

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA 08-799

KENNY BATY

APPELLANT

V.

HELENA CHEMICAL CO. and
HARTFORD UNDERWRITERS
INSURANCE CO.

APPELLEES

Opinion Delivered APRIL 15, 2009

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F509778]

AFFIRMED

JOHN B. ROBBINS, Judge

Appellant Kenny Baty sustained an injury to his lower back while working for appellee Helena Chemical Company on August 11, 2005. The appellee accepted the injury as compensable and paid some medical benefits as well as temporary total disability benefits through April 9, 2006. A controversy arose with regard to Mr. Baty's claim for additional medical benefits beyond July 10, 2006, which included a discography recommended by Dr. Thomas Hart and performed on November 15, 2006. After a hearing, the Workers' Compensation Commission found that Mr. Baty failed to prove that any treatment provided by Dr. Hart after July 10, 2006, was reasonably necessary in connection with his compensable injury. Thus, the Commission denied Mr. Baty's request for medical benefits beyond that date. On appeal, Mr. Baty argues that the Commission erred in determining that he was not entitled to continued medical treatment after July 10, 2006. We affirm.

Workers' compensation law provides that an employer shall provide the medical services that are reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Stone v. Dollar Gen. Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005). The Commission has the duty of weighing medical evidence, and the resolution of conflicting evidence is a question of fact for the Commission. *Id.*

On appeal, we view the evidence in the light most favorable to the Commission's decision and affirm when that decision is supported by substantial evidence. *Howell v. Scroll Technologies*, 343 Ark. 297, 35 S.W.3d 800 (2001). Substantial evidence exists if reasonable minds could reach the same conclusion. *Id.* Moreover, we will not reverse the Commission's decision unless fair-minded persons could not have reached the same conclusion when considering the same facts. *Id.* Where the Commission denies benefits because the claimant has failed to meet his burden of proof, the substantial-evidence standard of review requires us to affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.*

At the hearing, Mr. Baty testified that he began working for Helena Chemical Company as a loader operator on February 28, 2005. On August 11, 2005, Mr. Baty was lifting a heavy roll of chain-link fence when he felt a pop and a sudden pain in his back. He did not immediately seek medical treatment, thinking that the pain might go away, and he went to work over the next couple of weeks but was not required to engage in any labor.

Mr. Baty first saw Dr. Bill Ball on August 24, 2005, and he subsequently came under the care of Dr. Wayne Bruffett, an orthopedic surgeon. Pursuant to a change of physician authorized by the Commission, Mr. Baty began treating with Dr. Hart, a pain specialist, on July 10, 2006.

According to Mr. Baty's testimony he underwent injections and physical therapy without any success. He stated that pain medication has helped some, but has not cured him. Mr. Baty stated that his right hip and leg continue to hurt, and that if he walks too much his leg becomes numb and heavy. As a result of his continued back and leg pain, Mr. Baty said that he remains off work and sometimes uses a cane to walk. Mr. Baty indicated that Dr. Hart wanted to help treat his back condition, but that he has not been able to visit Dr. Hart since the November 15, 2006, discography because of a lack of insurance or other coverage.

The relevant medical evidence in this case is as follows. An MRI was performed on September 1, 2005, which detected mild degenerative disc disease at L4-5 and L5-S1 and moderate degenerative disc disease at L3-4, as well as mild herniations at L3-4 and L4-5. On January 13, 2006, Dr. Bruffett noted a bulging disc and degenerative disease of the lumbar spine with low back and right leg pain, and ordered a myelogram and CT scan.

The myelogram and CT scan were performed on February 13, 2006. The impression from the myelogram was, "Slight foreshortening of the L5 roots bilaterally, but this may not be of significance. Otherwise, unremarkable exam with no definite nerve root herniation or spinal stenosis." The radiology report from the CT scan provided:

FINDINGS:

At the L1-2 and L2-3 levels, there is no evidence of disk bulge or herniation. Foramina are patent.

At the L3-4 level, I see no significant disk bulge or herniation. There is bony spurring identified anteriorly and to the right, consistent with degenerative disk disease. There's no stenosis. Foramina are patent.

At the L4-5 level, I see no significant disk bulge or herniation. Foramina are patent. There is mild facet hypertrophy.

At the L5-S1 level, is no significant disk bulge or herniation identified. Minimal facet hypertrophy is identified.

IMPRESSION

1. Bony spurring anteriorly and to the right at L3-4, consistent with degenerative disk disease.
2. No evidence of focal disk herniation.
3. No evidence of spinal stenosis or foraminal stenosis.

After an office visit on March 6, 2006, Dr. Bruffett reported:

RADIOGRAPHIC REPORT:

His myelogram and post myelogram CT were reviewed. He has degenerative changes, but I do not see any evidence of high grade stenosis or nerve impingement. There is no evidence of any nerve compression.

IMPRESSION:

Bulging disc with degenerative disc disease.

DISCUSSION:

I told Mr. Baty that I do not see a surgical problem in his spine. I think nonsurgical things have been exhausted. He agrees with this. I would say that he is at a point of MMI. To determine his capabilities, as far as returning to work, I would recommend an FCE for objective data.

A functional capacity evaluation was performed on March 20, 2006, but Mr. Baty's true functional limits could not be assessed because he gave an inconsistent and unreliable effort.

Thereafter, on April 7, 2006, Dr. Bruffett reported:

His FCE is reviewed with him and his wife in detail. It appears that he gave unreliable effort with 21 of 44 consistency measures within expected limits. It is stated that Mr. Baty put forth very inconsistent effort and exhibits inappropriate illness behaviors.

IMPRESSION:

Low back pain with work injury with invalid FCE.

DISCUSSION:

I told Mr. Baty that I really can not put restrictions on him or limitations because these are not measurable. I would say he has no restrictions. He probably has limitations based on his pain, but I can not say that he should not be allowed to do this or that. I am going to release him back to work on Monday with no restrictions. I really do not see an objective injury here to assign a specific impairment rating. Therefore, I do not think he has a rateable injury.

Dr. Patrick Chan, a neurosurgeon, examined Mr. Baty on May 3, 2006, and his diagnosis was persistent low back pain and right leg pain, and he recommended a new MRI of the lumbar spine and also reported, "May need L34 L45 L5S1 discogram/nucleoplasty." Dr. Hart first saw Mr. Baty on July 10, 2006, and he thought that Mr. Baty was an appropriate candidate for provocative discography at the L2-3, L3-4, L4-5, and L5-S1 levels. Dr. Hart indicated that a discography is a more sensitive study than an MRI, CT scan, or myelogram, and gives more objective and subjective information. After the discography was performed on November 15, 2006, Dr. Hart gave the following analysis:

In summary, the 2-3 was a perfectly normal disc, normal appearance with normal pressure volumes and no pain. The 3-4 was very painful; the most painful, with marked complete circumferential disruption, abnormal pressure volumes, and again subjectively very painful right greater than left back, buttock, and lateral thigh pain

complaints. L4-5 also demonstrated complete circumferential disruption immediately, also abnormal pressure volumes, as well as reproduction of concordant pain, right greater than left back, buttock, posterolateral thigh to the knee. Also, 5-1 demonstrated a posterior disruption, but no annular tear outside of the disc and reproduced moderate back pain, but not as painful as 4-5 and 3-4 and right greater than left back and buttock pain complaints.

Dr. Hart sent a copy of the discography results to Dr. Bruffett, and thought it was medically necessary for Mr. Baty to return to Dr. Bruffett for a reevaluation because conservative care had failed.

Dr. Bruffett expressed a different opinion than Dr. Hart about the need for a discography. In this regard, Dr. Bruffett reported on August 30, 2006:

Mr. Baty underwent a functional capacity evaluation on March 20, 2006, which showed that he gave unreliable effort with 21 of 44 consistency measures within expected limits. Therefore, more than half the time, he gave an inconsistent effort with this testing. Therefore, his capabilities were unable to be adequately assessed.

I think this speaks volumes towards his response to treatment in the future. In reviewing Dr. Hart's note, he is recommending diskography. I use diskography quite a bit in my practice, but I feel the only reason to obtain this would be if we were going to make further treatment recommendations based on this. After a patient basically "fails" a functional capacity evaluation, I would say that the chances of having successful treatments and good outcomes is very limited at best.

Certainly, Mr. Baty is not a candidate for any spinal surgery based on the results of diskography. Also, I really do not feel that doing a percutaneous nucleoplasty or taking out part of a damaged disk would yield any significant improvement unless there is evidence of specific nerve compression from the disk. The myelogram has ruled that out. Therefore, I really do not feel that diskography is indicated or necessary, because I do not think it changes our treatments.

On appeal, Mr. Baty argues that the Commission erred in finding that he was not entitled to medical treatment beyond July 10, 2006, to specifically include the discography performed at the direction of Dr. Hart. The ALJ had awarded the additional medical benefits

sought by Mr. Baty, but the ALJ's decision was reversed by the Commission. In assigning error to the Commission, Mr. Baty relies on *Wade v. Mr. C. Cavanaugh*, 298 Ark. 363, 768 S.W.2d 521 (1989), where we held that the Commission is entitled to rely on the ALJ's observations and comments made about the claimant's demeanor, conduct, appearance or reaction at the hearing. Mr. Baty submits that the Commission apparently did not take into consideration the fact that the ALJ heard his testimony and observed his demeanor at the hearing. Mr. Baty directs us to his testimony where he stated he continues to experience significant physical difficulties and pain, which have not been ameliorated by conservative treatment.

Mr. Baty acknowledges that it was the Commission's duty to resolve the difference of opinion between Drs. Hart and Bruffett. Mr. Baty asserts that the deciding factor should have been Dr. Bruffett's false assumption that Mr. Baty failed his FCE because of lack of effort, upon which Dr. Bruffett based his opinion that a discography was not reasonably necessary. Mr. Baty directs us to Dr. Hart's initial report on July 10, 2006, wherein Dr. Hart stated:

As to the functional capacity evaluation, again, if a patient walked in and had two nails in his foot and had a functional capacity evaluation for his foot, obviously there would not be effort in performing those maneuvers. Here is a physical therapist who works for the insurance company performing a functional capacity evaluation in a patient who may have or probably has legitimate back pain complaints who obviously cannot put full effort into this study. *Denial of his care based on a functional capacity evaluation I think is inappropriate and basically unethical.* I mentioned above the other sources of pain have not been ruled out. If the discography performed properly obviously demonstrates that he has a discogenic component to his back pain complaints, the question is, is he a candidate for a minimally invasive, percutaneous type procedures [sic] or would he require further follow up with either an orthopedic spinal specialist or neurosurgeon for surgical intervention.

(emphasis in appellant's brief). Mr. Baty contends that his testimony regarding his extreme pain and diminished physical condition strongly reinforces the conclusion that the FCE results relied on by Dr. Bruffett are basically worthless. Both the ALJ and dissenting Commissioner were in agreement that the discography is a valid test and reasonably necessary for Mr. Baty's treatment by Dr. Hart. Mr. Baty argues that under the circumstances of this case the Commission should have credited Dr. Hart's recommendation and ordered Helena Chemical Company to pay for all of his continuing reasonably necessary medical treatment, to particularly include the discography.

We hold that the Commission's opinion displays a substantial basis for denial of the additional medical benefits sought by Mr. Baty. While Mr. Baty refers us to the credibility determinations and findings of the ALJ, issues of weight and credibility are exclusively within the province of the Commission, *see Wade, supra*, and we do not review the decision of the ALJ but rather review the decision of the Commission. *See Pharmerica v. Seratt*, 103 Ark. App. 9, ___ S.W.3d ___ (2008). This case turns on a resolution of the conflicting opinions between Drs. Hart and Bruffett, and the Commission was well within its authority to credit Dr. Bruffett's opinion that further treatment to include a discography was not reasonably necessary for the treatment of Mr. Baty's compensable injury. The FCE indicated that Mr. Baty put forth very inconsistent effort and exhibited inappropriate illness behaviors, and Mr. Baty failed to go back to work despite Dr. Bruffett's returning him to work without restrictions. Dr. Bruffett reported in March 2006 that surgery was not necessary, that nonsurgical measures had been exhausted, and that Mr. Baty had reached maximum medical

improvement. Although Mr. Baty complained of continuing severe pain and inability to complete the FCE, the Commission was not bound to credit his testimony, and the myelogram and CT scan failed to document significant problems other than degenerative disk disease. While Dr. Bruffett stated that he frequently uses discography in his practice, under the circumstances presented here he thought that such a procedure was not indicated. Based on the evidence presented, we conclude that fair-minded persons could have reached the Commission's conclusion that Mr. Baty failed to prove entitlement to continue medical treatment after July 10, 2006.

Affirmed.

KINARD and BAKER, JJ., agree.