

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212496

EARL C. PASCHAL, CLAIMANT	CLAIMANT
SMI JOIST/HOPE, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED DECEMBER 22, 2005

Hearing held September 29, 2005, before the HONORABLE DALE DOUTHIT, Administrative Law Judge, at Texarkana, Miller County, Arkansas.

Claimant was represented by Hon. Gregory R. Giles, Attorney at Law, of Texarkana, Arkansas.

Respondents were represented by Hon. Nelson V. Shaw, Attorney at Law, of Texarkana, Texas.

STATEMENT OF THE CASE

On September 29, 2005, the above-styled claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was conducted June 22, 2005, and a Prehearing Order was entered on June 23, 2005. A copy of the June 23, 2005 Prehearing Order has been marked as Commission Exhibit "1" and made a part of the record herein, without objection, subject to any modifications made on the record at the September 29, 2005 full hearing.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employer/employee/carrier relationship existed at all relevant times, including September 28, 2002; that the claimant's hourly wage rate was \$8.10 at the time of the incident; that the claimant sustained a compensable back injury on September 28, 2002, for which some benefits were paid; and that the claimant was paid nine weeks and three days of TTD benefits at the rate of \$155.00 per week for a total of \$1,680.00. The parties further stipulated the claimant filed for unemployment benefits after he was terminated on July 19, 2004.

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The parties agreed the issues to be presented were whether the claimant is entitled to the medical treatment reflected in Claimant's Exhibit "2", as well as all treatment provided by Drs. Hart and Akin through the date of the full hearing, and to the lumbar fusion recommended by Dr. Akin; whether the claimant is entitled to TTD benefits for the period of September 28, 2002 through June 30, 2003, excluding four days the claimant worked during that period and excluding the nine weeks and three days the respondents admittedly paid TTD benefits during that period; a determination of the claimant's applicable TTD compensation rate at the time of the September 2002 compensable injury; whether the claimant was underpaid TTD benefits for the nine weeks and three days the respondents admittedly paid the claimant TTD benefits between September 28, 2002 and June 30, 2003; whether the claimant is entitled to TTD benefits from July 27, 2004 to a date yet to be determined; controversion, and attorney's fees.

In summary, the claimant contends he sustained an admittedly compensable injury and is entitled to TTD benefits from September 28, 2002 through June 30, 2003, excluding four days in which he worked during that period and excluding nine weeks and three days he was paid TTD benefits by the respondents during that period; however, claimant contends the \$155.00 per week the respondents paid for nine weeks and three days during that period was less than he was entitled. Claimant contends his weekly TTD rate should have been \$216.00 based on his being hired for a forty (40) hour week at the rate of \$8.10 per hour. Claimant further contended he is entitled to TTD benefits from July 27, 2004, to a date to be determined, plus attorney fees. Claimant contended he is entitled to all medical expenses associated with his compensable injuries, including but not limited to, those contained in Claimant's Exhibit "2". Further, claimant contended he is entitled to the lumbar fusion recommended by Drs. Akin and Hart.

The respondents contended the claimant has received all benefits to which he is entitled regarding the September 28, 2002 incident.

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 Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date for his back, including but not limited to, those expenses represented in the record as Claimant's Exhibit"2" has been reasonably necessary in connection with his admittedly compensable injury.
- 4) The claimant has proven by a preponderance of the evidence that the lumbar fusion surgery recommended by Dr. Akin is reasonably necessary in relation to the claimant's admittedly compensable injury
- 5) The claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits from July 27, 2004 to a date yet to be determined; however, of course if the surgery recommendation is followed, the claimant may in the future enter a period of TTD as a result .
- 6) The claimant's average weekly wage at the time of his compensable injury was \$299.73, which entitled him to a TTD rate of \$198.00 per week.
- 7) The claimant was underpaid TTD benefits for nine weeks and three days previously paid by the respondents and the respondents

are ordered to pay the deficiency forthwith.

8) The claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits from September 28, 2002 through April 8, 2003 at the rate of \$198.00 per week, less the four days the claimant worked during that period and less the nine weeks and three days of TTD benefits that were underpaid by the respondents.

9) The claimant has failed to prove by a preponderance of the evidence that he is entitled to TTD benefits beyond April 9, 2003.

DISCUSSION

The claimant is fifty-six (56) years of age, and worked as a welder for the employer at the time of his compensable injury. The claimant testified that in September of 2002 he tripped over a welding machine on the floor while backing up and hit a jig table and some pipe on the ground with his back. The claimant testified he immediately told his supervisor, Mack, that his back was hurting. The claimant testified that someone then took him to the hospital.

The claimant first treated with the company doctor, Dr. George Garrett. Dr. Garrett then referred the claimant to an orthopedic surgeon, Dr. Dickson. Dr. Dickson got the claimant an MRI and epidural steroid injections. The claimant testified that after treating with Dr. Dickson, he attempted light duty work for the respondent-employer, but was unable to perform. The claimant testified that when he told his employer's safety person, Leo, that he could not perform, Leo told him to go home.

The claimant next treated with Dr. Scott Schlesinger, a neurosurgeon. The claimant testified that Leo, the company safety person, took him to a chiropractor by the name of Dr. Laura Douglas. After seeing Dr. Schlesinger, the claimant treated some more with Dr. Dickson and went back to work for the respondents on July 1, 2003.

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The claimant worked for the respondent again from July 1, 2003 through July 19, 2004 as a supervisor and welder. The claimant testified that his pain never went away during the period of re-employment with the respondent, and on June 7, 2004, a change of physician order was entered by Ms. Pat Capps Hannah allowing the claimant to treat with Dr. Thomas Hart. On June 28, 2004, the claimant had his initial visit with Dr. Hart who recommended a discography.

Before the discography was performed, the claimant was fired by the respondents for fighting while on the job on July 19, 2004. On July 27, 2004, Dr. Hart did the discogram. (CX-1, pgs. 56-59). After the discogram, Dr. Hart referred the claimant to another neurosurgeon, Dr. Akin. Dr. Akin first recommended physical therapy, which was completed by the claimant. The claimant also was given an independent medical evaluation from Dr. Earl Peoples who said the claimant could return to work with no restriction. (CX-1, pgs. 74-79)

After the physical therapy recommended by Dr. Akin was complete, with no apparent benefit, Dr. Akin then offered the claimant a fusion surgery. The surgery was scheduled for March 25, 2005; however, the claimant got pneumonia and was unable to have the surgery as scheduled.

The claimant testified that after the first surgery was postponed, he was unable to get approval for another surgery from the insurance company. The claimant testified that Dr. Akin then recommended an RX stimulator, but was unable to use it because he was not approved to see Dr. Akin anymore to get proper instruction on usage of the stimulator. The claimant testified that since he couldn't figure the stimulator out, and couldn't see Dr. Akin for help, that he sent the stimulator back to the manufacturer.

The claimant testified that he had never had back problems prior to the September 2002 compensable injury.

ADJUDICATION

A. Entitlement to Additional Medical Treatment.

After a thorough review of the voluminous medical records contained in this record, it appears the respondents' main argument for denial of the surgery recommended by Dr. Akin is the claimant's degenerative disc disease. Also, the respondents rely on the medical records from Drs. Dickson, Schlisenger and Peeples stating that no surgery is recommended and that the claimant can return to work with no restrictions. These are strong factors weighing against the claimant's entitlement to additional benefits. However, this examiner finds the respondents' "pre-existing" condition argument without merit when they have admittedly accepted compensability.

Here, compensability has been accepted by the respondents regarding the claimant's back, and 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. §11-9-408(a). What constitutes reasonable medical treatment is a question of fact.

There is no doubt the claimant has degenerative disc disease; however, the claimant testified credibly that he had never had any back problems prior to his admittedly compensable back injury in September of 2002. An employer takes an employee as he finds him and the aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. Oliver v. Guardsmark, Inc., 68 Ark. App. 24, 3 S.W. ed 336 (1999).

Dr. Dickson perhaps said it best in his November 20, 2002 report:

"I also believe that he has an injury to a pre-existing condition."
(Emphasis added.)

Dr. Dickson had stated early on in an October 30, 2002 report:

"I believe that he has discogenic type pain." (CX-1, pg. 13)

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A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment argument if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought.

Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W. 2d 879 (1985)

Even Dr. Scott Schlesinger agrees that the claimant aggravated a pre-existing condition due to the September 2002 compensable injury as indicated in his June 23, 2003 report:

“I think his work injury caused a musculoskeletal aggravation of an underlying degenerative disc disease.” (RX-2. pg. 7)

The CT Scan of the lumbar spine with discogram contrast was performed at Baptist Health Medical Center in Little Rock, Arkansas, on July 28, 2004. The impression of the test stated as follows:

“IMPRESSION:

1. Intradiskal degeneration at L4-5 and L5-S1 level with broad based and bilateral posterolateral bulge at L4-5 and focal central bulge at L5-S1 level.
2. Facet joint and ligamentum flavum hypertrophy causing moderate spinal canal stenosis at L4-5 and mild spinal canal stenosis at L3-4 and L5-S1 levels.”

Clearly, the discogram shows just what Dr. Dickson had felt: “an injury to a pre-existing condition.” This examiner finds that the claimant’s pre-existing arthritis and disc disease was aggravated by the September 2002 compensable injury.

There is no evidence to suggest that any of the treatment provided to the claimant thus far for his back has been unreasonable or unnecessary. This examiner is not totally disregarding the reports from Drs. Peebles, Schlesinger or Dickson; however, those reports never mention why they discount the discogram as a useful diagnostic test when followed with the CT Scan.

Dr. Peebles report does mention that a discogram was conducted; however, his report never mentions the findings. The lack of discussion with regard to the discogram leads this examiner

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to question whether he ever reviewed those diagnostic findings.

I find that the treatment provided to date, including but not limited to those in Claimant's Exhibit 2, for the claimant's back has been reasonably necessary and related to his September 2002 compensable injury. I find that Dr. Dickson was initially correct when he felt the claimant had discogenic type pain and that the claimant had an injury to a pre-existing condition. Dr. Dickson did not have the benefit of the discogram initially, and I find Dr. Akin's assessment regarding the fusion surgery is accurate. The claimant underwent physical therapy through Dr. Akin, without benefit, and based on his review of the discogram and other factors, Dr. Akin now feels the only other way to help the claimant is with the fusion surgery. I find the claimant is entitled to the fusion surgery recommended by Dr. Akin if he so chooses to proceed, knowing the risks involved.

B. Determination of Claimant's Applicable TTD Rate.

The parties have been unable to agree on the claimant's average weekly wage at the time of the admittedly compensable injury of September 2002. A.C.A. §11-9-518 states as follows:

Weekly wages as basis for compensation.

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the

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number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The parties did supply a Form AR-W. (CX-1 Pg. 61). The parties also stipulated the claimant earned \$8.10 per hour. In calculating the claimant's average weekly wage, this examiner relied mainly on the AR-W and the Full Commission guidelines in Armstrong v. Wheeler Construction Co., 2000 AWCC 152, Opinion filed May 26, 2000, Claim No. E615744. This examiner took out the weeks the claimant worked less than 20.00 hours per week, added in overtime, and calculated the claimant's average weekly wage at \$299.73, which entitled the claimant to a TTD rate of \$198.00. Therefore, based on my calculations, I find the claimant was underpaid for the nine weeks and three days the respondents previously paid TTD benefits.

C. Additional TTD Benefits.

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. Arkansas State Highway & Transportation Dept. v. Breashers, 272 Ark. 244, 613 S.W. 2d 392 (1981).

The claimant seeks TTD benefits for two separate periods. First, the claimant argues he is entitled to TTD benefits from September 28, 2002 through June 30, 2003. Based on the evidence presented, I find the claimant never reached the end of his healing period after the September 2002 compensable injury, especially in light of the now pending surgery recommendation. The question then becomes whether the claimant was totally incapacitated to earn wages during the period of requested TTD benefits.

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Dr. Dickson gave the claimant a complete release on April 9, 2003, according to his June 26, 2003 letter. (RX-1, pg. 24). The claimant admittedly returned to work for the respondents on July 1, 2003, and worked as a welder and supervisor until his termination on July 19, 2004. Even though I disagreed with Dr. Dickson regarding the surgery recommendation from Dr. Akin, I do find the claimant's back was as good as it was going to get on April 9, 2003 without the surgery now recommended by Dr. Akin. With the benefit now of perfect hindsight, it is clear the claimant was able to be gainfully employed for over one year even though he was not yet at MMI. The testimony of the claimant shows he was not totally incapacitated to earn wages. The claimant stated that he did in fact work as a welder from July 1, 2003 through July 19, 2004, in basically the same condition that he is in today.

The evidence shows the claimant did not sustain any new injury or aggravation after Dr. Dickson gave him his full release on April 9, 2003. I find that although the claimant has not reached MMI, he was not totally incapacitated to earn wages. Based on the evidence, this examiner feels this claimant would still be working for the respondent if not for the altercation at work for which he was terminated.

The evidence shows the claimant has been in virtually the same condition since April 9, 2003. The credible evidence also shows the claimant worked in the same capacity as before his September 2002 compensable injury from July 1, 2003 through July 19, 2004. The claimant has failed to prove he is entitled to TTD benefits after April 9, 2003.

The claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits from September 28, 2002 through April 8, 2003, less the four days he worked in that period and less the nine weeks and three days the respondents underpaid the claimant TTD benefits. Based on the same reasons as outlined above, I find the claimant has failed to prove by

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a preponderance of the evidence that he is entitled to TTD benefits for the second period requested, (July 27, 2004 to a date yet to be determined). As stated, nothing significant changed with regard to the claimant's back after he was terminated for fighting. I find that but for the fighting episode at work on July 19, 2004 the claimant would still be employed as a welder for the respondents. However, of course, should the claimant elect to proceed with the surgery recommended by Dr. Akin and awarded herein, the claimant may become eligible for TTD benefits associated with the surgery.

AWARD

_____The claimant has proven by a preponderance of the evidence that the medical treatment received to date with regard to the claimant's back has been reasonable, necessary and related to his admittedly compensable injury of September 2002, and that he is entitled to the fusion surgery now recommended by Dr. Akin. The claimant has proven by a preponderance of the evidence that he is entitled to TTD benefits from September 28, 2002 through April 9, 2003, less the amounts excluded in the Findings of Fact and Conclusions of Law recited herein. The claimant has proven by a preponderance of the evidence that he was underpaid TTD benefits by the respondents. The respondents are hereby directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

The claimant's attorney, Mr. Gregory Giles, is hereby awarded the maximum statutory attorneys fee on all indemnity benefits controverted, pursuant to A.C.A. §11-9-715.

All sums should be paid in a lump sum, without discount, and this award shall earn interest at the legal rate until paid pursuant to A.C.A. §11-9-809.

IT IS SO ORDERED

DALE DOUTHIT
Administrative Law Judge