

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301173

GARY COOPER, EMPLOYEE	CLAIMANT
ALL COMMUNICATION, INC., EMPLOYER	RESPONDENT
STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 6, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on March 21, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Simmons S. Smith, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. A. Gene Williams, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted March 21, 2005, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 29, 2004, and a Prehearing Order was filed on January 3, 2005. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced without objection as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the parties at all relevant times, including January 1, 2003; that the claimant sustained a compensable injury on said date; that he earned sufficient wages to entitle him to

a compensation rate of \$213.00 per week for temporary total disability; that respondents paid various medical and indemnity benefits through on or about July 23, 2003; and that respondents had controverted claimant's entitlement to additional disability benefits, as well as additional medical treatment related to the claimant's pulmonary and/or vascular problems.

By agreement of the parties, the issues presented for determination included:

- 1) The date claimant's healing period ended for his admitted injury, as well as claimant's entitlement to additional temporary total disability or additional medical treatment.
- 2) Whether the claimant's pulmonary problems were compensable.
- 3) If answered affirmatively, claimant's entitlement to associated benefits.

Claimant contended, in summary, that in addition to a musculoskeletal injury, that his pulmonary problems were directly and causally related to the January 1, 2003, motor vehicle accident; that respondents should be held responsible for all outstanding medical treatment, together with continued, reasonably necessary medical treatment; that he was entitled to additional temporary total disability benefits after benefits were terminated, and continuing through on or about March 1, 2004, the date claimant maintained that he reached maximum medical improvement; and that a controverted attorney's fee should attach to any additional benefits awarded. The claimant reserved the issue of permanent disability, if applicable.

The respondents contended that the claimant's healing period ended on or before July 23, 2003; that it had paid all appropriate benefits to which the claimant was entitled; that the claimant's pulmonary problems pre-existed his motor vehicle accident and were unrelated to said accident, while controverting all additional benefits.

The claimant was the only lay witness to testify in this matter. The record is composed of the transcript of the March 21, 2005, hearing containing various medical reports, together with the claimant's discovery deposition, introduced as "Respondent's Exhibit 1" and retained in the Commission file in bound form, as well as the evidentiary depositions of Dr. Bruce L. Safman, Dr. Thomas Rayburn, and Dr. Clifton Johnson which were introduced as Joint Exhibits "C," "D," and "E," respectively, and retained in the Commission file in bound form.

From a review of 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 made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.

3. In addition to the musculoskeletal injury the claimant sustained as a result of his January 1, 2003, compensable motor vehicle accident, he also sustained either a chest injury and/or an aggravation of a pre-existing pulmonary condition for which respondents initially paid various medical and indemnity as reflected by the stipulations, aforementioned.
4. The healing period for the claimant's work-related injuries ended on or about October 23, 2003.
5. The claimant has proven, by a preponderance of the credible evidence, that he is entitled to additional, temporary total disability for the period beginning July 24, 2003, and continuing through October 23, 2003.
6. The claimant has failed to prove, by a preponderance of the credible evidence, that his ongoing pulmonary problems and need for treatment are causally related to the January 1, 2003, accident. The claimant's ongoing physical problems and disability are permanent in nature.
7. The claimant specifically reserved the issue of permanent disability.

DISCUSSION

The record in this case is replete with inconsistencies and contradictions. Admittedly, some of the claimant's own testimony contains inconsistencies and contradictions. However, I feel compelled to point out that the record reflects that the claimant is not highly educated. Based upon my observations, he did not understand various questions. Further, he did not appreciate or comprehend either

specific questions or the consequences of past medical histories which was confirmed by medical providers. I am persuaded by a review of the record as a whole, that the claimant's ability to continue working would have, in all likelihood been compromised even if the January 1, 2003, motor vehicle accident had not occurred, when considering the extent of the claimant's chronic obstructive pulmonary disease (COPD). However, claimant's entitlement to permanent impairment benefits, as well as permanent disability benefits, was specifically reserved. I point this out simply because major cause will be an element for consideration of claimant's entitlement to permanent disability benefits, if any. These observations are made merely in hopes that the parties will explore amicable resolution of all issues rather than pursue protracted litigation and appeals.

The claimant, Gary Cooper, is forty-four (44) years old. On and before January 1, 2003, the claimant was employed by the respondent. His duties consisted primarily of installing telephone systems, specifically, running telephone lines in homes and buildings. His duties required him to climb ladders and pull telephone cable. It is undisputed that the claimant was dispatched to a job in Fayetteville, Arkansas, on January 1, 2003. The claimant stated that while traveling to the job-site, the claimant was involved in a motor vehicle accident when he collided with a tractor-trailer rig. The claimant was rendered unconscious and was transported by ambulance to the Crawford Memorial Hospital in Van Buren, Arkansas. Contrary to the claimant's recollection that he was involved in a collision,

the EMS and emergency room reports reflect that the claimant was involved in a one-vehicle rollover which apparently resulted in multiple musculoskeletal injuries. However, the EMS report does reflect mild wheezing of the lungs. The claimant was apparently discharged from the hospital on the date of the accident to return to Little Rock and receive care locally. (Tr.12-13)(Jt. Ex. A, pp.2-10)

The claimant was next examined and treated by his family physician, Dr. Harold Betton, in Little Rock, Arkansas, whose reports were not introduced. The claimant was subsequently referred by the respondent insurance carrier to Dr. Bruce L. Safman with Arkansas Specialty Care Centers in Little Rock, Arkansas. Although the claimant was referred to Dr. Safman primarily for evaluation and treatment of the claimant's cervical, thoracic, and lumbar spine, his initial evaluation also noted complaints of difficulty with breathing and constant hyperventilation which Dr. Safman initially felt might be anxiety-driven. Dr. Safman obtained permission to obtain additional diagnostic testing concerning the claimant's pulmonary problems. Dr. Safman also reported receiving a call from Sam English, the claims adjustor, who advised that he felt the claimant's prior treatment was related to a previous car accident and not the current injury which apparently added confusion to the etiology of the claimant's complaints. However, the confusion was caused by Mr. English because the record reflects that the course of treatment was for the January 1, 2003, motor vehicle accident without evidence of any prior MVA. (Jt. Ex. A, pp.11-13)

Because of abnormal diagnostic studies, Dr. Safman subsequently referred the claimant to Dr. Thomas Rayburn, a thoracic surgeon, as well as Dr. Clifton R. Johnson, a pulmonary specialist. It was determined that the claimant was suffering from empyema which is an accumulation of fluid in his chest cavity which required an immediate thoracotomy and decortication by Dr. Rayburn on February 6, 2003. As reflected by the stipulations, respondents exercised good faith in meeting their obligations under our workers' compensation laws by accepting and paying the medical treatment provided by both Dr. Rayburn and Dr. Johnson, including apparently the surgical intervention, together with temporary total disability through on or about July 23, 2003, at which time it controverted claimant's entitlement to additional benefits related to the claimant's ongoing pulmonary and/or vascular problems.

The record does reflect that the claimant had significant pre-existing physical problems related to his pulmonary and respiratory systems. Specifically, the record reveals that the claimant suffers from COPD. Prior to the admitted accident and injury, the claimant was a long-time cigarette smoker. The claimant smoked two and one-half (2-1/2) packs of cigarettes per day for almost thirty (30) years. (Resp. Ex. 1, p.17)

The record also reflects that, as a young man, the claimant was shot by a shotgun with buckshot. The incident resulted in a six (6) year prison sentence. The claimant also was treated for problems involving his right lung in 1997, which

resulted in fluid being withdrawn from his chest cavity with needles. In addition, the claimant was treated again for shortness of breath in December, 2000, which again resulted in fluid being removed. (Tr.24-25)(Jt. Ex. B)

Again, the record is clear that the claimant had significant pre-existing pulmonary problems. However, it is undisputed that the claimant was involved in a serious motor vehicle accident when he rolled the vehicle he was driving several times on January 1, 2003, resulting in multiple injuries, including, but not limited to an apparent chest injury which caused a significant accumulation of fluid in the claimant's chest cavity requiring a thoracotomy by Dr. Rayburn on February 6, 2003, which respondents accepted and paid, both temporary total disability, as well as related medical expenses. As will be set out further below, it appears that the respondents prematurely ended the claimant's healing period for the admitted injury because the claimant was released to return to work with restrictions. Accordingly, respondents should be held responsible for additional temporary total disability through the date that the claimant reached maximum medical improvement for his chest injury and/or aggravation of his pre-existing pulmonary problem. However, respondents are correct in its assertion that the claimant's pulmonary problems pre-existed the motor vehicle accident and are not compensable. Although it can be argued that the claimant's empyema simply spontaneously occurred, a preponderance of the credible evidence does not support this conclusion. Rather, a preponderance of the credible evidence, including the medical evidence, indicates

that the motor vehicle accident was an aggravating incident which brought about the empyema resulting in the need for treatment, including surgery.

As previously pointed out, it is undisputed that the claimant suffered from a pre-existing pulmonary condition. Nevertheless, there is no evidence that he was symptomatic at any time immediately prior to the January 1, 2003, accident. When a claimant's disability arises soon after the accident, and is logically attributable to it, with nothing to suggest any other explanation, the Commission may find the existence of the causal connection. *Hall vs. Pittman Construction Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Company vs. Parker*, 256 Ark. 161, 506 S.W.2d 118 (1974). The occurrence of the admitted accident and injury, together with the testimony of the treating physician, establishes the causal connection. *Kearby vs. Yarborough Brothers Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970); *Exxon Corp. vs. Fleming*, 253 Ark. 798, 489 S.W.2d 766 (1973).

Portions of the evidentiary deposition of Dr. Thomas Rayburn, the primary treating physician to whom the claimant was referred by Dr. Safman, an authorized treating physician is set out below:

Q All right. Did Mr. Cooper inform you of the fact that his complaints were the result of an automobile accident?

A He did. He did. This was – he apparently – and it was – he apparently had a – was a good bit removed from this accident. A good bit meaning a week or two or three. It certainly was not in the acute episode. And this was – he felt like this was a problem from this. And if I remember correctly – I don't have that particular – I don't have those particular reports in front of me, but I believe he's had some X-ray reports at some point in time that show he had some rib fractures after this.

Q All right. After your talking with him and doing whatever examinations you did, what did you advise him to do at that particular time, or how did you treat him?

A Well, when I saw him, he was clearly symptomatic from this large volume loss in his chest which was consistent with fluid. And we obtained a couple of things on him. The first thing we did was get a CT scan of his chest which showed a large loculated, calcified fluid collection consistent with an empyema which is –

Q Could you spell that for me?

A E-m-p-y-e-m-a. Which is a name given to an infected fluid collection in the chest. And because of the calcification and because of the fact that it was multi-loculated, meaning that there was not just a simple layer of fluid where you could easily drain it, we recommended that he undergo surgery to try to clean that area out to let his lung re-expand and to get all that grumous out of there.

Q Did it appear to you that what had happened to him at that particular point in time may be the result of the automobile accident?

MR. WILLIAMS: Object to form.

A It'd be difficult to say, but this injury would be consistent with whatever trauma he suffered that caused his rib fractures over there. The mechanism being trauma to the chest – rib fractures from an injury either bleeding, or inflammatory fluid that had weeped out of there that became so significant, and it was unable to reabsorb itself.

Q (By Mr. Smith) How did you treat this?

A He underwent a big operation. He had a thoracotomy, an incision between his ribs on that left side. And basically, we drained that multi-loculated fluid cavity – the empyema, and basically had to pull a lot of that inflammatory grumous off of his lung to let that lung re-expand. And he got a good result from that.

Q What is a hemothorax?

A Hemothorax is a retained blood or hem within the thorax of the chest cavity. It's what you'll commonly see after a gunshot wound or any sort of injury which is – a hemothorax is probably what preceded his – it's probably what this thing was – preceded this empyema.

Q So in terms of he might have had this hemothorax before, and then the

accident caused the empyema. Am I pronouncing that right?

A Empyema. Correct. That's correct. (Jt. Ex. D, pp.7-9)

Q Apparently, Gary Cooper was not the perfect individual when you found him – that, apparently, he had some previous injuries. And apparently, had some physical problems prior to you seeing him; is that not correct?

A Right.

Q In as far as the automobile accident is concerned, could the automobile accident have aggravated the condition that he was in?

A Sure.

Q Do you think it's possible, in terms of looking at the medical records and your doing the surgery and all of that, that possibly, the trauma caused by the accident may have been also a cause for him having some of the problems that he's had?

MR. WILLIAMS: Object to form.

A Sure. Absolutely. (Jt. Ex. D, p.27)

It is unclear from the record whether the respondents actually dispute the occurrence of a compensable chest and/or lung injury since they apparently accepted and paid timely benefits through on or about July 23, 2003, including both medical and indemnity benefits. Clearly, respondents have disputed whether additional medical treatment related to the claimant's pulmonary and/or vascular problems are compensable which respondents raised as an issue. I specifically find that the claimant's physical problems after October 23, 2003, are related to the pre-existing COPD rather than the work-related injury.

Another issue concerns the date the claimant's healing period ended, as well

as claimant's entitlement to additional temporary total disability. It is unclear the exact basis for respondents terminating temporary total disability on July 23, 2003. Dr. Rayburn released the claimant to return to work on August 25, 2003, with specific restrictions, specifically, light-duty as tolerated with a fifteen (15) pound lifting restriction for six (6) additional weeks while allowing the claimant to work up to regular routine over that period of time. (Cl. Ex. 1)

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. *Arkansas Highway & Transportation Department vs. McWilliams*, 41 Ark. App. 1, 864 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable, and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not, in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher, Inc. vs Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The record reflects that the claimant attempted to return to gainful employment, but was advised by his employer that there was no work available within his physical restrictions. Accordingly, respondents are responsible for continued, temporary total disability until the claimant reached maximum medical improvement which was not achieved until he was released fully by Dr. Rayburn, as well as Dr. Clifton R. Johnson. It appears that Dr. Rayburn would have released the

claimant approximately six (6) weeks after August 25, 2003. Likewise, Dr. Johnson released the claimant to return to work on October 23, 2003, as reflected by his report of said date. (Jt. Ex. A, pp.24-25)

In view of the foregoing, I find that the claimant's healing period ended on October 23, 2003, and that the claimant has proven entitlement to additional temporary total disability beginning July 24, 2003, through October 23, 2003.

The claimant's ongoing physical problems are permanent in nature. Permanent disability has been specifically reserved.

I feel compelled to point out that although permanent disability has been specifically reserved, a claim for such benefits requires that the major cause of the disability or impairment was the compensable injury. A.C.A. §11-9-102(f)(ii)(a). Further, if an injury combines with a pre-existing disease or condition, permanent benefits are only payable for the resultant condition if the compensable injury is the major cause of the permanent disability or need for treatment. In the absence of additional medical evidence, it appears apparent that the major cause of the claimant's disability is his pre-existing COPD. This observation is only made in hopes that the parties will amicably resolve any remaining issues.

AWARD

Respondent, State Automobile Mutual Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$213.00 per week beginning July 24, 2003, and continuing through October

23, 2003.

All benefits having accrued, respondent is to pay same in lump sum and without discount.

Additionally, claimant's attorney, Mr. Simmons S. Smith, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge