

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502578

BRUCE BULLARD, EMPLOYEE

CLAIMANT

WHITE'S SIGN COMPANY, EMPLOYER

RESPONDENT

AIG CLAIMS SERVICE, CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 25, 2006

Hearing before Administrative Law Judge J. Mark White on August 17, 2006, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Ms. Carol Worley, Attorney at Law, Little Rock, Ark.

STATEMENT OF THE CASE

On August 17, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on July 10, 2006, and a Prehearing Order was entered that same day. A copy of the July 10, 2006, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including June 16, 2004; that on or about

June 16, 2004, the claimant sustained a compensable injury to his low back; and that respondents accepted the June 16, 2004 injury as compensable and paid some benefits. At the hearing, the parties further stipulated that the claimant earned an average weekly wage of \$502.70, entitling him to a compensation rate of \$335 for total disability benefits and \$251 for permanent partial disability benefits; and that the claimant was granted a change of physician by the Commission to Dr. Christopher Mocek, effective March 17, 2006.

The parties agreed that the issues to be presented were whether the claimant is entitled to benefits under Ark. Code Ann. § 11-9-505(a); whether the claimant is entitled to additional temporary total disability benefits and medical treatment; and controversion and attorney's fees.

The claimant contends that he was paid temporary total disability benefits through September 23, 2005; that he should be awarded temporary total disability benefits from on or about September 23, 2005 to a date yet to be determined, or alternatively, the claimant contends that he should be awarded benefits pursuant to Ark. Code Ann. § 11-9-505(a) based upon the fact that the respondents unreasonably refused to return the claimant to work until he came under the care of Dr. Christopher Mocek on April 18, 2006; that as of April 18, 2006, either the claimant would be entitled to continuing benefits under Section 11-9-505(a) or he

would be entitled to additional temporary total disability benefits based upon the re-entering of a new healing period under the care of Dr. Mocek, who now believes it is reasonable and necessary for him to remain off work pending the additional care he is recommending; that the additional medical treatment he has had following the release of Dr. Sprinkle has been reasonable, necessary, and related to his compensable injuries; that the additional medical treatment being recommended by Dr. Mocek is reasonable, necessary, and related to his compensable injuries and should be ordered; that respondents should be ordered to pay attorney's fees as provided by law; and that he has submitted mileage expenses which remain unpaid.

The respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim; that the claimant was released to full duty on September 23, 2005 by Dr. Brent Sprinkle; that there was no job available for the claimant with the respondent-employer after September 23, 2005, and thus Ark. Code Ann. § 11-9-505 (a) does not apply; that the claimant was not entitled to temporary total disability benefits after September 23, 2005; that the treatment recommended by Dr. Mocek is for pre-existing problems not related to the compensable injury; that they are entitled to a credit for unemployment benefits received by the claimant; and that Dr. Sprinkle indicated that the claimant did not sustain any permanent impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, the deposition of Dr. Christopher Mocek, 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 hereby made in accordance with Ark. Code Ann. § 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 failed to prove by a preponderance of the evidence that additional medical treatment remains reasonably necessary in connection with the compensable injury.
4. The claimant has failed to prove by a preponderance of the evidence that he remained within his healing period after September 23, 2005.
5. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
6. The claimant has failed to prove by a preponderance of the evidence that suitable employment within his limitations was available with the employer

subsequent to the time he was released to return to work.

7. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to benefits per Ark. Code Ann. § 11-9-505 (a).
8. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant injured his back in 1998 when he fell off a billboard. Dr. Joel Patterson performed surgery on his back, and the claimant testified that as of 1999, though he had some soreness in his back, he had no muscle spasms or leg pain. He testified that he was not under a doctor's care thereafter for his back, other than occasional visits with his family physician.

On or about June 15, 2004, the claimant slipped and fell off his truck while working for the respondent-employer as an electrician. By the following day, the claimant testified, he was experiencing muscle spasms in his back and pain down his left leg. The respondents accepted his injury as compensable and provided benefits, and he was sent to see a company doctor at Ark-La-Tex Health Center. X-rays performed that day revealed the prior surgery at L5 and arthritis throughout the spine.

The claimant testified that he repeatedly asked the respondent-employer to send him back to the doctor but that his requests were ignored. Deborah White, who was the contact person for workers' compensation with the respondent-employer, denied ever refusing a request by the claimant to return to see the doctor. In any event, the claimant did not see another doctor until he returned to the Health Center on November 23. An MRI exam performed November 29 revealed disc space narrowing at L4-5, with a disc bulge at that same level, post-surgical changes, and epidural fibrosis – that is, scarring tissue from the claimant's 1998 surgery. The radiologist opined there was no evidence of herniation from the bulge.

The claimant was sent to Dr. Bruce Safman for further treatment. Dr. Safman first saw the claimant December 15 and diagnosed him with a "chronic thoracolumbar strain." Dr. Safman indicated that nothing in the MRI report reflected an acute injury. He recommended conservative treatment, providing a trigger point injection and prescriptions for medication. When the claimant returned on December 29, Dr. Safman noted "a little improvement," but he also recorded that the claimant was "fixated on having some invasive surgical procedure." Dr. Safman opined that the disc bulge at L4-5 was not responsible for the claimant's symptoms. He then discharged the claimant from his care because he thought the claimant was not interested in conservative treatment.

The claimant had been working for most of this time, but he ceased working after a visit to the emergency room for back pain on January 14, 2005. At some point thereafter, the claimant's counsel and the respondent-carrier agreed for the claimant to see Dr. Edward Saer.

Dr. Saer first saw the claimant on March 24. Dr. Saer read the MRI films as showing post-surgical changes at L4-5 but no herniation, in agreement with the radiologist. He gave his diagnosis as, "Sprain/postlaminectomy syndrome L4-5." He opined that the claimant did not need surgery and recommended conservative treatment, including medication and physical therapy. Over the following months his physical therapist's notes recorded improvement in his condition, but when the claimant returned to Dr. Saer on April 22, Dr. Saer recorded his symptoms as "basically unchanged." Dr. Saer reiterated that surgical treatment was not indicated, and he referred the claimant to Dr. Brent Sprinkle for continued conservative treatment.

Dr. Sprinkle first saw the claimant on June 3. An EMG test to evaluate the claimant's leg pain revealed nothing abnormal, so Dr. Sprinkle prescribed a muscle stimulator. The stimulator provided little relief, so on August 30 Dr. Sprinkle provided trigger point injections. These too provided little relief. The claimant returned on September 30. In this visit, Dr. Sprinkle noted the presence of spasms

in the claimant's low back – the first mention made in the record of the observation of muscle spasms after the injury. Nonetheless, Dr. Sprinkle declared the claimant to be at maximum medical improvement and released him from care. He also released the claimant to full-duty work, though he indicated that a functional capacity evaluation would be needed if the claimant were unable to fulfill his job duties.

On March 17, 2006, the Commission granted the claimant a change of physician to Dr. Christopher Mocek. Dr. Mocek saw the claimant on April 18. In contrast to Drs. Safman and Saer, Dr. Mocek read the claimant's MRI films as showing a herniation at L4-5. He opined that the claimant's symptoms could be the result of both the disc protrusion at L4-5 and the scar tissue from the prior surgery irritating the L5 nerve root. He administered a straight-leg raise test which was positive, indicating an abnormality at L5 – consistent with his opinion of the source of the claimant's symptoms. He recommended that the claimant undergo surgery.

The parties introduced into evidence a surveillance video of the claimant taken September 23, 2005. In the video, the claimant is seen lifting large barrels five times and turning three of the barrels over to empty them. For two of the barrels, the claimant bent over at the waist to empty the barrels – his torso appeared to be almost at a 90-degree angle to his waist. For both such barrels, the claimant held this

position for more than twenty seconds. The claimant testified that he was simply rinsing out empty barrels with only one gallon of diesel, but the length of time it took the claimant to empty the barrels suggests there was more than just one gallon of liquid in them. At the end of the video, the claimant can be seen stepping up onto the bed of a truck, using his left leg. At no point in the video does the claimant display any sign of restriction or incapacity.

Much of the testimony at the hearing concerned a complaint filed by the claimant with OSHA against the respondent-employer. The findings reached below are independent of the circumstances of the OSHA complaint, and resolving the contradictory testimony on that point is not necessary to reach the findings made below.

II. Adjudication

A. Additional Medical Treatment

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. Ark. Code Ann. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). When an accidental injury aggravates a prior one,

the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Even if it is demonstrated that a pre-existing condition is also a causal factor, the claimant has met his burden of proof so long as he proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Electric Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

Dr. Mocek has opined that the claimant's symptoms could be the result of a combination of a disc herniation at L4-5 and scar tissue from the prior injury at that same level. Dr. Mocek's opinion is corroborated, at least in part, by the positive straight-leg raise test he administered and by the herniation he opined to be at L4-5.

Dr. Saer and the original radiologist, on the other hand, opined that the MRI films did not reveal a herniation. Dr. Safman too thought there to be no herniation, but it is unknown whether he viewed the actual films or only the radiologist's report. Although the straight-leg raise test administered by Dr. Mocek produced a positive result, Drs. Safman, Saer and Sprinkle all administered straight-leg raise tests with negative results. In addition, though the claimant testified that his muscle spasms began with the compensable injury, no medical provider recorded any observation of spasm until 15 months after the compensable injury.

The conflict in the medical evidence is amplified by the claimant's lack of credibility. The claimant's testimony contradicted the testimony of Todd White and Deborah White in multiple, significant ways. The medical records likewise record conflicts. As noted above, when the claimant attended physical therapy at the referral of Dr. Saer, the physical therapist reported regular improvement in the claimant's condition, yet the claimant reported no improvement to Dr. Saer. Finally, as noted above, the claimant's explanation of the surveillance video was implausible in light of the actual video footage. These multiple, significant conflicts, together with the claimant's evasiveness on cross-examination and my observation of his demeanor, lead me to find that the claimant was not a credible witness.

The most compelling evidence supporting the claimant's theory of the case is Dr. Mocek's opinion and testimony. It is offset by the opinions of Drs. Saer, Safman and Sprinkle. Because of this conflict in the medical evidence, together with the claimant's lack of credibility, and the complete lack of restriction or incapacity observed in the surveillance video, I am not persuaded that it is more likely than not that Dr. Mocek's is the correct opinion. Thus, I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment remains reasonably necessary in connection with the compensable injury.

B. Indemnity 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. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

As discussed above, I find that the claimant has failed to demonstrate by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury. Given this finding, and given the opinion of Dr. Sprinkle as to when the claimant reached maximum medical improvement, I find that the claimant has failed to prove by a preponderance of the evidence that he remained within his healing period after September 23, 2005. I therefore conclude that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.

The claimant also contends that he is entitled to benefits for his employer's refusal to return him to work after September 23, 2005. The Workers' Compensation Act, as codified at Ark. Code Ann. § 11-9-505 (a), provides as follows:

(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.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

To prove entitlement to benefits under § 11-9-505 (a), the claimant must establish that he sustained a compensable injury; that suitable employment within his limitations was available with the employer; that the employer refused to return him to work; and that the refusal to return him to work was without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

To prove entitlement to these benefits, the claimant must show "that suitable employment within his limitations is available with the employer." *Id.* Two witnesses testified without contradiction that the claimant's job was filled in March 2005, many months before Dr. Sprinkle released the claimant to return to work. There is no evidence to show that any other position was available, nor any

evidence that the respondents hired any other employees subsequent to Dr. Sprinkle's release.

Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that suitable employment within his limitations was available with the employer. I conclude that the claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505 (a).

AWARD

The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional benefits. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge