

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F303520

JOHN HARRIS, Employee	CLAIMANT
LONGHORN WELL SERVICE, Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., Carrier	RESPONDENT

OPINION FILED OCTOBER 6, 2003

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 JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On September 15, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 25, 2003, and an amended pre-hearing order was filed on July 30, 2003. A copy of the amended pre-hearing order has been marked 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 relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant was earning an average weekly wage of \$555.58 which would entitle him to compensation at the weekly rates of \$371.00 for total disability benefits and \$278.00 for permanent partial disability benefits.
4. Respondent paid medical and temporary total disability benefits through March 25, 2003.

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

1. Compensability of injury to claimant's back on March 17, 2003.
2. Claimant's entitlement to additional temporary total disability and medical treatment.
3. Attorney fee.

At the time of the hearing the claimant modified his request of temporary total disability benefits to include the period March 26, 2003 through August 25, 2003.

The claimant contends that he suffered a compensable injury to his back on March 17, 2003. He contends he is temporarily totally disabled because of his back injury without consideration of his leukemia. Claimant contends that even if he is disabled because of his leukemia, that does not prevent him from being entitled to receive benefits based upon the disability that is being independently caused by his compensable injury. The claimant also contends he is entitled to reasonable and necessary medical treatment regarding his back injury, and that his attorney is entitled to an attorney fee.

The respondents contend that claimant did not suffer a compensable injury. The respondents contend that the claimant's disability and medical treatment, if any, has been due to a personal medical condition which was discovered during the course of the initial treatment for the alleged low back 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 the pre-hearing conference conducted on June 25, 2003, and contained in an amended pre-hearing order filed July 30, 2003, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on March 17, 2003, while employed by the respondent.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable back injury. This includes, but is not limited to, the emergency room visits, Dr. Bishop's medical treatment for claimant's back condition, and the MRI scan. It does not include any hospitalizations or medications prescribed by treating physicians for claimant's leukemia.

4. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits for a six week period of time beginning March 18, 2003. Respondent is entitled to a credit for temporary total disability benefits previously paid.

5. Respondent has controverted claimant's entitlement to disability benefits. This includes disability benefits previously paid by the respondent.

FACTUAL BACKGROUND

The claimant began working for the respondent approximately five months before March 17, 2003. Claimant's job with the respondent required him to "work the tongs," operate the elevator, and perform various jobs on the respondent's drilling floor including picking up pipe. Claimant testified that on March 17, 2003, he was helping pick up a pipe which weighed approximately 400 pounds when he felt a sharp pain in his low back. Claimant testified that he reported this incident to his operator at the end of the work day.

On the next day, March 18, 2003, claimant sought medical treatment from Sparks' emergency room. Claimant was complaining of pain in the lower right side of his low back and medication was prescribed. Claimant eventually sought medical treatment at the Crawford Memorial Hospital emergency room on March 21, 2003. On that visit claimant

was evaluated by Dr. Robert Bishop, a general practitioner. Dr. Bishop took the claimant off work for 10 days at that time. Claimant returned to Dr. Bishop for a follow-up visit on March 25, 2003. As a result of claimant's complaints of pain an MRI scan was ordered. At this same time, claimant underwent some tests which revealed that he was suffering from leukemia. As a result, claimant was hospitalized at Crawford Memorial Hospital. The medical records indicate that claimant has been hospitalized on several occasions and has undergone extensive treatment for his leukemia since his diagnosis. The MRI scan of claimant's lumbar spine was performed on March 26, 2003, and it revealed no disc herniation or nerve root compromise. After Dr. Bishop's visit with claimant on March 25, 2003, Dr. Bishop did not evaluate claimant again until May 2003, and then not again until August 25, 2003.

The respondent initially accepted this injury as compensable and paid medical benefits and temporary total disability benefits through March 25, 2003. However, respondent subsequently contended that claimant did not suffer a compensable back injury. As a result, claimant has filed this claim contending that he suffered a compensable injury to his back on March 17, 2003. He seeks payment of medical benefits, temporary total disability benefits beginning March 26, 2003 and continuing through August 25, 2003, as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his back while working for respondent on March 17, 2003. As such, claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on March 17, 2003.

While claimant's diagnosis of leukemia has certainly complicated his physical condition, I find that the evidence nevertheless does prove that claimant suffered a compensable injury to his back. First, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Claimant testified that he suffered the injury to his back while helping lift a pipe which weighed approximately 400 pounds on March 17, 2003. Claimant testified that he reported this incident to his operator at the end of the work day. The next day, March 18, the claimant sought medical treatment from the Sparks emergency room. A review of the emergency room notes reveals that claimant gave a history of low back pain after lifting a heavy object the day before. Page 2 of the Sparks emergency room report indicates that claimant's injury occurred after lifting pipe at work. Furthermore, Dr. Bishop also testified that claimant had given this history of injury to him.

With respect to this issue, I believe it is also important to note that Dr. Bishop is of

the opinion that in addition to claimant's leukemia, he also suffered from a back injury. While objective testing was negative for a herniated disc or nerve root compromise, it was Dr. Bishop's opinion that the claimant had suffered a nerve root injury which he diagnosed as acute sciatica.

Accordingly, based upon the testimony of the claimant which I find to be credible, medical evidence indicating that claimant gave a history of injury consistent with his testimony, and the opinion of Dr. Bishop which I find to be entitled to great weight, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that he has offered proof by a preponderance of the evidence that the injury was caused by a specific incident which is identifiable by time and place of occurrence.

I also find that the claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability, and that claimant has offered medical evidence supported by objective findings establishing an injury. Here, while the MRI scan was negative for a herniated disc or nerve root compromise, and Dr. Bishop testified that he did not observe any muscle spasm, I do note that at the time of claimant's initial medical treatment at the emergency room on March 18, 2003, claimant was diagnosed as suffering from right low back pain with spasm. Muscle spasms are objective findings sufficient to satisfy a finding of compensability. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 3d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997).

In this particular case, after considering the totality of the evidence, including the objective finding of muscle spasms the day after claimant's injury, I find that claimant has satisfied the remaining elements of compensability.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his

low back while working for respondent on March 17, 2003.

Having found that claimant suffered a compensable injury, respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with his compensable back injury. This includes, but is not specifically limited to, claimant's visits to the emergency room, medical treatment provided by Dr. Bishop for claimant's back condition, and the MRI scan. Respondent is not liable for payment of any medical treatment associated with claimant's hospitalizations. There is insufficient evidence that these hospitalizations were causally related to claimant's compensable back injury. Instead, they were for treatment of claimant's non-work related leukemia. Respondents' liability also does not include payment for prescriptions authorized by the physicians treating claimant for his leukemia.

For his claim, claimant also contends that he is entitled to additional medical treatment for his compensable back injury. Based upon the evidence presented, I find that at this time claimant is at least entitled to an additional evaluation from Dr. Bishop. Dr. Bishop testified at his deposition that following his last evaluation of the claimant on August 25, 2003, he did not prescribe any additional medical treatment nor additional medication. However, Dr. Bishop was of the opinion that claimant should return to him for a follow-up visit in three months to be evaluated for both his leukemia condition and his back condition. Accordingly, I find that the follow-up visit with Dr. Bishop is reasonable and necessary and causally related to claimant's compensable back injury.

The final issue for consideration involves claimant's request for temporary total disability benefits. The evidence indicates that claimant has not worked for the respondent or any other employer since the date of the injury on March 17, 2003. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period for his back injury and that he suffered a total incapacity to earn wages. *Arkansas State Highway &*

Transportation Department v. Breshears, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, at the time of Dr. Bishop's initial evaluation of the claimant he took claimant off work for his back condition. Even though claimant was subsequently hospitalized and treated for leukemia, it is claimant's contention that even if he had not been diagnosed and treated for leukemia, that he was incapable of working as a result of his back injury.

I find based upon the evidence presented, that claimant is entitled to an award of temporary total disability benefits for six weeks beginning March 17, 2003. Dr. Bishop addressed this issue at his deposition. Specifically, with respect to claimant's work status as of May 2003, Dr. Bishop testified that claimant was off work at that time because of chemotherapy and treatment for leukemia. Specifically, Dr. Bishop went on to testify that given claimant's physical condition with respect to his back, he would have taken claimant off work for a maximum of six weeks. Following that period, claimant would have been allowed to return to work with restrictions.

Q. And, Doctor, I realize this is difficult for us trying to figure out, you know, when you've got a situation like this. But, and I know that your crystal ball may not be any clearer than ours is, but what, from a time frame, you know, if we can try to look at what you think would have happened with a patient who did not have this condition, how long would it have been before you think you probably would have suggested this trial work from the original visit in March?

A. I would say six weeks, max, assuming I would have probably repeated the MRI, done some additional testing, continued physical therapy. I would have pretty much insisted on a work trial at six weeks, I mean after six weeks of returning to work under restrictions, and trial of work within the frame of his restrictions.

Dr. Bishop went on to indicate that given claimant's condition he would have been surprised if claimant was not back at work by May 2003. Furthermore, the evidence indicates that an off-work slip was completed by Dr. Bishop's office on June 23, 2003. That note indicates that claimant was to be off work because of pain in his back. At his

deposition, Dr. Bishop testified that the predominant reason claimant was off work in June 2003 was his leukemia. Dr. Bishop again went on to state that if not for claimant's leukemia, he would have been surprised if claimant was off work at that time more than three months after his injury given his physical findings.

Based upon Dr. Bishop's opinion, I find that claimant is entitled to temporary total disability benefits for a six-week period of time beginning March 18, 2003. While claimant was off work for more than six weeks, there is insufficient credible evidence that claimant would have suffered a total incapacity to earn wages for more than this six-week period of time given his physical findings. Respondent is entitled to a credit for temporary total disability benefits which have previously been paid.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

While respondent has been given a credit for temporary total disability benefits previously paid, I nevertheless find that respondent controverted claimant's entitlement to all disability benefits, even those previously paid, by subsequently controverting compensability. In *Cleek v. Great S Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998), the Court held that where a case was controverted on compensability after benefits were previously paid, that even though the respondent was to be given a credit for those benefits, that an attorney fee is due and owing on all compensation benefits, even those previously paid by respondent. Accordingly, claimant's attorney fee is to be calculated on

the entire six weeks of temporary total disability benefits awarded.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on March 17, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable back injury. This includes, but is not specifically limited to, the emergency room visits, treatment provided by Dr. Bishop for claimant's low back injury, and the MRI scan. This does not include any medical treatment associated with claimant's hospitalizations or medications prescribed by the physicians treating claimant for his leukemia. In addition, claimant is entitled to temporary total disability benefits for a six-week period beginning March 18, 2003.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE