

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303988

JAMES NEWMAN		CLAIMANT
TANDA, INC.		RESPONDENT
TRANSPORTATION INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED AUGUST 17, 2005

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

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

Respondents No. 1 represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 31, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on October 12, 2004. This pre-hearing order set out 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, a correction was made in regard to the date upon which benefits were terminated by the respondent. A copy of the pre-hearing order, with that amendment 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 April 7, 2003 the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation rates are \$ 311.00 for total disability and \$233.00 for permanent partial disability.
3. On April 7, 2003, the claimant sustained a compensable injury to his lumbar spine.
4. All appropriate temporary total disability benefits have been paid through August 17, 2004.
5. All appropriate medical services have been provided through August 17, 2004.

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

1. The claimant's entitlement to additional temporary disability benefits from August 18, 2004 through a date yet to be determined.
2. The claimant's entitlement to additional medical services after August 17, 2004.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends that "the claimant is entitled to continuing medical treatment and TTD benefits from August 23, 2004, through a date yet to be determined, as well as statutory attorney's fee."

In regard to these issues, the respondents #1 contend:

- (a) Claimant reached MMI no later than August 24, 2004.
- (b) Claimant is not entitled to an award of additional temporary total disability benefits.
- (c) Having achieved his baseline condition, claimant is not entitled to an award of additional medical care.

In regard to these issues, the Second Injury Fund takes no position.

#### DISCUSSION

##### I. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The first issue is the claimant's entitlement to continued temporary total disability benefits from August 18, 2004 through a date yet to be determined. In order to be entitled to these benefits, the claimant must prove by the greater weight of the credible evidence two separate facts. First, he must prove that he has continued within his healing period from the effects of his compensable injury. Secondly, he must prove that he has been rendered totally disabled from performing all forms of regular gainful employment for which he would otherwise be qualified as a result of the effects of this compensable injury.

The duration of the healing period is a medical question. Thus, it must be resolved on the basis of the greater weight of the credible medical evidence presented. The healing period ends when the actual physical damage caused by the compensable injury entirely resolves or at least stabilizes at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement. Once this underlying physical damage has stabilized, the mere continuation of chronic symptoms is not sufficient, in and of itself, to extend the healing period.

In the present case, the evidence presented clearly shows that the claimant's compensable injury was in the form of an aggravation of a pre-existing condition, which was itself the result of a prior

compensable injury. The record reveals that the claimant began to initially experience difficulties with his lower back and some radicular symptoms into his lower extremities following an employment related accident in 1980. However, the symptoms following this initial accident and injury appear to have rapidly resolved with no residual symptoms. This initial employment related injury appears to have occurred during a previous period of employment between the claimant and the current respondent.

There is no evidence that the claimant had any further difficulties with his lower back or lower extremities until a second employment related accident. This injury occurred when the claimant was employed by another employer. This injury resulted in surgery, in the form of a right sided hemilaminectomy and partial fasciectomy of the L5-S1 disc space. The claimant was ultimately released and rated for this injury in September of 1984.

Following his release from this second injury, the claimant returned to employment as a heavy machine operator. However, he continued to experience periodic episodes of increased pain and difficulties with his lower back and lower extremities, primarily the right. The claimant was treated for the first of these episodes from October 26, 1987 through June of 1989. He was treated for subsequent episodes of increased complaints in January of 1993, May and June of 1995, January of 1998, and March through July of 2001. During the episode of difficulties in 2001, a spinal cord stimulator was permanently implanted to reduce or alleviate the claimant's periodic episodes of chronic symptoms.

There is no indication that the claimant sought any further medical treatment for any difficulties with his back or lower extremities, until the compensable injury on April 7, 2003. Following the last compensable injury on April 7, 2003, the claimant has received various evaluations and tests by a number of physicians. During this period, he has also received extensive treatment, in the form of spinal injections and oral medication, to alleviate his substantial pain complaints and the consistently observed severe or significant muscle spasms in the lumbar area. The presence of constant pain in the claimant's lower back and lower extremities and the constant presence of severe or significant muscle spasms have only been noted since the claimant's compensable injury of April 7, 2003. Although the claimant experienced similar difficulties prior to the compensable injury, these prior symptoms were only occasional. The magnitude and persistence of his current difficulties represent a substantial change.

Clearly, the various objective tests performed on the claimant have shown significant defects involving his lumbar spine. However, all of the various physicians involved in this case have concluded that the claimant would not benefit from further surgical intervention. All of these physicians also concur that the claimant has received the maximum benefit of time and medical treatment in regard to the healing of the actual physical damage caused by the compensable injury.

Dr. Fisher indicated that maximum medical improvement had been achieved by September 8, 2003. Dr. Short opined that the claimant had reached maximum medical improvement by August 24, 2004. Dr. Michael Calhoun, a neurosurgeon, apparently evaluated the claimant at the respondents' request. In his report of July 28, 2004, he recommended a second CT myelogram, which the respondents apparently refused to provide. However, Dr. Calhoun's reports and records indicate that this second CT myelogram was recommended merely to eliminate the possibility of subsequent damage or injury occurring after the previous CT myelogram. As there is no evidence of any subsequent injury, this repeat study would seem unnecessary. Dr. Calhoun joins in the consensus that the claimant is not a surgical candidate, and he proposes no other potential treatment modality.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that by August 17, 2004, the claimant had received the maximum benefit of time and medical treatment in regard to the resolution or improvement of the actual physical damage to his lumbar spine that was caused by the compensable injury of April 7, 2003. Although the evidence unquestionably shows that the claimant has continued to experience significant symptoms and complains from his most recent compensable injury, these are not sufficient, in and of themselves, to extend the healing period. All of the medical experts have indicated that these symptoms and complaints are now chronic and cannot be improved by treating the physical

damage to the claimant's lumbar spine caused by the claimant's most recent compensable injury.

Therefore, the claimant has failed to prove that he has continued within his healing period from the effects of the 2003 compensable injury on and after August 18, 2004. As a result, he would not be entitled to continued temporary total disability benefits from August 18, 2004 through a date yet to be determined. His claim for such benefits must be denied.

## II. MEDICAL EXPENSES

The next issue is the claimant's entitlement to additional medical services, at the respondents' expense, after August 17, 2004. Ark. Code Ann. §11-9-508 entitles the claimant to all "reasonably necessary medical services" for his compensable injury at the respondents' expense. Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. The Act does not limit "reasonably necessary medical services" to those medical services intended only to resolve or reduce the actual physical damage caused by a compensable injury. Thus, a claimant's entitlement to medical services does not automatically terminate upon the end of the "healing period." Reasonably necessary medical services extend to those services which are reasonably necessary to accurately diagnose the nature and extent of the compensable injury. More importantly, reasonably necessary medical services also extend to those medical services which are only reasonably

necessary to reduce or alleviate the symptoms or complaints caused by a compensable injury, including chronic or indefinite symptoms and complaints.

It would appear from the record that the only medical services in dispute (i.e. which have not been provided by the respondents) are the CT myelogram recommended by Dr. Calhoun and the management of the claimant's chronic symptoms of pain and muscle spasms by Dr. Fisher. The burden rests upon the claimant to prove that these medical services represent "reasonably necessary medical services" for his compensable injury.

\_\_\_\_\_In regard to the second CT myelogram that was recommended by Dr. Calhoun, it is apparent that this test was recommended out of an abundance of caution. Dr. Calhoun makes it clear that, based upon the previous CT myelogram (which was performed some two months after the claimant's compensable injury), the claimant's continuing symptoms and complaints could not be improved by surgical intervention. Dr. Calhoun was apparently concerned that some increased damage or injury might have occurred since the prior CT myelogram, which could possibly be improved by surgical intervention. From the evidence presented, it would appear highly unlikely that any new injury or damage has occurred. The claimant has denied any subsequent injury or noticeable change in his condition. The medical evidence also shows that the claimant's symptoms and findings have continued unchanged since before the prior CT myelogram.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to show that the additional CT myelogram (recommended by Dr. Calhoun) is reasonably necessary to accurately ascertain the nature and extent of the claimant's compensable injury, to develop an appropriate program of treatment for the claimant's compensable injury, or for any other purpose associated with the claimant's compensable injury of April 7, 2003. Thus, this test has not been shown to be necessitated by or connected with the claimant's compensable injury or to have a reasonable expectation for accomplishing any intended purpose related to the compensable injury. This test would not represent "reasonably necessary medical services" under Ark. Code Ann. §11-9-508, and the respondents are not obligated to provide this recommended testing.

However, the continued services of Dr. Fisher for the management of the claimant's chronic symptoms and complaints (pain and muscle spasms) is a different matter. It is obvious that the services of Dr. Fisher are medically appropriate for the claimant's chronic symptoms and complaints. The greater weight of the evidence further shows that the claimant's current chronic symptoms and complaints are attributable to the compensable injury of April 7, 2003.

In his report of September 8, 2003, Dr. Fisher indicated that the claimant had achieved the maximum benefit of time and medical treatment in regard to the healing of the actual physical damage caused for the compensable injury, but further noted that he will

continue to require “chronic maintenance of his stimulator and an occasional pain medication script.” In his report of July 15, 2004, Dr. Fisher notes that the claimant had some chronic symptoms both before and after his compensable injury of April 7, 2003. However, the evidence clearly shows that these chronic symptoms have been constant and of increased magnitude since the current compensable injury. Whereas, prior to the last injury these complaints had only occurred sporadically and of lesser magnitude.

In his report of April 24, 2004, Dr. Short opined that the claimant’s compensable injury of April 7, 2003, was an exacerbation of his previous “diagnosis” (i.e. failed surgical back syndrome). However, he expressly stated that it is his expert opinion that the claimant’s current chronic complaints and symptoms are the direct result of the “re-injury” of April 7, 2003.

The greater weight of the credible evidence shows that the continued services of Dr. Fisher for the management of the claimant’s chronic back symptoms and complaints is necessitated by and connected with the claimant’s compensable injury of April 7, 2003. The evidence further shows that these services are medically appropriate and therefore have a reasonable expectation of accomplishing the purpose or goal for which they are intended (i.e. reducing the magnitude of the claimant’s chronic symptoms and complaints). Thus, such medical services represent “reasonably necessary medical services,” under Ark. Code Ann. §11-9-508. Pursuant to this subsection, the respondents are liable for the expense of these services. This liability is subject to the medical

fee schedule established by this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 7, 2003, the relationship of employee- employer-carrier administrator existed between the parties.
3. On April 7, 2003, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$311.00 for total disability and \$233.00 for permanent partial disability.
4. On April 7, 2003, the claimant sustained a compensable injury to his lumbar spine.
5. All appropriate temporary total disability benefits have been paid through August 17, 2004.
6. The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to additional temporary total disability benefits from April 18, 2004 through a date yet to be determined. Specifically, he failed to prove by the greater weight of the credible evidence that he has continued within his healing period from the effects of his compensable injury on and after April 18, 2004.
7. All appropriate medical services have been provided to the claimant by the respondents through August 17, 2004.
8. The claimant has failed to prove that the repeat CT MRI recommended by Dr. Calhoun represents "reasonably

necessary medical services” for his compensable injury. Specifically, he has failed to prove by the greater weight of the credible evidence that such medical services are reasonably necessary to accomplish any purpose or goal connected with his compensable injury or April 7, 2003.

9. The claimant has proven that continued medical services for management of his chronic symptoms and complaints, by Dr. Robert Fisher, represents “reasonably necessary medical services” for his compensable injury of April 7, 2003. The greater weight of the evidence presented shows that these medical services are necessitated by or connected with the claimant’s compensable injury of April 7, 2003 and have a reasonable expectation of accomplishing the purpose or goal for which they are intended (i.e. the reduction of the chronic symptoms and complaints resulting from the effects of the claimant’s compensable injury).
10. The respondent employer-carrier has controverted the claimant’s entitlement to any additional temporary total disability benefits, on and after August 18, 2004, and his entitlement to any additional medical services after August 17, 2004.
11. As no controverted benefits are herein awarded to the claimant, no controverted attorney’s fee can be herein awarded to the claimant’s attorney.

ORDER

The respondents shall remain liable for all reasonably necessary medical services required by the claimant for his compensable injury of April 7, 2003. These reasonably necessary medical services include continuing management of the claimant's chronic symptoms and complaints with his back and lower extremities, on and after August 18, 2004, by and at the direction of Dr. Robert Fisher. This liability shall be subject to the medical fee schedule established by this Commission.

For the reasons heretofore stated in this Opinion, the claimant's request for additional temporary total disability benefits is hereby denied.

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