

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405429

JOHN MARBERRY,
EMPLOYEE

CLAIMANT

TERRY YEAGER AUTO SALVAGE,
EMPLOYER

RESPONDENT

UNIVERSAL UNDERWRITERS INS. CO.,
CARRIER

RESPONDENT

OPINION FILED AUGUST 30, 2005

Hearing before Administrative Law Judge March Churchwell on June 21, 2005, in Harrison, Boone County, Arkansas.

Claimant represented by Honorable Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Honorable Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 21, 2005 in Harrison, Arkansas. A Prehearing Order was entered in this case on April 18, 2005. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The claimant's average weekly wage was \$240, entitling him to compensation rates of \$160 per week for total disability and \$120 per week for permanent partial disability.

2. The respondents have controverted this claim in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited the following at the start of the hearing:

Claimant:

1. Compensability of claim.
2. TTD benefits. [From date last worked to a date yet to be determined]
3. Reasonable and necessary medical treatment.
4. Unpaid medical bills.
5. Controverted attorney fees.
6. Constitutionality of the Arkansas Workers' Compensation Act.

Respondent:

1. The compensability of the claimant's alleged 5/10/04 injury.

The record consists of the June 21, 2005 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record the

claimant's brief filed July 13, 2005 and the respondent's brief filed July 13, 2005.

DISCUSSION

1. Compensability of Low Back Injury Claim, TTD Benefits, Unpaid Medical Bills, and Controverted Attorney's Fees

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. 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).

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

In the present case, I find that Mr. Marberry proved by a preponderance of the credible evidence that he sustained a compensable back injury on May 10, 2004 lifting a transmission. In this regard, I note that the contemporaneous medical reports from May 10, 2004 document a transmission lifting incident causing Mr. Marberry's injuries. Carl Pride's testimony and written statement corroborate that a transmission weighs 150 pounds and that he observed Mr. Marberry lift the transmission in question

on May 10, 2004 without the benefit of a roll back, a wench, or a second person's assistance.

In reaching my conclusion, I am also persuaded by the fact that Mr. Marberry has no documented back problems pre-existing May 10, 2004, and by the fact that the record contains no credible evidence indicating any alternative activity that Mr. Marberry arguably engaged in to cause his back injury at issue.

I am also highly persuaded by Dr. Leslie's May 24, 2004 post-MRI opinion that Mr. Marberry was experiencing bulging disk with secondary radiculopathy and secondary pain all from an injury at work. There are no contrary medical opinions in the record to rebut Mr. Leslie's opinion on causation, and Dr. Leslie's opinion does not appear to me to be based on any material mistake of fact.

The respondents seem to place great weight on the fact that Mr. Marberry did not comment to Mr. Pride after setting the transmission down that he had injured his back, that Mr. Marberry did not comment to any mechanics back at Yeager's (if any mechanics were in fact working late), and that Mr. Marberry did not call either of the business' owners prior to proceeding from Yeager's to the emergency room after dropping off Yeager's delivery truck. In light of the evidence that the out-of-town delivery occurred at the end

of the normal work day, that Mr. Marberry was in a hurry (rather than seeking or waiting to use a wench, a roll back, or Mr. Pride's assistance), that Mr. Marberry then had to drive back from Branson to Harrison, arriving even later in the evening, and then proceeded directly to the emergency room after he dropped off the delivery truck, I am not suspicious of Mr. Marberry's credibility simply because he did not seek out or discuss his pain with Mr. Pride, with any mechanics who may have been back at the shop, or with Mr. Halstead after the injury occurred relatively late in the day.

I also find that Mr. Marberry's back injury is established by objective medical findings including a Flexeril prescription and Dr. Leslie's interpretation of the lumbar MRI as indicating disk bulge abnormality (with secondary pain and radiculopathy). See Fred's, Inc. V. Jefferson, ___ Ark. ___, ___ S.W.3d ___ (04-1085 Del. March 31, 2005) [Flexeril prescription is objective]; Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001) [MRI finding of a disk abnormality is objective].

I also find that the preponderance of the evidence establishes that Mr. Marberry is entitled to temporary total disability compensation from May 11, 2004 through the hearing date and continuing to a date yet to be determined.

In this regard, I am persuaded by Dr. Leslie's recommendation that Mr. Marberry remain off work until he can be seen by a neurosurgeon. As of the date of the hearing, Mr. Leslie had not yet seen a neurosurgeon because the respondent has denied him treatment, and he cannot pay for a neurosurgeon himself. In fact, Mr. Marberry relies on family just to pay his bills. In reaching this conclusion, I note that, when the respondents inexplicably delayed Mr. Marberry's treatment, Dr. Leslie ordered a functional capacity evaluation. I am impressed by the reliable effort which Mr. Marberry provided, as indicated by achieving 34 of 34 consistency measures within expected limits. Both Dr. Leslie's records and the FCE records corroborate Mr. Marberry's testimony indicating that Mr. Marberry's physical activities are pain-limited, and Mr. Leslie remains within his healing period and has no business trying to return to work, in light of the nature and extent of his medically documented back injury and symptoms, until he has received an appropriate neurosurgical evaluation to determine the proper course of future medical treatment. Accord City of Fouke v. Buttrum, 59 Ark. App. 219, 956 S.W.2d 193 (1997); Luther J. Nobel v. Whistle Lumber Co., Full Workers' Compensation Commission, Opinion filed August 21, 1997 (E514580).

I further find that all of the medical treatment in the record to date appears to have been appropriate for and related to the need to diagnose the extent of Mr. Marberry's injury and to treat that injury. For the reasons discussed above, I also find that a neurosurgical evaluation is reasonably necessary to treat Mr. Marberry's injury.

2. Constitutional Challenges

In the previous section, I awarded the claimant all of the benefits which the claimant currently seeks. The claimant challenges the constitutionality of the Arkansas Workers' Compensation Law, but the respondents make no such challenge.

The Arkansas Supreme Court has indicated that constitutional questions should be avoided where appropriate. In the present case, the claimant stands to gain nothing financially if I were to address the constitutionality of the Arkansas Workers' Compensation Law since I have already awarded the claimant everything that he requested. Under these circumstances, I find the claimant's constitutional argument moot. See Quinn v. Webb Wheel Prods., 334 Ark. 573, 976 S.W.2d 386 (1998).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant's average weekly wage was \$240, entitling him to compensation rates of \$160 per week for

total disability and \$120 per week for permanent partial disability.

2. The respondents have controverted this claim in its entirety.

3. The claimant proved by a preponderance of the evidence that he sustained a compensable back injury on May 10, 2004.

4. The claimant proved by a preponderance of the evidence that he is entitled to temporary total disability compensation beginning May 11, 2004, and continuing through the date of the hearing to a date yet to be determined.

5. The claimant has established by a preponderance of the evidence that all of the medical treatment documented in the hearing record to date has been appropriate for and related to the need to diagnose the extent of Mr. Marberry's injury and to treat that injury.

6. I also find that a neurosurgical evaluation is reasonably necessary to treat Mr. Marberry's injury.

7. Because I have awarded the claimant all compensation that he has requested, I find that the claimant's constitutional argument is moot.

ORDER

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25 percent attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

HONORABLE MARK CHURCHWELL
Administrative Law Judge