

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS F303229 & F309376

**BILLY DON TANNER,
EMPLOYEE**

CLAIMANT

**WESTLAKE TRUCKING INC.,
EMPLOYER**

RESPONDENT NO. 1

**FAIRFIELD INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 2

**FIRSTCOMP INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 3

OPINION FILED APRIL 5, 2004

Hearing conducted February 25, 2004, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas, appearing for the claimant,

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1, and

Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 2.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for additional temporary total disability benefits and medical care for one, or both, of two admittedly compensable injuries, the first occurring on March 14, 2003, when Fairfield Insurance Company provided coverage, and the second on August 22, 2003, when FirstComp Insurance Company provided coverage.

The claimant contended that he should be awarded additional temporary total disability benefits from the date following the termination of such benefits on November 3, 2003, until a date to be determined. He also requested additional benefits for medical care provided by Dr. David Oberlander. An attorney's fee for controversion was also requested. Other possible issues were

reserved. At the conclusion of the hearing, as an alternative position, claimant's counsel requested that responsibility be apportioned between the two insurance carriers.

Fairfield Insurance Company contended that the claimant was not entitled to additional benefits as a result of his first injury, since he returned to work and suffered a new injury August 22, 2003. Alternatively, Fairfield contended that the claimant's current problems are the result of his pre-existing back condition, primarily arising from a 1992 injury for which he received an impairment rating of 7%.

FirstComp Insurance Company contended that the claimant's August 22, 2003, injuries were merely a temporary exacerbation of his prior condition and that by November 3, 2003, when he was evaluated by Dr. Scott Schlesinger, the claimant could return to his regular job and had suffered no permanent impairment and had experienced no change in his condition as it existed after the prior injury of March 14, 2003.

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. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered compensable injuries, primarily to his back March 14, 2003, when coverage was provided by Fairfield Insurance Company, his average weekly wage was \$464.00, and for which he received an impairment rating of 5%; he again suffered compensable injuries August 22, 2003, when coverage was provided by FirstComp Insurance

Company and his average weekly wage was \$427.00; and payment of any additional benefit has been controverted by the parties respondent.

3. The preponderance of the evidence fails to show either that Dr. Oberlander's continuing care was reasonably necessary in connection with the claimant's compensable injuries or that, as a result of the compensable injuries, the claimant remained in a healing period and was totally incapacitated to earn wages so that he should receive additional temporary total disability benefits.

DISCUSSION

The claimant has requested additional temporary total disability benefits and medical expenses which he attributes to his compensable back injuries suffered during motor vehicle accidents in March and August, 2003, during his employment as a truck driver for the respondent employer. The question of his entitlement to the requested benefits is complicated by his history of previous back problems.

Thus, the record indicates that previously, on or about October 1, 1992, while working for American Transportation as a material handler and forklift driver in its warehouse, the claimant had suffered a low back injury which was the subject of a workers' compensation claim. During a hearing on that claim, on cross-examination, the claimant admitted that earlier, in August, 1988, while working for ConAgra, he had slipped and fallen, landing on his back, and was given medical care because of complaints of low back pain. After the 1992 injury, the report of an MRI scan of his lumbar spine dated February 12, 1993, included the following observations: a small broad based central and left protrusion at L4-L5 resulting in mild canal narrowing, with some narrowing as a result of a developmentally small canal; mild central disc protrusion at L5-S1 without significant

stenosis; and disc desiccation at L4-5 and L5-S1. A rehabilitation services record appearing at page 3 of Exhibit 1 of the Respondents indicates that the claimant had back pain, neck and shoulder problems. The record on the next page indicates that the claimant's pain was described as throbbing, aching, tight, tender, sharp, discomforting, pressing, pulling, miserable, and, on the next page, the claimant indicated that his pain varied from 4 to 7 on a scale of 0 to 10. On July 12, 1993, Dr. J. Todd Ghormley, the claimant's treating physician, rated his impairment at 7% to the body as a whole and recommended that the claimant consider retraining for more sedentary work with restrictions of probably not lifting more than 40 - 50 pounds and not bending excessively. Dr. Ghormley also stated that if the claimant was unable to return to work he may need to have a spinal fusion performed. On September 27, 1993, Dr. Ghormley wrote that as a result of the claimant's continuing pain since the October 1, 1992, injury, it was not very likely that he would be able to return to work at a job that required heavy labor or excessive lifting. He described his condition as a chronic lumbar sprain, facet syndrome, and degenerative disc disease at L4-5 and L5-S1.

The record also indicates that after the 1992 injury the claimant filed for Social Security Disability Benefits. During the current hearing, when cross-examined by Mr. Ryburn, the claimant testified that he was disabled and off work for three years because of the 1999 injury, a lower lumbar strain or sprain.

However, the effect of the 1992 injury on the claimant's ability to work, is complicated by the termination of his employment in March, 1994, by American Transportation. The claimant testified that, as a result of UAW litigation, he was reinstated as an employee around the end of 1995 and returned to work at American Transportation on the chassis line. On direct examination during

the current hearing, the claimant stated that he was having no back pain to speak of during that time and that he worked every day from that time until 2003 doing manual jobs.

In December, 2002, he went to work for Westlake Trucking, Inc., the respondent employer. During that employment, on March 14, 2003, while driving a truck hauling hardwood chips, he lost control of the vehicle, the trailer slipped over to the shoulder, flipped over, bringing the truck right behind it into the ditch. The claimant described the vehicle as “demolished”. He stated that he had a bruise on his right shoulder, was scratched up, and hurt his shoulder, neck, and back. The report of an MRI study of the claimant’s lumbar spine dated March 18, 2003, found that the claimant had an acute, but slight, compression fracture at L2; a small central protrusion at L4-5; right paracentral disc herniation at L5-S1; desiccation at L4-5 and L5-S1; and facet hypertrophy at multiple levels.

The claimant was treated conservatively for his injuries and returned to work in July, 2003, with a lifting restriction of no more than 10 pounds, according to the note of Dr. David Oberlander dated July 22, 2003. The claimant testified that after his return to work he missed one day to have a cortisone shot and then, on August 22, 2003, he was injured in a second motor vehicle accident when the brakes failed and his tractor trailer rig went out of control in a sharp curve, slid across the highway, jumped a culvert, and hit a tree.

He stated that before this incident he had some neck and shoulder pain but just kind of tolerated it and tried it for awhile to see if he was able to drive, but afterward was a lot worse in his neck, shoulders, and lower back. As a result of this injury, FirstComp Insurance Company provided the claimant additional medical care, including treatment by Dr. Oberlander.

On October 8, 2003, Little Rock neurosurgeon Dr. Scott M. Schlesinger wrote that he had previously examined the claimant in May, 2003, after his March motor vehicle accident and MRI

scans of the cervical and lumbar spine revealed only degenerative changes with mild bulging discs at C6-7 and L4-L5 and L5-S1. He stated that following the August, 2003, motor vehicle accident, MRI scans were repeated and had been reviewed by him and that he saw no change whatsoever in the lumbar MRI compared to the old MRI which he personally had reviewed and compared. On November 3, 2003, Dr. Schlesinger wrote that he examined the claimant again and that his complaints were the same concerning pain in his neck, back, thoracic area, and right side of his chest. He also stated that he had carefully reviewed the MRI scans of the cervical, thoracic, and lumbar spine independent of the radiologist and had compared this to the radiologist's interpretation and prior studies. He opined that the claimant had mild degenerative changes throughout the cervical, thoracic, and lumbar spine only. He stated that the so call annular tear on the MRI of the lumbar spine at L4-5 and L5-S1 are degenerative changes that were present on prior studies and that there was "absolutely nothing to suggest a new injury radiologically or by objective criteria." He also stated that the claimant's pain is suggestive of musculoskeletal pain. He suggested that the claimant return to his regular job without restriction and he saw nothing on which to base a permanent impairment rating. At this point, the claimant's temporary total disability benefits were terminated.

The claimant testified that his symptoms continued and the record shows that he was seen by Dr. Oberlander in November and again in January, 2004. Dr. Oberlander's reports from those visits are relatively similar in their wording except for the last two lines in the second paragraph of the history section, his blood pressure data, and the date for the claimant's return visit. In both, it was his opinion that the claimant should continue his medication and avoid work or lifting weight at home over five pounds.

After observing the claimant at the hearing and reviewing the medical record, the opinion of Dr. Schlesinger concerning the claimant's condition is found to be persuasive. This is particularly true in light of Dr. Schlesinger's careful review of the objective evidence, rather than merely relying upon the reports of the radiologists, and the claimant's subjective complaints. Moreover, the claimant's current complaints are remarkably like the ones that existed after his 1992 injury when, as he testified, he was off work for three years because of a lumbar strain or sprain, while resolving his previous case. On the other hand, Dr. Schlesinger stated that the MRI of the lumbar spine following the claimant's August, 2003, injury showed absolutely nothing to suggest a new injury radiologically or by objective criteria; that the claimant's pain was suggestive of musculoskeletal pain; and he returned the claimant to his regular job without restriction or permanent impairment. Thus, the preponderance of the evidence fails to show that the claimant's condition at that time was either disabling or such that additional treatment by Dr. Oberlander was reasonably necessary in connection with the claimant's compensable injuries.

For the foregoing reasons, these claims for benefits should be, and they are, respectfully denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge