

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301768

VICTOR SALLEE

CLAIMANT

SMITH CHEVROLET

RESPONDENT

RISK MANAGEMENT SERVICES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 24, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,  
Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held in the above styled claim on January 20, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on September 24, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the claimant withdrew, without objection, the issue of his entitlement to additional temporary total disability benefits. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On February 10, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly wage is \$862.28, and the corresponding weekly compensation rates are \$440.00 for total disability benefits and \$330.00 for permanent partial disability benefits.
3. On February 10, 2003, the claimant sustained compensable injuries to his left shoulder and lower back.
4. There is no dispute over the payment of medical expenses, accruing through

March 31, 2003.

5. There is no dispute over the payment of temporary total disability benefits accruing through March 31, 2003.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical services after March 31, 2003.
2. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a) beginning on May 5, 2003.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he is entitled to benefits pursuant to Ark. Code Ann. §11-9-505(a) from May 5, 2003 for a period of time not to exceed one year. The claimant contends that although he was capable of returning to work on May 5 and has continued to be capable to return to work the respondents failed and refused to allow him to return to work, without good cause, although they had work available as evidenced by the testimony of one of their representatives in an unemployment hearing and as evidenced by a want ad that appeared in the Times Record on May 10, 2003, wherein the respondent employer advertised an open job position for an auto body technician."

In regard to these issues, the respondent contends:

"Respondents contend that all appropriate benefits have been paid in this matter and that additional treatment is no longer reasonable and necessary. Further, any physical complaints the claimant has are due to a pre-existing condition for which the respondents should not be liable."

## DISCUSSION

### I. LIABILITY FOR MEDICAL EXPENSES INCURRED AFTER MARCH 31, 2003

\_\_\_\_\_The first issue concerns the claimant's entitlement to additional medical services, after March 31, 2003. Obviously, the claimant is entitled to "reasonably necessary medical

services” for his compensable injury, Ark. Code Ann. §11-9-508. However, the burden rests upon the claimant to prove that any services actually received or recommended constitute “reasonably necessary medical services”, within the meaning of this subsection.

On March 31, 2003, Charlotte Flanagan, the claims specialist for the respondent’s TPA, sent the following correspondence to the claimant:

“This is to advise you that as of the date of this letter [we] have denied your above captioned claim in its entirety and will no longer be paying any benefits. After a recent review of your file it has been determined that there are no objective findings of an injury. We have agreed to pay the authorized medical treatment up to March 31, 2003.”

The respondent’s correctly decided to abandon this reason for “controverting the claim in its entirety”. Clearly, the medical evidence presented contains ample “objective findings” to support the actual existence of a physical injury to his low back or lumbar spine. The initial lumbar MRI was interpreted by the radiologist as showing mild bulging of the annulus (disc) at L5-S1. On March 31, 2003, Dr. George Howell, Sr. notes that he observed the presence of lumbar muscle spasms on his physical examination of the claimant (Respondent’s Exhibit No. 1, page 29). The initial MRI (performed on March 6, 2003), and a subsequent MRI (performed in November of 2003) was interpreted by Dr. Anthony Capocelli as showing an “annular tear”, in addition to the previously noted “bulging” of the annulus.

In their current contentions, the respondent now concedes that the claimant sustained a “compensable injury” to his back. However, they continue to deny liability for additional medical services (after March 31, 2003), on the basis that these services were necessitated by or related to only the claimant’s pre-existing degenerative condition and were in no way necessitated by or related to his stipulated compensable injury.

In order to meet his burden, the claimant must prove two facts. First, he must show that the disputed medical services were necessitated by or related to his compensable injury. Secondly, he must show that these services have a reasonable expectation of

accomplishing the purpose for which they were or are intended.

The medical evidence shows that on the date the respondent denied continuing liability for the expense of medical services, the claimant was still under active medical treatment for his compensable injury by his original authorized physicians. This medical treatment was being provided by and at the direction of Dr. Terry Brackman and Dr. George Howell, Sr. (one page of a two page narrative report dated February 27, 2003- Respondent's Exhibit No. 1, page 23-appears to have the type font and format used by Dr. Howell, rather than those used by Dr. Brackman). Dr. Howell is an associate of Dr. Brackman, and both are family practice physicians. When claimant was seen on March 31, 2003, his medication was continued and he was directed to return for follow up evaluation in one month.

Following the respondent's refusal to provide further medical services, the claimant consulted Dr. Greg Jones for his continuing symptoms. Dr. Jones is an orthopaedic surgeon. He had previously treated the claimant for shoulder difficulties, which predated the compensable injury involved in this claim. Dr. Jones provided the claimant with some conservative medical treatment for his continuing symptoms. This treatment was in the form of medication and a regimen of physical therapy. These are commonly accepted as appropriate treatment modalities for injuries such as those experienced by the claimant and were consistent with the ongoing treatment which the claimant had been receiving from Dr. Brackman and Dr. Howell. Further, it appears that the claimant actually experienced some relief from his symptoms, as a result of this continuing conservative care.

Thus, I find that the medical services rendered to the claimant for his left shoulder and back injury complaints by and at the direction Dr. Greg T. Jones, on and after April 9, 2003, constitutes "reasonably necessary medical services", Ark. Code Ann. §11-9-508. The expense of these services is the liability of the respondent herein, subject to the

medical fee schedule established by this Commission.

However, the medical evidence implies that the claimant also continued to consult Dr. Brackman for various complaints. The notation by Dr. Brackman, dated August 12, 2003, indicates that he saw the claimant for bilateral knee and neck pain, as well as right shoulder difficulties. This report also indicates that the claimant had been continuing to receive medication through Dr. Brackman, with the last prescription (prior to this visit) being given on July 22, 2002. However, in this report there is no indication given concerning the type of medication prescribed or the purpose it was prescribed. There is also no mention in this report that the claimant was provided with any medical services for either his compensable left shoulder injury or his compensable lower back complaints.

Thus, the claimant has failed to prove that these services were necessitated by or connected with his compensable injuries. The respondent would not be liable for any expense incurred for services provided, in regard to these non compensable difficulties and complaints.

The claimant was next seen for increased lower back difficulties by Dr. Terry Hoyt, a family practitioner. The only records of Dr. Hoyt, which have been introduced, consist of two brief notations, which are handwritten on prescription forms. The first of these notations is dated October 21, 2003. In this notation, Dr. Hoyt states that the claimant has experienced a worsening of his low back difficulties and requires a repeat MRI study of the lumbar spine. In the second undated notation, Dr. Hoyt indicates that the claimant's increased low back pain is related to his February 10, 2003 compensable back injury (although this notation is undated, it was obviously made subsequent to the notation of October 21, 2003, as the heading indicates that Dr. Merle and Dr. Von Phomakay were no longer associated with the facility).

Except for the repeat lumbar MRI, performed in November of 2003, it is difficult to ascertain from Dr. Hoyt's rather sketchy records exactly what medical services he provided

the claimant for his reported back difficulties. Following the MRI study, Dr. Hoyt referred the claimant to Dr. Anthony Capocelli, a neurosurgeon.

In his report of January 6, 2004, Dr. Capocelli diagnoses the claimant's continuing back difficulties as being attributable to an "annular tear", which is separate and distinct from the previously noted disc bulging. Dr. Capocelli also opines that this condition represents a traumatic injury that occurred shortly prior to the initial MRI study in March of 2003. He states that the initial MRI in March of 2003, showed that the claimant "clearly had edema at the edge of the disc consistent with an annular tear of an acute nature at that time". The subsequent MRI apparently revealed no new injury or defect, but showed only healing of the annular tear. Finally, he recommended that the claimant permanently refrain from engaging in heavy physical labor and to continue his anti-inflammatory medications.

The fact that the claimant's lower back difficulties substantially improved and then worsened would make the second MRI, requested by Dr. Hoyt, reasonably and medically appropriate, in order to determine if this increase in lower back symptoms was the result of a new and more recent injury or was a continuation or reoccurrence of the compensable back injury of February 10, 2003. This test accomplished its purpose, by showing no new damage or showing change from the prior study (except healing of the annular tear). Dr. Capocelli is a highly competent neurosurgeon with a great deal of expertise in the area of medicine associated with lumbar injuries and complaints. I find his opinions to be persuasive.

The greater weight of the evidence establishes that the medical services provided the claimant for his low back difficulties, by and at the direction of Dr. Hoyt and Dr. Capocelli were necessitated by or related to the claimant's initial compensable back injury of February 10, 2003. The medical services provided by and at the direction of these physicians (in the form of examinations, testing, and continued conservative treatment) were medically appropriate and reasonable. The repeat MRI study and the evaluation by

Dr. Capocelli have clearly accomplished the purposes which were intended.

Therefore, the medical services provided to the claimant for his lower back difficulties by and at the direction of Dr. Hoyt and Dr. Anthony Capocelli represent “reasonably necessary medical services” for his compensable low back or lumbar injury of February 10, 2003. Pursuant to Ark. Code Ann. §11-9-508, the expense of these services is the liability of the respondent (subject to the medical fee schedule established by this Commission).

## II. ARK. CODE ANN. §11-9-505(a)

The remaining issue concerns the claimant’s entitlement to benefits under the provisions of Ark. Code Ann. §11-9-505(a). The claimant seeks these benefits beginning on May 5, 2003. The burden rests upon the claimant to prove his entitlement to these benefits.

Ark. Code Ann. §11-9-505(a) states:

“(1) Any employer who without reasonable cause refuses to return an employee who was injured in the course of employment to work, where suitable employment was available within the employee’s physical and mental limitations, upon order of the Workers’ Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between the benefits received and the average weekly wages lost during the period of the refusal, for a period not to exceed one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control. “

Thus, in order to prove his entitlement to benefits under this subsection, the claimant

must show by the greater weight of the evidence:

- (1) The respondent had employment available, which was within his physical and mental limitations;
- (2) The respondent refused, without reasonable cause, to return him to such a position.

There was no only evidence presented by the claimant, in regard to an available employment, concerns his preinjury position with the respondent.

The claimant testified that this position, as an auto body repairman, involved frequent lifting and carrying heavy objects. He further indicated that this job also involved bending, stooping, and twisting.

Clearly, the claimant had the mental abilities and expertise to perform this position. However, the greater weight of the credible evidence clearly shows that this position was not within his “physical” limitations.

The claimant initially testified that he could have done the work required by this position from on May 5, 2003 through the present date. However, he also testified that he did not believe he could perform these duties for a full eight hour day. He further stated that whenever he has tried to perform “physical labor” his back symptoms would increase. His inability to lift and carry any significant weight was the reason for his quitting the position he obtained after he was terminated by the respondent.

The medical evidence shows that the claimant was released by Dr. Jones to return to work, without restriction, on May 5, 2003. However, this release appears to be based primarily upon the claimant’s purported statement that his back was “much better” and that he, personally, believed he could perform his regular job duties. More importantly, this release presumes that the only injury the claimant sustained to his lumbar spine (in the employment related incident on February 10, 2003) was a minor strain or sprain.

The subsequent medical evidence establishes the existence of a more severe injury, in the form of an annular tear. Dr. Capocelli has clearly expressed the opinion that this more substantial injury would prevent the claimant from performing heavy manual labor, particularly the claimant’s “pre-morbid work duty”. The increase in the physical restrictions imposed by Dr. Capocelli ( over those imposed by Dr. Jones), is not due to any change or increase in the nature or magnitude of the physical damage to the claimant’s

lumbar spine. Instead, this difference in the physical restrictions, between these two physicians, is simply the result of differing diagnoses of the nature and extent of the claimant's initial compensable injury. I find that the diagnosis made by Dr. Capocelli is entitled to the greater weight and credit. Thus, the physical restrictions and limitations imposed by Dr. Capocelli, on January 6, 2004, would have been appropriate on all dates since the initial compensable injury on February 10, 2003.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that the respondent has had suitable employment available, which was within his physical limitations. Therefore, he has failed to prove his entitlement to benefits under Ark. Code Ann. §11-9-505(a).

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 10, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On February 10, 2003, the claimant earned an average weekly wage of \$862.28. This wage would yield corresponding weekly compensation rates of \$440.00 for total disability and \$330.00 for permanent partial disability.
4. On February 10, 2003, the claimant sustained compensable injuries to his left shoulder and lower back. The compensable injury to his lower back was in the form of a tear of the annulus of the L5-S1 intervertebral disc.
5. There is no dispute over the payment of medical expenses incurred for treatment of the claimant's compensable injuries through March 31, 2003. All such expenses have apparently been paid by the respondent.
6. The medical services rendered the claimant after March 31, 2003, for his left shoulder and back difficulties by and at the direction of Dr. Greg Jones, Dr.

Terry Hoyt, and Dr. Anthony Capocelli constitute “reasonably necessary medical services” for compensable injuries to these portions of the claimant’s body. Pursuant to Ark. Code Ann. §11-9-508, the expense of these services, (subject to the medical fee schedule established by this Commission), is the liability of the respondent herein.

7. The claimant has failed to prove by the greater weight of the credible evidence that since his compensable injury, the respondent has had any employment position available, which would be within his physical and mental limitations. Thus, the claimant has failed to prove his entitlement to benefits under Ark. Code Ann. §11-9-505(a).
8. The respondent has controverted the claimant’s entitlement to the payment of any medical expenses incurred after March 31, 2003, and his entitlement to benefits under Ark. Code Ann. §11-9-505(a).

#### ORDER

The respondent shall be liable for the expense of the medical services provided to the claimant for his compensable left shoulder and lower back difficulties, after March 31, 2003, by Dr. Greg Jones, Dr. Terry Hoyt, and Dr. Anthony Capocelli. This liability is limited to the medical fee schedule established by this Commission.

As no indemnity benefits or other benefits payable to the claimant have been awarded, no fee can be awarded to the claimant’s attorney.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG

## Administrative Law Judge