

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E907288

**ALLEN WILLIAMS,
EMPLOYEE**

CLAIMANT

**SALINE CRUSHING & EXCAVATING,
EMPLOYER**

RESPONDENT NO. 1

**TRANSCONTINENTAL INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 1

**DEATH & PERMANENT TOTAL
DISABILITY FUND**

RESPONDENT NO. 2

OPINION FILED DECEMBER 12, 2003

Hearing conducted December 12, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Silas H. Brewer, Attorney at Law, Little Rock, Arkansas, appearing for the claimant,

Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1, and

Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas, appearing for Respondent No. 2.

STATEMENT OF THE CASE

This is a dispute over compensability of two back surgeries performed in January, 2003, that is, whether they were necessitated by an unrelated motor vehicle accident occurring in November, 2002, or properly attributable to the claimant's admittedly compensable low back injury of February, 1999.

The claimant contended that the surgeries were necessitated by his compensable injuries and, thus, the responsibility of Respondents No. 1. Other possible issues, including additional temporary total disability benefits and the ultimate end of the claimant's healing period, were reserved.

Respondents No. 1 contended that the 2003 surgeries were at a different level of the claimant's spine and not related to his compensable injuries. Alternatively, they contended that the motor vehicle accident was an independent intervening cause, relieving them of responsibility for the 2003 surgeries. Respondent No. 2 took no position concerning this issue.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable low back injury February 8, 1999; the injury required surgical procedures, the first performed by Dr. Robert Dickens June 29, 1999, at L4-5 on the left and the second performed by Dr. Dickens July 22, 2000, at L3-4 on the right; claimant's impairment as a result of his compensable injury is 12%, consistent with the opinion of Dr. Bruce Safman, together with additional disability of 5% assessed by Dr. William E. Ackerman because of related vascular problems; in November, 2002, the claimant was involved in a motor vehicle accident; following the accident, Dr. Anthony Russell performed surgery January 16, 2003, at L5-S1 on the left and again on January 31, 2003, at L5-S1, which have not been accepted by the respondents; the claimant's average weekly wage at the time of his compensable injury was \$643.35; and Respondents No. 1 and the claimant have stipulated that he has been rendered permanently totally disabled by his admittedly compensable injury, a stipulation not opposed by the Fund.

3. The preponderance of the evidence shows that the surgeries performed by Dr. Russell in January, 2003, were reasonably necessary in connection with the claimant's compensable injury and, thus, are the responsibility of Respondents No. 1.

4. The preponderance of the evidence fails to show that the motor vehicle accident of November, 2002, was an independent intervening cause of the claimant's need for surgery.

5. Respondents No. 1 have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant, 60 years of age at the time of the hearing, injured his low back February 8, 1999, during his employment with the respondent employer, putting in roads and underground utilities on a new subdivision. On that day the ground had been frozen, and the claimant, a supervisor, was testing the soil with a shovel to see if conditions would allow for digging. As he pushed hard with his right foot on the shovel he struck a root, was spun around, fell to the ground, and felt immediate pain.

The claimant was given medical attention by the company doctor who initially treated him for a lumbosacral strain but then had an MRI scan performed February 18, 1999, which revealed mild diffuse bulging of disc material at L2-3; diffuse bulging of disc material causing mild neural foraminal narrowing, greater on the right, at L3-4; mild right paracentral posterior disc protrusion causing slight deformity of the anterior thecal sac and mild diffuse bulging of the disc material and bilateral facet hypertrophy causing mild narrowing of the neural foramina bilaterally at L4-5; and

mild central posterior disc protrusion with no apparent mass-effect on the nerve roots or thecal sac at L5-S1. The scan report also concluded that the claimant had mild to moderate degenerative disc disease. He was referred for additional care to Dr. Robert D. Dickens, a Little Rock neurosurgeon.

Dr. Dickens appears to have first seen the claimant March 18, 1999, when he wrote that he had reviewed the MRI scan and found the claimant to have disc protrusions at the lower two levels, the significant level being the right paracentral disc protrusion or herniation at L4-5, which would fit with the claimant's symptoms. On April 30, 1999, Dr. Dickens wrote that the claimant's lumbar MRI scan demonstrated disc protrusion at L4-5 and L5-S1 although neither appeared significant enough to cause the claimant's continuing symptoms. He stated that he did not identify a surgical abnormality on the MRI study and he recommended a lumbar myelogram and post myelogram CT scan. After those studies revealed an extruded fragment at L4-5, Dr. Dickens recommended surgery.

On June 29, 1999, he performed a laminotomy with discectomy at L4-5 on the left. The claimant only received slight relief from the surgery and, in fact, developed a pulmonary embolism for which he had received additional treatment. However, with his continuing symptoms, in spite of the previous surgery and followup care, Dr. Dickens performed an additional surgery July 21, 2000, a lumbar laminotomy with discectomy at L3-4 on the right.

Again, unfortunately, the claimant received little relief from his symptoms as a result of the surgery and continued to seek medical care for his back and his deep vein thrombosis. His impairment ratings of 12% for the back injury and 5% for his vascular condition were accepted by the respondents.

The claimant testified that he was being treated by his family physician after the death of Dr. Dickens because Dr. Dickens practice group would not continue to treat workers' compensation

patients such as himself. He stated that in 2002 he had attempted to be seen by a neurosurgeon to see if he needed additional surgery, but had been turned down because he could not afford an additional MRI scan which a neurosurgeon required. Thereafter, on November 5, 2002, he was involved in a motor vehicle accident which caused pain similar to the pain he had felt at the time of his original injury. On December 3, 2002, an additional MRI was performed showing at L5-S1 a broad-based disc bulge with small central disc herniation, along with marked facet and ligamentous hypertrophy causing moderate bilateral neural foramina narrowing.

Thereafter, the claimant was seen by North Little Rock neurosurgeon Dr. Anthony Russell who performed two surgeries in January, 2003 at L5-S1. As stated above, Respondents No. 1 have denied responsibility for this surgery contending, first, that they were at a different level of the spine and thus unrelated.

However, the report of the first MRI scan dated February 18, 1999, stated that there was a mild central posterior disc protrusion at L5-S1. When the claimant began to be treated by neurosurgeon Dr. Dickens, Dr. Dickens wrote on April 30, 1999, that the claimant's MRI scan demonstrated a disc protrusion at L4-5 and L5-S1, although he did not then think these findings accounted for the claimant's symptoms or were of surgical significance. His opinion later was to change as to the claimant's need for surgery. The claimant also testified, as the medical record suggests, that he continued to have significant symptoms related to his compensable back injury even after his original surgeries and considerable followup and conservative care. He also testified that the symptoms he experienced when he saw Dr. Russell were similar in location and nature to his original symptoms. Thus, the preponderance of the evidence suggests that the surgery performed by Dr. Russell was related to the claimant's original injury.

Dr. Scott M. Schlesinger, also a neurosurgeon, reviewed the films of the claimant at the request of the insurance carrier apparently in November, 2003, and wrote that Dr. Russell's surgery was done for degenerative disc changes and not a work or accident caused HNP. He stated that he disagreed with the conclusions of the radiologist concerning the December, 2002, MRI and, also stated that he saw no evidence of a clinically significant disc herniation in the claimant's earlier studies. However, while this is consistent with the initial impression of Dr. Dickens, Dr. Dickens and now Dr. Russell came to the conclusion that the claimant's condition warranted surgery and the preponderance of the evidence shows that the claimant was active and functioning prior to the accident at work.

When the primary injury has been shown to be compensable, the employer is responsible for any consequence that naturally flows from it, the fundamental test being whether a causal connection exists between the primary injury and the subsequent consequence. See, e.g., Bearden Lumber Co. v. Bond, 7 Ark. App. 65 (1983). The Act also requires the employer promptly to provide such medical and related services as may be reasonably necessary in connection with a compensable injury. Ark. Code Ann. §11-9-508.

Here, the respondents also contend that they are relieved of responsibility for Dr. Russell's surgery because of the intervening motor vehicle accident which occurred in November, 2002. In that regard, Ark. Code Ann. §11-9-102(4)(F)(iii) provides that benefits are not payable for a condition which results from a non-work-related independent intervening cause, following a compensable injury, which caused or prolonged disability or a need for treatment and that such an intervening cause does not required negligence or recklessness on the part of the claimant. In Davis v. Old Dominion Freight Line, Inc., 341 Ark. 751 (2000), it was held that this provision leaves intact

the requirement that the intervening cause be the result of unreasonable conduct on the part of the claimant. Thus, for an independent intervening cause to relieve the respondents of responsibility for additional benefits, the incident must be the result of the claimant's unreasonable activity and must cause or prolong disability or a need for treatment.

Here, however, there is no indication that the claimant's activity was unreasonable. His physicians had not warned him against driving a motor vehicle. His testimony and the accident report which has been submitted in evidence indicate that the claimant was properly stopped at a stop sign when, through no fault of his own, his vehicle was struck by that of another driver. Thus, the claimant's activity was not unreasonable, even if it should be thought to have caused or prolonged his disability or need for treatment. On the latter point, the claimant testified that prior to the motor vehicle accident he had attempted to consult a neurosurgeon to see if he needed additional surgery but was turned down because of his lack of an MRI scan. Thus, the preponderance of the evidence fails to show that the motor vehicle accident was the result of unreasonable activity or the cause of any additional disability or need for treatment of the claimant. For those reasons, it does not relieve the respondents of liability for the claimant's surgery in January, 2003.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted

attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge