

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H006705

JOHN SCHULGEN, Employee	CLAIMANT
LOWE'S HOME CENTERS, LLC, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, Carrier	RESPONDENT

OPINION FILED FEBRUARY 1, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 11, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 4, 2020 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on October 6, 2018.
3. The claimant sustained a compensable injury to his low back on October 6, 2018.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$587.40 which would entitle him to compensation at the weekly rates of \$392.00 for total disability benefits and \$294.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Temporary total disability benefits from August 10, 2020 through a date yet to be determined.
2. Additional medical treatment, including surgery as recommended by Dr. Blankenship.
3. Attorney's fee.

The claimant contends that he is entitled to temporary total disability benefits from August 10, 2020 until a date yet to be determined and reasonably necessary medical treatment including surgery that has been recommended by Dr. Blankenship. Claimant contends that his attorney is entitled to an appropriate attorney's fee.

The respondents contend that claimant has received all benefits to which he is entitled for the compensable injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted

on November 4, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$587.40 which entitle him to compensation at the rates of \$392.00 for total disability benefits and \$294.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits for his compensable injury.

FACTUAL BACKGROUND

Claimant was hired by respondent on March 24, 2015 as a millwork specialist. Claimant suffered an admittedly compensable injury to his low back on October 6, 2018 when he felt a twist and pop in his back while loading multiple bags of concrete mix.

As a result of that injury, claimant was sent by respondent for treatment at MedExpress where he was initially evaluated on October 6, 2018 by Janis Bishop, NP. Bishop diagnosed claimant's condition as a sprain of the ligaments of the lumbar spine and muscle spasm. Bishop instructed claimant to apply ice and provided claimant medication for pain and muscle spasm.

On October 9, 2018, claimant was evaluated by Sunny Bray, NP, at MedExpress. Bray did not observe any muscle spasm in claimant's lower back and assessed claimant's condition as a sprain of ligaments of the lumbar spine. Bray placed claimant on restricted duty and instructed him to return in one week.

On October 16, 2018, claimant was seen by Joseph Foley, INP, at MedExpress. Foley treated claimant with heat, Tylenol, and instructed him to continue taking medication. Foley also indicated that claimant had been referred to Orthopedics Arkansas in Little Rock.

For unknown reasons, claimant did not see a physician at Orthopedics Arkansas, but instead was evaluated by Dr. Thomas Cheyne at Mercy Clinic Sports Medicine on November 1, 2018. Dr. Cheyne diagnosed claimant's condition as an "acute lumbar strain with possible atypical sciatica with underlying mild degenerative disc narrowing at L5-S1." Dr. Cheyne gave claimant medication and prescribed physical therapy for a four week period of time. He also instructed claimant to return to see him in four weeks. Physical therapy records indicate that claimant's therapy was to begin on November 15, 2018. The physical therapist's notes indicate that claimant missed his evaluation and further stated:

We have tried to reschedule the therapy evaluation that was missed but have received no response from the claimant. At this point we will close this file until we receive further notice. We have advised the provider to contact us if the claimant does not make contact to reschedule, in the event that happens we will send you confirmation and reopen the file.

Claimant testified that he was not aware of the physical therapy referral and would have attended physical therapy if he had known it was scheduled.

Three days after claimant's visit with Dr. Cheyne on November 1, claimant submitted his resignation at respondent on November 4, 2018. Claimant testified that he left Lowe's in order to take a job with Gerdau, MacSteel. Claimant earned \$2.00 an hour

more for MacSteel and testified that he worked in Quality Assurance and was not required to lift anything over 20 pounds without assistance. Claimant continued performing that job for MacSteel throughout 2019 and on February 21, 2020, claimant sought medical treatment from Dr. Lance Clouse, NP-C. Claimant had previously seen Dr. Clouse for issues involving anxiety. Dr. Clouse's medical report of that date indicates that claimant was seen for complaints of lower lumbar spine pain. Dr. Clouse provided treatment in the form of spinal manipulation and an injection. The medical records indicate that claimant received similar treatment from Dr. Clouse on several occasions until Dr. Clouse ordered a lumbar MRI scan which was performed on July 13, 2020. The MRI report indicates that claimant had a left paracentral disc protrusion with an extruded disc fragment at the L5-S1 level. The MRI scan was also read as showing a small central protrusion at the L4-5 level and mild degenerative facet changes. As a result of these findings, Dr. Clouse referred claimant to Dr. Blankenship for an evaluation.

Claimant was evaluated by Dr. Blankenship on August 10, 2020, at which time he indicated that claimant's MRI scan revealed a massive disc herniation at the L5-S1 level. Dr. Blankenship stated that it was unlikely that claimant would get over a disc herniation of that size and therefore he recommended surgery. Dr. Blankenship also took claimant off of work beginning on August 10, 2020.

Claimant has filed this claim contending that he is entitled to additional medical treatment including the surgery which has been recommended by Dr. Blankenship. He also requests payment of temporary total disability benefits beginning August 10, 2020 and continuing through a date yet to be determined as well as an attorney fee.

ADJUDICATION

Claimant contends that he is entitled to additional medical treatment for his compensable low back injury which includes surgery recommended by Dr. Blankenship. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proof.

As previously noted, after claimant's admittedly compensable injury he was sent by respondent to MedExpress for medical treatment. Claimant was diagnosed as suffering from a lumbar sprain and was primarily treated with ice/heat, medication, and work restrictions. When claimant's condition did not improve, Joseph Foley referred claimant to Orthopedics Arkansas in Little Rock for a further evaluation. It is unknown why claimant did not seek medical treatment at Orthopedics Arkansas; specifically, whether this was a decision of the claimant or of the respondent. Claimant did testify that no one informed him that he could not receive medical treatment from Orthopedics Arkansas.

Nevertheless, claimant did receive medical treatment from Dr. Thomas Cheyne at Mercy Clinic Sports Medicine on November 1, 2018. Dr. Cheyne prescribed claimant physical therapy and indicated that claimant should return to see him in four weeks. As previously noted, claimant did not undergo physical therapy and according to his testimony was not aware of the prescribed physical therapy. In short, it is claimant's contention that Dr. Cheyne did not discuss physical therapy with him and he also received

no information from the physical therapy facility regarding that treatment.

Just three days after this visit with Dr. Cheyne, claimant resigned his position from the respondent and took a higher paying job at MacSteel. Throughout the remainder of 2018 and for all of 2019, claimant worked 40 hours per week at MacSteel at full duty and did not seek any additional medical treatment for his low back.

Claimant did not seek any additional medical treatment for low back complaints until he saw Dr. Clouse on February 21, 2020, more than 15 months after he last saw Dr. Cheyne and after he resigned his position with Lowe's to take the job at MacSteel.

Notably, a review of Dr. Clouse's medical records indicates that claimant's pain began in October 2019. Claimant's injury at respondent was in October 2018. Furthermore, Dr. Clouse's medical reports do not make any mention of an injury at the respondent, nor how his back pain began.

As previously noted, Dr. Clouse treated claimant for a period of time and eventually ordered a lumbar MRI scan which revealed a disc protrusion at the L5-S1 level. Dr. Clouse then referred claimant to Dr. Blankenship who has recommended surgery.

It should be noted that Dr. Blankenship's medical record does contain a history of claimant having originally injured himself at Lowe's. It should also be noted that claimant introduced into evidence a letter from Dr. Clouse stating that claimant had injured his back in late 2018 and opining that that work-related injury was the source of his current physical issues.

Respondent also introduced into evidence a letter from Dr. Owen Kelly dated January 1, 2021, who noted that claimant had a large disc herniation. According to Dr. Kelly, for claimant to have worked and not sought medical care for a symptomatic disc

herniation for well over a year did not fit his clinical picture. It was his opinion that the MRI findings being related to claimant's initial injury were extremely low.

I find after reviewing the totality of the evidence, that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury. Claimant was seen by Dr. Cheyne on November 1, 2018, and prescribed physical therapy. Even if claimant was not made aware of that physical therapy, Dr. Cheyne had also instructed claimant to return to him in four weeks for follow-up treatment. Claimant did not return to Dr. Cheyne for any follow-up treatment, but instead resigned his position with respondent and went to work at another job. Throughout the remainder of 2018 and all of 2019, claimant performed his job at MacSteel at full duty for 40 hours per week and he did not seek any medical treatment for any low back complaints. Claimant did not seek any additional medical treatment for low back complaints until February 21, 2020, when he saw Dr. Clouse. As previously noted, Dr. Clouse's initial medical reports indicate that claimant's problems began in October 2019, not 2018, and they make no mention of an injury with respondent.

It is also important to note that claimant admitted that he never asked respondent to authorize any additional medical treatment. In fact, even after claimant did begin seeing Dr. Clouse for low back complaints in February 2020, claimant admitted that he did not file a claim for additional workers' compensation benefits until it was determined that he would need surgery. Based upon this evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that his back complaints and need for surgery as recommended by Dr. Blankenship is causally related to his original compensable injury of October 6, 2018. Therefore, I find that claimant has

failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits for his compensable injury.

ORDER

Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits for his compensable injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are responsible for paying the court reporter's charges for preparation of the hearing transcript in the amount of \$351.70.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE