

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E401630

**MICHAEL H. MORTON,
EMPLOYEE**

CLAIMANT

**MOUNT HOLLY SCHOOL DISTRICT,
EMPLOYER**

RESPONDENT

**ARKANSAS INSURANCE DEPT.;
PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED DECEMBER 7, 2004

Hearing conducted July 27, 2004, before Administrative Law Judge C. Michael White in El Dorado, Union County, Arkansas, with

Mr. Ronald L. Griggs, Attorney at Law, El Dorado, Arkansas, appearing for the claimant and

Mr. Richard S. Smith, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for additional temporary total disability benefits related to surgery that he contends is attributable to his compensable low back injury of October 29, 1992.

Specifically, the claimant contended that he should receive additional temporary total disability benefits from the date of surgery, May 14, 2002, until the date of the hearing July 27, 2004. An attorney's fee for controversion was also requested. Other possible issues are considered reserved.

The respondents contended that the requested period of temporary total disability is not compensable because the surgery causing it was not necessarily a direct result of the claimant's compensable injury, but resulted from some of his intervening activities.

Procedurally, this case is considered pursuant to the Commission's Order of Remand dated June 5, 2002.

Previously a hearing had been conducted before Administrative Law Judge, now Commissioner, Karen McKinney January 17, 2002, in order to determine the extent of the claimant's permanent disability. After that hearing, it became known to the parties that additional surgery would be necessary for the claimant. This information had not been available to Judge McKinney and her Opinion of March 1, 2002, concerning permanent disability, was vacated as premature due to the possibility of an additional period of temporary total disability.

A second hearing was then conducted before Administrative Law Judge C. Michael White July 27, 2004. On October 18, 2004, the file was transferred to the present Administrative Law Judge. Thereafter, on November 19, 2004, the evidence of record was included with the file, so that the case was submitted for decision on the narrow issues as defined by Judge White and the parties at the July 27, 2004, hearing.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Pursuant to the stipulations of the parties and the record, the Arkansas Workers' Compensation Commission has jurisdiction of this claim; the claimant was an employee of Mount Holly School District when he sustained a compensable injury October 29, 1992; and his average weekly wage then was \$619.60.

2. The preponderance of the evidence shows that, as a result of the claimant's compensable injury, he was within a healing period and totally incapacitated to earn wages so that

he is entitled to additional temporary total disability benefits for a period beginning with the date of surgery, May 14, 2002, and continuing until the date of the hearing, July 27, 2004.

3. The evidence fails to reveal that the claimant's temporary total disability status or the related surgery was the result of an independent intervening cause.

4. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

On October 29, 1992, the claimant, a principal for the Mount Holly School District, suffered an admittedly compensable injury to his low back when he slipped and fell on a wet cafeteria floor. After initial conservative care proved unsuccessful, the injury required surgery at L3-4 and L4-5, performed January 24, 1994, by Dr. Richard D. Peek, and followed by serious complications, the development of infectious discitis which, in turn, required additional surgery, an anterior lumbar fusion at L3-4 and L4-5, performed August 22, 1994, by Dr. Peek. Once again, the result was not optimal and healing took longer than the one year process previously predicted by Dr. Peek in a note dated May 6, 1994. (2002 Tr., Jt. Ex. at 17). Indeed, by August, 1995, a note indicated that the fusion had still not healed. The extensive medical record shows that the healing from the surgeries was gradual at best and a February 4, 1997, note from Dr. Jeffrey K. Ketcham remarked that on January 21, 1997, Dr. Peek had commented that an MRI showed the L4/5 has clearly fused, L3/4 is gradually incorporating.

The claimant also received care from other physicians, such as Dr. Ketchum, who described the claimant's condition as failed back surgery syndrome with elements of lumbar spine changes and

degenerative postoperative changes and arachnoiditis. The claimant also had experienced pre-existing left knee problems and related surgery and subsequently developed pathology at T10-11, which has been treated surgically, its possible compensability yet to be addressed by the parties. Additional studies have indicated that the claimant's low back condition included narrowing at L5-S1.

At the time of the hearing before Judge McKinney, the record, including the medical record, reveals a long period of medical care with less than optimal results for the claimant, in spite of pain management therapy, medication, and surgery. Also presented in evidence were the testimony of the claimant and Linda Corpier, surveillance videotapes of the claimant, and the report of an evaluation by Dr. Jim J. Moore, including his opinion of the videotapes. However, following the hearing, the claimant underwent the unexpected additional surgery May 14, 2002, and an associated period of temporary total disability, so that it was necessary to remand the matter for the additional hearing conducted July 27, 2004.

The respondents do not deny that the claimant has experienced additional temporary total disability status as a result of the 2002 surgery. They merely contend that the surgery itself is not properly attributable to the claimant's underlying compensable injury but was the result of an independent intervening cause. In reference to the additional surgery, respondent's counsel explained, "...This was not necessarily a direct result of his injury way back in 1992, but resulted from some of his intervening activities. That's the basis...." (2004 Tr. at 10.) On the other hand, the claimant has not requested medical benefits for the surgery itself, even though Dr. Peek is an authorized physician. In the words of Judge White, "And just for clarification, the only issue we

have today is the TTD. There is no issue regarding the medical treatment or permanency or anything else, correct?" (2004 Tr. at 31.)

Temporary total disability occurs when the claimant is totally incapacitated to earn wages during the healing period resulting from a compensable injury. Arkansas State Highway and Transportation Department v. Breashears, 272 Ark. 242 (1981). Additional temporary total disability periods may occur where the claimant undergoes separate distinct healing periods and associated total incapacity to earn wages. Elk Roofing Co. v. Pinson, 22 Ark. App. 191 (1987).

The record developed before Judge White confirmed the claimant's status as temporarily totally disabled following his 2002 surgery. At that hearing, the claimant testified on cross-examination that on a typical day it was necessary for him to lie down all day because of his severe pain and that he could hardly function or walk at the time of the hearing, even though he did live alone and was able to drive to the hearing. On direct examination, he testified that he was taking numerous medications, including Methadone, Lorcet, or Hydrocodone for migraines, something for sleeping, anti-inflammatories, Prozac, Phenergan, and Zantac. He also stated that in the past year he had to go to the emergency room several times because his nausea had gotten to the point where he could not stop throwing up. He stated that he had not been released from medical care from the May, 2002, fusion surgery and, further, that this surgery had "broke loose" in May, 2003.

The medical record in evidence shows, for example, a continuing healing period and that Dr. Peek was "watching" the L5-S1 fusion surgery according to his letter of April 16, 2004. In a letter dated March 2, 2004, he stated that the claimant was not at maximum medical improvement and was totally disabled from employment. In a note dated March 20, 2003, Dr. Peek indicated that

the claimant was healing from his lumbar fusion, was disabled from employment, and under active medical treatment.

As contended by the respondents, the Act provides that benefits are not payable for a condition resulting from a non-work-related independent intervening cause, which causes or prolongs disability or a need for treatment after a compensable injury and, further, specifies that such an intervening cause does not require negligence or recklessness on the part of the claimant. Ark. Code Ann. §11-9-102(4)(F)(ii). It has been held that there is no independent intervening cause unless it is triggered by activity of the claimant that is “unreasonable” under the circumstances. Davis v. Old Dominion Freight Line, 341 Ark. 751 (2000).

The issue of an independent intervening cause relates to a discrete incident that might have interrupted the causal connection with the compensable injury. See, e.g., Burks, Inc. v. Blanchard, 259 Ark. 776 (1976) (where the claimant slipped and fell a distance of eight feet after recovering from his compensable injury); Aluminum Co. of America v. Williams, 232 Ark. 216 (1960) (where there was no independent intervening cause of subsequent injury when, off work, the claimant arose from a chair and got a “catch” in his back which caused him to give up his work.) However, in this case, there has been no proof that such a possible incident or event has occurred.

On this point, the respondents refer to evidence developed at the hearing on January 17, 2002, which included videotapes of the claimant’s activity with his son and his father. At that time, the evidence was presented to demonstrate the claimant’s ability to work and function since the issue was the extent of his permanent disability. In a letter dated May 6, 1999, and included in the record of the January 17, 2002, hearing, Dr. Jim J. Moore stated that he had reviewed the videotape evidence and the individual he presumed to be the claimant moved around with excellent fluidity,

with good range of motion and without any evidence of compromise as far as these physical activity levels were concerned. Dr Moore also discussed the claimant's low back problems and, then went on to state that there was a question that his thoracic problems were associated with the 1992 injury, but never questioned the link between the claimant's low back problems and his compensable injury. The May, 2002, surgery now in question dealt with the low back and not the thoracic spine.

Respondents now refer to the videotape evidence as showing a possible reason for his additional surgery and the resulting temporary total disability status, rather than demonstrating ability. In that regard, the current transcript contains a copy of a letter to Dr. Moore from respondent's counsel dated July 22, 2004, which bears handwritten responses from Dr. Moore. The letter refers to the videotape evidence previously reviewed by Dr. Moore in 1999 to assess the claimant's ability to work but now asks if he would have recommended that kind of activity for the claimant, to which Dr. Moore replied, "Only with great care." The letter then asks of Dr. Moore, "...as to whether the activities of the sort that you observed were likely to have contributed in a subsequently way to the claimant's development of symptoms of L5-S1?" Dr. Moore's response was, "Possibly."

The record also contains a letter from Dr. Peek dated March 21, 2002, indicating that he too had reviewed the videotape evidence and discussed with the claimant activities including trying to participate in some physical activities where he could, including fishing, if possible, on good days to aid in helping prevent suicide. Previously, in a letter dated May 15, 2000, Dr. Peek had indicated that he had not seen anything on the tape which was not within the claimant's restrictions and that the claimant does have good and bad days and that Dr. Peek had explained to him that on his good days he should do what he is able to do. Neither Dr. Moore nor Dr. Peek wrote that the videotapes

showed that the claimant suffered another specific injury, in addition to his original compensable injury, or that such an additional incident of injury was the result of activity that was “unreasonable.”

Furthermore, the evidence presented at the hearings on January 17, 2002, and July 27, 2004, does not reveal a specific independent intervening event, incident, injury, or cause of the claimant’s need for the 2002 surgery that has resulted in his temporary total disability status. The videotape evidence does not show such an event. Letters from Dr. Moore and Dr. Peek do not mention such an incident in their review of that evidence. The testimony does not reveal the existence of such an incident. At best, Dr. Moore is invited to speculate that some other unspecified activity of the sort revealed in the videotape evidence was likely to have contributed to the development of symptoms at L5-S1. Nevertheless, such speculation and conjecture that an incident may have occurred is not a satisfactory demonstration that such an incident did occur, was “unreasonable,” and did in fact interrupt the causal connection with the claimant’s compensable injury. A mere suspicion of an event and a possibility of a contribution from an unproven incident is not sufficient.

Respondents also question whether the surgery was “necessarily a direct result” of the compensable injury. However, in 1992, Ark. Code Ann. §11-9-508 did not demand a “direct” connection but merely required that medical care be reasonably necessary “for” and, now, “in connection with” the compensable injury, since amended by §19 of Act 796 of 1993. Moreover, the record, including the correspondence from Dr. Peek as well as from Dr. Moore, is persuasive that the claimant’s low back problems and this surgery are sufficiently related to his compensable injury and fails to reveal a connection with the speculated but unidentified independent intervening cause. At this time, however, compensability of the surgery itself is considered an issue reserved for another occasion.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge