 represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID SIMMONS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals a decision by the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that additional medical treatment was reasonable and necessary. Based upon our de novo review of the record, we affirm the decision of the Administrative Law Judge.

This claim was the subject of a previous hearing with an Order entered January 30, 2006. In that

prior opinion, an Administrative Law Judge found that the claimant was entitled to a repeat MRI as recommended by Dr. Reza Shahim. A change of physician order was entered on November 18, 2004, appointing Dr. Shahim as the claimant's treating physician. The claimant now contends he is entitled to additional diagnostic testing in the form of a discogram to evaluate the need for surgery. Respondent No. 1 contends further medical treatment is unreasonable, unnecessary and unrelated to the compensable injury. After reviewing the record, we agree with the respondents.

The claimant has sustained three back injuries. The first injury in November, 1995 was the result of a motor vehicle accident. The second injury in 1999 was a workers' compensation claim with the respondent-employer. The third injury, the subject of the case at bar, occurred on February 13, 2003. The claimant was treated conservatively by Dr. Harold Chakales for the last two injuries. A lumbar discography performed on April 27, 2004, showed abnormalities at L3-4, L4-5, and L5-S1. Dr. Chakales recommended surgery which was never performed. The respondents sent the claimant to Dr. Blankenship who opined the February 13, 2003, injury caused no objective medical findings. The claimant's condition was preexisting based on

comparative MRI scans from July 16, 2002 and February 13, 2003. Additionally EMG/NCV studies from May, 2003 were negative. He opined the claimant suffered from preexisting degenerative disc disease and the injury on February 13, 2003 did not objectively aggravate this condition.

The claimant obtained a change of physician to Dr. Shahim in November, 2004. Dr. Shahim recommended additional diagnostic testing in the form of an MRI and an evaluation for IDET. If the claimant's pain could not be controlled, Dr. Shahim felt the claimant was a candidate for lumbar fusion at L4-5, L5-S1.

In his opinion of January 30, 2006, Judge Greenbaum awarded additional medical treatment with Dr. Shahim. The respondents were instructed to provide Dr. Shahim with all previous medical records before making a decision about IDET or surgery. The respondents then sent the claimant to Dr. Cathey who assessed a 5% rating for multilevel degenerative disc disease and osteoarthritis. Dr. Cathey stated the rating could not be attributed solely to the 2003 injury. It was a cause of impairment but not the major cause. He opined the claimant was not a surgical candidate.

The claimant testified he remains

symptomatic, dependent on pain pills, and wishes to pursue Dr. Shahim's treatment recommendations.

The MRI scan was performed in March, 2006. The MRI showed the claimant had a foraminal disc herniation on the left at L4-5 causing lateral recess stenosis at L4-5, and an annular tear at L3-4. There were no significant changes from the 2003 and 2006 MRI scans. Dr. Shahim recommended conservative treatment in the form of a TENS unit, physical therapy, epidural steroid injections. Dr. Shahim opined that if pain control failed, the claimant might be a surgical candidate.

After epidural steroid injections failed to improve the claimant's symptoms, Dr. Shahim revised his opinion in August, 2006, opining the claimant should continue conservative treatment and defer surgery. Dr. Shahim commented, "if his symptoms were to continue he may require discography."

In December, 2006, Dr. Shahim noted the claimant's left leg radiculopathy had been unresponsive to conservative management. He prescribed an Aspen brace and recommended a left L4-5 laminectomy. The surgery was never performed.

Two years later, the claimant returned to Dr.

Shahim on August 12, 2008, inquiring about surgery. Dr. Shahim reviewed a recent MRI scan noting improvement in the stenosis at L4-L5, described as mild. Foraminal stenosis was also noted at L4-5, "but it is not very severe." Degenerative disc disease was found at L4-5 and L5-S1. Dr. Shahim stated in his August 12, 2008, report:

Mr. Simpson is symptomatic from lumbar spondylosis and lateral recess stenosis. Since the stenosis is not severe, I have offered him repeat epidural steroid injections and physical therapy. He doesn't want to go through that. He is questioning whether or not he could undergo surgery. I think he would need to have a discography again to decide the extent of the disc deterioration to see if he should undergo surgical decompression or fusion. I don't think surgeries are going to be curative for his symptoms. Based on his preference, we will work him up more. I will put him through a discography.

A review of the 2006 hearing transcript shows that according to Dr. Chakales' letters of April 14, 2003, the October 5, 2000 MRI scan the claimant suffered from multilevel degenerative disc disease. The July 16, 2002 MRI showed no change and the claimant was asymptomatic until the

compensable injury in February, 2003. An MRI scan in May, 2003 was interpreted by the radiologist as showing, "tri-level spondyloarthropathic changes of the lower three lumbar discs (L3-4/L4-5/L5-S1) that appears stable in comparison to description from prior study of July 16, 2002".

In his report of May 7, 2003, Dr. Chakales reviewed the latest MRI scan and opined, "this gentleman aggravated a preexisting spondyloarthropathy of the spine and is bothered with low back pain and chronic sciatica. He continues to have leg pain as well." His report of June 23, 2003, reflects Dr. Chakales' opinion that the claimant "has a pre-existing spondyloarthropathy of the spine aggravated by trauma." He recommended either a Functional Capacity Evaluation or a discography with a CT scan at L5-S1 in his reports of November 4, 2003 and June 23, 2004 to evaluate a possible disc protrusion or internal disc derangement. Dr. Blankenship issued a report on December 9, 2003 opining no additional medical treatment was necessary; the claimant could resume work in the "medium" category as defined by the FCE; and there were no objective changes between the 2002 and 2003 MRI scans.

On January 9, 2004 the claimant returned to Dr. Chakales who recommended a discography and CT scan. The

discography, performed April 27, 2004, was abnormal at L4-5, L5-S1 and L3-4. Dr. Chakales opined the claimant was a surgical candidate for decompression and stabilization in his report of May 7, 2004.

The test results were reviewed by Dr. Blankenship who issued a report on August 17, 2004 noting that Dr. Chakales' opinion differed from the opinion of the radiologist. Dr. Blankenship again reiterated his opinion that the claimant's objective medical condition, documented by MRI scan in 2002, was unchanged by the 2003 injury as verified by a repeat MRI scan in 2003.

The claimant saw Dr. Shahim in January, 2005. He reviewed the 2003 MRI scan and found no evidence of canal stenosis or disc herniation. Dr. Shahim recommended a repeat MRI scan. He also recommended conservative treatment and an evaluation for IDET at L4-5 and L5-S1. He commented, "the chance of surgery completely eliminating his symptoms is very small."

Ark. Code Ann. §11-9-508(a) (Supp. 2005) provides that an employer shall provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153

(2003). However, employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of the employee's injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal-Mart, supra; GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v. Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). 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. Gardner v. Area Agency on Aging, Full Commission Opinion, January 4, 2006 (Claim No. F302438); Jones v. Seba, Inc., Full Commission Opinion, December 13, 1989 (Claim No. D512553).

A review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment. The claimant has been treated by Shahim since November of 2004. Dr. Shahim opined in August of 2006 that the claimant was not a surgical candidate. Again, in August of 2008, Dr. Shahim opined that surgery would not be "curative for his symptoms." Dr. Shahim offered the claimant additional conservative treatment but the claimant declined and wanted to explore surgery. It appears that Dr. Shahim's recommendation of a discography was based on the claimant's insistence that he pursue the surgery option. Further, Dr. Shahim stated that the claimant's 2006 MRI showed improvement over the MRI performed in 2003. The claimant has significant degenerative problems and it is clear that the claimant's symptoms are related to these degenerative problems. The claimant's own treating physician has opined that surgery is not going to help the claimant. Having a discography will only demonstrate what Dr. Shahim already knows - that the claimant is not a surgical candidate. Simply put, the claimant has failed to prove that a discography is reasonable and necessary medical treatment. Accordingly, we hereby affirm the decision of

the Administrative Law Judge.

We note that the parties stipulated that the claimant sustained a compensable injury on February 13, 2003. First, the Administrative Law Judge appeared to find the 2003 injury to not be compensable, despite the parties' stipulation to the contrary, and despite the prior decision of the Commission finding the injury compensable. The Administrative Law Judge wrote that "[b]y challenging the causal connection, the respondents have also put compensability in issue." The Administrative Law Judge then concluded that there was no objective evidence of a new injury in 2003. Yet, the parties expressly stipulated to the compensability of the claimant's 2003 low-back injury.

Not only did the Administrative Law Judge's conclusion contradict the parties' expressed stipulations, it also ignored the prior Commission decision in this matter. In the decision following the 2006 hearing, the prior Judge adopted the stipulations of the parties, including the stipulation of a compensable back injury. That 2006 order is now final and is *res judicata* to the present matter. Thus, the finding of compensability of the claimant's back injury, and the fact that there was, indeed, a new injury established by medical evidence supported by

objective findings, were *res judicata* and binding on the present Judge.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review, I find that the evidence of record establishes that the discogram is indeed reasonably necessary. There is no evidence in this record to show that the claimant's condition has returned to its pre-2003 level, nor is there any medical opinion evidence contradicting Dr. Shahim's recommendation of a discogram. The claimant has had regular treatment for his compensable low-back injury since 2003; though his injury certainly has its roots in a pre-existing condition, it is black-letter law that the employer is responsible for every natural consequence flowing from an aggravation of a pre-existing condition. Hope Livestock Auction Co. v. Knighton, 67 Ark. App. 165,

992 S.W.2d 826 (1999). Such is the case here, and respondents are, therefore, liable for the discogram recommended by Dr. Shahim.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner