

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505501

GARY EWING, EMPLOYEE

CLAIMANT

AERO, INC., EMPLOYER

RESPONDENT

WESTPORT INSURANCE CORP., CARRIER

RESPONDENT

OPINION FILED JULY 27, 2006

Hearing before Administrative Law Judge J. Mark White on March 9, 2006, in Texarkana, Miller County, Arkansas.

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

Respondents represented by Mr. William Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 9, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on December 19, 2005, and a Prehearing Order was entered that same day. A copy of the December 19, 2005, 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 April 29, 2005; that on April 29, 2005, the claimant sustained an incident in the course and scope of his employment; that respondents initially accepted the April 29, 2005 incident as compensable and paid benefits; and that respondents now controvert this claim in its entirety. At the hearing, the respondents agreed to accept the claimant's April 29, 2005, injury as compensable, and the parties thus stipulated that the claimant sustained a compensable injury on April 29, 2005. The parties further stipulated that the claimant earned an average weekly wage of \$360, entitling him to a compensation rate of \$240 for total disability benefits and \$180 for permanent partial disability benefits; and that the respondents paid the claimant at least seven weeks of indemnity benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to temporary total disability benefits and medical treatment; and controversion and attorney's fees. Though the claimant initially raised the issue of temporary partial disability benefits, he waived that issue at the hearing. Likewise, the parties initially identified compensability as an issue, but at the hearing the respondents agreed to accept the claimant's injury as compensable.

The claimant contends that he sustained a compensable injury on April 29, 2005; that he should be awarded temporary total disability benefits from August 17,

2005, through on or about October 22, 2005, when he returned to work; that the medical treatment he has received to date has been reasonable, necessary, and related to his compensable injuries; that the additional medical treatment being recommended by Dr. Jeffery DeHaan is reasonable, necessary, and related to the compensable injury; and that respondents should be ordered to pay his attorney's fees as permitted by law, including a full attorney's fee on the temporary total disability benefits initially paid and now controverted.

Respondents contend that the claimant has had prior back problems in the form of surgery; that there was no objective anatomical change in the claimant's physical condition or diagnostic studies; and that the claimant did not have any herniations, but only what Dr. DeHaan described as a fair amount of degeneration.

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 an opportunity to hear the testimony of the claimant and to observe his 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 proven by a preponderance of the evidence that additional medical treatment as recommended by Dr. DeHaan is reasonably necessary in connection with the April 29, 2005, compensable injury.
4. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from May 11, 2005, through July 27, 2005, and from August 17, 2005, through October 22, 2005.
5. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 11, 2005, through July 27, 2005, and from August 17, 2005, through October 22, 2005.
6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

In September 1996 the claimant sustained a compensable injury to his low back while working for the respondent-employer. He was diagnosed with a disc

herniation at L3-4, and Dr. Jeffrey DeHaan performed surgery at that level in 1997. The claimant testified that the surgery dramatically improved his low back and right leg pain and that he successfully returned to work. The claimant testified that from his release by Dr. DeHaan in 1998 until his injury in 2005, he sought no medical treatment for his back or leg, nor did he take any prescription medications. However, he did continue to have back problems – he said that several times per week, he would get “stove up” – that is, he would suffer muscle cramps and spasms in his back, which could be relived only by rest. He described his pain level during this time as four out of ten, while his pain prior to the surgery was eight or nine out of ten.

Following his release, the claimant left the respondent-employer and worked a variety of other jobs, most involving manual labor. He returned to the respondent-employer for a brief time, left, and then returned for a third time in 2000. Since then, he has worked solely for the respondent-employer. He testified that his back condition did not limit his ability to perform his job duties after his 1998 release.

On April 29, 2005, the claimant sustained another compensable injury to his back while attempting to move a barrel. He testified that he felt a “pull” in his back and notified his supervisor. He finished out the day, and the following day he traveled to Amity to pick up some equipment. The following Saturday, he asked to

be sent to the company doctor, but he continued working and an appointment was not scheduled for several more days. He testified that he was having pain in his back and down his right leg in this time.

The claimant saw Dr. John Sayre on May 4. A CT scan performed that day revealed "right lateral recess stenosis at L4-5," and Dr. Sayre took him off of work and referred him back to Dr. DeHaan. Dr. DeHaan saw him first on May 12 for low back pain and radiating pain in the right lower extremity. An MRI was performed May 25, and Dr. DeHaan read it as showing "fairly significant degeneration of the discs that were worked on 8 yrs ago. I don't see any frank herniation present or any large scale herniation." Dr. DeHaan recommended physical therapy and medication and directed the claimant to not work. On June 22, Dr. DeHaan recommended a TENS unit.

When the claimant returned to Dr. DeHaan on July 27, he showed little improvement. Dr. DeHaan recommended a series of epidural steroid injections, and consideration of surgery if the injections were ineffective. He also, however, released the claimant to light-duty work. After this visit and work release, the respondents controverted all further benefits.

The claimant testified that he returned to work for a time, but he was unable to perform light-duty work because of his continuing back and right leg pain. Dr.

DeHaan rescinded the light-duty work release and took the claimant back off of work as of August 17. On September 9, Dr. DeHaan reiterated his recommendation of epidural steroid injections and opined: "Seems to be some question as to whether this is a new injury or not, which I believe it is." On October 21, at the claimant's request, Dr. DeHaan again released him to light duty. As of the hearing, the claimant was still working. In addition, as of the hearing the claimant was complaining of left leg pain, a radiating-type pain which he testified developed about three months prior to the hearing.

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). The employer takes an employee as he finds him. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). A temporary aggravation of a preexisting condition is a compensable injury; 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). Thus, even if it is demonstrated that a pre-existing condition is a causal factor, the claimant has met his burden of proof for additional medical treatment 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).

The parties have stipulated the claimant sustained a compensable injury to his low back on April 29, 2005. The claimant credibly testified that he was able to work without difficulty between his 1998 release from Dr. DeHaan's care and the April 2005 injury. The claimant likewise testified that he had no right leg pain between 1998 and 2005, and that his right leg pain did not return until after the April 2005 injury. There is no evidence in the record to the contrary, and no evidence the claimant ever sought medical treatment for his back or leg between 1998 and 2005.

Dr. DeHaan has expressly opined that the claimant's present symptoms arise from his April 2005 injury rather than the 1996 injury. He has opined that the MRI exam taken after April 2005 showed increased bulging at L4-5 consistent with the claimant's symptoms. He has opined that his treatment recommendations stem from

the April 2005 injury. There is no medical opinion in the record to contradict Dr. DeHaan's opinions.

I find that the claimant sustained a new injury in April 2005, or at the very least a compensable aggravation of a pre-existing condition, and that the claimant has not returned to his pre-injury condition. I further find that the claimant's present need for treatment is directly attributable to his April 2005 compensable injury. Therefore, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment as recommended by Dr. DeHaan is reasonably necessary in connection with his compensable injury.

B. Temporary Total Disability 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).

The claimant was off work at his doctor's direction from May 11 until July 27,

2005, and from August 17 through October 22, 2005. As discussed above, I find that additional medical treatment remains reasonably necessary in connection with his compensable injury. Therefore, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from May 11, 2005, through July 27, 2005, and from August 17, 2005, through October 22, 2005. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 11, 2005, through July 27, 2005, and from August 17, 2005, through October 22, 2005.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment as prescribed by Dr. DeHaan, and that he is entitled to temporary total disability benefits from May 11, 2005, through July 27, 2005, and from August 17, 2005, through October 22, 2005. 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. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark.

Code Ann. § 11-9-715, including all indemnity benefits previously accepted and paid by the respondents. *Cf. Wal-Mart Stores v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001).

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

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge