

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F410182 & F500545

**WILLIE LEE EVERETT, JR.,
EMPLOYEE**

CLAIMANT

**SUPERIOR MARBLE &
GLASS COMPANY,
EMPLOYER**

RESPONDENT NO. 1

**FAIRFIELD INSURANCE CO.;
CANNON COCHRAN
MANAGEMENT SERVICES, INC.,
INSURANCE CARRIER**

RESPONDENT NO. 2

**FIRSTCOMP INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 3

OPINION FILED MARCH 15, 2006,

Pursuant to a hearing conducted December 15, 2005, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Donald C. Pullen, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant;

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1 and 2; and

Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1 and 3.

STATEMENT OF THE CASE

This is a dispute over whether the claimant has sustained additional temporary total disability and impairment related to his back problems and, if so, whether these problems are the result of injuries at work during Fairfield's coverage in 2002, FirstComp's coverage in 2004, or pre-existing conditions.

The claimant has a history of back problems extending over several years, perhaps, as far back as 1986 when (according to his testimony and a doctor's note in September, 2000) he had a pinched nerve in his back and sought chiropractic care.

His employment with Superior Marble & Glass Company began in 1998 and has required heavy physical labor, such as lifting large pieces of glass and marble used in making custom vanity tops and related items for bathrooms and kitchens. During the period of this employment, he has experienced increasingly serious problems with his back which were finally relieved by surgery performed by Dr. Wayne Bruffett in January, 2005.

For example, in September, 1999, the claimant sought medical care, complaining of patchy areas of numbness on his right thigh and shin, as well as intermittent numbness in his arms, but no back pain. No back-related pathology was diagnosed at that time. A year later, on September 21, 2000, he again sought medical care, this time for back pain radiating down his right leg as the result of lifting a heavy object. His diagnosis was back pain, secondary to strain, as well as sciatica, and he was prescribed medication and advised to stay off work. When his symptoms continued, he underwent an MRI scan in November, 2000, the report of which indicated that he had a moderate-sized left-sided herniation of the L3-4 disc with large right paracentral herniation of the L4-5 disc.

On July 2, 2001, at the direction of Dr. Timothy D. Sloand, the claimant underwent a lumbar myelogram which was reported to be a suboptimal exam due to contrast present in epidural and subdural spaces but, nevertheless indicated indentation of the thecal sac at L3-4 and L4-5, corresponding to disc herniation seen on the December 18, 2000, MRI scan. The report also noted constriction of the thecal sac at L4-5, possibly related to spinal stenosis. A subsequent motor vehicle accident in November, 2001, caused the claimant to seek additional medical care, but corresponding

medical records indicate neck problems, rather than low back symptoms. His treatment for cervical strain included physical therapy and medication.

On August 21, 2002, during Fairfield's coverage, the claimant suffered an admittedly compensable back injury as a result of lifting at work. He received medical attention at the local emergency department where his recorded symptoms included low back pain with radiation down his right leg. His diagnosis at that time was severe muscle spasm and, later, after an exam on October 9, 2002, his diagnosis was again a herniated nucleus pulposus at L3-4 and L4-5. Subsequent treatment included lumbar epidural steroid injection therapy, back exercises, and medication and on January 2, 2004, the claimant underwent an MRI of the lumbar spine which was reported to show a large herniated nucleus pulposus at L4-5 with a large free fragment extending inferior to the disc space and along the right anterior aspect of the canal, as well as a central disc protrusion at L3-4. He continued to receive lumbar epidural steroid injection therapy and continued to work until he suffered an increase in symptoms in September 23, 2004, after another lifting incident at work, during FirstComp's coverage.

Following the September 23, 2004, incident, the claimant found that he was unable to work and he received little relief from conservative care including epidural steroid injection therapy. He stated that the injections did not have any effect, did not even slow it down. Thus, this injury significantly changed the claimant's condition, his ability to work, and his ability to respond to medical treatment. Consequently, he underwent surgery at two levels performed by Dr. Wayne L. Bruffett on January 21, 2005. The claimant testified that he had significant relief as a result of this surgery, describing Dr. Bruffett as "God sent." Following the surgery, Dr. Bruffett rated the claimant's impairment at 11% in a letter dated May 18, 2005.

At the hearing, the claimant contended that he suffered compensable injuries on August 21, 2002, and again on September 23, 2004, and should be awarded benefits for additional temporary total disability for a period from September 24, 2004, and continuing until March 21, 2005, reasonably necessary medical and related expenses, including Dr. Bruffett's care, and benefits for the impairment rating of 11%. An attorney's fee for controversion was also requested. Other possible issues were considered reserved.

Fairfield contended that the claimant's two herniated discs were due to an injury in 1998 and that he suffered merely a recurrence or temporary aggravation of that injury or condition on August 21, 2002, but, later, in September, 2004, suffered a new injury for which Fairfield was not responsible. Fairfield further contended that the claimant's impairment rating is not based on the AMA Guides as required by law and is not appropriate for an additional level of surgery. Fairfield further contended that work-related injuries were the major cause of only 1% of the impairment, because 10% pre-existed the 2002 injury.

FirstComp contended that on September 22, 2004, the claimant did not suffer a new injury but suffered merely a recurrence of prior problems which had first become manifested as far back as 1998 and included an incident in December, 2003. FirstComp also contended that Dr. Bruffett's 11% impairment was based on pre-existing symptomatic disc herniations, and that no work-related injury was the major cause of any permanent impairment.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered a compensable low back injury August 21, 2002, when Fairfield Insurance Company provided coverage; FirstComp Insurance Company provided coverage from February 22, 2004, through February 22, 2005; the claimant's average weekly wage was \$522.00; and temporary total disability benefits were paid by FirstComp Insurance Company from September 24, 2004, through November 4, 2004.

3. The preponderance of the evidence shows that the claimant suffered an additional compensable injury on or about September 23, 2004, for which FirstComp Insurance Company is responsible.

4. As a result of the injury of September 24, 2004, the claimant remained in a healing period and was totally incapacitated to earn wages, so that he is entitled to temporary total disability benefits from the date of injury until March 14, 2005, although FirstComp is entitled to credit for benefits previously voluntarily paid.

5. The compensable injury of September 24, 2004, is the major cause of additional permanent anatomical impairment in the amount of 3% to the body as a whole.

6. Respondents No. 1 and 3 have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by Respondents No. 1 and 3.

DISCUSSION

A review of the record shows that the claimant's medical care by Dr. Bruffett was reasonably necessary for the condition of his back; that the claimant was temporarily totally disabled from September 24, 2004, until March 14, 2005; and that his permanent anatomical impairment, accordingly to Table 75 at page 3/113 of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition was 11% following his two-level surgery . Whether this is attributable to his employment depends on an evaluation of the medical record and the claimant's testimony.

In that regard, the deposition testimony of Dr. Bruffett provides some cautionary wisdom, especially when it comes to giving weight to diagnostic studies. For example, at page 9 in his deposition, Dr. Bruffett was asked whether the disc herniations on an MRI dated December 18, 2000, were the same as those found on scans in 2004. He testified that it was always difficult to review reports because there are two different MRI's interpreted by two different radiologists but, just by the description of the reports, the L4-5 herniation appears to be similar while the L3-4 was described as moderated-sized left-sided in December, 2000, and more focal, right paracentral in November, 2005. He also testified that paracentral herniations may bulge to one side or the other at different times. (Dep. at 10). Dr. Bruffett also testified that what one person calls a protrusion, another may call a bulge, another may call a herniation, and another may call a rupture. (Dep. at 21). He also testified that the claimant's testimony that his symptoms were different after the 2004 incident because of pain on the inside of his foot, the back of his heel, and into his big toe would show some new type of damage or new aggravation. (Dep. at 22, 23). He also explained that the large free fragment which was noted in the report of the January, 2004, MRI scan was not observed during the surgery and may have been reabsorbed. (Dep. at 26). Dr. Bruffett also agreed that the cause of the

claimant's off-work status and surgery was the lifting incident in September, 2004, and that, by the claimant's history, the lifting episode in September really made things worse and brought it to a head, so to speak. (Dep. at 27, 28). Dr. Bruffett also testified that he last saw the claimant March 10, 2005, and released him to return to work the following Monday on light duty for a month and then full duty after that. (Dep. at 6). Thus, although the claimant had pre-existing disc pathology, the preponderance of the evidence shows that his current need for treatment and temporary total disability resulted from the September, 2004, injury, especially in light of his ability to respond to treatment and continue working prior to that time.

As noted above, Table 75 of the Fourth Edition of the AMA Guides provides for impairment of 11%, as stated by Dr. Bruffett. That table indicates that a surgically treated lumbar disc lesion results in a 10% impairment and adds 1% for an additional level, with or without operations. However, the record indicates that the claimant suffered pre-existing unoperated herniated nucleus pulposus, with or without radiculopathy, for which Table 75 provides a 7% rating, again adding 1% for an additional level, with or without operations, for a total of 8% due to pre-existing pathology.

Thus, when the claimant's very credible testimony concerning his ability to work and recover from his prior back problems is considered, along with the medical evidence including Dr. Bruffett's deposition testimony, the claimant had pre-existing impairment of 8% to the body as a whole for unoperated symptomatic lumbar discs, leaving an additional 3% as the result of his compensable injury of September, 2004. Similarly, Dr. Bruffett's care, including surgical treatment, was reasonably necessary for the September, 2004, injury. Surgical treatment had not been required previously, although it had been discussed, prior to that incident. Similarly, the claimant's temporary total disability period was brought on by the incident of September, 2004. This, of course, respects

the legal principle that the employer takes the claimant as he finds him, for purposes of Workers' Compensation Law.

AWARD

Pursuant to the foregoing opinion and the law, Respondents No. 1 and 3 are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge