

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401228

MIKE BONACCI, EMPLOYEE

CLAIMANT

HOME DEPOT, EMPLOYER

RESPONDENT

AMERICAN HOME ASSURANCE CO., CARRIER

RESPONDENT

OPINION FILED DECEMBER 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 20, 2004, at Little Rock, Arkansas.

Claimant represented by the HONORABLE JAMES W. STANLEY, JR., Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE JOHN D. WEBSTER, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On November 23, 2004, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective positions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Mike Bonacci, the claimant, coupled with medical reports and other

documents comprise the record in this claim.

DISCUSSION

Mike Bonacci, the claimant, with a date of birth of December 3, 1966, is a collage graduate with a degree in business administration from the University of Arizona. Claimant has also attended a two-year physical therapy program at Arkansas State University-Beebe. Claimant presents an employment history consisting of supervisory positions at K Mart, MCI, and Walgreens.

Claimant commenced his employment with respondents on February 11, 2003, as a member of the night crew/receiving and stocking. There is no evidence in the record to reflect that the claimant experienced difficulties, restrictions or limitation in the discharge of his employment duties prior to January 10, 2004.

The compensability of the claimant's January 10, 2004, injury is not disputed. Claimant suffered the injury to his low back while lifting a Rubbermaid shed onto a lift when he felt a pop in his back accompanied by pain and tightness in the back, which progressively worsened. Claimant initially attempted to address the symptoms growing out of the injury on his own, and later through chiropractic treatments.

Claimant's chiropractic treatment included direction to remain off work and continued bed rest with the aid of cold packs for pain. At the time claimant was seen by the chiropractor he was unable to bend, lift or sit comfortably as a result of compensable injury. The testimony of the claimant reflects that he sought chiropractic treatment within a day or two of the January 10, 2004, injury. Further, claimant noted that while he was under directions to remain on bed rest relative to the treatment of his compensable injury, he was contacted by respondent-employer and

informed that he had to report for work.

Claimant reported the injury to appropriate supervisory personnel of respondents. Claimant was off work for a period of three (3) weeks. When claimant returned to work he was under medical restriction or prohibition of no heavy lifting. Claimant had been seen by Dr. Dale Calhoun by the time of his return to work. Claimant asserts that while he provided respondent with the limited duty restriction, he was directed to perform his regular duties.

Claimant eventually came under the care and treatment of Dr. Brent Sprinkle, D.O., pursuant to the direction of respondents. Claimant's testimony reflects that while he continued to discharge employment duties his symptoms and complaints attributed to the January 10, 2004, injury continued. Treatment rendered to the claimant relative to his compensable injury has included physical therapy, medication [Bextra and Skelaxin], and epidural injections.

Claimant was seen by Dr. Sprinkle on March 19, 2004. The clinic note relative to the March 19, 2004, visit reflects, in pertinent part:

Mr. Bonacci returns in followup. On his MRI scan, he does have some slight degenerative changes at T6-7 and T7-8. There is no significant stenosis. There is a small bulge at 4-5 and a little bit more significant bulge at 5-1 with a more central protrusion. It may slightly tilt to the right side. There is some mild narrowing of the L5 neural foramina.

* * *

PLAN:

At this point I do not really think his disc bulges are causing any significant symptoms. If he does develop a more radicular pattern to his pain, he may benefit from epidural steroid injections. At this point I would recommend he get into a good lumbar stabilization program. . . . (JX. #1, p.1).

Dr. Sprinkle's impression of the claimant's complaint, as reflected in the March 19, 2004, clinic

note was that of “low back pain” and “small disc bulge”. A March 25, 2004, physical therapy initial evaluation note reflects that claimant was seen pursuant to a referral of Dr. Sprinkle relative to low back pain with degenerative disc disease. (JX #1, p. 2-3).

When seen by Dr. Sprinkle on April 16, 2004, claimant relayed that he had done a lot of lifting of lawnmowers and grills at work what increased his back pain. The April 16, 2004, clinic note generated by Dr. Sprinkle relative to the claimant’s visit reflects, in pertinent part:

PLAN:

He can discontinue the Skelaxin during the day and just take it only at bedtime. I will give him a Medrol Dosepak and revise his work restrictions to no lifting over 40 pounds at all, no lifting over 10 pounds greater than 10 times in a single day. I will see him in three weeks to assess his response. (JX. #1, p.5).

Claimant’s testimony reflects that he underwent three (3) trigger-point injections under the directions of Dr. Sprinkle, however only received from his low back pain from the first one.

Claimant has continued under the same medical restrictions as reflected in the April 16, 2004, clinic note of Dr. Sprinkle, even under the subsequent medical care of Dr. Thomas Hart following the entry of a change of physician order.

The testimony of the claimant reflects that at the time respondents terminated his employment he had not been released by his treating physician to regular duties. Claimant testified that his employment was terminated over an allegation of violating safety measures with respect blocking off an area while stocking shelves. Claimant denies that such a violation occurred noting that the barrier was still in place and that there were no other individuals in the area that was blocked off, contrary to the assertion to the supervisor. Further claimant noted that at the time the infraction allegedly occurred the store was closed so that there were no customers

present.

The testimony of the claimant reflects that he continued to receive medical treatment relative to his compensable injury subsequent to the termination of his employment. Claimant complained of sharp pain in his low back with sitting and standing on occasions; as well as a constant dull aching pain in the low back.

Claimant acknowledged that he filed for and received approximately four (4) months of unemployment benefits at a weekly rate of \$200.00. Claimant last receive unemployment benefits on November 8, 2004. Claimant further acknowledge that he actively sought employment as a requirement of receipt of the unemployment benefits, however maintains that he was not physically capable of performing unrestricted manual labor due to residuals of his compensable injury. Claimant also noted that he disclosed to prospective employer his injury and restrictions.

Claimant's testimony reflects that he last treated with Dr. Sprinkle in June 2004. Claimant asserts that he requested a change of treating physician when he saw that his injury was not improving under Dr. Sprinkle's care. On June 21, 2004, a Change of Physician Order was entered designating Dr. Thomas Hart as the claimant's treating physician relative to the January 10, 2004, compensable injury.

Claimant was seen for the first time by Dr. Hart, pursuant to the Change of Physician Order, on July 1, 2004. The report relative to the visit reflects, in pertinent part:

. . . . On his presentation he describes the pain as an aching, throbbing or dull type pain. He says that it is rarely beyond the mid posterior lateral thigh or below the knees. He denies any pain in the calves. The initial pain that he had in November he said is not always present. It is in the mid posterior thoracic

spine. His main complaint is his lower lumbosacral spine upper buttock area. . . . On a VAS score with 0 being no pain and 10 the worst pain he rates his intensity currently as a 5/10. He says his worse pain is in the morning. The least amount is mid day. . . .

* * *

BACK: He had diffuse tenderness in the mid thoracic spine. Minimally on deep palpation. No radicular component. In the lower back the right side was negative. On the left side he had pain from the mid line, to the left back, flank and to the left upper buttock area. He had some limited range of motion but no marked difficulty going from sitting to standing position.

IMAGING STUDIES: I have a report of the MRI of the thoracic spine dated 2/5/04, as well as the MRI of the lumbosacral spine where he had degenerative disc at T6-7 and 7-8. No frank herniations. These were small central protrusion without cord compression. At the 3-4 level mild degenerative disc disease. A small central protrusion of the disc identified at L3-4 with mild anterior thecal sac compression. At L4-5 there is a broad based posterior central disc protrusion and mild anterior thecal compression. No nerve root compression signs. At 5-S1 there was a 6 mm central protrusion of the disc with mild anterior thecal compression and mild narrowing of the L5 neural foramen due to lateral bulge of the disc. . . .

PLAN: At this point I discussed with Mr. Bonacci that first of all his initial injury, i.e., the mid posterior thoracic spine he has two disc protrusion at T6-7 and 7-8. He may have continued discogenic pain. This is basically in no man's land. He is not a surgical candidate. There is no paralysis. There is no nerve root compression. That is something, hopefully that he will continue to improve and that is not his main complaint.

As to his lower back, which is the main complaint, overall on his neurological examination he is intact. I don't see any nerve root compression signs. He has normal deep tendon reflexes. No atrophy is identified but his imaging studies do indicate 3 disc protrusions at 3-4, 4-5 and most notably at 5-S1. Again, I did not have the MRI to review and demonstrate to Mr. Bonacci. There were no frank herinations.

Basically our discussion at that time was the difference between a disc, a nerve and a facet, referred pain versus radicular pain. One does not need a herniation in order to hurt. In fact, the most common cause of back pain is the disc, i.e., discogenic pain. An MRI does not tell you where you hurt. 30 to 40% of the population have bulging disc which have no pain. But to look at his MRI and tell where he hurts is impossible unless one performs a discography. But first at this point, I discussed with Mr. Bonacci to still pursue a conservative pathway. I think it would be appropriate to line him up for a properly performed epidural steroid injection performed properly and documented under fluoroscopic visualization, not a sit 'em up poke 'em in the back without fluoroscopic procedure. If on the other hand he fails conservative care and he has continued back pain, then according to North American Spine Society's protocol commission the appropriate study would be a discography, not an MRI and not a CT myelogram. If one wants to know about disc, then one injects the disc. This will allow us to compare the objective, i.e., morphological appearance and pressure volumes, to subjective, i.e., reproduction of concordant pain at these three bulging disc. If we find an abnormal disc we will inject intradiscal steroid, which may be more effective than an epidural steroid injection. Then the question is if he has significant disc disruption, is he or is he not a surgical candidate? He does not appear to be at this time. If he does have normal disc, are there other modalities which may help his discogenic pain. If on the other hand the disc are normal, i.e., not reproduction of concordant pain and normal morphologically, then other structures may be identified, for example a facet, which is the number two cause of back pain complaints. (JX. #1, p. 6-9).

Claimant's testimony reflects that he was seen by Dr. Hart on two or three occasions. Under Dr. Hart's care, claimant testified that a home exercise program was provided. Further, claimant's testimony reflects that he underwent the ESI's as recommended by Dr. Hart, and that while he benefitted from the first one, the last two were not effective.

Claimant was last seen by Dr. Hart on November 8, 2004. The clinic note of Dr. Hart relative to the claimant's November 8, 2004, visit reflects, in pertinent part:

PHYSICAL EXAMINATION: On his presentation today he is 6 feet 4 inches, 248 pounds. . . . Back is diffusely tender with some limited range of motion. Minimal paravertebral back spasms. . . .

PLAN: Again, I discussed extensively with Mr. Bonacci that first of all I don't assign impairment and disability. . . . Our plan obviously since he is not making improvement and according to the North American Spine Society's Protocol Commission, pain beyond four months not delineated by any other imaging studies, discography would be the most appropriate study, . . . That is the direction that we are heading at this point. The purpose of the discography is to determine does he or does he not have intervertebral disc disruption, i.e., does he have contained herniations or discogenic pain at 3-4, 4-5, and 5-S1. . . . Also the issue came up about Arkansas Spine and Sport. I had made that recommendation also back in July to get with Arkansas Spine and Sport and do the Med-X equipment and hopefully do some rehabilitation to his back. Apparently to this point that has still not been approved. I am not sure what the delay is there? So after risks, benefits and expectations were discussed extensively with Mr. Bonacci, to a degree of medical certainty and probability, I strongly recommend we proceed with discography, 2-3 as the control, 3-4, 4-5, and 5-S1 possible suspects. If we find an abnormal disc we will obtain post CT imaging. (JX. #1, p10-11).

Claimant desires to proceed with the treatment recommendation of his authorized treating physician, to include discography. Further, claimant maintains entitlement to temporary total disability benefits relative to his compensable injury. Respondents take the position that claimant has been paid all appropriate benefits relative to the January 10, 2004, compensable injury.

After a thorough consideration of all the evidence in this record, to include the testimony of the claimant, review of the medical reports, and application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 10, 2004, the relationship of employee-employer-carrier existed among the parties.

3. On January 10, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$277.00/\$207.00, for temporary total/permanent partial disability.

4. On January 10, 2004, the claimant sustained an injury to his back arising out of and in the course of his employment with respondents.

5. The claimant was temporarily totally disabled for the period July 1, 2004, and continuing through the end of his healing period, or until such time as he returns to appropriate employment within his medical restrictions growing out of the compensable injury, a date to be determined.

6. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of January 10, 2004, to include the recommended procedure of the claimant's authorized treating physician.

7. The respondents have controverted the claimant's entitlement to medical treatment as recommended by his authorized treating physician with respect to the discogram and Arkansas Spine and Sports referral, and the payment of temporary total disability benefits.

CONCLUSIONS

There is not a dispute regarding the compensability of the claimant's January 10, 2004, back injury. Claimant asserts entitlement to medical benefits, to include the procedures and recommendations of his authorized treating physician, in the treatment of his compensable injury. Claimant also asserts entitlement to temporary total disability benefits from July 1, 2004, to a date yet to be determined, as a result of the compensable injury. Respondents maintain that claimant has been paid all appropriate benefits, and asserts an overpayment of temporary total disability in

the amount of \$1,187.14, in that claimant had returned to work during a period in which temporary total benefits were continued. Further, respondents content that the procedure recommended by Dr. Hart, the claimant's treating physician, is not reasonably necessary in the treatment of the compensable injury. The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

There is no evidence in the record to reflect that claimant experienced any symptoms relative to his back prior to the January 10, 2004, compensable injury in the employment of respondents. Subsequent to the January 10, 2004, compensable injury, and after respondents were notified of same, the credible evidence reflects that claimant was totally incapacitated from engaging in gainful employment for approximately three (3) weeks. While the claimant returned to work he remained under active medical treatment relative to the compensable injury. Indeed, the evidence disclosed that claimant has never been released to unrestricted work duties by either of his treating physicians relative to the January 10, 2004, compensable injury.

The claimant's authorized treating physician relative to the January 10, 2004, compensable injury is Dr. Thomas Hart, a Little Rock pain specialist. Dr. Hart has proposed a course of treatment relative to the claimant's injury, to include physical therapy and discography. Arkansas Code Annotated § 11-9-508 (a) mandates that employers provide such medical services as may be reasonably necessary in connection with the employee's compensable injury. *Cox v. Klipsch & Associates*, 71 Ark. App. 433, 30 S.W. 3d 764 (2000). Whether a medical procedure or device is reasonable and necessary treatment is a question of fact. *Id.*

In the instant claim, the credible evidence reflects that claimant has failed conservative

treatment measures to date relative to the January 10, 2004, compensable injury. In addition to the fact that he has remained symptomatic since the occurrence of the injury, claimant has remained under the active treatment of physicians for same. In his correspondence recommending specific treatment measures relative to the claimant's compensable injury Dr. Hart has set forth an explanation for each recommendation based on his examination of the claimant, review of diagnostic studies, and the results of treatment efforts to date.

The evidence preponderates that the treatment recommendations of Dr. Hart, the claimant's authorized treating physician, are reasonably necessary relative to the treatment of the claimant's January 10, 2004, compensable injury. Respondents have controverted the claimant's entitlement to the afore medical benefits.

Claimant has been under the active care of a physician since his January 10, 2004, compensable injury. The evidence further reflects that the claimant's treating physician imposed physical limitations/restrictions on his employment activity relative to the compensable injury. Claimant was initially seen by a chiropractor, Dr. Bob Carpenter, for complaints relative to the January 10, 2004, compensable injury. Later, claimant came under the care of Dr. Brent Sprinkle, D.O, a physiatrist. While the claimant returned to the employment of respondents, he remained under active medical treatment with medical restrictions on his employment activities. Claimant was under the medical restrictions on his employment activities as imposed by his treating physician at the time respondents terminated his employment in April 2004.

The credible evidence in the record reflects that respondents did not comply with restrictions on the claimant's light/restricted duty release with respect to assigning claimant job tasks. It is undisputed that claimant worked the night shift, during hours when the store was

closed to customers. Claimant was informed that his employment was terminated due to a violation of safety measures with respect to blocking off areas with barrier/tape while stocking with a forklift. Claimant disputes the afore, noting that the barriers were in place and that there were no customers or employees in the area. Nevertheless, at the time of the termination of his employment claimant was under medical restrictions as a result of his compensable injury. (JX. #1, p. 5).

Claimant continued to treat with Dr. Sprinkle following the termination of his employment by respondents. Later, a Change of Physician Order was entered designating Dr. Hart as the claimant's treating physician. While the claimant applied for and received unemployment benefits for a period of four (4) months, during which time he actively sought employment, he remained under the medical restrictions that were in place at the time of his April 2004, firing, and under active medical treatment relative to the compensable injury.

The healing period is that period for healing of an injury which continues until the injured employee is as far restored as the permanent character of the injury will permit. If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W. 2d 457 (1994). Conversely, if the disability has not become stable and if something further in the way of treatment will improve the condition then the healing period has not ended.

Since coming under the care and treatment of Dr. Hart consistent recommendations have been put forth in terms of treatment relative to the claimant's compensable injury. Respondents have authorize some of the measures and have either refused or failed to authorize others. The

evidence preponderates that the claimant remains within his healing period relative to his January 10, 2004, compensable injury.

Claimant's testimony reflects that while he continued to discharge employment duties until he was fired, the residuals of his compensable injury were progressively increasing. Claimant noted that respondents were not complying with his medical restrictions. Subsequent to his firing claimant continued receiving active medical treatment for the compensable injury to include trigger-point injections, and medication. Temporary total disability is awarded when the claimant shows the is within his healing period and is totally incapacitated from earning wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

The credible evidence in the record reflects that the claimant was within his healing period at the time of his April 2004, firing by respondents. Further, at the time of the termination of his employment by respondents claimant was under medical restrictions relative to his employment activities growing out of the compensable injury. Claimant's symptoms grew progressively worse as he continued to discharge employment duties. Following his firing, claimant returned to his treating physician, Dr. Sprinkle, at which time he underwent trigger-point injections. *Superior Industries v. Thomaston*, 72 Ark. App. 7, 32 S.W. 3d 52 (2000). The evidence preponderates that the claimant remained within his healing period and totally incapacitate from engaging in gainful employment subsequent to the termination of his employment by respondents in April 2004. Respondents have controverted claimant's entitlement to temporary total disability benefits subsequent to his firing in April 2004.

Claimant received approximately four (4) months of unemployment compensation

benefits at a weekly rate of \$200.00. The evidence reflects that at the time claimant received the unemployment benefits he was continuing to receive active medical treatment relative to his compensable injury. Claimant has never been released to unrestricted work duties since sustaining the January 10, 2004, compensable injury. The fact that claimant received unemployment compensation benefits does not preclude a finding of temporary total incapacitation or disability. Ark. Code Ann. § 11-9-506 (b) reflects:

Provided, however, if a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits.

In the instant claim, claimant's weekly unemployment benefits was \$200.00, while his weekly temporary total disability rate is \$277.00. Claimant is entitled to the difference of \$77.00 per week during the period that he received unemployment compensation. Pursuant to the operation of the statute, Ark. Code Ann. § 11-9-506, respondents are not entitled to a credit for the unemployment benefits received by claimant. The statute precludes the claimant from double recovery or unjust enrichment.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly rate of \$277.00, for the period commencing in April 2004, when claimant's employment was terminated and continuing through the end of his healing period, or until he returns to gainful employment within his medical restrictions, a date to be determined, as a result of the January 10, 2004, compensable injury. Said sums accrued shall be paid in lump,

without discount. Claimant shall be paid \$77.00 per week by respondents during the four (4) month period he received unemployment compensation benefits while temporarily totally disabled. Respondents may claim credit for any documented overpayment of temporary total disability benefits made to the claimant during the time claimant earned wages while performing work in the employ of same under a limited duty restriction.

Respondents are further ordered and directed to pay all reasonable necessary medical, hospital, nursing and other apparatus expenses relative to the claimant's January 10, 2004, compensable injury, to include the treatment measures recommended by Dr. Thomas Hart, the claimant's authorized treating physician, as well as medical related travel.

Claimant's attorney, the Honorable James W. Stanley, is herein awarded attorney fees at maximum rate on the controverted awarded indemnity benefits, pursuant to Ark. Code Ann. § 11-9-715, § 11-9-801, and WCC Rule 10. The claimant's portion of the controverted attorney's fee shall be withheld from and paid out of indemnity benefits, and remitted by respondents directly to claimant's attorney.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge