

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM F409867**

**MATTHEW CHRISTOPHER HARGIS,  
EMPLOYEE**

**CLAIMANT**

**CITY OF HAMBURG, ARKANSAS,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**ARKANSAS MUNICIPAL LEAGUE  
WORKERS' COMPENSATION TRUST,  
BENEFITS ADMINISTRATOR**

**RESPONDENT**

**OPINION FILED MAY 18, 2006,**

Pursuant to a hearing conducted February 17, 2006, before Administrative Law Judge Richard B. Calaway in Monticello, Drew County, Arkansas, with

Mr. John Richard Byrd, Sr. and Mr. John Richard Byrd, Jr., Attorneys at Law, Hamburg, Arkansas, appearing for the claimant, and

Mr. J. Chris Bradley, Attorney at Law, North Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This was a hearing concerning the disputed issues of entitlement to additional temporary total disability benefits and the occurrence of a compensable brain injury during a motor vehicle accident where the claimant suffered admittedly compensable neck and upper back injuries.

On September 8, 2004, the claimant was injured in a motor vehicle accident during his employment as a general laborer for the City of Hamburg. The accident occurred when his vehicle was making a slow turn and was struck by a log truck. The claimant, who was not wearing a seatbelt, was partially ejected from his vehicle. He has requested benefits for injuries to his neck and upper back, which the respondents accept as compensable, as well as injuries to his brain. His claim of a brain injury is complicated by his medical history.

In 1997, when he was 15 years of age, the telescopic gun sight on a rifle he was using struck him in the face and eye, causing injuries, including circulatory problems, eventually resulting in a stroke. He received medical attention, including diagnostic studies which showed that his brain has undergone significant structural changes.

At the hearing the claimant contended that he should also be awarded additional benefits for temporary total disability beginning August 25, 2005, and continuing until the present. His additional contention is that he sustained a compensable brain injury or aggravation of his pre-existing condition at the time of the compensable injuries to his neck and upper back. He also requested an attorney's fee for controversion. Other possible issues were reserved. His previous request for additional medical care was amicably resolved by the parties following the prehearing conference and was not addressed at the hearing.

Although the respondents acknowledged that the claimant suffered injuries primarily to his neck and upper back, they contended that the occurrence of an injury to his brain cannot be established by medical evidence, supported by objective findings. They also denied entitlement to additional temporary total disability benefits, although such benefits had been paid until August 24, 2005, when they were terminated based, primarily, upon surveillance showing recreational activity by the claimant on August 10, 2005.

The record, which included documentary evidence and the testimony of the claimant and his father, was closed at the end of the hearing.

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 compensable injuries primarily to his neck and upper back on September 8, 2004; his average weekly wage was \$300.00; and the claimant has not been released by any physician to return to work.

3. The preponderance of the evidence shows that the claimant remained in his healing period and was totally incapacitated to earn wages from August 25, 2005, until a date to be determined, so that he is entitled to additional benefits for temporary total disability.

4. The preponderance of the evidence fails to establish that the claimant sustained a compensable new injury to his brain, or an aggravation of his pre-existing brain pathology, based on medical evidence, supported by objective findings, as required by the Act.

5. The respondents 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 the respondents.

## **DISCUSSION**

After the motor vehicle accident in September, 2004, the claimant received medical attention locally including the care of his family physician, Dr. James D. Rankin. He was promptly referred to Little Rock internal medicine specialist Dr. Larry S. Watkins and was also treated by Dr. Victor Biton, a specialist in the treatment of epilepsy. His care included the attention of Little Rock neurologist Dr. Reginald J. Rutherford, as well as Dr. William Ackerman and Dr. Kenneth

Rosensweig. During this time, he underwent imaging studies and was evaluated by neuropsychologist Dr. Jody L. Hagen of Little Rock and his records were reviewed and evaluated by Dr. Ralph B. Lilly, a Houston neurologist specializing in acquired brain injuries.

The claimant's symptoms after his motor vehicle accident have been various but included the development of headaches of such severity as to cause nausea and vomiting, sometimes followed by the need to sleep. The claimant's testimony tended to show that these and other symptoms, some of which were associated with his prior brain pathology, were exacerbated by the September, 2004, motor vehicle accident. Nevertheless, the claimant has attempted to return to work without success. For example, he tried to assist his father with meter readings but found that the process was too painful for him. He also attempted to work for a Mr. Naff in construction for a couple of days but found that his pain made it impossible to continue.

His temporary total disability benefits were terminated primarily because of video surveillance which was shown at the hearing. It had a period of about four minutes when the claimant and a friend were sometimes shooting a basketball at a goal mounted in a driveway. During this short moment of recreation, the claimant was not constantly playing basketball. When he was, his level of exertion was relatively low. In short, the video did demonstrate that the claimant was not utterly physical incapacitated, but it did not contradict his claim of being incapacitated to earn wages in a typical workplace setting.

The claimant's testimony was that he was not able to perform work such as working at Dillard's because he cannot stand in one place for very long. The claimant also testified that his attempts to return to work for his father and for Mr. Naff were unsuccessful due to the severity of his headaches. As noted above, no physician has released the claimant to return to work. Further,

the respondents have not offered or provided the claimant additional medical care since the time of the surveillance video. His last treatment was by Dr. Biton on April 12, 2005. Thus, the preponderance of the evidence tends to show that the claimant continued in his healing period and was totally incapacitated to earn wages as the result of his compensable injury, the surveillance video notwithstanding.

The claimant's contention that he suffered a compensable brain injury has been denied on the basis of lack of objective findings. Ark. Code Ann. §11-9-102 (4) (D) states that a compensable injury must be established by medical evidence, supported by "objective findings," which are later defined as findings which cannot come under the voluntary control of a patient. Ark. Code Ann. §11-9-102 (16).

The imaging studies in the record show that the 1997 stroke resulted in dramatic changes in the structure of the claimant's brain. The record indicates that the claimant had received medical attention since that time for various symptoms. This included a generalized tonic clonic seizure in February, 2004, which was noted in the record of Dr. Biton of October 1, 2004. Dr. Biton compared the MRI scan of September 16, 2004, with a previous scan dated January 4, 1998. He noted a focal area of porencephaly with adjacent gliosis in the posterior right frontal lobe, which he suspected to be post traumatic porencephaly or possibly post cerebral infarct.

On the third page of his October 1, 2004, report, Dr. Biton writes that one of the claimant's problems is a lesion in the right frontal area. He states that the history is suggestive of a CVA. He also noted that there was a hint of some displacement of the midline and asymmetry of the ventricle on the right side. He recommended a MR spectroscopy to determine any potential evidence of a tumor.

The report of a CT scan performed March 21, 2005, notes a focal zone of encephalomalacia and states that the findings were consistent with remote infarction or contusion within the right temporoparietal region.

In his note of April 8, 2005, Dr. Biton noted that a CT scan of March 31, 2005, reveals a finding consistent with a remote infarction or contusion in the right temporoparietal region. He also noted that MRI spectroscopy of the brain on November 10, 2004, revealed a focal area of cystic encephalomalacia in the right frontal lobe in a vascular distribution, most probably consistent with prior infarction.

In his letter of October 7, 2004, Dr. Rutherford indicated that the claimant's complaints of headache and neck pain were consistent with post-traumatic headache and cervical strain.

Additionally, Houston neurologist Dr. Ralph B. Lilly reviewed some of the claimant's records and concluded that his condition had been accentuated by a closed head injury on September 8, 2004, secondary to the motor vehicle crash substantially aggravating all pre-existing clinical features associated with the right middle cerebral artery infarct. He also concluded that the claimant suffered from attention deficit disorder secondary to right middle cerebral artery infarct and aggravated by the closed head injury of September 8, 2004, as well as recurrent vascular headache secondary to polytrauma and accentuated by motor vehicle crash on September 8, 2004.

However, a review of the medical record indicates that there is only a possibility of a relationship between his objective pathology and his motor vehicle accident while there is clearly a relationship between his objective pathology and his 1997 injury. None of his treating physicians have frankly related any such pathology to the current motor vehicle accident. Dr. Lilly in Houston has opined that the claimant suffered a new injury based on a review of his records. On the other

hand, a neuropsychological evaluation by Jody L. Hagen, PHD, dated September 16, 2005, indicated that, after an extensive review of the record, as well as interviews with the claimant and his parents, it was her conclusion that, while the accident in 2004 created new physical pain due to the neck injury, it did not appear to have resulted in additional cognitive deficits. In reaching this conclusion, she had reviewed medical records prior to the September 4 injury including a neuropsychological evaluation performed in 1998 and a psychological evaluation performed in 1999.

The record tends to show that the claimant's headaches are related to his neck and upper back injury and should be addressed by medical attention provided by the respondents. However, the claimant had sustained significant brain pathology prior to the motor vehicle accident in 2004 and there is insufficient objective evidence to show that he has suffered a new brain injury or an aggravation of his pre-existing condition as the result of his on-the-job injury.

Accordingly, his claim based upon a compensable injury to his brain or an aggravation of his pre-existing condition should be, and it is hereby, respectfully denied and dismissed.

#### **AWARD**

Pursuant to the foregoing opinion and the law, the respondents 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.**

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RICHARD B. CALAWAY  
Administrative Law Judge