

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505209

JAMES LOAR, EMPLOYEE

CLAIMANT

**COOPER TIRE & RUBBER CO.,
SELF-INSURED EMPLOYER**

RESPONDENT

CROCKETT ADJUSTMENT, TPA

RESPONDENT

OPINION FILED JULY 17, 2006

Hearing before Administrative Law Judge J. Mark White on June 15, 2006, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Nelson Shaw, Attorney at Law, Texarkana, Texas.

Respondents represented by Mr. William Bullock, Attorney at Law, Texarkana, Texas.

STATEMENT OF THE CASE

On June 15, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on May 1, 2006, and a Prehearing Order was entered that same day. A copy of the May 1, 2006, 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/self-insured employer

relationship existed at all relevant times, including April 23, 2005; that on April 23, 2005, the claimant sustained a compensable injury to his back; that respondents accepted the April 23, 2005, back injury as compensable and paid some benefits; and that the claimant earned wages sufficient to entitle him to the maximum compensation rates.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits and medical benefits; whether the respondents are entitled to offsets; and controversion and attorney's fees.

The claimant contends that he suffered a compensable injury to his back and legs on April 23, 2005; and that he is entitled to temporary total disability benefits, medical expenses, and attorney's fees.

The respondents contend that there is a legally insufficient causal relationship between claimant's need for further medical treatment and any lost time at work, if any; that the medical bills and treatments which claimant seeks subsequent to his return to full duty were not incurred as the result of and were not reasonable and necessary treatment for a compensable injury, and that the disability periods claimant has sustained, if any beyond the periods of TTD paid by respondent, were not incurred as the result of a compensable injury; that the medical treatments

provided to or sought by claimant since his return to full duty are not reasonable or necessary in accordance with Rule 30 of the Rules of the Commission; and that in the event an award is rendered in favor of claimant, respondent is entitled to offset against any disability benefits found to be owed and the amount of money paid to claimant by respondent pursuant to its group health plan, its accident and sickness benefit plan, and any other employee benefit plan meeting the definitions set forth in Ark. Code Ann. § 11-9-411.

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 all

additional medical treatment received after January 6, 2006, including the February 2006 surgery by Dr. Shahim, was reasonably necessary in connection with his compensable injury, and that additional treatment remains reasonably necessary.

4. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from February 2, 2006, 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 February 2, 2006, through a date yet to be determined.
6. The claimant has proven by a preponderance of the evidence that his average weekly wage temporarily decreased as a result of his compensable injury.
7. The respondents are entitled to an offset for benefits paid by group health or disability insurance per Ark. Code Ann. § 11-9-411.
8. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant has worked for the respondent-employer for several years as a tire layer, lifting and handling more than one thousand tires in each twelve-hour shift. On April 23, 2005, he sustained a compensable injury to his back when he slipped on some grease while climbing down from a tire press. The claimant testified that when he fell, he was unable to lift himself back up or stand, and an ambulance was summoned to take him to the hospital. He was treated and released, and two days later he saw Dr. Craig Ditsch, who diagnosed "fall with contusion to the back." Dr. Ditsch ordered a lumbar MRI, which revealed mild to moderate spinal stenosis from L2 through L5. Dr. Ditsch referred him to a neurosurgeon, Dr. Reza Shahim. Dr. Shahim recommended a thoracic MRI, as well as epidural steroid injections. Dr. Shahim noted:

Based on his history, his lower thoracic pain is due to the recent fall, and although the stenosis is a longstanding disease, he has certainly aggravated this condition from the trauma.

Two epidural steroid injections were provided to the claimant with no benefit, according to Dr. Shahim's notes. Continued conservative treatment failed to alleviate the claimant's symptoms, and on August 23 Dr. Shahim recommended surgery, a lumbar laminectomy at L2-3.

The respondents sent the claimant to Dr. Edward Saer for a second opinion. Dr. Saer opined that a laminectomy would not help the claimant's symptoms, and the respondents apparently denied the surgery. Dr. Shahim then continued conservative treatment, including facet joint blocks and a rhizotomy at L2-3 and L1-2. These treatments brought considerable relief, and Dr. Shahim's partner, Dr. Amir Qureshi, returned the claimant to light duty. As of November 22 the claimant's condition had worsened, but by January 5, 2006, his condition had improved again and Dr. Shahim released him to full-duty work, at the claimant's own request. The respondents controverted all further treatment after January 6.

The claimant returned to work for a few weeks, but on January 27 he went to the emergency room for renewed low back pain. The claimant returned to Dr. Shahim on February 2, and Dr. Shahim again recommended surgery. Dr. Shahim performed the surgery, a laminectomy at L2-3 and L3-4, on February 24. The claimant reported significant improvement in his pain after the surgery, and as of the hearing he was working his regular job on a part-time basis.

The claimant does have a long-standing history of back pain prior to the compensable injury herein. He saw a number of specialists in the preceding years, including Dr. Stuart Small of the Texas Back Institute. On August 3, 2004, eight months prior to the compensable injury, Dr. Small wrote in his treatment notes:

He is not doing well at all. He has got significant right lumbar radicular pain in addition to his continuing dysesthesia in both feet. His back pain is still present. James does not believe there has been any change in his status since we saw him last.

Consequently, there is nothing else to do but attempt epidural steroid injections. I will do a transforaminal injection at the right L3 and also the right L4 spinal nerves. In addition, I am going to start him on Keppra. I have indicated to James if neither of these treatment modalities give him relief, he is going to need to go on and have a CT-myelogram with the intent of finally doing surgery.

Though the claimant testified that he received considerable relief from the injections provided on Dr. Small's orders, the medical records reflect he was still complaining of back pain up through April 5, 2005, only a few weeks before the compensable injury herein. The claimant testified that he was pain free immediately prior to the accident, but he acknowledged that as of the accident, he had been taking narcotic pain medication for his back for some time.

II. Adjudication

A. Additional 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). A temporary aggravation of a preexisting condition is a compensable injury; when an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999). Thus, even if it is demonstrated that a pre-existing condition is a causal factor, the claimant has met his burden of proof for additional medical treatment so long as he proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Electric Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

There is no question that the claimant's present back problems, together with his need for surgery, are due at least in part to his pre-existing conditions. Nonetheless, Dr. Shahim has explicitly opined on multiple occasions that the compensable injury aggravated the claimant's pre-existing condition. Dr. Ditsch suggested otherwise, but Dr. Ditsch is not a neurological specialist, and I therefore assign greater weight to the opinion of Dr. Shahim.

I recognize that the MRI findings before and after the compensable injury were essentially the same. I further recognize that the claimant's symptoms were the

same in nature and location before and after the compensable injury. But, the claimant testified that the severity of his symptoms was much worse after his compensable injury than before. The fact that he was able to work prior to the compensable injury, and unable to work afterwards, corroborates his testimony. Dr. Small had indeed mentioned surgery prior to the compensable injury, but only in the event epidural steroid injections failed to alleviate the claimant's pain, and the claimant testified they did in fact alleviate his pain. It was not until after the compensable injury that surgery was definitively recommended. On balance, I am persuaded that the compensable injury aggravated the claimant's pre-existing condition, that he did not return to his status quo condition prior to his surgery, and that his compensable injury combined with his pre-existing condition to bring about the need for treatment and surgery.

Dr. Saer did recommend against surgery, but by all accounts the claimant's surgery was successful at alleviating his pain. It is well established that success of a treatment is a relevant factor to be considered in determining whether a treatment was reasonably necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Therefore, I do not give Dr. Saer's opinion great weight.

Given the above, I find that the claimant has proven by a preponderance of the evidence that all additional medical treatment received after January 6, 2006,

including the February 2006 surgery by Dr. Shahim, was reasonably necessary in connection with his compensable injury, and that additional treatment remains reasonably necessary.

B. Additional 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 respondents paid benefits to the claimant through January 2006. When the claimant's back pain recurred later that month, Dr. Shahim initially placed him on light duty. On February 2, however, Dr. Shahim took the claimant off of work entirely, and the claimant underwent surgery on February 24. The record does not identify the date the claimant was released to return to work after his surgery, nor does the record identify when (or if) the claimant reached the end of his healing period. I find that the claimant has proven by a preponderance of the evidence that

he was within his healing period and totally incapacitated from earning wages from February 2, 2006, through a date yet to be determined. I therefore conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 2, 2006, through a date yet to be determined.

An employee is entitled to temporary partial disability benefits when the employee's average weekly wage has temporarily decreased as a result of his compensable injury. Ark. Code Ann. § 11-9-520. The claimant testified that when he returned to work he did not immediately resume his regular full-time job. He testified that while on light-duty work he earned a lower hourly rate of pay, and he testified that as of the hearing he was only working half of his normal shift. I find that the claimant has proven by a preponderance of the evidence that his average weekly wage temporarily decreased as a result of his compensable injury. As the record does not identify the end of the claimant's healing period, nor his exact wages, I am unable to calculate his exact entitlement to temporary partial disability benefits. The parties agreed at the hearing to make the necessary calculations, therefore no specific award will be made herein.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment, and that he is entitled to temporary total disability benefits from February 2, 2006, through a date yet to be determined. 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. Nelson Shaw, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, 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.

HON. J. MARK WHITE
Administrative Law Judge