

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404346

HARL LEDFORD	CLAIMANT
SUPERIOR INDUSTRIES	RESPONDENT
CROCKETT ADJUSTMENT INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 3, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 1, 2006, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 9, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. The prior opinion is res judicata and the law of this case.

3. The respondents have paid TTD to the claimant from April 14, 2004, through May 13, 2004.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional medical treatment provided by Dr. Cyril Raben.

2. The claimant's entitlement to reimbursement for the unpaid medical treatment provided by Dr. Berger.

3. Penalties, interest and possible contempt.

4. The claimant's entitlement to TTD from March 28, 2005, through April 11, 2005.

5. Attorney's fees.

In regard to the foregoing issues the claimant contends that the Commission has determined a compensable injury to his lumbar spine; however, the respondents will not authorize Dr. Raben to provide follow up treatment regarding the claimant's back. The claimant contends that he is entitled to temporary total disability benefits per the administrative law judge's order, as affirmed by the Full Commission, for the period of April 15, 2004, through May 13, 2004, regarding his back. Further, the claimant contends that he is entitled to temporary total disability benefits, as reflected in the medical records, for the period on or about March 14, 2005, until on or about November 11, 2005. Further, the claimant contends that he is entitled to permanent partial disability benefits based upon permanent impairment as a result of his herniated disc and that permanent impairment should be assessed utilizing the A.M.A. Guides to the Evaluation of Permanent Impairment, Forth Edition. The claimant contends that he is entitled to an attorney's fee on all disability benefits.

In regard to the foregoing issues the respondents contend that they have not denied any additional treatment to Dr. Raben and recognize Dr. Raben as the treating physician. The respondents

contend that the previous TTD award of the Administrative Law Judge from January 17, 2004, to March 9, 2004, relates to the hip injury which was determined by the Full Commission to be non-compensable and, therefore, the respondents are not liable for those benefits. The respondents admit they are liable for TTD from April 15, 2004, to May 13, 2004, less a credit for any short-term disability paid. The respondents contend the treatment of Dr. Clay Berger is unreasonable and unnecessary and the respondents controvert the bills of Dr. Berger. At no time were any previous medical reports or bills of Dr. Berger introduced into evidence at the hearing conducted on October 5, 2004. The respondents are not aware of any permanent disability impairment rating at the present time and, therefore, contend, based on the present medical evidence, at this point in time, the claimant is not entitled to any permanent impairment.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and additional documentary evidence marked Claimant's Exhibit No. 2. The respondents submitted the pay sheet from Crockett Adjustment marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified and agreed that as a result of a prior opinion the respondent was not responsible for his hip problems but was responsible for his back problems. The claimant agreed that he

underwent surgery on his back on March 28, 2005, performed by Dr. Tony Raben. The claimant testified that his need for back surgery arose during the period of time that his case was in the litigation process but that he elected to go forward with the surgery because he was in such intense pain. The claimant testified that he did not work from the date of his surgery until April 11, 2005, when he returned to see Dr. Raben but that he did return to work after April 11, 2005, because he needed to support his family. The claimant agreed that the recommendations of Dr. Raben that he undergo physical therapy and additional treatment were not done because he had to return to work. The claimant testified that when he tried to return to see Dr. Raben the respondents refused to authorize the visit. The claimant testified that he attempted more than once to be seen by Dr. Raben because he felt like he was in need of additional treatment but the visits were not authorized. The claimant testified that he still has low back pain which is in the same area he had pain before he had his surgery. The claimant testified that he has had no new injuries since his March 28, 2005, surgery but does feel that Dr. Raben's surgery helped his condition a little.

The claimant testified that he has continued to work since April 2005. The claimant testified that he is not working for the respondent because the work required constant lifting which he could not do. The claimant agreed that during the period of time his case was under consideration by the Full Commission, he received treatment from Dr. Clay Berger. The claimant testified

that the treatment by Dr. Berger addressed pain relief and helped him temporarily. The claimant testified that he has not received any treatment from Dr. Berger since his back surgery in March 2005. The claimant testified that the treatment he received from Dr. Berger was for his back and not treatment for his hip. The claimant agreed that the treatment provided by Dr. Berger included physical manipulations, electrical stimulation, heat and physical therapy. The claimant further agreed that Dr. Berger's treatment was for his back problem but did provide him some relief for other parts of his body. The claimant testified that he is seeking reimbursement for his out of pocket expenses in regard to the treatment provided by Dr. Berger as well as mileage expense for these treatments.

On cross examination, the claimant agreed that he was seeing Dr. Berger prior to his accident on December 12, 2003. The claimant testified that he saw Dr. Berger for a back strain which he had and that the doctor gave him electrical stimulation and heat treatments. The claimant testified that when he saw Dr. Berger he would report to him all of his various symptoms but he was specifically there for his lower back problems. The claimant testified that he is currently employed with Henderson Specialties. The claimant explained that this company does mill and dye work. The claimant testified that he is a supervisor and that his crew does welding fabrication. The claimant testified that his crews go to the job and that the jobs do require lifting in excess of fifty pounds as well as welding which he does sometimes. The claimant

testified that he does not stoop over or work in odd positions when welding because he just cannot. The claimant testified that he began working for Henderson in July 2005 and had not worked anywhere else since working for the respondent. The claimant agreed that initially the respondents sent him to Dr. Moffitt who referred him to Dr. Cooper. The claimant testified that on one occasion his pain was so severe he went to the emergency room where he was seen by Dr. Raben. The claimant testified that Dr. Berger has discussed with him his bill and he believes that he told Dr. Berger to talk with his attorney. The claimant testified that he does not know how Dr. Berger got information to send his bills to Judy Bourne because he does not know Ms. Bourne.

On redirect examination, the claimant agreed that by the time he saw Dr. Berger in September 2003 he had recovered from his previous back strain. The claimant agreed that the bills which were submitted to the respondents for treatment provided by Dr. Berger started on April 4, 2004, which was after his December 2, 2003, accident. The claimant agreed that the work he does for Henderson is much lighter work than that which he did for the respondent. The claimant testified that with the respondent he worked with weights in excess of one hundred pounds and the work was much more physically demanding than his current employment. The claimant testified that two weeks after his surgery he returned to work for the respondent and continued to work for them until he began work for Henderson. The claimant testified that he is making less money working for Henderson. The claimant stated that he

could not do the work required of him for the respondent because of his back. The claimant agreed that his back surgery was on March 28, 2005, and that the respondents did not pay the bill for his surgery until December 2005. The claimant also agreed that he was not allowed to return to see Dr. Raben.

On recross examination, the claimant testified that when he returned to work for the respondent two weeks after his back surgery in March 2005 he had a restriction of not to lift anything and was in a back brace.

The medical records set forth that the claimant was seen by Dr. Cyril Raben on July 6, 2004, for follow up of his L5 S1 back problems. Dr. Raben notes that the claimant has undergone disc space injections at this level and received some relief. The doctor notes that the claimant is working full time and can sit, stand or walk anywhere from thirty minutes to two hours. Dr. Raben notes that Dr. VanOre is monitoring the claimant's medications and further notes that the claimant is seeing Dr. Berger three times a week for chiropractic treatment. Dr. Raben discussed an arthroscopic diskectomy at the L5/S1 level on the left with the claimant, noting that the claimant is currently fighting a workers' compensation claim and wants to wait on the surgery at this point. On March 1, 2005, Dr. Raben writes that the claimant is seen and reports that his pain is at least 50 percent worse. Dr. Raben writes that he is going to repeat some test as well as make sure that the claimant has proper medications for his pain, spasm and inflammation. Dr. Raben also recommended that the claimant be

fitted for a brace especially if they go ahead with surgery. On March 14, 2005, Dr. Raben writes that he has reviewed the claimant's MRI which shows an area of hypo intensity in the lumbar spine at L5/S1 with a central herniation. Dr. Raben recommended decompression at the L5/S1 level with arthroscopic discectomy and annuloplasty. Dr. Raben notes that the claimant is in agreement to go forward with surgery. The claimant underwent surgery on March 28, 2005, performed by Dr. Raben. On April 11, 2005, Dr. Raben writes that the claimant's wounds are healing nicely although he is having problems with his medications as well as side effects including constipation and some chills. Dr. Raben writes that the claimant will be completely and totally disabled from his occupation and will require job restructuring, reeducation and retraining. Dr. Raben notes that the claimant will never be released to heavy work of a welder again.

The medical records also set forth that the claimant was seen by Dr. Clay Berger as of May 4, 2004, for treatment of his low back and left hip and leg problems. The chiropractor's records set out that the claimant was seen from three to nine times a month for adjustments and electrical stimulation. This treatment continued through March 3, 2005.

After a complete review of this case, I find that the claimant has proven and the respondents have accepted that he is entitled to additional medical treatment provided by Dr. Raben to include his surgery on March 28, 2005, and follow up subsequent to that surgery. The respondents have also admitted that Dr. Raben is the

claimant's authorized treating physician and is entitled to return to him for treatment of his compensable low back injury. I further find that the treatments provided by Dr. Clay Berger for this claimant's low back are both reasonable and necessary. From the claimant's testimony, he was working full time and trying to avoid surgical intervention for the pain and discomfort he was experiencing as a result of his compensable injury. It is noted that the respondents controverted this claim on May 24, 2004, which is very close in time to when the claimant began being treated by Dr. Berger for his low back problems. From reviewing the previous opinions, the respondents had initially accepted and paid some medical treatment for this claimant following his compensable injury on December 3, 2003, but subsequently controverted the claim. The respondents, therefore, should pay Dr. Berger's charges for his chiropractic treatment of this claimant's low back compensable injury. It is further found that the respondents should pay a penalty of 36 percent on the temporary total disability which they were ordered to pay and have subsequently agreed that they were to pay for a period from April 15, 2004, to May 13, 2004. The Commission's opinion was handed down on October 10, 2005, finding that the claimant had sustained a compensable low back injury and was entitled to benefits for that injury. The claimant's attorney began contacting the respondents about benefits for the claimant's compensable low back injury by letter dated December 12, 2005. In a letter dated May 5, 2006, from the claimant's attorney to the respondents, the non payment of the

above mentioned temporary total disability was set forth. The requested temporary total disability was not paid by June 9, 2006, noting that past due temporary total disability was to one of the issues to be tried at this second hearing. The respondents did pay temporary total disability to this claimant for a period from April 14, 2004, through May 13, 2004, on July 26, 2006. Due to the length of time from the date of the Commission's opinion awarding benefits to this claimant to include the temporary total disability mentioned above, correspondence from the claimant's attorney to the respondents concerning unpaid benefits which had been awarded to the claimant by the Full Commission's opinion and the necessitating of the filing of a pre-hearing questionnaire by the claimant's attorney on May 8, 2006, setting forth that the temporary total disability ordered by the Full Commission was still unpaid, in my opinion, is willful and intentional and, therefore, a 36 percent penalty plus interest should be assessed on the award of temporary total disability from April 15, 2004, to May 13, 2004.

Based also on a review of the record, I find that the claimant is entitled to temporary total disability from March 28, 2005, through April 11, 2005. The claimant underwent back surgery performed by Dr. Cyril Raben on March 28, 2005, and by the doctor's report dated April 11, 2005, he clearly sets forth that the claimant is disabled and unable to return to his former employment. The claimant has testified that due to his financial situation, he did get a release from his doctor so he could return to work and did in fact return to work for the respondent for a period of time

until he was able to secure a lighter less strenuous type job. The respondents, therefore, shall pay temporary total disability to this claimant from the date of his surgery on March 28, 2005, through April 11, 2005. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein to include a fee on penalty and interest awarded in this matter.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. The prior opinion is res judicata and the law of this case.

3. The respondents have paid TTD to the claimant from April 14, 2004, through May 13, 2004.

4. The claimant has proven by a preponderance of the evidence that additional medical treatment provided by Dr. Raben is both reasonable and necessary and that Dr. Raben by agreement of the parties is to be considered his authorized treating physician. See discussion above.

5. The medical treatment provided by Dr. Clay Berger is both reasonable and necessary for this claimant's low back compensable injury and these treatments should be paid for by the respondents. See discussion above.

6. The respondents should pay 36 percent penalty on the TTD from April 14, 2004, to May 13, 2004, plus interest. See discussion above.

7. The respondents should pay temporary total disability from March 28, 2005, through April 11, 2005. See discussion above.

8. The respondents have controverted this claimant's entitlement to additional benefits in their entirety as well as their obligation for penalties and interest.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee on the benefits awarded herein as well as a fee on the penalties and interest.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment provided by Dr. Cyril Raben for his compensable injury.

The claimant has proven by a preponderance of the evidence that the treatment provided to him by Dr. Clay Berger is both reasonable and necessary and should be paid for by the respondents.

The respondents should be assessed a 36 percent penalty against TTD from April 14, 2004, to May 13, 2004, plus interest.

The respondents should pay temporary total disability to this claimant from March 28, 2005, through April 11, 2005.

The claimant's attorney shall be entitled to attorney's fees on the penalties and interest assessed herein.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE