

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306205

CARL HALE

CLAIMANT

GATOR FREIGHTWAYS, INC.

RESPONDENT EMPLOYER

FIDELITY & GUARANTY INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED FEBRUARY 6, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DONALD S. RYAN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on January 28, 2004. A prehearing conference was held on December 2, 2003 and a prehearing order was filed the same date. The prehearing order was admitted into evidence as Commission Exhibit No. 1 without objection.

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

1. There was a specific incident injury on May 12, 2003.
2. The compensation rates are \$440/330.

The claimant contends that he is entitled to temporary total disability benefits from September 11, 2003 through November 18, 2003. All other issues are reserved.

The respondents contend that the medical evidence does not support entitlement to temporary total disability benefits for the claimant's compensable injury.

The respondents contend the claimant was being treated for an unrelated health problem diagnosed by Dr. Reginald Rutherford. Alternatively, the respondents contend if the claimant is entitled to additional temporary total disability benefits, respondents should be entitled to a credit for short-term disability benefits the claimant received and credit for unemployment benefits the claimant received.

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. There was a specific incident injury on May 12, 2003.
2. The compensation rates are \$440/330.
3. The claimant has proven by a preponderance of the evidence that he remained in his healing period because of his compensable injury and unable to earn wages from September 11, 2003 through November 18, 2003.
4. The respondents are liable for benefits.

DISCUSSION

The claimant, 37 years old, was working on a truck when the transmission fell and the claimant's head struck the side of the truck frame. The claimant did not immediately go to the doctor but developed a headache. About two weeks after the

incident, the claimant sought medical attention where the doctor drilled holes in the claimant's head to drain blood off the brain. The claimant was eventually released to light-duty work and returned to work.

According to the claimant, on September 11, 2003, the claimant spoke with Mr. Armor and Jim Reichert and was advised not to return to work until he was notified. The claimant continued to see Dr. Reza Shahim and was given a full release on November 18, 2003. The claimant testified he has attempted to find work but has not found work; however, he did file for unemployment benefits following his November 18, 2003, release to full duty. According to the claimant, he remained unable to work regular duty but was not provided light-duty work from September 11, 2003 through November 18, 2003. The claimant testified that he did not receive short-term disability benefits during the time he was off work. The claimant currently draws \$311 per week after taxes for unemployment benefits.

The claimant hit the back, top and right side of his head when he hit the truck frame. The claimant still has a knot on the top of his head. According to the claimant, he still has mild headaches, is more nervous than before, and has memory loss. The claimant confirmed that he had a stroke-related incident 16 years ago. The claimant recently underwent a neuropsychological evaluation at the request of Dr. Shahim. Dr. Shahim requested the evaluation in order to assist him in assigning a permanent impairment rating.

The only issue for consideration at this time is the claimant's entitlement to temporary total disability benefits from September 11, 2003 through November 18, 2003. The claimant contends that he remained in his healing period and had some

work restrictions and was restricted by his employer from returning to work on light duty. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the respondents contend that the claimant was being treated for an unrelated health problem as diagnosed by Dr. Reginald Rutherford. I give much greater weight to the opinion of the authorized treating neurosurgeon, Dr. Reza Shahim, who opined on September 2, 2003, in part:

In the face of recent head trauma with subdural hematomas, I think he would be a difficult clinical diagnosis to make based on the MRI finding of multifocal white matter disease. Certainly, he could have multiple sclerosis and I would leave that diagnosis to the judgment of our neurology colleague, Dr. Rutherford.... Cl. Exh. No. 1, p. 1.

In considering the opinion of the authorized treating neurosurgeon, Dr. Reza Shahim, versus the opinion of the respondent-selected second opinion physician, Dr. Reginald Rutherford, I give much greater weight to Dr. Shahim's opinion of the claimant. Dr. Shahim performed the surgery on the claimant to relieve pressure on the brain and has described the claimant's condition as "significant brain injury with subdural hematoma formation." Cl. Exh. No. 2. Dr. Rutherford was looking at some testing and has made an initial guess as to the claimant's condition. He used the wording "most likely" and follows up with his diagnosis "is not confirmed at present." The claimant was placed on work restrictions and the employer elected not to honor the work restrictions of the claimant and sent him home. Based on the restrictions made by the authorized treating physician, Dr. Shahim, and after hearing the claimant's credible

testimony about being relieved from working with restrictions, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and remained unable to earn wages.

The Arkansas Supreme Court in *Breshears, supra*, held that the term “disability” controls compensation awards in all cases of temporary disability except where compensation is statutorily based upon the “healing period.” We have disability and healing period defined in Ark. Code Ann. §11-9-102(8) and (12):

(8) ‘Disability’ means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury;

(12) ‘Healing period’ means that period for healing of an injury resulting from an accident;

In the present case, the claimant’s regular job involved lifting and heavy work and it is undisputed that the claimant’s authorized treating physician placed lifting and other restrictions on the claimant and deemed him able to return to work on light duty. It is also undisputed that the employer sent the claimant home and did not allow him to work in a light-duty capacity either September 11, 2003, or shortly thereafter. The instant case has medical evidence of physical impairment and functional limitations of the claimant and the employer did not provide light-duty work. There was no testimony presented of other opportunities available to the claimant to earn the same or similar wages he was receiving at the time of the injury. The claimant satisfied the definition of “disability” and he remained in his healing period and has proven that he is entitled to total temporary disability benefits from the date he was sent home by his employer,

which is believed to be September 11, 2003 through the end of his healing period, November 18, 2003.

The respondents asked for an offset for any short-term disability benefits or unemployment benefits the claimant may have received during September 11, 2003 through November 18, 2003. The only testimony that was provided was from the claimant that he received neither unemployment benefits nor short-term disability benefits during the period he requested temporary total disability benefits. If no benefits were received by the claimant, there can be no offset.

ORDER

The claimant has proven by a preponderance of the evidence that he remained in his healing period because of his compensable injury and unable to earn wages from September 11, 2003 through November 18, 2003. The respondents are liable for benefits.

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**