

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F501870

KEVIN MCABEE, Employee	CLAIMANT
SCOTT BURK CONSTRUCTION, INC., Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED FEBRUARY 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 11, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 14, 2005, and a pre-hearing order was filed on September 15, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury on January 22, 2005.
4. The claimant was earning an average weekly wage of \$850.00 which would entitle him to compensation at the rate of \$466.00 per week for temporary total disability benefits.
5. Respondents paid medical and temporary total disability benefits through July 7, 2005.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment.
2. Temporary total disability benefits from June 30, 2005 through a date yet to be determined.
3. Attorney fee.

The claimant contends he is entitled to additional medical and temporary total disability benefits.

The respondents' contentions as set forth in their pre-hearing questionnaire are as follows: "The claimant suffered a possible piriformis strain. The claimant was treated by Dr. Tomlinson and Dr. Moffett. The claimant was told that he might need a piriformus injection and according to Dr. Moffett he was not interested in pursuing that type of treatment. Dr. Moffett indicated that the claimant was at maximum medical improvement and that there were no further treatments that would be likely to improve his condition."

From a review of 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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 14, 2005, and contained in a pre-hearing order filed September 15, 2005, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional medical treatment or temporary total disability benefits as a result of his compensable injury.

### FACTUAL BACKGROUND

The claimant is a 42-year-old man who began working for the respondent in the fall of 2002. The respondent is a construction company that remodels Wal-Mart stores which claimant described as including everything from tearing out old material to rebuilding.

On January 22, 2005, the claimant was in the process of putting into a dumpster a counter/cabinet that was in the back of a pickup truck when the driver of the truck backed up and pinned claimant between the truck's tailgate and the dumpster. Claimant was struck on the right side of his belt line and had intense pain in the right side of his back, right side, and stomach.

Following his injury claimant was helped into his truck and told to go to the motel where the crew was staying. After taking a pain pill the claimant went to the bathroom and noticed blood in his stool, took a shower, and went to bed. The next day claimant informed his supervisor that he was hurting and requested medical treatment. After medical treatment was refused claimant drove himself to the VA Hospital in Jackson, Mississippi, where he had received treatment on other occasions. After a short hospitalization the claimant was released and he returned to Arkansas where he was sent by the respondent to Dr. Tomlinson, orthopaedic surgeon. Dr. Tomlinson evaluated the claimant on February 7, 2005, and ordered an MRI scan. That MRI scan revealed mild facet hypertrophy at the L4-5 and L5-S1 levels. Dr. Tomlinson subsequently diagnosed claimant's condition as a lumbosacral strain/sprain with contusion. Dr. Tomlinson recommended physical therapy for claimant's condition.

In a report dated March 23, 2005, Dr. Tomlinson noted that claimant had undergone nine physical therapy visits and was no better. He indicated at that time that he might refer claimant to another therapist. Before Dr. Tomlinson could provide any additional medical treatment the respondent referred claimant to Dr. Moffitt for further treatment. Dr. Moffitt's initial evaluation occurred on May 2, 2005 and his report of that date indicates that

x-rays of claimant's pelvis and hip were negative. Dr. Moffitt diagnosed claimant's condition as a crush injury to the low back and recommended physical therapy. Dr. Moffitt subsequently ordered a bone scan and EMG/NCV. The bone scan was negative and the EMG/NCV was abnormal but was peripheral in nature rather than central in nature. According to the deposition testimony of Dr. Raben, this would indicate a disease process such as diabetes, not nerve damage caused by compression or damage to one particular nerve.

Dr. Moffitt subsequently ordered a functional capacities evaluation which revealed that claimant was capable of performing light physical work. When claimant did not respond to the physical therapy recommended by Dr. Moffitt, Dr. Moffitt recommended a steroid injection. When claimant indicated that he was not interested in a steroid injection, Dr. Moffitt in a report dated July 7, 2005 indicated that he knew of no further treatment that would improve claimant's condition. He stated that claimant had reached maximum medical improvement and assigned a 5% impairment rating.

Claimant subsequently was examined by Dr. Raben, neurosurgeon, on one occasion on December 6, 2005. Dr. Raben has made various recommendations regarding claimant's treatment including prescriptions, physical therapy, and a steroid injection.

Respondent has denied claimant's entitlement to any additional medical treatment; therefore, claimant has filed this claim requesting additional medical treatment and temporary total disability benefits relating to his compensable injury.

#### ADJUDICATION

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proof.

First, I believe it is important to note that claimant has a history of prior back problems. Claimant testified that he had an injury to his back in 1985 or 1986 while on active duty in the Marine Corps. While claimant downplayed that injury, he did admit that the injury was significant enough that it led to his discharge from the Marines. In addition, claimant was given a 10% disability as a result of that prior injury.

Included in the medical records are those from the VA Hospital where claimant has received medical treatment for various conditions over the last several years. Those medical records contain numerous references to back pain as an active problem. In fact, claimant admitted that he was taking medication including hydrocodone in part because of back pain prior to his injury with the respondent. Most recently, in January 2004 the VA medical records indicate that claimant was complaining of back pain and arthritis which were causing sleeplessness. As a result, claimant was prescribed Vicodan. Medical records from the VA in March 2004 indicate that claimant's "Back and leg pain continues." Furthermore, on September 3, 2004, the claimant requested additional hydrocodone for back pain which was so severe he was having trouble walking.

Received call from patient. He has been having increased back pain and needing more hydrocodone for comfort. Pain is severe that he can't walk at times.

Subsequently, on October 15, 2004, the claimant was seen for complaints of right groin pain at which time he also complained of pain in the right side of his back.

Following his injury with the respondent the claimant has primarily been treated with medication and physical therapy. According to claimant's testimony, the physical therapy which was ordered first by Dr. Tomlinson and later by Dr. Moffitt were ineffective.

In support of his contention that he is entitled to additional medical treatment,

claimant relies primarily upon the recommendations of Dr. Raben. Dr. Raben evaluated the claimant only one time on December 6, 2005. Dr. Raben testified by deposition on January 3, 2006. According to Dr. Raben's testimony, the claimant did give him a history of a back strain in 1986; however, claimant did not indicate that he had had ongoing problems with his low back since that time. More importantly, Dr. Raben indicated that he was not aware that claimant had been taking hydrocodone in part for low back pain prior to his injury nor was he aware that claimant had been on a mild antidepressant for chronic pain for the last five years. While Dr. Raben recommended a functional capacities evaluation, Dr. Raben admitted that he was not aware that claimant had already undergone a functional capacities evaluation which indicated he could perform light physical labor.

Significantly, Dr. Raben acknowledged that an MRI scan, bone scan, and EMG/NCV did not show any objective findings which would explain claimant's current complaints. While an employee is not required by law to establish the need for ongoing medical treatment through evidence of objective findings, *Williams v. Prostaff Temporaries*, 336 Ark. 510, 988 S.W. 2d 1 (1999), the fact that objective testing does not explain a claimant's current complaint is evidence which may be considered in determining whether additional medical treatment is necessary.

Finally, I note that Dr. Raben testified that he believed claimant suffered an injury to his SI joint. However, Dr. Raben testified that there is no objective evidence of injury to the SI joint. Dr. Raben also testified that he did not have any evidence that would indicate that claimant's injury was anything other than a temporary exacerbation of his prior back condition.

In short, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. The claimant has a long history of prior back problems and he was taking medication in part for treatment of continued back problems prior to January 22,

2005. Following claimant's compensable injury he was prescribed physical therapy by two treating physicians which was not beneficial. Dr. Moffitt subsequently recommended a steroid injection which the claimant refused. Following a functional capacities evaluation Dr. Moffitt opined that claimant had reached maximum medical improvement and released claimant to return to work in accordance with the evaluation. Although claimant subsequently was evaluated by Dr. Raben, the evidence indicates that Dr. Raben was not aware of claimant's prior back problems nor the fact that he was taking medication for those problems prior to the injury of January 22, 2005. Furthermore, the functional capacities evaluation which Dr. Raben ordered had already been performed. Finally, Dr. Raben acknowledged that objective testing did not explain claimant's current symptoms. Based upon the foregoing evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

Having found that claimant is not entitled to additional medical treatment for his compensable injury, the claimant's healing period has ended and he is not entitled to additional temporary total disability benefits. Furthermore, I note that the evidence of record does not support a finding of temporary total disability benefits given claimant's admission that he has performed some work following his release by Dr. Moffitt, claimant's testimony that he is capable of performing some work, Dr. Moffitt's opinion that claimant is capable of working, and Dr. Raben's opinion that claimant continued to look for work in the light duty area.

#### ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment or temporary total disability benefits as a result of his compensable injury. Therefore, his claim for additional compensation benefits is hereby

denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE