

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310772

CHARLES M. KELLEY, EMPLOYEE	CLAIMANT
MILAM CONSTRUCTION CO., EMPLOYER	RESPONDENT
TRANSCONTINENTAL INS. CO., CARRIER	RESPONDENT

OPINION FILED JULY 15, 2004

Hearing before Administrative Law Judge J. Mark White on May 19, 2004, in El Dorado, Union County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 19, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on March 1, 2004, and a Prehearing Order was entered that same day. A copy of the March 1, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the respondents have controverted

this claim in its entirety; and that the claimant earned an average weekly wage of \$662.93, entitling him to a compensation rate of \$410 for total disability benefits and \$308 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to his back on November 29, 2001; and whether the claimant is entitled to associated medical and indemnity benefits.

The claimant contends that he sustained a compensable injury to his back on November 29, 2001, for which he is entitled to benefits; that he is entitled to payment of the medical expenses he has incurred as a result of his compensable injury; that he remains entitled to reasonably necessary medical treatment for his compensable injury; and that he is entitled to temporary total disability benefits from January 9, 2003, to a date yet to be determined.

Respondents contend that they have controverted this claim in its entirety; and that no benefits have been paid.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, the briefs of the parties 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment; that his injury caused internal or external physical harm to the body requiring medical services; and that the injury was caused by a specific incident and is identifiable by time and place of occurrence.
4. The claimant has proven by a preponderance of the evidence that the existence and extent of his left chest injury is established by medical evidence supported by objective findings.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left chest on November 29, 2001.
6. The claimant has failed to prove by a preponderance of the evidence that the existence and extent of his low back injury is established by medical evidence supported by objective findings.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his low back on November 29, 2001.
8. The claimant has failed to prove by a preponderance of the evidence that the medical treatment he received after September 6, 2002, was reasonably necessary in connection with a compensable injury.
9. The claimant has proven by a preponderance of the evidence that the medical treatment he received from November 29, 2001, until September 6, 2002, was reasonably necessary in connection with his compensable injury.
10. A preponderance of the evidence establishes that the claimant's healing period ended on September 6, 2002.
11. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 9, 2003, to a date yet to be determined.
12. The claimant has failed to prove by a preponderance of the evidence that future additional medical treatment is reasonably necessary in connection with a compensable injury.

DISCUSSION

I. History

On November 29, 2001, the claimant was working for the respondent-employer on a construction project. Another worker was dispatched to a local hardware store to pick up some materials, and the claimant asked to ride along so that he could purchase more nails for his nail gun. En route to the hardware store, their truck was struck from behind by another car. The claimant declined medical treatment at the scene, but later that day he sought treatment from the company doctor, Dr. Douglas Owens. Dr. Owens was not in the office that day, so the claimant was seen by Dr. Greg Smart. Dr. Smart recorded the claimant's chief complaint as "back pain and headache," but he also noted complaints of pain and tenderness in the left chest area. Dr. Smart diagnosed a "left chest contusion (axillary)" and "left lateral lumbar strain." He prescribed medication, restricted the claimant to light-duty work, and directed him to return in four days. The claimant returned and was treated over the next several months by Dr. Owens. Unfortunately, Dr. Owens refused or was unable to produce the claimant's medical records to the parties, and it is unknown what precise treatment he provided.

Apparently, the police officer who completed the report on the claimant's accident neglected to list the claimant as a passenger in the truck. Because of this

omission, the respondents eventually controverted further benefits. The claimant is a veteran and sought treatment through Tri-Care Insurance, which provides coverage for retired military personnel. He saw Dr. Elizabeth Anderson-Doze on February 18, 2002. Dr. Anderson-Doze noted "tenderness just beneath his left shoulder blade which is [sic] describes as tingling and tender at the same time w/ radiation into his left arm and down the left side of his chest." She refilled his prescriptions and recommended a thoracic-spine MRI. The MRI, performed April 8, 2002, noted "midline discextrusion with caudal migration" at T7-8 and "probably small central disc protrusion T8-9."

Dr. Jorge Martinez, a neurological surgeon, saw the claimant on May 30, 2002. Dr. Martinez recorded the claimant's chief complaint as, "chest pain, left side, and left lower back pain." Dr. Martinez opined that the abnormalities revealed by the MRI were not related to the claimant's complaints of pain. He recommended referral to pain management.

A lumbar spine MRI was performed on July 2, 2002, revealing:

1. Mild central canal stenosis with bilateral neural foramen narrowing at L3-4 caused by generalized disc bulging and bilateral facet joint hypertrophy and arthritis with possible component of short pedicles.
2. Bilateral neural foramen narrowing, worse on the left at L4-5 due to generalized disc bulging.

After two follow-up visits with Dr. Anderson-Doze, the claimant was seen at the LSU Pain Clinic in Shreveport on September 6, 2002. Dr. Randall Cork noted complaints of “pain on the left upper back and his left arm pit to the left mid back” and “a second, more severe pain in his left lower back, his left flank.” After this September 6 visit, I can find no other mention in the record of the claimant’s complaints of chest and upper back pain. Instead, over the next year the claimant was treated for his low back pain with a variety of surgical and nonsurgical modalities by the LSU Pain Clinic, in addition to seeing Dr. Anderson-Doze. Though the LSU records reflect some improvement in the claimant’s condition, the claimant now says that his condition is no better than it was before the treatment at LSU.

On April 1, 2004, the claimant saw Dr. Earl Peeples at the respondents’ request for an independent medical evaluation. Dr. Peeples diagnosed the claimant with “preexisting degenerative disc disease and facet changes in the mid thoracic area and in the lower lumbar area.” Dr. Peeples stated that “an acute injury clearly attributable on an anatomic basis to his accident is not identified nor was it identified by the initial treatment physician nor by the examining neurosurgeon, Dr. Martinez, who did not believe his pain and the abnormalities noted in the spine were related.” Dr. Peeples further opined that the invasive treatment performed by the LSU Pain Clinic was not reasonably necessary. Dr. Peeples recommended a bone

scan and MMPI evaluation; the MMPI evaluation resulted in a diagnosis of conversion disorder. After reviewing the results of the MMPI and bone scan, along with the original MRI films, Dr. Peeples recommended against invasive pain treatment or orthopedic intervention and opined that the claimant's failure to improve is attributable to his conversion disorder.

I should note at this point the claimant's allegations in the hearing that Dr. Peeples fabricated evidence. Specifically, the claimant testified that he was in possession of the MRI films; that it was impossible for there to have been any other copies of the MRI films; and that therefore, Dr. Peeples could not have examined the MRI films even though he claimed in his letter he had done so. Without further evidence, I do not find it plausible to conclude that Dr. Peeples fabricated evidence. The more reasonable and plausible answer is that there was more than one copy of the MRI films. I see no reason whatsoever to think that Dr. Peeples fabricated evidence.

II. Adjudication

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

The claimant's testimony as to the details of the accident itself and the reason for his trip; the corroborating testimony of Albert Ezell, who was driving the vehicle at the time of the accident; and the medical records submitted into evidence lead me to find that the claimant has proven by a preponderance of the evidence that he

sustained an injury arising out of and in the course of his employment; that his injury caused internal or external physical harm to the body requiring medical services; and that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

The only remaining question is whether the existence and extent of the claimant's injury is established by medical evidence supported by objective findings. In point of fact, the claimant's medical records reflect two injuries sustained by the claimant in his accident: an injury to his left chest, and an injury to his back. I will deal with the chest injury first.

The day of his injury, the claimant saw Dr. Smart who diagnosed him with "left chest contusion (axillary)." "Axillary" is defined by *Dorland's Illustrated Medical Dictionary*, 26th Edition, as "pertaining to the axilla," which in turn is defined as, "a small pyramidal space between the upper lateral part of the chest and the medial side of the arm." Because Dr. Smart identified the precise location of the contusion, rather than referring only to the chest generally, I find it reasonable to assume that Dr. Smart actually saw an injury to the chest. Even if this were not the case, his diagnosis was later confirmed by an objective test, a bone scan performed April 29, 2004, which revealed, "Solitary left rib uptake. This is only faintly hot and suggest[s] remote trauma." A left rib would be within the same area of the body as the axilla,

and the bone scan was taken more than two years after the injury, which could certainly be classified as "remote trauma." Given Dr. Smart's diagnosis of a contusion, and the corroborating evidence of the bone scan, I find that the claimant has proven by a preponderance of the evidence that the existence and extent of an injury to his left chest is established by medical evidence supported by objective findings. Because the claimant has proven every element of compensability as to his left chest injury, I conclude that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left chest on November 29, 2001.

Whether the claimant's low back injury is likewise established by medical evidence supported by objective findings is a murkier question. I can find nothing in the medical records to show that the claimant exhibited muscle spasms in the weeks after his accident. The first mention of muscle spasm is not until September 6, 2002, some nine months after the accident. MRI tests did reveal degenerative changes in the claimant's thoracic and lumbar spine, but nothing to substantiate an acute injury. In this regard, Dr. Peeples opined upon reviewing the medical records, "An acute injury clearly attributable on an anatomic basis to his accident is not identified." After reviewing the actual MRI films themselves, Dr. Peeples added that the claimant "has findings often seen in his age group in the thoracic and lumbar

spine that produce mild narrowing of the canal in the lumbar spine, mild foraminal narrowing and some mass effect on the anterior portion of the thecal sac in the thoracic area without overt nerve compression.”

To prove his claim compensable, the claimant must establish that the existence and extent of his injury is established by medical evidence supported by objective findings, and he must show a causal connection between these objective findings and his alleged injury. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). This is true even where the alleged injury is an aggravation of a preexisting condition. *Id.* The Full Commission has previously found a claim not to be compensable where the only objective findings pointed to a degenerative condition and not an acute injury. *See, e.g., Matheny v. Medcath, Inc./Arkansas Heart Hosp.*, A.W.C.C. F200248 (April 29, 2003). The claimant’s credible testimony that his low back pain began with his car accident supports a conclusion that the accident and resulting injury aggravated his preexisting back condition. Nonetheless, I am unable to find that any such aggravation is established by medical evidence supported by objective findings causally connected to the injury. For me to find otherwise would require me to arbitrarily disregard Dr. Peeples’ opinion that the objective findings of the MRI tests are unrelated to any acute injury. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that the

existence and extent of his low back injury is established by medical evidence supported by objective findings. Because he has failed to prove a causal connection between the objective findings within the record and his alleged back injury, I must conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his low back on November 29, 2001.

B. Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

From the day of the accident until his initial evaluation at the LSU pain management clinic on September 6, 2002, the claimant complained of and was treated for both his low back and his left chest. After this September 6, 2002, visit, however, it appears that all of the treatment received by the claimant was for his low back. Because I have already concluded that the claimant has failed to prove he sustained a compensable injury to his low back, I must conclude that he has failed to prove by a preponderance of the evidence that the medical treatment he received

after September 6, 2002, was reasonably necessary in connection with a compensable injury.

Prior to September 6, however, the claimant was treated by his physicians for both his back and his left chest, which injury I have concluded is compensable. The respondent's expert, Dr. Earl Peeples, has opined that the treatment provided prior to the claimant's treatment with the LSU pain management clinic was reasonable and necessary. Though Dr. Peeples denied that the treatment at the LSU pain management clinic was reasonable and necessary, the fact remains that the claimant's first visit with LSU was on the recommendation of both Dr. Anderson-Doze and Dr. Martinez. Therefore, I find that the claimant has proven by a preponderance of the evidence that the medical treatment he received from November 29, 2001, until September 6, 2002, including the initial visit at LSU, was reasonably necessary in connection with his compensable injury.

C. Other Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing

period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

I can find no evidence in the record to show that the claimant was treated for his compensable left chest injury after September 6, 2002. Therefore, I find by a preponderance of the evidence that the claimant's healing period ended on September 6, 2002. The claimant contends he is entitled to temporary total disability benefits from January 9, 2003, to a date yet to be determined. Because this period of time begins after the end of the claimant's healing period, I must conclude that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 9, 2003, to a date yet to be determined.

The claimant also contends that he remains entitled to additional medical treatment. As noted above, I find that the healing period for his compensable left chest injury ended on September 6, 2002. I can find nothing in the record to show that any doctor has recommended any further treatment for the left chest injury. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that future additional medical treatment is reasonably necessary in connection with a compensable injury.

AWARD

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left chest on November 29, 2001. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge