

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F309318

OLLIE COX III, EMPLOYEE

CLAIMANT

**CEDAR CREEK WHOLESALE CORPORATION,
EMPLOYER**

RESPONDENT

**UNITED STATES FIRE INSURANCE COMPANY,
(CRUM & FORSTER, TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 8, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 10, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Gail Ponder Gaines, Attorney at Law, Little Rock, Arkansas.

A hearing was held on March 10, 2005, to determine claimant's entitlement to additional temporary total disability indemnity benefits, additional medical benefits, and attorney's fees.

The parties stipulated to the existence of the employee-employer relationship on July 1, 2003, when claimant sustained a compensable back injury. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$440.00 for temporary total disability and \$330.00 for permanent partial disability benefits. The parties additionally stipulated that claimant

was given a 10 percent impairment rating, which was accepted and has been paid by respondents.

Claimant modifies his contentions from those made in the Prehearing Order issued on December 6, 2004, to contend that he is entitled to temporary total disability benefits from April 16, 2004, through a date yet to be determined, rather than from December 4, 2003. Claimant is further contending that he is entitled to additional medical treatment for depression secondary to pain caused by his work injury by Dr. Ken Counts, along with any prescriptions that would be recommended by Dr. Counts and approved by Dr. Garlapati, specifically Lexapro. Claimant asserts that because respondents controvert these benefits, claimant is also entitled to attorney's fees. Claimant requests that the issue of permanency be held in abeyance.

Respondents controvert any additional temporary total disability benefits beyond those benefits that have been paid to date. Respondents admit that claimant has had a second opinion and surgery has been recommended which was, as of the date of the hearing, set to take place in either April or May of 2005. Respondents aver that they will resume temporary total disability benefits from the date of his upcoming surgery and continuing until the time the treating physician says that it is appropriate in accordance with that surgery.

In regard to psychological treatment, respondents contend that it is not reasonable and necessary in conjunction with claimant's July 1, 2003, compensable

injury and that it has not been approved under the requisite requirement for the Workers' Compensation Act.

STATEMENT OF THE CASE

Claimant is a thirty-three-year-old highschool graduate who testified that he has taken some college business classes and has, in the past, worked for other businesses that were successful and owned some businesses of his own that were profitable. He testified that he had worked as a truck driver for respondent-employer for approximately six months at the time of his compensable injury on July 1, 2003. He testified that he originally began working for respondent-employer as a temporary driver through an employment agency but that, prior to his injury, he had been hired as a permanent employee.

The facts of claimant's injury are undisputed. He testified that he had just left the yard of respondent-employer on the morning of July 1, 2003, and was only about fifteen-to-twenty miles down on Interstate 40, when it began to rain. He stated that he pulled over to cover his load with a tarp and, as he pushed up on the tarp to get it over his head, he heard his back pop and began to experience pain.

Claimant testified that he tried to continue working for about six weeks, but the pain kept getting worse. He sought medical attention on August 21, 2003, from Dr. Derek Lewis, who found that claimant had a herniated disc at L4-L5 and took claimant off work. Dr. Lewis eventually referred claimant to Dr. Eric Akin, a back

specialist, who performed surgery on September 25, 2003. Within five days, claimant developed a cerebrospinal fluid (CSF) leak at the right L4-5 level, which required another surgery for repair on September 30, 2003.

Medical records reflect that Dr. Akin released claimant to return to work on November 5, 2003, with a twenty-pound weight restriction and opined that if claimant's symptoms persist, "he would likely benefit from formal physical therapy exercises." On November 20, 2003, Dr. Akin's chart notes stated as follows:

During Mr. Cox's last visit, he described a number of complaints with continued low back pain and right lower extremity pain after his right L4-5 discectomy on 9/25/03. I explained to him that due to his back pain, he may not be able to return to his current job as a truck driver, as this is likely significantly contributing to his pain. I have recommended that he *change his line of work to something else which does not require prolonged driving or heavy lifting*. If he must return to his present job, he should be at a 20 lb. weight restriction and further, he should not be required to drive for longer than a 2 hour duration continuously. Should his symptoms persist, he will need formal physical therapy.

[Emphasis added.]

On December 4, 2003, Dr. Akin found claimant at maximum medical improvement and issued claimant an 8 percent impairment rating; further, although claimant requested a referral to a pain specialist, Dr. Akin opined that that would not be useful to claimant at that time, as he was then improving. Dr. Akin's notes state, however:

I told him that if he should have an exacerbation of his back pain in the future that we would be glad to arrange for a pain clinic appointment for him, but as of right now I do not think that would be very useful.

Claimant testified that, although Dr. Akin released him to return to work, he did not return to respondent-employer. He testified that, instead, he went back to the temporary agency and did some work for them for a short while, driving a truck. He testified that he then drew approximately \$3,200.00 in unemployment benefits from January through March of 2004, until his period of eligibility was exhausted.

Dr. Akin reissued his impairment rating on March 3, 2004, to reflect a 10 percent impairment in accordance with the AMA Guide to the Evaluation of Permanent Impairment, Fourth Edition; his previous rating had erroneously been based on the Third Edition. The medical records further reflect that claimant was seen on March 4, 2004, by Dr. Lewis and was released to full duty by him on that date. The claim was accepted as compensable by respondents and benefits were paid, including the 10 percent impairment rating issued by Dr. Akin on March 3, 2004.

Although Dr. Lewis fully released claimant, with “no impairment” on March 4, 2004, claimant returned to Dr. Lewis on March 29, 2004, April 16, 2004, and May 24, 2004, complaining of back pain and spasms and pain down both sides of his left leg. Claimant testified that he requested the March 4, 2004, full release from Dr. Lewis so that he could attempt to return to work for the temporary agency as a driving instructor, and the agency needed a doctor’s release. However, the agency would not

accept Dr. Lewis's release but needed a release from the neurosurgeon stating that claimant was fully recovered and was not taking medication for his back. Claimant testified that he did not want to be dishonest about the fact that he was still having pain, so he decided to forego that job.

He testified that in April of 2004, his symptoms began to become markedly worse and began to intensify after bending down on April 16, 2004, to pick up a clothes basket. Claimant testified that since April 16, 2004, he has been unable to work due to the intense level of pain he has. This is the date from which he seeks additional temporary total disability indemnity benefits. Although there are clinic notes from Dr. Lewis on April 16, 2004, no off-work slip was issued on that date.

Claimant testified that he takes, as prescribed by Dr. Lewis, Lorcet Plus and Raopax for pain, although the Raopax makes him have migraine headaches, and that he also takes Soma, a muscle relaxer. He testified that these medications affect his ability to concentrate and make him feel drowsy, dizzy, and fatigued and that he began suffering from extreme depression as a result of his long-term chronic pain. He testified that he has had anxiety or panic attacks and had become afraid to leave his house. He testified that he takes Lexapro and Klonopin for depression and anxiety.

Records reflect that Dr. Lewis issued an off-work slip to claimant on August 17, 2004, which states that claimant was advised to remain off work from June 23

through October 1, 2004. Records further reflect that claimant had another MRI on July 7, 2004, ordered by Dr. Butchaiah Garlapati from Arkansas Pain Centers.

Dr. Garlapati stated in a letter written to claimant's counsel on August 9, 2004, that the MRI showed "moderate right paracentral recurrent disc protrusion at L4-5 causing posterior displacement of the proximal right L5 nerve root." He also noted that "enhancing scar tissue was surrounding the proximal right L5 nerve root within the right lateral recess." He opined as follows:

In summary, Mr. Cox has *recurrent disc herniation* at L4-5 and also increased scar tissue at the proximal right L5 nerve root that, in the future, may compromise the freedom of movement of that particular nerve. The last time I saw Mr. Cox was on 07/09/04 for lumbar epidural steroid injection.

Mr. Wren, it is difficult for me to assess when and what kind of treatment is going to completely relieve Mr. Cox from his chronic low back pain and *it is also difficult for me to assess when he could go back to work*. I know definitely one thing, *Mr. Cox will not be a good candidate as a truck driver* knowingly (sic) that he has a recurrent disc herniation as mentioned above in his recent MRI report.

[Emphasis added.]

Claimant testified that Dr. Garlapati referred him to Dr. Ken Counts, a psychologist, although there is no medical record, note, or report from Dr. Garlapati suggesting a referral to any psychologist or the need for one. Claimant testified that Dr. Garlapati "could see that I had some mental issues." Claimant testified that he

had become so depressed that he could hardly have an in-depth conversation without crying.

Records reflect that Dr. Counts saw claimant on August 6, 2004, and again on September 21, 2004. Claimant testified that seeing Dr. Counts was beneficial to him but that he did not continue, as the insurance company ceased paying for it. Claimant testified that it was Dr. Counts who recommended Lexapro and Klonopin, although he could not prescribe them because he is not a medical doctor. Claimant testified that these medications helped him.

Dr. Counts's progress notes from his August 6, 2004, visit with claimant state as follows:

This is a young man in his late thirties I believe that complains of low back problems primarily. He used to be a truck driver and states that he can't do that anymore. He is unemployed. He has not filed for disability benefits. He says that he is practically homeless and stays some with friends. He appears to be in a great deal of stress. He also has some depressive symptoms secondary to his chronic pain, job loss, and his other losses. I am not sure if there is any pain management procedures scheduled for him. He may best be served by some supportive services. At any rate, I will see him back.

His progress notes from his September 21, 2004, visit with claimant state as follows:

Ollie continues to complain of the same symptoms that have plagued him in the past. Specifically, he suffers from chronic pain that is so extensive that even routine daily life tasks are nearly impossible. He admits to depression. He admits to feeling quite hopeless. He still

is rather sketchy about where he stays. I am not sure if he is staying with friends or if he has his own place to stay. He fells (sic) at the end of his rope because he cannot work due to his pain and has no hope for the future.

I did suggest that he check back with Dr. Garlipatti (sic) regarding pain management procedures in that this is his primary complaint. Certainly he is depressed, but his primary complaint is chronic pain.

After his first visit I did fax Dr. Garlipatti (sic) about a trial on Lexapro and Mr. Cox did suggest that the Lexapro was helping him with his depression. He stated that he was feeling somewhat better in regards to his depression.

Notably, no mention is made in Dr. Counts's notes of any actual referral from Dr. Garlapati or of any recommendation to claimant of Klonopin. Likewise, no mention is made of any mental illness tests or studies administered to claimant or of any actual *diagnosis* of any mental condition. Dr. Counts simply states that claimant "appears to be in a great deal of stress," and this is apparently based on the history given to him by claimant. Further, he states that claimant "has some depressive symptoms" and that claimant "admits to depression"; still, no actual *diagnosis* is made by Dr. Counts.

On December 15, 2004, claimant was seen by Dr. Scott Schlesinger for an independent medical evaluation (IME). Dr. Schlesinger opined as follows:

In this case, it is my neurosurgical consultative opinion that he certainly had a work related disc herniation, but has not done well with his surgical intervention.

His last study was in July 2004 and this study showed postoperative changes at the L4-5 level with some residual bulge of disc at L4-5 to the right without any significant neural compression, but it does about the L5 nerve root. There is nothing on the left at all. There are extensive degenerative changes at this level. He has not had any subsequent studies since. The rest of his discs look reasonably okay, but the L4-5 disc is significantly degenerated.

This gentleman has a rather poor prognosis for having a good outcome from this situation. Before considering any further treatment, I would get a more up to date MRI of the lumbar spine and plain x-rays with flexion/extension views. I would be happy to arrange these if you desire for completion of this IME. If not, it would be hard to make a recommendation for treatment.

If his MRI looks largely the same, certainly one could consider doing a lumbar fusion at this level, but I think the prognosis for him doing well with this is probably quite poor. I would certainly do a MMPI and be sure there is a psychiatric evaluation on him first to help predict the factors for his recovery. I would be very pessimistic that further surgery would help him. If the patient did not desire further surgery, I would simply get a FCE to determine his long-term limitations and give him a final rating and release.

In terms of a disability rating, I would give him a permanent partial disability rating of approximately 12% as he required a second operation and has persistent pain in accordance with The American Medical Association publication Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, page 113.

Claimant testified that between April 16, 2004, and January of 2005, he was living “here and there,” staying with friends and, at times, sleeping in the backseat of his car. In January, he moved in with his mother. He testified that, although it is not working out well living with her, he “decided the pain was a factor.” He testified that he is now a student at East Arkansas Community College and is able to attend free of charge because his mother is on staff there. He testified that she pays for his books and his gas money. He testified that he attends classes three hours per day, five days per week.

Claimant admitted on cross-examination that he had a previous back injury in 1995 or 1996 and took steroids for that problem. Further, he admitted to having a minor automobile accident in 2002, wherein he hurt his back, hired an attorney, and received a settlement. Claimant also admitted that he has been suffering from other medical problems lately that have caused him some stress and anxiety.

FINDINGS OF FACT

1. The stipulations agreed to herein by the parties are accepted as fact;
2. Claimant is entitled to additional temporary total disability indemnity benefits from June 23, 2004, through October 1, 2004, and again from the date of his last surgery, which was scheduled for April or May of 2005, and continuing through a date yet to be determined;

3. Claimant has failed to prove entitlement to the additional period of temporary total disability indemnity benefits sought of April 16, 2004, through a date yet to be determined;
4. Claimant has failed to prove entitlement to additional medical treatment by Dr. Counts for depression secondary to pain caused by his work injury;
5. Respondents have controverted the additional period of temporary total disability benefits prior to claimant's most recent surgery;
6. The issue of permanency is held in abeyance.

DISCUSSION

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* These are matters of weight and

credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

In this case, claimant asserts that he is entitled to an additional period of temporary total disability benefits beginning April 16, 2004, and continuing through a date yet to be determined. The evidence clearly establishes that claimant was released to return to work by Dr. Akin on December 4, 2003, at which time Dr. Akin found claimant to be at maximum medical improvement (MMI) and issued an impairment rating. Although his rating did have to be reissued on March 3, 2004, it was based on a technicality and had nothing to do with his opinion that claimant had previously reached MMI on December 4, 2003. Claimant did not return to work, however, but drew unemployment benefits through March of 2004.

On March 4, 2004, claimant was fully released by Dr. Lewis with “no impairment,” although claimant contends that he asked Dr. Lewis to give him that release in an attempt to obtain a job. At any rate, the evidence reflects that claimant began seeing Dr. Lewis again at the end of March, as his pain intensified. Although there is a clinic note from April 16, 2004, there is no evidence that Dr. Lewis took claimant to an “off work” status on that date.

Dr. Lewis eventually did issue an off-work slip to claimant for the period of June 23, 2004, through October 1, 2004, *only*; no other off-work slips were introduced into the record following this one. While it is true that Dr. Garlapati stated in a letter

to claimant's counsel on August 9, 2004, "it would be difficult for me to assess when [claimant] could go back to work," the fact remains that there is no evidence of any off-work slips or notes from Dr. Garlapati after the October 1, 2004, end-date of Dr. Lewis's last off-work slip, or at *any* time by Dr. Garlapati. As such, the only additional period of temporary total disability benefits to which claimant has proven entitlement is the period from June 23, 2004, through October 1, 2004.

With regard to claimant's assertion that he is entitled to additional medical treatment for depression secondary to pain caused by his work injury by Dr. Ken Counts, along with any prescriptions that would be recommended by Dr. Counts, the Arkansas Court of Appeals has held that medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury *may* constitute reasonably necessary medical treatment. *See generally, Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tiner v. Total Petroleum*, Full Workers' Compensation Commission, Opinion filed April 3, 2003 (W.C.C. F104990). In addition, an employer may remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). ("Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer.") However, a claimant must still prove

that the additional treatment he desires is reasonable and necessary, in relation to his compensable injury.

Arkansas Code Annotated § 11-9-113 states in part:

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

(2) No mental injury or illness under this section shall be compensable unless it is also *diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.*

(b)(1) Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.

[Emphasis added.]

In this case, no evidence was presented to establish that Dr. Counts is a licensed psychologist or that claimant has been diagnosed with a condition that meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders, as required by Ark. Code Ann. § 11-9-113(a)(2). Further, claimant admitted that he has recently suffered other medical problems, unrelated to his work injury, that have caused him stress and anxiety. As such,

claimant has failed to prove that his treatment with Dr. Counts is reasonable and necessary in relation to his compensable injury of July 1, 2003. Claimant's asserted claim for additional medical treatment for depression secondary to pain caused by his work injury by Dr. Ken Counts is, therefore, respectfully denied and dismissed.

AWARD

Respondents are directed to pay claimant additional temporary total disability indemnity benefits for the specific periods noted herein.

Respondents are directed to pay the claimant's attorney, Mr. M. Keith Wren, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge