

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F408636

JAMES WASHBURN, Employee	CLAIMANT
FARMERS COOPERATIVE ASSOCIATION, Employer	RESPONDENT
AG-COMP SIF, Carrier	RESPONDENT

OPINION FILED MAY 19, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by KEN OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 6, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 26, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. On August 9, 2004, the claimant suffered a compensable injury in the form of an aggravation of a pre-existing condition.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$332.00 for total disability benefits and \$249.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical benefits and temporary total disability benefits from August 9, 2004 through a date yet to be determined.
2. Attorney fee.

At the time of the hearing the claimant clarified his request for temporary total disability benefits to include August 9, 2004 through March 1, 2005.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "The claimant contends that he was injured while dumping a barrel into a truck. The forklift driver let his foot off the brake and he injured his back. The claimant is seeking benefits for TTD, medical expenses ongoing, and attorney's fees."

The respondents' contentions as set forth in their pre-hearing questionnaire are as follows: "Respondents contend that the claimant has several prior injuries and pre-existing conditions as a result of these prior injuries which are unrelated to any August 9, 2004 event. Any need for treatment is related to these prior claims and/or injuries and not the result of the August 9, 2004 event. Respondents accepted the August 9, 2004 event as a temporary aggravation and have paid all appropriate benefits in relation to that event. Any additional treatment is not related or reasonable and necessary in relation to that claim. The claimant is not entitled to any additional temporary total disability benefits."

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 26, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits as a result of his compensable injury.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

#### FACTUAL BACKGROUND

The claimant began working for the respondent in June 2004. Claimant had various job duties for the respondent including driving its feed truck, carrying sacks of feed, and hauling sacked feed out to various farms.

Claimant testified that on August 9, 2004 he and a co-employee, Darren Wood, put loaded barrels on a pallet and picked the pallet up with a forklift. Claimant testified that he was standing on the pallet with the barrels and Wood raised the forks eight to ten feet off the ground so that claimant could dump the barrels over the side of a truck. According to claimant's testimony the forklift lunged while he was dumping the barrel causing him to grab the mast of the forklift and resulting in a jerking injury to his back.

Claimant testified that following this incident he initially received medical treatment from a physician's assistant before eventually being evaluated by Dr. Martin Greenberg, a neurosurgeon. At Dr. Greenberg's request the claimant underwent an MRI scan which Dr. Greenberg interpreted as revealing a herniated disc at the L5-S1 level with an annular bulge. Claimant underwent a second lumbar MRI scan which Dr. Greenberg again interpreted as showing a herniated disc with an annular bulge.

Claimant has also been evaluated by Dr. Blankenship, surgeon, who does not interpret the MRI scans as revealing a herniated disc. Dr. Blankenship ordered a functional capacities evaluation which revealed that claimant was capable of performing some work.

Claimant has filed this claim requesting additional medical treatment and requesting temporary total disability benefits beginning August 9, 2004 and continuing through March 1, 2005, the date he returned to work for another employer.

### ADJUDICATION

The initial issue for consideration involves claimant's request for temporary total disability benefits. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that even though claimant may have remained within his healing period subsequent to August 9, 2004, claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages subsequent to that date.

In reaching this conclusion I initially acknowledge that Dr. Greenberg in a report dated September 13, 2004 indicated that claimant should remain off work until September 27, 2004. I also note that as of November 30, 2004, Dr. Greenberg indicated that claimant was 100% disabled. However, based upon the remaining evidence presented, I find that Dr. Greenberg's opinion under the circumstances presented is entitled to little weight.

First, the respondents have offered into evidence numerous videos taken by private investigators of the claimant's activities. Respondents also included as documentary evidence the investigators' reports of their observations. [It should be noted that Pages 47 through 49 of the investigator's report is not contained in the documentary evidence.] However, my statements with regard to the videos are based upon my review of the videos themselves, not the investigators' reports of observations. The video from August 2004 shows claimant capable of driving his car, pumping gas, and carrying his infant child both with and without a car seat. Specifically, the video of August 28, 2004 shows the claimant getting on the ground to look up under a truck. The video dated September 2, 2004 shows the claimant carrying an infant in a car seat multiple times during the day, the claimant

bending over to check something on his truck, and claimant attending a football scrimmage/game for an extended period of time wherein he sat on both the ground and in the bleachers.

According to the testimony of Mike Becker the claimant helped him build a six-foot privacy fence around a swimming pool in August 2004. Becker is a friend of the claimant's who would later provide claimant with a home in exchange for work on a farm. Becker also testified that claimant helped put a motor in a pickup truck in February or March 2005. Finally, Becker testified that claimant never indicated he could not work. Becker stated that he noticed no change in claimant's ability to work since August 2004.

During the time period in which Dr. Greenberg indicated that claimant should remain off work, the claimant was applying for full-time employment with Cowart Construction. Claimant completed an employment application on October 29, 2004 indicating that he was available for full-time work as of October 30, 2004.

Also testifying at the hearing was the claimant's mother-in-law, Connie Wilkerson. Wilkerson testified that claimant informed her that during the fall of 2004 he performed mechanic work at his home for Bob Misenheimer of Misenheimer's Body Shop.

As previously noted, claimant was initially examined by Dr. Blankenship on October 20, 2004. Dr. Blankenship ordered a functional capacities evaluation which was performed on November 9, 2004. That functional capacities evaluation indicated that although the inconsistencies were minor, the claimant nevertheless gave a sub-maximal effort. The evaluation indicated that claimant had the ability to perform activity with at least sedentary physical demands. As a result, Dr. Blankenship in a report dated November 16, 2004 indicated that claimant was at least able to work at a sedentary-type job. However, the evidence subsequent to that date indicates that claimant was capable of performing work in excess of sedentary-type work. Around Thanksgiving 2004 Mike Becker allowed claimant to stay in a house on some farm land he owned in exchange for

the claimant feeding cows and helping move turkeys. Becker testified that moving turkeys took approximately six to eight hours per house and they generally performed this work on weekends approximately every eight to nine weeks.

In conjunction with claimant's work at the Becker farm, Wilkerson testified that one day while passing that farm she observed the claimant picking up bales of hay and throwing them off a trailer. Wilkerson testified that claimant performed this activity for approximately five minutes until he noticed her watching.

The videotapes introduced by the respondent include claimant's activities on December 17, 2004. The videotape shows the claimant engaging in a number of work activities on Becker's farm that day. These activities include: claimant on his knees on the ground working on a water line; the claimant working on a tractor and operating the tractor with a front end loader; and the claimant using the shovel to dig a hole. Certainly, the activities depicted on the December 17, 2004 tape do not support Dr. Greenberg's opinion that claimant is totally disabled nor do they indicate that claimant is limited to sedentary-type work.

As previously noted, claimant clarified his contentions with respect to temporary total disability benefits to conclude as of March 1, 2005, the date he began working for Stewart's State Line in West Siloam Springs selling cars, running a wrecker, and repossessing vehicles. Claimant testified at the hearing that from August 2004 until March 2005 he primarily sat around the house and watched tv. He also testified that other than his own car he had not performed any mechanic work after the injury until March 2005. Specifically, claimant denied working for Stewart's State Line prior to March 2005.

Q. You had actually been working there since January, correct?

A. No.

Q. You hadn't been doing anything for them?

A. Not in January, no.

Q. So in January if there are videotapes that show you out there showing cars, working on cars, changing tires, driving cars, they're just wrong?

A. I haven't – I wasn't working there then. I'm working there right now.

Videotapes offered into evidence by the respondent include claimant's activities of January 20 and January 21, 2005. Those videotapes indicate that claimant was performing various employment activities at Stewart's State Line. The videotape shows the claimant talking to customers, moving vehicles, working under the hood of vehicles, and operating a wrecker.

When confronted with this evidence, claimant testified that while he was at Stewart's State Line he was not receiving any compensation until March 2005. Instead, claimant testified that Stewart's State Line provided him with a truck and any monies earned were applied to payment for his vehicle. Regardless of whether claimant actually took home money beginning in January 2005, claimant was working for Stewart's and was receiving some compensation for that work. Stewart's State Line considered claimant to be an employee as of January 2005 as evidenced by a note from Dee Andrews of State Line Trading indicating that claimant had been employed there since January 2005.

In summary, in order to be entitled to temporary total disability benefits claimant has the burden of proving not only that he remains within his healing period but that he suffers a total incapacity to earn wages. While Dr. Greenberg did opine that claimant should remain off work through September 27 and subsequently in November indicated that claimant was 100 percent disabled, I find that Dr. Greenberg's opinion is entitled to little weight given the remaining evidence. As previously noted, Dr. Blankenship was not of the opinion that claimant was incapable of working. Furthermore, and more importantly, the claimant's activities indicate that he was capable of working and even of performing more

than sedentary-type duty as reflected by the functional capacities evaluation. In August 2004 the claimant helped Mike Becker construct a six-foot privacy fence around a swimming pool. Also in the fall of 2004 claimant was performing mechanical work for Bob Misenheimer of Misenheimer's Body Shop. In October 2004 claimant applied for employment with Cowart Construction Company indicating that he was capable of full-time employment as of October 30. Around Thanksgiving 2004 claimant began living in a house provided to him by Mike Becker in exchange for work on Becker's farm. This work included feeding claimant's cows and moving turkeys. Video taken of the claimant's activities on December 17, 2004 do not reveal an individual who is totally incapacitated from earning wages or who is capable of performing only limited work. Finally, videotapes indicate that claimant began working at State Line Trading as of January 2005. Given all this evidence, I find that claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages; therefore, he is not entitled to additional temporary total disability benefits.

The second issue for consideration involves claimant's contention that he is entitled to additional medical treatment for his compensable injury. Based upon much of the same evidence previously discussed, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. While Dr. Greenberg has diagnosed claimant as suffering from a herniated disc, other physicians have not made that same diagnosis. Dr. Harris interpreted claimant's MRI scan of September 13, 2004 as revealing no focal disc protrusion. Following claimant's second MRI scan Dr. David Davis indicated that claimant did have some bulging at the L4-5 level, but indicated that the protrusion was below the L5 nerve root with impingement uncertain. Dr. Moon's review of the September 27, 2004 MRI scan stated that claimant had a bulge but noted that the study was generally unremarkable. Finally, Dr. Blankenship reviewed claimant's MRI scans and in a report dated October 20,

2004, stated that he did not believe the claimant had a herniated disc. Dr. Blankenship also noted some inconsistencies in his examination of the claimant.

He also has back and leg pain with axial loading, which would be considered a positive Waddle sign that is inconsistent with true radicular component to his pain and is nonphysiologic in nature.

Based upon his examination Dr. Blankenship ordered a functional capacities evaluation which as previously noted revealed a submaximal effort.

Given all of this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

#### ORDER

\_\_\_\_\_ Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits as a result of his compensable injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE