

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F304082

PAUL CUNNINGHAM, Employee	CLAIMANT
KEN'S TRUCK & REFRIGERATION SERVICE, Employer	RESPONDENT
FARMERS INSURANCE EXCHANGE, Carrier	RESPONDENT

OPINION FILED MARCH 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 9, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 29, 2003, and a pre-hearing order was filed on that same date. A copy of the 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 sustained compensable injuries to his left shoulder and arm on April 15, 2003.
4. The claimant was earning an average weekly wage of \$330.00 which would entitle him to compensation at the weekly rates of \$220.00 for temporary total disability benefits and \$165.00 for permanent partial disability benefits.

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

1. Compensability of injuries to right hand, wrist, chest, and left foot.
2. Claimant's entitlement to additional medical treatment as recommended by Dr. Cygnet Schroeder in correspondence dated December 9, 2003.
3. Temporary partial disability for his employment with Wal-Mart beginning on July 3, 2003 and ending on August 15, 2003, with an hourly rate of \$6.50.
4. Temporary partial disability while employed by Reynolds Guttering and Pest Control beginning on August 19, 2003 and ending on September 9, 2003, earning \$7.50 per hour.
5. Temporary total disability from termination of his employment with Reynolds Guttering on September 9, 2003.
6. Attorney fee.

At the time of the hearing the respondent clarified its position to state that it had accepted claimant's injuries as compensable. Respondent contends that any medical treatment subsequent to June 19, 2003 is not reasonable and necessary for claimant's compensable injuries. In addition, subsequent to the pre-hearing conference respondent raised as an issue its entitlement to a credit for benefits paid to claimant subsequent to June 19, 2003. As a result, the issues to be litigated include claimant's entitlement to additional medical treatment; claimant's entitlement to temporary total or temporary partial disability; respondent's entitlement to a credit for benefits paid subsequent to June 19, 2003; and a controverted attorney fee.

The claimant contends that he is entitled to additional medical treatment as a result of his April 15, 2003 compensable injury. Claimant contends that he is entitled to temporary partial disability benefits while working for Wal-Mart and Reynolds Guttering, and temporary total disability benefits beginning September 9, 2003 and continuing through a date yet to be determined.

The respondents contend that medical treatment subsequent to June 19, 2003 is

not reasonable and necessary in relation to claimant's compensable injury. In addition, respondent contends that the medical records do not establish claimant's entitlement to temporary partial disability benefits or his entitlement to temporary total disability benefits subsequent to September 9, 2003.

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 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 December 29, 2003, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Respondents' stipulation that it has accepted claimant's injuries as compensable injuries is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable injury.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary partial disability benefits as a result of his compensable injury.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 9, 2003, and continuing through a date yet to be determined. To the extent that claimant has an outstanding child support obligation, an amount up to 25% of his weekly compensation benefits may be deducted by the respondent to satisfy the child support obligation pursuant to A.C.A. §11-9-110.

6. Respondent has controverted claimant's entitlement to temporary total disability

benefits.

FACTUAL BACKGROUND

_____The claimant is a 33-year-old man who began working for the respondent in 1998 or 1999. The respondent performs maintenance and repair on refrigerated railroad cars of the Union Pacific Railroad.

On April 15, 2003, the claimant was accidentally run over by a truck owned by the respondent. Claimant was taken to the emergency room and outpatient surgery was performed on claimant by Dr. Passmore to irrigate and debride a large abrasion wound on his upper left arm. At the emergency room claimant was evaluated by Dr. Wilson who ordered a CT scan of the claimant's cervical spine, thoracic spine, and lumbar spine. Dr. Wilson opined based upon his review of that testing that claimant had suffered a non-displaced right transverse process fracture at the T1 level. Dr. Wilson indicated that claimant should receive follow-up treatment from an orthopaedic surgeon who could evaluate and treat the claimant. Claimant was evaluated by Dr. Bebout, an orthopaedist, who in a report dated April 21, 2003, opined that claimant had a fracture of the T1 transverse process. Dr. Bebout indicated that claimant would heal with out any permanent impairment but would be off work for a substantial period of time. Dr. Bebout renewed claimant's medication and indicated that claimant should return for an additional evaluation in four weeks.

When claimant returned to the clinic for follow-up care on May 5, 2003, he was evaluated by Dr. Queeney. In his report of that date Dr. Queeney noted that the MRI scan of claimant's cervical spine did not reveal any evidence of herniated discs or significant nerve root compression. Dr. Queeney diagnosed the claimant as suffering from thoracic myofascial dysfunction and a transverse process fracture at T1. Dr. Queeney recommended no surgery, but instead indicated that claimant should be treated

conservatively by physicians specializing in occupational medicine. As a result, claimant came under the care of Dr. Clark. Claimant's initial visit with Dr. Clark occurred on May 12, 2003, at which time Dr. Clark prescribed medication, physical therapy, and stated that claimant should remain off work pending a re-evaluation in two weeks. In a report dated May 27, 2003, Dr. Clark noted that claimant's primary complaint of that date was pain in both of his shoulders. Dr. Clark indicated that claimant should continue medications and physical therapy and remain off work for at least one more week. On June 3, 2003, Dr. Clark noted that claimant's overall condition was better with the exception of discomfort in the left shoulder area. Again, Dr. Clark indicated that claimant should continue medication and that he should continue with physical therapy with an emphasis on his left shoulder. Dr. Clark opined that claimant could return to work with some restrictions and that he should return for a re-evaluation in one week. On June 13, 2003, Dr. Clark noted that claimant's only discomfort was in the left shoulder area. Dr. Clark gave claimant a trigger point injection into his left shoulder. He also indicated that claimant should continue physical therapy and continue working with restrictions. Claimant was advised to return for a re-evaluation in seven to ten days.

Claimant's next visit occurred with a colleague of Dr. Clark's, Dr. Holder. In a report of June 19, 2003, Dr. Holder noted that the claimant was doing significantly better since his injection. Based upon claimant's statements to him that he had a job with another employer, Dr. Holder released the claimant to return to work without restrictions as tolerated. He indicated that claimant should return for follow-up treatment as needed.

Following this release the claimant became employed by Wal-Mart on July 3, 2003 stocking shelves. Claimant testified that he primarily stocked shelves in the beverage and paper goods area. Claimant testified that the heaviest amount lifted was approximately 15 to 20 pounds. Claimant testified that while working at Wal-Mart he continued to have pain in the same areas as before. Claimant testified that he eventually quit working for

Wal-Mart on August 15, 2003 because of continued pain. Claimant sought employment performing a lighter physical job from Reynolds Guttering and Pest Control where he worked as a helper installing guttering that weighed less than 10 pounds. Claimant testified that his primary duties with Reynolds included putting hangers on gutter as it was coming out of the machine, helping hold the gutter, and screwing the gutter onto the house. Claimant continued working on the job for Reynolds until September 9, 2003, when his pain became so great that he sought additional medical treatment from the emergency room.

The emergency room report of September 9, 2003 indicates that claimant was complaining of intractable pain. The emergency room physician diagnosed the claimant as suffering from left cervical radiculopathy and chronic pain syndrome. The physician also believed that claimant's pain was out of proportion to his physical findings, but noted that claimant should see his personal physician for chronic pain management. Following the emergency room visit claimant returned to Dr. Holder who in a report dated September 12, 2003 again noted that claimant had a right T1 process fracture, left sternoclavicular joint strain, and a left C7-T1 small left posterolateral disc protrusion/herniation. Dr. Holder prescribed medications and ordered an EMG/nerve conduction study. Dr. Holder also indicated that claimant could return to work with restrictions.

The EMG/nerve conduction study was performed on September 19, 2003, and was read as normal with no evidence of neuropathy or radiculopathy. Following this study claimant returned to see Dr. Holder on September 24, 2003. Claimant testified that at the time of that visit his wife was working and was unable to accompany him to the doctor. As a result, claimant testified that he took his wife's cousin with him in order to help him remember things. Dr. Holder's letter of September 24, 2003, indicates that this cousin was present and was asked to leave. When the cousin refused to leave, Dr. Holder indicated that he could not continue to treat the claimant. As a result, Dr. Holder indicated that

claimant was being discharged from the clinic and could ask for a change of physicians. Subsequently, claimant was sent to Dr. Schroeder for an evaluation on November 7, 2003.

Claimant testified that the respondent agreed with this evaluation. In her report of November 7, 2003, Dr. Schroeder diagnosed the claimant as suffering from numerous conditions including T1 spinous process fracture, residual edema, cervical radiculopathy, possible injury to the right shoulder, chest wall injury, and multiple areas of myofascial pain. As a result, Dr. Schroeder recommended that the claimant undergo an MRI scan of the shoulder and anterior chest. She also indicated that claimant should undergo an MRI scan of the brain and a complete EMG and nerve conduction study of the left arm and neck. She also recommended that claimant be referred to a psychiatrist for a consultation and indicated that claimant was not able to return to work at that point in time.

Claimant has filed this claim contending that he is entitled to additional medical treatment as a result of his compensable injury, including the medical treatment recommended by Dr. Schroeder. He also seeks payment of temporary partial disability benefits and temporary total disability benefits.

ADJUDICATION

ADDITIONAL MEDICAL TREATMENT.

A claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). 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 is entitled to additional medical treatment for his compensable injury. Specifically, I find that the additional medical treatment recommended by Dr. Schroeder

is reasonable and necessary and causally related to claimant's compensable injury of April 15, 2003.

Here, as previously noted, claimant suffered multiple injuries to his body as a result of being run over by a truck on April 15, 2003. As a result of those compensable injuries the claimant has been evaluated and treated by a number of physicians. The medical evidence indicates that after claimant came under the care of Dr. Clark, a specialist in occupational medicine, that the focus of his treatment became claimant's discomfort in his left shoulder area. In fact, Dr. Clark's medical reports indicate that claimant's discomfort became so great that Dr. Clark on June 13, 2003 gave claimant a trigger point injection into his left shoulder. The claimant testified that after some initial pain following that injection, that his left shoulder condition significantly improved. This is evidenced by the medical report of Dr. Holder dated June 19, 2003, which indicates that claimant's shoulder is significantly better since the injection. As a result of that improvement, Dr. Holder released the claimant to return to work without restrictions as tolerated.

Although claimant's shoulder pain initially improved after the injection, claimant testified that after a period of time passed his pain returned to the point it existed prior to the injection. By this time the claimant was working at Wal-Mart and subsequently went to work for Reynold's Guttering. Claimant testified that the job duties he performed for both of these employers did not exceed the physical limitations which had previously been placed upon him by Dr. Clark. With respect to this issue, I note that Dr. Holder had released claimant to return to work without restrictions as of June 19, 2003. Claimant also testified that he did not suffer any new injury while working for either Wal-Mart or Reynold's. At some point, claimant testified that his pain became so great that he was forced to seek additional medical treatment from the emergency room on June 9, 2003. The emergency room report while indicating that claimant's pain is exaggerated, nevertheless indicates that claimant suffers from left cervical radiculopathy and chronic

pain syndrome. When claimant sought additional medical treatment from Dr. Holder, Dr. Holder opined that claimant still suffered from a right transverse process fracture, a sternoclavicular joint strain and a small posterolateral disc protrusion/herniation. Although Dr. Holder ordered an EMG/nerve conduction study, claimant testified that this study was only performed between his elbow and his wrist and did not include his shoulder. Indeed, Dr. Schroeder in a report of November 7, 2003 recommends that a complete EMG/nerve conduction study of the left arm and neck be performed. As previously noted, Dr. Schroeder has diagnosed the claimant as suffering from numerous conditions and has recommended additional testing. In her report of November 7, 2003, Dr. Schroeder states that claimant's complaints are consistent with claimant's original work injury.

In support of its contention that claimant's physical complaints subsequent to June 2003 are not causally related to his original compensable injury, respondent has offered into evidence a fax sent by the adjuster to Dr. Holder dated September 16, 2003. This report is Page 15 of Respondent's Exhibit Number 1. In a handwritten note that same date, Dr. Holder stated that claimant's current complaints were an aggravation of his previous April 15, 2003 injury. I find that this opinion of Dr. Holder is entitled to little weight. First, prior to September 2003 Dr. Holder had evaluated the claimant on only one occasion. That one occasion was June 19, 2003, the date he released claimant to return to work without restrictions. Furthermore, my review of Dr. Holder's medical reports does not reveal any history of an aggravation. As previously noted, claimant testified that he did not suffer any new injury while working for Wal-Mart or Reynold's Guttering. Given these factors, I find that Dr. Holder's opinion that claimant's subsequent problems were the result of an aggravation of his prior injury to be of little weight.

In summary, after reviewing the evidence presented in this case, I find that claimant has met his burden of proving by a preponderance of the evidence that the medical treatment recommended by Dr. Schroeder is reasonable and necessary and causally

related to his compensable injury of April 15, 2003. While claimant was released by Dr. Holder in June 2003, this release occurred shortly after a trigger point injection into the claimant's left shoulder. Although this initially provided claimant some relief, claimant testified that his pain subsequently returned to his pre-injection state. Although claimant did in fact return to work for two other employers subsequent to his release, there is no evidence that claimant suffered a new injury or aggravation of his work-related injury while working for those employers. Finally, Dr. Schroeder has opined that claimant's complaints are consistent with his prior work-related injury. For these reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that the proposed medical treatment by Dr. Schroeder is reasonable and necessary for treatment of his compensable injury.

TEMPORARY PARTIAL DISABILITY BENEFITS.

Claimant contends that he is entitled to temporary partial disability benefits for the time period he was employed by Wal-Mart from July 3, 2003 through August 15, 2003, and while employed by Reynold's Guttering from August 19, 2003 through September 9, 2003. As previously noted, claimant suffered multiple injuries to his body as a result of an accident on April 15, 2003. These injuries included injuries to his shoulder and spine and are considered unscheduled injuries. For unscheduled injuries, a claimant has the burden of proving by a preponderance of the evidence that they remained within their healing period and that they suffer either a total incapacity or partial incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, even if it were assumed that claimant remained within his healing period for the disputed period of time, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a partial incapacity to earn wages while working for Wal-Mart or Reynold's. The medical evidence indicates that while claimant

was performing these jobs he had been released by Dr. Holder to return to work without restrictions. Claimant has offered no evidence that his ability to work during this period of time was partially incapacitated as a result of his compensable injuries. Therefore, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to temporary partial disability benefits while employed by Wal-Mart or Reynold's.

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 9, 2003, through a date yet to be determined. Claimant terminated his employment with respondent on that date and sought medical treatment from the emergency room. Claimant subsequently came under the care of Dr. Holder and was eventually evaluated by Dr. Schroeder. In her report of November 7, 2003, Dr. Schroeder indicated that claimant was not capable of returning to work at that point in time. I find that Dr. Schroeder's opinion is credible and entitled to great weight and therefore find that claimant remained within his healing period and suffered a total incapacity to earn wages beginning September 9, 2003 and continuing through a date yet to be determined.

CREDIT.

As previously noted, respondent has requested a credit for benefits paid subsequent to June 19, 2003. To the extent that this credit is requested for medical benefits, I find that respondent is not entitled to a credit. To the contrary, I find that medical claimant received subsequent to June 19, 2003 was reasonable and necessary and causally related to his compensable injury. To the extent that respondent seeks a credit for temporary total disability benefits paid subsequent to June 19, 2003, I find that respondent is entitled to

a credit for benefits paid subsequent to that date based upon the opinion of Dr. Holder of June 19, 2003 opining that claimant was released to return to work without restrictions. To the extent that respondent paid claimant temporary disability benefits subsequent to that date and before September 9, 2003, respondent is entitled to a credit.

CHILD SUPPORT LIEN.

Claimant acknowledged at the hearing that a child support lien had been filed against him. Although there was some indication that this lien was being satisfied from claimant's entitlement to an income tax refund, I note that pursuant to A.C.A. §11-9-110 up to 25% of weekly benefits may be withheld by the respondent in order to satisfy the child support obligation. Accordingly, to the extent necessary, respondent is ordered to withhold up to 25% of claimant's weekly benefits to satisfy his child support of obligation.

ATTORNEY FEE.

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.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment as a result of his compensable injury. This

includes the medical treatment which has been recommended by Dr. Schroeder as well as medical treatment provided subsequent to September 9, 2003.

Claimant is entitled to temporary total disability benefits beginning September 9, 2003 and continuing through a date yet to be determined. Respondent is hereby ordered to withhold up to 25% of claimant's weekly benefits to satisfy claimant's child support obligation pursuant to A.C.A. §11-9-110. Respondent has controverted claimant's entitlement to temporary total disability benefits.

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