

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311899

BILLY R. COOPER, EMPLOYEE	CLAIMANT
FRITO LAY, INC., EMPLOYER	RESPONDENT
FIDELITY & GUARANTY INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 22, 2005

Hearing before Administrative Law Judge J. Mark White on May 17, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Zimmery Crutcher, Jr., Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Lee Muldrow, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 17, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on April 13, 2005, and a Prehearing Order was entered that same day. A copy of the April 13, 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 November 4, 2003; that on November 4, 2003, the claimant sustained a compensable injury to his low back; that respondents accepted the November 4, 2003, injury as compensable and paid some benefits; and that the claimant earned sufficient wages to be entitled to the maximum compensation rates.

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

The claimant contends that he sustained a compensable injury; that he is entitled to temporary total disability benefits; that he is entitled to temporary partial disability benefits; and that he is entitled to payment of medical expenses, mileage, and attorney's fees. At the hearing, the claimant modified his contentions to reflect that he seeks temporary partial disability benefits through September 23, 2004, and temporary total disability benefits from September 24, 2004, through a date yet to be determined.

The respondents contend appropriate medical and indemnity benefits have been paid; that the claimant returned to work on light duty on or about November

11, 2003; that the claimant was released for full duty on December 12, 2003; that nearly a year later, the claimant again was taken off work, complaining either of new problems or continuing problems; that claimant has received all benefits to which he is currently entitled; that claimant's renewed complaints are not causally related to his job injury; that claimant's renewed complaints are not the result of a compensable aggravation or new injury; that claimant's renewed complaints are not supported by objective medical evidence; and that the work does not represent the major cause for claimant's additional disability or need for treatment.

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 was reasonably necessary in connection with his compensable injury after December 2003.
4. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after September 24, 2004.
5. The claimant has therefore failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits after September 24, 2004.
6. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

On November 4, 2003, the claimant sustained a compensable injury to his low back when the company truck he was driving was struck by another vehicle. The claimant was working for the respondent-employer as a route salesman at the time. Later that day the claimant sought treatment from the company doctor, Dr. John Adametz, Jr. Dr. Adametz diagnosed lumbosacral strain and recommended medication and physical therapy. He released the claimant to light-duty work. On November 18 the claimant reported pain radiating into the right leg and foot, and

Dr. William Warren, a partner of Dr. Adametz, added a diagnosis of lumbar radiculopathy and provided a trigger point injection.

On November 24 the claimant saw another partner, Dr. Scott Carle, who changed the diagnosis to “sacroiliac/facet sprain with pseudoradiculitis” and performed a sacro-iliac injection. An MRI exam performed that same day revealed a posterior annular tear at L4-5 without extrusion and mild degenerative facet disease at L3-4, but no abnormality to explain the claimant’s right leg pain.

Over the following weeks the claimant continued to treat with these three physicians, and their notes reflect that the claimant reported improvement in his symptoms. Dr. Carle released the claimant to regular duty on a “trial” basis as of December 9. On December 12, Dr. Carle recorded the claimant as saying his “pattern of symptoms is better with no pain.” Dr. Carle released the claimant from care and opined that he had sustained no permanent impairment as a result of his injury. The claimant returned to regular-duty work and worked through the summer of 2004. The claimant testified that he occasionally had recurrences of pain while working.

Some eight months after his release by Dr. Carle, on August 27, 2004, the claimant sought treatment for his back from his personal physician, Dr. S. Ebel. Dr. Ebel recorded the history as, “Patient complains of low back pain for the last week. He was involved in a motor vehicle accident years ago and does quite a bit of lifting

on his job. No other injury recently." The claimant returned on August 27 and was given a depo-medrol shot by Dr. Robin Perry. Dr. Perry noted, "He continues to have a lot of lower back pain. It is radiating into both hips." The claimant returned to Dr. Perry on September 7 reporting improvement. During this time the claimant was occasionally off from work at his doctor's direction.

On September 23, the claimant sustained another incident of back pain while working, this time when he was moving boxes into Target. The claimant testified that while moving a cart his leg gave out on him, causing him to fall and strain his lower back again. He left work that day, and he has not returned to work since. He was released to light-duty work at least once by Dr. Perry, but the respondent would not allow him to return to work without a full-duty release.

The claimant saw Dr. Sundeep Lal on December 3 complaining of "chronic low back and bilateral lower extremity pain," rating his pain as nine on a scale of ten. He then returned to Dr. Carle on December 9, and Dr. Carle gave his assessment as "probably spinal stenosis and activity intolerance." Dr. Carle ordered another MRI exam, performed on December 14. The MRI this time revealed degenerative disc disease at L4-5 and L5-S1 with a moderate to large disc extrusion at L5-S1, and moderate foraminal narrowing at L4-5 and L5-S1. No mention was made by the radiologist of the annular tear or disc extrusion at L4-5 detected in the 2003 MRI.

When the claimant returned on December 16, Dr. Warren gave a diagnosis of “lumbar disc degeneration” and released him to return to work full-duty. On December 22, Dr. Carle sent a letter to the respondent, opining that the “major cause for his current need for treatment” was his pre-existing degenerative condition, rather than any work incident.

On December 28 the claimant returned to Dr. Ebel, who recommended more physical therapy and changed his medications. On January 31, 2005, Dr. Perry noted lumbar muscle spasms on the right. Since that time, the claimant has continued to receive conservative treatment by Dr. Perry and Dr. William Blakenship, who recommended the claimant return to Dr. Lal for continued conservative treatment.

The claimant has a long-standing history of back problems prior to the compensable injury. Medical records from 1989 indicate the presence of a herniation at L5-S1, apparently the result of a work injury. An MRI exam performed March 13, 2002, on the basis of “back pain and bilateral leg pain,” revealed a small protrusion at L4-5 with associated mild degenerative facet disease.

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 was released from treatment by Dr. Carle in December 2004, only a month after his compensable injury. Dr. Carle wrote at the time that the claimant felt “the pattern of symptoms is better with no pain.” Dr. Carle also noted, “Full and reasonable movement is maintained at the torso. Patient is able to reasonably squat and forward flex to touch the lower aspects of both legs. Side bending is also adequate without any evidence of intolerance with motion.” The claimant did not seek medical treatment for his back for another eight months, until August 2004, when he went to the doctor complaining of low back pain “for the last week.”

The MRI taken in 2002, before the compensable injury, revealed a protrusion at L4-5. The MRI taken in 2003 shortly after the claimant’s compensable injury revealed an annular tear at L4-5, with no extrusion or stenosis noted in the lumbar spine, and no mention of a protrusion at L4-5. The MRI taken in December 2004 did not reveal the annular tear at L4-5, though it did show an extrusion at L5-S1, along with narrowing at L4-5 and L5-S1.

Finally, as noted by the respondents on cross-examination, the claimant has an extensive history of prior back and right leg problems. As recently as two months before the compensable injury, he had sought medical treatment for right leg pain. I note that the radiologist who reviewed the 2003 MRI exam specifically opined there was nothing revealed in the exam to explain the right leg symptoms. The claimant had sought treatment for back pain as recently as five months before the compensable injury, and a 1989 letter from a former doctor mentioned a herniation at L5-S1.

Given the claimant's long-standing history of low back and right leg pain, given the eight month gap in treatment from 2003 to 2004, and given the changes in the MRI exams from 2003 to 2004, I cannot find that the claimant's complaints of low back and right leg pain since August 2004 are a continuation of his compensable injury. It is also conceivable that the claimant sustained an aggravation of his pre-existing condition in the incident at Target in September 2004 to which the claimant testified. But the parties did not list this as an issue, nor has the claimant filed a claim for the September 2004 injury. I decline to make a finding on this issue *sua sponte*.

Even if the September 2004 incident did not break the chain of causation, I am not persuaded by the evidence herein that a causal connection exists between the

claimant's compensable injury and his back problems after 2003. I am more persuaded, rather, that his compensable injury was a temporary aggravation of a pre-existing condition that has resolved to its pre-injury state. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment was reasonably necessary in connection with his compensable injury after December 2003.

B. Temporary 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).

Given my finding above regarding additional medical treatment, I find that the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after September 24, 2004. Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that he was

entitled to temporary total disability benefits after September 24, 2004.

An employee is entitled to temporary partial disability benefits where the employee's average weekly wage has decreased as a result of partial disability brought about by his compensable injury. ARK. CODE ANN. § 11-9-520. Temporary partial disability may be awarded for that period within the healing period in which the claimant suffers a partial incapacity to earn wages. The benefits may be computed by subtracting the actual wages earned post-injury from the pre-injury average weekly wage, subject to the maximum compensation rate for temporary total disability benefits. *Traylor v. Clyde Traylor, Inc.*, A.W.C.C. E121246 (May 19, 1997).

Given my findings above, it appears that the claimant was within his healing period through December 2003, and the claimant credibly testified that he sustained a loss of earnings after his compensable injury. However, the claimant did not testify as to specifically how much that loss was, or when the loss occurred. The parties did not submit into the record any evidence of the claimant's pre-injury average weekly wage, nor did they submit any evidence of the claimant's actual post-injury wages. Without such evidence, I cannot make a specific award of temporary partial disability benefits. *See, Mason v. Mid-America Packaging Co.*, A.W.C.C. E517535 (Oct. 9, 1998).

AWARD

The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits or medical treatment after December 2003. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge