

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F503589**

**ROY W. BANKS, EMPLOYEE**

**CLAIMANT**

**LITTLE RIVER MILLWORKS, EMPLOYER**

**RESPONDENT**

**TWIN CITY FIRE INSURANCE CO., CARRIER**

**RESPONDENT**

**OPINION FILED DECEMBER 7, 2005**

Hearing before Administrative Law Judge J. Mark White on November 3, 2005, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

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

**STATEMENT OF THE CASE**

On November 3, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on July 25, 2005, and a Prehearing Order was entered that same day. A copy of the July 25, 2005, 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 March 25, 2005; and that the respondents have controverted this claim in its entirety. At the hearing the parties further stipulated that the claimant earned wages sufficient to entitle him to a compensation rate of \$253 for total disability benefits and \$190 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits; whether medical treatment is reasonably necessary in connection with a compensable injury; and attorney's fees.

The claimant contends that he sustained a compensable injury to his back on or about March 25, 2005; that he should be awarded temporary total disability benefits from March 25, 2005, until August 23, 2005; that the medical treatment he has received to date has been reasonable, necessary, and related to his compensable injuries; that the additional treatment recommended by his neurosurgeon is reasonable, necessary, and related to his compensable injuries; and that respondents should be ordered to pay attorney's fees as permitted by law.

The respondents contend that the claimant was not injured in the course and scope of his employment; that the claimant has only minor degenerative changes per his MRI; that the claimant has given conflicting accounts of the accident that

allegedly caused his back problem; that the respondent has video evidence showing the claimant performing activities at least as demanding as his job; and that no attorney's fees are due.

### **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 witnesses and to observe their 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 proven by a preponderance of the evidence that on March 25, 2005, he sustained an injury to his low back caused by specific incidents and identifiable by time and place of occurrence, and that his injury arose out of and in the course of his employment.
4. The claimant has proven by a preponderance of the evidence that his low

back injury caused internal physical harm to the body requiring medical services.

5. The claimant has proven by a preponderance of the evidence that the existence and extent of his injury is established by medical evidence supported by objective findings.
6. The claimant has therefore proven by a preponderance of the evidence that he sustained a compensable injury to the low back on March 25, 2005.
7. The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date has been reasonably necessary in connection with his compensable injury, and that additional medical treatment remains reasonably necessary.
8. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from April 1, 2005, until August 23, 2005.
9. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period from April 1, 2005, until August 23, 2005.

## DISCUSSION

### I. History

The claimant worked for the respondent-employer as a forklift driver. He testified that on March 25, 2005, he was driving his forklift outside from one building to another. He testified that as he drove off a concrete pad onto dirt, the forklift's counterweight hit the concrete, jarring the claimant and injuring his back. He described the pain as a "sharp" pain in his low back, "by my tailbone." He testified that he promptly reported the incident to his supervisor, Tommy Clapp. Clapp testified, and he agreed that the claimant reported the incident to him. He described the claimant as "kind of hobbling a little bit" when he stepped down from the forklift to report the injury.

The claimant testified that later that same day, he again injured his back when he attempted to climb back on the forklift, missed a step, and fell. He said this incident caused increased pain in the same location as the first incident. He testified that he reported this second incident to Clapp that same day, but Clapp testified that the claimant reported it to him the following day.

The claimant continued to work in the following days, until he went on his own to see Dr. George Covert on April 1. Dr. Covert recorded a complaint of back pain radiating into the right leg, and he prescribed medication, physical therapy,

and a lumbosacral support. Dr. Covert ordered an MRI exam, performed April 4. The exam revealed mild disc bulges with small posterior annular tears resulting in “mild bilateral lateral recess stenosis” at L5-S1 and L4-5. Dr. Covert’s initial treatment notes do not mention any history of a work injury, but a letter from Dr. Covert dated April 14 does reflect such a history:

On April 1, 2005, Mr. Banks came to my office and complained of back pain that radiated down into his right leg. Mr. Banks said he had missed a step when he went to step up on a forklift at work on 3/25/05. My diagnosis on 4/1/05 was Sciatica of the right lower extremity, and I ordered some screenings to be performed to verify this finding.

On April 7, 2005, Mr. Banks returned to my office for follow-up. The MRI results are attached and substantiate sciatica of the right lower extremity with some lateral stenosis at L4-5, S1.

Dr. Covert referred the claimant to a neurosurgeon, but the respondents at some point thereafter controverted the claim and terminated benefits. The claimant then went on his own to Dr. James Vorhease, who referred him to a neurosurgeon, Dr. J. Brett Dietze. Dr. Dietze saw the claimant on June 13; he did not think surgery would be necessary, but he recommended physical therapy and an RS lumbar muscle stimulator.

The respondents obtained surveillance video of the claimant at home; the video was submitted into evidence by the respondents, and a written summary

prepared by the private investigator is part of the documentary evidence submitted herein. After comparing the written report with the video, I must note that the written summary is misleading in at least one respect. The written summary states that the claimant was observed "operating a weed trimmer." What the written summary fails to mention is that the claimant is seen operating a trimmer for no more than 27 seconds. After this, he lays the trimmer on the ground, and as he is behind a bush, it is impossible to determine what he is doing. I also note that while the written summary stated the claimant was able to "ambulate normally," to this observer his gait appeared abnormally slow.

## **II. Adjudication**

### **A. Compensability**

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the

existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

The claimant offered a plausible account of an on-the-job injury involving two separate incidents. His supervisor agreed that the claimant informed him of both incidents, and Dr. Covert wrote that the claimant informed him of an on-the-job injury. On balance I find the claimant's testimony regarding his accident to be credible. The one discrepancy between his testimony and that of his supervisor – whether he informed his supervisor of the second incident the same day or the next day – is too minor to render the claimant's account as a whole uncredible. I also recognize that Dr. Covert does not mention the incident involving the forklift's counterweight, but I do not find this discrepancy significant.

Given the claimant's testimony, and the corroborating evidence herein, I find that the claimant has proven by a preponderance of the evidence that on March 25, 2005, he sustained an injury to his low back caused by specific incidents and identifiable by time and place of occurrence, and that his injury arose out of and in

the course of his employment. Given the medical records herein, I find that the claimant has proven by a preponderance of the evidence that his low back injury caused internal physical harm to the body requiring medical services. The medical record includes the observation of muscle spasms, and there is no evidence whatsoever that these spasms pre-existed the claimant's alleged injury. I find that the claimant has proven by a preponderance of the evidence that the existence and extent of his injury is established by medical evidence supported by objective findings.

The claimant has proven every element of a compensable injury. I therefore conclude that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to the low back on March 25, 2005.

### **B. Benefits**

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).

There is no evidence that any of the treatment recommendations made by the

claimant's physicians are unreasonable. Given the recommendations of his doctors, I find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received to date has been reasonably necessary in connection with his compensable injury, and that additional medical treatment remains reasonably necessary, specifically the treatment recommended by his neurosurgeon, Dr. Dietze.

An employee who suffers a compensable uncheduled 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 claimant testified that Dr. Covert took him off work as of April 1, and a physician's statement signed by Dr. Covert states the claimant was totally disabled from April 1 to a date yet to be determined. He was released to light-duty work as of August 8 by Dr. Dietze, but the claimant testified that the respondent-employer refused to return him to work without a full release. The claimant testified that he returned to work for the respondent-employer after August 23. As noted above I

find additional treatment to be reasonably necessary, indicating that he remains in his healing period.

Given the above, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from April 1, 2005, until August 23, 2005. I therefore conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits for the time period from April 1, 2005, until August 23, 2005.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on March 25, 2005; that medical treatment is reasonably necessary in connection with his compensable injury; and that he is entitled to temporary total disability benefits for the period from April 1, 2005, until August 23, 2005. 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. Greg Giles, 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.**

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**HON. J. MARK WHITE**  
Administrative Law Judge