

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213821 & F406691

BLANE THETFORD, EMPLOYEE	CLAIMANT
RICELAND FOODS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 21, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on May 27, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant appeared pro se.

Respondents represented by Mr. Mark A. Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 27, 2005, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on April 20, 2005, and a Prehearing Order was filed on said date. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

At the prehearing conference, it was stipulated that the employee/employer/carrier relationship existed at all relevant times, including September 8, 2002, as well as August 23, 2003; that the claimant sustained an admitted, compensable cervical injury on September 8, 2002, which was treated as a medical only claim and for which the respondents paid various medical expenses. It was further agreed that the claimant reported an onset of symptoms on or about

August 23, 2003, which respondents controverted in its entirety. At the prehearing conference, the parties disagreed as to the average weekly wage and appropriate compensation rate at which time they were advised to submit wage records unless the applicable compensation rate could be resolved. At the hearing, the parties stipulated that the claimant's average weekly wage was \$609.00, entitling him to a compensation rate of \$407.00 per week for total disability.

At the prehearing conference, the parties agreed to litigate the following issues:

- 1) Whether the claimant was entitled to temporary partial disability benefits for the September 8, 2002, admitted injury.
- 2) Whether, in addition to the admitted cervical injury, the claimant sustained a low back injury on either September 8, 2002, or August 23, 2003, and, if overcome, claimant's entitlement to associated benefits.

At the hearing, the claimant attempted to amend his claim to include issues related to alleged retaliatory discharge and penalties pursuant to Ark. Code Ann. §11-9-107, as well as a claim for additional compensation for refusal to provide suitable employment pursuant to Ark. Code Ann. §11-9-505 which respondents agreed to litigate rather than reserving for future determination.

Claimant contended, in summary, that he sustained both a neck and low back injury as the result of specific incidents on both September 8, 2002, as well as August 23, 2003; that following the September 8, 2002, injury, he was unable to work overtime and was, therefore, entitled to temporary partial disability benefits for unspecified dates which would be a matter of proof. In addition, the claimant

contended that as a result of a second incident on August 23, 2003, which aggravated his pre-existing condition, he was entitled to additional temporary total disability or temporary partial disability from August 23, 2003, through a date yet to be determined, maintaining that his healing period had not ended; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment while reserving entitlement to permanent disability benefits, if any. At the hearing, claimant amended his contentions to include penalties for discharging him, as well as additional benefits for up to one year for failing to provide suitable employment within his physical restrictions.

The respondents contended that with respect to the September 8, 2002, injury, the claimant was not entitled to additional medical evaluations and/or treatment while maintaining that the claimant had been evaluated and treated by Dr. Timothy Dow, Dr. Steven Cathey, Dr. Terry Braden, and Dr. Dewayne Eubanks. Respondents contended that the additional medical care and/or evaluation was not reasonably necessary nor related to the minor injury of September 8, 2002. Respondents specifically disputed the claimant sustaining an alleged back injury on September 8, 2002, maintaining that the claimant's low back problems, if any, were not caused by a compensable event. Concerning the August 23, 2003, claim, respondents acknowledged that the claimant reported an onset of symptoms at that time; however, maintained that the claimant did not sustain any new injury or

aggravation in 2003, but has continued to complain of symptoms associated with the September 8, 2002, injury. Concerning the wrongful termination or discrimination, respondents assert that the claimant was terminated for cause and, therefore, no penalty is appropriate under A.C.A. §11-9-102 and that the claimant is not entitled to additional benefits pursuant to A.C.A. §11-9-505.

The claimant testified in his own behalf. Leland Self, David Caldwell, Bobby Self, Jack Murray, Alvin Mullins, and Karen White all testified in respondents' behalf. The record is composed solely of the transcript of the May 27, 2005, hearing containing numerous exhibits.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. On September 8, 2002, the claimant sustained a compensable cervical injury which arose out of and during the course of his employment with Riceland Foods, Inc.

4. On August 23, 2003, the claimant sustained a compensable aggravation of his pre-existing cervical injury.
5. The claimant has failed to prove, by a preponderance of the credible evidence, that he sustained a low back injury on either September 8, 2002, or August 23, 2003.
6. The healing period for the claimant's September 8, 2002, injury ended on November 11, 2002.
7. The healing period for claimant's August 23, 2003, compensable aggravation of the pre-existing cervical injury ended on or before November 6, 2003.
8. Respondents paid appropriate medical and related treatment following the claimant's September 8, 2002, admitted injury.
9. Respondents are responsible for outstanding medical treatment for claimant's cervical complaints after August 23, 2003, including, but not limited to reimbursing the claimant any out-of-pocket co-payments for his cervical injury and respondents remain responsible for continued, reasonably necessary medical treatment so long as it is determined to be directly and causally related to the cervical injury. Respondents are not responsible for any medical treatment for the claimant's low back complaints, if any. Further, respondents are entitled to a dollar-for-dollar offset for any benefits previously received for the same medical services which were paid under group health insurance pursuant to A.C.A. §11-9-411.

10. The claimant was terminated for cause, specifically, as the result of being on the employer's premises while under the influence of alcohol. Accordingly, the claimant has failed to prove, by a preponderance of the credible evidence, that respondents willfully discriminated against the claimant for filing a workers' compensation claim. Penalties under Ark. Code Ann. §11-9-107 are not appropriate. Likewise, the claimant was terminated for cause. He has failed to prove, by a preponderance of the credible evidence, that the employer unreasonably refused to return him to work when suitable employment was available pursuant to Ark. Code Ann. §11-9-505.
11. The claimant is entitled to temporary partial disability benefits for any dates between September 8, 2002, and November 11, 2002, and, again, beginning August 24, 2003, and continuing through November 6, 2003, that the claimant earned less than \$609.00 per week.
12. Claimant's entitlement to permanent disability benefits has been specifically reserved.

DISCUSSION

The claimant began working for Riceland Foods, Inc., in January, 2001. He sustained an admitted, compensable cervical injury on September 8, 2002, when climbing out of a rice dryer he hit the top of his head on a metal brace, jamming his neck. The claimant promptly reported the injury to his foreman, David Caldwell, at which time he was provided medical treatment. The claimant was

initially seen by the company nurse, Karen White. The claimant was subsequently examined and treated by the company doctor, Dr. Timothy Dow. The claimant continued working at all times following his September 8, 2002, cervical injury. However, Dr. Dow restricted the claimant to working eight (8) hours per day while avoiding certain overhead work. Again, the claimant continued working. The claimant was eventually referred to Dr. Steven Cathey, a neurosurgeon, who apparently released the claimant to full work duties following an evaluation on November 11, 2002. The record reflects that the claimant subsequently retained the services of an attorney and petitioned for a change of physicians. The claimant was next evaluated by Dr. Dewayne Eubanks, a neurosurgeon in Jonesboro, Arkansas, who, likewise, permitted the claimant to continue working. In fact, the record reflects that the claimant continued working for the employer herein at all times through on or about January 1, 2004, at which time he was laid-off. The claimant subsequently returned to work for the employer and was terminated for cause on September 24, 2004.

The record reflects that respondents terminated all medical treatment on November 11, 2002, which was the date Dr. Cathey ended the claimant's healing period for the admitted injury. After respondents terminated medical treatment, the claimant began receiving follow-up medical care from his family physician, Dr. James Robinette. Because respondents terminated treatment, and because the claimant received his one-time only change of physicians to Dr. Eubanks, the

claimant's medical treatment was paid under a group health and accident insurance policy provided by the employer. Claimant's primary treatment consisted of medications and epidural steroid injections by Dr. Robinette which the claimant maintained helped him to continue working. A second undisputed incident occurred on August 23, 2003. The claimant related that he was working on a Saturday with a co-worker, Leland Self. The claimant was walking into a shop owned by the employer. He stated that the overhead shop door was apparently pulled down, above eye level. He recounted that he was wearing a hard hat and walking hurriedly, and hit his hard hat on the door, jamming it down and knocking the hat off his head. Leland Self confirmed hearing the claimant run into the metal door, but Leland Self did not see the incident. The claimant began experiencing additional problems with his neck following the August 23, 2003, incident which he first reported to Bobby Self, Leland Self's son, who was a supervisor, as well as Jack Murray, a manager. The claimant testified that Mr. Murray filled out an incident report and sent the claimant to the company doctor, Dr. Timothy Dow. Dr. Dow conducted various diagnostic studies and allowed the claimant to continue working; however, Dr. Dow did, again, restrict the claimant to working eight (8) hours per day and to avoid overhead work. The claimant continued working until January 1, 2004, at which time he was laid off, along with other employees, at which time the claimant drew unemployment compensation through June, 2004. The claimant was then rehired by Riceland on September 3, 2004. He continued working until

September 24, 2004, at which time he was terminated for cause. Apparently, the claimant challenged the justification for the termination which will be discussed further below, and received additional unemployment compensation benefits. (Tr.50-52)

The claimant contends that he is entitled to additional benefits related to his termination. Apparently, based upon conversations with a Commission legal advisor, the claimant raised the issues of penalties under Ark. Code Ann. §11-9-107 and additional compensation pursuant to Ark. Code Ann. §11-9-505. Said statutory provisions do not apply to the facts in the instant claim.

Ark. Code Ann. §11-9-107 provides for statutory penalties against employers for retaliatory discharge or discrimination for filing of a workers' compensation claim.

It is set out in its entirety below:

(a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars (\$10,000.00) as determined by the Workers' Compensation Commission.

(2) This fine shall be payable to the Second Injury Trust Fund and paid by the employer and not by the carrier.

(b)(1) In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine.

(2) Provided, however, if the employee is the non-prevailing party, the attorney's fee and costs shall, at the election of the employer, be paid by the employee or deducted from future workers' compensation benefits.

(c) The employer may also be guilty of a Class D felony.

(d) This section shall not be construed as establishing an exception to the employment at will doctrine.

(e) A purpose of this section is to preserve the exclusive remedy doctrine and specifically annul any case law inconsistent herein, including, but not necessarily limited to: *Wal-Mart Stores, Inc. vs. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991); *Mapco, Inc. vs. Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991); and *Thomas vs. Valmac Industries, Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991).

Ark. Code Ann. §11-9-505 provides additional compensation under restricted circumstances when an employer refuses to return an injured employee to work.

The relevant subsection states:

(a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year. (Emphasis supplied)

Rather than conduct an exhaustive analysis of the record in this cause, suffice it to say that the claimant has simply failed to prove, by a preponderance of the evidence, that either of the foregoing sections of the Workers' Compensation Act have any application to this claim. Rather, the overwhelming weight of evidence reflects that the claimant's termination on September 24, 2004, was for cause, specifically, following the claimant's appearance at the workplace while under the influence of alcohol. The incident which resulted in the claimant's termination was verified by numerous employer witnesses. There is no credible evidence whatsoever that the claimant's termination was in any way related to the filing of a workers' compensation claim. To the contrary, the record reflects that the

respondents accepted and paid related medical expenses following the initial claim. Further, although respondents disputed the second claim, medical treatment was provided under the employer's accident and health insurance policy and the claimant either continued working or received unemployment compensation for more than one (1) year after August 23, 2004, prior to his termination on September 24, 2004, for cause. I find that the claimant has failed to prove entitlement to additional benefits under A.C.A. §11-9-505. Further, I find that the employer was not guilty of discrimination in its termination of the claimant's employment. I feel compelled to point out that the penalty provisions of A.C.A. §11-9-107 are not payable to the claimant, but, rather, if applicable, are paid to the Second Injury Fund. Although the claimant testified that he was awarded additional unemployment benefits following the termination on September 24, 2004, this decision to authorize unemployment compensation does not reflect that the employer was not justified for terminating the claimant's employment. The claimant has failed to prove that his termination was related to the filing of his workers' compensation claim.

The next issue presented for determination is whether the claimant is entitled to temporary partial disability benefits for the September 8, 2002, admitted injury.

Temporary partial disability is provided in Ark. Code Ann. §11-9-520. It states:

In case of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid, to the employee, sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his or her wage earning capacity after the

injury. (Emphasis supplied)

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages while temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Arkansas State Highway & Transportation Department vs. Breshears*, 272 Ark. 214, 613 S.W.2d 392 (1981).

The record reflects that the claimant earned \$10.00 per hour. During the drying season, the claimant worked as many as twelve (12) hours per day, seven (7) days per week or up to eighty-four (84) hours per week. Following the September 8, 2002, admitted injury, the claimant was restricted to an eight (8) hour work day. Nevertheless, the claimant worked up to seven (7) days per week or as many as fifty-six (56) hours per week which when considering the overtime work, would exceed the stipulated, average weekly wage of \$609.00 per week. The record reflects that there were weeks within the claimant's healing period following the compensable injury that he was unable to work a full-work week. Specifically, it appears the week ending October 17, 2002, and October 24, 2002, the claimant worked part-time and is, therefore, entitled to temporary partial disability. (Jt. Ex. B, p.8)

Another issue presented for determination was whether, in addition to the admitted cervical injury, the claimant sustained a low back injury on either

September 8, 2002, or August 23, 2003, and, if so, claimant's entitlement to associated benefits.

There is no credible evidence whatsoever that the claimant sustained any injury in addition to the admitted cervical injury. In fact, the only injury ever reported on either September 8, 2002, or August 23, 2003, related to cervical complaints. Accordingly, it is herein determined that any physical problems beyond the claimant's cervical injury either pre-existed the September 8, 2002, admitted injury or were the result of some independent intervening cause, and unrelated to any work-related injury.

Respondents did, for some unexplained reason, refuse to accept and pay for any additional medical treatment after Dr. Cathey ended the claimant's healing period on November 11, 2002.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200,

649 S.W.2d 845 (1983).

As previously pointed out, once respondents terminated the claimant's medical treatment, after November 11, 2002, the claimant began receiving follow-up maintenance care from his family physician, Dr. Robinette which was paid under health insurance; however, even after the claimant reported a second incident on August 23, 2003, which aggravated his pre-existing condition, respondents sent the claimant back to its company physician, Dr. Timothy Dow, yet continued to pay for the medical treatment under health insurance rather than workers' compensation.

Ark. Code Ann. §11-9-411 provides, in part:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

Any treatment provided by Dr. James Robinette following the claimant's one-time change of physicians is unauthorized treatment and would not be the responsibility of respondents prior to August 23, 2003. However, respondents were not justified in unilaterally terminating all treatment. Respondents acknowledge that they have controverted compensability of the August 23, 2003, incident in its entirety. Accordingly, the change of physician rules do not apply to any treatment after August 23, 2003. A preponderance of the credible evidence reflects that all treatment after said date was the result of the work-related incident and aggravated

the claimant's pre-existing cervical injury. Therefore, respondents are responsible for payment of all reasonably necessary medical treatment after August 23, 2003, including, but not limited to reimbursing the claimant for any out of pocket expenses and/or co-payments since his medical was paid under the employer's accident and health insurance policy.

I feel compelled to point out that the healing period for the claimant's compensable condition ended on November 6, 2003, which is reflected by the medical opinion of Dr. Timothy Dow. (Jt. Ex. A, pp.32-33)

Further, the record reflects that although the claimant did not work eighty-four (84) hours per week, he did, at all times, work a minimum of fifty-six (56) hours per week during his second healing period and is, therefore, not entitled to any temporary partial disability following the second incident. (Jt. Ex. B, p.9)

AWARD

Respondent, Liberty Mutual Fire Insurance Company, is hereby directed and ordered to pay temporary partial disability benefits consistent with the findings of fact and conclusions of law, aforementioned.

Additionally, respondents are directed and ordered to pay outstanding medical and related expenses, including, but not limited to reimbursing the claimant for any out of pocket expenses and/or co-payments following the August 23, 2003, compensable aggravation of claimant's pre-existing cervical problems.

Claimant's entitlement to permanent disability benefits, if any, was

specifically reserved.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge