

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308939

CESAR A. CANO, EMPLOYEE	CLAIMANT
B & T PALLET, INC., EMPLOYER	RESPONDENT
CONTINENTAL CASUALTY CO., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 24, 2005

Hearing before Administrative Law Judge J. Mark White on January 18, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Andrew L. Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Constance G. Clark, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On January 18, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on November 15, 2004, and a Prehearing Order was entered that same day. A copy of the November 15, 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 August 6, 2002; that on August 6, 2002, the claimant sustained a compensable injury to his back; that respondents accepted the August 6, 2002, back injury as compensable and paid benefits; and that the claimant earned an average weekly wage of \$519.18, entitling him to a compensation rate of \$346 for total disability benefits and \$260 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to his right shoulder on August 6, 2002; whether the claimant is entitled to temporary total disability benefits; whether additional medical treatment is reasonably necessary in connection with a compensable injury; whether the claimant is entitled to permanent partial disability benefits for his back injury; and controversion and attorney's fees. All other issues, including wage-loss disability and permanent benefits for the shoulder, were specifically reserved.

The claimant contends that he sustained a compensable injury to his right shoulder at the same time he sustained his back injury of August 6, 2002; that after being released by Dr. Ron Williams, the claimant was sent to Dr. Kevin Collins for treatment of his low back, and Dr. Collins took him off work; that he is entitled to additional temporary total disability benefits from March 4, 2004, through September 14, 2004; that he is entitled to additional medical treatment for his back

and shoulder; that he is entitled to permanent partial disability benefits for his back; and that he is entitled to attorney's fees.

Respondents contend that they do not controvert the claimant's right to any medical treatment which may be reasonable and necessary for treatment of the claimant's back injury; that they deny any causal relationship between the claimant's present shoulder complaints and the injury of August 6, 2002; that the claimant's shoulder problems preexisted his August 6, 2002, injury and that, at most, that injury only temporarily aggravated his chronic and long-standing shoulder troubles; that the claimant reached maximum medical improvement as of February 4, 2003, and that he was released to and did return to work, at which point temporary total disability benefits were discontinued; and that if the claimant is currently unable to work, such disability is not the result of the August 6, 2002, compensable injury and no additional indemnity benefits are owed.

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 failed to prove by a preponderance of the evidence that he sustained an injury to his shoulder arising out of and in the course of his employment.
4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder.
5. The claimant has proven by a preponderance of the evidence that additional medical treatment for his back is reasonably necessary in connection with his compensable injury.
6. The claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages as a result of his compensable injury from March 4, 2004, through September 14, 2004.
7. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
8. The claimant has proven by a preponderance of the evidence that he has

sustained permanent impairment in the amount of 5% to the body as a whole.

9. The claimant has proven by a preponderance of the evidence that the 5% rating assigned by Dr. Williams is supported by objective and measurable physical findings, and that the claimant's compensable injury was the major cause of this 5% impairment.
10. The claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 5% to the body as a whole.
11. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

On August 6, 2002, the claimant sustained a compensable injury to his back when a forklift fell on top of him. The claimant testified that the forklift struck him "everywhere" and that he immediately experienced pain in his feet, legs, back and right shoulder. The medical records from the claimant's hospital visit that day do not reflect complaints of shoulder pain. He was diagnosed by Dr. Joseph Jensen with a "soft tissue injury" and discharged the next day. The claimant testified he was

unable to walk for thirty to forty-five days after the accident, but Dr. Jensen's discharge note states that the claimant was "walking the halls with a walker." Over the next few weeks the claimant underwent physical therapy.

On September 25 he returned to Dr. Jensen, who noted the claimant had "some pain rt. shoulder" as well as continued low-back and leg pain. X-rays of the shoulder were normal.

On October 28, 2002, an MRI of the lumbar spine revealed a "small central focal disc herniation at L4-5." Dr. Jensen opined on October 30 that the claimant's continuing right leg pain was attributable to this herniation, and he referred the claimant to a neurosurgeon, Dr. Ronald Williams. Dr. Williams ordered a CT scan and myelogram, both of which revealed the same bulging revealed in the MRI, though none of the exams revealed stenosis or nerve impingement. Dr. Williams expressed his intent to also obtain an MRI of the shoulder, but this was not immediately done. Based on the lumbar MRI results, Dr. Williams opined on December 12 that surgery was not indicated, and he recommended a lumbar epidural steroid injection, which was finally performed on February 4, 2003. Dr. Williams noted in the same letter that an FCE had been performed, revealing submaximal effort by the claimant. Dr. Williams released him to return to work and determined he had reached maximum medical improvement. In a March 14 letter,

Dr. Williams assigned the claimant a permanent impairment rating of 5% to the body as a whole.

On May 19 the claimant sought treatment from Dr. Kevin Hiegel for his back. A change in medication failed to relieve the claimant's pain, and Dr. Hiegel concluded he had nothing else to offer as of July 25, though he recommended the claimant "follow-up with his rehab doctor for further recommendations." In the interim, on April 15, 2003, the claimant had also seen Dr. Cynthia Almond, and she too had recommended referral to a pain management clinic. Dr. John Wilson saw the claimant on October 16 for both his back and shoulder and agreed that surgery was not appropriate. He recommended only a change of medication.

The claimant returned to Dr. Hiegel on January 26, 2004. Dr. Hiegel noted: "Cesar comes in for right shoulder pain, extending into his elbow. Now for a year and a half, and it has been worse recently. He is not sure how he injured it, and it has been off and on." Dr. Hiegel diagnosed rotator cuff syndrome and referred the claimant for orthopaedic treatment. Contrary to the note, the claimant testified that he informed Dr. Hiegel that this shoulder pain was a result of his work injury.

The claimant then saw Dr. Scott Bowen for his shoulder on February 5. Dr. Bowen recommended physical therapy and an MRI of the shoulder. The MRI exam, performed February 13, revealed "some mild tendinosis [of] the supraspinatus

tendon” and “mild degenerative calcification involving the right AC joint.” The claimant returned to Dr. Bowen on February 24. Dr. Bowen gave him a steroid injection to the right shoulder and opined that surgery was not appropriate. But on March 23, Dr. Bowen reversed course and determined that the claimant needed arthroscopic surgery to “decompress the shoulder.”

Through the spring of 2004 the claimant treated for his back with Dr. Kevin Collins. Dr. Collins treated him with medication; he had recommended another set of injections, but according to Dr. Collins these were denied by the respondents. The respondents then denied Dr. Collins’ recommendation of Duragesic Patches. Dr. Collins noted on May 20: “He will need to follow up with an anesthesiology pain doctor. I am not sure why worker’s compensation does not want to work with them since he does have a herniated disc. There is nothing I can do from a rehab perspective. We are stuck in space here.” He continued, “I recommend that he go to see Dr. William Ackerman.”

Dr. Collins’ June 21 note indicates the claimant did see Dr. Ackerman and received an injection which provided some relief of his back pain. None of Dr. Ackerman’s records were introduced into evidence. On July 19, Dr. Collins noted: “Patient is as good as I think he is going to get at this point. He is seeing Dr. Ackerman who is doing injections. I don’t have any notes.” He continued: “I would

like Dr. Ackerman to evaluate him for a longer acting pain medicine. The Hydrocodone makes him anxious, irritable, sleepy and a little bit agitated. He gets tremulous. We will stop that for sure. I will switch him to Oxycontin, 20 mg. bid for now and see how that works. I will touch base with him in a couple of weeks and see how that goes. I would like to know if Dr. Ackerman has any other recommendations.”

On August 4 the claimant returned to Dr. Williams, “still having back pain” and “occasional pain going into the legs.” Dr. Williams obtained a repeat MRI which revealed “mild degenerative disc disease, and a very tiny central disc protrusion that does not seem to be an actual rupture, and is not causing any nerve root compromise.” Dr. Williams recommended another injection; he recorded in his notes that the claimant declined it, but the claimant testified Dr. Williams had misunderstood him and that no interpreter was present at the time to clarify his preference to the doctor.

The claimant admitted in his testimony that he had low back and right shoulder pain prior to his compensable injury. He sustained a prior compensable injury in 1999 causing back pain, but an MRI performed July 20, 2000, revealed nothing. On April 30, 2002, some four months before his compensable injury, the claimant saw Dr. Hiegel for complaints of low-back pain and right shoulder pain.

II. Adjudication

A. Compensability of Shoulder Injury

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 was treated on multiple occasions by both Dr. Jensen and a physical therapist in the seven weeks following his compensable injury. Yet none of the records from this nearly two months of treatment reflect any complaints whatsoever regarding the right shoulder. And the first notation of any objective sign

of injury to the shoulder is from Dr. Wilson's note of October 16, 2003, more than a year after the compensable injury. Given these gaps, and given the lack of any supporting medical opinion, I cannot find a causal connection between the claimant's compensable injury and his right shoulder problems. I find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury to his shoulder arising out of and in the course of his employment. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder.

B. 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).

Even if it is demonstrated that a preexisting condition is also a causal factor, the claimant has met his burden of proof so long as he proves that the work injury combined with or aggravated the preexisting condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969

S.W.2d 667 (1998). Given that the claimant saw a doctor for back pain only once in the year preceding his compensable injury, and given that his MRI scan in 2000 was normal, I find that the claimant's compensable injury aggravated any pre-existing condition so as to bring about the need for the treatment, and that the claimant is still suffering the effects of his compensable injury. Though all of the claimant's doctors have ruled out surgery, there appears to be a consensus that the claimant is still in need of pain management treatment. I find that the claimant has proven by a preponderance of the evidence that additional medical treatment for his back is reasonably necessary in connection with his compensable injury.

In making this finding, I recognize that the claimant's healing period has most likely ended, particularly given Dr. Collins' statement that the claimant "is as good as I think he is going to get." However, in the same letter Dr. Collins indicated he wanted the claimant to continue seeing Dr. Ackerman. It is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Lewis v. WSD Turner*, A.W.C.C. F212623 (July 12, 2004). My finding is that the claimant is entitled to such management treatment.

C. Temporary Total Disability Benefits

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 record does contain a number of off-work slips signed by Dr. Collins. However, Dr. Collins' treatment notes make clear that he took the claimant off of work in anticipation of the claimant having surgery on his shoulder – and as discussed above, I do not find that the claimant sustained a compensable injury to his shoulder. There is little evidence to show that any incapacity to earn wages was due to the compensable back injury. I find that the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages as a result of his compensable injury from March 4, 2004, through September 14, 2004. I therefore conclude that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.

D. Permanent Partial Disability Benefits

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any determination of permanent physical impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Benefits for permanent impairment may be awarded only upon a showing that the compensable injury was the major cause of the impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a).

Dr. Williams has assigned the claimant an impairment rating of 5% to the body as a whole for his low-back injury. Neither party has challenged the validity of that rating under the *AMA Guides*, and none of the medical evidence submitted herein challenges or contradicts it. I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent impairment in the amount of 5% to the body as a whole. It is true that the claimant did have low-back pain prior to this injury, but an MRI performed in 2000 was normal, while MRI and

other exams performed after his compensable injury revealed a disc bulge or herniation at L4-5. Moreover, between the 2000 MRI and the instant compensable injury, the claimant saw a doctor for back pain only once. Given this evidence, I find that the claimant has proven by a preponderance of the evidence that the 5% rating assigned by Dr. Williams is supported by objective and measurable physical findings, and that the claimant's compensable injury was the major cause of this 5% impairment. I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 5% to the body as a whole.

AWARD

The claimant has proven by a preponderance of the evidence that additional medical treatment for his back is reasonably necessary in connection with the compensable injury, and that he is entitled to permanent partial disability benefits in the amount of 5% to the body as a whole. 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. Andrew L. Caldwell, 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