

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403010

JIMMY MAXWELL

CLAIMANT

THORNTON DRILLING COMPANY

RESPONDENT

ZURICH AMERICAN INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 3, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 5, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on July 13, 2004. This pre-hearing order purported to set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties agreed on the specific weekly compensation rates for total and permanent partial disability benefits. A copy of the pre-hearing order with this addition noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On March 7, 2004, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$339.00 for total disability and \$254.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. Whether the claimant sustained compensable injuries to his back, hip, and both

knees in a specific incident on March 7, 2004.

2. Whether these injuries would be expressly excluded from “compensable injuries” by the provisions of Ark. Code Ann. § 11-9-102(4)(B)(iv).
3. The claimant’s entitlement to the payment of medical expenses, temporary total disability benefits from March 8, 2004 through a date yet to be determined, and attorney’s fees.

In regard to these issues, the claimant contends:

“The claimant is entitled to TTD benefits from March 7, 2004 to a date yet to be determined, as well as a change of physician from Dr. Holder to an orthopaedic specialist and statutory attorney’s fee.”

In regard to these issues, the respondents contend:

1. The respondents are asserting the affirmative defense that the claimant’s claim should be barred pursuant to Ark. Code Ann. § 11-9-102(4)(B)(iv)(a)-(d). In that regard, the claimant apparently refused to consent to a drug test on two separate occasions. Once directly following the incident, as well a second time a few days following the injury date. Accordingly, the respondents contend that the claimant’s claim should be barred based upon his unreasonable refusal to consent to the drug test, and the presumption of intoxication should arise.
2. The respondents contend that the claimant’s subsequent drug test obtained ten days following the accident is not sufficient to rebut the presumption. Furthermore, the respondents would request the claimant properly authenticate the alleged drug test and confirm the chain of custody prior to its admission into evidence. In that regard the respondent would place the claimant on notice at this point that they will be objecting to the introduction of the drug test without the proper authenticating documentation or testimony concerning said drug test.
3. The respondents would also challenge the general compensability of the claim and contend that the claimant must meet his burden of proof on all other compensability factors.
4. The respondents will not consent to a change of physician until compensability is determined.

5. The respondents reserve to raise the Second Injury Fund liability issues at a later date if the claimant has any pre-existing conditions, and if or when wage loss becomes a factor.
6. The respondents reserve the right to amend and supplement their contentions after additional discovery has been completed.

## DISCUSSION

### I. APPLICABILITY OF ARK. CODE ANN. . § 11-9-102(4)(B)(iv)

The first issue to be addressed is the respondents' contention that Ark. Code Ann. § 11-9-102(4)(B)(iv) is applicable to the present claim and would bar the claimant from receiving any benefits. The burden rests upon the respondents to prove all of the elements necessary to invoke the provisions of this subsection.

In order to raise the statutory presumption, provided by this subsection, the respondents must prove that, at the time of the claimant's accident on March 7, 2004, the claimant had the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders in his system. After consideration of the evidence presented, it is my opinion that the respondents have failed to prove this fact.

Although the claimant concedes that he had previously had problems with an addiction to cocaine, he testified that this was in the past and that he had not used this drug for a substantial period of time. The claimant's testimony, in this regard, is supported by medical evidence that indicates he had sought and received medical services to assist him in continuing to overcome his addiction. Most importantly, this aspect of the claimant's testimony is supported by the fact that a drug test was required, as a condition of his employment with the respondent, that this test was given on March 3, 2004, and that the claimant was subsequently employed by the respondent ( the respondent has not offered the result of this pre-employment drug test). Thus, it can be assumed that this drug screen, performed only four days prior to the employment accident, was negative. The medical evidence also shows that the claimant took another drug test on March 16, 2004. This

test was also interpreted as negative.

All of the witnesses to the accident, on March 7, 2004, testified that the claimant did not appear to be under the influence of any type of drug or alcohol. Willie Lovell, the driller whose error occasioned the incident, testified that it was his opinion that the claimant's reaction time seemed slow and that he (personally) thinks the claimant could have gotten out of the way of the tongs. Robert Eaton, another witness to the accident and co-employee of the claimant, testified that he, too, thinks that the claimant could have gotten out of the way, if he was really watching. Robert Tolbert, the respondent's "floor man" and witness to the accident, testified that he saw the tongs move in "slow motion" and strike the claimant, knocking him into the rail. However, Patrick Cross, another witness, and co-employee, testified that the accident happened "real quick" and that the claimant would not have had time to get out of the way. He, too, testified that the tongs picked the claimant up and threw him against the rail, which ran around the floor platform. Finally, most of the witnesses testified that the claimant appeared to be inexperienced in working on a "rig."

I simply find that the foregoing testimony is not sufficient to prove that the claimant was under the influence of any drugs or alcohol, at the time of his accident. The matter of whether the claimant could have gotten out of the way of the tongs, if he was properly attentive, might be relevant if this were a tort claim, where fault would be an issue. Clearly, Mr. Lovell, the driller, was also not properly attentive, or he would not have pulled the wrong lever, and caused the tongs to move in the wrong direction. However, there is no allegation that he, too, was under the influence of drugs or alcohol. The claimant's seemingly inexperience, is easily explained by the fact that he had not worked on a drilling rig for approximately 20 years (a fact set out on his employment application).

There remains the claimant's "refusal" to submit to a drug screen, when he was sent by the respondent for treatment to the Cooper Occupational Medicine Clinic. The claimant was initially transported by helicopter from the job site to St. Edwards Mercy Medical Center, at the respondent's direction. This was immediately following the employment-related accident.

However, no drug screen appears to have been requested or obtained at that time. Clearly, this would have been the most appropriate time for such a test. When the claimant requested additional medical treatment from the respondent, some three days later, he was directed to obtain this treatment from the Cooper Occupational Medical Clinic. It was only upon his initial visit to this clinic, on March 10, 2004, that a drug screen was demanded, as a pre-requisite to his obtaining treatment. By this time, the claimant had already received a morphine and phenergan injection at St. Edwards Mercy Medical Center emergency room and was placed on oral pain medication, in the form of Lorcet.

The claimant testified that he initially refused to submit to the drug test, until he had an opportunity to consult his attorney, because he did not see the need for this test. It is apparent that claimant was informed by Cooper Clinic personnel that he would not be treated until the test was taken. At that point, the claimant left. The claimant testified that the following day, after consulting his attorney, he returned to Cooper Clinic Occupational Medicine, but was advised that he had been terminated for refusing to take the drug test and that he would not be provided any medical treatment.

Clearly, this Commission has held that a claimant's refusal to submit to a drug test can be a sufficient basis to conclude that an employment related injury was substantially occasioned by the use of alcohol or by the illegal use of drugs by the claimant. However, I do not find under the facts presented in this case, these previous rulings to be controlling. In the present case, the claimant's refusal to submit to such a test was not absolute, but only conditional. The claimant's failure to see the necessity for this test, his fear that it was merely a pretext to deny him benefits, and his desire to seek legal advice, is all clearly understandable. The respondent had not sought such a test when the claimant was initially seen at St. Edwards Mercy Medical Center, but only sought this test three days later, when the claimant was to be seen by the "company doctors." The claimant was also clearly aware that he had been given various narcotic medications, when seen at the emergency room of St. Edwards Mercy Medical Center, which could clearly have some effect on this

subsequent testing.

The evidence shows that the claimant gave the respondents the opportunity to perform this test the following day, but the respondents refused to exercise this opportunity. The respondents' have not shown that they would have been prejudiced by this one day delay occasioned by the claimant, particularly in light of the fact that there had already been a three day delay, due to the respondents' failure to obtain the test when the claimant was initially seen at the St. Edwards Mercy Medical Center emergency room. The obvious purpose of Ark. Code Ann. § 11-9-102(4)(B)(iv) is to reduce or prevent work place injuries due to an employee's use of alcohol or the illegal use of drugs or to, at least, relieve a respondents from the financial burden of such injuries. It is not simply a trap for the unwary or a technical loop hole to allow the respondents to escape liability for workers' compensation benefits merely because the injured worker was unaware of the particular provisions of the Act. In the present case, the evidence presented simply fails to show that the claimant's initial refusal of the drug screen, on March 10, 2004, was motivated by his knowledge that he had alcohol or illegally used drugs in this system at the time of the employment related incident on March 7, 2004. Thus, his refusal is no evidence of this fact.

In summary, I find that the respondents have failed to prove the presence of alcohol or illegally used drugs in the claimant's system at the time of the employment related accident and resulting injury on March 7, 2004. Therefore, Ark. Code Ann. § 11-9-102(4)(B)(iv) is not applicable to the present claim and would not bar the claimant's entitlement to any benefits under the Act.

## II. COMPENSABILITY

The next issue is the question of whether the claimant sustained "compensable injuries" to his back, hip, and both knees in a specific employment related incident on March 7, 2004. The burden rests upon the claimant to prove all of the elements necessary for a "compensable injury" to these portions of his body.

First, Ark. Code Ann. § 11-9-102(4)(D) requires that the claimant present sufficient medical evidence to "establish" the actual existence of the physical injuries or conditions alleged to be

compensable. This subsection further requires the claimant to prove that the actual existence of these physical injuries or conditions is supported by “objective findings”-i.e. the independent observation of physical findings beyond the claimant’s voluntary control.

The medical evidence in the present claim, “establishes” the actual existence of physical injuries or conditions in the right sacral area and left knee. The injury to the claimant’s right sacral area appears to be the etiology of both his lower back and right hip complaints. There is no medical evidence of any actual physical injury to the claimant’s right hip joint. There is also no medical evidence of any physical injury to the claimant’s right knee (in fact, no mention of such an injury appears to have even reported by the claimant to his various physicians nor is it even mentioned in his testimony).

The actual existence of the medically established physical injury to the claimant’s sacral/ right sacroiliac area is also supported by “objective findings.” The initial emergency report, of March 7, 2004, records the visible observation of a contusion in the area of the claimant’s sacrum (Claimant’s Exhibit No. 1, pages 14 and 16). X-rays, subsequently taken during the claimant’s emergency room visit on March 23, 2004, were also interpreted as showing “a little inflammation” of the sacroiliac joint on the right,” which (in the opinion of the emergency room physician) was consistent with the location of the claimant’s complaints of pain.

However, there is no evidence of “objective findings” to support the actual existence of any physical injury to the claimant’s left knee. At the time of the claimant’s initial emergency room visit (March 7, 2004) there was no indication of the observation of any abnormalities involving the claimant’s left knee. In fact, at the time of this visit, there was no indication of any complaints that involved his left knee. The emergency room physician specifically notes:

“No real complaints in his (the claimant’s) arms or legs.”

Although the claimant subsequently reported that his left knee was periodically “popping in and out of joint,” such an event has not been observed and noted by any of his examining physicians. There is also no record of any other abnormalities, such as swelling, redness, etc., involving the left

knee joint. During the claimant's second emergency room visit, on March 23, 2004, only some tenderness to palpitation along the lateral edge of the claimant's left knee was record. This, in itself, is not an "objective" finding. X-rays were performed on the left knee, at the time, and were interpreted as negative for any abnormality.

In summary, the claimant has proven by the greater weight of the credible medical evidence, which is supported by objective findings, the actual existence of a physical injury to his low back/right hip in the area of his sacrum and right sacroiliac joint. However, he has not proven by the greater weight of the credible evidence the existence of any physical injury to his left knee that is supported by "objective findings." He has satisfied the requirements of Ark. Code Ann. § 11-9-102(4)(D) for a "compensable injury" to his sacrum and/or right sacroiliac joint, but has failed to satisfy the requirements of this subsection for a "compensable injury" to his left knee.

The claimant must next prove that the medically established and objectively documented physical injury to his sacrum/right sacroiliac joint satisfies the definitional requirements of Ark. Code Ann. § 11-9-102(4)(A)(i). These requirements are:

1. The physical injury must arise out of and occur in the course of the employment;
2. The physical injury must be caused by a specific incident;
3. The physical injury must be identifiable by time and place of occurrence;
4. The physical injury must cause internal or external physical harm to the claimant's body;
5. The physical injury must require medical treatment and result in disability.

There is no doubt, from the evidence presented, that the claimant was struck by a piece of equipment while performing his regularly assigned employment duties on March 7, 2004. It is further apparent that this piece of equipment knocked the claimant backwards and caused him to strike the lower part of his back on the metal railing surrounding the drilling platform. Clearly, the mechanics of this incident could logically and reasonably produce the diagnosed physical injury to the sacral/right sacroiliac area of the claimant's lower back. The claimant's symptoms commenced

contemporaneously with the occurrence of this specific incident and visible evidence of a contusion to this area was independently noted soon thereafter. The claimant's subsequent symptoms with his lower back and right hip continued to be consistent with a recent physical injury to this area.

Although the respondents have introduced medical evidence of a prior employment related claim that was involved an alleged physical injury to the claimant's lower back, this injury occurred two years prior the claimant's difficulties in March of 2004. It further appears that the claimant's difficulties with his lower back and right hip, beginning in June of 2002, readily resolved with little or no medical treatment. There is no evidence of any medical treatment for these prior complaints, after an initial emergency room evaluation on June 20, 2002. The claimant's testimony and the records of the Oklahoma Workers' Compensation Court show that the claimant was released to return to full duty, without any restrictions, on June 21, 2002. Apparently, he did so. There is no evidence that the claimant was experiencing any difficulties with his lower back or right hip, regardless of the cause, for a considerable period of time prior to the current employment related incident on March 7, 2004. Thus, there is simply no evidence that this prior injury played any role in the claimant's back/hip difficulties on and after March 7, 2004.

The medical evidence of a visible contusion, in the area of the claimant's sacrum and the subsequent x-ray evidence of inflammation in this area is sufficient to prove the occurrence of actual internal harm to this portion of the claimant's body. The very nature and extent of this injury and resulting symptoms would obviously reasonably require medical services to accurately ascertain the nature and extent of the physical damage or injury, to provide treatment to resolve this damage, and to provide treatment for symptomatic relief.

In summary, I find that the claimant has proven all of the definitional requirements of Ark. Code Ann. § 11-9-102(4)(A)(i) for a "compensable injury" to the sacral/right sacroiliac joint area of his back. Thus, he would be entitled to appropriate benefits, under the Act, for this "compensable injury."

### III. BENEFITS

Clearly, the claimant would be entitled to “reasonably necessary medical services” for his compensable injury under Ark. Code Ann. § 11-9-508. However, the claimant must still show that the medical services provided were “reasonably necessary medical services.”

Medical services are “reasonably necessary” when they are necessitated by or connected with the compensable injury. These services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

After consideration of the evidence presented, it is my opinion that the medical services provided the claimant by Air Evac Life Team, by the physicians and personnel at the emergency room of St. Edwards Mercy Medical Center (on March 7, 2004 and March 23, 2004) and by and at the direction of Dr. Pettway and Dr. Daniel at the Booneville Family Medical Clinic (on March 16, 2004, and April 8, 2004) all represent reasonably necessary medical services for the claimant’s compensable injury. All of these medical services were necessitated by or connected with this compensable injury and had a reasonable expectation of accomplishing the purpose or goal for which they are intended.

As the claimant has been unable to obtain any further medical treatment or evaluation of his compensable injury, due to the respondents’ refusal to provide services and his final inability to obtain them on his own, I find that an evaluation by a physician with particular expertise in the area of medicine associated with the claimant’s compensable sacral/sacroiliac joint injury is also reasonably necessary. The claimant’s entitlement to any further medical services is reserved, pending the outcome of this evaluation. The parties are encouraged to agree on the appropriate medical provider. However, if they are unable to do so, such a provider will be selected by this Commission.

In regard to temporary total disability benefits, the burden rests upon the claimant to prove his entitlement to such benefits. In order to be entitled to these benefits, the claimant must prove that he has continued within his healing period from the effects of his compensable injury and has

been rendered totally disabled from his regular gainful employment for which he is otherwise qualified by this compensable injury.

The duration of the healing period is a medical question, which must be resolved on the basis of the great weight of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the underlying physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of medical treatment would offer a reasonable expectation of improvement, then the claimant's healing period has ended.

A determination of the duration of the claimant's healing period, in the present case, is hampered by the fact that the claimant has been unable to obtain any further medical treatment for his compensable injury after April 8, 2004. The claimant's inability to obtain medical services is in no way due to any fault of his own. Rather, his inability to obtain these services is due to the respondents' refusal to provide appropriate medical services and his financial inability to obtain these services on his own.

Clearly, the claimant has continued within his healing period from the effects of his compensable injury through April 8, 2004. The greater weight of the evidence shows that through this date he continued to be rendered totally disabled a result of the effects of this compensable injury.

Therefore, it is my opinion that the claimant has proven his entitlement to temporary total disability benefits from February 8, 2004 through at least April 8, 2004. Based upon the evidence presented, it is my further opinion that any decision on the claimant's entitlement to continuing temporary total disability benefits, after April 8, 2004, should be reserved for future determination, when sufficient evidence is available to all parties and this Commission to allow a decision that is fair and just to all parties concerned.

## FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 7, 2004 , the relationship of employee-employer-carrier existed between the parties.
3. On March 7, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$339.00 for total disability and \$254.00 for permanent partial disability.
4. On March 7, 2004, the claimant sustained a compensable injury to the sacral/right sacroiliac joint area. Specially, the claimant has proven the occurrence of such a physical injury that is established by medical evidence, that is supported by objective findings, that arose out of and occurred in the course of the employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal physical harm to his body, and that required medical services and resulted in disability.
5. The claimant has failed to prove that he sustained "compensable injuries" to either of his knees, in the specific employment related incident on March 7, 2004. Specifically, he has failed to prove that he sustained any physical injury to his right knee that is established by medical evidence, that is supported by objective findings, that arose out of and occurred in the course of his employment on that date ,or that was caused by the special incident that occurred on that date. He has also failed to prove a physical injury to his left knee that is supported out by objective findings.
6. The claimant has also failed to prove any compensable injury to his actual right hip joint. Specifically, he has failed to prove the existence of such an injury by medical evidence, which is supported by objective findings.
7. Ark. Code Ann. § 11-9102(4)(B)(iv) is not applicable to the present claim. Specifically, the respondents have failed to prove the presence of alcohol, illegal drugs, or

prescription drugs used in contravention of a physician's orders at the time of an employment related incident on March 7, 2004.

8. The medical services rendered to the claimant for his compensable injury by and at the direction of Air Evac Life Team, by and at the direction of personnel at the emergency room of St. Edwards Mercy Medical Center on March 7, 2004, and March 23, 2004, and by and the direction of the physicians at the Booneville Family Clinic on March 16, 2004 and April 8, 2004, constitute reasonably necessary medical services for the claimant's compensable injury under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.
9. At least, an evaluation by a medical expert in the area of medicine associated with the claimant's compensable sacral sacro/ilic injury also constitutes reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for this expense, subject to the medical scheduled established by this Commission.
10. The claimant has proven by the greater weight of the credible evidence that he was rendered temporarily totally disabled as result of the effects of this compensable injury, for the period of March 8, 2004 through at least April 8, 2004. For the reasons heretofore set forth in this Opinion, the claimant's entitlement to continued temporary total disability benefits, after April 8, 2004, is reserved for future determination, (if necessary) once the ordered medical evaluation has been performed.
11. The respondents have controverted this claim in its entirety and have denied the claimant's entitlement to any benefits.
12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee

on the temporary total disability benefits herein awarded and on any weekly indemnity benefits which may hereinafter after be awarded to the claimant.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period of March 8, 2004 through April 8, 2004. The claimant's entitlement to continued temporary total disability benefits, after April 8, 2004, is specifically reserved for future determination, necessary.

The respondents shall be liable for the medical services provided to the claimant for his compensable injury by Air Evac Life Team, by personnel at the emergency room of St. Edwards Mercy Medical Center (on March 7, 2004 and March 23, 2004), by and at the direction of Dr. Pettway and Dr. Daniel of the Booneville Family Clinic, and the expense of an evaluation by a medical specialist with expertise in the area of medicine associated with the claimant's compensable injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge