

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308944

RUSSELL HAYDEN, Employee	CLAIMANT
HAWLEY CONCRETE CONSTRUCTION, Uninsured Employer	RESPONDENT #1
R.A. KING CONSTRUCTION	RESPONDENT #2
COMMERCE & INDUSTRY INSURANCE	RESPONDENT #2

OPINION FILED JUNE 23, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by JOE BYARS, Attorney, Fort Smith, Arkansas, although not present at hearing.

Respondent #2 represented by JOHN TALBOT, Attorney, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

On June 6, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 31, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulation:

1. The prior Opinion filed in this matter is final.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensation rate.
2. Temporary total disability benefits and/or temporary partial disability benefits.
3. Attorney fee.

At the time of the hearing the parties also agreed to litigate claimant's entitlement to unpaid prescription expenses since January 2005.

The claimant contends that his compensation rate should be determined by the Commission. Claimant also seeks payment of additional temporary total disability benefits, payment of unpaid prescription expenses since January of 2005, and a controverted attorney fee.

Respondent #2 contends that claimant is not entitled to any additional temporary total disability benefits and that claimant had reached maximum medical improvement; therefore, it is not liable for payment of unpaid prescription expenses since January of 2005.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The parties' stipulation that the prior opinion of July 22, 2004 is final is hereby accepted as fact.
2. Claimant earned an average weekly wage of \$500.00 which would entitle him to compensation at the rate of \$333.00 for temporary total disability benefits and \$250.00 for permanent partial disability benefits. Respondent is liable for paying the difference, if any, between this rate and the rate at which any temporary total disability benefits were previously paid.
3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to payment for unpaid medical prescriptions beginning in January of 2005.
5. Respondent has controverted claimant's entitlement to any difference between

the temporary total disability rate of \$333.00 and the rate previously paid.

FACTUAL BACKGROUND

This claim was the subject of a prior hearing conducted on June 28, 2004. An opinion was filed by this administrative law judge on July 22, 2004 finding, *inter alia*, that the claimant was an employee of Hawley Construction Company, an uninsured contractor, on September 3, 2003 when he suffered a compensable injury to his lumbar spine. I also found that R.A. King and its compensation carrier, Commerce & Industry Insurance Company, were liable for payment of compensation benefits as the general contractor pursuant to A.C.A. §11-9-402. I also found that claimant was entitled to payment of reasonable and necessary medical treatment and that claimant had failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits. Finally, I found that claimant's compensation rate should be based upon an hourly rate of \$12.50.

The opinion filed July 22, 2004 was not appealed by any of the parties and the parties have stipulated that it is final.

Claimant has brought this current claim requesting calculation of his correct compensation rate. In addition, claimant seeks payment of temporary total or temporary partial disability benefits, payment of unpaid prescription expenses, and a controverted attorney fee.

ADJUDICATION

The first issue for consideration involves the claimant's correct compensation rate. In the prior opinion filed July 22, 2004, I noted that it was impossible to determine the claimant's average weekly wage from the evidence presented at the time of the original hearing. However, I did make a determination that the claimant's compensation rate

should be based upon an hourly rate of \$12.50. At the most recent hearing claimant testified that his employment with respondent #1 was full time of at least 40 hours per week. I find claimant's testimony that he worked 40 hours per week for respondent #1 to be credible. Accordingly, I find that claimant's average weekly wage while working for respondent #1 was \$500.00 ($\$12.50 \times 40 = \500.00). This results in a compensation rate of \$333.00 for temporary total disability benefits and \$250.00 for permanent partial disability benefits.

There is some evidence that the respondent has paid claimant some temporary total disability benefits as a result of his compensable injury. To the extent that those benefits were paid at a lesser rate than \$333.00 per week, claimant is entitled to the difference. In addition, the respondents have controverted the claimant's entitlement to the difference, if any, between the rate at which benefits were paid and the correct rate of \$333.00 per week.

The second issue for consideration involves claimant's request for additional temporary total disability benefits. Claimant had previously requested temporary total disability benefits at the time of the hearing conducted on June 28, 2004. Specifically, claimant was requesting temporary total disability benefits beginning September 4, 2003 and continuing through a date yet to be determined. In the opinion filed July 22, 2004, I found that claimant had failed to meet his burden of proving by a preponderance of the evidence that he was entitled to temporary total disability benefits. In making this ruling, I noted that the medical records did not indicate that claimant was totally incapacitated from working. Furthermore, I noted that claimant indicated that he was capable of performing some concrete finishing work and in fact had performed concrete finishing work for an individual named Bill McIlroy.

Subsequent to that hearing the claimant began receiving medical treatment from River Valley Orthopaedics and was apparently taken off work. According to claimant's

testimony the respondent at some point began paying him temporary total disability benefits which continued until January 2005. Thus, the question is whether claimant is entitled to additional temporary total disability benefits beginning in January 2005 and continuing through a date yet to be determined.

In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he remained within his healing period or that he suffered a total incapacity to earn wages subsequent to January 2005.

As previously noted, claimant sought medical treatment from the River Valley Orthopaedic Clinic beginning in August 2004. Claimant's primary medical treatment from that clinic has consisted of evaluations by Marie Pham, a nurse practitioner. A review of her medical reports does indicate that she took claimant off work. Her medical reports also indicate that she ordered a second MRI scan which was performed on September 1, 2004. That scan was read as showing a bulging annulus with mild canal stenosis with degenerative disc disease at the L4-5 level and a small central disc protrusion at the L5-S1 level. Pham prescribed medications, physical therapy, and referred claimant to a pain specialist for steroid injections. In a report dated December 27, 2004, Pham referred claimant to Dr. Arthur Johnson for a surgical consultation. In addition, Pham has indicated that claimant should remain off work.

In January 2005 the respondent requested an independent medical evaluation from Dr. Holder. Dr. Holder in conjunction with his independent medical evaluation ordered a functional capacities evaluation which was performed on January 25, 2005. That

evaluation indicates that claimant gave variable levels of physical effort in performing the evaluation testing. According to the evaluation report claimant is capable of doing more physically than he demonstrated during the test. However, at a minimum the evaluation indicates that claimant is capable of performing light duty work.

Dr. Holder examined claimant on January 25, 2005 and after receiving the functional capacities report authored a report on February 7, 2005. Dr. Holder based his opinion on claimant's prior medical reports and testing; his examination of the claimant; and his review of the results of the functional capacities evaluation. It was his opinion that claimant at a minimum was capable of light work. He also stated that in his opinion the claimant had reached maximum medical improvement with a 0 percent impairment. Furthermore, Dr. Holder was also of the opinion that claimant's current complaints of pain was not related to the original compensable injury.

I do not believe that the current level of complaints of of pain is directly related to the report injury over 16 months ago. This is within a reasonable degree of medical certainty.

The fact that claimant's current complaints are not related to his original compensable injury is also supported by the report of Dr. Johnson dated December 2, 2004. Although claimant has not yet been physically evaluated by Dr. Johnson, Dr. Johnson is a neurosurgeon who has reviewed the claimant's two lumbar MRI scans. In his report of December 2, 2004, Dr. Johnson notes that the claimant's L5-S1 disc protrusion "is most likely associated with degenerative disc disease changes with gradual bulging of the disc and is not related to a traumatic event according to my records."

In addition, I believe it is important to note that according to claimant's own testimony he is not totally incapacitated from working.

Q. So it's fair to say you're not totally incapacitated from earning wages?

A. No, sir, I'm not. I'm not capable of doing the job that I used to do.

Q. But you are capable of doing some work and earning some money?

A. Yes, but not to the full extent that I was.

The fact that claimant is capable of performing some work is evidenced by the fact that he went to work for a gentleman named Jimmy Silva on March 15, 2005. Silva testified that he owns a construction company and that he hired claimant on March 15, 2005 to oversee concrete work performed by his company. Silva testified that he hired claimant because of his experience and that claimant does not perform physical labor. According to claimant's testimony he works for Silva full time approximately 40 hours per week.

In summary, in order to be entitled to additional temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. According to claimant's testimony he received temporary total disability benefits from the respondent until January 2005. I find insufficient evidence that claimant remained within his healing period or that he suffered a total incapacity to earn wages subsequent to January 2005. First, claimant underwent a functional capacities evaluation which revealed an inconsistent effort. However, the evaluation indicated that at a minimum the claimant could perform light duty work. Furthermore, Dr. Holder in a report dated January 25, 2005 indicated that claimant had reached maximum medical improvement and was capable of performing at least light duty work. Dr. Holder also opined that claimant's current complaints of pain were not directly related to the claimant's compensable injury. In addition, Dr. Arthur Johnson in s report dated December 2, 2004 indicated that the claimant's L5-S1 disc protrusion was associated with degenerative disc changes, not a traumatic event. Finally, claimant admitted that he was not totally incapacitated from working as evidenced by the

fact that he began working for another employer in March 2005.

Based upon the foregoing evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits subsequent to January 2005.

The final issue for consideration involves claimant's request for payment of unpaid medical prescriptions beginning in January 2005. The documentary evidence indicates that these prescriptions were authorized by Dr. Johnson. According to claimant's testimony he has not been evaluated by Dr. Johnson, but instead has seen only Marie Pham, a nurse practitioner in Dr. Johnson's office.

Claimant has the burden of proving by a preponderance of the evidence that these prescription expenses are reasonable and necessary in relation to his compensable injury. I find that claimant has failed to meet that burden of proof. As previously noted, Dr. Holder indicated that claimant had reached maximum medical improvement for his compensable injury. Furthermore, and more importantly, Dr. Holder opined that claimant's current complaints of pain were not causally related to his compensable injury. Likewise, Dr. Johnson in his report of December 2, 2004 indicated that the L5-S1 disc protrusion was associated with degenerative disc disease changes, not a traumatic accident. Finally, with respect to this issue, I believe it is important to note from a review of Marie Pham's progress noted dated December 27, 2004, that the clinic had received a message from claimant's wife indicating that claimant was seeking pain medications from multiple providers.

I find that claimant has failed to prove by a preponderance of the evidence that respondent is liable for payment of the unpaid prescription expenses. Based upon the opinions of Drs. Holder and Johnson, I find that claimant's current complaints of pain are not causally related to his original compensable injury, but rather to a pre-existing degenerative disc disease.

AWARD

Claimant earned an average weekly wage of \$500.00 which would entitle him to compensation at the rate of \$333.00 for temporary total disability benefits and \$250.00 for permanent partial disability benefits. Respondents are responsible for payment of the difference, if any, between this compensation rate and the rate at which compensation benefits were previously paid. In addition, respondents have controverted the difference, if any, between these rates. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits or payment of unpaid prescription expenses beginning in January 2005.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of any indemnity benefits which are payable to the claimant, if any. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

Any sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE