

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304994

GLENN LEE, JR., EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, TPA	RESPONDENT

OPINION FILED MAY 26, 2005

Hearing held on March 1, 2005, at Hope, Hempstead County, Arkansas, before HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by Honorable Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Honorable William G. Bullock, Attorney at Law, Texarkana, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 1, 2005, in Hope, AR. A prehearing order was filed in this case on January 4, 2005. The prehearing order set out the stipulations, contentions and issues offered by the parties. At the start of the full hearing, the parties agreed to reserve any issues related to permanent impairment and temporary partial disability. The parties also agreed to reserve the change of physician issue. Subject to modification made at the full hearing, the January 4, 2005 prehearing order was submitted into the record as Commission Exhibit No. I, without objection.

The following stipulations were offered by the parties and are hereby accepted:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed between the parties on

March 8, 2003.

- 3) The parties agreed the maximum weekly compensation rates allowed at the time of the injury apply, which would be \$440.00 for TTD and \$330.00 for PPD.
- 4) The claimant sustained a compensable injury on March 8, 2003, for which some benefits were paid.
- 5) All medical and indemnity benefits requested by the claimant after August 2, 2003, are controverted.

By agreement of the parties, the issues to be litigated were limited to the following:

- 1) Whether there is a causal relationship between the claimant's 3/8/03 compensable injuries and his subsequent 8/2/03 injuries.
- 2) Whether the claimant is entitled to additional indemnity and medical benefits after 8/2/03, and attorney fees.
- 3) Whether respondent is entitled to an offset pursuant to A.C.A. §11-9-411.

In regard to these issues, the claimant contends he sustained compensable injuries to his neck and left shoulder on March 8, 2003, to which he is entitled to additional medical and indemnity benefits. In the alternative, the claimant contends the incident at Wal-Mart in August of 2003, wherein the claimant fell, was due to medication from his compensable injury and that he is entitled to TTD benefits from August 3, 2003 through August 30, 2004, additional medical benefits and attorney fees.

The respondents contend claimant had an idiopathic fall on August 2, 2003, which constitutes an independent, intervening and superceding cause of his need for further medical treatment and his lost time at work, if any. Respondents further contend claimant will be unable to establish a causal relationship between his compensable injury and the

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controverted treatment and disability incurred subsequent to his idiopathic fall on August 2, 2003 under A.C.A. §11-9-523(a). Further, respondent contends the medical bills and treatments which claimant seeks subsequent to his idiopathic fall on August 2, 2003, were not incurred as a result of, and were not reasonable and necessary treatment for, the compensable injury; and the disability period claimant has sustained, if any, beyond the period of TTD paid by respondents were not the result of a compensable injury, and that the medical treatment prescribed to, or sought by claimant, are not in accordance with Rule 30 of the Arkansas Workers' Compensation Law. Respondents contend in the event an award is rendered in favor of claimant, respondents are entitled to an offset against any monies paid to claimant by respondent/employer's group health plan, accidental and sickness benefit plans, or any other employee benefit plan meeting the definition set forth in A.C.A. §11-9-411.

The record was left open by agreement of the parties for thirty (30) days to allow the deposition of Ms. Mary Ann Cox to be taken and included in the record. The deposition and its exhibits were provided to the Court reporter within thirty (30) days and included in the record as Respondents' Exhibit No. 4. During the deposition, the claimant objected to respondents' attorney's attachment # 5, of respondents' exhibit #4, and requested a ruling. Said attachment was a functional capacity evaluation conducted on the claimant on July 27, 2004. At the full hearing I excluded the functional capacity evaluation because it was not provided to claimant at least seven days prior to the hearing. My ruling remains the same with regard to the FCE and will not be considered by this ALJ for determination of the

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issues outlined herein. I do however, allow the FCE to be proffered and, therefore, Attachment #5 to Respondents' Exhibit #4 will hereafter be known as Respondents' Proffered Exhibit #1.

DISCUSSION

1. HISTORY

The claimant had worked for Cooper Tire for about six years prior to his admitted compensable injury on March 8, 2003. On March 8, 2003, the claimant's job description was a first stage tire builder. The claimant testified as follows regarding the March 8, 2003 incident:

A. Which includes pulling your first ply off of your trays and onto the drum, the round drum, and then if you are building a two ply tire you've got the first ply and the second ply, and then you've got your sidewall, and then your got to pull the tire off the drum. When you run out of material then you go around to the back and you've got racks back there that has got your materials on them. They are on a pin rack. Okay. You've got a hoist that is connected up to the ceiling which goes back and forth, left and right, or frontward and backward. So I went to get another roll of cord, which is your first ply, which I was building I believe a one ply, maybe a two ply, I can't remember, but anyway, I went back there to get the roll of cord (T. pg. 14 lines 12-25) and it happened to be stuck on the pin rack. So I thought I had the hoist up too far on the roll of cord to pick it up off of the pin rack, to

load it up in the machine. Well, it still wouldn't come off so I pulled on it again with my left arm and it still wouldn't come off so I thought, well, maybe I've got it up too high, so I lowered the hoist down and I pulled on it again and it still wouldn't come off. So I was like, well, maybe it's just stuck and so I started wiggling it back and forth and it still wouldn't come off. So then I thought, well, maybe I've got it down too far and it's not got it up off the pins, so I pulled on it again with my left arm and when I pulled I felt it rip in my left shoulder, neck, and into my shoulder blades in my back area. (T. pg 15, lines 1-15)

The claimant testified he filled out an injury report with the respondent on the date of injury, (RX 1, pg. 2), and that after the injury he had a lot of pain in his left shoulder, neck and the arm area.

Beginning on March 13, 2003, the claimant started treating with Dr. Gregory Richter. Dr. Richter ordered a MRI of the cervical spine which was conducted on April 3, 2003. The MRI showed bulges from C3-C4 through C6-C7. (CX 1, pg. 6) After the MRI Dr. Richter saw the claimant on April 10, 2003, and reported the following:

“comes in today with continued left shoulder, arm and neck pain. It has been going on for a month.” (CX 1, pg. 6)

On May 12, 2003 the claimant went to a neurologist, Dr. Reza Shahim, who reviewed his cervical MRI and recommended against surgery. Dr. Shahim prescribed physical therapy.

On June 12, 2003 the claimant saw Dr. Richter who reported the following:

“He has seen Dr. Shahim who recommended physical therapy. He

has done that and it hasn't helped at all.”

Dr. Richter then ordered nerve conduction studies.

On June 24, 2003, a nerve conduction study and EMG of the left upper extremity was conducted and came back normal. (CX 1, pg. 14) On July 31, 2003, the claimant started seeing Dr. Bruce Safman for pain management. Dr. Safman changed his medication and performed trigger point injections. (CX 1, pg. 17)

The next time Dr. Safman saw the claimant after his initial consultation was August 14, 2003. At that time Dr. Safman reported the claimant had passed out at Wal-Mart and has had increased pain and that Dr. Richter had taken him off work. (CX 1, pg. 19) Two weeks later Dr. Safman did more injections. (CX 1, pg. 23)

According to Dr. Richard Sharp, who saw the claimant on December 29, 2003, Mr. Lee got a second neurosurgeon's opinion in Dallas who did not recommend surgery. (RX 2, pg. 20) Through the claimant's testimony it became apparent the second neurosurgeon he saw was Dr. Marlin. The claimant testified Dr. Marlin basically told him the same thing as Dr. Shahim.

With continued complaints of left shoulder pain, Dr. McKay recommended a MRI of the left shoulder on March 2, 2004. On March 10, 2004 the MRI of the left shoulder was completed and revealed a partial tear. (CX 1, pg. 37). The same day Dr. Richter reviewed the shoulder MRI and recommended the claimant see an orthopedist. The claimant preferred to see an orthopedist by the name of Dr. Chris Alkire. On April 26, 2004, Dr. Alkire reported “no significant pathology in his left shoulder.....nothing that needs any kind

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of surgery or needs to be fixed.” (RX 2, pg. 8) With that diagnosis, Dr. Alkire recommended pain management with Dr. Safman.

On August 30, 2004, the claimant testified he returned to work on light duty. The claimant continued to work light duty for the respondent through the date of the hearing.

II. INDEPENDENT INTERVENING CAUSE

The central issue in this case is whether the fall at Wal-Mart, sometime in early August of 2003, constituted an independent intervening cause that broke the causal link between the claimant’s March 8, 2003 compensable injury and his post August, 2003 condition.

Respondents are responsible for benefits that result from an injury that is causally related to a compensable injury. However, the respondent is not responsible for benefits when the injury is sustained due to a non-work related, independent intervening cause, which causes a prolonged disability or need for treatment. Pitts v. Rheem Manufacturing, 2005 AWCC 75, Claim No. F30388 (April 21, 2005), Richardson v. ACF Industries, 2003 AWCC 120, Claim No. F100097 (June 18, 2003), A.C. A. §11-9-102 (4)(f)(6). An intervening cause does not exist unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W. 2d 677 (1998). When a primary injury is shown to have arisen out of the course of employment, the employer is responsible for any natural consequences of that injury. Wackenhut Corp. v. Jones, 73 Ark. 158, 40 S.W. 3d 333 (2001).

In the present case, the claimant credibly testified he initially had problems with his shoulder and neck from the onset of his March 8, 2003 injury. The medical reports are consistent throughout that the claimant was having left shoulder and neck pain from March 8, 2003, through the time of the full hearing. Dr. Richter's April 10, 2003 report backs up the claimant's testimony regarding his left shoulder and neck pain:

“...comes in today with continued left shoulder, arm and neck pain. It has been going on for a month.” (CX 1, pg. 6)

The claimant's left shoulder and neck were always his complaints of injury, stemming from the March 8, 2003 accident. The respondents accepted the March 8, 2003 injury as compensable but controverted any benefits after the claimant's August, 2003 fall at Wal-Mart. My review of the medical evidence shows virtually no change in symptoms before or after the August, 2003 fall at Wal-Mart. Dr. Richter stated in his September 17, 2003 report:

“there is so way that I can prove that his fall at Wal-Mart produced any further injury or did not produce any further injury but I feel like it is pretty clear that he passed out because of medication and pain secondary to the injury that he acquired at Cooper Tire. (CX 1, pg. 25)

The claimant was doing nothing out of the ordinary while at Wal-Mart in August of 2003. I find that the claimant's August, 2003 fall at Wal-Mart was not an independent intervening cause that broke the causal relationship between the claimant's March 8, 2003 compensable injury and his post-fall symptoms. With that issue resolved, the issues of additional medical benefits and additional TTD benefits must be addressed.

III. ADDITIONAL MEDICAL BENEFITS

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The respondents have controverted medical benefits after August 2, 2003 in relation to the March 8, 2003 injury.

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. (A.C.A. §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). In the present case, the medical evidence is overwhelming that the claimant sustained left shoulder and neck injuries as a result of his March 8, 2003 compenable injury. I find the opinion of Dr. Chris Alkire, the orthopedist of choice of the claimant, to be persuasive regarding the medical care received by the claimant.

Dr. Alkire's April 26, 2004 report sums up what future medical treatment is needed by the claimant.

"I've gone over this patient's exams by the previous doctors as well as his diagnostic studies. I've told him point blank that I don't think there's any significant pathology in his shoulder which is causing his continued pain and problems. Certainly his shoulder problem is not coming from his cervical spine. I think he's had all the tests and diagnostic studies that could be done to work up his problem. I told him point blank that I think the type of injury he has is going to continue to give him some pain, but I don't think he's ever going to be able to return to Cooper Tire building tires again. He has a body that is much like some professional football players who do a very strenuous job playing professional football have had some injuries and even though there is nothing that needs any kind of surgery or nothing that needs to be "fixed", he has had an injury which is going to prevent him from returning to Cooper Tire just like Troy Aikman was not able to return to playing for the Dallas Cowboys after he got his head so many times.(sic) He needs to search out some kind of work for the future such as sit-down, sedentary type work that won't hurt his arm and his neck. He only has a high-school education. Re-

education through Vocational/Rehabilitation would be his best choice. I don't see anything that needs any active orthopedic surgery. I think also continuing to see Dr. Safman for pain management would be very important in his treatment plan and would encourage him to continue to see Dr. Safman. Ms. Cox and I talked about all the above today. He will see me on an as-needed basis." (RX 2, pg. 8)

Both neurologists who examined the claimant saw the protrusions shown on the cervical MRI; however, both recommended against surgery. Physical therapy and pain management were the only recommendation from the neurologist. Dr. Alkire was the orthopedist who reviewed the left shoulder MRI and determined surgery was not an option, and recommended pain management for his shoulder.

With regard to the additional medical, I find the respondents are responsible for the left shoulder MRI that was conducted after August of 2003. This Administrative Law Judge is amazed it took so long to send the claimant to have an MRI of his left shoulder after months of complaints. The MRI did show a tear, but Dr. Alkire did not find surgery to be an option. I find the respondents are responsible for all claimant's visits to Collom & Carney Clinic between August 2, 2003 to the present. I find the respondents are responsible for treatment the claimant received from Dr. Reza Shahim from August 2, 2003 to the present, if any; however, the respondents are not responsible for the second opinion of Dr. Marlin.

The respondents are responsible for the left shoulder MRI and treatment by Dr. Alkire from August 2, 2003 through the date of the full hearing. I find all treatment by Dr. Safman is the responsibility of the respondents from the date of injury, and for future pain

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management by Dr. Safman concerning the claimant's neck and left shoulder. I find the claimant's need for pain management by Dr. Safman is reasonably necessary and related to his March 8, 2003 compensable injury. The Commission has always interpreted medical treatment intended to reduce or enable an injured employee to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Georgia Pacific Corp. v. Dickens, 58 Ark. App 266, 950 S. W. 2d 463 (1997). The pain management treatment from Dr. Safman is the only continual treatment regarding the compensable injury that is the responsibility of the respondents.

IV. ADDITIONAL TEMPORARY TOTAL DISABILITY

An injured employee is entitled to temporary total disability compensation during the time that he is within his healing period and is totally incapacitated to earn wages. AHTD v. Breashers, 272 Ark.244, 613 S.W. 2d 392 (1981). The claimant contends he is entitled to temporary total disability from August 3, 2003 through August 30, 2004 due to his March 8, 2003 compensable injury. I find the evidence does not preponderate in favor of the claimant for an award of temporary total disability benefits for this period.

The claimant has two injuries, cervical disc protrusions and left shoulder tear. The period of temporary total disability requested by the claimant is outside of his healing period. Even though pain management may be needed as additional medical treatment, the mere persistence of pain does not prevent a finding that the healing period has ended as long as the underlying condition has stabilized. Mad Butcher v. Parker, 4 Ark. App. 124, 628 S.W. 2d 582 (1982) As previously cited word-for-word, Dr. Alkire had the same

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opinion of every doctor that examined the claimant; that even though the claimant had sustained injuries, he was as good as he was going to get. 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 v. Parker. I find that Mr. Lee's healing period had ended prior to August 3, 2003 and, therefore, not entitled to temporary total disability. Dr. Shahim ordered physical therapy for three weeks on May 12, 2003 (CX 1, pg. 10) After the physical therapy was unsuccessful, all other reports indicate the claimant's condition was stable and that the only treatment available would be pain management. This is not to say other relief is not available to the claimant. As Dr. Alkire stated, vocational rehabilitation may be in order; however, that issue is not currently before the Commission. The claimant also reserved the issue of temporary partial disability, and is not being considered at present.

During the course of the hearing, the parties ultimately agreed that the respondents would be entitled to an offset pursuant to A.C.A. §11-9-411.

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 the opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

- 1) The stipulations agreed to by the parties are reasonable and hereby accepted.
- 2) The claimant's fall in August of 2003, did not constitute an independent

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intervening cause and, therefore, did not break the causal link between the March 8, 2003 compensable injuries and the claimant's present condition.

- 3) The claimant has proven by a preponderance of the evidence he is entitled to additional medical treatment and the respondents shall pay for all treatment recited in Section III, herein.
- 4) The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
- 5) Respondents are entitled to an offset pursuant to A.C.A. §11-9-411 for benefits awarded herein.

AWARD

The claimant has proven by a preponderance of the evidence he is entitled to additional medical treatment after August 2, 2003, and the respondents are hereby directed and ordered to pay for the additional medical as recited herein forthwith.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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