BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102848

DANIEL WEAVER,
EMPLOYEE — CLAIMANT

MEYER ROOFING & SHEET METAL,
EMPLOYER — RESPONDENT NO. 1

UNITED PACIFIC INSURANCE CO.,
INSURANCE CARRIER — RESPONDENT NO. 1

SECOND INJURY FUND — RESPONDENT NO. 2

OPINION FILED OCTOBER 20, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 were represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 1, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on July 9, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. Employer-employee relationship existed on or about 12-6-99.
2. That the low back claim was accepted as compensable.
3. That some benefits have been paid.
4. The claimant earned $13.00 per hour at the time of his injury.

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

1. The claimant's average weekly wage at the time of his injury (i.e. whether or not the claimant was a full-time employee).
2. Whether or not the respondents have timely raised a contention that the claimant's L5-S1 disc abnormality occurred after his admittedly compensable low back injury.
3. If I find that Issue 2 was timely raised, the parties have agreed that I should enter an order so stating and permit the parties to obtain the

depositions of Dr. Williams and Dr. Calhoun on that issue.

4. If I find that the respondent's contention was not timely raised, the parties agree that I should render my findings based on the existing record as to whether or not Dr. Williams' proposed surgery is reasonably necessary for the claimant's admittedly compensable back injury.

The record consists of the September 1, 2004 hearing transcript and the exhibits contained therein, as well as the post-hearing briefs submitted by the parties.

DISCUSSION

1. Was the Claimant a full-time employee?

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a 40 hour week, a claimant must either actually have worked at least 40 hours per week or be bound by contract to work 40 hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993).

In the present case the claimant was a roofing supervisor over 20 employees when he injured his back. I find credible the claimant's testimony that he was told that he would work 40 hours per week, weather permitting, and I find credible the claimant's testimony that he was not in a position to take off work, because he had to be present on the job to supervise the crew. Under these circumstances I find that the claimant was bound by contract to work 40 hours per week if the work was made available. Therefore, I find that the claimant was a full-time employee. Accord Gill v. Ozark Forest Products, 255 Ark. 951, 504 S.W.2d 357 (1994); Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). By agreement of the parties, I therefore find that the claimant's average weekly wage was $347.00 per week.(See T. 49).

2. Did the Respondents timely raise a contention that the claimant's abnormality at L5-S1 occurred after his admittedly compensable low back injury?

Resolution of the timeliness of the respondents' new contention seems to me to be somewhat complicated by the lack of reports from Dr. Williams in the record. For example, Dr. Williams apparently ordered a CT-myelogram in late 2003 or early 2004 which apparently prompted Dr. Williams, at least in part, to schedule the claimant for surgery. However, the

CT-myelogram is not in our hearing record. Likewise, Dr. Williams' contemporaneous office visit reports, if any, are not in the record. The only report in the record from Dr. Williams' office is dated March 9, 2004, and while that report makes some passing reference to scheduling surgery on March 26, 2004, that report makes no reference as to the nature of the surgery or the level of the spine involved.

A letter from Dr. Bruffet dated April 21, 2004 makes reference to Dr. Williams' proposal for surgery, but likewise does not indicate the level of the spine to be operated upon, or even whether Dr. Bruffett was aware of what level of the spine that Dr. Williams intended to perform surgery upon.

On July 16, 2004, some seven days after I entered a prehearing order in this case on July 9, 2004, Dr. Calhoun sent a letter to attorney Andrew Ivey indicating that Dr. Calhoun had seen a copy of the CT-myelogram, and indicating Dr. Calhoun's understanding that Dr. Williams was suggesting a left L5-S1 diskectomy. Mr. Spencer's brief persuades me that the attorneys have submitted all available medical records.

Therefore, the preponderance of the evidence indicates that Mr. Ivey had no knowledge prior to July 16, 2004 of the

nature of the surgery that Dr. Williams proposed or the level of the spine affected.

Furthermore, Mr. Ivey indicated on the record that, after receiving Dr. Calhoun's July 16, 2004 letter, Mr. Ivey personally spoke with Mr. Spencer on the telephone and told Mr. Spencer that Dr. Williams was apparently treating a level of the spine (L5-S1) which Mr. Ivey felt was completely different from every level that has been documented as having a herniation. Mr. Ivey indicated at the hearing that he advised Mr. Spencer during the telephone conversation that his client's position was that this was a new herniation and that this was going to be the respondents' position for denying the treatment at issue. Mr. Spencer indicated at the hearing that he was unable to confirm or refute whether or not Mr. Ivey advised him of such during their conversation after Mr. Ivey received Dr. Calhoun's report.

Absent any specific contrary recollection by Mr. Spencer, Mr. Ivey's recollection persuades me that Mr. Ivey updated Mr. Spencer as to the respondents' contentions over the telephone when he received Dr. Calhoun's letter. Under these circumstances, I find that the respondents timely brought to Mr. Spencer's attention their contention that the abnormality at the L5-S1 level was a new herniation, and not

causally related to the original work injury. Because I find that the respondents timely raised this issue, by agreement of the parties, I am returning this case to the Commission's general files to permit Mr. Spencer to obtain Dr. Williams' deposition and Mr. Ivey to obtain Dr. Calhoun's deposition to address the respondents' contention that the L5-S1 herniation is not causally related to the admittedly compensable work injury.(See T. 22).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employer-employee relationship existed on or about 12-6-99.

3. That the low back claim was accepted as compensable.

4. That some benefits have been paid.

5. The claimant earned $13.00 per hour at the time of his injury.

6. The claimant has established by a preponderance of the evidence that he was a full-time employee. By agreement of the parties, I therefore find that the claimant's average weekly wage was $347.00.

7. I find that the respondents timely raised a contention that the abnormality at the L5-S1 level was a new herniation and not causally related to the original work

injury. By agreement of the parties, the issue of the respondents' liability for the surgery proposed by Dr. Williams is therefore reserved.

ORDER

The respondents are directed to provide the claimant corrected indemnity compensation payments in accordance with the findings of fact set forth herein. The claimant's attorney is entitled to the maximum statutory attorney's fee on the additional indemnity payments to which the claimant is entitled as a result of my findings regarding his average weekly wage, one-half of the fee to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715(1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

The parties shall contact the Clerk of the Commission upon completing the physicians' depositions.

IT IS SO ORDERED.

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MARK CHURCHWELL
Administrative Law Judge