

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E607106

**CAMPY LEE BRISTER,
EMPLOYEE**

CLAIMANT

**LITTLE ROCK
WASTE WATER UTILITIES,
SELF-INSURED EMPLOYER**

RESPONDENT

**RISK MANAGEMENT RESOURCES,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED APRIL 19, 2005,

Pursuant to a hearing conducted January 19, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. H. Oscar Hirby, Attorney at Law, Little Rock, Arkansas, appearing for the claimant; and

Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for surgery, and associated temporary total disability benefits, related to his compensable neck injury of 1996.

The claimant contended that he should be awarded surgery recommended by neurosurgeon Dr. Ronald N. Williams, as well as benefits for the associated period of temporary total disability, and an attorney's fee for controversion. Other possible issues were reserved.

The respondents contended that the requested surgery was neither reasonably necessary in connection with, nor causally related to, the claimant's compensable neck injury of 1996.

The respondents also asserted that, pursuant to Ark. Code Ann. §11-9-411, if the claimant is awarded any temporary total disability benefits, the respondents should be entitled to credit of \$14,496.67 for short term and long term disability benefits received by the claimant in 1996, 1997,

and 1998, even though credit was not taken in 1999 when the claimant was awarded and paid temporary total disability benefits for the same period that he received the long term and short term disability benefits. The claimant opposed this request since the credit was neither asserted before the Commission in the 1999 hearing, when the issue was ripe, nor raised during the current proceedings until after the hearing had gotten under way. The claimant further contended that the self-insured respondent should not be permitted to assert the credit since there was no proof of the amounts paid and the amounts had not been pled during the prehearing procedure before either the current hearing or the 1999 hearing. The respondents contended that at the time of the 1999 hearing, the statute was in place and their position need not be verbalized but was something that needed to be applied when payment was made after the award but, for whatever reason, the previous benefits administrator did not do that.

It was ruled that the respondents should have timely raised the issue at the 1999 hearing, or when benefits were paid pursuant to the Commission's order after the 1999 hearing, so that raising the issue for the first time at the outset of the 2005 hearing was not timely and the issue has been waived.

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 sustained a compensable injury to his neck May 20, 1996; his average weekly wage was \$358.00; pursuant to the Commission's opinion, benefits were paid for temporary total disability for the period from May 24, 1996, through July 18, 1998, and for permanent partial disability pursuant to a 2% impairment rating; and Dr. Ronald N. Williams is an authorized treating physician.

3. The preponderance of the evidence shows that the surgery recommended by Dr. Williams is reasonably necessary in connection with the claimant's compensable injury and should be authorized to be performed at the expense of the respondents and, further, that the claimant is entitled to benefits for the associated period of temporary total disability.

4. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

On May 20, 1996, the claimant suffered compensable injuries to his low back and cervical spine during his employment as a laborer for Little Rock Waste Water Utilities, when he attempted to dislodge his jackhammer from the metal pipe of an abandoned gas line. The process, which is further described in the record, took 15 to 20 minutes and required the assistance of the claimant's foreman, Mr. Roosevelt Ingram. After the jackhammer had been removed and loaded onto a compressor, the claimant advised Mr. Ingram that he probably needed to go in and report the incident and maybe see a doctor.

The employer directed the claimant to a Medistat physician but refused to authorize an orthopedic evaluation for additional treatment. The claimant then sought the care of Dr. Yvette Baker, a Little Rock neurologist who prescribed medication, physical therapy, and chiropractic care. Dr. Baker also had the claimant examined by Little Rock neurosurgeon Dr. Ronald N. Williams, who has continued his care.

The claimant had problems with his neck and low back prior to the compensable injury of May 20, 1996. For example, by 1993, diagnostic testing revealed two moderately sized disc herniations at C5-6 and C6-7. Further, the claimant had been evaluated by neurologist Dr. Reginald Rutherford May 15, 1996, following emergency room treatment, and Dr. Rutherford had found the claimant's symptoms were consistent with tension-type headaches.

However, Dr. Williams, in a letter dated October 23, 1996, wrote that his comparison of MRI studies performed in 1993 and in June, 1996, showed that the herniation at C5-6 had enlarged slightly. The Commission in its opinion of June 24, 1999, found that this constituted an aggravation of the claimant's pre-existing condition and further remarked that the presence of pre-existing back and neck conditions was not fatal to the claim since "an employer must take the employee as he finds him, and an injury is compensable if employment circumstances aggravate a pre-existing condition."

Dr. Williams continued to care for the claimant and on July 16, 2002, he wrote to Dr. Michael C. Fischer, mentioning the claimant's August, 2000, and more recent MRI scans, indicating a worsening condition in the claimant's neck and stated that the claimant had undergone physical therapy and epidural steroid injections without much benefit and would like to go ahead and have surgery. (The record shows an MRI scan of the cervical spine taken on June 18, 2002.) On January 7 2003, Dr. Williams wrote that the claimant was referred back to Dr. Michael Fischer for

medication since workmen's comp had not approved his surgery and there was not much else to do except medications. On January 23, 2004, Dr. Williams wrote a letter mentioning that the claimant had neck pain prior to his injury in 1996 but that the pain has become worse since the compensable injury and Dr. Williams believed the neck had been exacerbated by the work injury, within a high degree of medical certainty. There is no indication that Dr. Williams has withdrawn his recommendation for surgery or that there is an intervening cause of the claimant's need for surgery. The claimant was also examined by internal medicine specialist Dr. Eleanor A. Lipsmeyer, to determine if he had rheumatoid arthritis "before he has surgery". Dr. Lipsmeyer opined that the claimant suffered from degenerative joint disease of the cervical spine, secondary fibromyalgia, but not active inflammatory arthritis.

When the entire record is reviewed, it appears that the claimant's compensable neck injury has worsened and is at the point where surgery recommended by Dr. Williams is reasonably necessary in connection with the compensable injury and should be authorized at the expense of the respondents. This, of course, assumes that Dr. Williams will continue to be of the opinion that surgery is appropriate after a current examination of the claimant. In addition, surgery of this nature necessarily renders the claimant temporarily totally disabled for a period during which respondents should provide temporary total disability benefits.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday

Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge