

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E706402

BARRY MEREDITH, Employee	CLAIMANT
BLUE GLASS, INC., Employer	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 13, 2004

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

Claimant represented by REX CHRONISTER, Attorney, Fort Smith, Arkansas.

Respondents represented by JEFFREY RICKARD, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On June 28, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 26, 2004, and a pre-hearing order was filed on April 29, 2004. 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 on May 22, 1997.
3. The claimant sustained compensable injuries on May 22, 1997.
4. The claimant was earning an average weekly wage of \$360.00 which would entitle him to compensation at the rate of \$240.00 per week for temporary total disability benefits.

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

1. Respondent's entitlement to a statutory lien in the amount of \$4,775.74 on

settlement proceeds from a third-party claim.

2. Unpaid medical.
3. Temporary total disability benefits.
4. Claimant's entitlement to permanent partial disability as a result of permanent impairment.
5. Attorney fee.

The claimant contends he is entitled to unpaid medical, temporary total disability benefits, and permanent partial disability benefits for impairment as a result of his compensable injuries. With respect to respondent's request for a statutory lien, claimant contends that he has not been "made whole"; therefore, respondent is not entitled to a lien.

The respondents contend they have paid all compensation benefits to which the claimant is entitled. The respondents also contend that its statutory lien in the amount of \$4,775.74 attaches to the settlement proceeds received by the claimant from Southern Farm Bureau and that the respondents are entitled to recover the full amount of its lien in accordance with the statutory provisions under A.C.A. §11-9-410. Furthermore, with respect to unpaid medical treatment, respondent contends that the medical treatment was unauthorized and is not reasonable and necessary.

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 witness and to observe his 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 April 26, 2004, and contained in a pre-hearing order filed April 29, 2004, are hereby accepted as fact.

2. Respondent is not liable for unpaid medical treatment. Medical treatment claimant received from Dr. Hughes and Dr. Tonymon was unauthorized; therefore, respondent is not liable for payment of this medical treatment.

3. Claimant has met his burden of proving by a preponderance of the evidence that as a result of his compensable injury he is entitled to temporary total disability benefits beginning September 19, 1997 and continuing through April 1, 1998. Respondent is entitled to a credit for unemployment compensation benefits claimant received during this period of time pursuant to A.C.A. §11-9-506(b).

4. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a permanent physical impairment in an amount equal to 10% to the body as a whole. Accordingly, claimant is entitled to permanent partial disability benefits in an amount equal to 10% to the body as a whole.

5. Claimant has not been "made whole" by the proceeds of a third-party settlement; therefore, respondent is not entitled to a statutory lien on settlement proceeds from the third-party claim.

6. Respondent has controverted claimant's entitlement to all unpaid compensation benefits and on the amount of the lien requested of \$4,775.74.

#### FACTUAL BACKGROUND

The claimant is a 41-year-old man with an eleventh grade education. Throughout his adult life the claimant has primarily worked in the oil fields, construction, and in factories. In 1991 the claimant underwent surgery on his low back at L5-S1. Following that procedure claimant was released without restrictions. At some point in time the claimant went to work for the respondent, which constructs rural water systems, as a backhoe operator and laborer. Claimant was paid \$9.00 per hour by the respondent and \$13.50 per hour for overtime. In addition, claimant also owned his own backhoe which the

respondent rented at the rate of \$35.00 per hour. Claimant was also paid mileage to haul the backhoe.

On May 22, 1997 after cleaning a job site claimant was in the process of leaving in a truck owned by the respondent and pulling a trailer he owned. As claimant was turning the vehicle and trailer around he was rear-ended by a school bus from the Booneville School District.

Claimant was taken to the emergency room the next day for medical treatment. Claimant testified that he was only in western Arkansas to work and that his home was in northeast Arkansas. As a result, after claimant received medical treatment from the emergency room he returned home to northeast Arkansas where respondent sent him to Dr. Ray Tyrer for medical treatment. Claimant testified that he saw Dr. Tyrer on four to six occasions over the course of a month. While claimant continued to receive medical treatment he also continued working for respondent until September 19, 1997. On that date the claimant was working for respondent in Hot Springs and informed Jack Hitt, the owner of the respondent, that his back was hurting and that he needed to sit. According to claimant Hitt stated that this was unacceptable and terminated the claimant's employment the next day.

After claimant's termination he sought medical treatment from Dr. Tonymon, a neurosurgeon, who diagnosed claimant as suffering from a disc herniation at the L5-S1 level. Dr. Tonymon performed surgery on February 26, 1998 and released claimant to return to work with a 50-pound weight restriction on April 1, 1998.

Respondent initially accepted claimant's injury as compensable and paid some compensation benefits. As a result of claimant's accident, he filed a third-party claim against Farm Bureau Insurance, the insurance carrier for the Booneville School District. That case was settled for \$35,000.00. Respondent contends that it is entitled to a statutory lien in the amount of \$4,775.74 on settlement proceeds from the third-party claim for

benefits it previously paid to the claimant.

Claimant has filed this claim contending that respondent is liable for unpaid medical benefits, temporary total disability benefits, and permanent partial disability benefits. In addition, claimant also contends that respondent is not entitled to a statutory lien on the settlement proceeds from the third-party claim.

### ADJUDICATION

#### UNPAID MEDICAL.

Claimant seeks payment for unpaid medical treatment; specifically, Dr. Hughes and Dr. Tonymon who performed surgery on claimant's lumbar spine. A.C.A. §11-9-514 indicates that the employer has the right to select the initial primary care physician. That statute also sets out the procedures to be followed by a claimant for changing physicians. Subsection (b) of §11-9-514 states that treatment or services furnished by any physician other than the one selected according to the statute will be at the claimant's expense unless emergency treatment is involved.

In this particular case, claimant was sent to Dr. Tyrer by the respondent. The documentary evidence contains Form N which was completed and signed by the claimant on May 23, 1997. Although the date next to claimant's signature does not indicate the year 1997, claimant testified that he completed this form within a week of his accident. Form N notifies claimants of the procedure to be followed in order to change physicians. There is no evidence that claimant requested a change of physicians from the Commission. Instead, claimant on his own sought medical treatment from his family physician, Dr. Hughes, who referred claimant to Dr. Tonymon. Although claimant did not see Dr. Tonymon until January 1998, a medical report from Dr. Hughes dated May 27, 1997, only four days after the claimant's injury, indicates that claimant is requesting a referral to a neurosurgeon and that referral was made to Dr. Tonymon. According to the

medical report of Dr. Tonymon dated January 15, 1998, claimant saw Dr. Tyrer in May only because he could not get an appointment with Dr. Tonymon sooner.

In summary, A.C.A. §11-9-514 gives the employer the right to choose the initial treating physician. If a claimant desires medical treatment from another physician, a change of physician request must be filed. Any medical treatment provided without following the change of physician procedures is at the claimant's expense. Here, claimant completed Form N notifying him of the change of physician procedures. Claimant was sent by respondent to Dr. Tyrer for medical treatment and on his own sought additional medical treatment from Dr. Hughes and Dr. Tonymon without filing a change of physician request. This medical treatment from Dr. Hughes and Dr. Tonymon was unauthorized and therefore is not the responsibility of the respondent.

#### TEMPORARY TOTAL DISABILITY.

Claimant requests temporary total disability benefits beginning September 19, 1997 and continuing through April 1, 1998. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity of earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

I find after reviewing the evidence in this case that claimant has met his burden of proof. First, I believe that the medical records support a finding that claimant remained within his healing period throughout the requested period of time. Although claimant continued to work after his injury on May 22, 1997, claimant testified that he continued to have a great deal of pain which caused him to take frequent breaks. As a result of claimant's continued complaints of pain he eventually sought medical treatment on his own from Dr. Tonymon who diagnosed claimant as suffering from a herniated disc and

performed surgery on February 2, 1998. I find based upon claimant's testimony and more importantly the medical evidence that claimant remained within his healing period from September 19, 1997 through April 1, 1998.

I also find that claimant suffered a total incapacity to earn wages from September 19, 1997 through April 1, 1998. Although claimant had continued to work for the respondent after his compensable injury, claimant was terminated by the respondent on or about September 19, 1997 because he was physically unable to perform his job. Claimant testified that on that date he was attempting to work but that his back was hurting and he informed Jack Hitt, the owner of the respondent, that he needed to sit and rest for a few moments. Claimant testified that Hitt stated this was unacceptable and terminated claimant's employment the next day. Claimant did not work for any employer between that date and April 1, 1998. On April 1, 1998 claimant was released to return to work by Dr. Tonymon. I find based upon claimant's testimony as well as the medical records that claimant suffered a total incapacity to earn wages beginning on or about September 19, 1997, the date of his termination by the respondent, and continuing through April 1, 1998, the date claimant was released to return to work by Dr. Tonymon.

During the period of time for which claimant requests temporary total disability benefits claimant applied for and received unemployment compensation benefits at the rate of approximately \$200.00 per week. Respondent is entitled to a credit for these benefits pursuant to A.C.A. §11-9-506(b). For those weeks claimant received unemployment compensation benefits during the period of September 19, 1997 through April 1, 1998, respondent is liable for the difference between claimant's weekly unemployment benefits and his compensation benefits of \$240.00 per week.

#### PERMANENT PARTIAL DISABILITY.

Claimant also contends that as a result of his compensable injury he is entitled to

permanent partial disability benefits. In a letter report dated August 12, 1998, Dr. Tonymon assigned the claimant a permanent physical impairment rating in an amount equal to 10% to the body as a whole based upon the Fourth Edition of the AMA Guides. Dr. Tonymon also stated in that letter report that the claimant's injury was the precipitating event which required surgery. Dr. Tonymon also stated that the major cause of claimant's surgery was the accident and that his opinion was within a reasonable degree of medical certainty.

Although Dr. Tonymon's medical treatment was unauthorized, his medical opinion may still be considered. I find that the opinion of Dr. Tonymon is credible and entitled to great weight. Based upon the opinion of Dr. Tonymon, I find that claimant is entitled to permanent partial disability benefits in an amount equal to 10% to the body as a whole as a result of his compensable injury.

#### RESPONDENT'S ENTITLEMENT TO A STATUTORY LIEN.

Respondent contends that it is entitled to a statutory lien in the amount of \$4,775.74 on settlement proceeds claimant received from a third-party claim. As previously noted, claimant filed a third-party claim against Farm Bureau Insurance, the insurance carrier for the Booneville School District. That claim was eventually settled for \$35,000.00. From that \$35,000.00 claimant paid his attorney a fee of one-third, leaving a net settlement to the claimant of approximately \$23,333.00. Respondent contends that it is entitled to a statutory lien pursuant to A.C.A. §11-9-410 for workers' compensation benefits it previously paid to claimant. Under the provisions of A.C.A. §11-9-410, a respondent is only entitled to a statutory lien if it is determined that the claimant has been "made whole" by the third-party action. *General Accident Insurance v. Jaynes*, 343 Ark. 143, 33 S.W. 3d 161 (2000). In order to determine whether claimant has been "made whole" by the proceeds of a third-party settlement the Commission must compare the amount of compensation benefits

received by the claimant with the total amount of damages incurred including expenses in the third-party action. A respondent can receive reimbursement only for the amount by which the sum received in the third-party action exceeds the total amount of damages incurred. *McDonald v. Logan County*, Full Commission Opinion filed June 17, 2004 (F103875); *Gerald James v. Phillip Morris*, Full Commission Opinion filed October 24, 2001 (E713387). In this particular case, I find that the sums received by the claimant in the third-party action do not exceed the total amount of damages incurred by the claimant.

First, as previously noted, the claimant settled his third-party claim for \$35,000.00 and paid his attorney a fee of one-third, leaving claimant with a net settlement of \$23,333.00.

I have previously found that the medical treatment claimant received from Dr. Hughes and Dr. Tonymon was unauthorized; therefore, claimant will be responsible for payment of that medical treatment. Claimant introduced documentary evidence indicating that he had total medical expenses in the amount of \$11,334.46. In addition, claimant also testified that he had lost wages and money related to the rental of his backhoe in the amount of \$18,000.00 to \$19,000.00. Claimant has recovered a portion of his lost wages since he has been awarded temporary total disability benefits. However, claimant has not received any reimbursement for the loss of rental on his backhoe. Documentary evidence from the respondent employer indicates that from February 1996 through July 1997 claimant earned \$24,918.00 in backhoe rental monies. This equates to \$1,661.12 per month. Claimant has not received reimbursement for any of these monies.

Furthermore, at the time of the accident the claimant was pulling his own trailer which was struck by the school bus. Claimant testified that the trailer was totaled and was worth approximately \$4,000.00.

Based upon the foregoing, I find that the third-party settlement did not make the claimant whole. Claimant's net settlement amount equals \$23,333.00. Claimant is

responsible for \$11,334.46 in medical expenses. Claimant has also lost his trailer which was worth \$4,000.00. Claimant has also lost money he earned from rental of his backhoe which exceeded \$1,660.00 per month. Finally, even though claimant was awarded temporary total disability benefits, workers' compensation pays only two-thirds of the claimant's average weekly wage. Therefore, claimant still has lost wages as a result of his compensable injury.

Based upon the foregoing, I find that claimant has not been made whole as a result of his third-party settlement; therefore, respondent is not entitled to a statutory lien pursuant to A.C.A. §11-9-410.

#### AWARD

Respondent is not liable for payment of unpaid medical treatment. The medical treatment claimant received from Dr. Hughes and Dr. Tonymon was unauthorized. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 19, 1997 and continuing through April 1, 1998. Respondent is entitled to a credit for unemployment compensation benefits claimant received during this period of time. Claimant has also met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 10% to the body as a whole. Respondent has controverted claimant's entitlement to all unpaid compensation benefits. In addition, I also find that respondent is liable for payment of an attorney fee on the amount of the statutory lien it sought from the third-party settlement.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. 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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE