

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206084

RAYMOND R. RUSSO

CLAIMANT

ARKANSAS DEPT. OF PARKS & TOURISM

RESPONDENT EMPLOYER

PUBLIC EMPLOYEE CLAIMS

RESPONDENT CARRIER

ORDER AND OPINION FILED JULY 31, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Batesville, Arkansas on June 17, 2003. A prehearing conference was held on April 17, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Employer-employee-carrier relationship existed between the parties on all relevant dates.
3. Claimant sustained a compensable specific incident injury to his back and left hip on April 19, 2002.
4. Claimant earned sufficient wages to entitle him to compensation at the rate of \$180.00 for temporary total

disability benefits and \$120.00 for permanent partial disability benefits.

5. Respondent accepted the claim as compensable and have paid some medical and indemnity benefits.

The parties also agreed the issues to be litigated were:

1. Whether claimant is entitled to additional medical treatment, namely left hip replacement surgery, and whether such is reasonably necessary and causally related to his compensable injury.

2. Whether claimant is entitled to temporary total disability benefits from August 29, 2002 through December 24, 2002.

3. Whether claimant is entitled to a controverted attorney's fee.

The claimant now contends that he is entitled to additional medical benefits that he has incurred subsequent to August 29, 2002 and extending through March 19, 2003. These requested benefits include a prescribed TENS unit, three periods of physical therapy, surgery for replacement of the left hip, treatment by Dr. George Gray, Dr. Wayne Bruffett and Dr. Charles Varela, various medications and mileage. The claimant also contends that he is entitled to additional temporary total disability benefits from August 29, 2002 through December 24, 2002. The claimant also contends the correct temporary total disability rate is \$120 and respondents paid some temporary total disability benefits at the rate of \$119.

The respondents contend that the claimant's healing period did not extend beyond August 29, 2002 and contend the claimant's hip problems and surgery were necessitated by the claimant's pre-existing condition and not as a result of 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the claim.
2. Employer-employee-carrier relationship existed between the parties on all relevant dates.
3. Claimant sustained a compensable specific incident injury to his back and left hip on April 19, 2002.
4. Claimant earned sufficient wages to entitle him to compensation at the rate of \$180 for temporary total disability benefits and \$120 for permanent partial disability benefits.
5. Respondent accepted the claim as compensable and have paid some medical and indemnity benefits.
6. The claimant has proven by a preponderance of the evidence that additional medical treatment subsequent to August 29, 2002, was reasonable and necessary for the claimant's compensable hip and back injuries sustained on April 19, 2002.

7. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from August 29, 2002 through December 24, 2002.

DISCUSSION

The claimant, 73 years old, worked for the respondent employer for six and a half years. The claimant's job title was security; however, he also performed maintenance of the lodge rooms and made rounds to verify all doors and buildings were secure. The facility the claimant patrolled was the Ozark Folk Culture Center, which includes a lodge, restaurant, administration building, crafts area and auditorium. The claimant's hours were midnight to 8:00 a.m. The claimant testified that he would be checking people in and out, sweeping, washing and waxing floors, folding towels, general maintenance of the lodge and then making rounds to check on all doors in the Center. The claimant testified that he normally made three walking rounds to check on the property and two drive-bys. The walking rounds would involve half to three-quarters of a mile and the terrain is hilly. According to the claimant, there are also three sets of steps. The claimant worked 4 days a week, totaling 30 hours per week.

According to the claimant, on April 19, 2002, he was busy checking in the Parks and Tourism commissioners after midnight and he did not get to his first security round until 2:30 or 3:00 a.m. According to the claimant, as he was making his rounds through the auditorium, he saw two guys running in the craft area. The claimant testified that he started to take off after them and did not realize he was at the end of the stage and either jumped or walked off the stage. The claimant testified that he landed on his left leg and it felt like something jarred loose and he immediately felt pain in his hip and

back. The claimant testified that he had not previously had back pain, although he had taken a fall at work in 1998 and had a cortisone shot in his left hip. After the April 19, 2002, incident, the claimant testified he had pain in his low back across his belt line. The claimant testified that he had to sit down for a while and finally was able to walk back to the administration building and he called his supervisor and reported both the two guys in the area and that he hurt his left side jumping from the stage. The supervisor came to the administration building and an incident report was completed. The claimant saw the company doctor, Dr. Zini on April 23, 2002. The claimant testified that he returned to work April 24, 2002, with restrictions of no stooping, bending and avoid walking up and down inclines. The claimant testified that he simply could not walk any more and he stopped working June 10, 2002. The claimant continued to seek treatment with Dr. Gray and Dr. Zini and then began drawing temporary total disability benefits in 2002 in the amount of \$238 every two weeks. Dr. Gray referred the claimant to Dr. Annette Meador and the claimant received some epidural steroids. After the injections, Dr. Gray or Dr. Zini referred the claimant to Dr. Charles Varela and he ultimately performed hip replacement surgery on September 17, 2002. After the hip replacement, the hip pain improved considerably, according to the claimant. The claimant testified that he underwent several weeks of physical therapy after the surgery, as authorized by Dr. Varela, and he received a TENS unit prescribed by Dr. Varela. According to the claimant, the TENS unit has helped his back pain.

The claimant testified that he has not been previously treated for back pain but he had both knees replaced in 1998. The claimant testified that he made two attempts to return to work the first week of April 2002. According to the claimant, he walked his

normal route for securing the buildings and he had too much pain in his back and hip. The claimant testified that his employer asked him to stay and that is why he attempted the walking to see if he was able to walk the route.

Edith Alice Russo, wife of the claimant, testified that she and the claimant have been married 52 years. Ms. Russo confirmed the claimant was in good physical condition after having both knees replaced and had no complaints with his hip or back before the April 2002 incident. Ms. Russo testified that her husband took Celebrex for arthritis in his ankles, wrists and fingers. According to Ms. Russo, before the claimant's injury, he worked in woodworking, mowed the yard and helped her build flower beds and did most of the driving. Ms. Russo testified that her husband mows the yard now, but it is very slowly and she now takes care of the garden. Ms. Russo testified that she now drives more.

The claimant contends he is entitled to a weekly compensation rate of \$120 per week as agreed to in the stipulations. The claimant testified he was paid \$238 every two weeks, which is a compensation rate of \$119 per week. The claimant was paid some temporary total disability benefits previously and the stipulated compensation rate is \$120 per week. I find respondents are liable for the difference in what was paid and what should have been paid for the temporary total disability benefits claimant was paid.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 1996). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the

compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

In the present case, it is undisputed that the claimant sustained a compensable injury on April 17, 2002, when he jumped from a stage while attempting to apprehend some intruders on the property of his employer. The respondents accepted responsibility of benefits and paid medical and appropriate temporary total disability benefits through August 29, 2002. The respondents seem to rely on Dr. Charles Varela's August 19, 2002, letter, which states:

In regards to Mr. Raymond Russo's injury of 19 April 2002, it is difficult to determine whether his injury has resolved, but most likely it has resolved. He did have a pre-existing arthritis and continues to have ongoing problems with this necessitating the hip replacement. (Resp. Exh. No. 1, p. 7.)

The claimant contends that the medical treatment he has sought since August 29, 2002, for his hip and back was reasonable and necessary and related to the compensable injury. The medical evidence indicates that the claimant had degenerative disc disease and osteoarthritis of his lumbar spine as well as his hips. The claimant testified that he had been employed with the respondent for six and a half years and had performed duties, which included a substantial amount of walking

without problems. Dr. George Gray, D.O., opined on May 12, 2003, that the claimant indicated to him that he was getting along fine until the April 19, 2002, incident at work. Dr. Gray looked at the claimant's MRI and provided his assessment of the findings and opined that an acute injury can make these findings more symptomatic and that the arthritic changes can be exacerbated acutely by strain. Dr. Gray opined that he had seen nothing in the claimant's demeanor that would suggest he was untruthful or attempting to obtain secondary gain. Dr. Wayne Bruffett opined on March 19, 2003, that the claimant had a long standing isthmic spondylolisthesis rendered symptomatic after the work injury.

A pre-existing disease or condition does not disqualify a claim, if the employment aggravated, accelerated or combined with the condition to produce the death or disability for which compensation is sought. *Conway Convalescent Center v. Murphree*, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979). In other words, the employer takes the employee as he finds him. *Id.* Further, "[w]hen an industrial injury precipitates a disability from a latent prior condition, such as heart disease, cancer, back disease, and the like, the entire disability is compensable." *Id.*

The respondents accepted responsibility for the claimant's medical treatment following his April 19, 2002, fall. Prior to the work-related fall, claimant had worked regularly and had experienced no symptoms or treatment for his back or hip, other than some work injuries he discussed at the hearing, that resolved. I found the evidence persuasive that the claimant's work-related accident aggravated the claimant's latent, asymptomatic degenerative disc disease and precipitated or accelerated his disability and need for treatment and was reasonable and necessary. The respondents are

responsible for all reasonable and necessary medical treatment the claimant has pursued for treatment of his hip and back subsequent to August 29, 2002, to include the hip replacement. I found the claimant to be most credible and presented a succinct account of his work accident and the problems he experienced following his accident. The claimant has a work history with the respondent where he performed his job involving a great deal of walking and apparently performed his job for a number of years without problems until the April 2002 work incident.

The claimant next contends that he is entitled to temporary total disability benefits from August 29, 2002 through December 24, 2002. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present claim, I find the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 29, 2002 through December 24, 2002. The medical evidence provides that the claimant's hip replacement was performed on September 17, 2002, by Dr. Charles Varela. Physical therapy was ordered by Dr. Varela and the medical records indicate this treatment was pursued from October 29, 2002 through November 21, 2002. Dr. Varela also treated the claimant for his back problems and referred the claimant to Dr. Wayne Bruffett for treatment of the claimant's back condition. Dr. Bruffett recommended the claimant continue conservative treatment, to include exercise, medication and epidural injections. The claimant provided credible testimony that he was unable to perform all the walking activities involved in his job. Also, the medical evidence indicates that the

claimant has continued to receive conservative treatment for his lumbar condition and the medical evidence does not indicate that he had reached the end of his healing period regarding his back by December 24, 2002.

ORDER

The claimant has proven by a preponderance of the evidence that additional medical treatment subsequent to August 29, 2002, was reasonable and necessary for the claimant's compensable hip and back injuries sustained on April 19, 2002. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from August 29, 2002 through December 24, 2002.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**