

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311216

JESSE L. YARBRO, EMPLOYEE	CLAIMANT
DOMTAR INDUSTRIES, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 2, 2004

Hearing before Administrative Law Judge J. Mark White on October 26, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Aaron Martin, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Mr. Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 26, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on July 19, 2004, and a Prehearing Order was entered that same day. A copy of the July 19, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including September 8, 2003; and that the claimant earned sufficient wages to be entitled to a compensation rate of \$440 for total disability benefits and \$330 for permanent partial disability benefits. At the hearing, the parties further stipulated that the claimant sustained a compensable injury on September 8, 2003; and that the respondents accepted the injury as compensable and paid benefits through March 26, 2004.

The parties agreed that the issues to be presented, as modified at the hearing, were whether additional medical treatment is reasonably necessary in connection with the compensable injury; whether the claimant is entitled to temporary total disability benefits; and controversion and attorney's fees.

The claimant contends that he sustained a compensable injury to his back as a result of an accident that occurred on September 8, 2003; that he is entitled to additional medical treatment, specifically the surgery recommended by Dr. Lee Buono; and that he is entitled to temporary total disability benefits from March 26, 2004, through April 5, 2004.

Respondents contend that the claimant has arthritis of his thoracic spine; and that additional medical treatment is neither related nor reasonable and necessary.

It should be noted that after the hearing, the respondents submitted

additional evidence for consideration, specifically a report from a functional capacity evaluation dated December 23, 2003. The respondents' counsel had asked the claimant about this evaluation during cross-examination, but the respondents' counsel was unable to locate the report in his file before the end of the hearing. The claimant has offered no objection to admitting this report, therefore the report will be admitted into the record as Respondents' Exhibit No. 1 and retained separately in the Commission's file.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that

additional medical treatment, specifically the surgery proposed by Dr. Lee Buono, is reasonably necessary in connection with the compensable injury.

4. The claimant has proven by a preponderance of the evidence that he was still within his healing period from March 26, 2004, until April 5, 2004.
5. The claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages from March 26, 2004, through April 5, 2004.
6. The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from March 26, 2004, until April 5, 2004.
7. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a maintenance mechanic. On September 8, 2003, he sustained a compensable injury to his back while lifting a grate. After first seeking treatment from his personal physician, Dr. Lynn Reep, he was treated by the company doctor, Dr. Mark Gabbie. Both doctors diagnosed him with a thoracic sprain and muscle spasms. Dr. Gabbie prescribed

medication and physical therapy; the claimant testified that the medication only “masked over” his pain and did not give him complete relief. At some point Dr. Gabbie took the claimant off of work, and the respondents began paying indemnity benefits.

An MRI was performed November 6 revealing a disk bulge at T7-8 with mild narrowing of the right neural foramen and no significant spinal canal stenosis; anterior osteophytes at multiple levels; and multiple thoracic vertebral body hemangiomas. An epidural steroid injection was given on November 25, but the claimant denied getting any relief from it.

On December 9 the claimant began to treat with an orthopedic surgeon, Dr. Richard Hillborn. Dr. Hillborn wrote in his treatment note:

I feel his symptomatology is consistent with a muscle strain and inflammation in his upper back. The relationship between the abnormalities on the MRI, specifically the disc bulge at T7/8 with his symptomatology, is not completely clear. There is not necessarily any relationship between the T7/8 disc bulge and his pain complaints.

Dr. Hillborn continued conservative treatment, including physical therapy, through February. The claimant testified that the physical therapy only made his back worse. Nonetheless, Dr. Hillborn noted on February 2, 2004, that the claimant “appears to be gradually improving.” On February 10 the claimant saw Dr. Jim J.

Moore for a consultation requested by the respondent-carrier. Dr. Moore concluded that the claimant's history was "consistent with either sprain/strain or the development of a thoracic disk." Dr. Moore recommended a selective nerve block and a bone scan. It appears that no nerve block was done, but a bone scan was performed on February 25. The scan revealed degenerative arthritis in the thoracic spine; the report notes that the arthritis had appeared some time after a bone scan that had been performed in 2000. Dr. Hillborn wrote in a handwritten note dated March 26 that he did not feel the claimant's pain was secondary to pre-existing degenerative arthritis.

The claimant returned to Dr. Hillborn twice more. On March 23, Dr. Hillborn agreed to release the claimant to regular-duty work as of April 5. He instructed the claimant to return in one month, but as of March 26 the respondents terminated all benefits and the claimant never returned to Dr. Hillborn.

The claimant returned to a personal physician, Dr. Jon Tarpley, who ordered a second MRI exam. This exam, performed July 7, revealed "minimal bone bruising involving the T8 vertebral body" and "a small stable disc protrusion on the right at the T7-8 level resulting in mild central spinal stenosis and cord deformity."

Several months later, on October 4, the claimant saw a neurosurgeon, Dr. Lee Buono. Dr. Buono reviewed the MRI and described the abnormality at T7-8 as a

“disk herniation compressing the right T8 nerve root. The disk is rather large and not significantly affecting the spinal cord.” Dr. Buono recommended surgery, a decompression of the T8 nerve root with foraminotomy. The claimant declined Dr. Buono’s offer of a second opinion, and as of the hearing the claimant was scheduled to undergo the surgery on December 10, 2004. It appears from the record that the claimant has seen Dr. Buono only once.

II. Adjudication

A. Additional Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

There is no question that the claimant has a disk abnormality at T7-8, and Dr. Buono has recommended surgery at that level. Yet it is striking that while the claimant has seen Dr. Buono only once, none of the claimant’s other treating

physicians over the prior year ever mentioned surgery as a possibility. Dr. Buono has implicitly concluded that the claimant's pain arises from the abnormality at T7-8, yet Dr. Hillborn opined that the relationship between these abnormalities and the claimant's pain was "not completely clear."

Given these and other conflicts in the evidence, I am not persuaded that the surgery proposed by Dr. Buono is reasonably necessary. I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment, specifically the surgery proposed by Dr. Lee Buono, is reasonably necessary in connection with the compensable injury.

B. Temporary Total Disability

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The respondents terminated the claimant's benefits on March 26, 2004, even

though Dr. Hillborn's work release was not to have taken effect until April 5, 2004. When Dr. Hillborn saw the claimant on March 23, he released the claimant to return to work as of April 5. He instructed the claimant to return for a follow-up in one month, but the claimant did not do so because the respondents had terminated benefits. Because Dr. Hillborn had instructed the claimant to return, I find that the claimant has proven by a preponderance of the evidence that he was still within his healing period from March 26, 2004, until April 5, 2004. Because Dr. Hillborn did not release him to work until April 5, I find that the claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages from March 26, 2004, through April 5, 2004. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from March 26, 2004, until April 5, 2004.

AWARD

The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from March 26, 2004, until April 5, 2004. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Aaron Martin, is hereby awarded the maximum

statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge