

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F410396

**MICHAEL DAVID LUTEN,
EMPLOYEE**

CLAIMANT

**XPRESS BOATS &
BACKTRACK TRAILERS,
EMPLOYER**

RESPONDENT

**WAUSAU UNDERWRITERS,
INSURANCE CARRIER**

RESPONDENT

**HOT SPRING COUNTY OFFICE
OF CHILD SUPPORT ENFORCEMENT**

INTERVENOR

OPINION FILED MAY 16, 2006.

Pursuant to a hearing conducted February 16, 2006, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Ms. Shannon Muse Carroll, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant, and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the claimant's request for additional benefits for temporary total disability for admittedly compensable injuries suffered by the claimant August 16, 2004.

The claimant injured his low back on August 16, 2004, during his employment as a truck driver for Xpress Boats. He reported the problem and was afforded medical care, eventually undergoing an MRI scan of his lumbar spine on September 20, 2004, which revealed a herniated disc at L5-S1. Additional MRI scans were performed on the lumbar spine December 14, 2004, and on April 6, 2005, when the claimant's left hip was also scanned.

The claimant's early medical care included the attention of the company physician, Dr. Michael Atta and the claimant's family physician, Dr. Robert J. Daniels, Jr., as well as his

assistant, Mr. James Huffman. He was also seen by Hot Springs neurosurgeon Dr. James M. Arthur, Hot Springs orthopedic surgeon Dr. Bruce L. Smith, Jr., Little Rock neurosurgeon Dr. Ronald N. Williams, and Little Rock orthopedic surgeon Dr. William F. Hefley, Jr. The claimant was also examined by Dr. Barry D. Baskin, at the direction of the respondents, for a second opinion.

At this time, the claimant has requested additional benefits for temporary total disability from November 4, 2004, until a date to be determined. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant is not entitled to temporary total disability benefits because, consistent with the opinion of Dr. Bruce Smith, he reached the end of his healing period November 4, 2004, and he was no longer totally incapacitated to earn wages. They also noted that on August 22, 2005, Dr. Williams rated the claimant's impairment and released him from care.

The record, which included documentary evidence and the testimony of the claimant, his wife, and Teresa Goolsby, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-705(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered compensable injuries August 16, 2004; his weekly benefit rate is \$279.00; Dr. Ronald N. Williams was among the claimant's authorized

treating physicians; Dr. Robert Kleinhenz is an authorized treating physician, pursuant to a referral by Dr. Williams; and the Hot Spring County Office of Child Support Enforcement has filed a Notice of Workers' Compensation Withholding for child support related to the case of Linda J. Luten v. Michael D. Luten (E-97-367) (ID 627711917) showing a past due amount of \$4,200.00 and the total amount to be withheld of \$154.00 as of August 1, 2005.

3. The preponderance of the evidence shows that the claimant has remained in a healing period and has been totally incapacitated to earn wages as the result of his compensable injury from the date benefits were terminated November 4, 2004, until a date to be determined, so that he is entitled to additional benefits for temporary total disability.

4. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

On August 16, 2004, the claimant, a long haul truck driver who was transporting boats for the respondent employer, suffered compensable injuries during a stop in El Dorado to adjust his load. The injury occurred when he used a 2 x 4 to attempt to move an aluminum bass boat and the 2 x 4 unexpectedly snapped, causing him to stumble.

The claimant's symptoms included pain in his back and left hip and leg, which did not correlate well with the MRI findings of degenerative changes in his low back and a right-sided herniated disc at L5-S1. By October 1, 2004, the company physician recommended a neurosurgical consultation which resulted in the claimant being seen by Dr. James M. Arthur. Dr. Arthur recommended steroid injection therapy and physical therapy three times a week for three weeks. He

also referred the claimant to Dr. Smith on October 13, 2004, in part because of an unsatisfactory doctor-patient relationship.

The medical record shows that Dr. Smith saw the claimant October 25, 2004, noted his complaints of pain in the low back with radiation into the left hip and leg and recommended a lumbar steroid injection and physical therapy. On November 3, 2004, Dr. Smith wrote to the insurance adjuster that the claimant had had the lumbar steroid injection and was basically unchanged, complaining of pain in the left paralumbar area. Dr. Smith indicated that he saw nothing surgical and thought that the claimant sustained a lumbar sprain which was resolving. He prescribed Soma for muscle spasm. His note dated November 12, 2004, indicated that the claimant was released to full duty and released from care as of November 3, 2004.

The claimant began to see Dr. Williams in December, 2004, and underwent the second MRI scan of his lumbar spine. His letter of December 7, 2004, did not address the claimant's ability to work. However, in his next letter, dated December 14, 2004, Dr. Williams indicated that he wished to get a work evaluation to see if it was safe for the claimant to return to work. A functional capacity evaluation dated January 18, 2005, indicated that the claimant was capable of light work at that time. On February 1, 2005, Dr. Williams noted that in spite of two epidural steroid injections the claimant was still having difficulty in his left hip and he recommended a repeat MRI of the back and an MRI of the left hip. On April 6, 2005, he noted that the MRI of the hip showed a paralabral cyst which the radiologist noted is sometimes associated with labral tears, and he referred him to Dr. Hefley for evaluation. Following Dr. Hefley's examination, Dr. Williams on April 27, 2005, recommended physical therapy three days a week for six weeks in Hot Springs. However, only a portion of this

was approved by the insurance carrier. On June 15, 2005, Dr. Williams indicated that the claimant was to remain off work until further notice.

On July 10, 2005, the claimant was examined by Dr. Barry Baskin at the request of the respondents. Dr. Baskin recommended a lumbar myelogram and a post myelogram CT scan and stated that at the very least it would be reasonable to try and get him involved in a work-hardening program with a little more extensive physical therapy and reconditioning, given that he has been off work since August 16, 2004. He also noted that he did not get the impression that the claimant was seeking secondary gain with his injury.

The claimant is entitled to temporary total disability benefits where the preponderance of the evidence shows that he has continued in a healing period and has been totally incapacitated to earn wages as the result of his compensable injury. The record here shows that the claimant's incapacitating symptoms have continued to require medical care, although the respondents have not always provided the reasonably necessary testing and physical therapy recommended by the claimant's treating physicians, not to mention their own second opinion doctor. Although the claimant's physicians have not been careful to address the issue of his off-work status consistently and clearly, the record tends to show that the claimant has continued in his healing period and has been incapacitated to earn wages. Even Dr. Baskin indicated that the claimant needed a work-hardening program to assist him back into the workforce. When Dr. Williams wrote on August 22, 2005, that the AMA Guides indicate that an injury such as the claimant's produces a 5% whole person impairment, he did not state that the claimant had reached maximum medical improvement but mentioned the claimant's care by Dr. Robert Kleinhenz. However, counsel for the parties indicated at the hearing that Dr. Kleinhenz has discontinued his private orthopedic practice.

Nevertheless, the greater weight of the evidence tends to show that the claimant has continued in his healing period, incapacitated to earn wages, so that he is entitled to the additional benefits requested.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant, subject, however, to withholding for child support obligations, pursuant to Ark. Code Ann. §11-9-110.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge