

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308915

JAMES WHITE, Employee	CLAIMANT
CASTOR'S CAR CARE CENTER, Employer	RESPONDENT
FARMERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED DECEMBER 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On November 10, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 22, 2004, and a pre-hearing order was filed on that same date. 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 at all relevant times.
3. The claimant sustained a compensable injury to his head on July 18, 2003.
4. The claimant was earning an average weekly wage of \$360.00 which would entitle him to compensation at the weekly rates of \$240.00 for total disability benefits and \$180.00 for permanent partial disability benefits.

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

1. Temporary total disability benefits from April 11, 2004 through a date yet to be determined.

2. Additional medical treatment and evaluation, specifically a one-year follow-up battery of neurological/psychological tests.

3. Attorney fees.

4. Whether claimant was terminated with or without cause, as related to A.C.A. §11-9-505.

The claimant's contentions are set forth in his pre-hearing questionnaire which is attached as Exhibit Number 1 to the pre-hearing order.

The respondents contend they are not liable for any additional compensation benefits. Respondents contend they paid claimant temporary total disability benefits through April 12, 2004, and that claimant is not entitled to any temporary total disability benefits thereafter. Furthermore, with respect to the claimant's request for additional medical treatment in the form of a one-year follow-up battery of neuropsychological tests, respondent contends that it has not denied medical treatment and in fact agrees that a one-year neuropsychological evaluation should be performed as recommended by Dr. Bettye Back-Morse.

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 witnesses and to observe their 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 September 22, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary total disability benefits.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505.

4. By agreement of the parties, the claimant is entitled to a one-year follow-up battery of neuropsychological tests. I find that these tests should be conducted by a physician chosen by Dr. Michael Morse, claimant's last authorized treating physician.

FACTUAL BACKGROUND

The claimant is a 49-year-old man who has been a professional mechanic for more than 20 years. Claimant began working for the respondent as a mechanic during the week of July 17, 2003. Claimant suffered a compensable injury on July 17, 2003 when a car he was raising up with a pneumatic jack shifted and struck claimant on the right side of the head. Claimant apparently did not lose consciousness but was dazed and had some abrasions on his head.

This accident occurred on Friday and claimant testified that he primarily slept over the weekend and that he had a great deal of head pain. On Monday claimant informed Cheryl McGee, the owner of respondent, that he needed medical treatment. Claimant's initial medical treatment was with Dr. Berestnev on July 21, 2003. Dr. Berestnev diagnosed claimant as suffering from head trauma, neck strain, and lacerations of the scalp. Dr. Berestnev ordered a CT scan of the claimant's head and indicated that claimant should not work near or operate heavy machinery. In a report dated July 30, 2003, Dr. Berestnev noted that the CT scan revealed no abnormalities. Dr. Berestnev assessed claimant's condition as a head trauma with unsteadiness and neck pain. He ordered physical therapy, medication, and indicated that claimant should not work around moving machinery.

In a letter dated August 15, 2003, Dr. Berestnev indicated that after physical therapy claimant's neck pain had been alleviated. He noted that claimant still complained of

occasional headaches which were not out of the ordinary. He also noted that claimant complained of unsteadiness and memory problems. Dr. Berestnev indicated that he suspected that claimant might suffer from post-traumatic stress disorder. As a result, he referred claimant to Dr. Richard Back for a neuropsychiatric evaluation. Dr. Berestnev also indicated that claimant should avoid working in safety sensitive positions.

The neuropsychological evaluation was performed by Dr. Richard Back in August of 2003. Dr. Back's report indicates that he performed various neuropsychiatric tests which revealed no evidence of exaggeration or malingering. Dr. Back noted that claimant was functioning in the average range of intelligence, verbal intelligence, and performance intelligence. He noted that claimant's intellectual functioning was slightly below his reported educational history. Dr. Back also noted a mild decline in claimant's cognitive functioning. Dr. Back indicated in his report that claimant's deficits were relatively minor as far as head injuries go and noted that claimant's condition should improve significantly over the next twelve months. He did not state that claimant was incapacitated from working. However, he did note that claimant might not be a very good mechanic. Dr. Back placed restrictions on claimant's ability to work as a result of his evaluation.

Claimant did in fact return to work for respondent until some point in time at which he did not feel safe working as a mechanic. As a result, respondent began paying claimant temporary total disability benefits and continued to pay those benefits through April 11 or 12 of 2004.

Following his evaluation with Dr. Back claimant returned to Dr. Berestnev. As a result of claimant's continued complaints, Dr. Berestnev ordered an MRI scan which according to his report of September 9, 2003 revealed no abnormalities related to the injury. Because of claimant's continued complaints of unsteadiness, Dr. Berestnev referred claimant to Dr. Dickens, an ear, nose, and throat specialist. Dr. Dickens' report of October 23, 2003 reveals that his examination of the claimant's head and neck are

unremarkable. Dr. Dickens noted that claimant had vertigo consistent with his trauma and indicated that claimant's headaches may be related to the trauma, but that they may also be related to his vestibular system. Dr. Dickens recommended a physical therapy evaluation with someone skilled in vestibular rehabilitation and a neurological evaluation.

On December 2, 2003 claimant underwent an initial evaluation by Dr. Michael Morse, a neurologist. Dr. Morse diagnosed the claimant's condition as post-traumatic encephalopathy. Dr. Morse noted that the natural history is for these symptoms to improve. He agreed with Dr. Richard Back's opinion that claimant's deficits were relatively mild. He also noted that claimant's condition would gradually improve.

Claimant underwent a functional capacities evaluation on January 15, 2004. That evaluation indicates that claimant gave a full physical effort and indicated that claimant was capable of performing medium-type work. However, the evaluation also recommended that claimant not return to his previous occupation as an auto mechanic due to safety concerns involving his poor tolerance to low level work and work that involves bending or stooping repeatedly.

Following this functional capacities evaluation claimant was granted a change of physician by the Commission in an order dated February 5, 2004. Claimant was permitted to change physicians from Dr. Berestnev to Dr. Morse, a physician he had previously seen in December.

On March 15, 2004, claimant underwent a second neuropsychological evaluation from Dr. Bettye Back-Morse. Dr. Back-Morse's report of that date indicates that her analysis of consistency measures revealed invalid responses to non-verbal and verbal testing. She did opine that claimant suffered from a probable concussive disorder as a result of his accident, but that it was most likely that claimant's current complaints were the result of an exaggerated response to his injury. She recommended that claimant undergo a full battery of neuropsychological tests in twelve months. Dr. Back-Morse did not place

any limitations on the claimant other than to state that claimant should not drive.

On April 2, 2004, claimant returned to Dr. Michael Morse for follow-up treatment. Dr. Morse noted that he had nothing else to offer claimant for his post-traumatic headaches. He noted that claimant's condition would improve with time and he released claimant from his care as having reached maximum medical improvement with no restrictions.

Following claimant's visit with Dr. Morse on April 2, 2004, claimant returned to the respondent's place of business on April 9 to inquire about additional work. Cheryl McGee, the owner of respondent, was not present at that time and claimant was instructed to return on April 13. On April 13 the respondent terminated the claimant for failure to call in or show up for work following his release by Dr. Morse on April 2 until April 9.

Claimant has filed this claim contending that he is entitled to additional temporary total disability benefits subsequent to February 11, 2004. Alternatively, he seeks payment of benefits pursuant to A.C.A. §11-9-505. Finally, claimant has requested additional medical treatment in the form of a follow-up battery of neuropsychological testing.

ADJUDICATION

TEMPORARY TOTAL DISABILITY BENEFITS.

The claimant requests additional temporary total disability benefits beginning April 11, 2004, and continuing through a date yet to be determined. Claimant's compensable injury was an unscheduled injury. As such, 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 to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, even if I were to assume that claimant remained within his

healing period subsequent to April 11, 2004, I find that claimant has offered insufficient evidence that he suffered a total incapacity to earn wages subsequent to that date.

As previously noted, claimant was granted a change of physicians by the Commission from Dr. Berestnev to Dr. Michael Morse, a neurologist. Following his evaluation of the claimant on April 2, 2004, Dr. Morse opined that claimant had reached maximum medical improvement, and more importantly, indicated that claimant had no restrictions. In fact, Dr. Morse subsequently completed form AR-3 indicating that claimant could return to work with no restrictions. Although claimant had undergone neuropsychological evaluations by Dr. Richard Back and by Dr. Bettye Back-Morse, neither of those physicians had indicated that claimant was totally incapacitated from working. Other than indicating that claimant should not drive, Dr. Bettye Back-Morse in March 2004 placed no other restrictions on the claimant's ability to work. Furthermore, I believe it is important to note from a review of her report that her testing revealed that claimant gave invalid responses to non-verbal and verbal tests. It was her opinion that claimant's complaints were the result of an exaggerated response to his injury.

In summary, in order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he suffers a total incapacity to earn wages. Here, Dr. Michael Morse, claimant's authorized treating physician, released claimant with no work restrictions as of April 2, 2004. I find that Dr. Morse's opinion is credible and entitled to great weight. Based upon the opinion of Dr. Morse as well as the remaining medical evidence which does not indicate that claimant suffers a total incapacity to earn wages, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits subsequent to April 11, 2004.

A.C.A. §11-9-505.

In the alternative, claimant contends that he is entitled to benefits pursuant to A.C.A. §11-9-505 because the claimant was terminated by the respondent without cause. I find that claimant has failed to meet his burden of proof with respect to this issue. A.C.A. §11-9-505(a) states:

(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is 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 benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

In order to prove entitlement to benefits pursuant to A.C.A. §11-9-505(a), the employee must establish (1) that he sustained a compensable injury; (2) that suitable employment within his physical and mental limitations was available with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work was without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W. 2d 237 (1996).

In this case, I find that claimant has failed to prove by a preponderance of the evidence that suitable employment was available within his physical and mental limitations. First, I find claimant's testimony to be significant. Claimant admitted on cross examination that he did not really think he could return to work as a mechanic. Furthermore, claimant admitted on cross-examination that he did not know whether a mechanic's job was available with respondent following his release by Dr. Morse on April 2, 2004.

The fact that no jobs were available is supported by the testimony of Cheryl McGee, the owner of respondent. McGee testified that it did not have any mechanic jobs available as of April 2, 2004, due to a drop in work volume. McGee's testimony was corroborated

by the testimony of James Simms, the manager of the respondent's shop. Simms testified that as of April 2, 2004, respondent's business had slowed. Simms testified that another mechanic was not needed at that time and that no new mechanics had been hired.

In order to satisfy the requirements of A.C.A. §11-9-505(a), claimant has the burden of proving that suitable employment was available and that the employer refused to return the employee to work at that job. Here, by claimant's own admission he did not believe that he was capable of even returning to work as a mechanic. Furthermore, claimant has offered insufficient evidence indicating that there was work available which was not provided to claimant. According to the testimony of McGee and Simms, there was no work available on April 2, 2004.

With respect to this issue, I note that a great deal of testimony was elicited at the hearing regarding the respondent's termination of the claimant for failing to contact the respondent until several days after his release by Dr. Morse on April 2. While claimant contends that respondent did not make an adequate effort to contact him following his release, I note that even if this were true, a finding which I do not make, that claimant is not without fault. According to claimant's own testimony he knew that Dr. Morse had released him to return to work without restrictions as of April 2, 2004. Nevertheless, by claimant's own admission, he made no effort to call or contact the respondent about the availability of work until April 9, 2004, one week after his release.

In summary, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505. Claimant has failed to prove that there was suitable employment available within his physical and mental limitations to which the respondent refused to return him to work. By claimant's own admission he did not believe he was capable of working as a mechanic. Furthermore, there is no evidence that any employment was available with the respondent according to the testimony of claimant, McGee, and Simms. Therefore, I find that claimant

has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505.

ADDITIONAL MEDICAL TREATMENT.

Claimant contends that he is entitled to additional medical treatment; specifically, a one-year follow-up battery of neuropsychological tests. Counsel for respondent stated at the hearing that respondent has not denied medical treatment and agrees that claimant should undergo a one-year neuropsychological evaluation. Since the parties are in agreement that a one-year follow-up of neuropsychological tests is necessary, there is no issue as to whether that treatment is reasonable and necessary. The only issue is the timing of that testing and the physician to perform it.

As previously noted, claimant underwent an initial neuropsychological evaluation by Dr. Richard Back in August 2003. Dr. Back in his report indicated that claimant would need a complete reevaluation in one year. Prior to that one year period of time, claimant underwent an additional neuropsychological evaluation from Dr. Bettye Back-Morse in March 2004. Dr. Back-Morse likewise indicated that claimant should be reevaluated in twelve months with a full neuropsychological battery of tests. Since the claimant had undergone additional neuropsychological testing after Dr. Back's original testing, I find that claimant's one-year follow-up of neuropsychological testing should be one year from the testing performed by Dr. Bettye Back-Morse in March 2004. Thus, claimant will be entitled to a full battery of neuropsychological testing in March 2005. I find that this testing should be performed by a physician chosen by Dr. Michael Morse, the claimant's last authorized treating physician.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled

to additional temporary total disability benefits subsequent to April 11, 2004. Claimant has also failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505. Finally, by agreement of the parties, the claimant is entitled to a full neuropsychological battery of tests. This testing is to be performed in March 2005 by a physician chosen by Dr. Michael Morse, claimant's last authorized treating physician.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE