BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403064

HAROLD D. HINDS, EMPLOYEE	**CLAIMANT**
BPB GYPSUM, INC., EMPLOYER	**RESPONDENT**
SENTRY INSURANCE COMPANY, CARRIER	**RESPONDENT**

OPINION FILED APRIL 25, 2006

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

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

Respondents represented by Mr. Gary Rogers, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 9, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on October 31, 2005, and a Prehearing Order was entered that same day. A copy of the October 31, 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 December 31, 2003; that respondents initially accepted the claimant's injuries as compensable and paid benefits, including temporary total disability benefits through August 17, 2005; and that on October 13, 2004, the Commission granted the claimant a change of physician to Dr. James Arthur. At the hearing, the parties further stipulated that the claimant sustained a compensable injury to his back on December 31, 2003; that the claimant was properly paid temporary total disability benefits from March 8, 2004, through August 17, 2005; and that the claimant was paid temporary total disability benefits at the rate of $350 per week.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether the claimant is entitled to medical treatment; unpaid medical bills; determination of the claimant's average weekly wage and corresponding compensation rate; and controversion and attorney's fees. The claimant reserved the issue of permanent benefits.

The claimant contends that he was entitled to temporary total disability benefits from March 8, 2004 through August 17, 2005; that respondents should be ordered to pay additional temporary total disability benefits from August 18, 2005 through a date yet to be determined; that respondents should be ordered to pay for the surgery which is being recommended by Dr. Kenneth Rosenzweig and Dr.

James Arthur; that respondents should be ordered to pay for unpaid medical expenses associated with claimant's compensable injury which respondents have failed to pay for to date, including unpaid mileage expenses; that respondents should be ordered to pay for claimant's attorney's fees as permitted by law; that since respondents have controverted the compensability of claimant's injury, the respondents should be ordered to pay attorney's fees on all indemnity benefits paid on this claim, including temporary total disability benefits paid from March 8, 2004 until August 17, 2005; and that the claimant is entitled to the maximum compensation rates.

Respondents contend that claimant did not sustain a compensable injury; and that the back problems at the L4-L5 area, including the steel rods and screws placed in claimant's L4-L5 region, were a preexisting degenerative condition that was not caused by the incident complained of by the claimant, and is therefore not the responsibility of the respondents.

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, including pain management and hardware removal surgery, remains reasonably necessary in connection with his compensable injury.
4. The claimant has proven by a preponderance of the evidence that he has been within his healing period and totally incapacitated from earning wages from August 18, 2005, through a date yet to be determined.
5. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 18, 2005, through a date yet to be determined.
6. The claimant has proven by a preponderance of the evidence that he earned wages sufficient to entitle him to the maximum compensation rates.
7. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant has a long-standing history of low back problems, going back to a severe motor vehicle accident in 1992. As a result of the accident, he underwent back surgery – a fusion at L4-5 by Dr. James Arthur. The claimant treated with Dr. Arthur through the end of 1992, and he eventually returned to his regular work duties. The claimant testified that when his treatment ended, he was able to work his regular job without difficulty and without the use of medication.

In 1996, the claimant sustained a recurrence of his low back problems. He returned to Dr. Arthur for treatment, and x-rays revealed that one of the pedicular screws implanted in the 1992 surgery had fractured. Dr. Arthur treated the claimant conservatively, and on August 26, 1996, he released him to regular work duties with no restrictions. The claimant testified that after his release, he required no medication and experienced no further trouble with his back. Several medical records from 2003 and earlier were introduced, and none of them reflect any complaint of back pain or problem after 1996.

The claimant came to work for the respondent-employer as a bundler operator, stacking layers of sheetrock and driving a forklift. On December 31, 2003, he sustained a compensable injury to his low back when the forklift he was driving

struck a concrete-encased pole. He was wearing a seatbelt at the time, and he said the impact “snatched” him to his right side. He did not notice any immediate symptoms, so he continued work and finished his shift. He continued to work for the next ten weeks, but he testified that he began to experience progressively worse stiffness and pain in his low back.

He first sought treatment at the hospital on January 2, 2004, complaining of pain in his back on the right and down into his right leg. He was prescribed medication and instructed to see his family doctor, Dr. H. Patel, whom he saw on January 7. Dr. Patel noted the presence of lumbar spasms, though x-rays revealed no new injury. The claimant testified that Dr. Patel referred him to a neurosurgeon, Dr. James Arthur, but the respondent-carrier redirected him to Dr. Reza Shahim, whom he first saw on March 8. Dr. Shahim expressed his preference for conservative treatment and ordered an MRI and CT scans. The scans revealed only degenerative changes, along with the pre-existing screw fracture. The claimant attended physical therapy as recommended by Dr. Shahim, and the therapist noted “severe” spasms in the low back and sacro-iliac area.

Dr. Shahim was initially unaware that the screw fracture occurred in 1996. A March 25, 2004, note indicates he thought the fracture was recent, and he mentioned the possibility of removing the screw hardware. However, by April 12,

Dr. Shahim was aware that the screw fracture occurred in 1996. He nonetheless opined as follows:

> It is possible that Mr. Hinds is now symptomatic from the fractured screw and it's possible that the injury has caused some jarring and movement of the instrumentation, and it is causing some of his hip and leg symptoms. I have recommended lumbar epidural steroid injections to him. If he fails that, my recommendation would be for him to have the instrumentation removed.

The claimant testified that after Dr. Shahim made this recommendation, he was sent to see Dr. Sundeep Lal. It appears from the medical record that Dr. Shahim referred the claimant to Dr. Lal to perform the recommended lumbar epidural steroid injections, but Dr. Lal instead performed a single SI-joint injection. Nothing in the record explains why Dr. Lal disregarded Dr. Shahim's recommendation. It is also noteworthy that in his report of May 19, 2004, Dr. Lal mistakenly asserts that Dr. Shahim ruled out surgery.

Dr. Lal diagnosed the claimant with "right SI joint dysfunction" and "lumbar axial pain." When the SI joint injection failed to initially relieve the claimant's symptoms, Dr. Lal opined that no further injections were needed. The claimant testified, and Dr. Lal's records corroborate, that while the SI injection initially failed to alleviate his symptoms, he did notice some improvement several days later. After a nerve conduction study produced normal results, Dr. Lal advised the claimant to

go back to work. When the respondent-employer indicated it had no light-duty work available, Dr. Lal sent the claimant for a functional capacity evaluation. The FCE noted a reliable effort by the claimant and found him capable of performing light-duty work with restrictions.

Dr. Lal's notes also mention a fall the claimant sustained on June 26, 2004; the claimant testified that his right leg gave way, causing him to fall. The claimant denied sustaining any injury to his back in that incident.

The claimant sought a change of physician and was granted one by the respondent-carrier to Dr. Kenneth Rosenzweig. Dr. Rosenzweig diagnosed failed back syndrome and noted the following in a letter of August 16, 2004:

> He has 2 areas of trigger points consistent with the hardware on the right at the L5 level and in correspondence with his radiographic findings it may be that he has a pseudoarthrosis at the previous 4-5 arthrodesis attempt. The fractured screw would imply the bony healing to be compromised. Although the hardware does not appear to be grossly loose, there is a suggestion of some windshield wiping or lucency around the screw threads.
>
> One might speculate that the arthrodesis did not take but that the scarring was extensive enough that he became asymptomatic. A minor injury in 1996 brought attention to it with resolution: However, this injury in 2003 pushed him over the edge.
>
> It is felt that a hardware block may differentiate his back pain being related to his hardware.

At Dr. Rosenzweig's referral, Dr. William Ackerman performed two lumbar epidural steroid injections for the purpose of ruling out the 1992 hardware as the source of the claimant's back problems. The results of the first injection indicated that the problems originated above or below the hardware. However, the results of the second injection pinpointed the hardware as the source of the claimant's pain. Dr. Ackerman wrote in his notes of October 8, 2004:

> It appears that the significant portion of his pain is from the right lower aspect of his hardware. It was noted last week that he had significant pain in his ligaments. Based on his response, it is my medical opinion that he is not fabricating his pain syndrome.

In his notes of October 12, 2004, Dr. Rosenzweig concurred with Dr. Ackerman's conclusion and indicated that hardware removal "may be in this patient's best interest." He further opined that the 2003 compensable injury had triggered the claimant's symptoms, though not the screw fracture itself.

At some point, the claimant had also asked for a change of physician from the Commission, which was granted on October 13, 2004, to Dr. Arthur, the surgeon who performed the original 1992 fusion surgery. Dr. Arthur's notes are somewhat cryptic, but it appears that as of March 16, 2005, he recommended pain management treatment, including a facet rhizotomy, and removal of the 1992 hardware. The claimant testified that from what Dr. Arthur told him, he understood the rhizotomy

to be a temporary pain management measure until surgery could be approved.

On June 16, 2005, the claimant was sent by the respondent-carrier to one of Dr. Lal's partners, Dr. Earl Peeples, for an "independent medical examination." Dr. Peeples dismissed without explanation any connection between the 1992 hardware and the claimant's present symptoms. Dr. Peeples asserted in his report that Dr. Shahim performed a lumbar epidural steroid injection, but the claimant denied receiving any such injection from Dr. Shahim, and there is no evidence in Dr. Shahim's notes of any injection being provided. An addendum notes that Dr. Peeples reviewed Dr. Rosenzweig's notes from October 12, 2004, but Dr. Peeples does not mention the concurring opinion of Dr. Ackerman, nor does he mention the October 8, 2004, lumbar injection, the results of which persuaded Drs. Ackerman and Rosenzweig of the need for hardware removal. One can only guess whether Dr. Peeples was aware of the October 8, 2004, injection or not. If Dr. Peeples was in fact aware of the injection, he does not explain why he thinks Drs. Ackerman and Rosenzweig misinterpreted the results of the injection.

Dr. Peeples recommended that a bone scan and psychological testing be performed. The bone scan was negative, and psychologist Winston Wilson diagnosed the claimant with conversion disorder. Dr. Peeples then opined that surgery was not necessary.

II. Adjudication

A. 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).

That the claimant's present condition has its origin in his 1992 injury is not in dispute. The respondents contend this fact relieves them of responsibility, but it is well settled that an employer takes the employee as he finds him. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Even if it is demonstrated that a preexisting 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 preexisting condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin,* 62 Ark. App. 120, 969 S.W.2d 667 (1998).

The claimant was asymptomatic for some seven years prior to his 2003 compensable injury. Though he complained of problems in 1996, those problems quickly resolved. Prior to his 2003 injury, he was not on medication, nor had he felt the need to see a doctor for his back since 1996. No spasms were observed during

the 1996 recurrence, but several medical providers noted the presence of muscle spasms after the 2003 incident. In short, this compensable injury is a classic example of a compensable aggravation of a pre-existing injury.

Three doctors have opined that additional treatment, including possible removal of the hardware, is necessary – Drs. Shahim, Rosenzweig, and Arthur. Dr. Ackerman did not make this recommendation expressly, but his opinion clearly corroborates that of these other three doctors. Only two doctors – Drs. Lal and Peeples – have recommended against additional treatment.

Dr. Peeples saw the claimant only once in what he described as an "independent medical evaluation." But Dr. Peoples' evaluation cannot fairly be described as "independent" in that Dr. Peeples and Dr. Lal are partners. Far more important, however, is the fact that in his report Dr. Peeples does not mention or discuss the October 8, 2004, lumbar steroid injection, the results of which convinced Drs. Ackerman and Rosenzweig of the need for hardware removal. Whether knowledge of this injection and its results would have changed Dr. Peeples' opinion is unknown.

In addition, Dr. Peeples was under the mistaken impression that Dr. Shahim had also provided a lumbar injection. Whether knowledge of this error would have changed Dr. Peeples' opinion is likewise unknown. Because of these errors and

omissions in Dr. Peeples' report, and because of his partnership with Dr. Lal, I assign little weight to the opinion of Dr. Peeples in this matter.

Psychologist Winston Wilson has diagnosed the claimant with conversion disorder. Even if Wilson's diagnosis of conversion disorder is correct, one can only guess whether this supposed conversion disorder is a factor in the claimant's need for treatment or not, particularly since Wilson apparently made no effort to review the claimant's medical condition and diagnoses. It is noteworthy that when the claimant underwent a functional capacity evaluation assigned by Dr. Lal, he was found to have given a consistent effort. It is likewise noteworthy that prior to Wilson's examination, Dr. Ackerman went out of his way to opine, "It is my medical opinion that [the claimant] is not fabricating his pain syndrome."

If the claimant truly has conversion disorder, it may mean that he has a tendency in the abstract to exaggerate his symptoms. But this does not necessarily mean he is exaggerating his symptoms in this specific case; the opinions given by his medical doctors strongly suggest he is not exaggerating. Illustrating this conflict is Wilson's warning that "compliance may be a significant issue in his case." In point of fact, there is no evidence whatsoever that the claimant has been non-compliant with the treatment recommendations of his physicians. For these reasons, I assign little weight to Wilson's opinion.

The claimant was asymptomatic for some seven years prior to his 2003 injury. Dr. Shahim first mentioned the possibility of hardware removal only three months after the compensable injury. Drs. Arthur and Rosenzweig have agreed that hardware removal may be necessary if additional pain management fails to alleviate the claimant's symptoms, and Dr. Ackerman has similarly opined that the hardware is the source of the claimant's symptoms. On balance, I find their opinion more convincing than that of Drs. Lal and Peeples, particularly given the errors and omissions in Dr. Peeples' report. Therefore, I find that the claimant has proven by a preponderance of the evidence that additional medical treatment, including pain management and hardware removal surgery, remains reasonably necessary in connection with his compensable injury.

Unpaid Medical Bills

The claimant contends he is entitled to payment of certain unpaid medical bills and mileage reimbursements. However, I am unable to locate any bills or mileage itemizations anywhere in the record, other than the claimant's testimony. Without specific bills to consider, and without specific dates for which mileage is sought, I am unable to make any factual determination as to whether the bills were incurred for treatment reasonably necessary in connection with the compensable injury. Therefore, I make no findings as to the issue of unpaid medical bills.

B. Temporary 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's physicians have regularly released him to light-duty work, but the claimant testified, and the medical records corroborate, that the respondent-employer has no light-duty work available. As discussed above, I find additional medical treatment to be reasonably necessary. Therefore, I find that the claimant has proven by a preponderance of the evidence that he has been within his healing period and totally incapacitated from earning wages from August 18, 2005, through a date yet to be determined. I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 18, 2005, through a date yet to be determined.

I note that the respondents initially controverted this claim in its entirety. At the hearing, the respondents acknowledged the compensability of the claimant's

injury and that the claimant was properly paid temporary disability benefits from March 8, 2004, through August 17, 2005. Though the respondents now acknowledge these benefits as compensable, they were originally controverted, and the claimant is therefore entitled to a controverted attorney's fees on all temporary total disability benefits, including those already paid.

C. Compensation Rate

Compensation is payable at a rate computed from the claimant's average weekly wage under the contract of hire in force at the time of the accident. Ark. Code Ann. § 11-9-518(a)(1). The Commission is empowered in exceptional circumstances to determine the average weekly wage by a method that is just and fair to the parties. Ark. Code Ann. § 11-9-518(c).

The claimant was paid compensation at the rate of $350 per week. It is plain that this rate was calculated from the claimant's alleged hourly rate – $13.11 – at 40 hours per week, without taking overtime into account. By statute overtime must be accounted for in calculating the claimant's average weekly wage. Ark. Code Ann. § 11-9-518(b).

The documentary evidence reflects the claimant's hourly wage as $13.11, but the claimant testified he had recently received a raise to $14.29 per hour. The

itemized wage records do not resolve this discrepancy, for when the bi-weekly wages are divided by the number of hours worked (including overtime at time-and-a-half), the resulting hourly rates are inconsistent with one another and with the two figures given above.

It ultimately does not matter how the claimant's average weekly wage is calculated from the wage records, since all of the different calculations show the claimant to be entitled to the maximum compensation rates when overtime is taken into account. Therefore, I find that the claimant has proven by a preponderance of the evidence that he earned wages sufficient to entitle him to the maximum compensation rates. The respondents are directed to rectify the underpayment of benefits from March 8, 2004, through August 17, 2005, including payment of a controverted attorney's fee on the unpaid amount.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment, including pain management and hardware removal surgery; that he is entitled to payment of temporary total disability benefits from August 18, 2005, through a date yet to be determined, at the maximum compensation rates; and that he is entitled to compensation for underpayment of

benefits from March 8, 2004, through August 17, 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, including the temporary disability benefits already paid and any underpayment thereof, pursuant to Ark. Code Ann. § 11-9-715.

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.

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HON. J. MARK WHITE
Administrative Law Judge