

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F300651**

**EDGAR J. JACKSON, EMPLOYEE**

**CLAIMANT**

**RICK TAYLOR INC., EMPLOYER**

**RESPONDENT**

**COMMERCE & INDUSTRY INSURANCE/  
AIG CLAIMS SERVICE, CARRIER/TPA**

**RESPONDENT**

**OPINION FILED AUGUST 9, 2006**

A hearing in this case was conducted on February 24, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Russellville, Pope County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Carol L. Worley, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

\_\_\_\_\_A prehearing telephone conference was held in this claim on January 24, 2006; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was entered into the record as Commission Exhibit #1.

The parties agreed to three stipulations. Two of these stipulations are listed in the Prehearing Order and were confirmed at the hearing; the parties agreed to the third stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on January 8, 2003 and at all other relevant times.

2. Claimant sustained compensable injuries to his head, neck, back, and knees on January 8, 2003.

3. Claimant's average weekly wage was \$611.47; his temporary total disability rate is \$408.00, and his permanent partial disability rate is \$306.00.

At the February 24, 2006 hearing, the parties discussed the issue set forth in the Prehearing Order. The parties agreed that the sole issue to be litigated and resolved is limited to the following:

1. Whether Claimant is entitled to additional medical benefits.

**MOTION FOR INTRODUCTION OF ADDITIONAL EVIDENCE**

Following the February 24, 2006 hearing, the Commission received the following items:

1. Claimant's Motion for Introduction of Additional Evidence, with four page completed Employment Security Division form attached, received April 13, 2006;
2. Claimant's Brief in Support of Motion for Introduction of Additional Evidence, received April 13, 2006; and
3. Respondents' Response to Motion for the Introduction of Additional Evidence, received April 25, 2006.

These items will be blue-backed and made a part of the record in this proceeding.

Claimant seeks to introduce a statement made by the Respondent employer to the Employment Security Division. This statement, dated April 4, 2006, responds to Claimant's request for unemployment insurance benefits and discusses the circumstances surrounding his lay off. This statement is attached to Claimant's Motion.

Claimant argues that the statement should be introduced into evidence. Claimant notes that the statement was prepared following the hearing on this matter and that it is relevant because "[t]his information lends credence to the fact that the claimant's problems

are continuing and, severe enough in the eyes of the employer as to warrant a lay off. This information bolsters the claimant's contention that on-going medical treatment for his back is reasonably necessary."

Respondents object to the introduction of the statement into the record. Respondents argue that the statement is not relevant to establishing a connection between Claimant's stipulated compensable back injury and his current need for medical treatment. Respondents also object because they would be denied their right to cross-examine the statement's author and Claimant concerning the statement and the circumstances surrounding Claimant's lay off.

Where new evidence is relevant, is not cumulative, would justify a different result, and the movant was diligent, the Commission's discretion to admit the new evidence should be exercised and the motion to present new evidence should be granted. Whirlpool Corp. v. Kaelin, 19 Ark. App. 331, 334, 720 S.W.2d 722, \_\_\_ (1986). However, while the Commission is not bound by technical rules of evidence, it must adhere to basic rules of fair play such as recognizing the right of cross-examination. See St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 542, 592 S.W.2d 447, \_\_\_ (1980). A party appearing before the Commission has the right to cross-examine a witness. See Davis v. Arkansas Best Freight Sys., 239 Ark. 632, 634-35, 393 S.W.2d 337, \_\_\_ (1965).

I find that Claimant's motion for the introduction of additional evidence should be, and hereby is, denied. Respondents assert their right "to cross examine Claimant and to elicit testimony and explanations from Rick and Shelli Taylor regarding the circumstances surrounding Claimant's layoff." Shelli Taylor signed the form to which the statement is attached. Since author of the statement is not available for cross-examination,

Respondents are denied their asserted right, so the statement will not be admitted into evidence. See Davis, 239 Ark. at 635-36, 393 S.W.2d at \_\_\_\_\_. However, Claimant will be permitted to proffer the statement; since it is attached to the motion which is made a part of the record above, the statement will be considered as proffered.

### **DISCUSSION**

\_\_\_\_\_At the time of the hearing, Claimant had been employed by the Respondent employer for approximately thirteen or fourteen years. His job duties included truck driving and heavy equipment operation. On January 8, 2003, Claimant was working to replace the roof on a “big metal shop” building. He fell through the roof and landed on a concrete floor twelve feet below. The parties stipulated that Claimant sustained compensable injuries to his head, neck, back, and knees on that date.

Claimant developed back pain after his compensable injury.

Q. Now, moving down here from your neck through you back, your low back area, have you had problems?

A. Yes.

Q. What sort of problems have you had?

A. Sometimes my left leg gets to where it just doesn't want to work. There is times that I have to lift it to put it on the clutch driving a truck, not always, but it gets to that point at times.

Q. Before this fall took place, Mr. Jackson, had you had those kind of problems in your lifetime?

A. Never. I have had small back problems, but nothing, you know, my legs and stuff had never bothered me like this.

Claimant confirmed that he experiences sharp pain in his low back, worse at some times than others. He described the pain: “[i]t'll tingle down my leg, and then sometimes it just --

I don't know what it does, but you can push down a little, but you can't lift it all." He denied having these problems before, but then seemed to qualify that denial when asked about prior chiropractic treatment.

When it got so bad, I went -- I had had it before in the past, and I had it once when the nerves got to where my leg wouldn't work at all. And he laid me on there, and he just -- they've never done me like this, but he just twisted my hips sideways, and it did help.

Claimant returned to work two or three months after his fall. He did not modify his job duties other than avoiding "getting under the truck and stuff"; he testified that he only took one day off due to his condition. Claimant sometimes lifts fifty pounds, sometimes uses a shovel, and continues to drive trucks and operate heavy equipment. He denied hurting his lower back while cutting trees at his home; he did not recall an incident in May of 2005 when he stepped out of his pickup truck and hurt his back.

For the first few months after his injury, Claimant's medical records do not contain any complaints of back pain. Likewise, there are no studies of Claimant's lumbar spine immediately following his injury. On May 19, 2003, Dr. Andrew Monfee recorded a complaint of "numbness in his right leg" that Claimant said "started following the accident." On July 30, 2003, Dr. Monfee recorded a complaint of "low back pain."

Dr. Bruce Safman examined Claimant on September 16, 2003. Claimant reported that "[h]e had a cervical injury, lumbar injury and injury to his knees" and that he continued to experience lower lumbar pain, among other symptoms. Following the examination, Dr. Safman's impression included lumbar strain; he ordered an MRI of Claimant's lumbar spine. Claimant again complained of lumbar discomfort when he presented to Dr. Safman on September 30, 2003.

Claimant underwent an MRI of his lumbar spine on October 2, 2003. His study produced the following impression: "Left sided disc protrusion at L5-S1 and small annular tear, left paramedian disc protrusion L1-2. Mild diffuse bulge of the L3-4 disc."

Claimant presented to Dr. Safman at least four more times. On October 21, 2003, Dr. Safman recorded that "[t]here is no lower lumbar tenderness." Claimant reported lumbar discomfort when he works in a flexed position when he presented to Dr. Safman on November 11, 2003; however, the doctor recorded an absence of lower lumbar discomfort upon palpation. Lower lumbar tenderness is reported on December 9, 2003 and December 23, 2003.

On June 21, 2004, Claimant presented to Dr. Monfee, reporting "back pain from injury Jan 03." However, in notes dated July 2, 2004 and July 24, 2004, Dr. Monfee does not indicate a complaint of back pain.

On July 29, 2004, Claimant presented to Dr. Reginald Rutherford. The doctor recorded Claimant's history of a fall on January 8, 2003, and that "[s]ince that time he has noted headache, neck pain, low back pain and bilateral knee pain." Dr. Rutherford's notes of August 13, 2004; September 10, 2004; and September 24, 2004 do not mention back pain. However, his note of December 17, 2004 records the following: "[Claimant] does report increasing low back pain as of late. This is beginning to interfere with work. He requires a current MRI study of the lumbar spine." However, as Dr. Rutherford notes in his April 14, 2005 report, Claimant's MRI was not approved. In that same note, Dr. Rutherford records the following:

Mr. Jackson reports increasing back pain and now weakness of his left leg. On examination he does have mild diffuse weakness of the left leg. Reflexes are preserved. When last seen in December, MRI study of the lumbar spine

was requested to further investigate complaint of back pain. This has been an ongoing complaint from when Mr. Jackson was first seen as is documented in his consult from July 29, 2004.

Page B1 in Claimant's Exhibit #1 is a chiropractor's note dated May 2, 2005. The note recorded Claimant's complaint of pain in his "low back down left leg." The note gives this history: "Stepped out of pickup, pain hit - nearly fell."

Dr. Sunder Krishnan examined Claimant on August 22, 2005. In a "History Survey" completed by Claimant on that date, he reports back pain "since 1-8-03." The doctor recorded Claimant's description of his fall and that "[s]ince that time he has been having quite a bit of neck pain ... as well as some low back pain extending into his right lower extremity intermittently." Upon examining Claimant and his available studies, Dr. Krishnan assessed "[l]umbar disk bulging" and ordered an MRI of Claimant's lumbar spine.

Claimant underwent an MRI of his lumbar spine on August 22, 2005. This study produced the following impression:

1. Multi-level degenerative changes of the lumbar spine with mild to moderate neural foraminal narrowing from L2-3 through L5-S1, along with mild central canal stenosis at L4-5 and L5-S1.
2. Left paracentral protrusion at L5-S1 abuts the left S1 nerve root.

Dr. Krishnan reviewed this study with Claimant on August 29, 2005. Claimant informed the doctor that he was feeling better now that he was seeing a chiropractor, causing the doctor to decline "to offer him injections in the lumbar spine if he is getting better."

Claimant presented to Dr. Reza Shahim on November 14, 2005. Among other complaints, Claimant mentioned lower back pain, intermittent right leg pain, and intermittent right leg numbness. The note records that Claimant's past medical history includes back pain. Dr. Shahim interpreted Claimant's lumbar spine MRI as depicting

“canal stenosis at L5-S1 due to central disc herniation which causes lateral recess stenosis.” He believed Claimant was symptomatic from lumbar stenosis and recommended lumbar epidural steroid injections from Dr. Krishnan. If Claimant failed those treatments, Dr. Shahim believed he could undergo a lumbar decompression at L5-S1 for treatment of this lateral recess stenosis.

On cross-examination, Claimant indirectly addressed why the medical records were initially silent concerning his back problem.

Q. Now, it looks like just specifically for your back, you didn't really receive any medical treatment from roughly December of 2003 to the summer of 2005; is that about right? Just for your back?

A. I don't know what they've done every time. Sometimes they didn't treat it, but I was telling them, trying to get them to.

Claimant testified to hurting his back as a teenager, receiving chiropractic treatment for his back prior to his injury, and wearing a back brace as a preventative measure prior to the injury, but he insisted, “as far as my lower back and my legs and stuff, they've never bothered me like this before.”

Trevor Lee Taylor testified for Respondents. He works with Claimant, and was working with him in January of 2003. He confirmed that, prior to January 2003, Claimant would complain of lower back problems. While Claimant did not modify his job duties after his injury, Taylor recalled that Claimant did sometimes appear to have trouble doing his job because of a low back problem. He also recalled Claimant hurting his back while off work.

Q. And do you have any knowledge of him hurting himself outside the work-force since I guess he returned to work in April of 2003?

A. Yes, ma'am.

Q. Okay. Tell the Judge about that.

A. It wasn't really major. I mean he hurt his back a little bit.

Q. Doing what?

A. I believe he was cutting trees.

Q. About when was that?

A. I guess sometime in the last year.

Q. And how did you find out about it?

A. He told me he done it.

On cross-examination, Taylor agreed that Claimant is an honest and straightforward individual. He also distinguished Claimant's complaints before and after his injury.

Q. Did you ever know him in the past to have problems with his legs?

A. You mean before the accident?

Q. Uh-huh.

A. Not really. I mean he did, but nothing major.

Q. Did he ever tell you his legs gave way, and sometimes he couldn't stand or that sort of thing?

A. We're talking before?

Q. Uh-huh.

A. No.

Q. Has he since that time?

A. Yes.

An employer shall 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). Reasonably necessary medical services "may include that

necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee need not establish that the compensable injury is the major cause for the need for medical treatment; rather, it is sufficient if the compensable injury is a factor in the resulting need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Ballance v. K.C. Contracting, Full Workers’ Compensation Commission Opinion filed August 30, 2004 (F204392).

The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, 90 Ark. App. 248, \_\_\_ S.W.3d \_\_\_ (2005). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant sustained his burden of proving his entitlement to additional medical treatment in connection with his compensable back injury. The discussion at the end of the hearing makes it clear that the parties are not arguing whether additional treatment is reasonably necessary; rather, the question is whether the need for additional medical treatment is connected with Claimant’s compensable injury. Nonetheless, I find that additional treatment for Claimant’s back is reasonably necessary, to the extent that it can reduce or alleviate his symptoms, maintain his level of healing, or prevent further

deterioration of the damage to his low back. Dr. Shahim's November 14, 2005 recommendations support this finding.

Further, I find that there is a causal connection between Claimant's stipulated compensable back injury and his need for treatment in the lumbar spine. Under the standard articulated in Williams v. L & W Janitorial, Inc., Claimant's compensable back injury is at least a factor in his resulting need for medical treatment. Claimant testified that his back problems were more severe after his compensable injury than they ever were before. Likewise, Taylor testified that Claimant did not complain of severe leg problems prior to his compensable injury, but he did afterwards. This testimony is corroborated by Claimant's medical records, wherein he consistently refers to his compensable back injury as the cause for his current need for lumbar spine treatment.

Respondents argue that Claimant's current need for medical treatment is not related to his original compensable injury. The record does reflect that Claimant sought treatment for his back prior to his injury; the medical records do not record any complaints of back pain for several months after the injury; and, Claimant may have hurt his back to some degree cutting wood and stepping out of his truck after the injury. Nonetheless, Claimant insisted that his condition was more severe after his compensable injury than before. Taylor's testimony corroborates this, and there is nothing in the medical records to the contrary. Certainly, Claimant's need for treatment is not inconsistent with a twelve-foot fall onto a concrete floor.

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

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on January 8, 2003 and at

all other relevant times.

3. Claimant sustained compensable injuries to his head, neck, back, and knees on January 8, 2003.

4. Claimant's average weekly wage was \$611.47; his temporary total disability rate is \$408.00, and his permanent partial disability rate is \$306.00.

5. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to additional medical benefits. Claimant's testimony and medical records such as Dr. Shahim's November 14, 2005 recommendations establish that additional treatment for Claimant's back is reasonably necessary to reduce or alleviate his symptoms, maintain his level of healing, and prevent further deterioration. Further, Claimant's testimony, as corroborated by Taylor and the medical records, all establish that Claimant's compensable back injury is at least a factor in his resulting need for medical treatment. Regardless of any previous or subsequent back injuries, Claimant's condition was more severe after his compensable injury than it was before.

**AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III  
Administrative Law Judge

DFA/ml