

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F110367**

**JIMMY HILL**

**CLAIMANT**

**BRADY MOUNTAIN LODGE**

**RESPONDENT EMPLOYER**

**AMERICAN HOME INSURANCE CO.  
SECOND INJURY FUND  
DEATH & PERMANENT TOTAL DISABILITY  
TRUST FUND**

**RESPONDENT CARRIER NO. 1  
RESPONDENT NO. 2  
RESPONDENT NO. 3**

**ORDER AND OPINION FILED FEBRUARY 2, 2006**

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Hot Springs, Arkansas on January 6, 2006. A prehearing conference was held and a prehearing order was filed on November 9, 2005. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable January 31, 2001, injury.
2. The compensation rates are \$267/200.
3. Respondents resumed temporary total disability benefits on November 3, 2005.
4. Respondents have accepted a 15% permanent impairment rating.

The claimant contends he is entitled to temporary total disability benefits from January 10, 2005 through November 3, 2005, and attorney's fees.

Respondents contend the claimant never re-entered a healing period nor was he totally incapacitated from work. Respondents contend Dr. Wayne Bruffett found the claimant at maximum medical improvement on March 10, 2004 and assigned a 15% impairment rating. Respondents contend there has been no change in the claimant's medical condition until the pain pump was installed.

### **ISSUES TO BE LITIGATED**

1. Temporary total disability benefits.
2. Attorney's fees.

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 Ark. Code Ann. §11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. There was a compensable January 31, 2001, injury.
2. The compensation rates are \$267/200.
3. The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from January 10, 2005 through November 2, 2005.

4. The claimant's attorney is entitled to maximum attorney's fees, as provided by Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

### **DISCUSSION**

The claimant was assistant marina manager on February 1, 2001, for the respondent employer. The claimant was walking the docks and he slipped and fell, causing back, leg and hip pain. According to the claimant, he has had five or six back surgeries since February 1, 2001. The claimant eventually treated with Dr. Bruffett and was assigned a 15% permanent impairment rating; however, the claimant continued to experience pain. The claimant has used a cane for assistance for three years or more.

According to the claimant, Dr. Bruffett recommended a fusion about January 10, 2005; however, a pain pump was placed in the claimant on November 3, 2005. The claimant testified that he was unable to do any type work during the time period of January 10, 2005 through November 3, 2005, because of pain and medications he was taking to alleviate the pain.

Under cross examination, the claimant verified that he had been contacted by Heather Naylor, respondents' vocational rehabilitation consultant, in March 2004. The claimant was not aware of receiving any correspondence that Ms. Naylor may have sent to him in August 2005. The claimant testified that he spoke with the owner of the respondent business and asked for some light-duty work but none was available. The claimant confirmed he has not made any efforts to return to work since November 15, 2005, but has a doctor's appointment on March 16, 2006.

The claimant verified that he had a functional capacity evaluation in February 2004, but continued to see Dr. Bruffett between January 10, 2005 through November 3, 2005. Dr. Bruffett referred the claimant to Dr. Sunder Krishnan for pain management and he provided a number of oral medications. The claimant testified that he would lay down, sit some and walk some and those were his daily activities.

The claimant contends that he was unable to work from January 10, 2005 through November 3, 2005, and is entitled to temporary total disability benefits. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant presented credible testimony about his current problems with pain, medications he takes and his inability to sit for long periods, stand for long periods or walk for any distance. The claimant has lifting limitations as well. Dr. Wayne Bruffett, the authorized treating physician, opined on January 10, 2005, that the claimant was unable to work again. The claimant had undergone a functional capacity evaluation in 2004 that indicated he had completed the test using full physical effort and also that his subjective reports of pain and associated disability were reasonable and reliable. The results of the tests indicated the claimant was unable to meet the physical demands of the assistant marine manager job. Dr. Bruffett, in January 2005, was discussing with the claimant the possibility of another surgery for a posterior fusion. Dr. Bruffett opined this surgery is intended to limit the motion at L4-5 and allow the interbody fusion anteriorly to heal. This surgery was not approved by the insurance company and the claimant was sent to Dr. Steven Cathey for another

opinion. Dr. Cathey, on May 19, 2005, recommended, instead of a fusion with instrumentation surgery, that long-term pain management was more appropriate and recommended an implantable pain pump. The claimant did undergo that procedure on November 3, 2005.

After considering the credible testimony of the claimant and considering the medical evidence, to include Dr. Bruffett's January 10, 2005, opinion that the claimant was unable to work, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from January 10, 2005 through November 2, 2005. Dr. Cathey's May 19, 2005, report revealed in addition to the claimant's chronic low back pain problems, he has experienced a neurogenic bladder since 2002, which requires twice daily self catheterization for bladder management. The claimant was taking Oxycontin for pain management in May 2005. While Dr. Cathey's May 19, 2005, report did not specifically address the claimant's ability to return to work, he did recommend a pain pump to address the claimant's pain management problems. I found the medical evidence to be persuasive that the claimant remained in his healing period and unable to earn wages.

Heather Naylor, respondents' vocational rehabilitation consultant, testified that she met with the claimant in his home in February 2004. Ms. Naylor testified that she sent the claimant correspondence offering her assistance in job placement in May 2004, July 2005, August 2005 and December 2005, but has not had any personal contact with the claimant or made calls since the initial meeting, although she did complete the one labor market study in March 2004, using the functional capacity evaluation.

Ms. Naylor testified that she was not aware that Dr. Bruffett had indicated the claimant was unable to return to work as of January 20, 2005. Ms. Naylor confirmed that she had not actually looked at any openings in the labor market where the claimant lived from January 10, 2005 through November 3, 2005, but did confirm that she had written him letters offering her assistance but had not heard from him.

### **ORDER**

The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from January 10, 2005 through November 2, 2005.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL**  
**ADMINISTRATIVE LAW JUDGE**