

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F509510

JASON ROGERS, Employee	CLAIMANT
BASIC CONSTRUCTION COMPANY, Employer	RESPONDENT
BITUMINOUS CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED MAY 23, 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 R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On April 20, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 14, 2005, and a pre-hearing order was filed on that same date. 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 employee-employer relationship existed between the parties on August 23, 2005 when claimant suffered a compensable injury to his back.

At the time of the hearing the parties also agreed to stipulate that claimant earned a sufficient average weekly wage to entitle him to compensation at the rate of \$351.00 per week for temporary total disability benefits.

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

1. Claimant's entitlement to temporary total disability benefits from August 23, 2005 through a date yet to be determined.

2. Attorney fee.

At the time of the hearing the parties agreed to add as issues the claimant's entitlement to additional medical treatment subsequent to February 13, 2006; specifically, treatment from Dr. Raben, and in addition the respondent's entitlement to an offset for any unemployment compensation benefits received by claimant in the event temporary total disability benefits are awarded.

The claimant contends that he is entitled to additional medical treatment subsequent to February 13, 2006; specifically, treatment from Dr. Raben. In addition, claimant requests temporary total disability benefits from August 23, 2005 through a date yet to be determined as well as a controverted attorney fee.

The respondents contend that claimant is not entitled to temporary total disability benefits or additional medical treatment subsequent to February 13, 2006. In the event claimant is awarded temporary total disability benefits, respondent requests an offset for any unemployment benefits received by claimant.

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 witnesses and to observe their 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 December 14, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to be entitled to compensation at the rate of \$351.00 for temporary total disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury; specifically, claimant is entitled to additional medical treatment from Dr. Raben.

4. Claimant is entitled to temporary total disability benefits beginning February 13, 2006 and continuing through a date yet to be determined. Pursuant to A.C.A. §11-9-506(b), respondent is entitled to credit for any unemployment compensation benefits claimant received beginning February 13, 2006.

5. Respondent has controverted claimant's entitlement to all indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 29-year-old man who began working for the respondent as a skilled laborer in May 2004. On August 23, 2005 the claimant was hauling a load of dirt in a scraper when he hit a bump or hole and the seat in which he was sitting bottomed out and bounced up which caused claimant to strike the roof of the scraper cab. Claimant testified that this incident knocked the wind out of him and caused pain in his back. Claimant testified that he reported this incident to his supervisor, Jim Popanz, and continued to work the remainder of his shift which was about three hours.

Claimant testified that on August 24, 2005 he called Popanz and told him that he needed to go to the doctor. Claimant sought medical treatment from Dr. Masters, a chiropractic physician, who ordered x-rays and provided an adjustment to claimant's lumbar spine. Claimant returned to work on August 25, 2006, but testified that his back problems continued to worsen. After working for approximately two and a half days the claimant was sent by the respondent to Dr. Moffitt who initially evaluated the claimant on August 30, 2005. Dr. Moffitt diagnosed claimant as suffering from a lumbar strain and prescribed medications. Dr. Moffitt also released claimant to return to work with restrictions of no standing more than eight hours, no lifting more than 20 pounds, and no

work of more than eight hours per day. Claimant was also to be permitted to go from sitting, standing, and walking as needed and to limit bending and twisting at the waist.

According to claimant's testimony he telephoned Popanz after the visit with Dr. Moffitt and was told to take off work for the next week. Popanz admitted that he told claimant to take off work for the rest of the week, but contends that this occurred after claimant saw Dr. Masters for the second time and before claimant saw Dr. Moffitt, not after. In any event, claimant did not return to work for respondent subsequent to August 25, 2005. Claimant did return to Dr. Moffitt on September 6, 2005, at which time he recommended physical therapy and again released claimant to return to work with the same restrictions. Dr. Moffitt's medical report of September 20, 2005 indicates that claimant's condition was improving and he again released claimant to return to work with the same restrictions. Claimant did not return to Dr. Moffitt for any additional medical treatment. Instead, claimant filed for and received a change of physician to Dr. Raben, orthopaedic surgeon. Claimant was initially evaluated by Dr. Raben on December 30, 2005 and was diagnosed as suffering from lumbar radicular syndrome. Dr. Raben ordered an MRI scan and prescribed medication.

Claimant's next visit with Dr. Raben occurred on January 13, 2006, after the MRI scan was performed. In a report written that day by Carla Boyd, the nurse practitioner for Dr. Raben, it was noted that the MRI scan revealed degenerative changes in the claimant's lumbar spine with loss of disc space height as well as desiccation. The report also indicates that claimant suffered from spinal stenosis at L4-5 and L5-S1. Dr. Raben's office recommended lumbar epidural steroid injections.

Before those injections could be performed, respondent sent claimant to Dr. Armstrong, D.O., board certified in neurological surgery. Dr. Armstrong's report of February 13, 2006 indicates that he interpreted claimant's MRI scan as showing a mid-line disc herniation at L3-4, L4-5, and L5-S1. Dr. Armstrong agreed with Dr. Raben's

recommended treatment of epidural steroid injections and also indicated that claimant should undergo physical therapy.

Respondent has not paid for medical treatment subsequent to February 13, 2006, the date claimant was evaluated by Dr. Armstrong. Claimant has filed this claim contending that he is entitled to additional medical treatment subsequent to that date as well as requesting temporary total disability benefits beginning August 23, 2005 and continuing through a date yet to be determined.

### ADJUDICATION

The initial issue for consideration involves claimant's contention that he is entitled to additional medical treatment subsequent to February 13, 2006; specifically, medical treatment from Dr. Raben. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment; specifically, medical treatment from Dr. Raben.

As previously noted, claimant initially sought medical treatment from Dr. Masters, a chiropractic physician. When claimant's back complaints continued, the respondent sent claimant to Dr. Gary Moffitt for medical treatment. Dr. Moffitt diagnosed claimant as suffering from a lumbar strain, prescribed medications and physical therapy, and released claimant to return to work with restrictions. Claimant was last evaluated by Dr. Moffitt on September 20, 2005, at which time he noted that claimant's condition was improving. However, Dr. Moffitt never stated that claimant did not need additional medical treatment for his compensable injury.

After claimant was last seen by Dr. Moffitt he filed for and received a change of physician to Dr. Raben who initially evaluated the claimant on December 30, 2005. Dr. Raben assessed claimant's condition as lumbar radicular syndrome, ordered an MRI scan, and prescribed medication. Following the MRI scan, Dr. Raben's notes of January 13, 2006 indicate that he recommended that the claimant undergo a series of lumbar epidural steroid injections. Before those injections could be performed respondent requested that claimant be evaluated by Dr. Armstrong. Dr. Armstrong evaluated the claimant on February 13, 2006 and agreed with Dr. Raben's recommendation that claimant undergo epidural steroid injections. In addition, Dr. Armstrong also recommended that claimant undergo physical therapy.

While the MRI scan did reveal a pre-existing degenerative condition in the claimant's lumbar spine, Dr. Armstrong in his report of February 13, 2006 indicated that that pre-existing condition was aggravated by the claimant's work-related injury.

The degenerative disc disease which is present in the patient's lumbar spine has been present for quite some time, and while not being caused by his work injury, would have predisposed him to have strained his back secondary to degenerative changes..... I feel that Dr. Moffitt was doing an excellent job in rehabilitating the patient, and I am sure Dr. Raben will pick up from that point and do the same through more conservative care and perhaps injection therapy and physical therapy.

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His MMI should probably be reached within the next three to six months provided adequate therapy and injection therapy is initiated. He may even require special injections from a qualified pain specialist.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury. Claimant was sent by the respondent to

Dr. Moffitt who treated the claimant and did not opine that claimant had reached maximum medical improvement. Following a change of physician order, claimant sought medical treatment from Dr. Raben who has recommended additional medical treatment in the form of steroid injections. The respondent sent claimant to Dr. Armstrong for an independent medical evaluation and he has also opined that claimant is in need of additional medical treatment for his work-related injury. In fact, Dr. Armstrong agreed that claimant should receive injections as recommended by Dr. Raben. Given this evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury; specifically, additional medical treatment from Dr. Raben.

The second issue for consideration involves claimant's contention that he is entitled to temporary total disability benefits beginning August 23, 2005, and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits the claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence, I find that claimant is entitled to temporary total disability benefits beginning February 13, 2006, the date he was evaluated by Dr. Armstrong, and continuing through a date yet to be determined.

Initially, I find that claimant has remained within his healing period for his compensable injury. As previously discussed, claimant was not released by Dr. Moffitt as having reached maximum medical improvement. Likewise, Dr. Raben was of the opinion that claimant was in need of additional medical treatment in the form of lumbar epidural steroid injections. Finally, Dr. Armstrong, the physician chosen by the respondent to perform an independent medical evaluation, opined in his report of February 13, 2006 that

claimant would not reach maximum medical improvement until three to six months provided adequate treatment was initiated. Given this evidence, I find that claimant has remained within his healing period for his compensable injury from the date of his injury.

The second element which must be proven for temporary total disability benefits is a total incapacity to earn wages. Here, claimant after some initial medical treatment from Dr. Masters was evaluated by Dr. Moffitt. Dr. Moffitt in his report of August 30, 2005 indicated that claimant could return to work with restrictions of no standing more than eight hours, no lifting more than twenty pounds, and no work of more than eight hours per day. Claimant was also instructed to go from sitting, standing, and walking as needed and to limit bending and twisting at the waist. In light of those restrictions, the respondent offered claimant a job driving a water truck at various job sites. It was claimant's testimony that he did not believe he could perform this job due to his pain. Claimant did not even attempt to perform the job and admitted that he did not give the respondent the opportunity to make allowances for sitting and standing on an as-needed basis while performing that job. Testifying at the hearing was James Popanz, the claimant's supervisor, who testified that he believed the water truck driving job was within the restrictions given to claimant by Dr. Moffitt. Popanz testified that the job did not require lifting of more than 20 pounds and respondent would have allowed claimant to alternate between sitting, standing, and walking. In short, the evidence does not indicate that claimant suffered a total incapacity to earn wages beginning on August 23, 2005. To the contrary, he was released by Dr. Moffitt to work with restrictions and work was offered to him by the respondent.

When claimant sought medical treatment from Dr. Raben, Dr. Raben's medical reports reflect claimant's subjective statements to him that he could not drive the water truck. However, Dr. Raben did not specifically address in his report of December 30, 2005 or his report of January 13, 2006 an opinion as to whether claimant was capable of working with or without restrictions.

Claimant's ability to work was addressed by Dr. Armstrong in a report dated February 13, 2006. Specifically, Dr. Armstrong stated:

It would be difficult to determine, at the present time, when the patient would be able to return to work, perhaps after therapy.

In short, claimant was released to return to work with restrictions by Dr. Moffitt but he did not do so. However, the medical evidence indicates that claimant did not suffer a total incapacity to earn wages at that time. When claimant sought medical treatment from Dr. Raben, Dr. Raben did not express an opinion as to whether or not the claimant was capable of returning to work at that time. However, when claimant sought medical treatment from Dr. Armstrong on February 13, 2006, he opined that claimant was not capable of working.

Accordingly, based upon the foregoing evidence, I find that claimant remained within his healing period and began suffering a total incapacity to earn wages as of February 13, 2006, the date he was evaluated by Dr. Armstrong. Therefore, claimant is entitled to temporary total disability benefits beginning February 13, 2006, and continuing through a date yet to be determined. In addition, I also find that claimant is entitled to temporary total disability benefits for the period of time he was taken off work by the respondent until he could be evaluated by Dr. Moffitt. This constituted less than one week.

Finally, pursuant to A.C.A. §11-9-506, I find that respondent is entitled to an offset for any unemployment compensation benefits claimant received subsequent to February 13, 2006. Claimant testified that he began receiving unemployment compensation benefits on December 18, 2005, and currently receives \$321.00 per week. Given claimant's compensation rate of \$351.00 per week for temporary total disability benefits, respondent is liable for payment of temporary total disability benefits at the rate of \$30.00 per week for any period of time subsequent to February 13, 2006 for which claimant

receives unemployment compensation benefits. Should claimant cease receiving those benefits, respondent will be liable for the full \$351.00 of temporary total disability benefits.

Finally, I find that respondent has controverted claimant's entitlement to all indemnity benefits.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury; specifically, claimant is entitled to additional medical treatment from Dr. Raben. In addition, claimant is entitled to temporary total disability benefits beginning February 13, 2006 and continuing through a date yet to be determined. Claimant is also entitled to temporary total disability benefits for the period of time he was taken off work by respondent prior to his evaluation by Dr. Moffitt. Respondent is entitled to a credit for unemployment compensation benefits claimant received subsequent to February 13, 2006. Respondent has controverted claimant's entitlement to all indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE