

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA 09-1328

VIRGILIO OCHOA

APPELLANT

V.

TYSON FOODS, INC.

APPELLEE

Opinion Delivered April 28, 2010

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F705690]

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Virgilio Ochoa appeals the decision of the Arkansas Workers' Compensation Commission denying his motion to remand to the administrative law judge for the submission of new medical evidence. For reversal, appellant contends that the Commission abused its discretion by denying his request. We affirm.

On May 3, 2007, appellant sustained a compensable injury to his lower back when a scissor lift on which he was standing was struck by a forklift. Appellant received treatment at the emergency room, where multiple x-rays were taken, and he subsequently came under the care of Dr. Cathleen Vandergriff. On May 7, 2007, Dr. Vandergriff ordered an MRI and sent appellant to physical therapy. She also released appellant to return to work with a weight-lifting restriction of ten pounds and advised him not to perform any above-ground work. When the

MRI showed an annular tear at L2-L3, she referred appellant to Dr. Luke Knox, a neurosurgeon. He examined appellant on June 19, 2007, and reviewed the MRI scan and plain films. Dr. Knox reported that he could discern no evidence of fracture, instability, or compressive pathology. Noting multiple Waddell findings, he opined that he had nothing to offer from a neurological standpoint, and he returned appellant to Dr. Vandergriff. In a report authored on June 29, 2007, Dr. Vandergriff recounted appellant's numerous and varied complaints, such as weakness and tingling in his left leg; diminished feeling in his toes; swelling and hardness on the lateral side of his left gluteal muscle; loss of use of his left leg; redness in his feet; the veins in his feet filling with blood; and feelings of "electrical shocks" on both thighs. Dr. Vandergriff stated that there were no objective findings to support these complaints, which she felt were not related to the low-back pain caused by the injury. She released appellant from her care and advised appellant to visit his primary care physician to rule out other pathologies for his complaints.

Appellant continued to work at his same duties, but he filed a claim for additional benefits after he began experiencing difficulties in the summer of 2008. At the hearing before the administrative law judge on November 17, 2008, appellant introduced into evidence documentation regarding his medical treatment for the May 2007 injury, ending with Dr. Vandergriff's report of June 29, 2007. In his testimony, appellant stated that he had health-insurance coverage and that he saw his family doctor a month after being released by Dr. Vandergriff. He said that the doctor ordered an MRI but that he did not undergo the scan

because it was going to cost him \$400. Appellant said that he had also seen a chiropractor at some point in time. He testified that he feels numbness “that goes from my middle waist all the way to my toes and comes back, just like an electrical shock, cramps.” Appellant stated that his feet are cold most of the time and that he has pain in his legs “like a nail going through my bone.” He said that the pain is so terrible that he loses control over the movement of his feet.

On January 30, 2009, the law judge denied appellant’s request for additional benefits, finding essentially that appellant’s present complaints were similar to those previously documented by Dr. Vandergriff, who said that those symptoms were not related to the compensable injury. Appellant filed a notice of appeal to the Commission.

On March 26, 2009, appellant filed a motion to remand to the law judge for the consideration of new medical evidence. In this motion, appellant stated that he saw Dr. Carolyn Nutter in February 2009 and that she had ordered an MRI. Appellant asserted that, based on the results of the scan, Dr. Nutter referred him to Dr. Knox, whose physician’s assistant advised that appellant’s back condition might require surgery. Appellant attached the MRI report to the motion and stated that the records of Drs. Nutter and Knox would be forthcoming. Appellant amended his motion to include an off-work slip from Dr. Knox, who had scheduled surgery on May 19, 2009. The Commission entered an order denying appellant’s motion to remand, finding that appellant was not diligent in collecting the new evidence prior to the November 2008 hearing. In an opinion dated September 29, 2009, the Commission

affirmed and adopted the law judge's decision denying appellant's claim for additional benefits. This appeal followed.

Appellant argues on appeal that the Commission abused its discretion in denying his motion to remand for the taking of additional evidence. Arkansas Code Annotated section 11-9-705(c)(1)(A) (Supp. 2009) states that all evidence must be submitted at the initial hearing on a claim. The statute also provides that further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or the Commission. Ark. Code Ann. § 11-9-705(c)(C)(i). The Commission's exercise of discretion in determining whether to remand for the taking of additional evidence will not be lightly disturbed on appeal. *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004). In order for the Commission to allow the submission of additional evidence, the movant must demonstrate that the new evidence is relevant; that the new evidence is not cumulative; that the new evidence would change the result of the case; and that the movant was diligent in presenting evidence to the Commission. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007).

Here, the Commission denied appellant's request based on lack of diligence. At the initial hearing, appellant presented no current medical evidence supporting his claim. Then, after receiving an adverse decision, appellant sought to supplement the record with new medical evidence. The record reflects that appellant has medical insurance coverage, and he has offered no cogent reason why he could not have consulted Drs. Nutter and Knox prior to the hearing.

Cite as 2010 Ark. App. 368

We must agree with the Commission that appellant was not diligent, and we find no abuse of discretion in the denial of appellant's motion.

Affirmed.

GLADWIN and BROWN, JJ., agree.