

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Department of Employment Services

MURIEL BOWSER
MAYOR



DEBORAH A. CARROLL
DIRECTOR

COMPENSATION REVIEW BOARD

CRB No. 14-159

**VINCENTE B. VANEGAS,
Claimant-Respondent,**

v.

**LVI ENVIRONMENTAL SERVICES AND CHARTIS CLAIMS INC.,
Employer/Third-Party Administrator-Petitioners.**

Appeal from a December 11, 2014 Compensation Order by
Administrative Law Judge Gerald D. Roberson
AHD No. 13-499A, OWC No. 701341

DEPT. OF EMPLOYMENT
SERVICES
COMPENSATION REVIEW
BOARD
2015 MAY 22 PM 12 49

David J. Kapson for the Claimant
Barry D. Bernstein for the Employer

Before Lawrence D. Tarr, Chief Administrative Appeals Judge, Heather C. Leslie, and Melissa Lin Jones, Administrative Appeals Judges.

Lawrence D. Tarr for the Compensation Review Board.

DECISION AND REMAND ORDER

FACTS OF RECORD AND PROCEDURAL HISTORY

On January 15, 2013 the claimant, Vincente B. Vanegas was loading boxes and material onto the employer's loading dock when a vagrant attacked him with a stick. The attack injured Claimant's neck, back, and right arm.

The Claimant's medical care since the accident have been fully described in Judge Jory's December 6, 2013 Compensation Order and the Compensation Order ("CO") that is the subject of this review, Judge Roberson's November 11, 2014 decision.

Briefly, after the assault, Claimant was taken by ambulance to the George Washington University Hospital where x-rays were taken of Claimant's hand, wrist, and forearm. He was diagnosed with a closed fracture of the distal end of the ulna, and his injured right arm was placed in a sling.

The next day Claimant went to Concentra Medical Center where he was told to see an orthopedist. Claimant came under the care of orthopedic surgeon Dr. Joel Fechter on February 8, 2013. Dr. Fechter continues to serve as Claimant's treating physician.

Dr. Fechter reviewed the George Washington University Hospital's x-rays and diagnosed a "closed mildly displaced but well aligned distal third ulnar shaft fracture in good alignment and with callus formation present secondary to the injury sustained at work 1-15-13."

Dr. Fechter placed the claimant in a short arm cast on February 15, 2013, which Claimant removed on February 16, 2013, after which Dr. Fechter placed Claimant in a short arm splint. Dr. Fechter continued to treat Claimant conservatively with medication and physical therapy. Dr. Fechter released Claimant to full duty on May 14, 2013.

Dr. Richard Barth examined Claimant at employer's request on May 16, 2013. Dr. Barth, as had Dr. Fechter, reported x-rays showed a healed right forearm fracture and that Claimant could return to full duty.

Claimant returned to his pre-injury employment on July 3, 2013 and continues to perform that position, although he experiences pain in his right wrist and forearm. On August 9, 2013, Dr. Fechter's partner, Dr. Harvey Minnenberg, recommended an MRI and restricted Claimant to light duty work. Dr. Fechter examined Claimant on August 20, 2013 and concurred with the recommendation for an MRI.

In her December 6, 2013 Compensation Order, Judge Jory held Claimant's continuing right wrist problems were causally related to the January 15, 2013 injury at work. She entered an award that ordered Employer to pay for medical treatment for, and an MRI to, Claimant's right wrist. *Vanegas v. LVI Environmental Services*, AHD No. 13-1499, OWC No. 664416 (December 6, 2013).

Claimant had the ordered MRI on December 26, 2013. The MRI showed a focal central tear of the articular disc of the triangular fibrocartilage complex (sometimes referred to as "TFCC") and a healed fracture of the distal ulna.

At his January 8, 2014 appointment, Dr. Fechter referred Claimant to Dr. Sunjay Berdia, an orthopedic surgeon, who also is a hand and upper extremity surgeon. Dr. Fechter stated:

The patient has had an MRI scan performed 12-26-13. Impression: Focal central tear of the articular disc with a triangular fibrocartilage complex. Healed fracture of the distal ulna. The patient brought the scan for my review. I concur with the official reading. The patient will continue with limited activities, home exercise and therapy. I recommend consultation with Dr. Berdia. Continue limited activities. Home exercise and therapy. Light duty work restriction. Recheck 2 weeks.

Dr. Berdia examined Claimant pursuant to Dr. Fechter's referral on February 17, 2014. Dr. Berdia took new x-rays and reviewed the December 26, 2013 MRI. Dr. Berdia noted the MRI

showed a focal central tear of the articular disc of the triangular fibrocartilage complex and a healed fracture of the distal ulna. His physical exam noted Claimant had “tenderness to palpation over the triangular fibrocartilage complex.”

Dr. Berdia’s office note for February 17, 2014 stated that he wanted to see Claimant when he could bring with him his past medical reports and imaging studies. Dr. Berdia stated:

Before we proceed with additional any additional imaging or mobilization, we recommend that Vicente bring with him at the next follow-up visit all past medical reports and imaging studies of the right wrist for a better understanding of his injury. Now, his MRI taken last December did reveal a TFCC tear. He has undergone physical therapy, as well as bracing; however, this has provided him with no relief. A TFCC debridement may be an option; however we would like to compare the x-rays taken today with his previous imaging studies. Although he only had the report of his MRI study, we would also like to look at the actual imaging studies. When he returns, he will bring the actual MRI images of the right wrist for further evaluation of the TFCC tear. The patient was in agreement with the plan.

Claimant returned to Dr. Fechter on February 21, 2014. Dr. Fechter noted Claimant continued to have difficulties with right wrist and forearm pain. On July 30, 2014, Dr. Fechter reported:

The patient’s diagnosis is right wrist sprain/strain and distal third ulnar shaft fracture. Objective signs of injury have included radiographic abnormalities on plain films and MRI scan. The symptoms that the patient experienced were consistent with tie diagnosis and objective findings. The accident from 1-15-13, in my opinion, did cause these injuries. The patient has returned to full duty at work but has not yet reached maximum medical improvement. He is awaiting follow up with Dr. Berdia.

Through the date of the formal hearing, Claimant had not returned for the follow-up appointment with Dr. Berdia.

Dr. Richard Barth, who had examined Claimant for Employer on May 16, 2013, issued two addenda to his report from the May 2013 examination. On October 4, 2013, Dr. Barth reported that he believed Claimant needed no further treatment. On January 31, 2014, Dr. Barth reported:

In my opinion, to a reasonable degree of medical certainty, his central TFCC tear is degenerative, asymptomatic, and unrelated to his present complaints or injury.

Claimant filed the present claim for authorization to have the follow-up appointment with Dr. Berdia. After a formal hearing, ALJ Roberson issued a Compensation Order in which he stated that Employer “did not question the appropriateness of the medical consultation with the specialist, but argued the TFCC tear was not causally related.”

The ALJ granted Claimant's claim for relief. Employer timely appealed with Claimant timely filing an Opposition.

ANALYSIS

It is clear from the entire record, that there is great confusion as to what issues were before the ALJ and what the ALJ decided. The confusion centers on whether the ALJ only found that the one follow-up appointment with Dr. Berdia is authorized or did the ALJ also find that the TFCC is medically causally related to the work injury.

At the hearing, Employer attempted to characterize the dispute as one of medical causal relationship. This statement by Employer's counsel during closing argument is representative of how Employer views the present controversy:

And that's why, Your Honor, this reason why the TFCC tear is not being—that evaluation is not being authorized is because it's our position, Your Honor, that the TFCC tear is not causally related and we'd ask after your review of the medical records and the evidence that was presented before you that you find that the TFCC tear is not causally related and deny Claimant's claim for relief.

HT at 33

In response to this statement, Claimant's counsel said that Claimant only was seeking authorization to attend the follow-up appointment that Dr. Berdia wanted:

I'll point out, and maybe this is the Employer's fatal flaw in this case, we're not asking for treatment for the TFCC tear necessarily. We're not asking for any specific medical treatment. We're not asking for a debridement procedure to fix that condition. We're simply asking for a consultation with Dr. Berdia, so that we know where we go from here.

So I'd urge you not to get caught up in all the arguments that Counsel just made about the TFCC tear. There's not been anything specifically recommended in terms of treatment for that problem. We're simply asking for a consultation with a hand and wrist specialist that Mr. Vanegas has been referred to by his treating physician for a wrist condition that has been found to be causally related, and that's it.

HT at 34

That Claimant sought authorization for the follow-up consultation with Dr. Berdia was made clear at the very beginning of the formal hearing when Claimant's counsel identified the claim for relief as follows:

The claim for relief is simply for a followup [sic] consultation with Dr. Berdia.

HT at 7.

This statement limiting the claim to requesting only the follow-up appointment with Dr. Berdia is consistent with other statements made by Claimant's counsel:

As I stated briefly once we went on the record, our claim for relief this afternoon is for Mr. Vanegas to have authorization to return to Dr. Sunjay Berdia for a follow-up consultation regarding his right wrist injury.

HT at 10

I think it's an error to get bogged down in what the MRI shows and a TFCC tear and is that really or isn't really. I don't know that we can even get there without Mr. Vanegas getting back for a consultation with Dr. Berdia, which is all that he's asking for.

HT at 27.

So when you look at all of this evidence, the testimony of Mr. Vanegas, the medical records, the previous compensation order that causally related the wrist condition and subsequent MRI, the only thing that's left at this point is for Mr. Vanegas to follow up with Dr. Berdia for a further consult for him to say this is what I think the problem is, this is how I think we can fix it, or this is how we can't fix it, and you're going to have to live with this problem.

HT at 30.

The December 11, 2014 CO also shows confusion regarding the issue for determination.

In the CO, the ALJ described the Claim for Relief and the Issue Presented as only referring to a dispute about the follow-up consultation:

Claimant seeks authorization for a follow-up consultation with Dr. Sunjay Berdia

Does the evidence causally relate the requested consultation with Dr. Sunjay Berdia to the January 15, 2013 work injury?

However, in the Discussion section of the CO, the ALJ seems to broaden his decision to include whether the TFCC tear is medically causally related to the work accident. After finding that Claimant's evidence triggered the medical causal relationship presumption, the ALJ assumed without deciding that Employer rebutted the presumption and held:

Even if Dr. Barth's opinion served to rebut the presumption, the prior CO has already established the right wrist complaints are causally related to the employment. Dr. Fechter provided findings which revealed Claimant's right wrist

remained symptomatic following the December 6, 2013 Compensation Order and the MRI of the right wrist dated December 26, 2013. Dr. Barth does not explain why the consultation would not be appropriate to treat the TFCC condition or any other right wrist condition. In his report dated February 17, 2014, Dr. Berdia requested all past medical reports and imaging studies of the right wrist for a better understanding of his injury. Dr. Berdia reported the MRI, completed in December, revealed a TFCC tear, and subsequent physical therapy and bracing did not provide Claimant with relief. Dr. Berdia indicated a TFCC debridement may be an option, but he wanted to compare x-rays taken with previous imaging studies. Dr. Berdia stated "Although he only had the report of his MRI study, we would also like to look at the actual imaging studies." CE 3 p. 66. Dr. Berdia requested Claimant return with the actual MRI images of the right wrist for further evaluation of the TFCC tear. CE 3, p.66. In keeping with the principles established in the prior Compensation Order, Employer has not established that the consultation with Dr. Berdia is not reasonable and necessary under the Act. The December 6, 2013 Compensation Order directed Employer to make payment of medical expenses for treatment to the right wrist, including but not limited to an MRI of the right wrist. Therefore, Dr. Berdia, an orthopedic hand specialist, should be given the opportunity to review the MRI images along with an accompanying follow-up with Claimant.

While this holding seems to limit the decision to authorizing the one follow-up consultation with Dr. Berdia, the CO's Conclusion of Law section ambiguously stated:

Claimant's right wrist condition and medical treatment, including the consultation with Dr. Berdia, are causally related to the January 15, 2013 work injury.

Moreover, not only did the ALJ hold the consultation was reasonable and necessary, a determination that cannot be made without Utilization Review, the ALJ's decision has been interpreted differently by the parties.

Employer apparently believes the ALJ determined the medical causal relationship of the TFCC. Employer argues that it rebutted the presumption of medical causation and that the ALJ erred in authorizing further treatment with Dr. Berdia because "no doctor has found that the TFCC tear is causally related to the accident of January 15, 2013." Employer further argues "The ALJ should have specifically found that the TFCC tear was not causally related and denied the evaluation with Dr. Berdia." Employer/Insurer's Memorandum of Points and Authorities at 4, 5.

Claimant argues that the ALJ found Employer did not rebut the presumption that the TFCC tear is causally related to the work accident:

The only issue raised on appeal is that the employer/insurer submitted evidence sufficient and comprehensive enough to rebut the presumption that the TFCC tear in Mr. Vanegas' right wrist is causally related to the work injury in question. Mr. Vanegas maintains the ALJ's finding that his right wrist condition remains causally related to the work accident of January 15, 2013 is supported by

substantial evidence. Specifically, the finding that the employer did not rebut the presumption of compensability is supported by substantial evidence.

Claimant's Opposition at 4.

Adding to the confusion is the fact that after the ALJ's CO, Employer authorized the follow-up consultation with Dr. Berdia. Claimant, in his Opposition filed after the follow-up consultation, believes Employer's review request is moot:

Mr. Vanegas [sic] consult with Dr. Berdia was authorized in accordance with the ALJ's directive. Mr. Vanegas was seen and examined by Dr. Berdia on January 7, 2015, further rendering the employer/insurers [sic] Application for Review Moot.

Claimant's Opposition at 3.

After learning from Claimant's counsel that the contested follow-up examination had taken place, the CRB issued a Show Cause Order to Employer April 13, 2015 asking it to show cause why the pending review should not be dismissed as moot. Employer's response shows it still believes the ALJ determined that the TFCC tear was medically causally related to the work accident.

In response, Employer stated (with emphasis in the response):

Although, the Employer and Insurer authorized the appointment with Dr. Berdia pursuant to the Order, the question remains whether Judge Roberson erred in determining that the Claimant's right wrist condition and medical treatment, **including** the consultation with Dr. Berdia, are causally related to the January 15, 2013 work injury?

The CRB is as uncertain of the ALJ's holding as are the parties. We therefore must remand this matter to the ALJ for clarification.

On remand, the ALJ is asked to identify whether his decision authorizing the follow-up appointment with Dr. Berdia is limited to the one-time appointment and is not intended to decide whether Claimant's TFCC condition is, or is not, medically causally related to the work accident.

If the ALJ clarifies that his decision intended to decide whether the TFCC condition is medically causally related to the work accident, the ALJ shall make a specific determination as to whether Employer rebutted the medical causal relationship presumption and if so, whether after weighing all the evidence, Claimant met his burden of proving the medical causal relationship by a preponderance of the evidence.¹

¹ We also should point out one other area of confusion that should be clarified on remand. The first CO held that Claimant's continued wrist complaints were medically causally related to the work accident. It is unclear whether the ALJ considers the later diagnosed TFCC condition, to be part of the original injury and thus included within Judge Jory's Award.

CONCLUSION AND ORDER

The December 31, 2014 Compensation Order is VACATED. This matter is remanded to the Administrative Hearings Division for a new decision consistent with the Decision and Remand Order.

FOR THE COMPENSATION REVIEW BOARD:

/s/ Lawrence D. Tarr

LAWRENCE D. TARR

Chief Administrative Appeals Judge

May 22, 2015

DATE